The Environmental Ombudsman and Administrative Decision Making:

An Assessment of its Suitability for Japan

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Justice delayed is justice denied

A legal maxim

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Abstract

This thesis considers whether the introduction of the institution of an Environmental Ombudsman is feasible and would be effective for improving environmental decision-making processes in Japan. Because the functionality of the Environmental Ombudsman has not been widely researched, the thesis also examines the extent to which the office of the Environmental Ombudsman across certain jurisdictions is effective in improving administrative decision making in environmental matters more generally.

The thesis explains the structure of environmental governance in Japan and its effectiveness from the viewpoints of executive transparency and accountability. This includes analysis of some well-known environmental disputes, including a case study on the National Isahaya Bay Reclamation Project. The thesis then uses comparative law and law reform methodologies to analyse the experiences of other jurisdictions that have already established an Environmental Ombudsman. To this end, empirical data were collected through semi-structured interviews in the Australian Capital Territory, New Zealand and Hungary. These jurisdictions are useful comparators for Japan, whose administrative law system is a hybrid of the common law and German-style civil law systems.

The principal finding of the thesis is that the introduction of an Environmental Ombudsman in Japan would redress significant shortfalls in the current review mechanisms for administrative environmental decision making. Although successful implementation of such a reform would require some practical impediments to be overcome, it must be emphasised that the introduction of this institution would be an important milestone in the rebuilding of environmental governance in Japan after the TEPCO Nuclear Disaster.

Statement of Candidate

I certify that the work in this thesis, entitled *The Environmental Ombudsman and Administrative Decision Making: An Assessment of its Suitability for Japan*, has not previously been submitted for a degree not has it been submitted as part of requirements for a degree to any other university or institution other than Macquarie University.

I also certify that the thesis is an original piece of research and it has been written by me. Any help and assistance that I have received in my research work and the preparation of the thesis itself have been appropriately acknowledged. In particular, the Ethics Committee approval has been obtained for the empirical research conducted by this thesis (Reference No. 520100378(D)).

In addition, I certify that all information sources and literature used are indicated in the thesis.

Mahito Shindou

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List of Abbreviations

Aarhus Convention	*Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*
ACAT	ACT Civil and Administrative Tribunal (ACT)
ACM	Administrative Counselling Mechanism (JPN)
ACT	Australian Capital Territory
Ariake Sea Committee	Committee for Comprehensive Investigation and Evaluation of Ariake and Yatsushiro Seas at the MOE (JPN)
AUD	Australian Dollar
AUS	Australia
B.Pectinirostris	'*Boleophthalmus Pectinirostris*' [a type of mudskipper]
CBD	Convention on Biological Diversity
CPEA	Committee on Promotion of Environmental Autonomy at Shiga Prefecture (JPN)
CSE	Commissioner for Sustainability and the Environment (ACT)
Cth	Commonwealth of Australia
Democratic Constitution	*Constitution of Japan* (JPN)
EDCC	Environmental Dispute Coordination Commission (JPN)
EIA	Environmental Impact Assessment
EU	European Union
FOI	Freedom of Information
FTE	Full Time Equivalents
GER	Germany
HUF	Hungarian Folint
HUN	Hungary
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRP	International Commission on Radiological Protection
Imperial Constitution	*Constitution of Imperial Japan* (JPN)
ISAKAN	*'国営諫早湾干拓事業'* [National Isahaya Bay Reclamation Project] (JPN)
JK	*'Justitiekansler'* [Chancellor of Justice] (SWE)
JO	*'Justitieombudsman'* [Parliamentary Ombudsman] (SWE)
JPN	Japan
JPY	Japanese Yen
MAFF	Ministry of Agriculture, Forestry and Fisheries (JPN)
MIC	Ministry of Internal Affairs and Communication (JPN)

MLIT	Ministry of Land, Infrastructure, Transport and Tourism (JPN)
MOE	Ministry of the Environment (JPN)
MP	Member of Parliament (or equivalent legislative body)
mSv	millisievert
NAIIC	National Diet of Japan Fukushima Nuclear Accident Independent Investigation Commission
NATO	North Atlantic Treaty Organisation
NGO	Non Governmental Organisation
NZ	New Zealand
NZD	New Zealand Dollar
Open-gate Committee	Consideration Committee on the ISAKAN (JPN), which was launched in In March 2010
PAS	*'Gesetzmäßigkeit der Verwaltung'* [Principle of Administration by Statutes] (GER/JPN)
PCE	Parliamentary Commissioner for the Environment (NZ)
PCFG	Parliamentary Commissioner for Future Generations (HUN)
Qadi al Qudat	Office of Chief Justice (Ottoman Empire)
Ramsar Convention	*Convention on Wetlands of International Importance especially as Waterfowl Habitat*
Rio Conference	United Nations Conference on Environment and Development
Seaweed Committee	Investigation Committee on Damage to Seaweed Production in Ariake Sea at the MAFF (JPN)
SLAPP	Strategic Lawsuits Against Public Participation
SPEEDI	System for Prediction of Environmental Emergency Dose Information
Stockholm Conference	United Nations Conference on the Human Environment
SWE	Sweden
TEPCO	Tokyo Electric Power Company
TEPCO Nuclear Disaster	Tokyo Electric Power Company’s complex nuclear accidents in Fukushima (JPN)
UDHR	Universal Declaration of Human Rights
UNCHR	United Nations Commission on Human Rights
USC	United States of America (Federal level)

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Chapter 1: Introduction

1.1 Background

In Japan, many environmental problems have been caused or exacerbated by the failure of administrative bodies, such as Minamata Disease (1950s–60s)[1], the Isahaya Bay Reclamation (1980s–)[2], and the TEPCO Nuclear Disaster (2011–).[3] Although the problem areas are as diverse as chemical contamination, ecosystem destruction, and the failure to manage hazardous substances, the root causes have been the same — poor environmental decision making.

It is clear that administrative environmental decision-making processes in Japan have serious shortcomings. More importantly, the repetition of poor decision making shows that existing review mechanisms for administrative environmental disputes have shortfalls. The Japanese review mechanisms for administrative disputes comprise judicial review and internal merits review.[4] However, there is no Ombudsman review, which is regarded as essential to ensuring accountability of the government in many parts of the world.[5]

The widely accepted features of the Ombudsman have been defined as follows:

> The Ombudsman is an office provided for by the constitution or by action of the legislature or parliament and headed by an independent, high-level public

1 See, eg, *チッソ水俣病関西訴訟* [Chisso Minamata Disease Kansai Case], Supreme Court of Japan, 平成 13(オ)1194, 15 October 2004, reported in (H16) 58(7) Supreme Court Reports (civil cases) 1802.

2 See, eg, 山下弘文 [Hirofumi Yamashita], *諫早湾ムツゴロウ騒動記： 忘れちゃいけない20 世紀最大の環境破壊 [The Dispute over 'Boleophthalmus pectinirostris' in Isahaya Bay: Never forget the largest environmental destruction of the 20th Century]* (南方新社 [Nanpo Shinsha], 1998), 48–52.

3 See, eg, 国会 東京電力福島原子力発電所事故調査委員会 [National Diet of Japan Fukushima Nuclear Accident Independent Investigation Commission (NAIIC) (JPN)], '報告書 [The Official Report of the Fukushima Nuclear Accident Independent Investigation Commission]' (5 July 2012) <http://naiic.tempdomainname.com/pdf/naiic_honpen.pdf>, 15–17.

4 *行政事件訴訟法* [Code of Administrative Procedure] (Japan) 16 May 1962, Law No 139 of S37; *行政不服審査法* [Administrative Appeal Law] (Japan) 15 September 1962, Law No 160 of S37.

5 See, eg, Robin Creyke and John McMillan, *Control of Government Action: Text, Cases and Commentary* (LexisNexis Butterworths, 2nd ed, 2009), 243–4.

> official who is responsible to the legislature or parliament, who receives complaints from aggrieved persons against government agencies, officials and employees or who acts on his own motion, and who has the power to investigate, recommend corrective action, and issue reports.[6]

In general, an institution with these basic characteristics is called a 'classical Ombudsman', and is the standard model of the Parliamentary Ombudsman in the global context.[7] Through investigation and reports, the classical Ombudsman improves the quality of administrative decision making. The lack of Ombudsman review in Japan suggests that this could be a significant cause of the repetition of poor administrative environmental decisions.

The institution of the Ombudsman is also well known for its diversity, and some Ombudsman institutions only supervise specific subject areas.[8] In the environmental field, an Environmental Ombudsman has been introduced in some jurisdictions, including in New Zealand (1987), Australian Capital Territory (1993), Austrian Provincial Governments (1993–2002), Kenya (1999), and Hungary (2008).[9]

Regarding the Japanese situation, the introduction of an Environmental Ombudsman may be an appropriate mechanism for improving future decision making with respect to the environment. What should not be allowed is for the Japanese government to do nothing and thus contribute to another serious environmental catastrophe like the TEPCO Nuclear Disaster. Thus, this thesis examines whether the introduction of an

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6 International Bar Association Resolution, Vancouver, 1974, quoted in Roy Gregory and Philip Giddings, 'The Ombudsman Institution: Growth and Development' in Roy Gregory and Philip Giddings (eds), *Righting Wrongs: The Ombudsman in Six Continents*, International Institute of Administrative Sciences Monographs (IOS Press, 2000) 1, 3.

7 Sir Brian Elwood, 'How to Harmonize General Ombudsman Activities With Those Related to Specialized Ombudsmen' in International Ombudsman Institute and Linda C. Reif (eds), *The International Ombudsman Yearbook Volume 2, 1998* (Kluwer Law International, 1999) 198, 199–202.

8 See, eg, Gregory and Giddings, above n 6, 8–9.

9 See, eg, George Pring and Catherine Pring, *Greening Justice: Creating and Improving Environmental Courts and Tribunals* (The Access Initiative 2009), 67–9.

Environmental Ombudsman could improve the quality of Japanese administrative environmental decision making and whether it is feasible to introduce this institution into Japan.

1.2 Literature review

This section provides a literature review on the elements with central importance for this thesis: namely, administrative environmental decision making in Japan and the institution of the Environmental Ombudsman.

Literature on administrative environmental decision making in Japan

In Japan, since the late 1960s, the poor quality of administrative environmental decision making behind a number of environmental problems has been one of the major concerns in the social sciences. Administrative environmental decision making does not have a single form. Hence, a large literature has analysed the structural problems in administrative decision making. The disciplines of the analysis vary and include political economy,[10] political studies[11], anthropology,[12] and so on. The focuses of these studies are also diverse. For instance, some studies focus on specific forms of decision-making processes, such as city planning.[13] Others focus on more general aspects of

[10] See, eg, 宇井純 [Jun Ui], *公害原論 I [Philosophy of Environmental Pollution; Volume 1]* (亜紀書房 [Aki Shobo], 1971); 庄司光 [Hikaru Shoji] and 宮本憲一 [Kenichi Miyamoto], *日本の公害 [Environmental Pollution in Japan]* (岩波書店 [Iwanami Shoten], 1975); 五十嵐敬喜 [Takayoshi Igarashi] and 小川明雄 [Akio Ogawa], *図解 公共事業のしくみ [Illustration, Mechanism of Public Construction Works]* (東洋経済新報社 [Toyo Keizai Shinpo Sha], 1999).

[11] See, eg, Karel van Wolferen, *日本／権力構造の謎 上 [The Enigma of Japanese Power: People and Politics in a Stateless Nation; Volume 1]* (篠原勝 [Masaru Shinohara] trans, 早川書房 [Hayakawa Shobo], 1990); Karel van Wolferen, *日本／権力構造の謎 下 [The Enigma of Japanese Power: People and Politics in a Stateless Nation; Volume 2]* (篠原勝 [Masaru Shinohara] trans, 早川書房 [Hayakawa Shobo], 1990); 飯尾潤 [Jun Iio], *日本の統治構造：官僚内閣制から議院内閣制へ [The Governance Structure of Japan: From Cabinet System Dominated by Bureaucrats to Parliamentary Cabinet System]* (中央公論新社 [Chuo Koron Shinsha], 2007).

[12] See, eg, 菅直人 [Naoto Kan], *大臣 [Minister]* (岩波書店 [Iwanami Shoten], 1998); 佐竹五六 [Goroku Satake], *体験的官僚論：55 年体制を内側からみつめて [Argument on Japanese Bureaucracy Based on Experience: From the Viewpoint of Insider of Governance System Formed 1955]* (有斐閣 [Yuhikaku], 1998); 古賀茂明 [Shigeaki Koga], *日本中枢の崩壊 [Collapse of the Pivot of Japan]* (講談社 [Kodan Sha], 2011).

[13] See, eg, 原科幸彦 [Sachihiko Harashina] (ed), *環境計画・政策研究の展開: 持続可能な社会づくりへの合意形成 [Development of Environmental Planning and Policy Research: Consensus Buildling for*

decision-making processes, such as environmental impact assessment and public participation.[14] All of these are important to consider the quality of administrative environmental decision making in Japan. However, it is necessary to limit the range of literature to be reviewed here to those most relevant to the themes of this thesis. This more limited literature discusses how review mechanisms can contribute to enhancing the quality of administrative decision making.

The literature addressing the issue of review mechanisms for administrative disputes has several notable features. Reflecting the nature of the Japanese legal system, which is a hybrid of the common law and civil law systems, the literature in this field has actively compared the Japanese situation with European countries and the United States.[15] However, it is often the case that the selected jurisdictions are limited to either a common law jurisdiction or a civil law jurisdiction, but not both.

More importantly, the literature has been strongly affected by the structure of existing review mechanisms. As noted, the review mechanisms in Japanese administrative law comprise judicial review and internal merits review. Thus, most research has focused on these two mechanisms and their inter-relationships.[16] However, the efficacy of merits

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Creation of a Sustainable Society] (岩波書店 [Iwanami Shoten], 2007); 大橋洋一 [Yoichi Ohashi], *都市空間制御の法理論 [Legal Theory for Controlling Urban Planning]* (有斐閣 [Yuhikaku], 2008).

[14] See, eg, Japan Association for Environmental Law and Policy (ed), *環境影響評価：その意義と課題 [Environmental Impact Assessment: Its Meanings and Problems]*, Journal of Environmental Law and Policy (商事法務 [Shoji Homu], 2011); 田村悦一 [Yoshikazu Tamura], *住民参加の法的課題 [Legal Problems of Citizen Participation]* (有斐閣 [Yuhikaku], 2006); 礒野弥生 [Yayoi Isono], '日本における情報公開法・環境情報の公開: 環境情報開示のあり方に関する検討会報告書 第 1 章 [Information Disclosure Law and Disclosure of Environmental Information in Japan: The Examination Meeting Report about the State of Environmental Information Disclosure − Chapter 1]' (2004) (135) *Environmental Research Quarterly (JPN)* 59; 大久保規子 [Noriko Okubo], '環境再生と市民参加：実効的な環境配慮システムの構築をめざして [Environmental Sustainability and Public Participation: Aiming at Building an Effective System for Environmetnal Protection]' in 淡路剛久 [Takehisa Awaji], 寺西俊一 [Shunichi Teranishi] and 西村幸夫 [Yukio Nishimura] (eds), *地域再生の環境学 [Environmental Studies for Regional Sustainability]* (東京大学出版会 [University of Tokyo Press], 2006) 251.

[15] See, eg, 高橋滋 [Shigeru Takahashi], *現代型訴訟と行政裁量 [Modern Litigation and Administrative Discretion]*, 行政法研究双書 [Administrative Law Research Series] (弘文堂 [Kobundo], 1990); 亘理格 [Tadasu Watari], *公益と行政裁量：行政訴訟の日仏比較 [Public Interest and Administrative Discretion: Comparison of Administrative Litigation between Japan and France]*, 行政法研究双書 [Administrative Law Research Series] (弘文堂 [Kobundo], 2002); 常岡孝好[Takayoshi Tsuneoka], *パブリック・コメントと参加権 [Public Comments and Right of Participation]*, 行政法研究双書 [Administrative Law Research Series] (弘文堂 [Kobundo], 2006).

[16] See, eg, 藤田宙靖 [Tokiyasu Fujita], *行政法Ⅰ：総論 [Administrative Law I: General Remarks]* (青林書

review in the environmental field has not been well researched[17] because no single internal merits review institution exclusively assesses all kinds of administrative environmental disputes. In practice, this has meant that the focus of research has been on the role and efficacy of judicial review.[18] Consequently, the problems of judicial review in the environmental field have been well documented.

Since the 1970s, judicial review has been criticised as being ineffective in preventing irreversible environmental damage.[19] Japanese literature has clarified that the two major causes of this are limitations on access to the court and insufficient control of administrative discretion. The former factor, in particular, the exclusion of citizens who are indirectly affected by an administrative decision,[20] or an administrative planning dispute, [21] has been strongly criticised. Although recent promotion of public participation and reform of the court procedure have reduced these limitations to some extent,[22] the

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院 [Seirin Shoin], 4th Revised ed, 2005); 塩野宏 [Hiroshi Shiono], *行政法Ⅱ：行政救済法 [Administrative Law II: Administrative Remedy Law]* (有斐閣 [Yuhikaku], 4th ed, 2005); 原田尚彦 [Naohiko Harada], *行政法要論 [Essence of Administrative Law]* (学陽書房 [Gakuyo Shobo], 6th ed, 2005),; 阿部泰隆 [Yasutaka Abe], *行政法解釈学Ⅱ：実効的な行政救済の法システム創造の法理論 [Administrative Law Hermeneutics II: Legal Theory to Create an Effective Legal Framework for Administrative Remedies]* (有斐閣 [Yuhikaku], 2009); 福家俊朗 [Toshiro Fuke] and 本多滝夫 [Takio Honda] (eds), *行政不服審査制度の改革：国民のための制度のあり方 [Reform of Administrative Appeal System: What it should be for Citizens]* (日本評論社 [Nippon Hyoron-Sha], 2008).

17 See, eg, 中川丈久 [Takehisa Nakagawa], '環境訴訟・紛争処理の将来 [Future of Environmental Litigation and Dispute Resolution]' in 大塚直 [Tadashi Otsuka] and 北村喜宣 [Yoshinobu Kitamura] (eds), *環境法学の挑戦: 淡路剛久教授・阿部泰隆教授還暦記念 [Challenges of Environmental Law Studies: Essays in Celebration of the 60th Anniversaries of Professor Takehisa Awaji and Professor Ysutaka Abe]* (日本評論社 [Nippon Hyoron Sha], 2002) 188, 194–6.

18 See, eg, 佐藤幸治 [Koji Sato] and 清永敬次 [Keiji Kiyonaga] (eds), *憲法裁判と行政訴訟：園部逸夫先生古稀記念 [Constitutional Adjudication and Administrative Litigation: Essays in 70th Anniversary of Itsuo Sonobe]* (有斐閣 [Yuhikaku], 1999); 三辺夏雄 [Natsuo Sanbe] et al (eds), *法治国家と行政訴訟: 原田尚彦先生古稀記念 [Constitutional States and Administrative Litigation: Essays in 70th Anniversary of Naohiko Harada]* (有斐閣 [Yuhikaku], 2004); 斎藤浩 [Hiroshi Saito], *行政訴訟の実務と理論 [Practice and Theory of Administrative Litigation]* (三省堂 [Sanseido], 2007).

19 See, eg, Shoji and Miyamoto, above n 10, 229–30; 原田尚彦 [Naohiko Harada], *環境法 [Environmental Law]* (弘文堂 [Kobundo], Revised ed, 1994), 259, (The relevant part was originally published in 1986.)

20 原田尚彦 [Naohiko Harada], *行政責任と国民の権利 [Administrative Accountability and Citizens' Right to Ask Administrative Intervention]* (弘文堂 [Kobundo], 1979), 160–7.

21 See, eg, 宮田三郎 [Saburou Miyata], *行政計画法 [Administrative Planning Law]*, 現代行政法学全集 [The Collected Writings of Modern Administrative Law Studies] (ぎょうせい [Gyousei], 1984), 220–8; Harada, above n 19, 258–60.

22 For instance, in 1997 the *Environmental Impact Assessment Law* entered into force, and in 2004, the *locus standi* of administrative procedures was partially relaxed. *環境影響評価法* [Environment Impact Assessment Law] (Japan) 13 June 1997, Law No 81 of H9; *行政事件訴訟法* [Code of Administrative Procedure] (Japan) 16 May 1962, Law No 139 of S37, arts 3(6)–(7), 4, 9(2) as amended by *行政事件訴訟法の一部を改正する法律* [Law for Partial Amendment of the Code of Administrative Procedure] (Japan) 9 June 2004, Law No 84 of H16.

extent to which accessibility to the court has been improved is still unclear.[23] Concerning the latter factor, there is a statutory limitation on the ability of the court to review the exercise of administrative discretion.[24] Accordingly, although there have been some exceptions,[25] the court has been reluctant to review the quality of administrative decision making. Academics have been critical of the court's reluctance and have made various proposals to encourage the court to assess the quality of decision making in detail.[26] For instance, in the environmental field, since 1979, Harada has proclaimed that the court should thoroughly review substantial aspects of decision-making processes to ensure that natural justice was secured in the original decision making.[27] However, these proposals have not succeeded in removing the statutory limitation or changing the court's stance.

In order to improve the quality of administrative decision making in the environmental field, it is necessary to examine whether the limitations of judicial review are overcome by other review mechanisms. However, as mentioned above, the research on merits review in the environmental field is under-developed. Turning to Ombudsman review — and reflecting the reality that there is no classical Ombudsman in Japan — the recognition and evaluation of the classical Ombudsman among administrative law experts are quite insufficient.[28] Partly for this reason, most of the literature on this institution has not been connected with other review mechanisms for administrative disputes, with the exception of internal complaint handling mechanisms.[29] Thus, it is

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23 See, eg, 松村信夫 [Nobuo Matsumura], '行政計画の司法審査 [Judicial Review on Administrative Planning]' (2006) 57(3) *Liberty & Justice: Japan Federation of Bar Associations* 11, 15–19; 大久保規子 [Noriko Okubo], '環境公益訴訟と行政訴訟の原告適格：EU 各国における展開 [Environmental Public Interest Litigation and Legal Standing]' (2008) (58) *Osaka University Law Review (JPN)* 659, 659.

24 *行政事件訴訟法* [Code of Administrative Procedure] (Japan) 16 May 1962, Law No 139 of S37, art 30.

25 See, eg, *日光太郎杉事件* [Nikko Taro Cedar Case], Tokyo High Court (JPN), 昭和 44(行コ)12, 13 July 1973, reported in (S48) 24(6&7) Administrative Law Cases Reports 533.

26 See, eg, Takahashi, above n 15, 264–7; Watari, above n, 15 341–8.

27 Harada, above n 20, 148–53.

28 See, eg, Fujita, above n 16, 464; Shiono, above n 16, 55–7; Harada, above n 16, 316–17; Abe, above n 16, 375–6.

29 See, eg, 小島武司 [Takeshi Kojima] et al, '行政管理機関等による行政苦情処理制度に関する調査研究：オムブズマン制度を中心として [Research on Administrative Complaint Handling Mechanisms by Administrative Management Institutions and Others: Focusing the Ombudsman Scheme]' (1977) 4 *Administrative Management Research (JPN)* 21; 宇都宮深志 [Fukashi Utsunomiya], *公正と公開の行政*

worthwhile examining how an Ombudsman could complement judicial review in the environmental field.

However, the institution of the Environmental Ombudsman is generally not well recognised in Japan. Only two Japanese scholars have given it more than a cursory mention. In 1999, Hiramatsu outlined the basic structure and functions of this institution in New Zealand, as a part of policy research on New Zealand's environmental protection framework.[30] Although Hiramatsu summarised the significance of such an office and its basic roles, his description was rather abstract and difficult to comprehend. In 2006, from a philosophical perspective, Utsunomiya recommended the introduction of an Environmental Ombudsman to promote the protection of public environmental interests.[31] However, Utsunomiya described the office merely as a form of specialised Ombudsmen, without defining any institutional setting. Thus, it is necessary to clarify the basic features of the Environmental Ombudsman, before a more detailed examination can be undertaken.

To reveal the functionality of the Environmental Ombudsman within the entire framework of review mechanisms for administrative environmental disputes, Sonobe's 1977 research furnishes a model. Sonobe examined the functionality of the general Ombudsman in the entire framework of review mechanisms on administrative disputes. This research was brief but well structured, and took a holistic approach that examined the hybrid nature of the Japanese legal system and the development of the administrative

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学：オンブズマン制度と情報公開の新たな展開 [Public Administration Studies on Fairness and Disclosure: New Development of the Ombudsman System and Information Disclosure] (三嶺書房 [Sanrei Shobo], 2001), 298–301; 林屋礼二 [Reiji Hayashiya], *オンブズマン制度：日本の行政と公的オンブズマン [Ombudsman Scheme: Public Administration and Official Ombudsman in Japan]* (岩波書店 [Iwanami Shoten], 2002), 219–23.

30 平松紘 [Hiroshi Hiramatsu], *ニュージーランドの環境保護：「楽園」と「行革」を問う [Environmental Protection in New Zealand: Inquiry into "paradise" and "administrative reform"]* (信山社 [Shinzan Sha], 1999),5, 130–5.

31 宇都宮深志 [Fukashi Utsunomiya], *環境行政の理念と実践：環境文明社会の実現をめざして [Principles and Practices of Environmental Administration: Towards Realisation of a Society of Environmental Civilisation]* (東海大学出版会 [Tokai University Press], 2006), 75, 99.

law framework, as well as the role and functionality of the Ombudsman. The object of this research was to provide an introductory work for encouraging debate on the issue.[32] However, no one has since followed up Sonobe's work. Although there is a need to take into account the 35 years that has passed since his study was published, and to re-focus on the environmental field, the approach of Sonobe's work is directly applicable to this thesis.

As this brief literature review has shown, the Japanese literature on how review mechanisms contribute to enhancing the quality of administrative environmental decision making is unevenly distributed. While there is a thick accumulation of literature on judicial review, literature on merits review, Ombudsman review, and the relationship between them are thin. Accordingly, to conduct research on the functionality of the Ombudsman in this framework requires a holistic approach, which can answer the questions arising from insufficient understanding of the roles of merits review, Ombudsman review and relationship between the three review mechanisms. In addition, other factors such as the hybrid nature of the Japanese legal system and the ambiguous division between environmental and other administrative decisions need to be addressed.

Literature on the Environmental Ombudsman

Turning to the global context, English literature focusing on the Environmental Ombudsman is also limited. Some literature refers to environmental watchdogs that supervise governmental activities, but does not discuss the specific role of an Environmental Ombudsman.[33] The Environmental Ombudsman has been a minor subject

[32] 園部逸夫 [Itsuo Sonobe], '行政法の観点から見たオムブズマン [An Analysis of the Ombudsman from the viewpoint of Administrative Law]' (1977) 4 *Administrative Management Research (JPN)* 1, 6–7.

[33] P.S. Elder, 'The Participatory Environment in Alberta' (1974) 12 *Alberta Law Review* 403; Mark Winfield, 'The Ultimate Horizontal Issue: The Environmental policy Experiences of Alberta and Ontario, 1971–1993' (1994) 27 *Canadian Journal of Political Science* 129; Mark Winfield, 'Political and Legal Analysis of Ontario's Environmental Bill of Rights' (1998) 47 *University of New Brunswick Law Journal* 325; Diana D.M. Babor, 'Environmental Rights in Ontario: Are Participatory Mechanisms Working Human Rights and the Environment' (1999) 10 *Colorado Journal of International Environmental Law and Policy* 121; Daniel Blake Rubenstein, 'Audit as an Agent of Constructive

of research in part because, regardless of its significance, this institution has not been widely diffused at a global level. Under such circumstances, the two major categories of the literature are those analysing the role of an existing institution and those proposing the introduction of a new institution to another jurisdiction.

Although there are annual and special reports of Environmental Ombudsmen and records of speeches of the officeholders, the first category of literature is helpful in clarifying the *raison d'être* of the institution. Writing of California, in 1971, Krier proclaimed the effectiveness of an Environmental Ombudsman in improving the quality of the environment through its ability to investigate, advocate and promote public participation in decision making.[34] This claim was based on the analysis of an existing institution, but the argument was staged at a general level rather than as a mere description of the functions of the institution. The institution analysed in Krier's literature was abolished in 1972, but Krier's work conveyed the basic notion of an Environmental Ombudsman to following generations, and provided a theoretical basis for establishing a new institution.

The other scholarship in this category focuses on the institution in New Zealand, which was established in 1987. In 1996, Bührs explicated the central significance of an Environmental Ombudsman to address systemic problems in environmental governance through a thorough examination of the New Zealand model.[35] His research also clarified that one of the core functions of an Environmental Ombudsman is complaint handling.[36]

Consequence and Social Change' (2001) 8 *Corporate Environmental Strategy* 234; Gregory Rose, 'Environmental Performance Auditing of Government: the Role for an Australian Commissioner for the Environment' (2001) 18(3) *Environment & Planning Law Journal* 293; Jodi Habush Sinykin, 'At a Loss: The State of Wisconsin after Eight Years without The Public Intervenor's Office' (2004) 88 *Marquette Law Review* 645; Allan Hawke, 'Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999' (Commonwealth of Australia, 30 October 2009) <http://www.environment.gov.au/epbc/review/publications/pubs/final-report.pdf>, 329–36.

34 James E. Krier, 'Environmental Watchdogs: Some Lessons from a Study Council' (1971) 23 *Stanford Law Review* 623, 666–8.

35 Ton Bührs, 'Barking Up Which Trees? The Role of New Zealand's Environmental Watchdog' (1996) 48 *Political Science (VUW)* 1, 5–7, 16–9, 26–8.

36 Ibid, 3–4, 9–11, 23–4.

In 1997, a record of the institution's 10-year anniversary symposium was published.[37] In this volume, several participants made specific contributions in clarifying the *raison d'être* of an Environmental Ombudsman. Among the noteworthy contributions, Bosselmann articulated the importance of the advocacy function for a guardian of the environment, [38] and Allan justified the compatibility between the general and Environmental Ombudsmen by emphasising the merits of the latter institution having expertise in the environmental field.[39] In 2007, the institution published a booklet that summarised the first two decades of operation of the office. This volume demonstrated that the priorities of the office could shift overtime.[40] These publications provide a basic understanding of the role of an Environmental Ombudsman, but whether these features can be generalised to all Environmental Ombudsmen has not been examined.

The impact of the research on the New Zealand model can be seen in the second major category of the literature, namely, that of discussing the introduction of a new institution. In 1994, when Bregha and Clément examined the feasibility of introducing an environmental watchdog into the Canadian federation, the reference models were specialised, but not environmental, Ombudsmen within Canada.[41] However, in 1999 when Rabie examined the same issue for South Africa, the lessons of New Zealand were the bases of analysis.[42] In the first decade of the twenty-first century, further development occurred in this category of literature. In the proposals for establishing an Environmental

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37 Gary Hawke (ed), *Guardians for the Environment* (Institute of Policy Science, Victoria University of Wellington, 1997).

38 Klaus Bosselmann, 'The Environmental Commissioner — A Guardian of the Environment?' in Gary Hawke (ed), *Guardians for the Environment* (Institute of Policy Science, Victoria University of Wellington, 1997) 33, 45–6.

39 Sylvia Allan, 'Environmental Commissioners as Ombudsmen: A Successful Role' in Gary Hawke (ed), *Guardians for the Environment* (Institute of Policy Science, Victoria University of Wellington, 1997) 53, 58–9.

40 David Young, *Keeper of the Long View: Sustainability and the PCE* (The Parliamentary Commissioner for the Environment, 2007), 34–5.

41 François Bregha and Philippe Clément, 'A Renewed Framework for Government Accountability in the Area of Sustainable Development: Potential Role for a Canadian Parliamentary Auditor/Commissioner for the Environment' (Working Paper 21, National Round Table on the Environment and the Economy (NRTEE) (CAN), January 1994), 7–8.

42 André Rabie, 'The New Zealand Parliamentary Commissioner for the Environment: A comparative perspective' (1999) 1999 *Acta Juridica* 97, 115–20.

Ombudsman in Hungary, Sólyom and Jávor articulated the additional fundamental concept of the protection of the interests of future generations.[43] The importance of the literature in this category is that it clarifies the merits of introducing a specialised Ombudsman in the environmental field. However, it should be noted that, regardless of the differences between the common law and civil law systems, all of the jurisdictions mentioned above already had classical Ombudsman institutions. Thus, none of them discussed the rationality of introducing an Environmental Ombudsman into a jurisdiction that is new to the concept of a classical Ombudsman.

The literature mentioned above focused on the Environmental Ombudsman itself. However, to justify the introduction of an Environmental Ombudsman, it is also important to clarify its effectiveness in the entire framework for enhancing the quality of environmental governance. In this regard, in 2002, Ebbesson tried to analyse the functionality of Ombudsman review in resolving environmental disputes in various member countries of the European Union (EU).[44] Although this edited work failed to achieve this objective due to the indifference of other participants, it demonstrates an area worthy of examination. Further, in 2009, Pring and Pring conducted research on environmental justice with a wide scope that includes the entire framework of review mechanisms. Although the focus of this research was on Environmental Courts and Tribunals, the Environmental Ombudsman was also one of the subjects.[45] However, this research did not connect the role of the Environmental Ombudsman with that of the Environmental Courts and Tribunals. Thus, the lacuna presented by Ebbesson has not yet been fully examined.

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[43] László Sólyom, 'The Rights of Future Generations, and Representing them in the Present' (2002) 43 *Acta Juridica Hungarica* 135, 136–41; Benedek Jávor, 'Institutional Protection of Succeeding Generations — Ombudsman for Future Generations in Hungary' in Joerg Chet Tremmel (ed), *Handbook of Intergenerational Justice* (Edward Elgar, 2006) 282, 287–92.

[44] Jonas Ebbesson (ed), *Access to Justice in Environmental Matters in the EU* (Kluwer Law International 2002); Jonas Ebbesson, 'Comparative Introduction' in Jonas Ebbesson (ed), *Access to Justice in Environmental Matters in the EU* (Kluwer Law International 2002) 1, 37.

[45] Pring and Pring, above n 9, 67–9.

What the literature review above reveals is that there are many gaps that need to be filled in order to examine the feasibility of introducing an Environmental Ombudsman in Japan. First, although a basic understanding of the Environmental Ombudsman's role exists, more detailed analysis of the institutional setting is needed to provide a basis of argument. Secondly, to discuss the rationality of such a reform, it is necessary to examine how the Environmental Ombudsman contributes to improving the quality of environmental decision making in the entire framework for enhancing the quality of environmental governance. Thirdly, the introduction of an Environmental Ombudsman into a jurisdiction that is new to a classical Ombudsman should be justified. To address these gaps, a well-structured comparative analysis of administrative law frameworks and Environmental Ombudsmen needs to be conducted.

1.3 Research questions

The purpose of this thesis is to clarify whether the introduction of the institution of Environmental Ombudsman would be feasible and effective for improving environmental decision-making processes in Japan. To achieve this goal, the following research questions are addressed:

1. What is an Environmental Ombudsman?

2. How can an Environmental Ombudsman improve administrative environmental decision making?

3. Is the introduction of an Environmental Ombudsman feasible for Japan?

As the literature shows, a fixed definition of an Environmental Ombudsman, which is applicable regardless the difference of jurisdiction, has not been established. Thus, it is

first necessary to identify a standard model of an Environmental Ombudsman, which can be applied as a basis for further examination. For this purpose, the following subsidiary questions need to be answered: ‘what are the objectives and core functions of an Environmental Ombudsman?’; ‘how do they differ from those of a general Ombudsman?’; and ‘what kind of institutional setting is required for an Environmental Ombudsman?’. Through answering these questions, this thesis aims to clarify the *raison d’être* of an Environmental Ombudsman.

At the same time, the contributions of an Environmental Ombudsman in enhancing the quality of administrative environmental decisions should be clarified. For this purpose, firstly, it is necessary to identify what is sound administrative environmental decision making and how it can be ensured. Then, based on this, the efficacy of an Environmental Ombudsman should be examined. Further, how this institution fits into the entire framework of review mechanisms for administrative environmental disputes needs to be assessed. Through these processes, this thesis aims at clarifying the functionality of an Environmental Ombudsman.

After examining the first two research questions, this thesis addresses the most significant one: the feasibility of introducing an Environmental Ombudsman in Japan. The prerequisite for an affirmative answer to this question is that there is the need for an Environmental Ombudsman. Thus, the efficacy of the current framework of review mechanisms for administrative environmental disputes in Japan is analysed to answer this question. Then, the obstacles to introducing an Environmental Ombudsman into a jurisdiction that is new to the classical Ombudsman institution are assessed. Finally, the feasibility of introducing an Environmental Ombudsman is discussed, bearing in mind the optimal institutional setting for Japan.

1.4 Research method

To answer the research questions, this thesis has recourse to comparative law because Japan does not have a classical Ombudsman. The main subject area to be compared is administrative law, and comparative administrative law requires not only the specific subject to be compared but also the context in which the subject is situated,[46] including cultural aspects.[47] Accordingly, this thesis examines not only the Environmental Ombudsman, but also the whole framework of review mechanisms for administrative disputes, and its underlying administrative law framework. For this purpose, the relevant literature, which is not limited to legal studies but extends to political economy, political studies and anthropology are examined. However, as detailed in Section 1.2, the shortfalls in the literature in this area suggest that doctrinal method is not sufficient on its own. Therefore, empirical research has been conducted to obtain necessary data.

1.4.1 Comparative administrative law

The selection of jurisdictions to be compared is of central importance for comparative administrative law research because the differences between the common law and civil law systems in the public law area are vast.[48] In this regard, it is significant that the Japanese administrative law system is a hybrid of the common law and German-style civil law systems.[49] This means the jurisdictions to be compared have to fulfil the conditions of having an Environmental Ombudsman and belonging to either a common

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46 John Bell, 'Comparing Public Law' in Andrew Harding and Esin Örücü (eds), *Comparative Law in the 21st Century*, W.G. Hart Legal Workshop Series (Kluwer Law International, 2002) 235, 236–40, 244–7.

47 W.J. Kamba, 'Comparative Law: A Theoretical Framework' (1974) 23 *International and Comparative Law Quarterly* 485, 515–6.

48 John S. Bell, 'Comparative Administrative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press, Paperback ed, 2008) 1259, 1264–5; Bell, above n 46, 243–4; Peter de Cruz, *Comparative Law in a Changing World* (Routledge-Cavendish, 3rd ed, 2007), 105–8.

49 園部逸夫 [Itsuo Sonobe] and 枝根茂 [Shigeru Edane], *オンブズマン法 [Ombudsman Law]*, 行政法研究双書 [Administrative Law Research] (弘文堂 [Kobundo], 2nd ed, 1997), 27–33.

law or a German-style civil law system. Based on these criteria, the countries to be researched have been selected from both the common law system (Australia and New Zealand) and the German-style civil law system (Hungary).[50] This selection also fulfils another basic requirement of comparative law; namely, that levels of economic and social development are similar.[51]

All the four jurisdictions are parliamentary democracies. Other basic information on each jurisdiction including population, which affects the amount of complaints an Ombudsman deals with, and thus the capacity of the office, is as follows. Japan is a unitary state with a bicameral system. Its population is 128.1 million.[52] Australia is a federal state with a bicameral system. However, the Australian Capital Territory (ACT), to which direct comparison is made, is a territory under the federation with a unicameral legislative system. The population of Australia is 22.7 million, and that of the ACT is 0.4 million.[53] New Zealand is a unitary state with a unicameral system. Its population is 4.0 million.[54] Hungary is a unitary state with a unicameral system. Its population is 10.0 million.[55]

1.4.2 Field research

To obtain empirical data in the jurisdictions to be compared, field research was conducted in the following manner.

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50 Herbert M. Kritzer (ed), *Legal Systems of the World: A Political, Social, and Cultural Encyclopedia* (ABC CLIO, 2002), 672.

51 de Cruz, above n 48, 226–7, 230.

52 Statistics Bureau at the Ministry of Internal Affairs and Communications (JPN), *平成 22 年国勢調査人口等基本集計結果：要約 [Summary of the Results of National Population Census 2010]* (26 October 2011) <http://www.stat.go.jp/data/kokusei/2010/kihon1/pdf/youyaku.pdf>.

53 Australian Bureau of Statistics, *Australian Demographic Statistics, Sep 2011* (29 March 2012) <http://www.abs.gov.au/ausstats/abs@.nsf/mf/3101.0>.

54 Statistics New Zealand, *Population of New Zealand, 2006 Census; Quick Stats About New Zealand* (8 June 2009) <http://www.stats.govt.nz/Census/2006CensusHomePage/QuickStats/AboutAPlace/SnapShot.aspx?id=9999999&type=region>.

55 Hungarian Central Statistical Office, 'Population Census 2011: 1. Preliminary data' (March 2012) <http://www.nepszamlalas.hu/files/sharedUploads/Anyagok/2012/04_ho/enepszelo2011.pdf>, 7.

Structure of field research

The field research was centred on interviews with relevant stakeholders. To assess the efficacy and functionality of the Environmental Ombudsman, the method applied was elite interviewing, in which the participants were chosen based not on their demographic characteristics, but on their expertise in the area.[56] To examine the feasibility of adopting an Environmental Ombudsman in Japan, the project also adopted an applied law reform methodology, which emphasises the importance of public consultation, especially full and frank dialogues with stakeholders.[57]

For both objectives, the method involved semi-structured interviews, which enabled the researcher to collect specific information from participants.[58] As this research compares different legal systems, the method of semi-structured interview was suitable for adapting the interview questions to the specifics of each jurisdiction. The influence of this methodology is strongly reflected in the selection of interviewees. The selection criterion for interview was whether the person had expertise or practical experience with the relevant administrative decision-making mechanisms. Participants were interviewed for 60–90 minutes at their own workplaces. They were asked to respond verbally to a range of semi-structured questions by providing description and commentary relevant to their experience. Participants had the freedom to withdraw at any time and for any reason. Results of the interviews were transcribed, coded and analysed following the methods of qualitative analysis.[59] Field notes were made during the meetings, and they were complemented by transcription of the interviews where necessary.

The interviewees for this study can be classified into five groups; (1) Environmental

[56] Teresa Odendahl and Aileen M. Shaw, 'Interviewing Elites' in Jaber F. Gubrium and James A Holstein (eds), *Handbook of Interview Research: Context & Method* (SAGE, 2002) 299, 299–300.
[57] Brian Opeskin, 'Engaging the public — community participation in the genetic information inquiry' (2002) (80) *Reform (AUS)* 53, 57.
[58] Sharan B. Merriam, *Qualitative Research: A Guide to Design and Implementation* (Jossey-Bass; A Wiley Imprint, 2nd ed, 2009), 89–90.
[59] Hennie Boeije, *Analysis in Qualitative Research* (SAGE, 2010), Ch5–6.

Ombudsmen, (2) other review mechanisms on administrative disputes, (3) relevant stakeholders, (4) complaint handling mechanisms at the national government level, and (5) potential users. Reflecting the differences between the objectives, the first three groups were interviewed in all four jurisdictions to be researched (ACT, New Zealand, Hungary, Japan), while the last two groups were interviewed only in Japan.

The second group includes general Ombudsmen, and merits review and judicial review institutions. The third group includes academic specialists in administrative and environmental law, members or clerks of relevant parliamentary committees, governmental officers of related sections, members of relevant NGOs, and law-makers in Japan. The fourth group was chosen by reference to the debate over the Ombudsman in the Japanese context. The fifth group was represented by practitioners in actual environmental disputes, and was aimed at revealing the potential influence of the introduction of an Ombudsman scheme. Although primary efforts were directed to making appointments with current officeholders/workers, in some cases it was only possible to obtain appointments with ex-officeholders/workers. In this thesis, reference to a position of the interviewees without the prefix ‘former’ means that the person occupied the position when the interview was conducted in each jurisdiction. The interviewees in each jurisdiction are listed at Appendix 1 of this thesis.

Regarding the questions asked at the interviews, there were four thematic questions. These were questions about the efficacy of the Environmental Ombudsman; its functionality in the whole framework of review mechanisms on administrative disputes; the functionalities of other mechanisms in the wider framework for promoting executive transparency and accountability, and the feasibility of introducing an Environmental Ombudsman into Japan. The thematic questions were optimised for each category and according to each jurisdiction. In particular, in Japan, the absence of general and

Environmental Ombudsmen was taken into account. The detailed research questions are listed at Appendix 2. The ethical aspects of this study were approved by the Macquarie University Human Research Ethics Committee.[60]

Implementation of field research

In the ACT, the field research was conducted from 27 to 31 May 2011 in Canberra. In this period eight people were interviewed. However, it was not possible to interview the select committees of the Legislative Assembly. In New Zealand, the field research was conducted from 8 to 13 June 2011. In addition to this, one interview was conducted in Canberra on 28 May 2011. In this period 10 people were interviewed. In Hungary, the field research was conducted from 22 to 28 June 2011. In this period 10 people were interviewed.

In Japan, the field research was conducted from 4 to 29 July 2011. In this period 14 people were interviewed. However, there was general unwillingness at all levels of the government to be interviewed about the topic of this research. Consequently, it was not possible to interview municipal Ombudsmen, representatives of the Ministry of Justice, Legislative Bureau of Cabinet, Select Committees and Legislative Bureaus at both Houses of the Diet. In addition, it was quite difficult to make appointments with law-makers. Although offers of interviews were made to all seven major political parties, positive responses were received only from the Democratic and Communist Parties, and unfortunately the interview with the latter did not eventuate due to scheduling difficulties.

Analysis of collected data

Consistent with the theory of qualitative analysis, the acquired data was segmented and reassembled.[61] First, the results of the fieldwork were coded in order to segment the

[60] Reference No. 520100378(D).
[61] Boeije, above n 59, 76–83.

acquired data into sets of meaning groups. For instance, some of the data were coded under the label of ‘reduction of potential disputes’ or ‘obstacles to introduction’. The segmented data was then reassembled in order to make possible an integrated explanation of the data. The reassembling of the coded data was done according to the four thematic questions listed above. In this process, for example, the data coded as ‘reduction of potential disputes’ were reassembled to the thematic question of ‘efficacy of the Environmental Ombudsman’. The analysed data have been utilised in the thesis where necessary and appropriate to the contents.

Limitations of field research

There are several limitations in the applied method under in this thesis. There is a practical limitation in the range of interviewees. Although every effort was made to make appointments with all relevant stakeholders, not all of them provided an opportunity for interview. However, this limitation was mostly addressed by obtaining appointments from ex-officeholders/workers. Nevertheless, due to the small sample of law-makers in Japan, the acquired data might not reflect wider opinion in this group.

There is also a limitation of bias in the data provided by interviewees. It is unlikely that elites have intentionally misrepresented information during the interviews, but it is undeniable that their positions lead them to hold particular opinions. However, best efforts were made to address this limitation by examining the underlying contexts through utilising every available resource, and triangulating information from multiple sources.

1.5 Structure of thesis

This thesis is divided into seven chapters. This Chapter introduces the thesis in the context of administrative environmental law and comparative law, and indicates where the study fits in this context.

Chapter 2 provides the 'conceptual framework' to the thesis. First, what constitutes sound administrative environmental decision making is defined as a basis of the larger arguments of this thesis. Next, the administrative law concepts of executive transparency and accountability, and their crucial role in ensuring sound administrative environmental decision making, are discussed. Then, the relationships between the goals of transparency and accountability, and mechanisms such as the courts, legislatures, executives, media and independent scrutiny (such as the Environmental Ombudsman) are examined. The focus here is not on Japan, but generally on both the common law and German-style legal systems. This provides a broader conceptual basis regarding the potentialities of public institutions and how can they lead to good environmental decision making.

Chapter 3 provides the structure of the current framework of environmental decision making in Japan. First, how the conceptual framework discussed in Chapter 2 fits into the Japanese context is clarified as a foundation of the comparative administrative law method. Then, the root causes of the poor quality of administrative decision making are examined by analysing two representative environmental disasters in Japan, namely, the Minamata Disease and the TEPCO Nuclear Disaster. This chapter also recounts the actual practice of mechanisms for executive accountability in the environmental field based on doctrinal data.

Chapter 4 examines the question, in the current Japanese system, of whether there really is a lacuna of justice in the environmental field based on a specific case study

relating to the problem. Through detailing the case of environmental damage in Isahaya Bay and the shortfalls in environmental administration in Japan, this chapter aims to clarify the gaps between the reality and the ideal.

Based on doctrinal data, Chapter 5 provides background information about 'what are the roles of Environmental Ombudsmen', and 'how have they evolved in the jurisdictions to be examined?' Here, the basic features of the Environmental Ombudsmen in the ACT, New Zealand and Hungary are presented. Further, regarding Japan, the existing institutions that are relevant to the Ombudsman scheme are addressed.

Based on the analysis of empirical data collected by the field research, Chapter 6 examines how the existing Environmental Ombudsman schemes can improve the quality of environmental decision making. The aspects examined are not limited to the efficacy of the institution as a dispute resolution mechanism, but extend to its functionality in a broad framework of executive transparency and accountability. The *raison d'être* of the Environmental Ombudsman is also clarified in relation to the general Ombudsman.

Utilising the empirical data acquired by the field research, Chapter 7 discusses the question of the feasibility of introducing an Environmental Ombudsman in Japan. First, the need for such a reform is assessed based on the analysis of the empirical data. Then, the obstacles to the introduction of a classical Ombudsman in Japan are examined. Finally, the introduction of an Environmental Ombudsman in Japan is discussed. Here, all results from the preceding analysis are gathered and examined in the context of the thesis, and the environmental damage in Isahaya Bay is used as an example to illustrate issues. The principal finding of the thesis is that the introduction of an Environmental Ombudsman in Japan would redress significant shortfalls in the current review mechanisms for administrative environmental decision making.

Chapter 2: Conceptual framework

In this chapter the conceptual framework of this thesis will be explained. There are three prerequisites for examining how the institution of the Environmental Ombudsman improves administrative environmental decision-making processes. The first is to provide a clear definition of sound environmental decision making. The second is to make explicit the manner in which sound environmental decision making fits within the context of administrative law. The third is to clarify the role of the Ombudsman institution that improves administrative decision making. Thus, Section 2.1 examines the elements and structure of sound environmental decision making, and how to achieve it. The scope of this section is at the global level. Section 2.2 examines administrative law principles in relation to sound environmental decision making at a national level. Here, the selected administrative law principles are transparency and accountability, which are fundamental to achieving sound administrative decision making. Section 2.3 analyses how the Ombudsman institution enhances the quality of administrative decision making. This section is the basis of the analysis of the environmental field, which is developed in the following chapters.

The diversity of administrative law among world legal systems is vast. This thesis conducts a comparative analysis of Australia, New Zealand and Hungary which all have Environmental Ombudsmen, and Japan. The former two apply the common law system, and the latter two are strongly influenced by the German legal system, which belongs to the civil law system. Therefore, when necessary, this chapter examines the differences between the common law and civil law systems, focusing on the German legal system where this is appropriate and feasible.

2.1 Administrative environmental decision making and sound decisions

Sound administrative environmental decision making is an umbrella concept comprising sound processes, sound decisions and substantive sound outcomes. The ultimate objective of sound environmental decision making is to achieve a sound outcome, and a sound process helps to reach a sound decision. However, the relationships between these factors are not always linear. Therefore, it is vital to understand the dynamics affecting the relationships. Positioning sound decisions at the centre, between sound processes and sound outcomes, this section examines how sound administrative environmental decision making can be achieved. In the first subsection, the development of basic environmental principles is reviewed as the basis upon which sound decisions are made. The next two subsections analyse the relationship between the three components to reveal the structure of sound environmental decision making. In the final subsection, the best approach to achieve a sound administrative environmental decision is discussed.

2.1.1 Environmental principles for sound decision making

It is difficult to define a sound decision in the context of administrative environmental decision making due to the heterogeneous nature of the individual cases encompassed by that field. However, international environmental principles, which have been developed at the international level to guide sound environmental outcomes, provide a baseline for judging the quality of environmental decisions. They also form the basis of the international environmental law framework. In this subsection, the function of environmental principles is examined in relation to sound environmental decision making. First, the ‘cross-sectoral’ principles that impact on every environmental decision, regardless of subject area, are outlined. Then, an analysis of how these principles are applied in individual subject domains — the so called, ‘sectoral approaches’ — is

presented. Finally, the significance and implications of applying these principles and approaches to the domestic legal system, in relation to the quality of decisions made, is discussed.

Cross-sectoral principles

There are various cross-sectoral principles. The most significant of these — those that form the basis of the international environmental legal framework — have developed over the past four decades in response to major international conferences on environmental issues.

By the late 1960s, environmental issues had become a global social problem, and the need for an essential change in humanity's exploitative attitudes towards the environment was widely recognised. For example, in 1972, the Club of Rome rejected the traditional economic assumption that natural resources were unlimited.[1] In the same year, at the United Nations Conference on the Human Environment (Stockholm Conference), the basic international environmental principles aimed at promoting environmental protection were formulated.[2] The most important among them were those that framed the regulatory approaches, which aimed to achieve sound environmental outcomes by directly regulating human activities.[3] These were the 'principles of conservation of nature and protection of natural resources' (Principles 2, 3, 4, 5); the 'obligation not to cause environmental harm' (Principle 21); and the 'principle of pollution prevention' (Principles 6, 7). In conjunction with these principles, the 'polluter pays principle', which obliged the polluters responsible for environmental damage to pay costs of recovery and

1 Donella H. Meadows et al, *The Limits to Growth: A Report for the Club of Rome's Project on the Predicament of Mankind* (A Potomac Associates Book/Earth Island, 1972)

2 *The Declaration of the UN Conference on the Human Environment*, UN DOC. A/CONF/48/14/REV.1 (16 June 1972) ('Stockholm Declaration').

3 Charles L. Cochran and Eloise F. Malone, *Public Policy: Perspectives and Choices* (Lynne Rienner, 3rd ed, 2005), 460–1; James Connelly and Graham Smith, *Politics and the Environment : From theory to practice* (Routledge, 2nd ed, 2003), 158–64.

compensation,[4] made a great contribution to entrenching the regulatory approaches.

Until the United Nations Conference on Environment and Development (Rio Conference) of 1992, regulatory approaches had held a dominant position as the method for environmental protection. However, the emergence of the concept of 'sustainable development' invoked a significant paradigm shift regarding how to manage the conflict between economic development and environmental protection.[5] At the Stockholm Conference, the integration of environmental concerns in development decision making, which sought to impose environmental consideration on economic activities, was proclaimed.[6] In 1987, based on the principle of 'inter- and intra-generational equity', the World Commission on Environment and Development launched the new concept that development is sustainable if it 'meets the needs of the present without compromising the ability of future generations to meet their own needs.'[7] The Rio Conference widely approved this concept of sustainable development, entrenching it in Principle 4, which provided for integration of the environment and development in decision-making processes, and which had a wider scope than the Stockholm Conference version.[8] In 2002, the World Summit on Sustainable Development reaffirmed the concept of 'sustainable development' as a way in which economic development, environmental protection and social development were treated as equally important objectives.[9]

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4 Organization for Economic Co-operation and Development, 'Recommendation of the council on guiding principles concerning international economic aspects of environmental policies' (Council Document no. C(72)128, OECD, 26 May 1972) <http://www.ciesin.columbia.edu/docs/008-574/008-574.html>; *The Declaration of the UN Conference on Environment and Development*, UN Doc.A/CONF.151/26/REV.1 (1992) ('*Rio Declaration*'), Principle 16.

5 Alhaji B.M. Marong, 'From Rio to Johannesburg: Reflections on the Role of International Legal Norms in Sustainable Development ' (2003) 16 *Georgetown International Environmental Law Review* 21, 26–7.

6 *Stockholm Declaration*, UN DOC. A/CONF/48/14/REV.1, Principles 13, 14.

7 World Commission on Environment and Development, *Our Common Future* (Oxford University Press, 1987), 8.

8 *Rio Declaration*, UN Doc.A/CONF.151/26/REV.1.

9 *The Johannesburg Declaration on Sustainable Development*, UN Doc.A/CONF.199/20 (4 September

A specific feature of 'sustainable development' is that it justifies and encourages the utilisation of economic approaches, aimed at achieving sound environmental outcomes by utilising market and economic incentives.[10] However, it does not prioritise any kind of economic development over environmental protection. In international environmental policy, economic development is encouraged only for the reduction of poverty in developing countries, with the limitation that it should not threaten ecological sustainability.[11]

Sectoral approaches

The emergence of international environmental principles evoked the rapid development of an international environmental law framework. In this process, environmental treaties applied the general environmental principles to specific domains to realise sound environmental outcomes, four examples of which are discussed below.

In the 'conservation domain', the treaties address the problem of how to harmonise human activities within the limited capacity of natural reproduction. The umbrella treaty in this domain is the *Convention on Biological Diversity* (CBD).[12] The CBD sets sustainable management of biological diversity as its central goal (Preamble, arts 6, 10), and applies an economic approach to utilising genetic resources (arts 1, 15–16). However, regulatory approaches, such as establishing protected areas[13] and controlling trade,[14]

2002).

10 *Rio Declaration*, UN Doc.A/CONF.151/26/REV.1, Principles 12, 16; Cochran and Malone above n 3, 460–1; Connelly and Smith above n 3, 158–64.

11 Marong, above n 5, 33.

12 *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993) ('*CBD*').

13 See especially, *Convention on Wetlands of International Importance especially as Waterfowl Habitat*, opened for signature 2 February 1973, 996 UNTS 245 (entered into force 21 December 1975) ('*Ramsar Convention on Wetlands*'); *Convention on the Conservation of Migratory Species of Wild Animals*, opened for signature 23 June 1979, 1651 UNTS 333 (entered into force 1 November 1983) ('*Convention on Migratory Species*'); *Concerning the Protection of the World Cultural and Natural Heritage*, opened for signature 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975) ('*World Heritage Convention*').

14 See especially, *Convention on International Trade in Endangered Species of Wild Fauna and Flora*,

have traditionally been dominant in this domain.

In the 'pollution domain', international treaties developed in the context of preventing transboundary pollution. The objectives also evolved from an 'obligation not to cause environmental harm', to setting environmental standards of pollutant discharge.[15] Regarding the sea, which has been thought to be *res communis* since the Ancient Roman era, international treaties have been structured to manage the 'common heritage of humankind'. The umbrella treaty in this area is the *United Nations Convention on the Law of the Sea*, which targets the protection and preservation of the marine environment.[16] There are other specific treaties aimed at preventing marine contamination from various causes, which utilise regulatory approaches.[17]

Closely related to the pollution domain, there is the 'hazardous domain', which focuses on the safe control of hazardous substances and activities, such as nuclear material, pesticides and wastes.[18] Owing to the strong danger of hazardous substances and activities, the main approach utilised in this domain is the regulatory approach.

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opened for signature 3 March 1973, 993 UNTS 243 (entered into force 1 July 1975) ('*CITES*'); *Cartagena Protocol on Biosafety to the Convention on Biological Diversity*, opened for signature 29 January 2000, 2226 UNTS 208 (entered into force 11 September 2003) ('*Cartagena Protocol on Biosafety*').

15 See especially, *Convention on Long-Range Transboundary Air Pollution*, opened for signature 13 November 1979, 1302 UNTS 217 (entered into force 16 March 1983) ('*CLRTAP*'); *Convention on the Protection and Use of Transboundary Watercourses and International Lakes*, opened for signature 17 March 1992, 1936 UNTS 269 (entered into force 6 October 1996).

16 *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3, pt XII (entered into force 16 November 1994) ('*UNCLOS*').

17 See especially, *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*, opened for signature 4 June 1974, 1546 UNTS 119 (entered into force 6 May1978) ('*London Convention*'); *International Convention for the Prevention of Pollution from Ships, 1973 as modified by the Protocol of 1978*, opened for signature 2 November 1973, 1340 UNTS 184 (entered into force 2 October 1983) ('*Marpol 73/78*').

18 See especially, *Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water*, opened for signature 5 August 1963, 480 UNTS 43 (entered into force 10 October 1963) ('*PTBT*'); *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, opened for signature 22 March 1989, 1673 UNTS 126 (entered into force 5 May 1992) ('*Basel Convention*'); *Convention on Nuclear Safety*, opened for signature 17 June 1994, 1963 UNTS 293 (entered into force 24 October 1996); *Stockholm Convention on Persistent Organic Pollutants*, opened for signature 22 May 2001, 40 ILM 532 (entered into force 17 May 2004) ('*POPs*').

However, it should be noted that the application of the polluter pays principle to this domain also reflects the economic approach because the external costs, which are internalised by the principle, are astronomical due to the nature of the hazardous substances.

The other important domain is the 'global domain'. This encompasses any event in which accumulated pollutants reach a threshold and cause a global environmental impact. Well known examples include the destruction of the ozone layer by chlorofluorocarbons and global warming by carbon dioxide and other greenhouse effective gases.[19] The driving principle behind dealing with global environmental problems is 'inter- and intra-generational equity'. Further, by the very nature of global issues, these treaties have to recognise the reality of the unequal responsibility and capacity of developed and developing countries to cope with environmental depletion. Thus the principle of 'common but differentiated responsibility' is applied to fill the gaps between these two groups of countries. In the case of global warming, there is considerable scientific uncertainty, which makes it difficult for law makers to set environmental standards to regulate economic activities. Hence, economic approaches, such as clean development mechanisms or emissions trading are utilised as central methods of control.

International environmental principles and sound decisions

The basic environmental principles and approaches provide the basis for sound environmental decision making, but the binding power of these principles differs according to individual states. As is the nature of state sovereignty, members of the

[19] See especially, *Vienna Convention for the Protection of the Ozone Layer*, opened for signature 22 March 1985, 1513 UNTS 323 (entered into force 22 September 1988); *Montreal Protocol on Substances that Deplete the Ozone Layer*, opened for signature 16 September 1987, 26 ILM 1550 (entered into force 1 January 1989) ('*Montreal Protocol*'); *United Nations Framework Convention on Climate Change*, opened for signature 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1994) ('*UNFCCC*'); *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 11 December 1997, 37 ILM 22 (entered into force 16 February 2005) ('*Kyoto Protocol*').

international community have freedom of choice regarding the introduction of environmental principles and the ratification of treaties.[20] Thus, even though it is widely recognised that international environmental principles significantly improve processes, their application in domestic legal systems is not guaranteed. In fact, the national implementation of international environmental law at the legislative, administrative and judicial levels varies from state to state.[21] For instance, the polluter pays principle is so influential that it is applied in many domestic laws relevant to the prevention of environmental pollution. However, the interpretation of this principle and its application to real policies differs between countries and depends on the specific situation in each jurisdiction.[22]

Nevertheless, international environmental principles play a significant role in the formation of domestic environmental legal frameworks that directly or indirectly impact on the individual administrative decision-making processes of a state.[23] In the environmental field, the state's freedom is constrained by environmental principles. For instance, a state is obliged not to harm other states, and must compensate for any damage caused when harm occurs.[24] Environmental principles also form the basis of domestic environmental policy because international environmental damage can also occur within domestic borders. In this context, the government has to consider the balance between environmental protection and economic development at the national level.[25]

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20 David Hunter, James Salzman and Durwood Zaelke, *International Environmental Law and Policy* (Foundation Press, 3rd ed, 2007), 469; Marong, above n 5, 50–2.

21 Catherine Redgwell, 'National Implementation' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2007) 922, 929–35.

22 Patricia Birnie and Alan Boyle, *International Law and The Environment* (Oxford University Press, 2nd ed, 2002), 93–5.

23 Hunter, Salzman and Zaelke, above n 20, 469–70; Marong, above n 5, 56–7.

24 See especially, *Trail Smelter Case (United States v Canada) (Awards)* (1938, 1941) 3 RIAA 1905. Also this obligation is clarified at the Stockholm Conference. *Stockholm Declaration*, UN DOC. A/CONF/48/14/REV.1, Principle 21.

25 François Du Bois, 'Social Justice and the Judicial Enforcement of Environmental Rights and Duties' in

When national implementation of international environmental principles is absent, it is difficult for the state to compel those responsible for environmental damage to follow sound processes. Parties are required to apply international environmental principles as long as the country applies international environmental law. Thus, the national implementation of international environmental principles is fundamental to sound environmental processes. It is also desirable for the legal regime to reflect environmental principles to ensure that its administrative environmental decision making is sound. An environmental decision-making process that does not reflect environmental principles is generally unsound. The failure of the legal regime to reflect environmental principles is likely to invite such a consequence. Conversely, a legal regime reflecting environmental principles is likely to produce sound environmental decisions.

2.1.2 Sound processes and decisions

A sound process of environmental decision making is the basis for a sound decision. It is not only international environmental principles that require ensuring sound environmental decision-making processes, but also various conceptual bases, such as political theories on public interests, substantive and procedural environmental human rights, and legitimacy of law.[26] One of the key features of a sound process is to ensure the participation in environmental decision making by those who may be affected by the decision.[27]

The awakening of the public's environmental consciousness by the late 1960s also

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Alan E. Boyle and Michael R. Anderson (eds), *Human Rights Approaches to Environmental Protection* (Clarendon Press, 1996) 153, 164–5.

[26] Jonas Ebbesson, 'The Notion of Public Participation in International Environmental Law' (1997) 8 *Yearbook of International Environmental Law* 51, 51–80; Benjamin J. Richardson and Jona Razzaque, 'Public Participation in Environmental Decision-making' in Benjamin J. Richardson and Stepan Wood (eds), *Environmental Law for Sustainability: A Reader* (Hart Publishing 2006) 165, 170–4, 177–8.

[27] See generally, Ebbesson, above n 26, 59, 64, 79; Dinah Shelton, 'Human rights and the environment: substantive rights' in Malgosia Fitzmaurice, David M. Ong and Panos Merkouris (eds), *Research Handbook on International Environmental Law* (Edward Elgar, 2010) 265, 265.

prompted the questioning of traditional administrative decision-making processes, which naively assumed a two-dimensional relationship between the regulator and those who were regulated. Under this scheme, those who were not regulated but who would be affected by an administrative environmental decision were not taken into account. To overcome this structural problem, various methods have been promoted, including reforms of court procedures and legislation of environmental rights.[28] In this context, the regulator has become required to consider not only the interests of those who will be regulated, but also the interests of those who will be affected.[29] This paradigm shift was supplemented by a variety of instruments to cope with the new multi-dimensional relationship between the regulator and stakeholders. These instruments include written submission, environmental impact assessment (EIA), public environmental inquiry, and strategic environmental assessment.[30]

Although the development of these instruments was epoch-making, it did not resolve all the problems relating to administrative environmental decision making.[31] In this subsection, some of these underlying problems are examined to clarify what needs to be addressed by a new institution, such as an Environmental Ombudsman. First, the representative instrument of EIA is discussed and its scope and limitations reviewed. Then, the actual relationship between sound processes and decisions is analysed. Finally,

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28 Joseph F. Castrilli, 'Environmental Rights Statutes in the United States and Canada: Comparing the Michigan and Ontario Experiences' (1998) 9 *Villanova Environmental Law Journal* 349, 358–60, 434.

29 Prudence E. Taylor, 'From Environmental to Ecological Human Rights: A New Dynamic in International Law?' (1998) 10 *Georgetown International Environmental Law Review* 309, 356–7; Alan Boyle, 'Human Rights or Environmental Rights? A Reassessment' (2007) 18 *Fordham Environmental Law Review* 471, 486–7.

30 Richardson and Razzaque, above n 26, 179–81.

31 For instance, in practice, it is often the case that administrative bodies have discretion to design individual participation schemes. This determines the fundamental characteristics of the scheme and directions of outputs. Thomas C. Beierle and Jerry Cayford, *Democracy in Practice: Public Participation in Environmental Decisions* (Resource for the Future, 2002), 9–13; Frans H.J.M. Coenen, 'Introduction' in Frans H.J.M. Coenen (ed), *Public Participation and Better Environmental Decisions: The Promise and Limits of Participatory Processes for the Quality of Environmentally Related Decision-making* (Springer, 2009) 1, 12–14. Also it is well known that the degree of participation has strong influence on results. Sherry R. Arnstein, 'A Ladder of Citizen Participation' (1969) 35 *Journal of the American Institute of Planners* 216, 217.

solutions for the underlying problems are prescribed.

Environmental impact assessment

EIA is an important procedural principle of the Rio Declaration (Principle 17), which obligates decision-makers to investigate the potential environmental damage that could be caused by an authorised activity. When there is a possibility of damage, public participation is undertaken to assist in making a final decision. Some environmental destruction is irreversible and directly or indirectly causes significant and spatio-temporal damage.[32] Thus, EIA at the planning stage of a development project is critical in preventing environmental destruction.[33] An effective EIA process aims to balance economic and environmental values through consideration of alternative plans, including withdrawal of the project.[34] The importance of EIA is that decision-makers must consider not only the proponent's voice but also those of other stakeholders.

EIA is one of the most widespread legal instruments for ensuring sound environmental decision-making processes.[35] However, the existence of an EIA scheme

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[32] John Glasson, Riki Therivel and Andrew Chadwick, *Introduction to Environmental Impact Assessment*, The Natural and Built Environment Series (Routledge, 3rd ed, 2005), 20.

[33] Glasson, Therivel and Chadwick, above n 32, 4; Paul Stookes, 'Getting to the Real EIA' (2003) 15 *Journal of Environmental Law* 141, 142.

[34] William A. Tilleman, 'Public Participation in the Environmental Impact Assessment Process: A Comparative Study of Impact Assessment in Canada, the United States and the European Community' (1995) 33 *Columbia Journal of Transnational Law* 337, 434–5.

[35] Since the legislation in the USA in 1969, a number of countries have applied similar law by date. *National Environmental Policy Act of 1969*, 42 USC §§ 4321-47 (1970) ; Christopher Wood, *Environmental Impact Assessment: A Comparative Review* (Pearson Education, 2nd ed, 2003), 91; Glasson, Therivel and Chadwick, above n 32, 36–7. At international level, many umbrella treaties require application of EIA, even though the provisions of these treaties are frequently non-binding. See, eg, *CBD*, art 14; *UNFCCC*, art 4(1)(f); *UNCLOS*, art 206. Meanwhile, some regional treaties impose binding provisions to cope with transboundary environmental issues. See especially, Convention on Environmental Impact Assessment in a Transboundary Context, opened for signature 25 February 1991, 1989 UNTS 309 (entered into force 10 September 1997) ('Espoo Convention'). In addition, since the late 1990s, international funding institutions started to introduce EIA to their development projects in developing countries. See, especially, World Bank, 'Operational Directive on Environmental Assessment' (O.D. 4.01, World Bank, October 1991); Development Assistance Committee at the Organization for Economic Co-operation and Development, 'Good Practices for Environmental Impact Assessment of Development Projects' (OECD/GD (91) 200, DAC/OECD, 3 December 1991) <http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=OCDE/GD%2891%29200&docLanguage=En>.

does not automatically guarantee a sound environmental process. The acceptance of EIA differs between countries; and in some cases, fundamental elements of EIA are omitted from provisions of domestic law.[36] For instance, although the consideration of alternatives is a crucial part of EIA,[37] some jurisdictions do not oblige this.[38] Further, in practice, it is not uncommon for an EIA to not be applied, or for the EIA to be lacking in quality.[39] In such cases, the effectiveness of the EIA is threatened, as objectivity of scrutiny and balance of interests might be lost.[40]

Processes and quality of decisions

The relationship between a process and a decision can be classified into four patterns as shown in Figure 2-1 below.

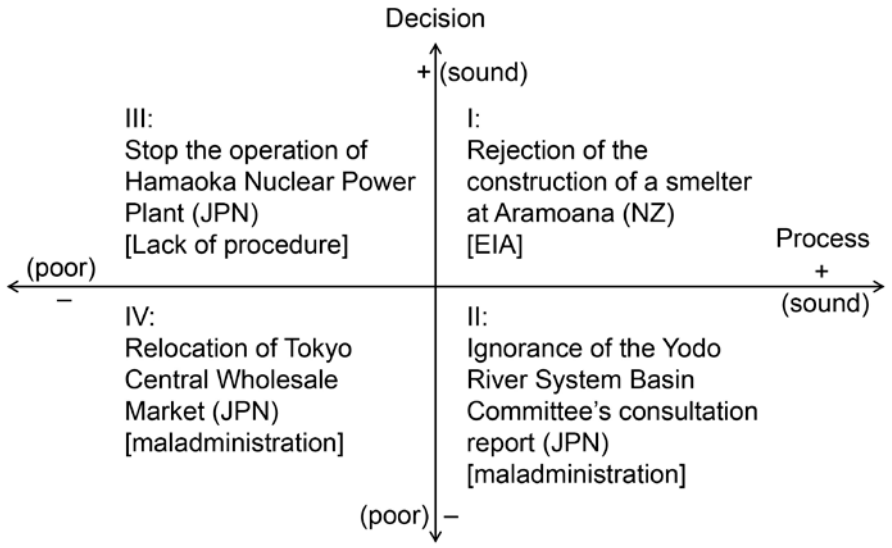

Figure 2-1: Relationship between a process and a decision

First, a sound process may result in a sound decision. This is the rational linear case. A

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36 Wood, above n 35, 5–6

37 Wood above n 35, 125–8; Glasson, Therivel and Chadwick, above n 32, 21; Tilleman, above n 34, 384.

38 See, eg, Wood above n 35, 130–1; *Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations*, Statutory Instruments (UK) 1999, No. 293; Glasson, Therivel and Chadwick, above n 32, 301; ‹‹中华人民共和国环境影响评价法›› [Environmental Impact Assessment Law] (People's Republic of China) National People's Congress, Order No 77, 28 October 2002.

39 Svitlana Kravchenko, 'Citizen Enforcement of Environmental Law in Eastern Europe' (2004) 10 *Widener Law Review* 475, 479–81.

40 Tilleman, above n 34, 391–3.

typical example is the second proposal for construction of a smelter at Aramoana in New Zealand. The proposed site was famous for its rich biodiversity. Thus, the proposal was strongly criticised by environmental movements. In 1974, the government at the time examined the EIA report submitted by the developer and rejected the proposal.[41]

The second pattern is that a sound process may result in a poor decision. In this case, maladministration is likely to be seen as the main cause. A typical example is the case of the Yodo River System Basin Committee's consultation report being ignored by the Ministry of Land, Infrastructure, Transport and Tourism (MLIT) in Japan. In February 2001, the MLIT formed the Committee in accordance with article 16-2 of the *River Law* (JPN), which was created to conserve the river environment through public participation. The Committee comprised experts and representatives of local communities.[42] The MLIT tasked the Committee with consulting on the river management plan for the Yodo River System. In April 2008, after seven years of thorough research, public hearings and examinations, the Committee submitted its interim report. The report denied the necessity of the four dams that the MLIT desired to construct in the area. In June 2008, the MLIT suddenly dissolved the Committee and published the Yodo River Basin Management Plan, which claimed that the construction of the dams was necessary.[43] Such action by the

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41 Roger Wilson, *From Manapouri to Aramoana: The battle for New Zealand's environment* (Earthwork Press, 1982), 88, 96.

42 *河川法* [River Law] (Japan) 10 June 1964, Law No 167 of S39, art 16-2; Ministry of Land Infrastructure Transport and Tourism (JPN), *河川整備基本方針・河川整備計画について [About Basic Policy and Plans on River Management]* (30 March 2009) <http://www.mlit.go.jp/river/basic_info/jigyo_keikaku/gaiyou/seibi/about.html >; Yodo River System Basin Committee (JPN), *淀川水系流域委員会とは [About the Yodo River System Basin Committee]* (2007) <http://www.yodoriver.org/about/toha.html>.

43 Yodo River System Basin Committee (JPN), '「淀川水系河川整備計画原案(平成 19 年 8 月 28 日)」に対する意見 [Comments on the 28 August 2007 Proposal of Yodo River System Management Plan]' (Reference No 1 of the 78th Committee Meeting (13 May 2008), Yodo River System Basin Committee (JPN), 25 April 2008) <http://www.yodoriver.org/kaigi/iin/78th/pdf/iin78th_ss01.pdf>; Yodo River System Basin Committee (JPN), '淀川水系河川整備計画策定に関する意見書 [Report on the Consultation of Yodo River System Management Plan]' (Final report, Yodo River System Basin Committee (JPN), 16 October 2008) <http://www.yodoriver.org/ikensho/ikensho_h20/081016_seikei_ikensho.pdf>; Kinki Regional Management Bureau at the Ministry of Land Infrastructure Transport and Tourism (JPN), '淀川水系河

MLIT neglected the role of the Committee, and was strongly criticised for ignoring the law, environmental value and public participation.[44]

With the third pattern, an unsound process may nevertheless result in a sound decision. Although this is not frequent, on some occasions a decision-maker ignores the result of an unsound process and makes a sound decision. An example is Prime Minister Kan's request to Chubu Electric Power Company to stop the operation of its Hamaoka Nuclear Power Plant on May 2011 in Japan.[45] Japan's electric power companies enjoy monopolies within divided local areas and are allowed to determine the electricity utility charge in fixed proportion to total costs.[46] They should not be regarded as private legal entities but as quasi-state entities, because they do not follow market rules. Regardless of the public nature of the electricity business, before the Tokyo Electric Power Company's complex nuclear accidents in Fukushima (TEPCO Nuclear Disaster), there was no legitimate process by which an operating nuclear power plant could be stopped based on national or public interests.[47] This was despite the fact that some experts had indicated that the

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川整備計画の策定について [About the determination of Yodo River System Management Plan]' (Media Release, 31 March 2009) <http://www.biwakokasen.go.jp/seibi/final/pdf/090331siryou.pdf>; Kinki Regional Management Bureau at the Ministry of Land Infrastructure Transport and Tourism (JPN), '淀川水系河川整備計画 [Yodo River System Management Plan]' (Policy, Ministry of Land Infrastructure Transport and Tourism (JPN), 31 March 2009) <http://www.biwakokasen.go.jp/seibi/final/pdf/betten3.pdf >.

44 Kyoto Bar Association, *淀川水系河川整備計画案に対する意見書 [Opinion against the Proposal of Yodo River System Management Plan]* (28 August 2008) <http://www.kyotoben.or.jp/siritai/menu/pages_kobetu.cfm?id=94 >; Editorial, '淀川水系４ダム なぜ流域委を無視する [Four Dams of Yodo River System: Why ignore the Basin Committee?]', *Tokyo Newspaper* (online), 22 July 2008 <http://www.tokyo-np.co.jp/article/column/editorial/CK2008072202000118.html>; 野田武 [Takeshi Noda], '記者の目：淀川流域ダム計画、河川行政の逆行 [Reverse of River Policy: The Yodo River System Dam Projects - Eyes of journalists]', *Mainichi Newspaper* (online), 22 July 2008 <http://mainichi.jp/select/opinion/eye/news/20080722k0000m070136000c.html>.

45 菅直人 [Naoto Kan], Prime Minister (JPN), 'About the Request to Stop Running Hamaoka Nuclear Power Plant' (Speech delivered at Official Press Conference, Tokyo, 6 May 2011).

46 *電気事業法* [Law on Electricity Bussiness] (Japan) 11 July 1964, Law No 170 of S39, arts 19, 28–9; Consumer Affairs Agency (JPN), *公共料金の窓：電気料金の決まり方 [Information about Public Utility Charges: How to Decide Electricity Utility Charges?]* (12 September 2011) <http://www.caa.go.jp/seikatsu/koukyou/elect/el03.html>.

47 Japan, *Diet Debates*, Permanent Committee on Budget at the House of Councillors, 13 May 2011, 9–11 (山本順三 [Junzo Yamamoto], Liberal Democartic Party: 菅直人 [Naoto Kan], Prime Minister: 海江田万里 [Banri Kaieda], Minister of Economy, Trade and Industry); Japan, *Diet Debates*, Permanent

Hamaoka plant was extremely susceptible to earthquake damage, and warned of enormous fatalities in the Greater Tokyo Area should the plant fail.[48] In the wake of the TEPCO Nuclear Disaster, and faced with the risk of another large earthquake occurring near the Hamaoka plant, Prime Minister Kan issued a political request to stop the Hamaoka plant to prevent any further disaster, despite the lack of a legal framework to do so.[49] Initially, there were some criticisms relating to the Prime Minister's exercise of extra-legal measures and his ignoring the vested interests of those who benefitted from the plant; causing the company to hesitate in agreeing to the request.[50] However, with the request bolstered by strong public opinion, 10 days later, the company conceded.[51]

The fourth pattern is that an unsound process may result in a poor decision. This is the

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Committee on Surveillance of Administrative Activities at the House of Councillors, 16 May 2011, 10–12 (岩井茂樹 [Shigeki Iwai], Liberal Democartic Party: 田嶋要 [Kaname Tajima], Parliamentary Secretary at the Ministry of Economy, Trade and Industry).

48 See, eg, 石橋克彦 [Katsuhiko Ishibashi], '原発震災：破滅を避けるために [Nuclear Power Plant Breaking Earthquake Disaster: To Prevent a Disaster]' (1997) 67 *Kagaku* 720, 721–3; 瀬尾健 [Takeshi Seo], *原発事故…その時、あなたは! [Severe Accident of a Nuclear Power Plant:Then, you are...!]* (風媒社 [Fubai Sha], 1995)

49 Kan, above n 45.

50 Japan, *Diet Debates*, Permanent Committee on Budget at the House of Councillors, 13 May 2011, 9–11 (山本順三 [Junzo Yamamoto], Liberal Democratic Party); Japan, *Diet Debates*, Permanent Committee on Surveillance of Administrative Activities at the House of Councillors, 16 May 2011, 10–12 (岩井茂樹 [Shigeki Iwai], Liberal Democratic Party); Japan, *Diet Debates*, Permanent Committee on Budget at the House of Councillors, 20 May 2011, 7–10 (牧野たかお [Takao Makino], Liberal Democratic Party); 電気事業連合会 [Federation of Electric Power Companies], *電事連会長 定例会見要旨：浜岡原子力発電所の運転停止について[Summary of the Press Conference of the President: About the Stop of Running the Hamaoka Nuclear Power Plant]* (20 May 2011) <http://www.fepc.or.jp/about_us/pr/kaiken/__icsFiles/afieldfile/2011/05/20/kaiken_0520.pdf>; '中部電力社長「返答は保留させていただきたい」 [CEO of Chubu Electric Power Company said "I would like to reserve my reply."]', *Yomiuri Shimbun* (online), 6 May 2011 <http://www.yomiuri.co.jp/politics/news/20110506-OYT1T00720.htm>.

51 '【世論調査】浜岡原発停止、６６％が評価 [Public Opinion Poll says 66% Supports the Prime Minister's Request to Stop the Running of Hamaoka Nuclear Power Plant]', *Kyodo News* (online), 15 May 2011 <http://www.kyodonews.jp/feature/news04/2011/05/post-3129.html>; '原発停止要請「正しかった」…スズキ会長 [President of Suzuki Motor Corporation says the Request to Stop the Nuclear Power Plant was "Right"]', *Yomiuri Shimbun* (online), 8 May 2011 <http://www.yomiuri.co.jp/atmoney/news/20110508-OYT1T00051.htm>; '首相の浜岡原発停止要請「当然」 川崎重工会長が見解 [President of Kawasaki Heavy Industries says the Prime Minister's Request to Stop Hamaoka Nuclear Power Plant was "Rational"]', *Asahi Shimbun* (online), 9 May 2011 <http://www.asahi.com/business/update/0509/OSK201105090104.html>; '浜岡原発停止、今後は「危険残る」専門家が強調 [Hamaoka Nuclear Power Plant Was Stopped: Experts emphasise 'Risk will Remain']', *Chunichi Shimbun* (online), 15 May 2011 <http://www.chunichi.co.jp/article/feature/denryoku/list/201105/CK2011051502000103.html>.

other rational linear case. A typical example is the Tokyo Central Wholesale Market relocation plan in Japan. This is the largest fish market in the world. It has been located in Tsukiji since 1935, and is visited by approximately 50 000 tourists per day. In 1999 the newly elected Governor Ishihara suddenly launched the market relocation plan, to move the market to Toyosu. However, there was a gas plant at the proposed relocation site and in 2001 the gas company announced that the site had a serious soil contamination problem. Yet, the Governor promoted the relocation plan without sincere consideration of alternative sites. In 2008, an expert board formed by the Governor to examine the extent of the contamination found that the soil of the Toyosu site was seriously contaminated by a number of toxic chemicals and metals. Experts who were not part of the board pointed out that the extent of the contamination was so serious that it was technically impossible to purify the soil. Immediately after the publication of this report, the expert board was dissolved, and a new technical board for purification was established. The members and proceedings of the technical board were kept secret until its first report was published in 2009. During the proceedings of both the expert and technical boards, the Governor refused cross-examination by the other experts. Hence, many experts doubted the rationality of the conclusions arrived at by the boards.[52] By 2009, most of the stakeholders, including the Tokyo Metropolis Assembly, municipal bodies, workers of

[52] 畑明郎 [Akio Hata], '築地市場の移転先・東京ガス豊洲工場跡地の問題点 [Problems with the Tsukiji Fish Market Relocation Site, the Former Tokyo Gas Toyosu Plant]' (2007) 37(1) *Research on Environmental Disruption* 57; 坂巻幸雄 [Yukio Sakamaki], '豊洲埋立地の土壌汚染と地質特性：築地市場の移転問題に関連して [Soil Contamination and Specific Geological Features in Toyosu Reclaimed Land: In relation to the Tsukiji Fish Market Relocation Problem]' (2009) 61 *Geological Education and Scientific Action (JPN)* 25; Tokyo Metropolis, *Assembly Debates*, Permanent Committee on Economy and Harbour, 19 January 2010, (坂巻幸雄 [Yukio Sakamaki], Witness: 平田健正 [Tatemasa Hirata], Witness); Tokyo Metropolis, *Assembly Debates*, Permanent Committee on Economy and Harbour, 18 February 2010, (畑明郎 [Akio Hata], Witness: 原島文雄 [Fumio Harashima], Witness: 矢木修身 [Osami Yagi], Witness); David Cyranoski, 'Missing data spark fears over land clean-up: Proposed home for world's largest fish market is contaminated land.' (2010) 26 April 2010(199) *Nature* <http://www.nature.com/news/2010/100426/full/news.2010.199.html>; Japan Association on the Environmental Studies and Research Committee on Environmental Disruption at the Japan Scientists' Association, *声明：東京都中央卸売市場（築地市場）の豊洲移転計画を憂慮する [Official Statement: Demand Repeal of the Relocation Plan of the Tokyo Central Wholesale Market from Tsukiji to Toyosu]* (14 February 2009) <http://www.jaes.sakura.ne.jp/topics/others/seimei20090214.pdf>.

the market and ordinary citizens had confirmed their opposition to the relocation plan. Nevertheless, at the time of writing, Governor Ishihara continues to insist on the plan based on the second report of the technical board published in 2010, which claims that purification of the Toyosu site is possible.[53]

Maladministration as an underlying problem

As shown above, regardless of the quality of a process, a decision-maker plays a crucial role in determining the quality of a decision. When a decision-maker ignores the result of an unsound process or acts without adhering to procedure and makes a sound decision, the decision-maker's action might be seen as an error. However, such action is rational and justifiable, thus deserving evaluation as being without injustice.[54] Conversely, when a decision-maker ignores the result of a sound process and makes a poor environmental decision, such an action should be evaluated as 'maladministration'. The term 'maladministration' covers a wide range of conduct, from insignificant mistakes to significant corruption.[55] However, in the context of administrative decision making, the scope of relevant maladministration should be limited to certain categories. These are:

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53 Editorial, '都議選 与党半数割れ 首都にもチェンジの大波 [Defeat of the Governor Support Group in the Metropolitan Assembly Election: Hit by Big Wave of Change]', *Tokyo Newspaper* (online), 13 July 2009 <http://www.tokyo-np.co.jp/article/column/editorial/CK2009071302000093.html>; Yoshihide Yada (Mayer), *築地市場移転問題についての要望 [Demand on the Tsukiji Market Relocation Problem]* (22 October 2010) Chuo City in Tokyo Metropolis <http://www.city.chuo.lg.jp/kusei/kuseizyoho/tukizisizyo/tukizisizyouitennmonndaiyoubou/files/tukijisijyoumondaiyoubou.pdf>; '築地市場の豊洲移転反対 業者「食の安全守れぬ」[Workers' Opposition to the Relocation of Tsukiji Market to Toyosu: Impossible to Provide Safe Food]', *Kyodo News* (online), 7 March 2007 <http://www.47news.jp/CN/200703/CN2007030701000399.html>; '伸び悩む 五輪支持 築地移転 賛成は３割満たず [Opinion Poll showed less than 30% supports Olympic with Relocation of Tsukiji Market]', *Tokyo Newspaper* (online), 8 June 2009 <http://www.tokyo-np.co.jp/feature/09togisen/news/CK2009060802000054.html>; Environmental Protection Agency (USA), *Environmental Justice; Basic Information* (31 August 2010) <http://www.epa.gov/environmentaljustice/basics/index.html>.

54 Roy Gregory and P. G. Hutchesson, *The Parliamentary Ombudsman: A Study in the Control of Administrative Action* (Royal Institute of Public Administration, 1975), 302–5.

55 Gregory and Hutchesson, above n 54, 279–81; A. J. Callaghan, 'Maladministration' (1988) 7 *Ombudsman Journal* 1, 2–3; Gabriele Kucsko-Stadlmayer, 'The Legal Structure of Ombudsman-Institutions in Europe: Legal Comparative Analysis' in Gabriele Kucsko-Stadlmayer (ed), *European Ombudsman-Institutions: A comparative legal analysis regarding the multifaceted realisation of an idea* (Springer, 2008) 1, 33–4.

abuse of decision-making processes by dishonest activities such as bias, corruption and negligence; consideration of irrelevant evidence; failure to consider of all the relevant information; failure to acquire relevant information; and application of faulty arguments to draw a conclusion.[56]

Based on this, it can be argued that to secure the quality of a decision, efforts both to establish a sound process and to reduce the amount of these kinds of maladministration are required. Nevertheless, in many complicated environmental disputes, the evaluation for maladministration is quite a delicate issue. Thus, the reviewing institutions on environmental disputes are required to have enough expertise in the field. In addition, building a comprehensive framework to maintain the quality of processes is necessary. This is further detailed in Subsection 2.1.4.

2.1.3 Sound decisions and outcomes

A sound decision is the basis of a sound outcome, but as with the relationship between a process and a decision, the relationship between a decision and an outcome is complex. In this subsection, the relationship between sound decisions and outcomes, as it reveals itself in practice, is discussed. Solutions for the underlying problems are proposed based on these examples.

Quality of decisions and outcomes

As shown in Figure 2-2 below, the relationships between a decision and an outcome also fall into four patterns, which roughly correspond to those of the relationships between processes and decisions.

[56] Gregory and Hutchesson, above n 54, 307–12; Callaghan above n 55, 18–20.

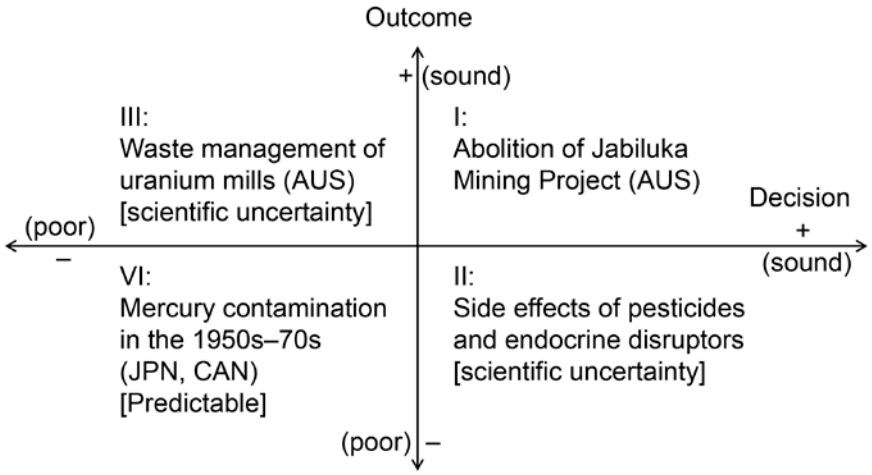

Figure 2-2: Relationship between a decision and an outcome

First, a sound decision may result in a sound outcome. This is the rational linear case. A typical example is when, following an environmental decision, a destructive development project is abandoned and rich biodiversity is preserved, such as in the abolition of the Jabiluka Mining project in Australia's Northern Territory in 2003.[57]

Secondly, a sound decision may result in a harmful environmental outcome. The sound decision here means a decision that a decision-maker made based on all available evidence at that time. In this case, scientific uncertainty is likely to be seen as the main cause of the adverse outcome. Typical examples are the harmful side effects of pesticides and endocrine disruptors, which were widely used before their negative effects were known.[58]

Thirdly, an unsound decision may result in a sound outcome. Although largely depending on luck, it could happen that, for example, emission of toxins do not immediately cause direct environmental harm. For instance, regarding the waste

[57] Heledd Jenkins, 'Corporate Social Responsibility and the Mining Industry: Conflicts and Constructs' (2004) 11 *Corporate Social Responsibility and Environmental Management* 23, 25–6; Helen Hintjens, 'Environmental direct action in Australia: the case of Jabiluka Mine' (2000) 35 *Community Development Journal* 377, 380–1.

[58] See, eg, Rachel Carson, *Silent Spring* (Hamish Hamilton, 1962); Theo Colborn, Dianne Dumanoski and John Peterson Myers, *Our Stolen Future: Are We Threatening Our Fertility, Intelligence, and Survival? — A Scientific Detective Story* (Dutton, Penguin Books, 1996).

management of uranium mills in South Australia, the danger of uranium mine tails was criticised as being underestimated. However, as of 2003, there had been no obvious evidence of directly hazardous impact.[59]

Fourthly, a poor decision may result in a harmful outcome. This is the other rational linear case. Typical examples are the mercury contamination cases in Japan (1951–1968) and Ontario in Canada (1969–1973). Although the governments in these cases were aware quite early on of the serious damage mercury poisoning could cause to the human body, they did not disclose the information or take any action. As a result, the number of fatalities was higher than it should have been.[60]

Scientific uncertainty and the precautionary principle

Historically it has often been the case that scientific uncertainty has created a mismatch between a decision and an outcome. The ‘precautionary principle’ refers to scientific uncertainty on environmental issues. Differing from the principle of prevention, this principle is concerned with environmental threats that are not clearly predictable. This principle has two aspects. One is not to allow a decision-maker to hesitate in implementing preventive measures due to scientific uncertainty or cost. The other aspect of the precautionary principle is a shift of onus in environmental litigation.[61]

The former aspect developed to prevent serious damage by an unexpected causal relationship. Through the 1970s and 1980s, the precautionary principle was established in

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59 G.M. Mudd, 'Uranium mining in Australia: Environmental impact, radiation releases and rehabilitation' in International Atomic Energy Agency (ed), *Protection of the Environment from Ionising Radiation: The Development and Application of a System of Radiation Protection for the Environment* (International Atomic Energy Agency, 2003) 179, 181–8; Communications Senate Environment, Information Technology and the Arts References Committee (Cth), *Regulating the Ranger, Jabiluka, Beverly and Honeymoon uranium mines* (Parliament of Australia, Senate, 2003), xv.

60 Patricia A. D'ltri and Frank M. D'ltri, 'Mercury Contamination: A Human Tragedy' (1978) 2 *Environmental Management* 3, 3–5, 8–10.

61 *Rio Declaration*, UN Doc.A/CONF.151/26/REV.1, Principle 15; Hunter, Salzman and Zaelke, above n 20, 510–11; Marong, above n 5, 64–5.

Germany in response to the recognition that not all thresholds of contaminants, which trigger environmental damage, were scientifically measurable. This was a paradigm shift from the assimilative capacity approach, which assumed that science was able to determine a threshold for any kind of environmental damage, and which had been the foundation of the regulatory approaches.[62] Later, in the 1990s, the application of this aspect of the precautionary principle was adopted globally. A typical example is the application of the precautionary principle to the global warming issue, which was justified by the assumption that the total cost of preventive measures against global warming would be much cheaper than that of the estimated serious environmental damage.[63] This encourages governments to take preventive action in case of serious threats of environmental damage.

The second aspect of the precautionary principle marks a huge paradigm shift in court procedure and is intended to promote environmental protection by reducing the plaintiff's burden of proof. In ordinary court procedures, at least in civil cases, those who wish to protect the environment are required to prove the danger of environmental harm. However, regarding the matter of scientific uncertainty, this aspect of the precautionary principle claims that the respondent should prove that no environmental harm is caused by their proposed action.[64] Although members of the international community do not widely apply this aspect of the precautionary principle, doing so would greatly enhance the quality of decision making by encouraging decision-makers to consider environmental risks more carefully.

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62 Owen McIntyre and Thomas Mosedale, 'The Precautionary Principle as a Norm of Customary International Law' (1997) 9 *Journal of Environmental Law* 221, 221–3.

63 *UNFCCC*, art 3(3).

64 Marong, above n 5, 65; David Farrier, 'Factoring biodiversity conservation into decision-making processes: The role of the precautionary principle' in Ronnie Harding and Elizabeth Fisher (eds), *Perspectives on the precautionary principle* (Federation Press, 1999) 99, 108–10. See also *Telstra Corporation Ltd v Hornsby Shire Council* [2006] NSWLEC 133; (2006) 146 LGERA 10, [150]–[152].

Application of the precautionary principle has been seen to reduce the effect of scientific uncertainty and increase the stability of linear relationships between decisions and outcomes. A typical example was observed in the case of the Chernobyl Nuclear Disaster in 1986. Following atmospheric radioactive contamination, the precautionary use of potassium iodide by the Polish government prevented a dramatic increase of thyroid cancer, which occurred in the population of countries that did not take the same action in the 1990s.[65]

2.1.4 Improvement of decision quality

In the light of the above patterns, the question becomes how the quality, or soundness, of administrative environmental decisions can be enhanced. As shown above, two factors prevent linear results: maladministration and scientific uncertainty. As mentioned in Subsection 2.1.3, the effect of the latter could be ameliorated by application of the precautionary principle, at least to a certain extent. Regarding maladministration, in Subsection 2.1.2, a more effective mechanism of checks and balances was noted as a potential solution, as maladministration does not comprise a single factor. The reduction of maladministration is of vital importance to securing the quality of sound decisions. However, due to the complexity of the problem, it is essential to ensure that the whole administrative environmental decision-making process is sound. In this subsection, the manner in which international environmental principles and the international environmental legal framework cope with this issue is detailed.

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[65] Janusz Nauman and Jan Wolff, 'Iodide Prophylaxis in Poland After the Chernobyl Reactor Accident: Benefits and Risks' (1993) 94 *American Journal of Medicine* 524, 530–1; Center for Drug Evaluation and Research at the Department of Health and Human Services Food and Drug Administration (USA), 'Guidance: Potassium Iodide as a Thyroid Blocking Agent in Radiation Emergencies' (December 2001) <http://www.birdflumanual.com/resources/Self_Defense/files/Guidance%20for%20use%20of%20KI%20for%20nuclear%20emergency%20USG.pdf>, 5–6.

Three pillars of the Aarhus Convention

The Rio Conference proclaimed three basic principles for ensuring sound environmental decision making: access to information, participation in the decision-making process and access to justice.[66] The *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (Aarhus Convention) is an environmental treaty that developed this principle by setting practical standards for realising access to information, public participation and access to justice.[67] The Convention itself was created as a regional treaty among European countries (art 17), and its scope was limited to administrative environmental decision making. Although current parties are limited to European countries including Hungary, the Convention is equally open to non-European counties (art 19(3)), such as Japan, New Zealand and Australia. The Convention also does not prevent its parties from applying more comprehensive and strict regulations (arts 3(5)–(6)). Therefore, the three pillars of the Aarhus Convention have the potential to become universal basic standards of sound environmental decision making.[68] In actuality, such a development is on-going at the international level. In 2010, the United Nations Environmental Programme's Governing Council decided to adopt a guideline for the three pillars, which reflects the contents of the Aarhus Convention.[69]

Regarding 'access to information', the Convention requires its parties to give the public access to environmental information necessary for decision making. Under the

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66 *Rio Declaration*, UN Doc.A/CONF.151/26/REV.1, Principle 10.

67 *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, opened for signature 25 June 1998, 2161 UNTS 447 (entered into force 30 October 2001) ('*Aarhus Convention*'); Ebbesson, above n 26, 53, 95–7; Richardson and Razzaque, above n 26, 174–5.

68 Malgosia Fitzmaurice, 'Environmental justice through international complaint procedures?' in Jonas Ebbesson and Phoebe Okowa (eds), *Environmental Law and Justice in Context* (Cambridge University Press, 2009) 211, 213.

69 *Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters*, UNEP GCSS. XI/5 A (26 February 2010).

Convention, citizens can request the government to disclose environmental information, and the government is obliged to disclose that information, regardless of the citizens' interests in disclosure (art 4(1)). Although the government can refuse to disclose environmental information in certain circumstances (arts 4(3)–(4)), to encourage the public to participate in environmental policy making, the government has an obligation to collect a wide range of environmental information and disseminate this to the public (art 5). This information includes 'state of environment' reports, documents of international and national environmental law, and documents of national environmental policy (arts 5(3), (5)). The government is also required to examine the environmental influence of commercial products and to protect consumers (art 5(8)).

Concerning 'public participation', the Convention requires parties to consult with members of the public who might be affected by the government actions. Under the Convention, the government has to involve the public in its decision-making process regarding authorisation of a proposed activity that may cause significant environmental damage (art 6(1), annex I). However, activities serving national defence purposes are left to the parties' judgments (art 6(1)(c)). At an early stage of the decision-making process, the government is required to inform stakeholders of the activity in a timely and effective manner. This information includes the nature of possible or draft decisions, the public authority in charge of the decision making, the envisaged procedure and whether the activity is subject to an environmental impact assessment procedure (art 6(2)). The government is required to allow enough time for stakeholders to prepare for the public participation (art 6(3)) and to apply public participation at an early stage (art 6(4)). Further, the government is required to encourage prospective applicants to communicate with other stakeholders before an application for authorisation (art 6(5)) and is required to disclose relevant environmental information regarding the proposal to the stakeholders,

without cost and delay (art 6(6)). The government is required to permit stakeholders to submit any comments, information, analysis and opinion relevant to the proposed activities through public hearing or inquiry (art 6(7)). The government is required to consider the outcome of public participation properly when making a decision (art 6(8)) and to disclose its conclusion swiftly in the form of a document with reasons and basis of consideration (art 6(9)).

The Convention also requires parties to build a transparent and fair framework for public participation through mechanisms detailed in articles 6(3)–(4), (8) (art 7). When preparing executive regulations and the other legally binding administrative rules with the potential for a significant impact on the environment, the government is required to follow certain procedures for public participation. Here, fair time frame, disclosure of draft rules and the public's opportunity to comment are required (art 8).

Regarding 'access to justice', the Convention requires parties to provide an independent and impartial review procedure for those who claim to have been refused access to environmental information or who wish to report an inappropriate public participation scheme (arts 9(1)–(2)). Those desiring access to justice for the latter objective are required to have 'a sufficient interest', or to maintain 'impairment of a right' if the administrative procedural law of a party requires these as preconditions (arts 9(2)(a)–(b)). Here the term 'an independent and impartial review procedure' refers not only to judicial or administrative organisations referred to in article 9(3) of the Convention, but also to the Ombudsman. However for the examination of cases on access to information, the review procedure should have legally binding power over its final decisions (art 9(1)). There is no such limitation for the examination of cases on public participation. The requirements on access to information and public participation mentioned above form the baseline for administrative law accountability in

environmental decision making. Further details about the roles of the reviewing institutions are discussed in Section 2.3.

2.2 Administrative environmental decision making and administrative law principles

This thesis examines the role of the Environmental Ombudsman at the national level, so it is necessary to clarify how international environmental principles of administrative environmental decision making are integrated into national systems. To understand this, national administrative law principles have a central importance. In this section, the administrative principles of executive transparency (see Section 2.2.1), and executive accountability (see Section 2.2.2) are discussed. A central issue of administrative law is balancing governmental efficiency and democratic purposes, which often oppose each other, such as the imposition of time limits and the protection of the right to be reviewed.[70] In other words, these principles are not absolute and have certain limitations.

2.2.1 Executive transparency

One of the administrative law principles that promotes sound environmental decision making is executive transparency. Historically, the concept of transparency developed in conjunction with ideas such as the requirement for the clarification of rules for governmental operations, the openness of decision making on public matters and the application of natural scientific methods to social science. The term ‘transparency’ has a wide range of meanings and is used differently in various contexts.[71] However, this thesis limits the usage of this term to the administrative law context at the national level. In this

[70] William B. Lane and Simon Young, *Administrative Law in Australia* (Lawbook Co., 2007), 3–4.

[71] Christopher Hood, 'Transparency in Historical Perspective' in Christopher Hood and David Heald (eds), *Transparency: The Key to Better Governance?*, Proceedings of the British Academy (Oxford University Press, 2006) 3, 5–10, 19–20.

subsection, the nature of executive transparency and its relationship to environmental policy is discussed. This includes transparency through access to information and through the structural openness of administrative decision making. The practical mechanisms to achieve transparency are also examined.

The primary definition of executive transparency is visibility of the activities of government, such that they can be understood by the public.[72] Visibility of administrative activities is ensured by information disclosure and clarification of responsibility in administrative procedures. Transparency prevents corruption by reducing bureaucratic secrecy, and by enhancing the effectiveness and efficiency of public policy through an improved feedback cycle. For instance, by removing secrecy, transparency encourages healthy criticism of administrative activities, and financial audit prevents private usage of national budgets.[73] Focusing on decision-making processes, transparency reveals problems, promotes the coordination of various actors in a complicated public policy field, and promotes public support for a decision.[74]

However, transparency is not an absolute value in administrative law, as there are other contradictory values.[75] There are tensions among different public interests, and between public and private interests. A typical example of the former is the tension between open government and national security, while an example of the latter is the tension between information disclosure and the privacy of personal or commercially sensitive information. When balancing these contradicting values, the priority given to

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72 Ibid, 4–5.

73 Ann Florini, 'Introduction: The Battle Over Transparency' in Ann Florini (ed), *The Right to Know: Transparency for an Open World* (Columbia University Press 2007) 1, 2, 6–7.

74 Ann Florini, 'Conclusion: Whither Transparency?' in Ann Florini (ed), *The Right to Know: Transparency for an Open World* (Columbia University Press 2007) 337, 339.

75 Hood, above n 71, 20.

transparency will vary depending on different contexts of policy fields.[76]

In the field of environmental policy, the subject matter to be made visible is the public commons. As the management of the public commons requires proper consideration of the public interest, an administrative decision should be based on sufficient informed consent to protect human beings and the environment.[77] This also means that the decision-making process needs to be visible to the public. For this reason, transparency should have high priority in environmental decision-making processes. Two elements are vital to enhancing transparency. One is access to basic environmental information, including the positive disclosure by the state of environmental reports. In practice, even in relation to private interests, many countries apply a disclosure-based approach to pollution control because the significance of the public interest in this field is well recognised.[78] The other element is transparency of administrative procedures that opens decision-making processes to competing interest groups.[79] Public participation contributes to the formation of a sound decision through utilising disclosed information and reflecting the interests of contradicting parties.[80]

Transparency through access to information

Access to government information is the central component of transparency. It is the prerequisite to monitoring and checking administrative activities. However, the disclosure of administrative information has been insufficient until recently. Until the late

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76 Neal D. Finkelstein, 'Introduction: Transparency in Public Policy' in Neal D. Finkelstein (ed), *Transparency in Public Policy: Great Britain and the United States* (MacMillan Press, 2000) 1, 6.

77 Vivek Ramkumar and Elena Petkova, 'Transparency and Environmental Governance' in Ann Florini (ed), *The Right to Know: Transparency for an Open World* (Columbia University Press 2007) 279, 283–5.

78 Ramkumar and Petokova, above n 77, 281–2.

79 Robin L. Juni, 'Decision-making Processes in Environmental Policy' in Neal D. Finkelstein (ed), *Transparency in Public Policy: Great Britain and the United States* (MacMillan Press, 2000) 52, 52; Ramkumar and Petokova, above n 77, 291–2, 298–9.

80 Jonas Ebbesson, 'Public Participation' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2007) 681, 698.

twentieth century, access to governmental information was not permitted due to a tradition of administrative secrecy in much of the world.[81] A notable exception was Sweden, which legalised the right of the citizens to access official documents in 1766.[82] The development of international human rights norms after World War II fostered the notion of a right to know at the global level, even though this notion did not apply directly to governmental information.[83]

In 1966, when the United States introduced the *Freedom of Information Act* (USC), the right of access to governmental information was clearly connected with the right to know. The concept of freedom of information (FOI) comprises both the right to access official documents and the right to access reviewing institutions, which has a certain similarity with the Swedish model.[84] However, it should be noted that the FOI system also sets out certain exceptions to access. These deal with information concerning national security, commercial interests and privacy[85] but their effects do not always last permanently. In some countries, the limitation on access to exceptional documents is relaxed after a certain period.[86] In general, a dispute about whether a request to access should be permitted is finally determined by an impartial and independent adjudicator.[87] Modelled on the US initiative, the global diffusion of FOI laws started in the 1970s. By the middle of the first decade of the twenty-first century, approximately 70 countries had

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81 Lane and Young, above n 70, 302.

82 *Tryckfrihetsförordning* [The Freedom of the Press Act] (Sweden) 2 December 1766, SFS 1949; 105; Ministry of Justice (SWE), 'The Swedish Approach to Public Access to Documents' (Fact Sheet, Ju 00.14e, November 2000) <http://www.sweden.gov.se/content/1/c6/01/62/87/5626168f.pdf>.

83 Patrick Birkinshaw, 'Transparency as a Human Right' in Christopher Hood and David Heald (eds), *Transparency: The Key to Better Governance?*, Proceedings of the British Academy (Oxford University Press, 2006) 47, 48; Lane and Young, above n 70, 296–8.

84 *Freedom of Information Act*, 5 USC § 552 (1966); Andrew McDonald, 'What Hope for Freedom of Information in the UK?' in Christopher Hood and David Heald (eds), *Transparency: The Key to Better Governance?*, Proceedings of the British Academy (Oxford University Press, 2006) 127, 127, 129; Ministry of Justice (SWE), above n 82.

85 McDonald, above n 84, 127–8; Birkinshaw, above n 83, 50–1.

86 Australia is one of these countries. See Robin Creyke and John McMillan, *Control of Government Action: Text, Cases and Commentary* (LexisNexis Butterworths, 2nd ed, 2009), 1202–3.

87 McDonald, above n 84, 127.

introduced FOI legislation, including Hungary, New Zealand and Australia.[88]

More recently, a new epoch has begun in the field of access to information: the emergence of e-government, which aims at positive information disclosure.[89] Since the introduction of FOI law, the main approach to information disclosure has been in reaction to applications for access by members of the public. However, e-government has changed this direction. Here, the government discloses information about its operations before the public applies for that information. The advantages of e-government include a dramatic increase in accessible information, systematically stable and codified disclosure criteria, and a raised public expectation towards openness. Although there are some barriers to accessing information, such as inequalities of internet access and difficulties associated with identifying the most relevant information from within the vast volume of disclosed documents, these barriers do not reduce the value of open government. In some jurisdictions, the government tries to control the range of information to be disclosed.[90] Nevertheless, if there is an FOI law, the public can seek further information disclosure. Hence, the efforts by the public to promote transparency are unlikely to disappear. Rather, e-government and FOI law complement each other to enhance access to information.

An FOI law still needs to overcome several obstacles to achieve full effectiveness. The main obstacles to information disclosure are a long tradition of secrecy, the protection of vested interests and concern about the mistreatment of disclosed information.[91] Further, an FOI law also faces resistance from bureaucracies, whose

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88 Hood, above n 71, 14; Florini, above n 73, 8; *1992. évi LXIII. törvény a személyes adatok védelméről és a közérdekű adatok nyilvánosságáról* [Act LXIII of 1992 on the Protection of Personal Data and the Disclosure of Data of Public Interest] (Hungary), 27 October 1992, *Magyar Közlöny*, No.1992/116, 3962; *Official Information Act 1982* (NZ); *Freedom of Information Act 1982* (Cth) .

89 See, eg, Government 2.0 Taskforce at Department of Finance and Deregulation (Cth), *Engage: Getting on with Government 2.0* (Department of Finance and Deregulation 2009), xix, xx.

90 Helen Margetts, 'Transparency and Digital Government' in Christopher Hood and David Heald (eds), *Transparency: The Key to Better Governance?*, Proceedings of the British Academy (Oxford University Press, 2006) 197, 197–204.

91 Florini, above n 73, 3.

culture is not always conducive towards information disclosure. There have also been formal challenges aimed at eliminating or restricting the right to information through legislative amendments and interpretation and litigation. Informal resistance has often been less detectable, but nevertheless also undermines the right to information. This informal resistance may include minimisation of record keeping, spin control on politically sensitive information, under-resourcing FOI institutions and the externalisation of governmental services.[92] To cope with this resistance, it is necessary to build a well-considered system that coordinates with accountability mechanisms.[93]

Practical mechanisms for promoting access to information

In addition to the legal framework, there are practical mechanisms designed to enhance executive transparency, such as supporting citizens in obtaining government information. Record management systems are also an important practical mechanism for ensuring the quality of governmental information to be accessed. Access to quality records is a presumption of citizens' access to information regardless of whether this is done through the avenue of FOI or open government. This is especially true in the environmental field in which the public frequently inquires about the rationale behind a governmental decision. In this regard, the role of public archives, which preserve the records on administrative processes, is crucial to track administrative activities and examine their legality and appropriateness.[94] If a national archive system is under-developed, or where governmental officials have a free hand in erasing the records of their activities, there exists a serious risk of corruption. The converse of this is that to

92 Alasdair Roberts, 'Dashed Expectations: Governmental Adaptation to Transparency Rules' in Christopher Hood and David Heald (eds), *Transparency: The Key to Better Governance?*, Proceedings of the British Academy (Oxford University Press, 2006) 107, 109–18.

93 Florini, above n 74, 341; Roberts, above n 92, 121.

94 Randall C. Jimerson, *Archives Power: Memory, Accountability, and Social Justice* (Society of American Archives, 2009), 246–7; Caroline Williams, *Managing Archives: Foundations, Principles and Practice* (Chandos Publishing, 2006), 18, 23.

prevent corruption recordkeeping is required, both to comply with methodological and technical requirements and to serve the ethical objectives for producing quality records.[95] In many democratic countries, including Australia, New Zealand and Hungary, access to public archives is a basic right of citizens, but legislation determines the rules of access, such as the resolution of conflicts between access on the one hand, and secrecy and privacy on the other.[96]

The other important practical mechanism for providing access to information is the media. The main role of the media is to investigate and interpret information for the purpose of conveying 'the truth' about events to the public. In the public law context, this function is vital to informing the public about government activities that the executive may be uncomfortable about making known. The main contributions of the media to improving administrative decision making are uncovering and disseminating evidence of maladministration or injustice. In other words, the media triggers mechanisms of accountability.[97] Frequently, media coverage also invigorates environmental campaigns, such as the Rainbow Warrior case.[98] The professionals of formal media are journalists who investigate and write news and opinion pieces, editors who check and balance the information, and producers who allocate space for news.[99]

While the role of the media is significant for enhancing transparency, there are many

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95 Chris Hurley, 'Recordkeeping and accountability' in Sue McKemmish et al (eds), *Archives: Recordkeeping in Society* (Centre for Information Studies, 2005) 223, 224–7; Jimerson, above n 94, 246.

96 Williams above n 94, 117–19; *Archives Act 1983* (Cth), ss 31–60; *Public Records Act 2005* (NZ), ss 43–56; *1995. évi LXVI. törvény a köziratokról, a közlevéltárakról és a magánlevéltári anyag védelméről* [Act LXVI of 1995 on Public Records, Public Archives, and the Protection of Private Archives] (Hungary), 30 June 1995, *Magyar Közlöny*, No.1995/56, 3019, arts 22–9.

97 Julianne Schultz, *Reviving the Fourth Estate: Democracy, Accountability and the Media* (Cambridge University Press, 1998), 3; Jane Hendtlass and Alan Nichols, *Media Ethics: Ethics, Law & Accountability in the Australian Media* (Acorn Press, 2003), 22–3.

98 Ramesh Thakur, 'A dispute of many colours: France, New Zealand and the 'Rainbow Warrior' affair' (1986) 42(12) *The World Today* 209.

99 Hendtlass and Nichols, above n 97, 12–16.

obstacles to realising this goal. First, there are pressures on journalists. Journalists may be physically threatened or harassed by government officers because the right to know potentially conflicts with the private interests of those in power, or with misguided public interests.[100] Defamation lawsuits and a lack of legal protection for the secrecy of sources are also serious threats to journalists. Such risks reduce the motivation of the media to serve the public interest. This can even happen in developed countries.[101]

Secondly, there are pressures on information providers. In countries in which journalists suffer from a high risk of defamation lawsuits, leaked information is a major source of information for the media. Here, there are legal obligations prohibiting public officers from revealing governmental information, which are enforced by ethical and criminal codes.[102] However, the quality of whistleblower protection affects the quality of transparency. Even when journalists are protected from defamation lawsuits, if information providers are unprotected, the motivation to provide information in the public interest is reduced.[103]

Thirdly, there are pressures on editors and producers. Strategic lawsuits against public participation (SLAPP suits) threaten media that report news about the activities of those in power.[104] The issue of the economic sustainability of the media might affect the extent and nature of reports on public interests as well. For instance, greater dependence on commercial finances may lead to less news in the public interest.[105] The concentration of ownership of different kinds of media also threatens the diversity of news reports.[106] Further, there is the risk of ethical corruption through intervention in editorial activities.

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100 Marian Sawer, Norman Abjorensen and Philip Larkin, *Australia: The State of Democracy* (The Federation Press, 2009), 226–8.
101 Ibid, 211–14, 223–5
102 Ibid, 222
103 Ibid, 214–16
104 Ibid, 223–4,
105 Schultz, above n 97, 4–5.
106 Sawer, Abjorensen and Larkin, above n 100, 216–17.

Even in national publicly funded media, which is free from commercialism, there is the problem of political intervention in the form of budget cutting when the media upholds a critical stance against the government of the day.[107]

If media does not function well, the level of transparency is undermined and public demands for accountability become weaker. Thus, having a healthy media is crucial for maintaining the quality of administrative decision making, both in general and in environmentally specific fields. To ensure that a healthy media is maintained, an appropriate legal framework, including constitutional and statutory rights to know, whistleblower protection law and regulation of cross-ownership of media, is essential.[108] Media ethics and the institutions that monitor and redress disputes on media ethics play important roles in maintaining the quality of media.[109]

Transparency of administrative procedures

Transparency of administrative procedures is also significant in reducing maladministration and ensuring the quality of decisions. Administrative decision-making processes are opaque when their procedures are unknown, inadequate information is put before the decision-maker and the reasoning behind decisions is not disclosed. Transparency of administrative procedures removes these obstacles. It was only in the mid to late twentieth century that the significance of transparency in administrative procedures was clearly recognised and implemented.[110]

Regarding the attitudes behind this kind of executive transparency, there are clear

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107 For instance, in Australia, the Australian Broadcasting Corporation is frequently accused of bias by the government. See Schultz, above n 97, 5–6; Sawer, Abjorensen and Larkin, above n 100, 219–21, 225–6.

108 Sawer, Abjorensen and Larkin, above n 100, 208, 217–19.

109 Neil Nemeth, *News Ombudsmen in North America: assessing an experiment in social responsibility*, Contributions to the Study of Mass Media and Communications (Praeger Publishers, 2003), 149; Hendtlass and Nichols, above n 97, 64–7.

110 Hood, above n 71, 4–5.

differences between common law and civil law systems. In common law systems, since the seventeenth century, the principle of natural justice has applied, requiring a decision-maker to hear the opinions of stakeholders; that is, those whose rights would be affected by the decision. Also, the same principle requires the decision-maker not to have any conflicts of interest and to make decisions without bias. Although for a long period the subject of this principle was limited to adversarial decisions of a judicial nature, the interpretation of judicial nature was relatively flexible and was applied to some administrative decisions.[111] From the early to mid-twentieth century, the application of the natural justice principle was quite limited. It was only in the 1960s that the application of this principle was widened to include ordinary administrative decision-making processes.[112] In some common law jurisdictions, such as in the United States, codification of administrative procedures was promoted.[113] However, in general, the common law does not require administrative bodies to disclose the reasoning behind administrative decisions.[114] This has been criticised as not promoting executive transparency and thus some statutes, such as the *Administrative Decisions (Judicial Review) Act 1977* (Cth), have required administrative bodies to provide the reasoning for certain types of decisions.[115]

In contrast, civil law systems, especially in the case of the German-style legal system, did not recognise the principle of natural justice. Administrative bodies had the privilege of making a primary decision without opening up the decision-making process. If the

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111 Martina Künnecke, *Tradition and Change in Administrative Law: An Anglo-German Comparison* (Springer, 2007), 138–9; Lane and Young, above n 70, 115; Creyke and McMillan, above n 86, 684–7.

112 Künnecke, above n 111, 139–41; Linda Pearson, 'Procedual fairness: The hearing rule' in Matthew Groves and H P Lee (eds), *Australian administrative law; Fundamentals, principles and doctrines* (Cambridge University Press, 2007) 265, 272–7; Creyke and McMillan, above n 86, 686–7, 696–9.

113 Hood, above n 71, 14; *Administration Procedure Act of 1946*, 5 USC §§ 500 et seq. (1946).

114 See, eg, *Public Service Board of NSW v Osmand* (1986) 159 CLR 656.

115 Michael Kriby, 'Reasons for judgment: 'Always Permissible, Usually Desirable and Often Obligatory'' (1994) 12 *Australian Bar Review* 121, 132; Creyke and McMillan, above n 86, 1259–62, 1266–9; Lane and Young, above n 70, 99–100; *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 13.

decision caused problems, judicial or administrative review examined the rationality of the original decision.[116] Although there had been trials since the seventeenth century to impose principles aimed at realising sound administration, it was only in the early twentieth century that the removal of the opaqueness of administrative decision-making processes began through the codification of administrative procedural law in Austria in 1925. Diffusion of this law took a further half century; it was introduced in Germany in 1976. Afterwards, other civil law jurisdictions introduced administrative procedural law.[117] In Germany, the *Law on Federal Administrative Procedure* (GER) aims at securing transparency in administrative decisions through clarification of procedures, public participation, and disclosure of the reasoning behind decisions.[118]

Practical mechanisms for procedural transparency

Further, reflecting the complexity of environmental issues, specific kinds of administrative procedures have been developed in the environmental field. Both cross-sectoral laws, such as EIA laws, and individual sectoral laws, such as national parks law, determine the details of public participation, the administrative decision-making processes, and the extent of disclosure of reasoning for decisions. These environmental laws are quite common, regardless of whether a jurisdiction belongs to the civil law or common law family.[119]

Among the practical mechanisms underpinning environmental law, planning

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116 Künnecke, above n 111, 155.

117 Ibid, 147–8. Examples of the other jurisdictions are France 1983, Italy 1990, and Sweden 1998. Christopher Ansell and Jane Gingrich, 'Reforming the Administrative State' in Bruce E. Cain, Russell J. Dalton and Susan E. Scarrow (eds), *Democracy Transformed?: Expanding Political Opprotunities in Advanced Industrial Democracies* (Oxford University Press, 2003) 164, 175.

118 Künnecke, above n 111, 148–51; Michael Nierhaus, 'Administrative Law' in Mathias Reimann and Joachim Zekoll (eds), *Introduction to German Law* (Kluwer Law International, 2nd ed, 2005) 87, 102–5; *Verwaltungsverfahrensgesetz* [Law on Federal Administrative Procedure] (Germany) 25 May 1976, BGBI I, 2003, 102 ('*VwVfG*')

119 Elena Petkova et al, *Closing the Gap: Information, Participation, and Justice in Decision-making for the Environment* (World Resource Institute, 2002), ch 4; Wood, above n 35.

decisions are noteworthy, as they may have exceptional features in their corresponding administrative decisions depending on the legal system in which they are made. In common law systems, it is frequently the case that tribunal-type bodies make recommendations as to the final decisions.[120] However, such recommendations are thought to be part of regular administrative activities, and final planning decisions are in the hands of Ministers. This means that there is no specific restriction on the review of results.[121] Conversely, in the German legal system, the planning procedure is an administrative procedure independent of other administrative decisions. Although there are some exceptions, in general the planning procedure is performed through comprehensive public participation and, once the decision is made by the administrative body, its results have strong legal consequences.[122] As a result, the availability and intensity of judicial review for planning decisions is limited.[123] The reason for this exceptional treatment is the comprehensive public participation, which promotes the transparency of decisions. Nevertheless, what should be emphasised is that not all German-style civil law systems apply the same planning procedure. For instance, as is detailed in Section 6.1, Hungary's planning decisions are reviewable.

2.2.2 Executive accountability

The second important administrative law principle that promotes sound environmental decision making is executive accountability. The term accountability, like the term transparency, has a diversity of meanings and is used differently in various

[120] Lane and Young, above n 70, 231. A typical example is the public inquiries in the UK. See Michael Purdue, 'Public Inquiries as a Part of Public Administration' in David Feldman (ed), *English Public Law*, Oxford English Law (Oxford University Press, 2004) 1059, 1061–3.

[121] Purdue, above n 120, 1064, 1105; Rosemary Lyster et al, *Environmental and Planning Law in New South Wales* (The Federation Press, 2nd ed, 2009), 78.

[122] Nierhaus, above n 118, 102–3; Claus-Peter Martens et al, 'Regulation of Environmentally Relevant Activities' in Horst Schlemminger and Claus-Peter Martens (eds), *German Environmental Law for Practitioners* (Kluwer Law International, 2nd ed, 2004) 40, 42–3; Susan Rose-Ackerman, *Controlling Environmental Policy: The Limits of Public Law in Germany and the United States* (Yale University Press, 1995), 82.

[123] Künnecke, above n 111, 90–1; Martens et al, above n 122, 139; Rose-Ackerman, above n 122, 82.

contexts.[124] In the public law context at the national level, the widely accepted definition of executive accountability is the examination of governmental activities when undertaking formal processes and the remedy of faults where necessary.[125] The objective of accountability, in this sense, is to control public power responsible for government action or inaction. The mechanisms to serve this purpose vary, from legal regulations and political instructions, to reviewing institutions. Among the functions of accountability, the essential ones are evaluation and correction. The possibility of sanctions consequent to examination is also a driver to improve the effectiveness of executive activities.[126]

Accountability is closely connected with transparency in two ways. First, transparency is the basis for the examination of subjected activities. It is apparent that the more transparency in administrative activities, the easier it is to examine their appropriateness. Secondly, transparency helps the public to understand why remedies are necessary and appropriate.[127] Without transparency, it is difficult to reveal the causes of a problem and to show how repetition of the problem can be avoided.

In the environmental field, accountability plays a critical role in improving the quality of environmental decision making. The development of environmental policy over the last four decades has required decision-makers to consider environmental values that were historically undervalued. In the conservative culture of bureaucracy it has not been

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124 Michael W. Dowdle, 'Public Accountability: Conceptual, Historical, And Epistemic Mappings ' in Michael W. Dowdle (ed), *Public Accountability: Designs, Dilemmas and Experiences* (Cambridge University Press, 2006) 1, 3–6; Carol Harlow, 'European Governance and Accountability' in Nicholas Bamforth and Peter Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart Publishing 2003) 79, 80–1; Richard Mulgan, "Accountability': An Ever-Expanding Concept?' (2000) 78 *Public Administration* 555, 555; Mark Bovens, Thomas Schillemans and Paul 'T Hart, 'Does Public Accountability Work?: An Assessment Tool' (2008) 86 *Public Administration* 225, 226–7.

125 Andrew Le Sueur, 'The Nature, Powers and Accountability of Central Government' in David Feldman (ed), *English Public Law*, Oxford English Law (Oxford University Press, 2004) 173, 231; Dawn Oliver, 'Law, Politics and Public Accountability. The Search for New Equilibrium' (1994) 1994 *Public Law* 238, 246.

126 Mulgan, above n 124, 563–6; Bovens, Schillemans and Hart, above n 124, 232.

127 Mulgan, above n 124, 569–70; Bovens, Schillemans and Hart, above n 124, 233.

easy for decision-makers to adjust to such a paradigm shift without an external driving force. Accountability is expected to drive the diffusion of the paradigm shift and promote behavioural change in decision-makers.[128] Further, remedies including sanctions provide decision-makers with incentives to follow the newly imposed norms. Accountability also provides a pragmatic training and learning process for decision-makers, assisting them to acclimatise to the new situation and concept.[129]

Accountability comprises four elements: political accountability, administrative law accountability, financial accountability and ethical accountability.[130] The nature, procedures and remedies differ for each element. Each has certain strengths and weaknesses, but supplements the others to achieve better governance. In this subsection, each element of accountability is examined with regard to the environmental context.

Political accountability

The procedure for checking the exercise of power varies according to the different role of the doctrine of separation of powers in each jurisdiction.[131] In a parliamentary democracy, political accountability is achieved through monitoring and scrutinising the activities of the executive branch through Parliament.[132] Here the subjects of political accountability are the top echelon of the executive; that is, the Cabinet and its Ministers.

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128 Benedict Kingsbury, 'Global Environmental Governance as Administration: Implications for International Law' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2007) 63, 66; François Bregha and Philippe Clément, 'A Renewed Framework for Government Accountability in the Area of Sustainable Development: Potential Role for a Canadian Parliamentary Auditor/Commissioner for the Environment' (Working Paper 21, National Round Table on the Environment and the Economy (NRTEE) (CAN), January 1994), 4; Lee Godden and Jacqueline Peel, *Environmental Law: Scientific, Policy and Regulatory Dimensions* (Oxford University Press/Australia & New Zealand, 2010), 86.

129 Bovens, Schillemans and Hart, above n 124, 232.

130 Creyke and McMillan, above n 86, 2.

131 M.J.C. Vile, *Constitutionalism and the Separation of Powers* (Oxford University Press, 1967), 19–20.

132 Creyke and McMillan, above n 86, 8; Christoph Gusy, 'Parliaments and the Executive: Old Control Rights and New Control Contexts in Germany' in Katja S Ziegler, Denis Baranger and Anthony W Bradley (eds), *Constitutionalism and the Role of Parliaments*, Studies of the Oxford Institute of European and Comparative Law (Hart Publishing 2007) 127, 127–8.

The focus of scrutiny on political accountability is to reveal and sanction serious faults. There are three forms of sanction. The first is that ruling parties might lose their dominance in Parliament through popular election. Secondly, individual Ministers might lose their positions if asked to resign by the Prime Minister. Thirdly, the Cabinet or individual Ministers might lose their positions by losing the support of the majority of Parliament.[133] The concept of individual ministerial accountability has developed historically in the context of common law systems, and is closely related to the notion of legislative supremacy.[134] Based on the Ministerial Code, individual Ministers have to be able to explain the entirety of the activities of their administrative branches, such as in regards to not having any conflict between their public duties and private interests, upholding the political impartiality of the public service and supervising public servants in following the relevant code of conduct. However, they do not have to take responsibility for the failures of their subordinates.[135] In civil law systems, the collective responsibility of the Cabinet is the main principle, while the individual responsibility of Ministers is not.[136] In relation to environmental decision making, it is rare that a ministerial or cabinet decision on an environmental policy directly leads to a replacement of the executive. However, such a decision may cause a reshuffle of individual Ministers, and could be one of the main issues of an election.[137]

The ultimate form of political accountability in a democratic society is the election.

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133 Sueur, above n 125, 191, 195, 231; Mulgan , above n 124, 555–6.

134 Sueur, above n 125, 233; Vile, above n 131, 231–2.

135 Sueur, above n 125, 233–6; Mulgan, above n 124, 557. Regarding the Ministerial Code, see, eg, Deirdre McKeown, *Codes of conduct in Australian and some overseas parliaments* (2 December 2003) Parliamentary Library (Cth) <http://www.aph.gov.au/library/intguide/pol/codeconduct.htm>.

136 Harlow, above n 124, 79–80; Bovens, Schillemans and Hart, above n 124, 226; Gusy, above n 132, 128.

137 For an example of a reshuffle of individual Ministers, see eg, Nick Bryant, 'Australia environmental minister Peter Garrett demoted', *BBC News* (online), 26 February 2010 <http://news.bbc.co.uk/2/hi/8538158.stm>. At the Australian federal election 2007, the environmental policy on Climate Change was one of the main issues. See, eg, 'Howard, Rudd outline aims for government', *ABC News* (online), 21 October 2007 <http://www.abc.net.au/news/2007-10-21/howard-rudd-outline-aims-for-government/704848>.

Theoretically, the work of the executive is judged by the public through popular election. However, the system of indirect representation is a legacy of the eighteenth century and is not optimised for this era of universal suffrage, starting from the early twentieth century. In reality, elections are rarely effective at judging the quality of individual works of a government during the legislative period. Therefore, examination of political accountability during the legislative period is mainly the role of Parliament. The practical mechanisms that directly result in the replacement of the executive are the no-confidence vote and the confidence vote. However, the feasibility of these sanctions is low due to a majority of seats being held by the ruling parties and a resistance to losing the policy package of the Cabinet.[138] In reality, Parliament utilises other methods to scrutinise the responsibility of the executive, such as questions, debates and parliamentary committee inquires.[139] In addition, in many jurisdictions Parliament requires the Cabinet to submit reports on significant issues, such as investigations implemented by the Cabinet, for the purpose of scrutiny.[140]

Although the scrutiny on political accountability has central importance for promoting executive accountability, there are certain limitations. First, there is the limitation of scope; political accountability focuses on the ministerial level and not on the lower levels of decision making. Secondly, there is the limitation of range; control at the ministerial level may find it difficult to reach the modern quasi-governmental institutions, such as the independent statutory authorities and governmental business enterprises. Thirdly, there is fear of conflict of interest with other types of accountability. While political accountability drives public officials to work for the government of the time, it

[138] Torbjörn Bergman et al, 'Democratic Delegation and Accountability: Cross-national Patterns' in Kaare Strøm, Wolfgang C. Müller and Torbjörn Bergman (eds), *Delegation and Accountability in Parliamentary Democracies*, Comparative Politics (Oxford University Press, Paperback ed, 2006) 109, 147–8, 152, 157, 163.

[139] Sueur, above n 125, 231–2; Creyke and McMillan, above n 86, 8–9; Bergman et al, above n 138, 167–73.

[140] Bergman et al, above n 138, 168–72.

may cause contradictions with the officials' duty to the public and blur the distinction between law and policy.[141]

Administrative law accountability

Administrative law accountability has developed to examine the administrative decision-making processes of operational matters. The ultimate objective of administrative law accountability is to secure the rights and interests of the public. Here, the main concerns of accountability are to prevent abuses of power and maladministration.[142] In contrast to political accountability, remedies of administrative law accountability redress the state of abuses or maladministration. As is shown in Subsection 2.1.4, the reduction of maladministration is crucial in securing the quality of environmental decision making. Therefore it could be said that administrative law accountability has central importance in the environmental field.

The processes that provide remedies in the case of administrative law accountability are merits review, judicial review and Ombudsman review. Merits review examines 'what … the "correct or preferable" decision' should have been by '"standing in the shoes" of the original decision-maker'.[143] Judicial review examines whether the activities of governmental officials were legally correct, were done within the legal boundary in which they were confined and were exercised in the manner required by law. Ombudsman review examines whether the activities of public officers were correct or just, especially in situations in which the other processes are unavailable or unsuitable. Each process of administrative law accountability has certain limitations on its scope and influence, reflecting its nature and objectives.[144] Further details of these practical

[141] Creyke and McMillan, above n 86, 9–10.
[142] Creyke and McMillan, above n 86, 14; Oliver, above n 125, 241, 243–4; Bovens, Schillemans and Hart, above n 124, 230–2.
[143] Lane and Young, above n 70, 2 (emphasis in original).
[144] Ibid; Creyke and McMillan, above n 86, 14, 16; Sueur, above n 125, 232.

mechanisms of administrative law accountability are given in Section 2.3.

Financial accountability

The objective of financial accountability is to examine the probity, efficiency and effectiveness of governmental expenditure. It is the role of Parliament to control the financial flow of the government through various activities, such as tax legislation or approval of budgets, both in the general assembly and in committees. Generally the impartial audit body supports Parliament. The audit body, for example, the Australian Auditor General, examines the compliance of government agencies with budgetary rules, through audits of their financial statements and performance of their operations. The collected data are then reported to Parliament and the public. Remedies for lack of financial accountability are usually provided in a political manner.[145] Reflecting this structure, the audit body in many jurisdictions belongs to Parliament.[146] In some jurisdictions, the audit body examines the environmental effectiveness in budgetary use or has a specialised environmental section. For instance, regarding a failed public construction work project, the Australian Capital Territory Auditor General issued recommendations from a financial perspective, but also outlined errors in the administrative environmental decision-making process.[147]

Ethical accountability

The objective of ethical accountability is to examine whether public servants follow

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145 Creyke and McMillan, above n 86, 11–12; John Halligan, Robin Miller and John Power, *Parliament in the Twenty-first Century: Institutional Reform and Emerging Roles* (Melbourne University Press, 2007), 88–97.

146 Bergman et al., above n 138, 169–72.

147 Australian Capital Territory Auditor-General's Office, 'The North Weston Pond Project' (No.3/ 2011, 26 May 2011) <http://www.audit.act.gov.au/auditreports/reports2011/Report_3-2011_North_Weston_Pond_Project%20-%20post%20tabling%20revised.pdf>, 13–16. In Canada, the Commissioner of the Environment and Sustainable Development is a part of the Office of the Auditor General. Office of the Auditor General of Canada, *Commissioner of the Environment and Sustainable Development* (7 May 2008) <http://www.oag-bvg.gc.ca/internet/English/cesd_fs_e_921.html>.

ethical principles. Over the last two decades, ethical principles have been adopted and further developed in many parts of the world; one example is Australia's 'Australian Public Service Value and Code of Conduct in practice'.[148] Ethical principles emphasise the responsibility of public officials to serve the public, and list core public values, such as impartiality, legality and integrity. Compliance with ethical principles aims at improving the quality of governance through safeguarding the rights and interests of members of the public.[149] In the environmental field, these principles also form the basis of realising sound environmental decisions.

The mechanisms to supervise compliance with ethical principles are the Ombudsman, anti-corruption institutions, and ethics commissions.[150] In some jurisdictions, the complaint-handling function is handed from the Ombudsman to administrative bodies. In such situations, these internal complaint-handling mechanisms are responsible for being pragmatic mechanisms for ethical accountability.[151]

Accountability and quality of environmental decisions

Among the four elements of accountability described above, administrative law accountability is especially important for securing the quality of administrative environmental decision making. This is because, although political accountability has a significant effect on the direction of environmental policy, most decisions that directly influence enforcement are made at the lower level of administration. Further, the contributions of financial and ethical accountabilities in the environmental field are less significant compared with those of administrative law accountability.

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148 Australian Public Service Commission (Cth), *APS Values and Code of Conduct in practice* (18 November 2009) <http://www.apsc.gov.au/values/conductguidelines.htm>.

149 Creyke and McMillan, above n 86, 2, 20–1.

150 Ibid, 21–2.

151 For instance, Australia. John McMillan, 'The Ombudsman and The Rule of Law' (2005) 44 *AIAL Forum* 1, 9–10; John McMillan and Ian Carnell, 'Administrative Law Evolution: Independent Complaint and Review Agencies' (2010) 59 *Admin Review (AUS)* 30, 36.

To examine whether administrative law accountability is fulfilled in the environmental field, it is necessary to understand the structure and functions of its practical mechanisms. These are the review mechanisms for realising access to justice, which was detailed in Subsection 2.1.4. The existence of these reviewing institutions and easy accessibility to them promotes transparency of administrative decision-making processes by instilling bureaucrats with a fear of examination. The role of these mechanisms is to correct both systemic and individual errors, thus safeguarding proper usage of administrative powers and discretions.[152] The following section details these review mechanisms.

2.3 Administrative environmental decision making and review mechanisms

This thesis focuses on the Environmental Ombudsman, which is a specialised form of the Ombudsman institution. However, before the contribution and relative strength of the Environmental Ombudsman to administrative environmental decision making can be analysed in depth, a context needs to be provided through an overview of the system of review within which the Ombudsman is situated. Here, it should be remembered that Ombudsman review is not isolated in the framework to promote administrative law accountability. Thus, this subsection details Ombudsman review, merits review and judicial review.

The focus is on the general features of these individual mechanisms and their institutional settings. The general features include the objectives, grounds for review, *locus standi* and procedures for each process. The grounds for review are the categories of errors on which the review mechanisms examine illegality, and *locus standi* is the

[152] Ebbesson, above n 80, 701.

criterion used to determine whether an applicant has a sufficient interest to initiate the review mechanisms.[153] Regarding the institutional settings of these review mechanisms, these vary according to the jurisdiction. To demonstrate this point, the common law system as applied in Australia and New Zealand and the German-style legal system as applied in Hungary and Japan are examined.

2.3.1 Ombudsman review

Ombudsman review is an important practical mechanism for administrative law accountability — one that is central to this thesis. The fundamental role of this review is that the Ombudsman, who is independent from both the executive and the judiciary, supervises the activities of administrative bodies, with a focus on maladministration.[154] The specific feature of Ombudsman review is that the Ombudsman examines not only individual cases but also systemic problems in administrative proceedings, policy and law, which neither judicial review nor merits review examine.[155] This distinguishing feature of Ombudsman review provides for breadth of examination of administrative law accountability.[156] In this subsection, the basic features of Ombudsman review, including the range of supervision, investigation and remedies, are examined. In addition, in accordance with the purpose of this section, the institutional settings in the common law and German legal system are reviewed.

Range of supervision

The range of supervision of an Ombudsman review is quite wide in terms of subjects,

153 Cf Lane and Young, above n 70, 101, 205.

154 Creyke and McMillan, above n 86, 249; Marten Oosting, 'Protecting the Integrity and Independence of the Ombudsman Institution: The Global Perspective' in Linda C. Reif (ed), *The International Ombudsman Yearbook Volume 5 2001* (Kluwer Law International, 2002) 13, 16–17.

155 Marten Oosting, 'The Ombudsman: A Profession' in International Ombudsman Institute and Linda C. Reif (eds), *The International Ombudsman Yearbook Volume 1, 1997* (Kluwer Law International, 1998) 5, 7–9; Anita Stuhmcke, 'Ombudsman and Integrity Review' in Linda Pearson, Carol Harlow and Michael Taggart (eds), *Administrative Law in a Changing State; Essays in Honour of Mark Aronson* (Hart Publishing, 2008) 349, 354–5.

156 Lane and Young, above n 70, 397–8; McMillan, above n 151. 5–8.

scope and grounds. The subjects of supervision are government administrators. However, depending on the definition of the term ‘administrator’ in individual legal systems, the actual range of subjects differs. While the administrative branches are the central focus of this form of review, and the legislature is definitely excluded from among the potential subjects, there is no universal rule regarding whether the Cabinet, judiciary and semi-governmental private legal entities are included or excluded from among the potential subjects.[157] For example, the Cabinet is excluded in some states, but individual members of the Cabinet may be included. Even in common law jurisdictions, individual Ministers can be indirectly supervised through examination of the works of an official that formed a ministerial decision.[158] Further, in most jurisdictions, the judiciary is excluded; only in some civil law jurisdictions is the judiciary partially or extensively included. However, in many jurisdictions, the administration of justice is supervised.[159] Finally, in many jurisdictions, including some common law jurisdictions, semi-governmental private legal entities are included.[160]

The scope of Ombudsman review generally covers the entire administrative field, but some Ombudsmen work only in a specific field, such as a specialised Environmental Ombudsman.[161] Further details about an Environmental Ombudsman are presented and

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157 Kucsko-Stadlmayer, above n 55, 22, 30; Linda C. Reif, *The Ombudsman, Good Governance and the International Human Rights System*, International Studies in Human Rights (Martinus Nijhoff Publishers, 2004), 3.

158 Kucsko-Stadlmayer, above n 55, 25; J. F. Northey, 'New Zealand's Parliamentary Commissioner' in Donald Cameron Rowat (ed), *The Ombudsman: Citizen's Defender* (Allen and Unwin, 2nd ed, 1968) 127, 136–7; Roy Gregory, 'Building An Ombudsman Scheme: Statutory Provisions and Operating Practices' (1994) 12 *Ombudsman Journal* 83, 93.

159 Kucsko-Stadlmayer, above n 55, 25–30; Reif, above n 157, 13–14.

160 Kucsko-Stadlmayer, above n 55, 23–5; Roy Gregory and Philip Giddings, 'The Ombudsman and the New Public Management' in Roy Gregory and Philip Giddings (eds), *Righting Wrongs: The Ombudsman in Six Continents*, International Institute of Administrative Sciences Monographs (IOS Press, 2000) 425, 437–8.

161 Roy Gregory and Philip Giddings, 'The Ombudsman Institution: Growth and Development' in Roy Gregory and Philip Giddings (eds), *Righting Wrongs: The Ombudsman in Six Continents*, International Institute of Administrative Sciences Monographs (IOS Press, 2000) 1, 8–9. The example of the specialised Environmental Ombudsman is the Parliamentary Commissioner for the Environment in New Zealand. Parliamentary Commissioner for the Environment (NZ), *About us* (2010)

examined in Chapter 5.

The grounds of Ombudsman review include not only those of administrative law accountability but also those of ethical accountability, such as the attitudes or behaviours of individual administrative officers.[162] Administrative law accountability covers the legality of administrative activities, maladministration, equity and human rights.[163] By examining the equity of decisions, the Ombudsman contributes to fixing structural disorders arising from the obsolescence of the law.[164]

Investigation

The assessment procedure of Ombudsman review is inquisitorial, and thus excludes adversarial mechanisms. The Ombudsman generally has strong and comprehensive investigation powers. In general, the subjects of supervision are obliged to disclose administrative information within certain time limits, but certain types of national secrets may be exempted in some jurisdictions. The Ombudsman is usually granted access to official buildings, attendance at meetings, and interrogation of relevant officers. In some jurisdictions, the Ombudsman is also bestowed with the power to examine lay and expert witnesses. Insufficient or delayed cooperation with the investigation may be penalised. The strength of penalty varies by jurisdiction, from being the subject of an adverse report, to criminal sanctions.[165] Exercising these strong investigative powers, the Ombudsman examines the facts and issues, informal resolutions and formal reports.[166]

<http://www.pce.parliament.nz/about-us/>.

162 Lane and Young, above n 70, 395–6; Stuhmcke, above n 155, 371.

163 Kucsko-Stadlmayer, above n 55, 31–9; Dennis Pearce, 'The Ombudsman: Review and Preview the Importance of Being Different' (1993) 11 *Ombudsman Journal* 13, 26–30.

164 Kucsko-Stadlmayer, above n 55, 34–6; Michael Ross, 'The Ombudsman: A New Court of Chancery' (1988) 7 *Ombudsman Journal* 71, 75–6.

165 Kucsko-Stadlmayer, above n 55, 40–4; Gregory above n 158, 95–6; Arne Fliflet, 'Historical Development and Essential Features of the Ombudsman Worldwide' (1994) 12 *Ombudsman Journal* 117, 125.

166 Lane and Young, above n 70, 385; Roy Gregory, 'The Ombudsman: "An Excellent Form of Alternative Dispute Resolution"?' in Linda C. Reif (ed), *The International Ombudsman Yearbook Volume 5 2001*

There are two types of investigation: investigation of a complaint from a member of the public, and self-initiated investigation. The former is well known by complainants for its speed, zero cost and easy access.[167] However, in many jurisdictions, a complainant is required to have a legitimate interest and to have exhausted other available remedies.[168] Further, the Ombudsman retains discretion in determining whether a lodged complaint is worth examination.[169] Complaints from the public regarding maladministration are viewed as 'negative feedback' on administrative operations that can be used to detect administrative errors and improve processes.[170]

The specific feature of Ombudsman review in comparison to merits review and judicial review lies in its unique form of investigation. The Ombudsman can choose a target for investigation without being bound by regulations on access or individual complaints. The power of self-initiated investigation makes it possible for the Ombudsman to tackle structural problems that give rise to repeated complaints in the administration. Accordingly, the Ombudsman can deal not only with administrative errors in individual cases but also with systemic ones.[171] Regarding this systemic approach, the longer term of the office than that of Parliament enables the Ombudsman to take a long view of problems.[172] In particular, the high levels of accessibility to Ombudsman review help the socially weak, who may not be able to afford the other forms of review.[173]

(Kluwer Law International, 2002) 98, 106–8.

167 Pearce, above n 163, 14.

168 Kucsko-Stadlmayer, above n 55, 19–20.

169 Gregory, above n 166, 103; Clark, David Clark, David Bamford and Judith Bannister, *Principles of Australian Public Law* (LexisNexis Butterworths Australia, 3rd ed, 2010), 313–14.

170 Drew Hyman, 'Citizen Complaints as Social Indicators: The Negative Feedback Model of Accountability' (1987) 6 *Ombudsman Journal* 47, 62.

171 Kucsko-Stadlmayer, above n 55, 21–2; Gregory, above n 166, 115–16; Oosting, above n 155, 8–9.

172 Interview with David McGee, Ombudsman (Wellington, 8 June 2011)

173 Lane and Young, above n 70, 398; Daisy de Asper y Valdés, 'The Self-perceptions of the Ombudsman: A Comparative and Longitudinal Survey' (1991) 9 *Ombudsman Journal* 1, 35–6.

Remedies

Ombudsman review provides several types of remedies. Firstly, a problem can be resolved informally by methods such as the provision of detailed explanation, mediation or negotiation.[174] Secondly, the Ombudsman can issue recommendations to the subject of supervision and/or the superior agency at the end of investigation. This is the representative remedy of Ombudsman review. These recommendations do not have legally binding power.[175] However, in many civil law jurisdictions, the subjects of supervision are obliged to react to the recommendations, with failure to do so resulting in sanctions.[176] In practice, the recommendations are usually respected in most jurisdictions, whether they are part of the common or civil law system.[177] This compliance can be explained by the clear and reliable reasoning behind the recommendations, the timely issuing of the recommendations and their acceptability to the government.[178] This kind of non-coercive and cooperative approach is especially effective in resolving systemic problems.[179] In addition, the recommendations are usually publicised and attract the attention of the media and the public.[180] A third type of remedy available to the Ombudsman is the power to submit a special report to Parliament on an exceptionally serious problem. This report is also publicised, and so attracts attention not only of the

174 Kucsko-Stadlmayer, above n 55, 44; Gregory, above n 166, 108, 116.

175 Kucsko-Stadlmayer, above n 55, 44–5; Lane and Young, above n 70, 397; Purdue, above n 120, 1042; Gregory, above n 166, 117; Stephen Stec (ed), *Handbook on Access to Justice under the Aarhus Convention* (The Regional Environmental Center for Central and Eastern Europe, 2003), 225.

176 Kucsko-Stadlmayer, above n 55, 45–7.

177 Gregory, above n 166, 117; Stec, above n 175, 225.

178 Gregory, above n 158, 98–9; Ross, above n 164, 77.

179 Reif, above n 157, 17–19; Stephen Owen, 'The Ombudsman: Essential Elements and Common Challenges' in Linda C. Reif (ed), *The International Ombudsman Anthology: Selected Writings from the International Ombudsman Institute* (Kluwer Law International, 1999) 51, 52; Marc Hertogh, 'The Policy Impact of the Ombudsman and Administrative Courts: A Heuristic Model' in International Ombudsman Institute and Linda C. Reif (eds), *The International Ombudsman Yearbook Volume2, 1998* (Kluwer Law International, 1999) 63, 79–81; Marc Hertogh, 'Coercion, Cooperation, and Control: Understanding the Policy Impact of Administrative Courts and the Ombudsman in the Netherlands' (2001) 23 *Law & Policy* 47, 63–4; Dennis Pearce, 'The Jurisdiction of Australian Government Ombudsmen' in Matthew Groves (ed), *Law and Government in Australia* (The Federation Press, 2005) 110, 112; Lane and Young, above n 70, 386–8.

180 Kucsko-Stadlmayer, above n 55, 47.

legislative but also of the wider public.[181] The fourth remedy discussed here is that, in many civil law jurisdictions, the Ombudsman is bestowed with the power to submit legislative bills to Parliament. This is extremely helpful in resolving systemic problems.[182]

Institutional settings

The Ombudsman is quite a widespread mechanism in both the common law and civil law systems.[183] Many jurisdictions in the common law system have a general Ombudsman, and many also have specialised Ombudsmen.[184] However, Germany is exceptional in that it only has a specialised military Ombudsman and does not have either a general or an Environmental Ombudsmen.[185] One of the reasons for the non-existence of a general Ombudsman is the belief that the German court system, which is detailed in the following subsections, fully protects the citizens.[186] In place of an Ombudsman, there is the Petition Committee at the Federal Parliament. The Petition Committee is only one of the standing committees, but is exceptionally well resourced, with approximately 90 staff. The Committee fulfils similar functions to those of the Ombudsman and is able to take legislative initiatives, although it does not have the power to launch any *ex officio* investigation.[187] The other German-style civil law jurisdictions, such as Austria and

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181 Kucsko-Stadlmayer, above n 55, 49–50; Gregory, above n 158, 90.

182 Kucsko-Stadlmayer, above n 55, 50–1.

183 Gregory and Giddings, above n 161, 19–20.

184 Victor O. Ayeni, 'The Ombudsman around the World: Essential Elements, Evolution and Contemporary Issues' in Victor Ayeni, Linda Reif and Hayden Thomas (eds), *Strengthening Ombudsman and Human Rights Institutions in Commonwealth Small and Island States: The Caribbean Experience* (Commonwealth Secretariat 2000) 1, 4–5.

185 Udo Kempf, 'Complaint-Handling System in Germany' in Roy Gregory and Philip Giddings (eds), *Righting Wrongs: The Ombudsman in Six Continents*, International Institute of Administrative Sciences Monographs (IOS Press, 2000) 189, 189.

186 Udo Kempf and Marco Mille, 'The Role and the Function of the Ombudsman: Personalised Parliamentary Control in Forty-Eight Different States' in Linda C. Reif (ed), *The International Ombudsman Anthology: Selected Writings from the International Ombudsman Institute* (Kluwer Law International, 1999) 195, 195.

187 Brigitte Kofler, 'Germany' in Gabriele Kucsko-Stadlmayer (ed), *European Ombudsman-Institutions: A comparative legal analysis regarding the multifaceted realisation of an idea* (Springer, 2008) 203, 203–7. In other jurisdictions, it is regarded that compared with the petition mechanism to Parliament or

Hungary, apply the Ombudsman scheme.[188] Further details of the Ombudsman institutions are discussed in Section 5.1.

2.3.2 Merits review

Merits review, which checks abuses of power from the viewpoint of the executive, is another important component of the mechanisms for administrative law accountability. Here, disputes on administrative decisions are reviewed to provide the most appropriate resolutions.[189] In such cases, there is no restriction on the ability to make substitute decisions, either in the common law or German legal systems.[190]

General features

Merits review has the following general features. First, it is a comprehensive scheme for re-examination of an original decision. Hence, its grounds include legality, discretion, policy and facts.[191] Secondly, the criterion of *locus standi* for merits review is the existence of a certain connection between the applicants and the cases to be examined, which is not markedly different from that of judicial review, albeit with looser conditions.[192] Thirdly, regardless of the diversity of the institutions of merits review, each institution exercises inquisitorial powers of investigation to collect evidence, including

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its members, the Ombudsman has advantages in time, capacity, resources, expertise, experience and formal investigatory powers. Lane and Young, above n 70, 398; Donald C. Rowat, 'Why a Legislative Ombudsman is Desirable' (1993) 11 *Ombudsman Journal* 127, 130.

188 Kofler, above n ; Joachim Stern, 'Hungary' in Gabriele Kucsko-Stadlmayer (ed), *European Ombudsman-Institutions: A comparative legal analysis regarding the multifaceted realisation of an idea* (Springer, 2008) 221.

189 Lane and Young, above n 70, 225; Creyke and McMillan, above n 86, 191; Robin Creyke, 'Administrative tribunals' in Matthew Groves and H P Lee (eds), *Australian administrative law; Fundamentals, principles and doctrines* (Cambridge University Press, 2007) 77, 83; Mahendra P. Singh, *German Administrative Law: In Common Law Perspective* (Springer-Verlag, 1985), 123–4.

190 Lane and Young, above n 70, 224; Künnecke, above n 111, 29.

191 Lane and Young, above n 70, 225; Elizabeth Fisher, 'Administrative Law, Pluralism and the Legal Construction of Merits Review in Australian Environmental Courts and Tribunals' in Linda Pearson, Carol Harlow and Michael Taggart (eds), *Administrative Law in a Changing State; Essays in Honour of Mark Aronson* (Hart Publishing, 2008) 325, 331; *Verwaltungsgerichtsordnung* [Code of Administative Court Procedure] (Germany) 21 January 1960, BGBI I, 1991, 686 ('*VwGO*'), § 68.

192 Lane and Young, above n 70, 261; *VwGO*, § 69.

that which was not available to the original decision-maker, to facilitate a comprehensive and objective examination of the original decision.[193]

Depending on the level of independence of the reviewing institution from the administrative body that made the primary decision, two types of merits review can be identified; that is, external review and internal review. The reviewing institution in external review is a quasi-judicial body with a combination of executive and judiciary characteristics. Independent external review covers either general areas (such as the Administrative Appeals Tribunal in Australia) or specific areas (such as the Migration Review Tribunal of Australia). Conversely, the reviewing institution in internal review is the same administrative body that made the primary decision, or its supervisory body.[194] Thus, the impartiality and objectivity of the examiner might be questioned, especially when the disputes are directly connected with the executive's stance. This also means that the subject range is area specific, which leads to certain limitations on the examination of complex issues.[195]

Merits review would appear to be an informal, inexpensive and swift alternative to judicial review, but in actuality some formal merits review schemes are complex in procedure, expensive and time consuming.[196] Regardless of this, some forms of merits review can examine issues that judicial review cannot.[197] In this respect, merits review

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193 Lane and Young, above n 70, 226; Creyke, above n 189, 85–6, 94–5; 大久保規子 [Noriko Okubo], 'ドイツの異議審査請求制度：裁判外の行政紛争処理の動向 [Merits Review System in Germany: Research on Out-of-Court Settlement of Administrative Dispute Resolution]' in 小早川光郎 [Mitsuo Kobayakawa] and 高橋滋 [Shigeru Takahashi] (eds), *行政法と法の支配：南博方先生古稀記念 [Administrative Law and Rule of Law: Essays in Honour of Professor Hiromasa Minami's 70th Anniversary]* (有斐閣 [Yuhikaku], 1999) 117, 123–4.

194 Genevra Richardson, 'Tribunals' in David Feldman (ed), *English Public Law*, Oxford English Law (Oxford University Press, 2004) 985, 995–6; Lane and Young, above n 70, 222, 231; Creyke and McMillan, above n 86, 79–82, 150–1, 168–9; *VwGO*, § 73(1).

195 Lane and Young, above n 70, 231–2; Creyke and McMillan, above n 86, 306; Okubo, above n 193, 118, 140; Roger Douglas, *Douglas and Jones's Administrative Law* (The Federation Press, 6th ed, 2009), 236–7.

196 Lane and Young, above n 70, 234; Okubo, above n 193, 118.

197 Lane and Young, above n 70, 235; Künnecke, above n 111, 29; Fisher, above n 191, 328.

plays an important role in the realisation of administrative justice and the fulfilment of administrative law accountability.

Institutional settings

The institutional settings of merits review in the common law system are quite different from that in the German legal system. In the common law system, the external review mechanism is well developed in the form of administrative review tribunals, which apply an adversarial model to the assessment procedure. The history of administrative review tribunals in common law countries can be traced to the early nineteenth century. However, the significance of these tribunals became well recognised only after the mid-twentieth century due to a need to cope with the vast increase in administrative disputes.[198] The institutional structure of administrative review tribunals is diverse: some are informal, while others are formal. At their most formal, tribunals are headed by a judge and include trained legal practitioners and experts in certain administrative fields.[199] The subject range of a tribunal is also diverse; many of them have a specialised focus area, such as environmental disputes, but some of them cover an entire range of administrative issues.[200]

Besides the tribunals, there are internal review mechanisms within administrative bodies, in which the original decision-makers unilaterally handle the complaints against them. The assessment procedures vary, from informal negotiation with original decision-makers, to formal review by specialised staff. In common law systems, a legislated formal internal review mechanism is unusual.[201] However, in some

198 Richardson, above n 194, 986–8; Künnecke, above n 111, 17–18; Lane and Young, above n 70, 221–2, 225.

199 Richardson, above n 194, 999; Creyke and McMillan, above n 86, 177–8.

200 Richardson, above n 194, 990–1; Creyke and McMillan, above n 86, 160. An example of a specialised environmental tribunal is the Environmental Review Tribunal in Ontario, Canada. Environmental Review Tribunal (ONT), *Home* (2010) <http://www.ert.gov.on.ca/english/home.html >.

201 Douglas, above n 195, 231–7.

jurisdictions operating formal review mechanisms, the utilisation of internal review mechanisms is a precondition for access to external review mechanisms.[202]

Within the civil law system, the institutional structure of merits review varies by jurisdiction. In the German legal system, the internal review mechanism is the central form of merits review and the precondition for access to most administrative litigation. The expectations of internal review are that they allow the original decision-maker to revise their decision, provide informal redress for citizens and filter the cases to be examined by the court.[203] Regarding the assessment procedure of internal review mechanisms, the rules of the *Code of Administrative Court Procedure* are applied.[204]

In practice, a case is first sent to the unilateral review mechanism. Here, the same administrative body that made the original decision reviews the decision and, if illegality or unsuitableness is found, provides a remedy.[205] When the original administrative body upholds the original decision, the case is automatically sent to a semi-adversarial mechanism, in which the supervisors of the original decision-maker examine the case based on written evidence submitted by both parties. The division of original decision-makers and supervisors is relatively strict; usually the supervisors belong to a superior administrative body rather than to the original administrative body.[206]

Remarkably, in the German legal system, external review exists only as a part of the internal review framework. The *Code of Administrative Court Procedure* allows the government to replace internal review mechanisms with commissions or advisory boards comprising trained legal practitioners, other experts or lay people, and to apply

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202 New South Wales in Australia is one of these jurisdictions. *Administrative Decisions Tribunal Act 1997* (NSW) ss 53, 55. See also, Lane and Young, above n 70, 232–3.

203 Nierhaus, above n 118, 106–7; Nigel Foster and Satish Sule, *German Legal System and Laws* (Oxford University Press, 4th ed, 2010), 302–3.

204 *VwVfG*, § 79.

205 *VwGO*, § 72; Okubo, above n 193, 122–3.

206 *VwGO*, §§ 68, 73(1); Singh, above n 189, 123; Okubo, above n 193, 119–21.

adversarial procedures. However, the existence of such adversarial bodies is exceptional, and some do not have any legally binding power in their decisions.[207]

2.3.3 Judicial review

Judicial review is the central process of administrative law accountability. In most European countries, the main objective of this review is to prevent abuses of power.[208] The role of judicial review is to examine whether the exercise of administrative discretion has been lawful.[209] The basic features of judicial review vary depending on the legal system in which it operates, with significant differences between judicial review in common law systems and in German-style legal systems. Therefore, in this subsection, representative factors that differentiate judicial review in the two systems are examined, namely, the foundation of judicial intervention, the grounds of review, *locus standi* and remedies, and the institutional settings.

Foundation of judicial intervention

The foundation of judicial intervention in a jurisdiction depends to a large extent on the interpretation of the doctrine of the separation of powers. Common law systems were originally developed on the principle of parliamentary sovereignty, which allows Parliament to alter the law without any limitation of substance, subject to any provisions in, or implications from, a written constitution. The traditional basis for judicial review is the concept of *ultra vires*, which presumes the primary role of the court as the interpreter of legislative intention. This concept also considers judicial review to be allowed only when positive reasons with a statutory basis exist. Against this, there is a counter concept of the common law model of illegality, which regards the principal role of the court to be

[207] *VwGO*, § 73(2); Okubo, above n 193, 129–34.
[208] Oliver, above n 125, 241.
[209] Maurice Sunkin, 'Grounds for Judicial Review: Illegality in the Strict Sense' in David Feldman (ed), *English Public Law*, Oxford English Law (Oxford University Press, 2004) 715, 715–17, 720–1.

the creation of the common law. This holds that judicial controls should be allowed, except where clear limitation by Parliament exists.[210] The latter position is widely accepted in jurisdictions with a written constitution, such as Australia.[211] In common law systems, the doctrine of separation of powers is interpreted as requiring the judiciary not to substitute its view for the original decision of the administrative body, as such action breaches the separation of powers. Nevertheless, the necessity of minimum control of administrative discretion is accepted.[212]

In contrast, the civil law system does not generally apply parliamentary sovereignty. Therefore, judicial intervention is founded on a different norm. In the German legal system, under constitutional sovereignty, the three branches of government are bound by law and justice. Here, the separation of powers requires that any judicial review not review policy matters. The system of administrative law in Germany is structured to focus on the concept of effective judicial protection of individuals. To this end, there is no need to avoid judicial control over the substance.[213]

Grounds of review

There are various classifications of the grounds for judicial review in Western European legal systems[214] and each legal system has different features. In common law systems, the classification of 'illegality', 'irrationality' and 'procedural impropriety', set out by Lord Diplock in *Council of Civil Service Union v Minister for the Civil Service*, are the modern standard.[215] The ground of 'illegality' relates to the misinterpretation or

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210 Paul Craig, 'Fundamental Principles of Administrative Law' in David Feldman (ed), *English Public Law*, Oxford English Law (Oxford University Press, 2004) 689, 690, 695–7.
211 See, eg, Creyke and McMillan, above n 86, 440–4.
212 Craig above n 210, 705–9.
213 Künnecke, above n 111, 28–9, 34–5, 82.
214 Oliver, above n 125, 241; Jürgen Schwarze, *European Administrative Law* (Office for Official Publications of the European Communities/Sweet and Maxwell, 1992), ch 2.
215 *Council of Civil Service Union v Minister for the Civil Service* [1985] AC374; Sunkin, above n 209, 716; Lane and Young, above n 70, 101.

misapplication of the law. The ground of 'irrationality', which is also referred to as '*Wednesbury unreasonableness*', examines any apparent absurdity in a decision. In actuality, while the latter is frequently explained as a forms of procedural review, it is a really grounds for review on substantive quality.[216] 'Procedural impropriety' is the ground for review on procedure. It examines the failure of application of procedural fairness by either the original decision-maker or an administrative tribunal.[217] Thus, the main focus of judicial review in common law systems is on the procedural aspect, rather than the substantive aspect.[218]

In contrast, in the German legal system, the representative grounds are 'equality' and 'proportionality'.[219] These are grounds for review on substance. The ground of 'equality' examines whether administrative bodies exercised their discretion without discrimination. The ground of 'proportionality' examines the legality of discretionary decisions. This examination focuses on the following three elements: whether the measure applied by the administrative bodies was appropriate to obtain the objective of the statute, whether the administrative body chose the least onerous measure among the choices available, and whether the measure was proportional in achieving designated objectives. These grounds provide judges with a basis for highly intensive review on substantive aspects.[220] Conversely, errors of the procedural aspect are curable in litigation and hardly cause for nullification.[221] Thus, the focus of judicial review in the German system is on the substantive aspect, rather than the procedural aspect.

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216 *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223; Sunkin, above n 209, 718–20.

217 S.H. Bailey, 'Grounds for Judicial Review: Due Process, Natural Justice and Fairness' in David Feldman (ed), *English Public Law*, Oxford English Law (Oxford University Press, 2004) 775, 776.

218 Sunkin, above n 209, 719, 721–2; Bailey, above n 217, 780.

219 Künnecke, above n 111, 35.

220 Ibid, 110, 124–5, 128, 134; Nierhaus, above n 118, 90.

221 Künnecke, above n 111, 170.

Locus standi and remedies

The basic test of *locus standi* for judicial review is whether the applicant has sufficient interest or right in the case.[222] As a matter of policy, *locus standi* is intended to prevent overloading of the courts and 'officious intermeddling'. In the context of environmental issues, one of the foci is on whether public interest challenges by a group pass this test.[223] In both the common law and German legal systems, detailed rules for the test are determined according to the nature of individual remedies.[224] Thus, further details of *locus standi* are discussed in relation to relevant remedies in later chapters.

The available remedies depend on each process and vary by legal system. In the common law system, the traditional remedies include prerogative writs and equitable remedies. Prerogative writs comprise quashing orders (*certiorari*), prohibitory orders (*prohibition*) and mandatory orders (*mandamus*), while equitable remedies include injunction and declaration.[225] In the German legal system, the statute-based remedies are similar to those in the common law system, with the exception of the lack of injunction. However, in contrast to the common law system, some judicial remedies in the German system order administrative bodies to follow a designated process. A typical example is when administrative discretion is evaluated as a 'reduction to zero', in which the exercise of discretion is limited to only one course.[226]

Institutional settings

Institutional settings of judicial review in the common law and German legal systems

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[222] Paul Craig, 'Access to Mechanisms of Administrative Law' in David Feldman (ed), English Public Law, Oxford English Law (Oxford University Press, 2004) 873, 884, 886–7; Lane and Young, above n 70, 205. Some of these remedies are replicated in statutes as well.

[223] Craig above n 222, 889–90; Lane and Young, above n 70, 205.

[224] Lane and Young, above n 70, 205; Foster and Sule, above n 203, 303–8.

[225] Maurice Sunkin, 'Remedies Available in Judicial Review Proceedings' in David Feldman (ed), English Public Law, Oxford English Law (Oxford University Press, 2004) 915, 916; Lane and Young, above n 70, 45, 53.

[226] Künnecke, above n 111, 37, 42–3; Foster and Sule, above n 203, 303–8; Gerhard Robbers, *An Introdution to German Law* (Nomos, 4th ed, 2006), 96–7.

also differ significantly. The major differences are observed in the institutional structures, practical rules of assessment procedures, and qualification of judges. These differences may affect the quality of judicial review, and are thus examined here.

In the common law system, which traditionally does not have a separate administrative court, there is no distinction between administrative and civil procedure rules.[227] Consequently, the adversarial mechanism, which is the basic form of judicial review, is directly applied to administrative procedures. In a purely adversarial system, there are two shortcomings caused by neglecting the imbalance in the ability of individual citizens and the administrative bodies to collect evidence. One is the limitation on fact-finding methods, which prevents the establishment of objective facts. The other is the applicant's burden of proof, based on the presumption of legitimacy of crown activities, except in disputes on clearly established human rights.[228] Moreover, judges in the common law system are generally selected from experienced barristers and are not specifically trained in administrative proceedings.[229] In the ordinary courts, there is no lay person who is an expert in specific administrative fields. However, in the case of environmental disputes, some jurisdictions have specialised environmental courts with non-lawyer environmental experts.[230]

Conversely, in the German legal system, the adversarial mechanism is modified to provide greater equality between administrative bodies and citizens. Specialised administrative courts exercise inquisitorial investigations to collect the evidence needed

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227 Phil Harris, *An Introduction to Law* (Cambridge University Press, 7th ed, 2007), 180–2; A.W. Bradley, 'The Constitutional Position of the Judiciary' in David Feldman (ed), *English Public Law*, Oxford English Law (Oxford University Press, 2004) 333, 333–4; Schwarze, above n 214, 152.

228 Künnecke, above n 111, 44–6, 70; Sunkin, above n 209, 719–20.

229 Bamford and Bannister, above n 169, 268–9; Harris, above n 227, 451–2.

230 For instance, the Land and Environment Court in New South Wales in Australia, and the Environment Court in New Zealand. Land and Environment Court (NSW), *Home* (10 July 2012) <http://www.lawlink.nsw.gov.au/lec >; Environment Court of New Zealand (NZ), *Home* (23 February 2010) <http://www.justice.govt.nz/courts/environment-court>.

to make objective judgments. The burden of proof rests with the party for whom the proof of a fact is beneficial. Additionally, during examination, the execution of administrative activities to be reviewed is principally suspended.[231] Thus, in terms of procedure, the review on legality in the German legal system is more user friendly than that in the common law system.

Further, judges in the civil law system have generally not worked as barristers or solicitors, although in some jurisdictions administrative judges have been trained as administrative decision-makers.[232] In the German legal system, professional judges are not experts in specific administrative fields. However, this is the task of lay judges. Among the German administrative courts, state and local levels have lay judges, while the Federal Administrative Court comprised only professional judges.[233] Referring to environmental disputes, some civil law jurisdictions have specialised environmental courts, but the German legal system does not.[234]

2.3.4 Composition of review mechanisms

The practical mechanisms for administrative law accountability in any jurisdiction form a multi-layered structure comprising the three layers of judicial review, merits review and Ombudsman review. As has been shown, both the common law and the German legal system possess three layers of mechanisms for administrative law accountability. However the 'thickness' of each layer differs between the systems. In the common law system, the judicial review mechanism is focused on procedural aspects and merits review and the Ombudsman review covers the substantive aspects. External merits

231 Künnecke, above n 111, 46–7, 70; *VwGO*, §§ 86, 99, 123.

232 The typical example of the administrative judges trained as administrative decision-makers is seen in France. See John Bell, *French Legal Cultures* (Butterworths, 2001), 191–5.

233 Künnecke, above n 111, 30; Foster and Sule, above n 203, 87.

234 For instance, Sweden has the Environment Court. See Jan Darpö, 'Environmental justice through environmental courts?: Lessons learned from the Swedish experience' in Jonas Ebbesson and Phoebe Okowa (eds), *Environmental Law and Justice in Context* (Cambridge University Press, 2009) 176.

review plays an important role in administrative law accountability. Conversely, in the German legal system, administrative law accountability is structured around judicial review, supplemented by an internal merits review mechanism that is more formal than in the common law system. The focus of these review mechanisms is on substantive aspects rather than on procedural aspects. In Germany, instead of an Ombudsman, the Petition Committee handles complaints from the public. However, the lack of a general Ombudsman might affect Germany's ability to cope with systemic problems in the long term, due to the overlapping nature of the executive and Parliament.

Despite these differences, the overall effectiveness of these mechanisms in regards to administrative law accountability in individual cases is not so different. It seems that the combination of the courts and administrative review tribunals in the common law system is equivalent to the combination of the courts and internal review mechanisms in the German legal system. However, further detailed examination is necessary before any conclusions can be drawn on whether this is true in the case of environmental disputes.

2.4 Summary

This chapter clarifies the nature and structure of sound environmental decision making, its location in the wider administrative law context and the contribution of the Ombudsman institution to soundness of decision making. This background forms the foundation upon which this thesis bases its examination of the Environmental Ombudsman's contribution to improving administrative environmental decision-making processes; the details and findings of which are presented in the following chapters. In this chapter, the following facts were revealed.

Sound administrative environmental decision making is achievable when sound

processes are followed. To realise sound processes, it is necessary to reduce maladministration. The three pillars of the Aarhus Convention — access to information, public participation and access to justice — work to achieve this. Next, to achieve a sound outcome, which is the ultimate objective of sound environmental decision making, it is necessary to reduce scientific uncertainty. To achieve this, the application of the precautionary principle is effective.

In the wider administrative law context, two fundamental principles promote sound environmental decision making. One is transparency, which is vital for ensuring the reliability of the environmental decision-making process. The legal framework and practical mechanisms of transparency encourage the involvement of citizens in the decision-making process. The second is accountability, which aims to correct wrongs and improve the quality of environmental decision making. Among the various elements within executive accountability, administrative law accountability is the most significant in the environmental context.

The Environmental Ombudsman is one of the institutions of administrative law accountability. The Ombudsman plays an important role in securing sound administrative decision making in collaboration with merits review and judicial review. Between the common law and German legal systems, there are differences in the general features and institutional settings. However, the overall effectiveness of administrative law accountability in these systems appears to be very similar.

Chapter 3: Administrative environmental decision making in Japan

For a proper analysis of a subject, it is necessary to possess fundamental knowledge about that subject. As this thesis examines the feasibility of introducing an Environmental Ombudsman into Japan, an understanding of administrative environmental decision making in Japan is necessary for an appreciation of the main argument. In the previous chapter, basic knowledge about the relationship between administrative environmental decision making and the administrative law framework was acquired. However, this is not sufficient to achieve logical and meaningful outcomes in analysing the Japanese situation in this thesis because the Japanese legal system is a hybrid of the common law and German-style civil law systems. As detailed in the previous chapter, in the field of administrative law, differences between common law and civil law systems are the most obvious. Thus, it is necessary to clarify to what extent the Japanese administrative law framework is hybrid, and to focus the scope of this thesis for analysis of the Japanese context. For this purpose, Section 3.1 examines the administrative law framework and practical mechanisms in Japan. In relation to the fact that one of the mother legal systems denies the necessity of an Ombudsman scheme, this section also assesses the applicability of the same logic of that mother system to the Japanese framework.

Then, this chapter examines the theory and practice of administrative environmental decision making in Japan. Section 3.2 clarifies the fundamental problems of environmental governance with which an Environmental Ombudsman would be expected to cope, through analysis of representative environmental disasters that have occurred in Japan. The historical development of the environmental law framework during two disasters (the Minamata disease in the 1960s and the recent TEPCO Nuclear Disaster) and

the limitations of the framework are examined. Section 3.3 assesses the structure of mechanisms that review administrative environmental decision making to reveal whether there is a need for an Environmental Ombudsman. The findings in this chapter inform the discussions in the following chapters.

3.1 Administrative law in the Japanese context

This section clarifies the nature of the Japanese administrative law framework, which is the basis of the analysis in the following chapters. Subsection 3.1.1 examines the hybrid nature of the Japanese administrative law framework through analysis of the change of constitution that occurred during the modern history of Japan. Subsection 3.1.2 assesses the basic features of the Japanese administrative law framework that underlie the structure and roles of the practical mechanisms for executive transparency and accountability. Subsections 3.1.3– 3.1.5 address the structure of the mechanisms for executive transparency and accountability in Japan.

The Japanese administrative law framework has a hybrid nature comprised of the common law and German-style civil law systems. In relation to the object of this thesis, it should be noted that neither Japan nor Germany has Ombudsman review as a mechanism for administrative law accountability. In particular, as seen in Subsection 2.3.1, one of the reasons that Germany does not have Ombudsman review is that existing review mechanisms fully protect the citizens. In light of this, the reason for discussing the feasibility of the introduction of an Environmental Ombudsman in Japan might be lost. Thus, through assessing the structure of review mechanisms, this section also examines this question in Subsection 3.1.5.

3.1.1 Hybrid nature of the administrative law framework

This subsection addresses the formation of the hybrid system of common law and German legal systems originating from the change in constitution during the modern history of Japan. First, the two modern constitutions are examined to understand the development of the public law framework of Japan. Then, the influence of change in constitution on Japanese bureaucracy, which is the ultimate subject of administrative law, is summarised. Finally, the development of the administrative law framework under the influence of the shift in constitutions is discussed.

Development of public law framework in Japan

Japan modernised its legal system during the imperial era. After the Meiji Revolution in 1868, Japan drastically switched its entire legal system from traditional customary law to a civil law system based on the French and German legal systems. In particular, the German influence spread beyond the legal system, influencing the organisational structure of Japan's administrative and judicial organs, and jurisprudence.[1] The symbol of the modern Japanese legal system was the *Constitution of Imperial Japan* (Imperial Constitution).

The Imperial Constitution, which entered into force in 1890, was largely influenced by the *Constitution of the German Empire*.[2] This Constitution declared imperial sovereignty; that sovereignty resided only in the Emperor and that all other Japanese people were his subjects (chs 1–2). The rights of the people under the Constitution were

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1 塩野宏 [Hiroshi Shiono], *行政法 I ：行政法総論 [Administrative Law I: General Remarks of Administrative Law]* (有斐閣 [Yuhikaku], 3rd ed, 2003), 13–18; Aritsune Katsuta, 'Japan: A Grey Legal Culture' in Esin Örücü, Elspeth Attwooll and Sean Coyle (eds), *Studies in Legal Systems: Mixed and Mixing* (Kluwer Law International, 1996) 249, 251–2.

2 *大日本帝国憲法* [Constitution of Imperial Japan] (Japan) 11 February 1889; Secretariat of the Research Commission on the Constitution at the House of Representatives (JPN), '明治憲法と日本国憲法に関する基礎的資料：明治憲法の制定過程について [Basic References on the Constitution of Imperial Japan and the Constitution of Japan: About the Enactment Process of the Constitution of Imperial Japan]' (衆憲資第 27 号 [Reference No. 27], May 2003) <http://www.shugiin.go.jp/itdb_kenpou.nsf/html/kenpou/shukenshi027.pdf/$File/shukenshi027.pdf>, 15; *Verfassung des Deutschen Reiches* [Constitution of the German Empire] (Germany) 16 April 1871, RGBl, 1871, 63.

limited to civil liberties (ch 2). The principle of the separation of powers was applied; however, separation was not absolute, so as to secure the Emperor's supervision of all governmental branches (art 4). Thus, the Emperor had a wide range of strong governance powers, including the ability to issue orders without consulting the Diet, and to conclude treaties (ch 1, arts 9, 13). The Emperor was the only legitimate legislator, so the role of the Diet was limited to approval of Bills (arts 5, 6, 37). In actuality, the Diet could participate in the enactment of a law by asking for the support of the Emperor (arts 38, 49). The Emperor's governance was supported by Ministers as well as the Privy Council, which was the highest consultative body (arts 55–6). The Emperor had the power to appoint all governmental officers, including the Ministers (art 10). The Judicial Court exercised its power under the name of the Emperor, but several legal areas were excluded from the Court's jurisdiction, with these areas instead being placed under special courts, such as the Administrative Court (arts 57, 60–1). The Minister of Justice appointed judges and managed court administration.[3] At the time of its repeal by the *Constitution of Japan* (Democratic Constitution) in 1947, the Imperial Constitution had not been amended.[4]

After World War II, under the supervision of the Supreme Commander for the Allied Powers, the Democratic Constitution was created. In the enactment process, the leading democratic constitutions at that time were referred to for the purpose of modernising the public law framework from the half-feudal system to a truly democratic system. This meant that the British style of parliamentary democracy underpinned the new model.[5] This new Constitution declared sovereignty to reside in the citizens, thus making the

3 *裁判所構成法* [Court Structure Law] (Japan) 10 February 1890, Law No 6 of M23, arts 8, 18(3), 31, pts 2, 4

4 *日本国憲法* [Constitution of Japan] (Japan) 3 November 1946

5 Secretariat of the Research Commission on the Constitution at the House of Representatives (JPN), '憲法制定の経過に関する小委員会報告書の概要 [Outline of Report of Subcommittee on the Enactment Process of the Constitution of Japan]' (衆憲資第 2 号 [Reference No. 2], April 2000) <http://www.shugiin.go.jp/itdb_kenpou.nsf/html/kenpou/shukenshi002.pdf/$File/shukenshi002.pdf>, 30–6.

position of the Emperor symbolic of the unity of citizens (preamble, art 1). The rights of citizens under this Constitution were expanded to include the right to life and economic, social and cultural rights (ch 3). However, it should be noted that the existence of this bill of rights does not guarantee court protection of these rights.[6]

Regarding the structure of government, the Democratic Constitution deprived the Emperor of all political power, thereby accomplishing separation of powers. This was done in reference to the systems of the United States and the United Kingdom. With this change in the Constitution, the Diet became the highest branch of government and the only legislative body (art 41). The Cabinet began supervising administrative activities and taking responsibility to the Diet (arts 65–6). Further, the Judicial Court became fully independent from the control of the Minister of Justice, and its jurisdiction was expanded to include all legal areas. Under the new regime, any specialised court that was not under the supervision of the Supreme Court became prohibited (arts 76–7). The status of governmental officials also changed from agents of the Emperor to public servants, and all public servants, including the Emperor, were vested with the duty to respect and protect the Constitution (arts 15(2), 99). No amendment has yet been made to this Constitution.

Constitutional change and bureaucracy

In the imperial era, the Japanese government revolved around the bureaucrats as agents of the Emperor. Under the Democratic Constitution, the legacy of the imperial era remains.[7] Specifically, this legacy can be seen in the strong sectionalism of the individual

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6 *朝日訴訟* [Mr Asahi's Case], Supreme Court of Japan, 昭和 39(行ツ)14, 24 May 1967, reported in (S42) 21(5) Supreme Court Reports (civil cases) 1043; *堀木訴訟* [Ms Horiki's Case], Supreme Court of Japan, 昭和 51(行ツ)30, 7 July 1982, reported in (S57) 36(7) Supreme Court Reports (civil cases) 1235; Benjamin J. Richardson and Jona Razzaque, 'Public Participation in Environmental Decision-making' in Benjamin J. Richardson and Stepan Wood (eds), *Environmental Law for Sustainability: A Reader* (Hart Publishing 2006) 165, 178.

7 菅直人 [Naoto Kan], *大臣 [Minister]* (岩波書店 [Iwanami Shoten], 1998), 11; 飯尾潤 [Jun Iio], *日本の統治構造：官僚内閣制から議院内閣制へ [The Governance Structure of Japan: From Cabinet System Dominated by Bureaucrats to Parliamentary Cabinet System]* (中央公論新社 [Chuo Koron Shinsha], 2007), 28–9; Karel van Wolferen, *日本／権力構造の謎 下 [The Enigma of Japanese Power: People and*

ministries. As the Imperial Constitution did not refer to the Cabinet, individual Ministers owed responsibility to the Emperor in individual subject fields.[8] In contrast, the Democratic Constitution clearly defined the Cabinet and the leadership of the Prime Minister.[9] However, until recently, bound by the customs of the imperial era, the Cabinet and Prime Minister's roles, in practice, were limited to coordinating between the ministries.[10] Further, ignoring the legislative intent behind the *Law on National Public Officers*, the personnel management system has been applied to public officers based on imperial era custom, in which individual officers have been under the control of individual ministries and the intervention of the Cabinet has been excluded.[11] Related to this, the mentality of bureaucrats has not changed from that of the imperial era.[12]

It is obvious from the overview above that Japan has a strong bureaucracy. Thus, control of the bureaucracy has been an important theme of the Japanese administrative law framework. Considering the role of Ombudsman review, which was detailed in Subsection 2.3.1, this suggests that there is a potential demand for an Ombudsman. With this in mind, the development of the administrative law framework is examined.

Constitutional change and administrative law

The greatest influence of the constitutional change on the administrative law framework was that it created a hybrid legal system between the German-style civil law system and the common law system. Under the Imperial Constitution, the jurisprudence

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Politics in a Stateless Nation; Volume 2] (篠原勝 [Masaru Shinohara] trans, 早川書房 [Hayakawa Shobo], 1990), 130–3, 195–6.

8 Kan, above n 7, 107–8; Iio, above n 7, 9–12, 48–50; *大日本帝国憲法* [Constitution of Imperial Japan] (Japan) 11 February 1889, art 55.

9 Iio, above n 7, 26–7; 大石眞 [Makoto Oishi], *憲法講義Ⅰ [Japanese Constitutional Law Ⅰ]* (有斐閣 [Yuhikaku], 2004), 134; *日本国憲法* [Constitution of Japan] (Japan) 3 November 1946, ch 5.

10 Kan, above n 7, 108–12; Iio, above n 7, 28–32, 63, 195–7.

11 Iio, above n 7, 40–4; *国家公務員法* [Law on National Public Officers] (Japan) 21 October 1947, Law No 120 of S22; 古賀茂明 [Shigeaki Koga], *日本中枢の崩壊 [Collapse of the Pivot of Japan]* (講談社 [Kodan Sha], 2011),146–7, 155–6.

12 佐竹五六 [Goroku Satake], *体験的官僚論：55 年体制を内側からみつめて [Argument on Japanese Bureaucracy Based on Experience: From the Viewpoint of Insider of Governance System Formed 1955]* (有斐閣 [Yuhikaku], 1998), 7–9, 57–8; Koga, above n 11, 146–50, 167–70; 寺脇研 [Ken Terawaki], *「官僚」がよくわかる本 [Book to Understand Bureaucrats in Japan]* (アスコム [Asukomu], 2010), 113–24.

of administrative law was strongly influenced by that of the German legal system. Thus, there was a clear division between the public law and private law spheres.[13] In categorising administrative activities, certain activities that were an exercise of the ruling power or served the realisation of national or public interests were classified as the subjects of administrative law.[14] Disputes on subjects of administrative law were required to be settled not by the Judicial Court, but by the Administrative Court.[15] The abolition of the Administrative Court, as a result of the change in constitutions, dramatically weakened the theoretical basis of the division of the public law and private law spheres. Consequently, nowadays the meaning of this division is considered lost.[16] However, it should be noted that although the Administrative Court was abolished, Japan kept separate the court procedure applicable for administrative disputes from that for private disputes.[17] Thus, the practical division of the public and private law spheres and the effectiveness of the German-style jurisprudence of administrative law were retained.[18] Here, the hybrid nature of the Japanese administrative law framework, in which the structure of the courts follows the common law system but the practice of judicial review follows the German-style civil law system, was formed.[19]

3.1.2 Basic features of the administrative law framework

To examine the main concern of this section, which is whether the existing review mechanisms in Japan can fully protect citizens as the German legal system does in

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13 Shiono, above n 1, 18; 藤田宙靖 [Tokiyasu Fujita], *行政法Ⅰ：総論 [Administrative Law I: General Remarks]* (青林書院 [Seirin Shoin], 4th Revised ed, 2005), 30–1; 原田尚彦 [Naohiko Harada], *行政法要論 [Essence of Administrative Law]* (学陽書房 [Gakuyo Shobo], 6th ed, 2005), 21.

14 Fujita above n 13, 27–30; Harada above 13, 7–8.

15 Shiono above n 1, 16–18; Fujita above n 13, 27–30, 359–62; *大日本帝国憲法* [Constitution of Imperial Japan] (Japan) 11 February 1889, art 61; *行政裁判法* [Administrative Court Law] (Japan) 30 June 1890, Law No 48 of M23.

16 Shiono above n 1, 23–40; Fujita above n 13, 39–46, 362–3; Harada above 13, 17–28; 阿部泰隆 [Yasutaka Abe], *行政法解釈学Ⅰ：実質的法治国家を創造する変革の法理論 [Administrative Law Hermeneutics I: Legal Theory to Create a Real Rechtsstaat]* (有斐閣 [Yuhikaku], 2008), 21–2.

17 *民事訴訟法* [Code of Civil Procedure] (Japan) 26 June 1996, Law No 109 of H8; *行政事件訴訟法* [Code of Administrative Procedure] (Japan) 16 May 1962, Law No 139 of S37

18 Fujita above n 13, 23–4; Harada, above n 13, 23–4; Abe, above n 16, 67.

19 Fujita above n 13, 363–5; Harada, above n 13, 350–1; 塩野宏 [Hiroshi Shiono], *行政法Ⅱ：行政救済法 [Administrative Law II: Administrative Remedy Law]* (有斐閣 [Yuhikaku], 4th ed, 2005), 63–4.

Germany, it is prerequisite to understand the basic features of the Japanese administrative law framework. The relationship between the administrative law framework and practical mechanisms for executive accountability is equivalent with that between an operating system and its software. Despite the hybrid nature of the Japanese administrative law framework, it is undeniable that the strong influence of the German-style legal system remains. This is exemplified by the remaining practical division of the public and private law spheres and the continuing influence of German-style jurisprudence. In particular, the latter is the key to understanding the Japanese administrative law framework.

The foundation of the jurisprudence of administrative law in any German-style civil law system, including that of Japan, is the *Gesetzmäßigkeit der Verwaltung* [Principle of Administration by Statutes (PAS)], which requires a legislative basis for the subjects of administrative law.[20] However, unlike the rule of law, which is the foundation of the common law system, in the past, this principle did not refer to the content of individual statutes. Thus, under the Imperial Constitution of Japan, which determined the absolute sovereignty of the Emperor, the PAS was used for limiting constitutional rights by statute.[21] Under the Democratic Constitution, reflecting past abuses of human rights, the principle was reinterpreted to state that statutes must not harm constitutional rights.[22]

The PAS also has a strong influence over the entire administrative law framework in Japan. To understand the practical division of the public and private law spheres in the Japanese legal system, in this subsection, the basic features of the Japanese administrative law framework under the PAS are explained. Then, in relation to the practical mechanisms for executive transparency and accountability, further development beyond the traditional scope of the PAS is discussed.

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20 Fujita above n 13, 48–58; Shiono above n 1, 58; Harada, above n 13, 80.
21 Fujita above n 13, 58–9; Abe, above n 16, 95–6; *大日本帝国憲法* [Constitution of Imperial Japan] (Japan) 11 February 1889, arts 22–9.
22 Fujita above n 13, 123; Harada, above n 13, 80; Abe, above n 16, 112.

Practical division of the public and private law spheres

In Japan, the public and private law spheres are divided principally by whether an administrative activity can be included in the subjects of administrative law or not. The subjects of administrative law, which are bound by the PAS, are primarily limited to an 'administrative act', which is 'an administrative action that unilaterally decides specific individual's concrete rights, obligations and other legal status, based on the authority given by statutes in order to realise objectives of administration'.[23] The concept of an administrative act is significant because only this form of administrative activity generates legal effect without the agreement of those who will be affected. Regardless of whether the administrative act is legitimate or illegal, once generated, the legal effect is valid until internal merits review or judicial review revokes it.[24] As such, in Japan, the division of the public and private law spheres forms the basis of the development of the review mechanisms that specifically review administrative disputes.[25]

Conversely, various administrative activities that do not fit the criteria of administrative acts have been exempted from the subjects of administrative law. For instance, activities that follow rules of the private law sphere, such as contracts, are exempt. Secondly, activities within administrative bodies that are presumed not to affect any individual's rights, obligations or legal status, such as the administrative directive, are exempt. Thirdly, activities that decide rights and obligations not individually but abstractly, such as delegated legislation, are exempt. Fourthly, activities that are part of administrative processes and so do not immediately alter legal status, such as administrative planning, are exempt. Fifthly, activities that affect citizens' interests significantly, but do not have direct legally binding powers, such as administrative

[23] Shiono above n 1, 96; Fujita above n 13, 22–3; Harada, above n 13, 135–6, 373.
[24] Fujita above n 13, 200–1, 207–11; Harada, above n 13, 138–40; Shiono above n 1, 122–3.
[25] Shiono above n 1, 96, 123; Harada, above n 13, 140–1; *行政不服審査法* [Administrative Appeal Law] (Japan) 15 September 1962, Law No 160 of S37, arts 2–3, 40(3); *行政事件訴訟法* [Code of Administrative Procedure] (Japan) 16 May 1962, Law No 139 of S37, arts 3, 9; *行政手続法* [Administrative Procedure Law] (Japan) 12 November 1993, Law No 88 of H5, arts 2–4.

guidance, are exempt.[26] In reality, these activities on the border of the public and private law spheres significantly affect citizens' lives. However, the avenues of review are not prepared for all of them. Thus their exemption is regarded as one of the limitations of the PAS.[27]

Further development of administrative law

From the viewpoint of executive transparency and accountability, which were detailed in Section 2.2, the PAS has a number of limitations. For example, it presumes a two-dimensional relationship between the regulator and those who are regulated and does not consider third party interests.[28] To fix these limitations, the *Administrative Procedure Law* was enacted in 1993.[29] Although the scope of this law is limited only to major administrative acts, administrative guidance, and some delegated legislation (arts 1–3, chs 4, 6),[30] the law clarifies the basic rules of administrative procedures (ch 2). Importantly, the law allowed the involvement of interested third parties in administrative decision making through hearings or written submissions (arts 10, 17, chs 3, 6). Nevertheless, the provisions were deemed insufficient and were considered reflective of the paradigm shift from a two-dimensional to a multi-dimensional relationship of regulation, which occurred through a number of lawsuits.[31] Another instrument targeted

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26 Harada, above n 13, 136–8; Fujita above n 13, 284–5, 289–91, 297, 319, 325–7; Shiono above n 1, 169, 181, 190.

27 Shiono above n 1, 63–6; Fujita above n 13, 284–5.

28 Fujita above n 13, 91–2; Harada, above n 13, 83; 大橋洋一 [Yoichi Ohashi], *行政法Ⅰ：現代行政過程論 [Administrative Law and Process]* (有斐閣 [Yuhikaku], 2009), 12.

29 Fujita above n 13, 141, Harada, above n 13, 155–6: *行政手続法* [Administrative Procedure Law] (Japan) 12 November 1993, Law No 88 of H5.

30 This was the result of political considerations regarding the introduction of new legal concepts. Fujita above n 13, 151, 159; Shiono above n 1, 249; Harada, above n 13, 156.

31 Fujita above n 13, 157–8; Harada, above n 13, 83, 98, 162–3; 大橋洋一 [Yoichi Ohashi], '行政法総論から見た行政訴訟改革 [Examining the Reform of Code of Administrative Procedure from the Viewpoint of the General Rules of Administrative Law]' in 三辺夏雄 [Natsuo Sanbe] et al (eds), *法治国家と行政訴訟: 原田尚彦先生古稀記念 [Constitutional States and Administrative Litigation: Essays in 70th Anniversary of Naohiko Harada]* (有斐閣 [Yuhikaku], 2004) 1, 17; 中川義朗 [Yoshiro Nakagawa], '多極的行政法関係における「第三者」の手続法的地位論序説：行政手続法・都市計画法を中心にして [An Introduction of Argument on the Legal Status of Thrid Parties among Multilateral Relationships in Administrative Law: Focusing on Administrative Procedure Law and City Planning Law]' in 安藤高行 [Takayuki Ando] and 大隈義和 [Yoshikazu Okuma] (eds), *新世紀の公法学: 手島孝先生古稀祝賀論集 [Public Law Studies in the New Century: Essays in 70th Anniversary of Takashi Tejima]* (法律文化社 [Houritsu Bunka Sha], 2003) 243, 243–5; *新潟空港航空運送事業免許取消事件* [Niigata Airport Airline Service Licence Case], Supreme Court of Japan, 昭和 57(行ツ)46, 17 February 1989, reported in (H1)

at the limitation of the PAS was the legislation of the *Law on Disclosure of Information Possessed by the Executive Branch* in 1999.[32] This Japanese version of a freedom of information law and the *Administrative Procedure Law* are quite important as drivers to increase executive transparency and to realise democratic control of the administrative branch.[33]

While these laws compensate for the limitations of the PAS regarding executive transparency to some extent, the mechanisms for executive accountability in the Japanese administrative law framework are still under-developed. Even under the traditional German jurisprudence of administrative law, the effectiveness of the PAS is checked by merits review and judicial review.[34] However, in Japan, the concept of executive accountability was introduced in a marginalised form. In Japan, only the aspect of necessity of explanation of administrative activities was exploited and defined as the basis of access to information.[35] Nevertheless, as detailed in Subsection 2.2.2, the essence of executive accountability lies in the examination of administrative activities and the provision of a remedy. Therefore, such a narrow understanding of this concept in Japan is problematic from the viewpoint of control of public power.

3.1.3 Mechanisms for access to information

This subsection focuses on the practical mechanisms for executive transparency in Japan, of which, as detailed in Section 2.2, there is a variety. As the mechanisms for administrative procedures were already detailed in previous sections, the focus in this

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43(2) Supreme Court Reports (civil cases) 56; *もんじゅ事件上告審判決* [Monjyu Nuclear Power Plant Case: Phase One], Supreme Court of Japan, 平成 1(行ツ)130・131, 22 September 1992, reported in (H4) 46(6) Supreme Court Reports (civil cases) 571, 1090; *伊方原発事件* [Ikata Nuclear Power Plant Case], Supreme Court of Japan, 昭和 60(行ツ)133, 29 October 1992, reported in (H4) 46(7) Supreme Court Reports (civil cases) 1174.

32 *行政機関の保有する情報の公開に関する法律* [Law on Disclosure of Information Possessed by the Executive Branch] (Japan) 14 May 1999, Law No 42 of H11

33 Fujita above n 13, 160; Shiono above n 1, 286.

34 Fujita above n 13, 60; Harada, above n 13, 80; Abe, above n 16, 92–3.

35 Shiono above n 1, 74, 292; Abe, above n 16, 520; Ohashi, above n 28, 48; *行政機関の保有する情報の公開に関する法律* [Law on Disclosure of Information Possessed by the Executive Branch] (Japan) 14 May 1999, Law No 42 of H11, art 1.

subsection is on the structure of the mechanisms for access to information. The practical mechanisms examined here are the record management system and the media.

Record management system

As mentioned in Subsection 2.2.1, the record management system is vital to verifying the rationale of an administrative decision or administrative act in the Japanese context. In Japan, until recently, there had been no comprehensive record management system for official documents, even though there were internal rules for individual administrative offices. The internal rules did not aim for enhanced executive transparency, so the administrative offices were able to freely discard official documents.[36] In fact, between the enactment and the entering into force of the freedom of information law (1999–2001), administrative offices discarded a vast amount of official documents.[37] Further, in the mid-2000s, the poor record management system caused several serious social problems. In 2009, reflecting these social problems, the *Law for Management of Public Documents* was enacted to promote public access to administrative records (art 1).[38] The law obliged the proper creation of public documents, their management and preservation. The duration of preservation is decided by heads of individual administrative offices. After the expiry of this period, official documents of historical importance are stored in the National Archive, while others are discarded. The whole record management process is

[36] 小川千代子 [Chiyoko Ogawa], '文書基本法（案）と記録管理院構想：アーキビストの思い [A Plan for Documents Basic Law and A Plot for Record Management Agency: Form the viewpoint of an Archivist]' in 総合研究開発機構 [National Institute for Research Advancement] and 高橋滋 [Shigeru Takahashi] (eds), *公文書管理の法整備に向けて [For Legislation of National Archives Law: Policy Advocacy]* (商事法務 [Shoji Houmu], 2007) 265, 273–5; 高橋滋 [Shigeru Takahashi], '公文書管理法制はいかにあるべきか：比較法的視点から [How the Legislation of Public Documents Management Law should be?: From the viewpoint of Comparative Law]' (2008) 99(10) *Urban Issues (JPN)* 68, 69–71.

[37] NPO Information Disclosure Clearing House (JPN), '各行政機関の文書廃棄量調査結果 [Result of Investigation on the Amount of Public Documents, which Individual Administrative Offices Discarded]' (NPO Information Disclosure Clearing House (JPN), 7 December 2004) <http://homepage1.nifty.com/clearinghouse/research/bunsyohaiki02.pdf>.

[38] Takahashi, above n 36, 68; 三宅弘 [Hiroshi Miyake], '公文書管理法制定と情報公開法改正を：市民の立場から [Legislate Public Documents Management Law, and Reform Information Disclosure Law: From viewpoint of Citizens]' (2008) 99(10) *Urban Issues (JPN)* 76, 78–9; Cabinet Office (JPN), *公文書管理 (国立公文書館) [Public Documents Management (National Archives)]* (13 April 2012) <http://www.cao.go.jp/gyouseisasshin/contents/11/public-document-management.html>; *公文書等の管理に関する法律* [Law on Management of Public Documents] (Japan) 1 July 2009, Law No 66 of H21.

under the supervision of the Prime Minister, who has to agree with the duration of the preservation period and the discarding of public documents after consultation with a board of experts (arts 2, 4–10, 29). Further examination of the functionality of the record management system is provided in Subsection 7.2.4.

Media

As explained in Subsection 2.2.1, while the media has significant impact on securing executive transparency, the effectiveness of the media as a practical mechanism for accessing information is affected by various obstacles. In Japan, in many cases, the media functions as the public relations section of the government rather than as an independent mechanism for executive transparency.[39] There are several underlying structural problems. Firstly, in Japan, legal instruments only ban monopoly of the media in certain spatial areas, and do not regulate the cross-ownership of different kinds of media.[40] As a result, newspapers, television and radio stations primarily belong to one of five highly influential mass media networks, while media not included in one of these major networks has far less influence. Hence, there is a concern that cross-ownership prevents healthy criticism in the mass media.[41] Secondly, the editorial and business management of the media is not divided. Thus, the will of management, or pressure applied on

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39 See, eg, Karel van Wolferen, *日本／権力構造の謎 上 [The Enigma of Japanese Power: People and Politics in a Stateless Nation; Volume 1]* (篠原勝 [Masaru Shinohara] trans, 早川書房 [Hayakawa Shobo], 1990), 180,184–5, 310–11.

40 *放送法* [Broadcasting Law] (Japan) 2 May 1950, Law No 132 of S25, art 93; *基幹放送の業務に係る表現の自由享有基準に関する省令* [Ordinance for the Principle of Excluding Multiple Ownership of the Media] (Japan) 29 June 2011, Ordinance of Ministry of Internal Affairs and Communications No 82 of H23; *基幹放送の業務に係る表現の自由享有基準に関する省令の認定放送持株会社の子会社に関する特例を定める省令* [Ordinance for the Exceptions of the Principle of Excluding Multiple Ownership of the Media] (Japan) 29 June 2011, Ordinance of Ministry of Internal Affairs and Communications No 83 of H23

41 Japan, *Diet Debates*, Permanent Committee on Internal Affairs and Communications at the House of Councillors, 20 December 2007, 5–6 (内藤正光 [Masamitsu Naito], Democratic Party: 増田寛也 [Hiroya Masuda], Minister of Internal Affairs and Communications: 山口俊一 [Shunichi Yamaguchi], Liberal Democratic Party); videonews.com, *総務相が新聞社の放送局への出資禁止を明言 [Minister of Internal Affairs and Communications Declared the Prohibition of Newspaper Companies' Investments on TV Broadcasting Companies]* (14 January 2010) <http://www.videonews.com/videonews_on_demand/0901/001330.php>; Japan, *Diet Debates*, Permanent Committee on Internal Affairs and Communications at the House of Representatives, 18 May 2010, 6–7 (原口一博 [Kazuhiro Haraguchi], Minister of Internal Affairs and Communications: 内藤正光 [Masamitsu Naito], Vice Minister of Internal Affairs and Communications).

management, directly affects the contents of media reports.[42] Thirdly, the mass media have excluded other media from governmental press conferences and have utilised closed media releases as their main news resource. Consequently, journalists of mass media tend not to check the reliability of the governmental briefings, thus potentially publishing manipulated, monotone news.[43] Further examination of the functionality of the media is provided in Subsection 7.2.4.

3.1.4 Parliamentary scrutiny

In a parliamentary democracy, state powers revolve around the Parliament. In addition, as seen in Subsection 2.2.2, Parliament takes the primary role of securing executive accountability. Hence, this subsection examines the basic features of Japan's Diet as a mechanism for executive accountability.

Basic features of the Diet

The *Constitution of Japan* applies bicameralism: the Diet encompasses the House of Representatives and the House of Councillors (art 42).[44] The House of Representatives has superiority in some areas, such as legislation, examination of the national budget, ratification of treaties, and appointment of the Prime Minister (arts 59–61, 67). However,

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42 田原総一朗 [Soichiro Tahara], *牧野洋×田原総一朗「ジャーナリズムに未来はあるのか」第２回：「アメリカと日本のメディアの違い」 [Hiroshi Makino v Soichiro Tahara 'Does Japanese Journalism have a Future?' Volume 2: Differences of the Media between America and Japan]* (4 April 2011) 現代ビジネス（講談社）[Gendai Business- Kodansha] <http://gendai.ismedia.jp/articles/-/32099>; 清水量介 [Ryosuke Shimizu], *【特別対談】旧メディアの命運：真山 仁×上杉 隆 混乱し危機的な今こそ改革する絶好のチャンス [Special Talk, Jin Mayama v Takashi Uesugi, The Fate of Old Media: Current Confusion and Crisis are the Best Opportunity to Reform]* (19 January 2010) 週刊ダイヤモンド[Weekly Diamond] <http://diamond.jp/articles/-/5485>; 戸崎賢二 [Kenji Tozaki], '「NHK 番組改編事件」と「編集権」 [The "Editorial Right" on the editorial process of NHK's program dealing with wartime sex slavery]' (2009) 45(1) *Ritsumeikan University Journal of Social Sciences (JPN)* 107, 108–14; *NHK 番組改変問題訴訟控訴審判決* [Case on the Editorial Process of the NHK's TV Program dealing with Wartime Sex Slavery: Second Instance], Tokyo High Court (JPN), 平成 16(ネ)2039 , 29 January 2007, reported in (H19) 1258 Law Times Reports 242.

43 Yoshikazu Yada, 'Journalism in Japan' in Peter J. Anderson and Geoff Ward (eds), *The Future of Journalism in the Advanced Democracies* (Ashgate, 2007) 175, 184–6; Jane O'Dwyer, 'Japanese Kisha Clubs and the Canberra Press Gallery: Siblings or Strangers?' (2005) (16) *Asia Pacific Media Educator* 1, 6–7, 10–11; 高橋洋一 [Yoichi Takahashi], *一次資料も読めず、日銀の言いなりになってバーナンキ発言をミスリードする日本のマスコミは、役所に飼い慣らされた「ポチ」 [Japan's Mass Media is the Bureaucrats' Pet Dog: They Cannot Read First Hand Information, so Just Follow the Manipulation by the Bank of Japan, and Mislead Readers about the Speech of Mr. Bernanke]* (6 February 2011) 現代ビジネス（講談社）[Gendai Business- Kodansha] <http://gendai.ismedia.jp/articles/-/31737>.

44 *日本国憲法* [Constitution of Japan] (Japan) 3 November 1946.

for other matters, both houses have equal powers (ch 4). Regarding legislation, the Diet does not apply the reading procedure, which is common in the Westminster system. Instead, Bills are submitted to and examined at Permanent Committees, and then voted on in a House. Permanent Committees play a central role in the Diet.[45] Both houses have identical Permanent Committees according to the subject areas, many of which also correspond to individual ministries.[46]

While the Permanent Committees enjoy strong powers, their role in legislation is limited. The majority of Bills are submitted by the Cabinet and legislated without detailed examination by the Committees. This is because, before submission, these Bills are drafted by the individual ministries, negotiated with ruling parties, and their texts are examined by the Cabinet Legislative Bureau, which is the *de facto* most influential authority regarding interpretation of law in Japan.[47] However, the legitimacy of such wide commitments by bureaucrats to legislation has been questioned in relation to the PAS.[48] Further, there is a strong limitation on time because, in Japan, the legislative period is cut into short sessions, and any Bills that do not pass in a session are abolished.[49] This mechanism has been criticised as a legacy of feudalism and the main cause of inefficient parliamentary management.[50] Moreover, the postponement of one Committee stops the proceedings of all other Committees.[51]

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45 *国会法* [National Diet Law] (Japan) 30 April 1947, Law No 79 of S22, art 56(2); 大石眞 [Makoto Oishi], *議会法 [Parliamentary Law]* (有斐閣 [Yuhikaku], 2001), 137–8.

46 *国会法* [National Diet Law] (Japan) 30 April 1947, Law No 79 of S22, art 41; House of Representatives of Japan, *衆議院規則* [Rules of the House of Representatives] (Japan) 28 June 1947, r 92; House of Councillors of Japan, *参議院規則* [Rules of the House of Councillors] (Japan) 28 June 1947, r 74; Oishi, above n 45, 140–1.

47 Iio, above n 7, 50–5, 61–2, 84–7,123–5; Oishi, above n 45, 84; 古賀豪 [Tsuyoshi Koga], 桐原康栄 [Yasue Kirihara] and 奥村牧人 [Makito Okumura], '帝国議会および国会の立法統計：法案提出件数・成立件数・新規制定の議員立法 [Statics on Legislation at the Imperial and Democratic Diets: The number of submitted bills, legislated laws, and laws submitted by Members of the Diet]' (2010) 2010(11) *Reference (JPN)* 117, 121–4.

48 Fujita, above n 13, 123–4.

49 *国会法* [National Diet Law] (Japan) 30 April 1947, Law No 79 of S22, art 68.

50 Oishi, above n 45, 134–6; Iio, above n 7, 128–9.

51 Interview with 南部義典 [Yoshinori Nanbu], Secretariat, MP study group on the Parliamentary Ombudsman (Tokyo, 29 July 2011).

The Diet and executive accountability

Regarding executive accountability, the Diet mainly checks political accountability. The two main instruments of the Diet for examining political accountability are Diet Debates and written interrogatories. In Japan, the former is one of the strategies of each party, and the latter is based on the motivations of individual members of the Diet. Once a written interrogatory is submitted, the Cabinet has to reply to it in a timely manner with a Cabinet decision. For this reason, the written interrogatory is a powerful tool for securing the accountability of the executive to the Diet.[52]

The Diet also examines financial accountability with the Board of Audit. In Japan, the Board of Audit belongs to the executive, but is independent from the Cabinet. The Board examines the budgetary use of the government and submits an annual report to the Diet via the Cabinet.[53] However, in practice, the Diet does not examine the annual report of the Board.[54] The Board also issues annual reports and special reports to the Diet and Cabinet. The special reports comprise investigations initiated by the Board and those requested by the Diet of the Board.[55]

Meanwhile, the Diet's control of administrative law accountability is limited, due partly to the lack of an Ombudsman. For instance, the Diet does not examine the appropriateness of delegated legislation.[56] The major reason for this limited control is the controversial interpretation of article 65 of the *Constitution*, which states that '[t]he

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52 *国会法* [National Diet Law] (Japan) 30 April 1947, Law No 79 of S22, arts 74–5 12; 寺沢泰大 [Yasuhiro Terasawa], '議会による行政統制の制度設計 [An Institutional Design for Parliamentary Control of the Executive]' (2000) 2000 (28 Jan 2000) *Public Policy (JPN)* ppsaj/200001028; Oishi, above n 45, 114–18.

53 *日本国憲法* [Constitution of Japan] (Japan) 3 November 1946, art 90; *会計検査院法* [Board of Audit Law] (Japan) 19 April 1947, Law No 73 of S22, arts 1, 20; *財政法* [National Finance Law] (Japan) 31 March 1947, Law No 34 of S22, art 40.

54 Oishi, above n 45, 106.

55 Board of Audit of Japan, *検査結果 [Reports of Audit]* (23 January 2012) <http://www.jbaudit.go.jp/report/index.html>.

56 Oishi, above n 45, 90–2.

executive power is vested to the Cabinet.'[57] By the Cabinet Legislative Bureau's interpreting 'executive' to mean 'administrative', the administrative branch has resisted any control from the legislative branch, including the establishment of an Ombudsman.[58] The functionality of the Diet as a mechanism for executive accountability is further examined in Subsection 7.2.4.

3.1.5 Japanese review mechanisms and protection of citizens

Due to the Diet's relatively limited control on administrative law accountability, the central mechanisms for administrative law accountability in Japan are merits review and judicial review. Based on the findings in the previous subsections, this subsection examines the structure of these review mechanisms and clarifies their contributions to administrative law accountability. Further, based on the results of this examination, whether the Japanese review mechanisms fully protect citizens is assessed in comparison with the German model, which was presented in Subsection 2.3.3, to reveal the meaningfulness of the research question of this thesis.

Structure of merits review

As in Germany, merits review in Japan is an internal review mechanism. The general rules applied for internal merits review are codified in the *Administrative Appeal Law*, which aims for resolution of administrative disputes by a simple and swift procedure, and the realisation of a proper administration (art 1).[59] The subjects of internal merits review

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57 Public Administration Division of the Government Section at the Supreme Commander for the Allied Powers, 'Constitution of Japan' (SCAP Files of Commander Alfred R. Hussey, Doc. No. 12, Supreme Commander for the Allied Powers, 12 February 1946) <http://www.ndl.go.jp/constitution/e/shiryo/03/076a_e/076a_etx.html>, Art LX. This is the original draft of the *Constitution of Japan*, most of which was included in the actual Constitution.

58 Kan, above n 7, 4–8, 175–9; Japan, *Diet Debates*, Permanent Committee on Budget at the House of Representatives, 6 December 1996, 41–3 (菅直人 [Naoto Kan], Democratic Party: 橋本龍太郎 [Ryutaro Hashimoto], Prime Minister: 武藤嘉文 [Kabun Muto], Minister of Management and Coordination); Japan, *Diet Debates*, Permanent Committee on Budget at the House of Councillors, 10 December 1996, 19–20 (斎藤文夫 [Fumio Saito], Liberal Democratic Party: 大森政輔 [Masasuke Omori], Director-General of the Cabinet Legislation Bureau).This controversial interpretation was possible because in Japanese, both 'executive' and 'administrative' use the same spelling '行政 [Gyosei]'.

59 *行政不服審査法* [Administrative Appeal Law] (Japan) 15 September 1962, Law No 160 of S37.

are the administrative acts and inactions on applications from citizens, which have statutory basis (art 2).[60] Although certain types of administrative acts are excluded by application of the law, this does not prevent the establishment of a special merits review institution for those excluded by a statute (art 4). In actuality, there are various merits review institutions that are not bound by the *Administrative Appeal Law*.[61]

As in Germany, the review process of internal merits review under the law applies a semi-adversarial mechanism, which focuses on examination of documents submitted by the parties (arts 25–6, 48, 56).[62] However, the focus of this process is on the efficient processing of cases, and so the applicant's rights in the procedure are not well protected.[63] For instance, lodgement of an application does not automatically suspend the execution of administrative activity. The application of a stay of execution is determined at the discretion of the examiner's office (arts 34–5). Nevertheless, compared with judicial review, conditions for the granting of a stay of execution are not so severe.[64]

Structure of judicial review I: Judicial instruments

The general rules applied to judicial review are determined by the *Code of Administrative Procedure* (art 1).[65] Two of the four types of litigation that apply this law are particularly significant for ordinary citizens. These are 'appellate litigation', which reviews disputes about the exercise of public power, and 'popular litigation', which examines the abstract legitimacy of administrative activities (arts 2–3, 5).[66] However, popular litigation is only available when a statute determines its utilisation (art 42). Thus, the concrete procedures for appellate litigation are discussed below.

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60 Harada, above n 13, 319–20.
61 Fujita, above n 13, 475–8; Shiono, above n 19, 39–48.
62 Shiono, above n 19, 26–7; Harada, above n 13, 329–3.
63 Fujita, above n 13, 473; Shiono, above n 19, 27–31; Harada, above n 13, 330–3; 阿部泰隆 [Yasutaka Abe], *行政法解釈学Ⅱ：実効的な行政救済の法システム創造の法理論 [Administrative Law Hermeneutics II: Legal Theory to Create an Effective Legal Framework for Administrative Remedies]* (有斐閣 [Yuhikaku], 2009), 353–5.
64 Fujita, above n 13, 472; Shiono, above n 19, 24–5.
65 *行政事件訴訟法* [Code of Administrative Procedure] (Japan) 16 May 1962, Law No 139 of S37.
66 Fujita, above n 13, 366, 399–401; Harada, above n 13, 355, 370–1; Shiono, above n 19, 75, 239–40.

Appellate litigation is further classified into the following five judicial instruments (art 3). The 'action for revocation' pursues a remedy that revokes an administrative act (arts 3(2)). The 'action for declaratory judgment of invalidity' pursues a remedy that declares an administrative act invalid (art 3(4)). The 'action for declaratory judgment of illegality of inaction' pursues a remedy that declares the illegality of inaction by an administrative office in response to an application from the plaintiff (arts 3(5)).[67] The 'action for obligation' pursues a remedy that obligates an administrative office to do a certain administrative act (art 3(6)). The 'action for administrative injunction' pursues a remedy that orders an administrative office not to undertake a certain administrative act (art 3(7)).

Structure of judicial review II: Subjects of review and *locus standi*

The *Code of Administrative Procedure* determines that the subjects of the appellate litigation are limited to administrative acts and other actions that have equivalent effects (arts 3(2)).[68] When an administrative act is invalid, it has no administrative effect. Thus, it is excluded from the subjects of administrative review, and is reviewed instead through the civil procedure process. Whether an administrative act is invalid or not is reviewed by the action for declaratory judgment of invalidity.[69] When an administrative act is valid, the court has strictly applied the distinction between administrative acts and others.[70]

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67 'Administrative office' in Japanese administrative law system means 'those who have authority to exercise administrative acts'. Fujita, above n 13, 425–6; Harada, above n 13, 51.

68 *行政事件訴訟法* [Code of Administrative Procedure] (Japan) 16 May 1962, Law No 139 of S37, art 3(2); *大田区ごみ焼却場設置事件* [Case on the Construction of a Waste Incinerator at Ota Ward of Tokyo], Supreme Court of Japan, 昭和 37(オ)296, 29 October 1964, reported in (S39) 18(8) Supreme Court Reports (civil cases) 1809; Fujita above n 13, 367–8; Harada, above n 13, 135–6, 373; Shiono, above n 19, 95–6.

69 Fujita, above n 13, 241–3; Harada, above n 13, 178–80; Shiono, above n 1, 140–1.

70 *大田区ごみ焼却場設置事件* [Case on the Construction of a Waste Incinerator at Ota Ward of Tokyo], Supreme Court of Japan, 昭和 37(オ)296, 29 October 1964, reported in (S39) 18(8) Supreme Court Reports (civil cases) 1809; *成田新幹線訴訟* [Narita Bullet Train Case], Supreme Court of Japan, 昭和 49(行ツ)8, 8 December 1978, reported in (S53) 32(9) Supreme Court Reports (civil cases) 1617; *最高裁判所規則取消請求事件* [Case on the Action for Revocation regarding the Rule of Supreme Court], Supreme Court of Japan, 平成 2(行ツ)192, 19 April 1991, reported in (H3) 45(4) Supreme Court Reports (civil cases) 518; *高円寺土地区画整理事業計画事件* [Koenji Land Use Readjustment Plan Case], Supreme Court of Japan, 昭和 37(オ)122, 23 February 1966, reported in (S41) 20(2) Supreme Court Reports (civil cases) 271; *盛岡広域都市計画用途地域指定無効確認訴訟* [Case on the Action for Declaratory Judgment of Invalidity regarding the Designation of City Planning Area for the Greater

However, the exclusion of non-administrative acts from judicial review has been criticised.[71] In particular, the exclusion of administrative planning has been strongly criticised as lacking in theoretical basis, thus prohibiting any possibility of redress. Consequently, in some recent cases, the Supreme Court has included certain types of administrative planning with concreteness into administrative acts.[72]

The *locus standi* of the appellate litigation is limited to 'those who have legal interests' (art 9(1)). Although there are various arguments regarding the interpretation of the scope of legal interests, the traditional interpretation of the court has limited its scope to those interests that have a statutory basis for the protection of private individuals. Here, those interests having a statutory basis for the protection of public interests are excluded because the damage to individuals from a breach of such interests is evaluated as a side effect.[73] However, in relation to the multi-dimensional effects of an administrative act, the application of such a narrow interpretation was not rational. Thus, later, the court broadened the interpretation to include interests with a statutory basis for the protection of public interests, but where its breach could cause serious damage to individuals' lives, bodies or properties.[74]

Morioka], Supreme Court of Japan, 昭和 53(行ツ)62, 22 April 1982, reported in (S57) 36(4) Supreme Court Reports (civil cases) 705; *保険医戒告事件* [Case on the Admonishment for a Medical Doctor], Supreme Court of Japan, 昭和 36(オ)791, 4 June 1963, reported in (S38) 17(5) Supreme Court Reports (civil cases) 670; Fujita above n 13, 367–70; Harada, above n 13, 374–5; Shiono, above n 19, 98–105.

71 Fujita above n 13, 375–6; 大浜啓吉 [Keikichi Ohama], '法の支配と行政訴訟 [Rule of Law and Administrative Litigation]' in 三辺夏雄 [Natsuo Sanbe] et al (eds), *法治国家と行政訴訟: 原田尚彦先生古稀記念 [Constitutional States and Administrative Litigation: Essays in 70th Anniversary of Naohiko Harada]* (有斐閣 [Yuhikaku], 2004) 25, 36; Abe, above n 63, 65–6.

72 Fujita above n 13, 375–6; Harada, above n 13, 128–9: 宮田三郎 [Saburou Miyata], *行政計画法 [Administrative Planning Law]*, 現代行政法学全集 [The Collected Writings of Modern Administrative Law Studies] (ぎょうせい [Gyousei], 1984), 214–21; *第二種市街地再開発事業計画事件* [Class Two City Area Redevelopment Plan Case], Supreme Court of Japan, 昭和 63(行ツ)170, 26 November 1992, reported in (H4) 46(8) Supreme Court Reports (civil cases) 2658.

73 Fujita above n 13, 408–9; Harada, above n 13, 381–3; *質屋営業許可取消請求事件* [Case on the Business Permission for a Pawnshop], Supreme Court of Japan, 昭和 31(オ)1066, 18 August 1959, reported in (S34) 13(10) Supreme Court Reports (civil cases) 1286; *主婦連ジュース不当表示事件* [Case on Misleading Description of Contents of Juice, which was accused by the Housewives' Association], Supreme Court of Japan, 昭和 49(行ツ)99, 14 March 1978, reported in (S53) 32(2) Supreme Court Reports (civil cases) 211.

74 Fujita above n 13, 409–11, 414–19; Harada, above n 13, 383–4; Shiono, above n 19, 118–23; *新潟空港航空運送事業免許取消事件* [Niigata Airport Airline Service Licence Case], Supreme Court of Japan, 昭和 57(行ツ)46, 17 February 1989, reported in (H1) 43(2) Supreme Court Reports (civil cases) 56; *もんじゅ事件上告審判決* [Monjyu Nuclear Power Plant Case: Phase One], Supreme Court of Japan, 平成 1(行ツ)130・131, 22 September 1992, reported in (H4) 46(6) Supreme Court Reports (civil cases) 571; *開発許可処分取消事件* [Case on the Development Permission at the Area with HIgh Risk of Landslide],

Further, the court examines the effectiveness of a legal interest. When a revocation of an administrative act cannot protect the legal interest of the plaintiff, the court will deny standing. This could happen, for example, when a restoration of damage by revocation is impossible, or when the effect of an administrative act becomes irreversible during the review process.[75] The latter could happen because Japan applies the principle of non-stay of execution; unlike in Germany, the lodgement of an administrative lawsuit does not suspend the execution of an administrative act. The court is only allowed to issue the stay of execution under certain conditions. However, the Prime Minister has the power of veto against the court's order of stay of execution.[76] The principle of non-stay of execution is criticised as irrational because the damage to individuals by the execution of the administrative act is usually greater than that to the administrative office by the stay of execution.[77] The Prime Minister's veto is also criticised as an irrational intervention in the judiciary by the executive and thus as against the constitution.[78]

Structure of judicial review III: Procedural features and remedy

Japanese judicial review shares some procedural features with its German counterpart, such as the modification of the adversarial mechanism for providing some equity between administrative offices and citizens, which was detailed in Subsection 2.3.3.[79] Further, some common law system influences can be observed. For instance, regarding the grounds of review, a procedural error is not automatically regarded as ignorable or

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Supreme Court of Japan, 平成 6(行ツ)189, 28 January 1997, reported in (H9) 51(1) Supreme Court Reports (civil cases) 250; *総合設計許可と原告適格事件* [Case on Comprehensive Planning Permission and Standing of Affected Residents], Supreme Court of Japan, 平成 9(行ツ)7, 22 January 2002, reported in (H14) 56(1) Supreme Court Reports (civil cases) 46.

75 Fujita above n 13, 422–3; Harada, above n 13, 387–9; Shiono, above n 19, 127–31; *長沼ナイキ基地訴訟* [Naganuma Nike Base Case], Supreme Court of Japan, 昭和 52(行ツ)56, 9 September 1982, reported in (S57) 36(9) Supreme Court Reports (civil cases) 1679; *建築基準と訴えの利益事件* [Case on the Breach of Construction Standard and Legal Interest], Supreme Court of Japan, 昭和 58(行ツ)35, 26 October 1984, reported in (S59) 38(10) Supreme Court Reports (civil cases) 1169.

76 *行政事件訴訟法* [Code of Administrative Procedure] (Japan) 16 May 1962, Law No 139 of S37, arts 25, 27.

77 Fujita above n 13, 432–4; Shiono, above n 19, 183–4.

78 Fujita above n 13, 437–9; Shiono, above n 19, 192–3; Abe, above n 63, 211.

79 *行政事件訴訟法* [Code of Administrative Procedure] (Japan) 16 May 1962, Law No 139 of S37, arts 23-2, 24; Fujita above n 13, 444–5; Harada, above n 13, 402–5; Shiono, above n 19, 75–6, 145–8.

curable. However, its illegality is considered only when an error in a procedure with statutory basis affects the concrete rights or legal interests of individual citizens.[80] Thus, the procedural control on much administrative planning is exempt, because the *Administrative Procedural Law* does not cover it.[81]

Meanwhile, there is a qualitatively significant difference between German and Japanese judicial review schemes, regarding the control of administrative discretion. In Japan, the *Code of Administrative Procedure* adds some limitations on judicial review by declaring that 'the court is allowed to revoke the original administrative act only when discretion was exercised over the scope of statute or the decision was made in an abusive manner' (art 30).[82] In theory, the applied grounds here are explained as equivalent with those of Germany: 'equality' and 'proportionally'.[83] However, in practice, the applied criterion in Japan is 'whether an extreme unreasonableness in the social context existed or not', which is not as strict as the German grounds.[84] Rather, its low consistency of review is comparable with the '*Wednesbury unreasonableness*' of the common law system, but is much looser because the criterion does not require interpretation of law.[85]

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80 Fujita above n 13, 256–8; Harada above n 13, 183; *土地所有権確認家屋収去並に土地明渡請求* [Case on the Action for Declaratory Judgment of Invalidity on a Land Replacement], Supreme Court of Japan, 昭和 28(オ)347, 27 November 1956, reported in (S31) 10(11) Supreme Court Reports (civil cases) 1468; *温泉動力装置許可処分取消請求* [Case on the Action for Revocation of the Permission of Settlement of a Hot Spring Pump], Supreme Court of Japan, 昭和 39(行ツ)20, 22 January 1971, reported in (S46) 25(1) Supreme Court Reports (civil cases) 45; *成田新法事件* [Case on the Law on Security of Nariata Airport], Supreme Court of Japan, 昭和 61(行ツ)11, 1 July 1992, reported in (H4) 46(5) Supreme Court Reports (civil cases) 437.

81 Fujita above n 13, 322–3; Harada, above n 13, 125–6, 130–1; *行政手続法* [Administrative Procedure Law] (Japan) 12 November 1993, Law No 88 of H5.

82 Shiono, above n 19, 143; Fujita, above n 13, 99; Harada, above n 13, 150–1.

83 Shiono, above n 19, 143; Fujita, above n 13, 100–1; Harada, above n 13, 151.

84 *神戸税関職員懲戒免職事件* [Case on the Disciplinary Dismissal of Customs Officers at the Kobe Costoms House], Supreme Court of Japan, 昭和 47(行ツ)52, 20 December 1977, reported in (S52) 31(7) Supreme Court Reports (civil cases) 1101; *マクリーン事件* [Case of Mr. McLean], Supreme Court of Japan, 昭和 50(行ツ)120, 4 October 1978, reported in (S53) 32(7) Supreme Court Reports (civil cases) 1223; Shiono above n 1, 117; Shiono, above n 19, 143; Fujita, above n 13, 119–20.

85 斎藤誠 [Makoto Saito] et al, '日独における行政裁量論の行方：日独行政法シンポジウム『行政裁量とその裁判的統制』討論第二部 [Direction of Arguments on the Judicial Control of Administrative Discretion in Japan and Germany: Panel Discussion Part 2 at the Japan-German Administrative Law Symposium on 'Administrative Discretion and its Judicial Control']' (2006) (1935) *Law Cases Reports (JPN)* 10, 11–12; 中川丈久 [Takehisa Nakagawa], '米国法にからめた感想 [Impression of the Japan-German Administrative Law Symposium on 'Administrative Discretion and its Judicial Control' from the Viewpoint of Legal System of United States of America]' (2006) (1935) *Law Cases Reports (JPN)* 19, 19; 深澤龍一郎 [Ryuichiro Fukasawa], '行政裁量に関する法状況の日英独比較：特にわが国の法状況の問題点について [Comparision of Legal Situation of Administrative Discretion between Japan, Germany and United Kingdom: Especially about the Problems of Japan]' (2006) (1935) *Law Cases Reports (JPN)* 20, 20. Regarding the '*Wednesbury unreasonableness*', see *Associated Provincial*

The court's justification for such loose control of administrative discretion is three-fold. Firstly, the statutes bestow discretion on the administrative office regarding the exercise of administrative acts. Secondly, the judiciary's power is limited to resolving the legal aspects of disputes by the principle of separation of powers. Thirdly, decisions on policy, expertise and technology are beyond the capacity of judges.[86] The presumption behind these reasons is the absolute reliance on the administrative branch. This is the legacy of mid-nineteenth century German jurisprudence, which excluded the intervention of the Judicial Court in the public law sphere. After World War II, at which time Germany discarded this concept, Japan maintained it as the basis of the reconstruction of the social system. Based on this idea, another presumption developed regarding 'respect for the first instance decision of an administrative office', which assumes that, compared with the court, administrative offices have equivalent or better ability in fact finding and interpretation of the law. Consequently, even under the Democratic regime, the judiciary was unwilling to reverse administrative decisions.[87]

Academics have criticised this negativism on the part of the judiciary. For instance, Zhōu has argued that this negativism is based on an incorrect definition of 'the executive', which expands its range from the Cabinet to the whole administrative branch, and so irrationally marginalises the function of the judiciary.[88] It is notable that, as discussed in Subsection 3.1.4, the same logic was applied for limiting the legislative branch's control over the administrative branch. Fujita, a Supreme Court Judge between 2002 and 2010, questions this negativism from the viewpoint that the role of the judiciary is different from the administrative branch in terms of having the authority and responsibility to

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Picture Houses v Wednesbury Corporation [1948] 1 KB 223 (Lord Greene M.R.)

86 川神裕 [Yutaka Kawakami], '裁量処分と司法審査（判例を中心として）：日独行政法シンポジウム報告２ [Administrative Discretion and Judicial Review (Cnetring Precedents): Japan-German Administrative Law Symposium Report Part2]' (2006) (1932) *Law Cases Reports (JPN)* 11, 11.

87 Fujita, above n 13, 385–7, 434–5.

88 周作彩 [Zhōu Zuōcǎi], '法の支配と行政訴訟制度改革 [Rule of Law and Reform of the Administrative Litigation Mechanism]' in 三辺夏雄 [Natsuo Sanbe] et al (eds), *法治国家と行政訴訟: 原田尚彦先生古稀記念 [Constitutional States and Administrative Litigation: Essays in 70th Anniversary of Naohiko Harada]* (有斐閣 [Yuhikaku], 2004) 84, 88, 92–3, 106–7.

provide redress based on the PAS.[89] In addition, some former high level bureaucrats have expressed suspicions concerning the ability of administrative offices, which calls into question respect for their first instance decisions.[90]

Further, in Japan, the court's acknowledgement of the illegality of an administrative act does not always result in a remedy; this also impedes the full protection of citizens. When an illegality is minor or cured by the successive administrative activities or by regarding it as another relevant administrative act, regardless of lacking any statutory or theoretical basis, the court tends to retain the effectiveness of the administrative act that was reviewed.[91] Further, even when the illegality of an administrative act is obvious, the court may refuse to revoke the administrative action based on the recognition that the revocation would harm public welfare (a non-execution judgment).[92] Although having a statutory basis, the non-execution judgment is an exception to the PAS.[93]

Can Japanese review mechanisms fully protect citizens?

Based on the findings above, whether the German logic can be applied to the Japanese context to deny the necessity of the introduction of an Ombudsman is now discussed. The prerequisite for application of such logic is that the Japanese review mechanisms can fully protect citizens.

As has been shown, although the Japanese review mechanisms shares many basic

89 Fujita above n 13, 435.
90 Satake, above n 12, 269–98; Koga, above n 11, 274–9.
91 Fujita above n 13, 235–6; Harada, above n 13, 186–7; Shiono, above n 1, 145–6; *旭丘中学校教諭懲戒免職事件* [Case on the Disciplinary Dismissal from Teacher at the Asahigaoka Junior High School], Supreme Court of Japan, 昭和 44(行ツ)8, 10 December 1974, reported in (S49) 28(10) Supreme Court Reports (civil cases) 1868; *土地所有権確認請求* [Case on the Action for Declaratory Judgment of Acknowledgment of Landownership], Supreme Court of Japan, 昭和 32(オ)252, 22 September 1959, reported in (S34) 13(11) Supreme Court Reports (civil cases) 1426; *土地買収不当処分取消請求* [Case on the Action for Revocation of an Administrative Purchase of Land], Supreme Court of Japan, 昭和 25(オ)236, 19 July 1954, reported in (S29) 8(7) Supreme Court Reports (civil cases) 1387.
92 *行政事件訴訟法* [Code of Administrative Procedure] (Japan) 16 May 1962, Law No 139 of S37, art 31. The typical example of the non-execution judgment is the Nibutani Dam case, in which the court acknowledged the illegality of expropriation of the sacred land of the Ainu Tribe but prioritised the economic value of a dam over the endangered cultural value of the Ainu Tribe. *二風谷ダム裁判* [Nibutani Dam Case], Sapporo District Court (JPN), 平成 5(行ウ)9, 27 March 1997, reported in (H9) 44(10) Monthly Bulletin on Litigation (JPN) 1798.
93 Fujita, above n 13, 236–7; Shiono, above n 19, 180.

features with their German counterparts, they are not identical. Importantly, the underlying philosophy of the Japanese review mechanisms is in keeping with the presumption of the nineteenth century German Jurisprudence: the absolute reliance on the administrative branch. Consequently, the priority of the review mechanisms tends to be on easing the exercise of administration, rather than of protecting human rights or providing remedies. This is exemplified by the lack of avenues to remedies for certain types of administrative activities on the border of public and private law spheres, the principle of the non-execution of stay and the non-execution judgment. Further, in conjunction with the judicial negativism on the control of administrative discretion, the insufficient development of executive accountability is observed. All these factors clearly show that, in contrast to Germany, the existing review mechanisms in Japan cannot fully protect the citizens. Therefore, Japan is unable to apply the same logic applied in the German context to deny the necessity of the introduction of an Ombudsman.

The only remaining argument against the need for an Environmental Ombudsman in Japan is that all public officers and judges working in the environmental field are exceptionally excellent. To ensure whether such a situation is the case, the following sections examine the reality of environmental governance in Japan and the practices of the review mechanisms in resolving administrative environmental disputes.

3.2 Minamata disease to TEPCO Nuclear Disaster

Two of the most globally well known environmental disasters in Japan have been the methylmercury contamination in Minamata (Minamata disease), which made headlines in the late 1960s, and the Tokyo Electric Power Company (TEPCO)'s complex nuclear accidents in Fukushima (TEPCO Nuclear Disaster), which began on 11 March 2011. As explained in Subsection 2.1.1, the late 1960s – early 1970s was the era during which the

international environmental law regime was established. Japan's involvement in the regime's formation can be seen as reflecting the lessons of the Minamata disease incident. From this point, until 2011, Japan enjoyed fame as one of the leading countries in the international environmental law regime. However, the TEPCO Nuclear Disaster revealed to the world that environmental governance in Japan had serious problems. When considering the introduction of the institution of an Environmental Ombudsman, it is vital to recognise the reality of the problems facing administrative environmental decision making in Japan. Therefore, this section examines the causes underlying the Japanese environmental law framework's inability to prevent the TEPCO Nuclear Disaster. To assist in illustrating the depth of the problem, the Minamata disease incident and its lessons are detailed first. Then, the extent to which the government learned from the incident is clarified. Finally, the shortcomings in the government reaction to the TEPCO Nuclear Disaster are explained.

3.2.1 Lessons of Minamata

From the establishment of imperial government in 1868, the Japanese environmental law framework developed, centring on the issue of pollution. The key environmental problem in the nineteenth century was mining pollution, which caused serious damage to the agriculture, forestry and fisheries industries.[94] One famous example was that of the Ashio Mining Company in Tochigi Prefecture, whose polluting was politicised from 1891 at the Imperial Diet, which had been established in 1890.[95] However, this case was not resolved by a regulation on pollutants from mining, and a disproportionally small amount of compensation was offered, in combination with forced resettlement and

[94] 淡路剛久 [Takehisa Awaji], '環境法の生成 [Creation of Environmental Law]' in 阿部泰隆 [Yasutaka Abe] and 淡路剛久 [Takehisa Awaji] (eds), *環境法 [Environmental Law]* (有斐閣 [Yuhikaku], 2nd ed, 1998) 1, 3.

[95] See, eg, Japan, *Imperial Diet Debates*, House of Representatives, 23 December 1891, 22–4 (田中正造 [Shozo Tanaka], Constitutional Reform Party: 陸奥宗光 [Munemitsu Mutsu], Minister of Agriculture and Commerce); Japan, *Imperial Diet Debates*, House of Representatives, 24 December 1891, 4–5 (田中正造 [Shozo Tanaka], Constitutional Reform Party: 小間粛 [Shuku Koma], Liberal Party)

oppression. Although there was a legal instrument on mining, it was aimed at protecting the mining industry, rather than preventing environmental damage.[96] Hence, for the government at that time, the priority of resolving environmental problems was much lower than that of fostering economic development by promoting heavy industrialisation. Not until 1939 was the provision on liability without fault regarding the damages caused by the mining business added to the *Mining Law*. However, despite the quite progressive nature of this provision, it was not actually applied by the courts until 1967.[97]

As the issue of mining pollution demonstrates, it was only in the late 1960s when the Japanese environmental law framework really started to develop. The main drivers behind this development were environmental pollution problems. The subsection below focuses on the classic case — Minamata disease — and its influence on the development of the environmental law framework in Japan.

Minamata disease

Between World War II and the late 1960s, Minamata disease was the most highly visible effect of environmental pollution in Japan. During this period, Japan's political system transitioned from imperialism to democracy, but economic development took priority over environmental protection. The legendary economic recovery of Japan from the 1950s to the 1960s was possible partly because of ignorance of the external social costs of heavy industrialisation.[98] Behind the rapid economic development were a number of serious environmental problems. Among them, Minamata disease is the most widely known due to its large number of victims, the government's attempted suppression

96 Awaji, above n 94, 3–6.

97 吉田文和 [Fumikazu Yoshida] and 利根川治夫 [Haruo Tonegawa], '鉱害賠償規定の成立過程:鉱業法改正調査委員会議事録および第74回帝国議会議事録の検討を中心に [Legislation process of the provision of compensation for damages caused by mining: focusing on the examination of the minutes of Mining Law Reform Preparation Committee and hansards of the 74th Imperial Diet]' (1978) 28(3) *Economic Studies (Hokkaido University)* 73, 74; *鉱業法* [Mining Law] (Japan) 8 March 1905, Law No 45 of M38, as amended by *鉱業法中改正法律* [Mining (Amendment) Law] (Japan) 24 March 1939, Law No 23 of S14.

98 See, eg, 宮本憲一 [Kenichi Miyamoto], *環境政策の国際化 [Internationalisation of Environmental Policy]* (実教出版 [Jikkyo Shuppan], 1995), 192–3.

of information about the pollution and its effects, and the complicated and discriminatory remedial scheme for victims.

Minamata disease is caused by methylmercury contamination. It is named after Minamata City in Kumamoto Prefecture, where discharged waste-water from the Chisso Corporation's chemical factory caused environmental pollution that resulted in the mass poisoning of the city's residents. Methylmercury is extremely dangerous for humans when consumed. It irreversibly destroys neurons and transfers from mother to foetus by penetrating the placenta. The extent of the damage to neurons caused by the methylmercury varies on an individual basis, from sudden death to chronic disorders. Minamata City is located on the coast, so the methylmercury was concentrated through the natural food chain in the sea. Thus, it was the local fishers and their families who ate fish from the sea who incurred the most damage.[99] Between 1951 and 1968, a vast amount of methylmercury was discharged, and 115 deaths were recorded between 1956 and 1975 as a direct result. By 2009, the government had acknowledged 2269 victims, 1674 of whom had died.[100]

One of the main reasons that such a large number of people fell victim to the pollution was that the government did not take any action to prevent expansion of the damage. In May 1956, when the first death was reported, the causal relationship between pollutant and human health was unknown. Hence, an infectious disease was suspected as a cause. In November 1956, an investigation team from Kumamoto University Medical School

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99 原田正純 [Masazumi Harada], '水俣病の歴史 [History of Minamata Disease]' in 原田正純 [Masazumi Harada] (ed), *水俣学講義 [Lectures from Minamata Studies]* (日本評論社 [Nippon Hyoron Sha], 2004) 23, 26–7, 32–9, 46–8;Yukiko Kada et al, 'From Kogai to Kankyo Mondai: Nature, Development, and Social Conflict in Japan' in Joanne Bauer (ed), *Forging Environmentalism: Justice, Livelihood, and Contested Environments* (An East Gate Book, 2006) 108, 112.

100 環境庁 [Agency of the Environment (JPN)], *昭和50年度版 環境白書 [Environmental White Paper in 1975]* (大蔵省印刷局 [Publishing Bureau at the Ministry of Finance (JPN)], 1975), pt 2=ch 5=s 1=sub-s 4; Ministry of the Environment (JPN), *平成18年度 環境白書 [Environmental White Paper in 2006]* (Ministry of the Environment (JPN), 2006), pt 1=ch 2=s 3=sub-s 1; Ministry of the Environment (JPN), *水俣病問題に係る懇談会 (第2回) 参考資料1：水俣病問題関係略年表等 [Chronological Table and Basic Facts about the Minamata Disease Case: as a reference No.1 for the 2nd Discussion Meeting on Minamata Disease Case on 14th June 2005]* (2005) <http://www.env.go.jp/council/26minamata/y260-02/ref01.pdf>.

revealed that the disease was caused by the consumption of fish caught in Minamata Bay. However in September 1957, the Ministry of Health refused to apply article 4(2) of the *Food Hygiene Law*, which would have required the Ministry to issue a stop order for the operation of the fishery and the sale of fish. In July 1959, the Kumamoto University team published its report, claiming methylmercury as the source of the disease. In October 1959, the Chisso Corporation, as a result of animal testing, determined that its waste-water was at fault. However, this fact was not disclosed.[101] In November 1959, the Investigation Committee on Food Hygiene at the Ministry of Health approved the results of the Kumamoto University team. However, the Cabinet refused to approve it due to strong opposition from the then Minister of International Trade and Industry, Hayato Ikeda (later Prime Minister from July 1960 – November 1964).[102] At the same time, the Ministry of International Trade and Industries refused the request from the Director General of the Fisheries Agency to regulate the discharge of waste-water from the factory based on the *Water Quality Conservation Law* and the *Plant Effluent Control Law*.[103] Instead, in 1959 and 1960, the government and the association of chemical industries manipulated the information by mobilising the country's highest ranked academics. By alleging that methylmercury was not the cause of the disease, these academics successfully confused the public.[104] Although the Kumamoto University team demonstrated the causal relationship between damage to health and the methylmercury in the waste water from the factory in 1962, and this was officially publicised in February

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101 Minamata City (JPN), *水俣病：その歴史と教訓 [Minamata Disease: History and Lessons]* (Minamata City (JPN), 2007), 6, 56–8; *食品衛生法* [Food Hygiene Law] (Japan) 24 December 1947, Law No 233 of S22.

102 宮澤信雄 [Nobuo Miyazawa], '水俣病患者の闘い [Fights of Victims of Minamata Disease]' in 原田正純 [Masazumi Harada] (ed), *水俣学講義 [Lectures from Minamata Studies]* (日本評論社 [Nippon Hyoron Sha], 2004) 181, 201.

103 千場茂勝 [Shigekatsu Senba], *沈黙の海：水俣病弁護団長のたたかい [Silent Sea: A Fight of Leader of Counsel Team of Minamata Disease Litigation]* (中央公論新社 [Chuo Koron Shinsha], 2003), 209–10; *公共用水域の水質の保全に関する法律* [Water Quality Conservation Law] (Japan) 25 December 1958, Law No 181 of S33; *工場排水等の規制に関する法律* [Plant Effluent Control Law] (Japan) 25 December 1958, Law No 182 of S33.

104 宇井純 [Jun Ui], *公害原論 I [Philosophy of Environmental Pollution; Volume 1]* (亜紀書房 [Aki Shobo], 1971), 98–106; Minamata City, above n 101, 6, 58–9.

1963, the government did not take any action.[105] It was not until September 1968 that the government officially admitted the causal relationship. Finally, in July 1969, the government started to regulate the discharge of waste-water from the factory. However, the Chisso Corporation had already stopped the discharge of methylmercury in May 1968 because it had shifted its main business to another project.[106]

It is obvious that this series of government inactions delayed the termination of the contamination, allowed the methylmercury contamination to spread, and increased the number of victims.[107] As at 2009, in addition to the officially acknowledged number of victims mentioned above, approximately 14 400 more claimed to be victims. Further, it has been estimated that approximately 200 000 residents around Yatsushiro Sea, of which Minamata Bay is a part, were potential victims.[108]

Minamata litigation

The environmental lawsuits over liability and compensation for Minamata disease are termed the Minamata litigation. This series of lawsuits played a pioneering role in the development of public interest environmental litigation in Japan.

While the Chisso Corporation had always been concerned about its civil liability as a polluter, the corporation tried to avoid taking responsibility from the earliest stage. In December 1959, while concealing that the cause of the damage was the waste-water from its factory, the corporation concluded a private mediation contract with victims of Minamata disease, which provided them with a small amount of money. This contract included a provision that prohibited victims from asking for further compensation, even if

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105 高峰武 [Takeshi Takamine], '水俣病とマスコミ [Minamata Disease and Mass Media]' in 原田正純 [Masazumi Harada] (ed), *水俣学講義 [Lectures from Minamata Studies]* (日本評論社 [Nippon Hyoron Sha], 2004) 123, 137–9; Minamata City, above n 101, 7, 59–60.

106 Takamine, above n 105, 141; Senba, above n 103, 210–11; Minamata City, above n 101, 7, 60.

107 淡路剛久 [Takehisa Awaji], '水俣病最高裁判決と地球温暖化対策 [Chisso Minamata Disease Case Supreme Court Judgment and Prevention of Global Warming]' (2004) (1279) *Jurist (JPN)* 2, 3–4; Miyazawa, above n 102, 203–4.

108 川本輝夫 [Teruo Kawamoto], *水俣病誌 [Documentary of Minamata Disease]* (世織書房 [Seori Shobo], 2006), 318–9; Ministry of the Environment, above n 100 (Chronological Table).

the causal relationship between the waste-water and Minamata disease was proved in the future. Due to this contract, the victims were forced into silence until the official admission of the causal relationship in 1968.[109] After that admission, the victims resumed their pursuit of compensation. The government and the corporation tried to resolve this by setting an arbitration mechanism at the Ministry of Health. Of the victims who were officially acknowledged at that time, two thirds accepted this solution due to strong peer pressure from the rural community. The remaining one third commenced a lawsuit in June 1969 due to distrust of the government and the corporation.[110] In March 1973, the court declared that the contract was invalid because it was against equity, and admitted the corporation's liability to compensate.[111]

The results of the first lawsuit encouraged other victims to bring their cases before the court. Since then, a number of lawsuits on the damage caused by Minamata disease have been commenced.[112] In this context, in May 1976 the public prosecutor raised a criminal lawsuit against the Chisso Corporation. In February 1988, the Supreme Court confirmed the criminal liability of the corporation.[113] Among the series of lawsuits, the lengthiest disputes were those over administrative responsibility. Finally, in June 2004 the Supreme Court judged that the government was responsible for not exercising its powers in 1959 to prevent the expansion of the methylmercury contamination and its damage. Here, the administrative discretion of the government was evaluated as 'reduced to zero'; there had

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109 *見舞金契約* [Private contract between the Chisso Corporation and Victims of Minamata Disease regarding Compensation], quoted in Kawamoto, above n 108, 596–8; Ui, above n 104, 111–23; Miyazawa, above n 102, 194–5; Takamine, above n 105, 134–5.

110 富樫貞夫 [Sadao Togashi], '法創造に挑む水俣病裁判 [Challenge of the First Minamata Disease Lawsuit for Creation of Law]' in 原田正純 [Masazumi Harada] (ed), *水俣学講義 [Lectures from Minamata Studies]* (日本評論社 [Nippon Hyoron Sha], 2004) 163, 164–7; Kawamoto, above n 108, 47–9; Miyazawa, above n 102, 195; Takamine, above n 105, 141–2.

111 *水俣病一次訴訟* [Chisso Minamata Disease Civil Case: Phase One], Kumamoto District Court (JPN), 昭和 44(ワ)522・昭和 45(ワ)814・昭和 46(ワ)322etc・昭和 47(ワ)427, 20 March 1973, reported in (S48) 696 Law Cases Reports (JPN) 15. About 'equity', see Subsection 2.3.3

112 Takamine, above n 105, 129–30; Kawamoto, above n 108, 713–34; Minamata City, above n 101, 24–5, 62–101.

113 *水俣病刑事事件* [Chisso Minamata Disease Criminal Case], Supreme Court of Japan, 昭和 57(あ)1555, 29 February 1988, reported in (S63) 42(2) Supreme Court Reports (criminal cases) 314; Minamata City, above n 101, 62.

been no choice but to take action for prevention.[114] However, it was too late to sanction the individuals who had made the wrong decisions 45 years previously.

Lessons of Minamata disease

Various lessons can be drawn from the Minamata disease case. First, the case illustrates the necessity of environmental principles and the importance of their application. In particular, the Minamata case clarifies the significance of the polluter pays principle through the acknowledgment of civil liability of the Chisso Corporation. At the same time, this case shows how the non-application of the precautionary principle can expand environmental damage and make victim remediation more difficult. Secondly, there was the problem of a gap, or lacuna, of justice exemplified by the significant delay in criminal prosecution. Thirdly, there was the necessity to reduce maladministration. The most expensive lesson of the Minamata case is that wrong administrative decisions, which ignore the application of existing law, result in a dramatic expansion of damages, victims and remedial costs. Therefore, the necessity of building an effective system to reduce maladministration was, and is, crucial.

Another important lesson of the Minamata case was that it revealed the typical barriers to realising better environmental decision making in Japan. In 1971, Ui summarised the four fundamental underlying causes of most environmental pollution observed in the 1960s: the promotion of economic development by ignoring social and environmental costs; collusion between the government and industries; contempt for human rights and their protection; and too much subdivision of science and the lack of comprehensive technology to prevent environmental pollution. In addition, he identified three barriers to realising environmental justice. The first was that the government

[114] *チッソ水俣病関西訴訟* [Chisso Minamata Disease Kansai Case], Supreme Court of Japan, 平成 13(オ)1194, 15 October 2004, reported in (H16) 58(7) Supreme Court Reports (civil cases) 1802; Miyazawa, above n 102, 205–6; Takamine, above n 105,129–30. About 'reduction to zero', see Subsection 2.3.2.

manipulated information about causal relationships and actual damage. Here, the 'spin doctors' who were the highest ranked academics ('Goyo-Gakusha' in Japanese) were mobilised. The second barrier was that any governmental intervention under the name of 'outsider' was unreliable because such intervention always served the interests of the polluters. The third barrier was that the compensation of damage was based not on scientific evidence but on the geometric mean of victims' claim and polluters' claim. This was a political approach that was never fair for victims.[115]

3.2.2 Development of the environmental law framework

As detailed in Subsection 3.2.1, the period during which Minamata disease became a social problem overlapped with the development of basic environmental principles and the international environmental law framework. In reference to these developments, Japan started to build its domestic environmental law framework, which was also a response to the first two lessons of Minamata disease. This subsection details the development of the Japanese environmental law framework and examines the on-going problems.

Development between 1967 and 1978

The environmental pollution apparent in the 1960s invoked a political movement that sought the creation of a comprehensive legal framework to cope with environmental problems. The first step was the creation of the *Basic Pollution Law* as an umbrella law in 1967. However, this did not mean that the priority of economic development was replaced by that of resolution of environmental problems. The scope of this law was limited to the pollution domain, and the objective provision of the law prioritised economic development over the protection of the living environment (economic harmonisation clause). Although this clause was repealed in 1970 owing to strong public

[115] Ui, above n 104, 25–45, 53–6, 98–111.

opposition, this notion has long prevented further development of environmental administration.[116]

Between 1968 and 1978, under the *Basic Pollution Law* regime, the Japanese environmental law framework was rapidly formed. Firstly, a number of regulatory laws were created in the pollution domain; for example, the *Air Pollution Prevention Law* and the *Water Contamination Prevention Law*.[117] The only law created in the other domains in this era was the *Natural Environment Conservation Law* in the conservation domain.[118] Secondly, a series of laws were enacted to determine the manner of dispute settlement (the *Law on Environmental Pollution Dispute Resolution* and the *Law for Establishment of Environmental Dispute Coordination Commission*), the manner of response to environmental crimes (the *Law for Punishment of Environmental Pollution Crimes relating to Human Health*), and the manner of compensating victims of pollution (the *Law for Compensation of the Health Damage caused by Environmental Pollution* and the *Law on Entrepreneur's Bearing of the Cost of Public Pollution Control Works*).[119] Thirdly, the Environment Agency was established to promote environmental policy.[120]

Adoption of international environmental law

At the Stockholm Conference in 1972, Japan announced to the international community that it would participate in the development of the international

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116 *公害対策基本法* [Basic Pollution Law] (Japan) 3 August 1967, Law No 132 of S42, arts 1(2), 9(2) as repealed by *公害対策基本法の一部を改正する法律* [Basic Pollution (Partially Amendment) Law] (Japan) 25 December 1970, Law No 132 of S45; Awaji, above n 94, 11–12; Agency of the Environment (JPN), above n 100, pt 1=ch 1=s 1=sub-s 2; 山村恒年 [Tsunetoshi Yamamura], *検証しながら学ぶ環境法入門: その可能性と課題 [Introduction to Environmental Law and its Examination: Its Possibilities and Problems]* (昭和堂 [Showado], 2nd ed, 1999), 11.

117 *大気汚染防止法* [Air Pollution Prevention Law] (Japan) 10 June 1968, Law No 97 of S43; *水質汚濁防止法* [Water Contamination Prevention Law] (Japan) 25 December 1970, Law No 138 of S45.

118 *自然環境保全法* [Natural Environment Conservation Law] (Japan) 22 June 1972, Law No 85 of S47

119 *公害紛争処理法* [Law on Environmental Pollution Dispute Resolution] (Japan) 1 June 1970, Law No 108 of S45; *公害等調整委員会設置法* [Law for Establishment of the Environmental Dispute Coordination Commission] (Japan) 3 June 1972, Law No 52 of S47; *人の健康に係る公害犯罪の処罰に関する法律* [Law on the Punishment of Environmental Pollution Crimes relating to Human Health] (Japan) 25 December 1970, Law No 142 of S45; *公害健康被害の補償等に関する法律* [Law on Compensation of the Health Damage caused by Environmental Pollution] (Japan) 5 October 1973, Law No 111 of S48; *公害防止事業費事業者負担法* [Law on Entrepreneur's Bearing of the Cost of Public Pollution Control Works] (Japan) 25 December 1970, Law No 133 of S45.

120 *環境庁設置法* [Law for Establishment of the Environment Agency] (Japan) 31 May 1971, Law No 88 of S46.

environmental law framework. The governmental delegation even criticised itself for its lack of environmental consideration under the previous 'economic development first' policy, and emphasised the importance of introducing the concept of liability without fault regarding environmental damage, to implement the polluter pays principle.[121] Between 1980 and 1990, Japan ratified the major multilateral environmental agreements.[122] In this context, the *Ozone Layer Protection Law* was created in the global domain.[123]

Development after 1978

The development of the Japanese environmental law framework was not always smooth. The two oil shocks in the mid-1970s turned the government back to the traditional 'economic development first' policy. In 1978, the government loosened the environmental standard on nitrogen dioxide emissions. This was the beginning of a regression in environmental policy that lasted until the end of the Cold War. In 1983, despite efforts to introduce an Environmental Impact Assessment Bill since 1972, the Bill was abandoned due to strong opposition from industry. Further, in 1988, the government ceased acknowledging new victims of air pollution, even though air pollution continued to be a significant problem.[124]

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121 環境庁 [Agency of the Environment (JPN)], *昭和48年度版 環境白書 [Environmental White Paper in 1973]* (大蔵省印刷局 [Publishing Bureau at the Ministry of Finance (JPN)], 1973), pt 2=ch 1=s 2=sub-s 1, app1.

122 *Convention on Wetlands of International Importance especially as Waterfowl Habitat*, opened for signature 2 February 1973, 996 UNTS 245 (entered into force 21 December 1975) ('*Ramsar Convention on Wetlands*'); *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, opened for signature 3 March 1973, 993 UNTS 243 (entered into force 1 July 1975) ('*CITES*'); *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*, opened for signature 4 June 1974, 1546 UNTS 119 (entered into force 6 May1978) ('*London Convention*') were ratified in 1980. *International Convention for the Prevention of Pollution from Ships, 1973 as modified by the Protocol of 1978*, opened for signature 2 November 1973, 1340 UNTS 184 (entered into force 2 October 1983) ('*Marpol 73/78*') was ratified in 1983. *Vienna Convention for the Protection of the Ozone Layer*, opened for signature 22 March 1985, 1513 UNTS 323 (entered into force 22 September 1988) was ratified in 1985. *Montreal Protocol on Substances that Deplete the Ozone Layer*, opened for signature 16 September 1987, 26 ILM 1550 (entered into force 1 January 1989) ('*Montreal Protocol*') was ratified in 1987.

123 *特定物質の規制等によるオゾン層の保護に関する法律* [Ozone Layer Protection Law] (Japan) 20 May 1988, Law No 53 of S63.

124 Awaji, above n 94, 19–20; Yamamura, above n 116, 9–10; 富井利安 [Toshiyasu Tomii[, 伊藤護也 [Moriya Ito] and 片岡直樹 [Naoki Kataoka], *環境法の新たな展開 [New Development of Environmental Law]* (法律文化社 [Houritsu Bunka Sha], 1994), 69–70, 93, 103–4.

It was not until the Rio Conference in 1992 that further development of the environmental law framework in Japan occurred. In 1993, the *Basic Environment Law* replaced the *Basic Pollution Law*. This new umbrella law revised the scope of environmental policy, which was over-concentrated in the pollution domain, and expanded it to the hazardous, global and conservation domains. However, nuclear safety was removed from the scope of this law, with the hazardous domain's focus being on recycling.[125] In this context, laws with a sectoral approach in these new domains were enriched.[126] In 1997, after 25 years of trials, the *Environmental Impact Assessment Law* was finally legislated, despite resistance from industry.[127] Although late, this was an important step in establishing sound environmental decision-making processes. In the same year, the *Kyoto Protocol to the United Nations Framework Convention on Climate* was adopted under the chairmanship of Japan.[128] This displayed the continuing contribution of Japan to the development of the international environmental law framework. In 2001, the Environmental Agency was raised to the Ministry of the Environment, and came to have larger responsibilities in the field.[129]

Remaining problems

Behind the development of the environmental law framework, there still remained problems. One of these was that the application of the precautionary principle tended to be neglected because the government prioritised short-term economic gain over long-term health damage and cost. For instance, the risk of asbestos was globally well known by the 1980s, but the government did not enact sufficient regulation due to the

125 *環境基本法* [Basic Environment Law] (Japan) 19 November 1993, Law No 91 of H5, arts 2, 13.
126 See, eg, *循環型社会形成推進基本法* [Basic Law on Waste Management and Recycling] (Japan) 2 June 2000, Law No 110 of H12; *生物多様性基本法* [Basic Law on Biological Diversity] (Japan) 6 June 2008, Law No 58 of H20.
127 *環境影響評価法* [Environment Impact Assessment Law] (Japan) 13 June 1997, Law No 81 of H9.
128 *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 11 December 1997, 37 ILM 22 (entered into force 16 February 2005) ('*Kyoto Protocol*').
129 *環境省設置法* [Law for Establishment of the Ministry of the Environment] (Japan) 16 July 1999, Law No 101 of H11.

regressive mood.[130] As a result, this stock-type of pollution became an increasing social problem with 953 fatalities reported for 2004 alone.[131]

Another typical problem was that the environmental decision-making procedure was far from transparent. For example, in addition to the delay of legislation, the contents of the *Environmental Impact Assessment Law* had a number of problems, including the late stage of assessment, no impartiality of the assessment body and the lack of consideration of alternatives.[132] As a result, a number of incidents of irreversible environmental destruction were allowed to occur. In the 1990s, this became a serious social problem because people began to view such environmental degradation as a waste of the national budget and resources. This reflected the end of the economic bubble.[133] One representative example was the destruction in 1997 of the largest wetland in Japan by the National Isahaya Bay Reclamation Project (see Chapter 4 for details).

Around this time, the focus of the environmental concerns of the public shifted from the pollution domain to the conservation domain. Consequently, attention was directed at the quality of administrative environmental decision making.

Further, the shift of the *Basic Pollution Law* to the *Basic Environmental Law* was not fully reflected in the entire environmental law framework. For example, the scope of the law for dispute resolution, handling environmental criminals and awarding damages did not widen outside the pollution domain.[134]

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130 宮本憲一 [Kenichi Miyamoto], 'ストック公害・環境問題と責任 [Environmental Pollution Caused by Stocked Toxins and Liabilities]' (Speech delivered at the 10th Anniversary Symposium of the Environmental Economy and Policy Society (JPN), Tokyo, 10 October 2005): 粟野仁雄 [Masao Awano], *アスベスト禍 [Asbestos Disaster]* (集英社 [Shuei Sha], 2006), 140–5; 大久保規子 [Noriko Okubo] et al, '座談会; 責任と費用負担をめぐる今日的課題: 水俣病事件やアスベスト問題の現実をふまえて[Round-table Discussion; Contemporary Challenges Regarding Accountability Cost Payment, in Light of Minamata Disease and Asbestos]' (2007) 36(3) *Research on Environmental Disruption* 37, 42.

131 Ministry of Health Labour and Welfare (JPN), *都道府県（20 大都市再掲）別にみた中皮腫による死亡数の年次推移(平成7年～22年) [Statistics on the Dead by Mesothelioma in 47 Prefectures and 20 Large Cities between 1995 and 2010]* (5 August 2011) <http://www.mhlw.go.jp/toukei/saikin/hw/jinkou/tokusyu/chuuhisyu10/dl/110815-1.pdf>.

132 Yamamura, above n 116, 189–93; 宮田三郎 [Saburou Miyata], *環境行政法 [Environmental Administrative Law]* (信山社 [Shinzan Sha], 2001), 49–50.

133 五十嵐敬喜 [Takayoshi Igarashi] and 小川明雄 [Akio Ogawa], *図解 公共事業のしくみ [Illustration, Mechanism of Public Construction Works]* (東洋経済新報社 [Toyo Keizai Shinpo Sha], 1999), 112–4.

134 *公害紛争処理法* [Law on Environmental Pollution Dispute Resolution] (Japan) 1 June 1970, Law No

3.2.3 TEPCO Nuclear Disaster and lessons not learnt from the Minamata case

The TEPCO Nuclear Disaster has been the largest environmental disaster of the twenty-first century. The massive earthquake and subsequent tsunami that triggered the nuclear disaster were natural disasters. However, these do not excuse either the insufficient preparation for a severe nuclear power plant accident, or the increased number of people who were exposed to radioactive contamination. This heightened exposure was the result of poor governance in nuclear policy on the part of the Japanese government. No effective crisis management scheme, such as a chain of command, had been prepared. Hence, in the confusion, unsound decisions were made.[135] The abysmal outcomes are inexcusable in light of the history of the spread of environmental contamination in the Minamata disease case. Therefore, the reoccurrence of these failures should be examined to prevent further similar tragedies.

The causes of the severe nuclear accident and the manner in which it should have been dealt with were investigated by official committees both at the Diet and executive levels.[136] Due to the limited duration of the investigations, not all concerns were fully

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108 of S45, art 2; *公害等調整委員会設置法* [Law for Establishment of the Environmental Dispute Coordination Commission] (Japan) 3 June 1972, Law No 52 of S47, arts 3, 4(1); *人の健康に係る公害犯罪の処罰に関する法律* [Law on the Punishment of Environmental Pollution Crimes relating to Human Health] (Japan) 25 December 1970, Law No 142 of S45, art 1; *公害健康被害の補償等に関する法律* [Law on Compensation of the Health Damage caused by Environmental Pollution] (Japan) 5 October 1973, Law No 111 of S48, art 1; *公害防止事業費事業者負担法* [Law on Entrepreneur's Bearing of the Cost of Public Pollution Control Works] (Japan) 25 December 1970, Law No 133 of S45, art 2; *環境基本法* [Basic Environment Law] (Japan) 19 November 1993, Law No 91 of H5, art 2(3); 六車明 [Akira Rokusha], '環境基本法の下における裁判外紛争処理解決手続の在り方: 環境破壊の事前防止の観点からの検証 [Alternative Dispute Resolutions under the Basic Environmental Law: Examination from the Viewpoint of Prevention of Environmental Destruction]' (2000) 52 *Lawyers Association Journal (JPN)* 3423, 3439–40, 3448–9.

135 東京電力福島原子力発電所における事故調査・検証委員会 [Investigation Committee on the Accident at the Fukushima Nuclear Power Stations of Tokyo Electric Power Company at the Cabinet Office (JPN)], '中間報告 [Interim Report]' (26 December 2011) <http://icanps.go.jp/post-1.html>, 8–9, 12–14; Yoichi Funabashi and Kay Kitazawa, 'Fukushima in review: A complex disaster, a disastrous response' (2012) 68(2) *Bulletin of the Atomic Scientists* 9, 11–19; Daniel Kaufmann and Veronika Penciakova, *Japan's triple disaster: Governance and the earthquake, tsunami and nuclear crises* (16 March 2011) Brookings Institution <http://www.brookings.edu/opinions/2011/0316_japan_disaster_kaufmann.aspx>.

136 *東京電力福島原子力発電所事故調査委員会法* [Law on the Tokyo Electric Power Company's Fukushima Nuclear Power Plant Accident Independent Investigation Commission at the National Diet] (Japan) 7 October 2011, Law No 112 of H23; *東京電力福島原子力発電所における事故調査・検証委員会の開催について* [About the Establishment of the Investigation Committee on the Accident at the Fukushima Nuclear Power Stations of Tokyo Electric Power Company at the Cabinet Office] (Japan) 24 May 2011, Cabinet Decision.

examined by these committees.[137] However, it is already clear that some measures taken by the government caused on extension of the damage from the nuclear disaster. In this subsection, the problematic decisions made by the government are introduced. Then, the lessons not learnt from the Minamata case are detailed. Finally, the improvements necessary to build a sound administrative environmental decision-making regime in Japan are discussed.

TEPCO Nuclear Disaster

The TEPCO Nuclear Disaster is one of the worst nuclear disasters in history. The fact that only this disaster and the Chernobyl Nuclear Disaster in 1986 have been classified as level seven by the International Nuclear and Radiological Event Scale[138] reveals how serious the radioactive contamination is. Since 1986, the international community has learnt lessons about how to prepare and cope with nuclear disasters from the experience of Chernobyl. Regardless of this, with the TEPCO Nuclear Disaster, these lessons seemed not to have been effectively utilised. Consequently, citizens were unnecessarily exposed to dangerous levels of radiation in three ways.

Firstly, the Japanese government hid crucial information about the travel direction of the radioactive plume from the broken reactors, which was vital for local residents to avoid unnecessary exposure to dangerous levels of radiation. The data itself were forecast by the System for Prediction of Environmental Emergency Dose Information (SPEEDI). The government had been obliged to disclose the findings immediately after any exposure of ionising radiation into the environment to warn local residents needing to

[137] 国会 東京電力福島原子力発電所事故調査委員会 [National Diet of Japan Fukushima Nuclear Accident Independent Investigation Commission (NAIIC) (JPN)], '報告書 [The Official Report of the Fukushima Nuclear Accident Independent Investigation Commission]' (5 July 2012) <http://naiic.tempdomainname.com/pdf/naiic_honpen.pdf>, 8–9; 東京電力福島原子力発電所における事故調査・検証委員会 [Investigation Committee on the Accident at the Fukushima Nuclear Power Stations of Tokyo Electric Power Company at the Cabinet Office (JPN)], '最終報告 [Final Report]' (23 July 2012) <http://icanps.go.jp/post-2.html>, 443.

[138] International Atomic Energy Agency, *Fukushima Nuclear Accident Update Log: Updates of 12 April 2011* (12 April 2011) <http://www.iaea.org/newscenter/news/2011/fukushima120411.html>.

evacuate.[139] However, the government did not announce the SPEEDI forecast on time.[140] Consequently, in the confusion following the natural disasters, thousands of local residents evacuated into the dangerous radioactive plume.[141]

The data were also vital for determining the timing for the application of potassium iodide, which reduces the risk of thyroid cancer. This treatment was the most important lesson of Chernobyl.[142] However, the government did not distribute potassium iodide to all affected citizens, and the lack of information made the proper application of potassium iodide impossible. This may cause a dramatic increase in the rate of thyroid cancer among the exposed population in the future.[143]

Secondly, the government relaxed the environmental standards for radiological protection to cope with the severe radioactive contamination.[144] However, some of these

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139 *原子力災害対策特別措置法* [Law on Special Measures concerning Control of A Nuclear Disaste] (Japan) 17 December 1999, Law No 156 of H11, arts 4, 10; *災害対策基本法* [Basic Law for Disaster Control Measures] (Japan) 15 November 1961, Law No 223 of S36, arts 3, 11, 34, 50–1; Japan, *Diet Debates*, Permanent Committee on Justice at the House of Councillors, 12 May 2011, 6–7 (森まさこ [Masako Mori], Liberal Democratic Party: 江田五月 [Satsuki Eda], Minister of Justice); Investigation Committee on the Accident at the Fukushima Nuclear Power Stations of Tokyo Electric Power Company at the Cabinet Office (JPN), above n 135, 257–9.

140 Investigation Committee on the Accident at the Fukushima Nuclear Power Stations of Tokyo Electric Power Company at the Cabinet Office (JPN), above n 135, 258–61; Funabashi and Kitazawa, above n 135, 13; Investigation Committee on the Accident at the Fukushima Nuclear Power Stations of Tokyo Electric Power Company at the Cabinet Office (JPN), above n 137, 376–8.

141 See, eg, Norimitsu Onishi and Martin Fackler, 'Japan Held Nuclear Data, Leaving Evacuees in Peril', *New York Times* (online), 8 August 2011 <http://www.nytimes.com/2011/08/09/world/asia/09japan.html?pagewanted=all>; NHK 教育テレビジョン [Japan Broardcasting Corporation's Education Television], 'ネットワークでつくる放射能汚染地図５[Create Radioactive Contamination Map by Utilising Network: Volume 5]', *ETV 特集* [ETV Feature], 11 March 2012 (Narrator).

142 International Commission on Radiological Protection, 'Application of the Commission's Recommendations for the Protection of People in Emergency Exposure Situations' (ICRP Publication 109. Ann. ICRP 39 (1), February 2009), annex B.1 (Iodine thyroid blocking).

143 National Diet of Japan Fukushima Nuclear Accident Independent Investigation Commission (NAIIC) (JPN), above n 137, 440–9; Japan, *Diet Debates*, Permanent Committee on Budget at the House of Councillors, 28 September 2011, 24–5 (森まさこ [Masako Mori], Liberal Democratic Party: 斑目春樹 [Haruki Madarame], Chair of Nuclear Safety Commission: 細野豪志 [Goshi Hosono], Minister of Environment: 枝野幸男 [Yukio Edano], Minister of Economy, Trade and Industry); Japan, *Diet Debates*, Special Committee on Rehabilitation from the Disaster of Earthquake and Tsunami at the House of Councillors, 28 October 2011, 16–18 (森まさこ [Masako Mori], Liberal Democratic Party: 朝田英洋 [Hidehiroi Asada], Witness: 細野豪志 [Goshi Hosono], Minister of Environment: 枝野幸男 [Yukio Edano], Minister of Economy, Trade and Industry); Yuka Hayashi, 'Japan Officials Failed to Hand Out Radiation Pills in Quake's Aftermath ', *Wall Street Journal* (online), 29 September 2011 <http://online.wsj.com/article/SB10001424052970204010604576596321581004368.html>; 早川幸子 [Yukiko Hayakawa], *牛肉からも高濃度の放射性セシウム検出 放射能が身体に与える影響を考える：崎山比早子 元放射線医学総合研究所主任研究員・高木学校メンバー インタビュー [Dense Radioacitve Caesium found in Beef, Think about Inflence of Radiation on Human Body: Interview with Hisako Sakiyama MD (former Chief Reseacher of National Institute of Radiological Sciences / Memebr of Takagi School)]* (15 July 2011) Diamond Online <http://diamond.jp/articles/-/13135>.

144 Investigation Committee on the Accident at the Fukushima Nuclear Power Stations of Tokyo Electric Power Company at the Cabinet Office (JPN), above n 135, 289–325.

changes were extreme. The most notable example was the decision made in April 2011 to relax the standard of exposure to radiation in Fukushima Prefecture from one millisievert (mSv) to 20 mSv per year, regardless of difference in age group. The government justified the decision by claiming that they had followed the recommendation of the International Commission on Radiological Protection (ICRP) in its emergency guidelines.[145] As a result of this, a Special Adviser to the Cabinet (a former subcommittee member of the ICRP), denounced the decision and resigned. The main reasons for his resignation were that the decision-making process of the government was unlawful, the loosened standard was unacceptably high for children, and it was against science and humanism.[146] A month later, faced with strong political, social and public pressure against the decision, the government proclaimed their intention to revoke the decision.[147] However, at the time of writing, the government has not changed its position that the geographical area with radioactive levels up to 20 mSv per year is habitable.[148]

Thirdly, the government decided to promote a policy that would diffuse radioactive substances outside the areas affected by the nuclear disaster. The earthquake and tsunami had created huge amounts of disaster debris. The government proposed to incinerate some of this in areas unaffected by the nuclear disaster.[149] The disaster debris included

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145 Nuclear Disaster Emergency Operation Centre (JPN), '福島県内の学校等の校舎・校庭等の利用判断における暫定的考え方 [Tentative Guideline for Utilisation of School Infrastructures in Fukushima Prefecture]' (Media Release, 19 April 2011); Claire Cousins and Christopher Clement, 'Fukushima Nuclear Power Plant Accident' (ICRP ref: 4847-5603-4313, International Commission on Radiological Protection, 21 March 2011) <http://www.icrp.org/docs/Fukushima%20Nuclear%20Power%20Plant%20Accident.pdf>.

146 小佐古敏荘 [Toshiso Kosako], Special Advisor to the Cabinet (JPN), '内閣官房参与の辞任にあたって [Comments on My Resignation from the Special Advisor to the Cabinet]' (Media Release, 23 April 2011).

147 崎山比早子 [Hisako Sakiyama], '放射性セシウム汚染と子どもの被曝 [Radioactive Caesium Contamination and the Exposure of Children to It]' (2011) 81 *Kagaku* 695, 695; Japan, *Diet Debates*, Permanent Committee on Education and Science at the House of Councillors, 31 May 2011, 1 (鈴木寛 [Kan Suzuki], Vice Minister of Education and Science).

148 Japan, *Diet Debates*, Permanent Committee on Environment at the House of Councillors, 22 December 2011, 2–3 (舟山康江 [Yasue Funayama], Democratic Party: 細野豪志 [Goshi Hosono], Minister of Environment); Japan, *Diet Debates*, Special Committee on Rehabilitation from the Disaster of Earthquake and Tsunami at the House of Representatives, 8 March 2012, 2–3 (斎藤やすのり [Yasunori Saito], New Party of Bond: 西本淳哉 [Junya Nishimoto], Director-General for Technology Policy Coordination at the Ministry of Economy, Trade and Industry: 細野豪志 [Goshi Hosono], Minister of Environment).

149 Ministry of the Environment (JPN), *広域処理情報サイト [Information on the Management of the Waste Created by the Earth Quake and Tsunami on 11 March 2011 in Areas did not hit by the Disasters]* (27

radioactive waste, so specific procedures were arranged for its disposal. However, there was no clear disclosure about the incineration outside the areas where debris existed.[150] Although a few local governments, including Tokyo, cooperated with the policy,[151] there has been strong resistance among other local governments and the public, due to the danger of spreading radioactive contamination nationwide. The government's rationale for not following the internationally accepted principle of non-expansion of radiation has been especially criticised.[152] Consequently, at the time of writing, there was no consensus among the public regarding this policy.[153]

Lessons not learnt from the Minamata case

It is clear that, as in the Minamata case, the precautionary principle was not applied in the TEPCO Nuclear Disaster case. The reasons given for non-application of the precautionary principle are problematic. Regarding the delay in announcing the findings from the SPEEDI data, low consciousness about the value of the data, poor information transmission between agencies and the Cabinet, and the fear of public panic, were the reasons given for non-disclosure.[154] Concerning the 20 mSv problem, the government

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March 2012) <http://kouikishori.env.go.jp/>.

150 *放射性物質汚染対処特措法* [Law on Special Measures for Processing Materials that were Contaminated by Radiation from the Tokyo Electric Power Company's Complex Nuclear Accidents in Fukushima] (Japan) 30 August 2011, Law No 110 of H23, arts 11–24.

151 Editorial, '震災がれき 広域処理をもっと拡大したい [Disaster Debris: More Expansion of Areas is Desirable]', *Yomiuri Shimbun* (online), 26 March 2012 <http://www.yomiuri.co.jp/editorial/news/20120325-OYT1T00754.htm>.

152 Tokushima Prefecture (JPN), *ようこそ知事室へ：目安箱に寄せられた提言と回答（瓦礫広域処理への徳島県の見解） [Welcome to the Office of the Governor: Reply to the Opinion Submitted to the Grievance Box (Tokushima Prefecture's View on the Incineration of Disaster Debris in Non-Contaminated Areas)]* (15 March 2012) <http://www.pref.tokushima.jp/governor/opinion/form/652>; 池田こみち [Komichi Ikeda], '東日本被災地の廃棄物資源管理戦略 [Waste Management Strategy for the Affected Areas of East Japan Based on Zero Waste Policy]' (2011) 34(4) *Planning Administration (JPN)* 15, 16–19; 田中康夫 [Yasuo Tanaka], 松本健一 [Kenichi Matsumoto] and 泉田裕彦 [Hirohiko Izumida], '「震災復興」不都合すぎる真実：あえて問う！ なぜガレキを全国にバラまくのか ['Rehabilitation from Disasters' Quite Inconvenient Truth: Dare to Ask, Why Scatter Debris Nationwidely?] ' (2012) 2012.4.5 *Weekly Bunshun* 50, 53–4; International Atomic Energy Agency, 'Preparedness and Response For A Nuclear or Radiological Emergency: Safety Requirements' (Safety Standards Series No. GS-R-2, 2002) <http://www-pub.iaea.org/MTCD/publications/PDF/Pub1133_scr.pdf>, para 2.3(b).

153 Japan, *Diet Debates*, Special Committee on Environment at the House of Representatives, 16 March 2012, 5–7, (江田康幸 [Yasunori Saito], New Clean Government Party: 細野豪志 [Goshi Hosono], Minister of Environment)

154 Investigation Committee on the Accident at the Fukushima Nuclear Power Stations of Tokyo Electric Power Company at the Cabinet Office (JPN), above n 137, 376; Investigation Committee on the Accident at the Fukushima Nuclear Power Stations of Tokyo Electric Power Company at the Cabinet

evaluated socio-economic factors as being more significant than the reduction of potential health damage.[155] However, the relaxed exposure standard was approximately four times higher than the current special standard for prohibiting the entrance of lay people to the area where ionising radiation existed (5.2 mSv per year).[156] Thus, the decision of the government was criticised as illogical, contemptuous for human life and as having the high potential for causing health damage in the future.[157] As for the problem of disaster debris, the decision-making process was quite opaque. For example, the threshold of radiation that allows disaster debris to be processed in non-contaminated areas was determined under delegated legislation. However, the minutes of the meetings that decided the threshold were not disclosed.[158] Further, there was no consideration of alternatives. Some scientists, although not opposing the incineration of debris itself, have

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Office (JPN), above n 135, 260–3; '放射能拡散試算図 5 千枚を公開へ 細野首相補佐官が陳謝 [The Government Goes to Disclose 5000 Simulation Maps of Radiation Expansion: Mr. Hosono (Special Adivisor to the Prime Minister) Apologised]', *Kyodo News* (online), 2 May 2011 <http://www.47news.jp/CN/201105/CN2011050201001040.html>.

155 Japan, *Diet Debates*, Permanent Committee on Health and Labour at the House of Councillors, 10 May 2011, 10 (秋野公造 [Kozo Akino], New Clean Government Party: 中西宏典 [Hironori Nakanishi], Deputy Director-General for Policy Coordination at the Ministry of Economy, Trade and Industry); Japan, *Diet Debates*, Permanent Committee on Budget at the House of Representatives, 9 November 2011, 46 (服部良一 [Ryoichi Hattori], Social Democratic Party: 枝野幸男 [Yukio Edano], Minister of Economy, Trade and Industry).

156 *放射性同位元素等による放射線障害の防止に関する法律施行規則* [Ordinance for Enforcement of the Law on Prevention of Radiolesion from Exposure to Radioactive Isotopes] (Japan) 30 September 1960, Ordinance of Prime Minister's Office No 56 of S35, O 1(1); *電離放射線障害防止規則* [Ordinance for Prevention of Radiolesion from Ionising Radiation] (Japan) 30 September 1972, Ordinance of Ministry of Labour No 41 of S47, O 3.

157 Japan, *Diet Debates*, Permanent Committee on Budget at the House of Councillors, 1 May 2011, 17–8 (森ゆうこ [Yuko Mori], Democratic Party: 高木善明 [Yoshiaki Takagi], Minister of Education: 櫻井充 [Mitsuru Sakurai], Vice Minister of Finance: 斑目春樹 [Haruki Madarame], Chair of Nuclear Safety Commission); Japan, *Diet Debates*, Permanent Committee on Budget at the House of Councillors, 27 May 2011, 9–10 (米長晴信 [Harunobu Yonenaga], Democratic Party: 高木善明[Yoshiaki Takagi], Minister of Education: 矢ヶ崎克馬 [Katsuma Yagasaki], Witness); Japan, *Diet Debates*, Special Committee on Rehabilitation from the Disaster of Earthquake and Tsunami at the House of Councillors, 1 August 2011, 20–3 (古川俊治 [Toshiharu Furukawa], Liberal Democratic Party: 菅直人 [Naoto Kan], Prime Minister: 海江田万里 [Banri Kaieda], Minister of Economy, Trade and Industry: 高木善明 [Yoshiaki Takagi], Minister of Education); National Diet of Japan Fukushima Nuclear Accident Independent Investigation Commission (NAIIC) (JPN), above n 137, 435–6, 463–5; Investigation Committee on the Accident at the Fukushima Nuclear Power Stations of Tokyo Electric Power Company at the Cabinet Office (JPN), above n 137, 386–8.

158 *放射性物質汚染対処特措法* [Law on Special Measures for Processing Materials that were Contaminated by Radiation from the Tokyo Electric Power Company's Complex Nuclear Accidents in Fukushima] (Japan) 30 August 2011, Law No 110 of H23, art 17; *放射性物質汚染対処特措法施行規則* [Ordinance for Enforcement of the Law on Special Measures for Processing Materials that were Contaminated by Radiation from the Tokyo Electric Power Company's Complex Nuclear Accidents in Fukushima] (Japan) 14 December 2011, Ordinance of Ministry of the Environment No 33 of H23, r 14; Ministry of the Environment (JPN), *東日本大震災への対応について [Information on the Measures for Great Earthquake Disaster in Tohoku Region]* (17 March 2012) <http://www.env.go.jp/jishin/index.html#haikihyouka_kentokai>.

questioned why the government did not consider alternatives, such as returning the radioactive ashes to their point of origin.[159]

The reaction to the nuclear disaster also revealed the continued existence of the barriers to better environmental decision making described by Ui in 1971. The electricity and nuclear industries have exceptionally strong influence over economics and policy in Japan.[160] The poor preparations for a severe nuclear accident, as mentioned above, were the direct result of this collusion between government and industry.[161] The actual danger of radiation has been under-evaluated and propaganda emphasising the lack of serious danger has been spread through mass media.[162] Again, highly ranked academics were utilised as spin doctors to prevent the public from discovering the truth.[163] The reason that such spin is effective has been analysed, and it has been found that in Japan, the check

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159 太田裕之 [Hiroyuki Ota], '講演：子供の被曝減らせ 原子力容認、大人に責任－小出・京都大助教 /京都 [Summary of Lecture on 10 March 2012 "Reduce theAmount of Exposure by Children to Radiation; Those who are responsible for the existence of Nuclear Power Plants are Adults" by Dr. Hiroaki Koide, Research Assisstant, Kyoto University / from Kyoto]', *Mainichi Newspaper* (Online), 24 March 2012 <http://mainichi.jp/area/kyoto/news/20120324ddlk26040702000c.html>; 中西準子 [Junko Nakanishi], *雑感 581-「災害がれきの広域処理・処分をどう考えるか？ －廃棄物処分の難しさと歴史を考えれば、もう一つのオプションを考えてもいいのではないか－」 [Impressions 581 How to Think about Incineration of Disaster Debris in Non-Contaminated Areas?: Better to think about another option, when considering the history and difficulties of waste management]* (6 March 2012) 中西準子のホームページ [Junko Nakanishi's Homepage] <http://homepage3.nifty.com/junko-nakanishi/zak581_585.html#zakkan581>.

160 Koga, above n 11, 31–4, 258–60.

161 Investigation Committee on the Accident at the Fukushima Nuclear Power Stations of Tokyo Electric Power Company at the Cabinet Office (JPN), above n 135, 10–16, 416–38; Koga, above n 11, 370–1; ZDF [Second German Television], 'Die Fukushima-Lüge [The Fukushima's Lie]', *ZOOM*, 7 March 2012 (Johannes Hano, Reporter: Yukiteru Naka, Nuclear Engineer working at the TEPCO Fukushima Plants: Kei Sugaoka, former GE Nuclear Engineer: Eisaku Sato, former Governor of Fukushima Prefecture: Naoto Kan, former Prime Minister: Taro Kono, Member of the House of Representatives).

162 Koga, above n 11, 367; 今中哲二 [Tetsuji Imanaka], '“100 ミリシーベルト以下は影響ない”は原子力村の新たな神話か？ [Is "No health hazards at below 100 mSv" a new myth of Genshiryoku-mura (nuclear-power interest community in Japan)?]' (2011) 81 *Kagaku* 1150, 1151–2.

163 See, eg, 島薗進 [Susumu Shimazono], *低線量被ばくリスク WG 主査長瀧重信氏の科学論を批判する [Criticism on Chief Investigator MD Shigenobu Nagataki's View about Science at the Governmentral Working Group on Risks of Low Dose Radiation Exposure]* (3 January 2012) 島薗進・宗教学とその周辺 [Susumu Shimazono's Study of Religions and its Surroundings] <http://shimazono.spinavi.net/?p=263#more-263>; 影浦峡 [Kyo Kageura], *中川恵一氏を擁護する「専門家」の見解をどう捉えるか(3) [Analyse Discourse of MD Keiichi Nakagawa: How to understand 'expert's' view part 3]* (26 February 2012) 研究ブログ [Research Blog] <http://researchmap.jp/jo44fzbjv-111/#_111>. The most notable Goyo-Gakusha in this duration was MD Shunichi Yamashita, who disseminated wrong information about the exposure to radiation that was contradicted from his own past research. Sakiyama, above n 147, 696, 698; Fukushima Prefecture (JPN), *環境放射能が人体に及ぼす影響等について [Information about the Influence of Radiation in the Environment on Human Health: Summary of Press Conference of MD Shunichi Yamashita's Inaguration as Prefecture's Risk Management Advisor for Health and Radiation]* (20 March 2011) <http://www.pref.fukushima.jp/j/Q&A.pdf>; Fukushima City, '特集 専門家に聞く「放射線 Q&A」 [Feature: Ask Experts about 'Q&A on Radiation'] ' (2011) 4.21 *Periodical Letter on Fukushima City Government* 4, 4–5.

mechanism on academics' conflict of interests is under-developed, and academics themselves are often not conscious of the danger of having an under-developed check mechanism.[164] Further, human rights and their protection continue to be under-valued. For 280 000 children and 20 000 pregnant women who remained in the area of 1–20 mSv, the government provided a glass badge dosimeter, which monitored cumulative exposure to radiation, but did not inform about real-time exposure.[165] From the viewpoint of medical science, such monitoring is desirable and necessary for follow up research on the influence of long-term and low dose exposure to radiation.[166] However, there was criticism of this policy, with claims that the removal of people from the contaminated area would have been a better approach.[167] Reflecting the civil movement on this issue, in June 2012, the *Law on Protection of Children and Pregnant Women from the Exposure to Radioactive Isotopes that was Diffused by the Tokyo Electric Power Company's Fukushima Nuclear Power Plant Accidents* was enacted. This law enables the subsidising of children and pregnant women who are living in geographical areas within 1–20 mSv of radiation so that they can evacuate.[168]

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[164] 尾内隆之 [Takayuki Onai] and 本堂毅 [Tsuyoshi Hondo], '御用学者がつくられる理由 [Why and How Partisan Scientists Go Beyond the Validity of Science: A Review of the Problem Over the Scientists (Goyo-gakusha) from the Viewpoint of Social System]' (2011) 81 *Kagaku* 887, 891.

[165] Japan, *Diet Debates*, Permanent Committee on Health and Labour at the House of Representatives, 3 August 2011, 21–2 (柿澤未途 [Mito Kakizawa], Your Party: 矢島鉄也 [Tetsuya Yajima], Director-General for Technology Policy Coordination at the Ministry of Health and Labour); Japan, *Diet Debates*, Permanent Committee on Cabinet at the House of Councillors, 27 October 2011, 14 (浜田昌良 [Masayoshi Hamada], New Clean Government Party: 細野豪志 [Goshi Hosono], Specially Appointed Minister on Nuclear Administration).

[166] Cordula Meyer, 'Studying the Fukushima Aftermath: 'People Are Suffering from Radiophobia'', *Spiegel* (online), 19 August 2011 <http://www.spiegel.de/international/world/0,1518,780810,00.html>; National Cancer Centre (JPN), *放射性物質による健康影響に関する国立がん研究センターからの見解と提案 [View and Proposal on Ionising Radiation's Influence on Health by the National Cancer Centre]* (7 June 2011) <http://www.ncc.go.jp/jp/shinsai/kenkai_teian.html>.

[167] 西尾正道 [Masamichi Nishio] (President of National Hokkaido Cancer Centre: Ragilogy Expert), *Vol.196『福島原発事故における被ばく対策の問題－現況を憂う』(その2/2) [Vol. 196 The Problem of Policy on Exposure to Radiation from Fukushima Nuclear Accidents: Apprehension of the Current Situation, Part2]* (21 June 2011) MRIC by 医療ガバナンス学会 [MRIC by Society of Medical Governance] <http://medg.jp/mt/2011/06/vol19622.html>; Sebastian Pflugbeil, President of Association for Radiological Protection (GER), 'Die Grundregeln des Strahlenschutzes dürfen auch nach der Reaktorkatastrophe von Fukushima nicht mißachtet werden [The Basic Rules for Radiological Protection Must Not Ignored in the case of Nuclear Reacter Catastrophe in Fukushima]' (Media Release, 27 November 2011).

[168] *東京電力原子力事故により被災した子どもをはじめとする住民等の生活を守り支えるための被災者の生活支援等に関する施策の推進に関する法律* [Law on Protection of Children and Pregnant Women

Why were these lessons not learnt?

The question needs to be asked as to why, considering the tragedy of the Minamata case, the same mistakes were repeated, and why the quality of environmental decision making has showed only limited improvement. As seen in Subsection 3.2.2, Japan developed its environmental law framework based on the lessons of Minamata. However, as shown by the response to the TEPCO Nuclear Disaster, this was insufficient to prevent similar expansion of damage from a serious environmental contamination. The TEPCO case highlighted the low level of consciousness of decision-makers about quality of governance, managing conflicts of interests, and ensuring and protecting human rights. All of these problems are related to the rule of law. This shows that the administrative law framework in Japan has not adequately adopted the concept of the rule of law yet. Also, this strongly suggests that Japan has not learnt another important lesson from Minamata; that is, the necessity of building an effective mechanism to reduce maladministration. The introduction of an Environmental Ombudsman would address this absence of an effective mechanism. However, it is first necessary to examine whether there truly is a deficiency. Therefore, in the next section, the framework of the mechanism to review administrative environmental disputes in Japan is examined.

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from the Exposure to Radioactive Isotopes that was Diffused by the Tokyo Electric Power Company's Fukushima Nuclear Power Plant Accidents] (Japan) 21 June 2012, Law No 48 of H24, arts 9, 11; Friends of the Earth Japan, *「原発事故被災者支援法」のポイントと課題 [Main Features and Remaining Issues of the Law on Protection of Children and Pregnant Women from the Exposure to Radioactive Isotopes that was Diffused by the Tokyo Electric Power Company's Fukushima Nuclear Power Plant Accidents]* (21 June 2012) <http://www.foejapan.org/energy/news/120621.html>; Japan Federation of Bar Associations, *東京電力原子力事故により被災した子どもをはじめとする住民等の生活を守り支えるための被災者の生活支援等に関する施策の推進に関する法律の成立に関する会長声明 [Presidential Statement on the Enactment of the Law on Protection of Children and Pregnant Women from the Exposure to Radioactive Isotopes that was Diffused by the Tokyo Electric Power Company's Fukushima Nuclear Power Plant Accidents]* (21 June 2012) <http://www.nichibenren.or.jp/activity/document/statement/year/2012/120621_3.html>

3.3 Review mechanisms for administrative environmental disputes

The question posed in the previous section is whether there are sufficient review mechanisms for administrative environmental disputes to reduce maladministration in the environmental field. To answer this question, this section reveals the structure of the review mechanisms in the environmental field. The subjects detailed are merits review institutions in the environmental field (see Subsection 3.3.1) and the judicial instruments applicable for environmental litigation (see Subsection 3.3.2). Concerning the not always clear boundary between the public and private law spheres, subjects examined here are not limited to those in the administrative law framework. Finally, the composition of existing review mechanisms in the environmental field is classified (see Subsection 3.3.3).

It must be noted that the analysis does not address functionality in detail, but focuses on essential features only. Further detailed analysis on some of the subjects is provided in the following chapters.

3.3.1 Environmental disputes and merits review

This subsection introduces the basic features of the merits review institutions in the environmental field. As mentioned in Subsection 3.2.2, the Japanese environmental law framework allows for the preparation of a review scheme for environmental dispute resolution. Thus, this scheme is examined first to clarify to what extent it is effective to resolve disputes on administrative environmental decision making. Further, the other existing merits review institutions, on access to information and public participation, are examined according to the classification of the Aarhus Convention. It is noted that the review on public participation is seldom clearly divided from ordinary dispute resolution. Therefore, the institutions for ordinary environmental dispute resolution are also

summarised.

Environmental Dispute Coordination Commission

The basic legal instrument for environmental dispute resolution in Japan is the *Law on Environmental Pollution Dispute Resolution*, which aims at the swift resolution of environmental pollution disputes through the utilisation of adjudication, mediation, conciliation and arbitration.[169] The Environmental Dispute Coordination Commission (EDCC) is the state level institution established for the implementation of the objective of the law.[170] The EDCC is one of the few administrative offices in Japan that apply the council structure based on article 3 of the *National Government Organisation Law*. Thus it has the highest level of independence within the administrative branch.[171] The EDCC consists of one chair and six members. Further it can appoint up to 30 temporary members as experts.[172] The secretariat of the EDCC comprises a secretary-general, a deputy manager, nine examiners and general officers; with three of the nine examiners being judges.[173] All of the secretariat staff possess certain expertise on environmental issues and are seconded from the court and environment-related administrative offices. The current number of staff is 38.[174]

The EDCC reflects the hybrid nature of the Japanese legal system. Under the regime of the *Law on Environmental Pollution Dispute Resolution*, the jurisdiction of the EDCC

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169 *公害紛争処理法* [Law on Environmental Pollution Dispute Resolution] (Japan) 1 June 1970, Law No 108 of S45, art 1.

170 *公害等調整委員会設置法* [Law for Establishment of the Environmental Dispute Coordination Commission] (Japan) 3 June 1972, Law No 52 of S47, arts 3, 4(1).

171 国家行政組織法 [National Government Organisation Law] (Japan) 10 July 1948, Law No 120 of S23; *公害等調整委員会設置法* [Law for Establishment of the Environmental Dispute Coordination Commission] (Japan) 3 June 1972, Law No 52 of S47, art 2.

172 *公害等調整委員会設置法* [Law for Establishment of the Environmental Dispute Coordination Commission] (Japan) 3 June 1972, Law No 52 of S47, arts 6, 18.

173 *公害等調整委員会事務局組織令* [Order on Organisation of the Secretariat of Environmental Dispute Coordination Commission] (Japan), 26 June 1972, Cabinet Order No 236 of S47 , OO 1–2; 六車明 [Akira Rokusha], '公害等調整委員会における環境紛争解決手続の特色: 豊島事件の調停成立を契機に考える [Distinctive Features of the Resolution Procedure of Environmental Dispute Coordination Commission; At the Conclusion of Mediation of Teshima Case] ' (2000) (1035) *Law Times Report (JPN)* 91, 96.

174 河村浩 [Hiroshi Kawamura], '公害環境紛争処理の理論と実務：第一 公害紛争処理制度の俯瞰 [Theory and Practice of Environmental Pollution Dispute Resolution: 1 Overview of Resolution System of Environmental Pollution Conflicts]' (2007) (1238) *Law Times Report (JPN)* 93, 95.

is limited to civil disputes that are significant and cross a border of prefectures (art 24(1)). In relation to the court's civil procedure, commencement of the EDCC's adjudication may suspend the proceedings of the court's civil procedure on the same case (arts 42-26, 42-33). However, the result of adjudication will not bind the court's judgments in any way (arts 42-20, 42-21).[175]

By the *Law on Adjustment Procedures for Utilisation of Land for Mining and Other Industries*, the EDCC is also bestowed with jurisdiction over administrative disputes over land use relating to mining, as a quasi-judicial procedure.[176] Here, the results of adjudication bind all related administrative offices (art 44). In relation to the court's administrative procedure, a lawsuit on the same case after adjudication must belong to the Tokyo High Court (art 57). The facts acknowledged by the EDCC bind the Tokyo High Court (art 52), and submission of new evidence by the parties is limited to justifiable contentions (art 53).

In addition, as an administrative office, the EDCC can issue recommendations to the Minster of Internal Affairs and Communication for improvements to environmental policies based on findings acquired through its dispute resolution proceedings.[177] However, the EDCC cannot contribute to fill the lacuna of law, even when it feels amendments to environmental laws are necessary. This is because, unlike an Ombudsman, the EDCC does not have any power to propose a law reform plan.[178]

Regardless of its hybrid nature, in practice, the EDCC is hardly regarded as a merits

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175 大塚直 [Tadashi Otsuka], *環境法 [Environmental Law]* (有斐閣 [Yuhikaku], 2nd ed, 2006), 597.

176 *公害等調整委員会設置法* [Law for Establishment of the Environmental Dispute Coordination Commission] (Japan) 3 June 1972, Law No 52 of S47, arts 3, 4(2)–(4); *鉱業法* [Mining Law] (Japan) 20 December 1950, Law No 289 of S25, arts 15, 107(3); *鉱業等に係る土地利用の調整手続等に関する法律* [Law on Adjustment Procedures for Utilisation of Land for Mining and Other Industries] (Japan) 20 December 1950, Law No 292 of S25.

177 *公害紛争処理法* [Law on Environmental Pollution Dispute Resolution] (Japan) 1 June 1970, Law No 108 of S45, art 48.

178 川嵜義徳 [Yoshinori Kawasaki] et al, '座談会：公害等調整委員会の最近 10 年を振り返って [Past 10 Years of the Environmental Dispute Coordination Commission: Roundtable Talk] ' in 公害等調整委員会事務局 [Secretariat of Environmental Dispute Coordination Commission] (ed), *公害等調整委員会 30 年史 [30 Years of Environmental Dispute Coordination Commission]* (公害等調整委員会事務局 [Secretariat of Environmental Dispute Coordination Commission], 2002) 337, 350–3.

review institution because most cases it treats are civil disputes.[179] Regarding the subjects of civil disputes, as noted in Subsection 3.2.2, these are limited to the damage caused by environmental pollution. However, in practice, as is detailed in the next chapter, the EDCC tries to expand its scope.

Merits review institution on access to information

In Japan, merits review on access to information is processed by an internal merits review institution.[180] The body of merits review is the Examination Board on Information Disclosure and Privacy Protection, whose legal status is as a consultative body established by the *Law for Establishment of the Examination Board on Information Disclosure and Privacy Protection*. The status of members of the Board is exceptionally high for an internal merits review mechanism. They are appointed by the Prime Minister and must be approved by both Houses of the Diet. The procedure of the Board is unique as a merits review mechanism; it works as a consultative body. An appeal against a decision is submitted to the administrative office that made the original decision. Then, the administrative office consults the Board about the appeal. The Board examines the appeal and replies to the administrative office, which makes the final decision on the appeal.[181] The other specific procedural feature of the Board is the strong power of its in-camera examination, which enables it to examine any secret of the government. However, the exercise of this power is strictly limited to the examination of the rationality of the original decision. The examined information is neither disclosed nor utilised for

[179] Interview with 六車明 [Akira Rokusha], former Examiner, Environmental Dispute Coordination Commission / former Judge (Tokyo, 14 July 2011); Interview with 大久保規子 [Noriko Okubo], Professor, Osaka University Graduate School of Law and Politics (Osaka, 7 July 2011).

[180] Ministry of Internal Affairs and Communications (JPN), *情報公開 [Discolusre of Information]* (2009) <http://www.soumu.go.jp/menu_sinsei/jyouhou_koukai/index.html>.

[181] *情報公開・個人情報保護審査会設置法* [Law for Establishment of the Examination Board on Information Disclosure and Privacy Protection] (Japan) 30 May 2003, Law No 60 of H15, arts 4, 8, 15; Cabinet Office (JPN), *情報公開・個人情報保護審査会における調査審議の流れ [Working flow of the Examination Board on Information Disclosure and Privacy Protection]* (30 May 2005) <http://www8.cao.go.jp/jyouhou/gaiyou/nagare.pdf>.

further action.[182] While the examination process of the Board is closed, the contents of reply to the administrative office are publicised.[183] Further examination of the functionality of the Board is provided in Subsection 7.2.1

Merits review institution on public participation

As detailed above, there is no single internal merits review institution that reviews all types of environmental disputes. Rather, individual administrative offices exercise merits review according to their jurisdictions. Although many internal merits review mechanisms are informal and have only first instance jurisdiction, in some areas there are relatively formal second instance power of review that are determined by law or ordinance. The Appeal Committee on Compensation of Health Damage by Environmental Contamination is one such formal, second instance internal merits review body in the environmental field. The Appeal Committee's legal status is as a consultative body established by the *Law for Compensation of the Health Damage Caused by Environmental Contaminations*. The members of the Appeal Committee are chosen based on their expertise in the legal and medical fields. The Appeal Committee issues legally binding decisions, but its jurisdiction is strictly limited to disputes about administrative decisions on compensation for the major environmental contaminates and asbestos contaminations.[184] Regarding *locus standi*, the Appeal Committee requires the applicant to have been rejected by the first instance internal merits review, which is held by the Ministry of the Environment.[185] Further examination on the functionality of the Appeal Committee is provided in Subsection 7.2.2.

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182 *情報公開・個人情報保護審査会設置法* [Law for Establishment of the Examination Board on Information Disclosure and Privacy Protection] (Japan) 30 May 2003, Law No 60 of H15, art 9.

183 Ibid, art 14; *情報公開・個人情報保護審査会運営規則* [Rule for Procedures of the Examination Board on Information Disclosure and Privacy Protection] 2008 (Japan) , r 28.

184 *公害健康被害の補償等に関する法律* [Law on Compensation of the Health Damage caused by Environmental Pollution] (Japan) 5 October 1973, Law No 111 of S48, arts 111–35; *石綿による健康被害の救済に関する法律* [Law on Remedy for the Health Damage caused by Asbestos] (Japan) 10 February 2006, Law No 4 of H18, arts 75, 77.

185 Interview with Anonymous interviewee, Office of the Appeal Committee on Compensation of Health Damage by Environmental Contamination (Tokyo, 6 July 2011).

3.3.2 Environmental disputes and the court

There is no specialised Environmental Court in Japan, thus all environmental disputes, regardless of the differences of disputes on access to information or on public participation, are reviewed by the Judicial Court.[186] The Judicial Court has three layers: District Courts (50 offices, 203 branches), High Courts (eight offices, six branches) and the Supreme Court.[187] While District Courts and High Courts have the power to examine facts, in principle, the Supreme Court only examines problems of law.[188] As a unique feature of Japan, the Supreme Court consists of professional and lay judges. As a custom, nine out of 15 Supreme Court Judges are lay judges (two are former Public Prosecutors, four are former barristers, two are former high-level bureaucrats and one is a law professor).[189] The number of judges within the Judicial Court is 2805, and the budget of the judiciary is approximately JPY 312.69 billion (AUD 3.91 billion).[190]

As Table 3-1 below shows, the court utilises civil, administrative and criminal procedures according to the nature of individual cases. However, it should be noted that, reflecting the hybrid nature of the administrative law framework, the boundary between public and private law is not always clear.

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186 Ministry of Internal Affairs and Communications (JPN), above n 180.

187 Supreme Court of Japan, *裁判所の組織：概要 [Organisational Structure of the Courts in Japan]* (16 April 2012) <http://www.courts.go.jp/about/sosiki/gaiyo/index.html>.

188 *民事訴訟法* [Code of Civil Procedure] (Japan) 26 June 1996, Law No 109 of H8, arts 311–12, 318.

189 Supreme Court of Japan, *最高裁判所の裁判官 [Judges of Supreme Court]* (20 December 2010) <http://www.courts.go.jp/saikosai/about/saibankan/index.html>; Daniel H. Foote, *名もない顔もない司法：日本の裁判は変わるのか [Nameless and Faceless Judiciary: Can Japanese Courts Change?]* (溜箭将之 [Masayuki Tamaruya] trans, NTT 出版 [NTT Publication], 2007), 100–1.

190 The data is from 2010; JPY 80 = AUD 1. Japan Federation of Bar Associations, *法曹人口政策に関する緊急提言: 関連資料 [Emergent Proposal for the Policy on the Number of Legal Professionals: Statistics]* (29 March 2011) <http://www.nichibenren.or.jp/library/ja/opinion/report/data/110327_shiryou.pdf>, 1; Supreme Court of Japan, *平成 22 年度裁判所決算 [The Judiciary's Settlement of Accounts in the Financial Year of 2010-11]* (9 February 2012) <http://www.courts.go.jp/vcms_lf/203008.pdf>.

Table 3-1: Structure of judicial resolutions for environmental remedies

Methodologies	Methods	Instruments
Civil Procedure	Civil litigation	Action for damages
		Action for state redress
		Action for civil injunction
Administrative Procedure	Appellate litigation	Action for revocation
		Action for declaratory judgment of invalidity
		Action for declaratory judgment of illegality of inaction
		Action for obligation
		Action for administrative injunction
	Popular litigation	Action by inhabitant
Criminal Procedure	*Criminal Code*	*Law for the Punishment of Environmental Pollution Crimes relating to Human Health*
	Administrative punishment	Others

Sources: Hiromasa Minami and Noriko Okubo, *Environmental Law* (3rd ed, 2006); Tadashi Otsuka, *Environmental Law* (2nd ed, 2006); Yasutaka Abe and Takehisa Awaji (eds), *Environmental Law* (3rd, revised ed, 2006)

Civil procedure

In the context of environmental litigation, there are three important judicial instruments in the civil procedure: action for damages, action for state redress and action for civil injunction. All of them follow the procedural rules of the *Code of Civil Procedure*.[191] The action for damages pursues a remedy for damages that are caused by illegal activities of private bodies.[192] Since the late 1960s, this action is frequently used for seeking remedies in pollution cases. In pollution disputes, the amendments of adversarial mechanism have been required and undertaken because, while the polluters (defenders) monopolise information that is necessary for providing proof, the victims (plaintiff) usually suffer from scarce scientific knowledge and expertise.[193] Compared

[191] *民事訴訟法* [Code of Civil Procedure] (Japan) 26 June 1996, Law No 109 of H8.
[192] *民法* [Civil Code] (Japan) 27 April 1896, Law No 89 of M29, art 709; *民事訴訟法* [Code of Civil Procedure] (Japan) 26 June 1996, Law No 109 of H8, art 5(9).
[193] Otsuka, above n 175, 541; 南博方 [Hiromasa Minami] and 大久保規子 [Noriko Okubo], *環境法 [Environmental Law]* (有斐閣 [Yuhikaku], 3rd ed, 2006), 190; 大塚直 [Tadashi Otsuka] and 荏原明則 [Akinori Ebara], '公害・環境紛争と司法・行政上の解決 [Resolutions of Environmental Disputes by

with other civil cases, the review on pollution disputes has the following specific features. First, the standard of negligence applied for pollution disputes is stricter; liability without fault is even applied for certain pollutions.[194] Secondly, the illegality of private activities is acknowledged when the damage caused by the activities exceeds a socially acceptable standard, which is decided as a result of the court's comprehensive consideration of various factors including locality, public nature of the activities and efforts for prevention of damages.[195] Thirdly, the causal relationship is widely acknowledged by the utilisation of various scientific methods, including epidemiology.[196] Finally, compensation for damage is not limited to money; other forms of redress are possible by special agreement.[197]

The action for state redress pursues a remedy for damage caused by illegal administrative activities.[198] The cost of damage is borne by the state or local public bodies. These public bodies can ask for payment of damages to the responsible administrative officer only when gross negligence of the person is established.[199] The right to pursue state redress is regarded as a private right. Thus, although one of the parties is an administrative body, the procedural rules applied to the action for state redress is the *Code*

Judicial and Administrative Approaches]' in 阿部泰隆 [Yasutaka Abe] and 淡路剛久 [Takehisa Awaji] (eds), *環境法 [Environmental Law]* (有斐閣 [Yuhikaku], 3rd, revised ed, 2006) 349, 349.

194 Otsuka, above n 175, 541–3; Minami and Okubo, above n 193, 190–2. The liability without fault is declared in several statutes, such as *鉱業法* [Mining Law] (Japan) 20 December 1950, Law No 289 of S25, art 109; *原子力損害の賠償に関する法律* [Law on the Compensation of Damage caused by Nuclear Power Plants] (Japan) 17 June 1961, Law No 147 of S36, art 3; *大気汚染防止法* [Air Pollution Prevention Law] (Japan) 10 June 1968, Law No 97 of S43, art 25; *水質汚濁防止法* [Water Contamination Prevention Law] (Japan) 25 December 1970, Law No 138 of S45, art 19.

195 Otsuka, above n 175, 544; Minami and Okubo, above n 193, 192–3; *国道 43 号線公害訴訟* [National Route 43 Environmental Pollution Case], Supreme Court of Japan, 平成 4(オ)1503, 7 July 1995, reported in (H7) 49(7) Supreme Court Reports (civil cases) 1870.

196 Otsuka, above n 175, 546–51; Minami and Okubo, above n 193, 193–4.

197 *民法* [Civil Code] (Japan) 27 April 1896, Law No 89 of M29, arts, 417, 722(1): The typical example of compensation in the other forms is medical care for the victims of Minamata Diseases. Note that some environmental damage is difficult to recover just by money. Otsuka, above n 175, 556. In the mining cases, without a special agreement, the plaintiff can request restoration when it is possible within the budget that is not too expensive compared with the payment of compensation ordered by the court. *鉱業法* [Mining Law] (Japan) 20 December 1950, Law No 289 of S25, arts 111(2)–(3).

198 *日本国憲法* [Constitution of Japan] (Japan) 3 November 1946, art 17; *国家賠償法* [State Redress Law] (Japan) 27 October 1947, Law No 125 of S22, arts 1–2; *民事訴訟法* [Code of Civil Procedure] (Japan) 26 June 1996, Law No 109 of H8, art 5(9).

199 *国家賠償法* [State Redress Law] (Japan) 27 October 1947, Law No 125 of S22, arts 1–2; *農地委員会解散命令事件* [Case on the Resolution Order to an Agricultural Committee], Supreme Court of Japan, 昭和 28(オ)625, 19 April 1955, reported in (S30) 9(5) Supreme Court Reports (civil cases) 534.

of Civil Procedure.[200] However, the plaintiff can also lodge the action for revocation simultaneously. In this case, the action for state redress is linked to the action for revocation, and the judgment on the latter binds the judgment of the former.[201] In environmental litigation, the action for state redress is an important judicial instrument to prosecute the illegality of administrative activities and to obtain financial compensation.[202]

The action for civil injunction pursues a remedy of prevention of damage or removal of causes of the damage, and is mainly used for environmental litigation.[203] The issue of a civil injunction provides a great relief for the victims, but it can have a significant effect on business activities or stop a socially beneficial activity. Hence, regarding the illegality of the activities, the court tends to consider a socially acceptable standard as higher than in an action for damages.[204] Since the 1970s, the action for civil injunction has been utilised for environmental disputes over public construction works or public facilities, such as airports, roads and dams.[205] However, the Supreme Court has not clarified whether these kinds of disputes should be processed by either the action for civil injunction or the action for administrative injunction. Thus, the plaintiff has to choose either civil procedure or administrative procedure at their own risk of having their application rejected.[206]

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200 Shiono, above n 19, 265–6, 295–6, 320–1; Harada, above n 13, 308–9.

201 Shiono, above n 19, 295–6; *行政事件訴訟法* [Code of Administrative Procedure] (Japan) 16 May 1962, Law No 139 of S37, art 13(1); *換地処分取消棄却確定判決の既判力と国家賠償請求事件* [Case on the Effectiveness of the Confirmed Judgment on the Action for Revocation of the Adminisrative Act of Land Replacement over the Linked Action for State Redress], Supreme Court of Japan, 昭和 47(オ)642, 27 March 1973, reported in (S48) 108 Supreme Court Internal Reports (civil cases) 529.

202 Otsuka, above n 175, 583; Minami and Okubo, above n 193, 199.

203 There is no statutory basis for the action for civil injunction, but court precedents and academic arguments seek its theoretical basis for either the property right, human rights, or illegality of the action caused the damage, according to the nature of individual cases. See, eg, Otsuka, above n 175, 558; Minami and Okubo, above n 193, 204–5; *国道 43 号線公害訴訟* [National Route 43 Environmental Pollution Case], Supreme Court of Japan, 平成 4(オ)1503, 7 July 1995, reported in (H7) 49(7) Supreme Court Reports (civil cases) 1870.

204 Otsuka, above n 175, 559; Minami and Okubo, above n 193, 204–5; *国道 43 号線公害訴訟* [National Route 43 Environmental Pollution Case], Supreme Court of Japan, 平成 4(オ)1503, 7 July 1995, reported in (H7) 49(7) Supreme Court Reports (civil cases) 1870.

205 Otsuka, above n 175, 562; Minami and Okubo, above n 193, 208.

206 Minami and Okubo, above n 193, 208–10. The cases in which the Supreme Court admitted the

Administrative procedure

Among the administrative procedures, appellate litigation and action by inhabitant, which is a type of popular litigation, are those most frequently utilised for environmental disputes. Regarding the procedure of appellate litigation on environmental disputes, the principle of non-stay of execution, severe *locus standi*, insufficient control of administrative discretion and application of the non-execution judgment have been especially criticised. Firstly, the strict application of the principle of non-stay of execution is evaluated as promoting irreversible environmental damages by administrative activities, such as public construction works.[207] Secondly, regarding the *locus standi* of appellate litigation, the court denies the legal interest of collective lawsuits. This has been questioned in terms of the efficiency of lawsuit management (environmental disputes usually have a vast number of potential plaintiffs), and the effectiveness of protecting public interests.[208] Thirdly, in the environmental field, the quality of judicial review on administrative discretion, in which scientific technology and expertise play central roles, has been questioned. The court precedents on this issue were formed through disputes on

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application of the 'action for civil injunction' include *もんじゅ事件上告審判決* [Monjyu Nuclear Power Plant Case: Phase One], Supreme Court of Japan, 平成 1(行ツ)130・131, 22 September 1992, reported in (H4) 46(6) Supreme Court Reports (civil cases) 571; *国道 43 号線公害訴訟 [National Route 43 Environmental Pollution Case], Supreme Court of Japan, 平成 4(オ)1503, 7 July 1995, reported in (H7) 49(7) Supreme Court Reports (civil cases) 1870*. Conversely, the cases in which the Supreme Court rejected the application of the action for civil injunction is *大阪国際空港事件* [Osaka International Airport Case], Supreme Court of Japan, 昭和 51(オ)395, 16 December 1981, reported in (S56) 35(10) Supreme Court Reports (civil cases) 1369; *厚木基地騒音訴訟（第一次）* [Atsugi Air Force Base Noise Pollution Case (First Phase)], Supreme Court of Japan, 昭和 62(オ)58, 25 February 1993, reported in (H5) 47(2) Supreme Court Reports (civil cases) 643. However the reasoning of these cases about noise pollution caused by air ports is criticised as against the PAS. Harada, above n 13, 353–4; Abe, above n 63, 71; Fujita, above n 13, 136; Otsuka, above n 175, 562–3. In addition, later, the court denied the utilisation of the appellate litigation for a similar case. Thus, there is a suspicion that the court refused the exercise of jurisdiction, which is against article 32 of the *Constitution*. *羽田空港新 A 滑走路事件* [Haneda Airport New A Runway Case], Tokyo District Court (JPN), 昭和 63(行ウ)201, 18 March 1992, reported in (H4) 43(3) Administrative Law Cases Reports 418; Minami and Okubo, above n 193, 208–9; Abe, above n 63, 71.

207 Otsuka, above n 175, 578; Minami and Okubo, above n 193, 235–6; 原田尚彦 [Naohiko Harada], *環境法 [Environmental Law]* (弘文堂 [Kobundo], Revised ed, 1994), 272–4.

208 Harada, above n 13, 386–7; Shiono, above n 19, 122–3; *主婦連ジュース不当表示事件* [Case on Misleading Description of Contents of Juice, which was accused by the Housewives' Association], Supreme Court of Japan, 昭和 49(行ツ)99, 14 March 1978, reported in (S53) 32(2) Supreme Court Reports (civil cases) 211; *伊場遺跡事件* [Case on Archaeological Site of Iba], Supreme Court of Japan, 昭和 58(行ツ)98, 20 June 1989, reported in (H1) (1334) Law Cases Reports (JPN) 201; 大久保規子 [Noriko Okubo], '団体訴訟 [Class Action]' (2006) 57(3) *Liberty & Justice: Japan Federation of Bar Associations* 31, 34–7.

the construction of nuclear power plants. Here, the court applied specific criteria, in which the court avoided the review on substance, based on the reliance on advice of an expert panel to the administrative office. Instead, they focused on the procedural aspects. For the sub-criteria of the review on procedural aspects, the latest scientific standard was applied, and the burden of proof rested with the administrative office.[209] Towards these criteria, there have been criticisms over the ambiguity of the standard, the lack of examination on the impartiality of the expert panel, and the court's tendency to over-trust a first instance decision of the administrative office.[210] In view of the TEPCO Nuclear Disaster, these criticisms have been accurate, and the court should revise its criteria. Fourthly, in the environmental field, the application of the non-execution judgment could prevent any actual remedy in relation to the principle of non-stay of execution and the exclusion of administrative planning from the subjects of judicial review. Hence, the court is required to make a careful consideration before applying this judgment.[211] Reflecting a number of hurdles in the procedure, there have been limited cases in which the court has found the illegality of administrative acts.[212]

The action by inhabitant pursues a remedy that rectifies the improper budgetary expenses of local public bodies.[213] The commencement of an action by inhabitant requires that the plaintiff had exhausted an inhabitant audit request.[214] In contrast to

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209 *伊方原発事件* [Ikata Nuclear Power Plant Case], Supreme Court of Japan, 昭和 60(行ツ)133, 29 October 1992, reported in (H4) 46(7) Supreme Court Reports (civil cases) 1174; *もんじゅ訴訟* [Monjyu Nuclear Power Plant Case: Phase Two], Supreme Court of Japan, 平成 15(行ヒ)108, 30 May 2005, reported in (H17) 59(4) Supreme Court Reports (civil cases) 671.

210 Shiono, above n 19, 143–4; Harada, above n 207, 268–72; 稲葉馨 [Kaoru Inaba] et al, '日独における行政裁量の現状比較 : 日独行政法シンポジウム『行政裁量とその裁判的統制』討論第一部 [Comparison of Administrative Discretion in Japan and Germany: Panel Discussion Part 1 at the Japan-German Administrative Law Symposium on 'Administrative Discretion and its Judicial Control']' (2006) (1935) *Law Cases Reports (JPN)* 3, 6–9; 山下義昭 [Yoshiaki Yamashita], '74 専門的技術判断と裁判所の審査 [Case 74: Specialised Technical Decision and Judicial Review]' in 小早川光郎 [Mitsuo Kobayakawa], 宇賀克也 [Katsuya Uga] and 交告尚史 [Hisashi Koketsu] (eds), *行政判例百選 I [100 Representative Cases in Administrative Law: Volume 1]* (有斐閣 [Yuhikaku], 5th ed, 2006) 150, 151.

211 Fujita, above n 13, 238–9, 323–4, 432; Minami and Okubo, above n 193, 240–1.

212 Otsuka, above n 175, 578. A few examples are; *日光太郎杉事件* [Nikko Taro Cedar Case], Tokyo High Court (JPN), 昭和 44(行コ)12, 13 July 1973, reported in (S48) 24(6&7) Administrative Law Cases Reports 533; *川辺川利水訴訟* [Kawabe River Water Use Case], Fukuoka High Court (JPN), 平成 12(行コ)27, 16 May 2003, reported in (H15) (1839) Law Cases Reports (JPN) 23.

213 *行政事件訴訟法* [Code of Administrative Procedure] (Japan) 16 May 1962, Law No 139 of S37, arts 5, 42; *地方自治法* [Local Autonomy Law] (Japan) 17 April 1947, Law No 67 of S22, art 242-2.

214 *地方自治法* [Local Autonomy Law] (Japan) 17 April 1947, Law No 67 of S22, arts 242, 242-2.

appellate litigation, the action by inhabitant does not require the plaintiff to have a legal interest, so this action is frequently utilised for environmental litigation.[215] Although the legislative intent of the action by inhabitant was the direct control of budgetary matters, such utilisation is evaluated as the indirect control of non-budgetary matters.[216] However, such an unexpected utilisation has certain limitations. Hence, there is a demand to create an environmental collective or citizens' litigation.[217]

Criminal procedure

As a judicial methodology for environmental litigation, the environmental criminal law system is totally under-developed in Japan. There are two different legal sources of environmental criminal law. One is the *Law for the Punishment of Environmental Pollution Crimes relating to Human Health*, which is a special law of *the Criminal Code*. The other is provisions of statutes for administrative punishment.[218] Notably, only 12 people have been prosecuted under the *Law for the Punishment of Environmental Pollution Crimes relating to Human Health* between 1970 and 2000, mainly because the Supreme Court has interpreted the applicable conditions of this law quite narrowly.[219] Similarly, most of the other provisions of environmental administrative punishments are

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215 Otsuka, above n 175, 579–81; Minami and Okubo, above n 193, 226–8; *長浜町入浜権事件* [Case on Commons of Nagahama Beach], Matsuyama District Court (JPN), 昭和 49(行ウ)3, 29 May 1978, reported in (S53) 29(5) Administrative Law Cases Reports (JPN) 1081; *織田が浜埋立差止請求事件* [Case on Injunction of Budgetary Expense for Reclamation of Odagahama Beach], Supreme Court of Japan, 平成 3(行ツ)214, 7 September 1993, reported in (H5) 47(7) Supreme Court Reports (civil cases) 4755; *日比谷公園隣接高層ビル建築許可取消訴訟* [Case on Building Permission of the Skyscrapers neighbouring Hibiya Park], Tokyo District Court (JPN), 昭和 53(行ウ)36, 26 October 1978, reported in (S53) 29(10) Administrative Law Cases Reports (JPN) 1884; *田子の浦ヘドロ事件* [Tagonoura Harbour Sludge Pollution Case], Supreme Court of Japan, 昭和 52(行ツ)128, 13 July 1982, reported in (S57) 36(6) Supreme Court Reports (civil cases) 970.

216 Shiono, above n 19, 244–8: Harada, above n 13, 424–6.

217 Minami and Okubo, above n 193, 228.

218 *人の健康に係る公害犯罪の処罰に関する法律* [Law on the Punishment of Environmental Pollution Crimes relating to Human Health] (Japan) 25 December 1970, Law No 142 of S45; *刑法* [Criminal Code] (Japan) 24 April 1907, Law No 45 of M40, arts 8–9; 町野朔 [Saku Machino], '序説 概観：日本の環境刑法 [Introduction; Overview of Environmental Criminal Law in Japan]' in 町野朔 [Saku Machino] (ed), *環境刑法の総合的研究 [Comprehensive Research of Environmental Criminal Law]* (信山社 [Shinzan Sha], 2003) 3, 3; Harada, above n 13, 231–4.

219 Otsuka, above n 175, 589; *大東鉄線工場塩素ガス噴出事件* [Daito Iron Line Factory's Chlorine Gas Emission Case], Supreme Court of Japan, 昭和 55(あ)2014, 22 September 1987, reported in (S62) 41(6) Supreme Court Reports (criminal cases) 255; *日本アエロジル塩素ガス流出事件* [Japan Aerosil's Chlorine Gas Emission Case], Supreme Court of Japan, 昭和 59(あ)228, 27 October 1988, reported in (S63) 42(8) Supreme Court Reports (criminal cases) 1109.

applied to offenders only after an administrative guidance, which asks them to cease the environmentally harmful activities. Even when direct application is possible, the shortage of personnel, capacity and resources makes it *de-facto* impossible.[220] Consequently, the environmental criminal law system has been evaluated as 'just inapplicable, but worthwhile as a last resort'.[221]

Reflecting this situation, academic arguments in this area are also undeveloped. There is no consensus about basic elements of the environmental criminal law scheme, such as the interests protected by this scheme, the role of a judicial methodology for the remedy of environmental litigation and whether organisations including administrative bodies can be punished under criminal law.[222] This is not to suggest, however, that development in the environmental criminal law scheme as a judicial methodology for environmental litigation is not possible in the future.

3.3.3 Composition of review mechanisms in the environmental field

The examination in this section revealed that, in Japan, the existing review mechanisms in the environmental field lack the capacity to reduce maladministration. Regarding merits review institutions, there is no single internal merits review institution that reviews all types of environmental disputes. Although the EDCC is a specialised

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220 Machino, above n 218, 10–11; Otsuka, above n 175, 587–8.

221 Otsuka, above n 175, 591–2.

222 For the first point, Machino, above n 218, 5–7; 中山研一 [Kenichi Nakayama], '環境刑法の役割：行政的規制との関連を中心に [Roles of Environmental Criminal Law: Focusing on its Relationship with Administrative Regulations]' in 中山研一 [Kenichi Nakayama] et al (eds), *環境刑法概説 [Overview of Environmental Criminal Law]* (成文堂 [Seibundo], 2003) 22, 24; 伊東研祐 [Kensuke Ito], *環境刑法研究序説 [Introduction to Environmental Criminal Law Research]* (成文堂 [Seibundo], 2003), 63–6, 79–80. For the second point, 大越義久 [Yoshihisa Okoshi], '行政と環境刑法 [Administration and Environmental Criminal Law]' in 町野朔 [Saku Machino] (ed), *環境刑法の総合的研究 [Comprehensive Research of Environmental Criminal Law]* (信山社 [Shinzan Sha], 2003) 95, 102–3; 松宮孝明 [Takaaki Matsumiya], '環境犯罪と行政法との関係 [Relationship between Environmental Crimes and Administrative Law]' in 中山研一 [Kenichi Nakayama] et al (eds), *環境刑法概説 [Overview of Environmental Criminal Law]* (成文堂 [Seibundo], 2003) 39, 43; 前野育三 [Ikuzo Maeno], '環境問題と刑事政策 [Environmental Issues and Criminal Policy]' in 中山研一 [Kenichi Nakayama] et al (eds), *環境刑法概説 [Overview of Environmental Criminal Law]* (成文堂 [Seibundo], 2003) 45, 52–3. For the third point, 伊東研祐 [Kensuke Ito], '公務員・公的機関の刑事責任 [Criminal Liability of Administrative Officers and Administrative Bodies]' in 町野朔 [Saku Machino] (ed), *環境刑法の総合的研究 [Comprehensive Research of Environmental Criminal Law]* (信山社 [Shinzan Sha], 2003) 348; 今井孟嘉 [Takeyoshi Imai], '組織体の刑事責任 [Criminal Liability of Organisational Bodies]' in 町野朔 [Saku Machino] (ed), *環境刑法の総合的研究 [Comprehensive Research of Environmental Criminal Law]* (信山社 [Shinzan Sha], 2003) 360.

review mechanism for all kinds of environmental disputes, its jurisdiction is basically limited to civil disputes, and does not cover administrative disputes with the exception of disputes over mining issues. The scope of other internal merits review institutions is also limited, such as information disclosure or compensation of health damage by environmental contamination. Thus, it could be said that there is a need for a specialised institution that is able to review the merits of all sorts of administrative environmental disputes.

Turning to judicial instruments, it is clear that utilisation of civil procedure is effective to prevent, reduce or compensate environmental damage. However, to what extent this procedure is effective to reduce maladministration in the environmental field is not clear. In contrast, administrative procedure directly addresses administrative environmental disputes. However, due to the lack of consideration for environmental litigation, in many cases, the utilisation of this procedure does not lead to satisfactory results. Further, due to the under-development of environmental criminal law, criminal procedure is unlikely to correct maladministration in the environmental field. Hence, there are potential demands for the creation of a new judicial instrument optimised for reviewing administrative environmental disputes.

3.4 Chapter conclusion

This chapter has provided an overview of administrative environmental decision making in Japan. This serves as the basis of this thesis' argument for the introduction of an Environmental Ombudsman. This chapter examined the nature of the administrative law framework in Japan, the fundamental problems in environmental governance, and the review mechanisms for administrative environmental disputes. The findings of this

chapter are as follows.

Although there are certain influences from the common law systems, due to historical reasons, the Japanese administrative law framework is strongly affected by nineteenth century German jurisprudence. Thus, on the surface, the administrative law frameworks of modern Germany and Japan look similar. However, the underlying philosophies in these two jurisdictions are opposite. While the Japanese administrative law framework tends to prioritise efficiency of administration over protection of the citizens, modern Germany seriously weighs the latter. This is because the presumption of absolute reliance on the administrative branch, which is the legacy of the nineteenth century German jurisprudence, is still applicable in Japan, whereas Germany discarded it after World War II. Thus, even though neither jurisdiction has Ombudsman review, unlike modern Germany, Japan cannot deny the necessity of an Ombudsman by claiming existing review mechanisms function well.

Turning to administrative environmental decision making, Japanese environmental governance is afflicted by serious problems relating to the low level of consciousness of decision makers on issues such as the quality of governance, the management of conflicts of interests, and the protection of human rights. These problems have not been solved by the development of the environmental law framework. However, as this thesis argues, they could be rectified by the introduction of an Environmental Ombudsman, if they are the results of a lack of mechanisms to reduce maladministration.

Focusing on the review mechanisms in the environmental field, the composition of existing mechanisms lacks the capacity to concentrate on the reduction of maladministration. There are potential demands for a specialised institution with the ability to conduct merits reviews of all types of administrative environmental disputes or a judicial instrument optimised for reviewing administrative environmental disputes. Hence, it could be said there is a need for an Environmental Ombudsman.

These findings imply that the introduction of an Environmental Ombudsman may be beneficial in addressing the current problems. However, before confirming this, a more thorough examination of the gap that the introduction of an Ombudsman is proposed to fill has to be made, especially in regards to the question of whether the current environmental dispute resolution mechanisms are capable of effectively resolving disputes over administrative environmental decisions. Such as examination is essential because if the current mechanisms are already effective, the argument to introduce an Environmental Ombudsman loses its relevance. To examine this issue, the next chapter presents a case study of a major environmental dispute in Japan.

Chapter 4: Case Study: Environmental damage in Isahaya Bay

Using the previous chapter's discussion of the legal framework for environmental dispute resolution in Japan as a starting point, this chapter explores the consequences of the under-developed framework for executive transparency and accountability through a case study. The case considered is the National Isahaya Bay Reclamation Project (ISAKAN), which is representative of the environmental problems in Japan during the Rio Conference and the TEPCO Nuclear Disaster. This case is recognised as an exemplar of unnecessary public construction works caused by a lack of transparency in administrative decision-making processes. The serious environmental, economic, social and budgetary damage caused by the ISAKAN invigorated the argument for the improvement of public governance in Japan. In addition, this case is one of very few environmental disputes over conservation that have utilised both the Environmental Dispute Coordination Commission (EDCC) and the courts. Thus, examination of this case can assist in revealing whether the current scheme of dispute resolution is appropriate to resolve disputes in an environmental context.

Section 4.1 presents an overview of the ISAKAN and describes the main features of the case from an environmental perspective. Section 4.2 examines how disputes over the ISAKAN were settled under the existing institutional settings of the review mechanisms. Finally, Section 4.3 analyses the effectiveness and efficiency of the dispute resolution of the ISAKAN case and considers how the establishment of an Environmental Ombudsman might have led to better outcomes.

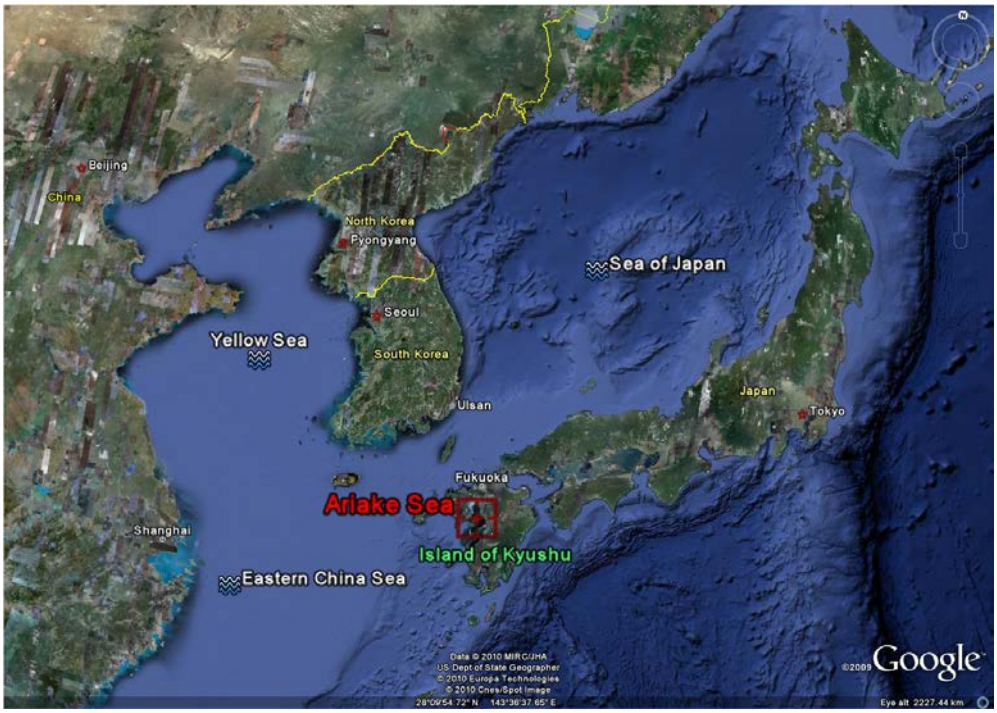

Figure 4-1: Location of the Ariake Sea in North East Asia (Source: Google Earth)

Figure 4-2: Location of Isahaya Bay in the Ariake Sea (Source: Google Earth)

4.1 National Isahaya Bay Reclamation Project

The ISAKAN is an example of a public construction work that caused serious environmental damage in Japan. The Ministry of Agriculture, Forestry and Fisheries (MAFF) was responsible for promoting the project. This section gives an overview of the location and ecological importance of the site, the history of the ISAKAN and the main issues of the environmental dispute.

4.1.1 Location and ecological importance of the site

The project site of the ISAKAN is located in the Ariake Sea region. As shown in Figure 4-1, the Ariake Sea is a semi-enclosed sea located in the northwest of the island of Kyushu, and connected with the Yatsushiro Sea (an enclosed sea), the Eastern China Sea and the Yellow Sea. As Figure 4-2 shows, Isahaya Bay (approximately 10 000 ha) is in the central west region of the Ariake Sea, bounded by Mount Tara and Mount Unzen. Before the damage caused by the ISAKAN, the Bay was famous for its tidal flat (approximately 3000 ha), which was the largest in Japan between 1959 and 1997.[1] The Isahaya Bay tidal flat was called 'the womb of the Ariake Sea'; it was the most important fish nursery in Western Japan and the main fishery of the Northern Kyushu prefectures.[2] This tidal flat also displayed great biodiversity, with the Bay housing 300 species of benthos (the organisms that live on, in or near the seabed), 175 species of fish and 232 species of birds.[3] Among these, two species were endemic to Isahaya Bay, one was an endemic species of the Ariake Sea and 65 were threatened (critical, endangered

[1] Before 1959, the largest tidal flat existed at Kojima Bay in Okayama Prefecture.

[2] 西尾建 [Tatsuru Nishio], *有明海干拓始末：たたかいぬいた漁民たち [The Particulars of the National Reclamation Project in the Ariake Sea: Won Through by Fishers]* (日本評論社 [Nippon Hyoron Sha], 1985), 15–17.

[3] 諫早干潟緊急救済本部 [Headquarters for Emergency Rescue of Isahaya Tidal Flat], *イサハヤ [Isahaya]* (游学社 [Yugaku Sha], 1997), 9–15; 佐藤正典 [Masanori Sato], '泥質干潟の生態系と多様性 [Mud Flat Ecosystem and Biodiversity]' in 片寄俊秀 [Toshihide Katayose] (ed), *諫早湾干潟の再生と賢明な利用: 国営諫早湾干拓事業の問題と代替案の提案 [In Search of Restoration and Wise Use of the Isahaya Bay Tidal Flat: Problems of the National Isahaya Bay Reclamation Project and Proposal of Alternative Uses]* (游学社 [Yugaku Sha], 1998) 31, 36–40.

and vulnerable) species. The world community had recognised the ecological significance of the tidal flat and asked the Japanese government not to destroy it in order that Japan might fulfil its obligations under the *Convention on Wetlands of International Importance, especially as Waterfowl Habitat* (Ramsar Convention) and bilateral treaties on migratory birds.[4]

4.1.2 History of the ISAKAN

As Table 4-1 shows, there have been three different but consecutive development projects on the Isahaya Bay tidal flat: the Nagasaki Great Reclamation Project (Nagasaki Reclamation Project: 1952–70); the South Nagasaki Comprehensive Development Plan (Nagasaki Development Plan: 1970–82) and the ISAKAN. The MAFF and the Governors of Nagasaki Prefecture have led the promotion of these projects. The basic model of these projects has been to build an estuary dam and an internal dam to reclaim land and create an artificial reservoir. The project was modelled on the 'double dams approach', which was invented in the Netherlands in the 1950s and introduced into Japan soon thereafter.[5] The first two projects were abandoned because of strong protests from fishers and citizens, but the MAFF was successful in commencing the third project which is the subject of this case study.

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4 Ramsar Convention on Wetlands, 'Resolution 5.1: The Kushiro Statement and the framework for the implementation of the Convention' (5th Meeting of the Conference of the Contracting Parties, Kushiro, Japan 9–16 June 1993) <http://www.ramsar.org/pdf/res/key_res_5.1e.pdf>; Ramsar Convention on Wetlands, 'Recommendation 5.1: Ramsar sites in the territories of specific Contracting Parties' (5th Meeting of the Conference of the Contracting Parties, Kushiro, Japan 9–16 June 1993) <http://www.ramsar.org/cda/en/ramsar-documents-recom-recommendation-5-1/main/ramsar/1-31-110%5E23157_4000_0__>; Letter from Delmar Blasco (Secretary General of Ramsar Convention) to Keiichi Kawase (Diplomat in Embassy of Japan in Switzerland), in 17 April 1997, disclosed at 諫早干潟緊急救済本部 [Headquarters for Emergency Rescue of Isahaya Tidal Flat] and 諫早干潟緊急救済東京事務所 [Tokyo Office for Emergency Rescue of Isahaya Tidal Flat], *Isahaya Higata Net; 97 年 4 月 17 日 ラムサール事務局→日本政府書簡 [Library − 17 April 1997, Letter from Secretary of Ramsar Convention to Japan Government]* (27 September 1997) <http://www.isahaya-higata.net/isa/libr/lb970927ramsar.html>.

5 Ashok K. Dutt and Stephen Heal, 'The Delta Works; A Dutch Experience in Project Planning' in Ashok K. Dutt and Frank J. Costa (eds), *Public Planning in the Netherlands; Perspectives and Change since the Second World War* (Oxford University Press, 1985) 184,188; 諫早湾地域振興基金 [Fund for Regional Development in Isahaya Bay] (ed), *諫早湾干拓のあゆみ [History of the National Isahaya Bay Reclamation Project]* (諫早湾地域振興基金 [The fund for regional development in Isahaya Bay], 1993), 58–9.

Table 4-1: History of the ISAKAN

Plans	Duration	Reclamation area	Objectives of projects	Reason for abandonment (Not including protests movements)
Nagasaki Reclamation Project	1952–70	10 094 ha	Creation of rice paddies	Excess of rice paddies
Nagasaki Development Plan	1970–82	10 100 ha	Provision of water	Quality of water was too poor
ISAKAN	1983–	3550 ha	Creation of farmland	On-going

Source: Fund for Regional Development in Isahaya Bay (ed), *History of the National Isahaya Bay Reclamation Project* (1993)

Nagasaki Great Reclamation Project

The Nagasaki Reclamation Project was launched in 1952. It aimed to create rice paddies to cope with the serious shortage of rice after World War II, by reclaiming the whole of Isahaya Bay.[6] As seen in Figure 4-3, the south west coast of Isahaya Bay is occupied by approximately 3500 ha of rice paddies. These were the result of small-scale reclamations over six hundred years, since 1330.[7] The Nagasaki Reclamation Project plan proposed to close the Bay, along with the east coasts of Mount Tara and Mount Unzen (see Figure 4-2), to create 7300 ha of rice paddies.[8] However, the opposition of fishers to this project was extremely strong and the problem of rice shortage was resolved by similar large reclamation projects in other prefectures in the late 1960s.[9] Hence, this first project was abandoned in 1970.

6 Fund for Regional Development in Isahaya Bay, above n 5, 52–3.

7 Reclamation Section of Agriculture Forestry and Fisheries Department at the Isahaya City (JPN), *諫早湾干拓事業の概要 [Outline of Isahaya Bay Reclamation Project]* (5 February 2010) <http://www.city.isahaya.nagasaki.jp/of/06_nourin/03_kantaku/kantaku/img/gaiyou.pdf>, 10.

8 Fund for Regional Development in Isahaya Bay, above n 5, 63–5.

9 Fund for Regional Development in Isahaya Bay, above n 5, 107–60; 山下弘文 [Hirofumi Yamashita], *諫早湾ムツゴロウ騒動記： 忘れちゃいけない20 世紀最大の環境破壊 [The Dispute over 'Boleophthalmus pectinirostris' in Isahaya Bay: Never forget the largest environmental destruction of the 20th Century]* (南方新社 [Nanpo Shinsha], 1998), 47–8.

Figure 4-3: Site of the National Isahaya Bay Reclamation Project (Source: Google Earth)

South Nagasaki Comprehensive Development Plan

Although the Nagasaki Reclamation Project was abandoned, the reclamation plan survived. Immediately following the first proposal, in 1970, the Nagasaki Development Plan was formulated with the aim of supplying fresh water to the municipalities surrounding the Bay.[10] The MAFF and the Governor of Nagasaki contended that the water quality of the artificial reservoir was suitable for industrial and agricultural use, and thus that the Nagasaki Development Plan was ideal to resolve the water shortage problem. However, the Water Quality Committee on the Nagasaki Development Plan at the Ministry of Health and Welfare questioned the quality of the water. Further, an assessment conducted by the neighbouring Saga Prefecture expressed concern about the potential significant environmental impact of the project. Local fishers and citizens also expressed strong opposition.[11] The Cabinet regarded this opposition as important and rejected the project, and in 1982 the Nagasaki Development Plan was also abandoned.[12]

The abandonment of the Nagasaki Development Plan was the decision of Iwazo Kaneko, who was the Minister of MAFF in the first Nakasone Cabinet (November 1982–December 1983). Kaneko was well-known as a member of the Diet special interest group for the protection of fisheries and had expressed opposition to the Nagasaki Development Plan for a long time.[13] While he wanted to terminate the reclamation plan, the Agricultural Structure Improvement Bureau, which was the most

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10 Fund for Regional Development in Isahaya Bay, above n 5, 161–76.

11 Nishio, above n 2,149–58; 東幹夫 [Mikio Azuma], 'これまでの沿岸環境改変の事例と課題～諫早湾干拓 [Cases and Problems of Modifications of Coastal Environment; Isahaya Bay Reclamation]' in Oceanographic Society of Japan (ed), *明日の沿岸環境を築く [Establishing a Future Coastal Environment]* (恒星社厚生閣 [Koseishay-Koseikakku], 1999) 50, 56.

12 Fund for Regional Development in Isahaya Bay, above n 5, 323–31.

13 Japan, *Diet Debates*, Permanent Committee on Budget at the House of Representatives, 19 March 1983, 19–23 (中野鉄造 [Tetsuzo Nakano], Clean Government Party: 森実孝郎 [Takao Morizane], Director General of Agricultural Structure Improvement Bureau at the Ministry of Agriculture, Forestry and Fisheries: 金子岩三 [Iwazo Kaneko], Minister of Agriculture, Forestry and Fisheries); Japan, *Diet Debates*, Permanent Committee on Agriculture, Forestry and Fisheries at the House of Councillors, 17 May 1983, 22–3 (下田京子 [Kyoko Shimoda], Communist Party: 森実孝郎 [Takao Morizane], Director General of Agricultural Structure Improvement Bureau at the Ministry of Agriculture, Forestry and Fisheries: 金子岩三 [Iwazo Kaneko], Minister of Agriculture, Forestry and Fisheries).

powerful section of the MAFF and dominated 50–70 per cent of the ministerial budget, strongly resisted the termination. As a result, Kaneko had to compromise with the bureaucracy, and continue with a reduced reclamation. Thus, he openly identified the need to create a substitute job for reclamation specialists in the MAFF as the main reason for the ISAKAN.[14]

National Isahaya Bay Reclamation Project

Despite the rejection of the second project, the idea of reclamation survived. However, the scale of the project was reduced to one third of that of the original Nagasaki Development Plan. In 1983, the MAFF contended that the ISAKAN could reduce the risk of flooding in the central area of Isahaya city.[15] This was an on-going concern because in 1957 there had been a huge flood in the city centre that killed 539 people.[16] It has since been revealed that this flooding occurred because a bridge and wood accidentally dammed the middle reach of the main river flowing through the city.[17] However, the MAFF and the Governor of Nagasaki alleged that the flooding was caused by the presence of the tidal flat at the mouth of the river, and that the ISAKAN could prevent similar flooding by reclaiming the tidal flat.[18] In the name of disaster

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14 Fund for Regional Development in Isahaya Bay, above n 5, 338–9; Yamashita, above n 9, 48–9; Japan, *Diet Debates*, Permanent Committee on Agriculture, Forestry and Fisheries at the House of Representatives, 22 September 1998, 10 (木幡弘道 [Kodo Kohata], Democratic Party); 五十嵐敬喜 [Takayoshi Igarashi] and 小川明雄 [Akio Ogawa], *図解 公共事業のしくみ [Illustration, Mechanism of Public Construction Works]* (東洋経済新報社 [Toyo Keizai Shinpo Sha], 1999), 100–1; '[ミニ時典] 農水省構造改善局とは [Mini Dictionary: About the Agricultural Structure Improvement Bureau at the Ministry of Agriculture, Fisheries and Forestry]', *Yomiuri Shimbun* (National), 4 March 2000, 2.

15 Fund for Regional Development in Isahaya Bay, above n 5, 331–6; Yamashita, above n 9, 49–50.

16 諫早市教育委員会社会教育課 [Social Education Section of Education Committee at the Isahaya City], *諫早水害誌 [Record of the Isahaya Flooding]* (諫早市 [Isahaya CIty], 1963), 4.

17 Japan, *Diet Debates*, Permanent Committee on Construction at the House of Representatives, 4 June 1997, 18–20 (石井紘基 [Koki Ishii], Democratic Party: 尾田栄章 [Hideaki Oda], Director General of River Bureau of Ministry of Construction: 太田信介 [Shinsuke Ota], Director of Project Planning Division of Planning Department of Agricultural Structure Improvement Bureau at the Ministry of Agriculture, Forestry and Fisheries: 亀井静香 [Shizuka Kamei], Minister of Construction); 長谷川熙 [Hiroshi Hasegawa], '騙されるな「防災のため」:諫早干拓推進論のウソ [Don't be Decived by "Disaster Prevention": Lies in Promotion of Isahaya Reclamation]' (1997) 1997.6.23 *Asahi Shimbun Weekly AERA* 21, 23.

18 Japan, *Diet Debates*, Permanent Committee on Settlement of Accounts at the House of Representatives (Subcommittee No.3), 27 May 1997, 3 (山本徹 [Toru Yamamoto], Director General of Agricultural Structure Improvement Bureau at the Ministry of Agriculture, Forestry and Fisheries); Headquarters for Emergency Rescue of Isahaya Tidal Flat, above n 3, 20–5.

prevention, by 1987 the fishers were compelled to relinquish the right to fish, which was the only right that could be used in court to stop the project, in exchange for a small amount of financial compensation.[19] In actuality, from the beginning, the MAFF's Committee on Disaster Prevention Technologies at Isahaya Bay questioned the rationality of the project's disaster prevention because the size of the reclamation was too small to realise desirable flood control at the mouth of the river.[20] However, this fact was not disclosed until 1997 and, in 1989, when the implementation of the public construction work started, the objective of the project changed from disaster prevention to the creation of farmland.[21]

The original plan was to reclaim 3550 ha on the west side of Isahaya Bay to create 1635 ha of farmland.[22] In 2002, the MAFF revised this plan and halved the size of farmland to be reclaimed to 816 ha.[23] The ISAKAN's public construction work started in 1989. In 1997, the ISAKAN segregated one third of the Bay by creating the estuary dam (completed in 1999) and, in 2007, completed the creation of two areas of farmland and an artificial reservoir behind the dam wall, as seen in Figure 4-3.[24] The cost of the public construction work was JPY 253.3 billion (AUD 3.17 billion), excluding the

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19 Fund for Regional Development in Isahaya Bay, above n 5, 363–81; 中嶌いづみ [Izumi Nakashima], '早期に水門を開き、有明の海を豊かに:インタビュー;松永秀訓 [Open the Gate Urgently, and Recover the Ariake Sea: Interview to Hidenori Matsunaga, Director of Konagai Fishery Cooperative]' (2008) 99(10) *Urban Issues (JPN)* 30, 39; 'いさかいの海 閉め切り１５年 諫干を語る・上／元小長井町漁協組合長 森文義さん (63):「天罰」"宝"売り人生狂う [Sea of Dispute − Talking about the ISAKAN at the point of 15 Years later since the Segregation Volume 1 − Fumiyoshi Mori (Age 63), Former Chief of Konagai Fishery Cooperative: 'Divine Punishment'-Sold Treasure and Ruined Myself]', *Nagasaki Newspaper* (online), 11 April 2012 <http://www.nagasaki-np.co.jp/news/k-isahaya/2012/04/11092511.shtml>.

20 農林水産省 諫早湾防災対策検討委員会 [Committee on Disaster Prevention Technologies at Isahaya Bay at the Ministry of Agriculture Forestry and Fisheries (JPN)], '中間報告 [Interim Report]' (Ministry of Agriculture Forestry and Fisheries (JPN), December 1983)

21 Japan, *Diet Debates*, Permanent Committee on Environment at the House of Representatives, 16 May 1997, 10–11 (藤木洋子 [Yoko Fujiki], Communist Party: 石井道子 [Michiko Ishii], Minister of the Environment): Yamashita, above n 9, 48–52.

22 Headquarters for Emergency Rescue of Isahaya Tidal Flat, above n 3, 24–5.

23 Ministry of Agriculture Forestry and Fisheries (JPN), *諫早湾干拓事業の概要 [Outline of Isahaya Bay Reclamation Project]* (18 March 2008) <http://www.maff.go.jp/kyusyu/nn/isahaya/outline/outline.html>.

24 有明海漁民・市民ネットワーク [Ariake Sea Network of Fishers and Citizens], *検証「諫早湾干拓事業」; 諫早湾干拓事業関連総合年表 [Verification of Isahaya Bay Reclamation Project; Comprehensive Chronological Table of Isahaya Bay Reclamation Project]* (28 July 2011) <http://www.justmystage.com/home/kenshou/gaiyou/nenpyo.html>

running costs of the project.[25]

4.1.3 Nature of the ISAKAN as an environmental problem

The ISAKAN is environmentally problematic in two respects: it caused a vast amount of environmental damage, and it also represents a case of very poor decision making.

Damage caused by the ISAKAN

The Isahaya Bay tidal flat was destroyed by the completion of the estuary dam in 1997, and this had a significant effect on both the natural environment and those people living in the area. From the viewpoint of environmental law, the most significant effect was the loss of rich biodiversity because the Isahaya Bay tidal flat had been one of the only muddy tidal flats remaining in the regional ecological unit that comprises the Ariake Sea, the Yatsushiro Sea, the Eastern China Sea and the Yellow Sea.[26] As a result of the destruction of the tidal flat, the endemic species of the Bay are thought to be extinct, and other indigenous species previously living on the tidal flat have been registered on the red list of threatened species.[27] A symbolic example of the affected species is the *Boleophthalmus pectinirostris (B.pectinirostris)*, a type of mudskipper endemic to the muddy tidal flats of this ecological region, which is now listed as being endangered.[28] In addition, the destruction of the tidal flat meant that migratory birds,

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25 Ministry of Agriculture Forestry and Fisheries (JPN), above n 23. Here, AUD 1 = JPY 80.

26 山下弘文 [Hirofumi Yamashita], *西日本の干潟：生命あふれる最後の楽園 [The Tidal Flat in Western Japan: The Last Paradise Full of Life]* (南方新社 [Nanpo Shinsha], 1996), 20–47; 佐藤正典 [Masanori Sato], '有明海の豊かさとその危機 [Richness of the Ariake Sea in Kyushu, Japan and its Crisis Caused by Human Impacts]' (2004) 10 *Saga Nature Study (JPN)* 129.

27 Sato, above n 26, 135–6, 143–4; 佐藤正典 [Masanori Sato], '干潟における多毛類の多様性 [Diversity of 'Polychaeta' in Tidal Flat]' (2006) 11 *Global Environment (JPN)* 191, 201–3; Ministry of the Environment (JPN), '鳥類、爬虫類、両生類及びその他無脊椎動物のレッドリストの見直しについて [About Revision of Red List on the Birds, Reptiles, Amphibia, and Other Invertebrates]' (Media Release, 22 December 2006); Ministry of the Environment (JPN), '魚類のレッドリストの新旧対照表 [Red List on the Fishes: Table of Comparison between Old and New Data]' (Revision of Red List on the Mammals, Brackishwater and Freshwater Fishes, Insects, Shellfishes, and Plant I & II: Reference No.11, 3 August 2007) <http://www.env.go.jp/press/file_view.php?serial=9955&hou_id=8648>.

28 Yamashita, above n 26, 20–47; Takeshi Takegaki, 'Threatened fishes of the world: Boleophthalmus pectinirostris (Linnaeus 1758) (Gobiidae)' (2008) 81 *Environmental Biology of Fishes* 373, 373.

which move from Russia to Australia, lost one of their most important feeding grounds.[29]

At the same time, the destruction of the tidal flat hugely affected the lives of humans in the area. The loss of the most important nursery for fish caused a dramatic reduction in fishery hauls in the Ariake Sea.[30] The destruction of the tidal flat also meant the loss of biological mechanisms for the purification of waste water in the area.[31] Consequently, the local public bodies had to create artificial substitutes.[32] However, the utilisation of a new public sewage system was not popular because local residents had to connect to it at their own expense.[33] Moreover, the loss of the tidal flat affected the local non-market economy of the area; local farmers were no longer able to catch fish from the tidal flat for family consumption.[34]

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29 花輪伸一 [Shinichi Hanawa], 東梅貞義 [Sadayoshi Tobai] and 古南幸弘 [Yukihiro Kominami], '渡り鳥の渡来地としての諫早湾干潟の重要性と潮受け堤防締め切りの影響 [The Importance of Isahaya Bay Tidal Flat as a Feeding Point of Migratory Birds and Influence of the Segregation of the Estuary]' in 諫早干潟緊急救済本部 [Headquarters for Emergency Rescue of Isahaya Tidal Flat] (ed), *国営諫早湾干拓事業に関する検討結果報告 [Report on Results of Examinations on the National Isahaya Bay Reclamation Project]* (諫早干潟緊急救済本部 [Headquarters for Emergency Rescue of Isahaya Tidal Flat], 1997) ; 磯崎博司 [Hiroji Isozaki], '国際条約に関する件 [Issues related to International Treaties]' in 諫早干潟緊急救済本部 [Headquarters for Emergency Rescue of Isahaya Tidal Flat] (ed), *国営諫早湾干拓事業に関する検討結果報告 [Report on Results of Examinations on the National Isahaya Bay Reclamation Project]* (諫早干潟緊急救済本部 [Headquarters for Emergency Rescue of Isahaya Tidal Flat], 1997) .

30 Nakashima, above n 19, 40–1; Sato, above n 26, 130, 133–6, 139–41.

31 Yamashita, above n 26, 58–9; Sato, above n 26, 132–3,136.

32 宇井純 [Jun Ui], '諫早干拓調整池の水質について [About Water Quality of the Artificial Reservoir of the Isahaya Reclamation]' in 諫早干潟緊急救済本部 [Headquarters for Emergency Rescue of Isahaya Tidal Flat] (ed), *国営諫早湾干拓事業に関する検討結果報告 [Report on Results of Examinations on the National Isahaya Bay Reclamation Project]* (諫早干潟緊急救済本部 [Headquarters for Emergency Rescue of Isahaya Tidal Flat], 1997) ; 安東毅 [Takeshi Ando], '調整池の水質に関わる問題 [Problems of Water Quality of the Artificial Reservoir]' in 諫早干潟緊急救済本部 [Headquarters for Emergency Rescue of Isahaya Tidal Flat] (ed), *国営諫早湾干拓事業に関する検討結果報告 [Report on Results of Examinations on the National Isahaya Bay Reclamation Project]* (諫早干潟緊急救済本部 [Headquarters for Emergency Rescue of Isahaya Tidal Flat], 1997) ; 農林水産省 諫早湾干拓調整池等水質委員会 [Committee for Water Quality of the Isahaya Reclamation Artificial Reservoir at the Ministry of Agriculture Forestry and Fisheries (JPN)], '検討結果の取りまとめ [Summary of Results of Examinations]' (December 2007) <http://www.maff.go.jp/kyusyu/nn/isahaya/news/20071226kentou.pdf>, 27.

33 Editorial, '諫早湾干拓はこのままでよいか [Should the Isahaya Reclamation keep on going?]', *Yomiuri Shimbun* (National), 17 April 1998, 3; Isahaya City (JPN), '諫早市下水道経営戦略プラン [Isahaya City Sewer System Management Strategy Plan]' (February 2007) <http://www.city.isahaya.nagasaki.jp/of/09_toshi/04_g_soumu/pdf/strategyplan.pdf>, 2; Nagasaki Prefecture (JPN), *第２期諫早湾干拓調整池水辺環境の保全と創造のための行動計画 [The Second Action Plan for Conservation and Creation of the Shore Environment of Isahaya Bay Reclamation Artificial Reservoir]* (Nagasaki Prefecture (JPN), 2008), 3.

34 鬼頭秀一 [Shuichi Kito], '環境運動/環境理念研究における『よそ者』論の射程： 諫早湾と奄美大島の『自然の権利』訴訟の事例を中心に [Range of "Stranger" Argument in Environmental Movement / Environment Philosophy Studies: Focusing on the Cases of "Rigtits of Nature" Litigation in Isahaya

Poor decision making

It is doubtful whether the government made a rational decision to proceed with the ISAKAN. Much of the damage that eventuated had been anticipated and warned of by academics and opponents of the project.[35] Moreover, if the government had followed the fate of the double dams approach in the Netherlands, from where the dam model had been imported in the 1950s, the negative effects would have been foreseen. In the Netherlands, the *raison d'être* of the estuary dam was rejected in the 1970s because it caused too much environmental destruction.[36] Consequently, in the late 1970s, the original plan to construct an estuary dam was converted into a plan for bridge that could close down the mouth of estuary and block the body of water at the approach of a storm.[37] This fact could have provided a strong reason not to segregate Isahaya Bay, to avoid unnecessary environmental damage. However, the government ignored any adverse information and promoted the project.

Behind the government's steamrolling of the ISAKAN, there were serious structural problems, including the lack of access to information, public participation and official procedures for revision. Information disclosure for this project was grossly insufficient. The MAFF concealed important information, including the futility of disaster prevention, and manipulated public perception by creating the impression that local farmers strongly demanded the project. In actuality, local farmers' real demands were

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Bay and Amami Oshima]' (1998) 4 *Journal of Environmental Sociology (JPN)* 44; 鬼頭秀一 [Shuichi Kito], '『かかわり』の中でいきる:新しい環境の哲学の視点から [Living in the Relations: From a Viewpoint of New Environmental Philosophy]' (Speech delivered at the 29th Session of Modern Buddhism Education Forum of Shingon Buddhism Chisan Denomination, Tokyo, 12 May 2004).

35 See, eg, Nishio, above n 2; 山下弘文 [Hirofumi Yamashita], *だれが干潟を守ったか： 有明海に生きる漁民と生物 [Who have protected the Tidal Flat?: Fishers and Lives in the Ariake Sea]* (農山漁村文化協会 [Cultural Association of Agricultural, Forestry and Fishery Villages] 1989); Yamashita, above n 26.

36 Province Zeeland, *Zeeland a striking area; the delta project — the Eastern Scheldt* (Office of information province of Zeeland, 1986), 7–14.

37 Tom Goemans and Tjebbe Visser, 'The Delta Project; The Netherlands Experience with a Megaproject for Flood Protection' (1987) 9 *Technology in Society* 97, 107.

for water supply rather than for reclaimed farmland.[38]

Moreover, the opportunity for public participation to form a common understanding about public interests on the project was quite limited. There was no effort to hear opinions from the public or to build a consensus among stakeholders. The MAFF and the Governor of Nagasaki Prefecture planned the ISAKAN without hearing opinions from the stakeholders, and then compelled the stakeholders to follow their plan.[39] The local farmers, whose real prior demand was for freshwater supply and the drainage of rice paddies, were persuaded to support the ISAKAN as an indirect instrument to realise their demands without the burden of costs.[40] The fishers around Isahaya Bay were compelled to give up their fishery rights on the understanding that there would be no serious environmental impact on the fishery from the project and under the assumption that the ISAKAN would be effective as an instrument of disaster prevention.[41]

Although after deciding on the project plan, the MAFF and Nagasaki Prefecture undertook an environmental impact assessment for the implementation of the public consultation work, they concentrated on the engineering aspects and did not examine the ecological aspects.[42] Further, by limiting participation in the process, ignoring

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38 Yamashita, above n 9, 48–52; Nakashima, above n 19, 39; 進藤眞人 [Mahito Shindo], *地域開発における意志決定過程の問題：国営諫早湾干拓事業から見えるもの* [Problems in the Decision-Making Processes of Rural Area Development Projects; Based on the Case Study of National Isahaya Bay Reclamation Project] (MSc Dissertation, Kyoto University, 2000), 28–30.

39 申東愛 [Dong-Ae Shin], '公共事業における公共性に関する研究：国営諫早湾土地改良事業を対象として [Study on the public works project and its nature of public welfare: Case study on the government-owned land reclamation by drainage in Isahaya, Nagasaki prefecture]' (2000) 2000 (27 Jan 2000) *Public Policy (JPN)* ppsaj/200001027, 13.

40 Shindo, above n 38, 21.

41 Nakashima, above n 19, 37–9.

42 Japan, *Diet Debates*, Permanent Committee on Environment at the House of Representatives, 27 February 2001, 11–13 (鮫島宗明 [Muneaki Samejima], Democratic Party: 沓掛哲男 [Tetsuo Kutsukake], Vice Minister of the Environment: 田中直紀 [Naoki Tanaka], Vice Minister of Agriculture Forestry and Fisheries: 佐藤準 [Jun Sato], Deputy Director-General of Rural Development Bureau at the Ministry of Agriculture Forestry and Fisheries); Japan, Diet Debates, Permanent Committee on Environment at the House of Councillors, 22 March 2001, 23–5 (岩佐恵美 [Emi Iwasa], Communist Party: 川口順子 [Yoriko Kawaguchi], Minister of the Environment: 中川雅治 [Masaharu Nakagawa], Director-General of Environmental Policy Bureau of Ministry of the Environment: 西尾哲茂 [Tetsushige Nishio], Director-General of Nature Conservation Bureau of Ministry of the Environment: 百足芳徳 [Yoshinori Mukade], Director-General of Planning Department of Rural Development Bureau at the Ministry of Agriculture Forestry and Fisheries).

comments from the public and underestimating potential damages, they concluded that the environmental impact of the ISAKAN would be negligible.[43]

In addition, there was neither a parliamentary check mechanism on the planning of public construction works nor a formal procedure through which to abandon the public construction works that had become unnecessary.[44] Although there were some internal mechanisms within the executive branch to check the proper implementation of individual projects, they were not effective. For instance, the Inspection Bureau on Administration at the Agency of Internal Affairs (at that time) questioned the effectiveness of the project in 1997, but it was too late by this stage to take action, and so the Bureau did not have any actual influence.[45]

4.2 Disputes over the ISAKAN

This section examines how the disputes over the ISAKAN became apparent, were brought to the review mechanisms and were settled, in chronological order. The chronology used in this section spans five periods: (i) from planning to the start of public construction work (1982–89); (ii) public construction work to the segregation of the Bay (1989–97); (iii) segregation of the Bay to significant fisheries damage

43 Shin, above n 39, 14; Azuma, above n 11, 53–61.

44 Igarashi and Ogawa, above n 14, 240–2; Japan, *Diet Debates*, House of Representatives, 12 June 1997, 1–4 (鳩山由紀夫 [Yukio Hatoyama], Democratic Party: 田野瀬良太郎 [Ryotaro Tanose], Liberal Democratic Party: 渡辺周 [Shu Watanabe], Democratic Party: 川内博史 [Hiroshi Kawauchi], Democratic Party: 辻第一 [Daiichi Tsuji], Communist Party: 仙谷由人 [Yoshito Sengoku], Democratic Party); Japan, *Diet Debates*, Special Committee on Administrative Reform at the House of Representatives, 20 April 1998, 13–14 (菅直人 [Naoto Kan], Democratic Party: 橋本龍太郎 [Ryutaro Hashimoto], Prime Minister : 小里貞利 [Sadatoshi Ozato], Minister of Internal Affairs); Japan, Diet Debates, Permanent Committee on Land, Infrastructure, Transport and Tourism at the House of Representatives, 11 March 2003, 7–10 (五十嵐敬喜 [Takayoshi Igarashi], Witness: 伴野豊 [Yutaka Banno], Democratic Party).

45 総務庁行政監察局 [Inspection Bureau on Administration at the Agency of Internal Affairs (JPN)], '大規模な農業基盤整備事業に関する行政監察結果に基づく勧告 [Reccommendations based on the Results of Inspection of Administrative Activities regarding Large-scale Agricultural Infrastructure Development Projects]' (28 February 1997); Ministry of Agriculture Forestry and Fisheries (JPN), '「大規模な農業基盤整備事業に関する行政監察結果に基づく勧告」に対する回答 [Response to the Reccommendations based on the Results of Inspection of Administrative Activities regarding Large-scale Agricultural Infrastructure Development Projects]' (1997), 1.

(1997–2000); (iv) fisheries damage to the change of government (2001–09); and (v) after the change of government (2009–).

The subjects of examination in this section are the stakeholders, experts, the Diet, the media and the review mechanisms. Here, the stakeholders are represented by the NGOs. NGOs and experts took central roles in the case, as discussed in the following paragraphs. The media is examined as it is a key institution for promoting executive transparency. The media referred to here is mainly the mass media, but regional and local media are included alongside national media. The Diet is examined as it is the key institution for executive accountability. The review mechanisms utilised for the ISAKAN case were the Environmental Dispute Coordination Commission (EDCC) and the court.

The NGOs in this case can be categorised into three major groups: the association of farmers, the association of fishers, and environmental groups. The association of farmers comprised rice farmers from the south coast of Isahaya Bay. The motivation of this group was to improve the poor drainage of their rice paddies and acquire a new water source. The achievement of these goals was supposed to be a by-product of the ISAKAN. The MAFF and Nagasaki Prefecture refused the direct resolution of farmers' problems in order to promote the ISAKAN, so this group decided to support the project for its indirect benefits to them.[46] The MAFF and this group worked in close liaison; and the MAFF's officers administered the office work of this group.[47]

In contrast, the other two groups are genuine NGOs. The association of fishers included many fishery cooperatives located along the entire coastline of the Ariake Sea.

[46] Hasegawa, above n 17, 23; Shindo, above n 38, 21, 26–9; 永尾俊彦 [Toshihiko Nagao], '農水省の策略に追い込まれた農民」: なぜ諫早の水門は開かないのか [Farmers Cornered by Stratagem of the MAFF: Why the Gates of Isahaya are not Opened?]' (2001) 356 (2001.3.23) *Weekly Kinyobi* 34, 35–6.

[47] Hasegawa, above n 17, 21–2; Shindo, above n 38, 17–18.

These fishery cooperatives exist not only in Nagasaki Prefecture, but also in Saga, Fukuoka and Kumamoto Prefectures. Historically, the fishery of Isahaya Bay has been recognised as an inseparable part of the Ariake Sea and for this reason, the series of reclamation projects was of common concern to all fishers in the Ariake Sea region.[48] The local groups that started their activities in the 1970s led the environmental groups, but national and international groups were also involved, especially after the segregation of the Bay.

Experts, including individual academics, researchers and academic societies have also taken important roles in the ISAKAN case. This was partly because the core environmental dispute was about scientific uncertainty, and partly because this issue was argued in the context of the improvement of public governance.[49] The field of experts ranged widely across the disciplines, including marine physics, biology, ecology, geology, chemistry, agricultural economics, political science and law. The type of contributions by experts also varied from publishing criticisms as individuals or societies with expertise, to taking part in administrative councils, to serving as temporary expert members of the EDCC, to presenting evidence in the court.

4.2.1 From planning to public construction work (1982–89)

During the period from the planning of the ISAKAN to the start of public construction work, there were few movements against the project. Regarding the Diet, because the shift from the Nagasaki Development Plan to the ISAKAN was led by the

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48 Nishio, above n 2; Fund for Regional Development in Isahaya Bay, above n 5; Yamashita, above n 9.

49 大塚直 [Tadashi Otsuka], '諫早湾干拓工事差止仮処分事件決定 [Case Comments: Preliminary Injunction against Isahaya Reclamation Construction Work]' (2007) 32 *Environmental Law Journal (JPN)* 90, 98; 片寄俊秀 [Toshihide Katayose] (ed), *諫早湾干潟の再生と賢明な利用: 国営諫早湾干拓事業の問題と代替案の提案 [In Search of Restoration and Wise Use of the Isahaya Bay Tidal Flat: Problems of the National Isahaya Bay Reclamation Project and Proposal of Alternative Uses]* (游学社 [Yugaku Sha], 1998); 五十嵐敬喜 [Takayoshi Igarashi] and 天野礼子 [Reiko Amano], *"公共事業コントロール法"を再提出 [Resubmission of the Public Construction Works Control Bill]* (11 April 2000) 長良川河口堰建設をやめさせる市民会議 [Nagaragawa Citizen's Coalition] <http://www.geocities.jp/nagaragawaday/press/p00-4-11.html>.

government, the decision was reported only in 1983.[50] From this date until the start of the public construction work, almost no action was taken by the Diet; from 1984 to 1989, the ISAKAN was mentioned only once in Diet Debates, when praising the abandonment of the Nagasaki Development Plan.[51] There was also no action by the court or the EDCC because these institutions do not accept cases until there has been actual loss or damage, or when there is a high probability of serious damage. As for the NGOs, the association of farmers maintained its position as a proponent of the project; the association of fishers had opposed the ISAKAN until compelled to abandon its rights to fish in the name of disaster prevention for city residents;[52] and environmental groups allied with the association of fishers were opposed to the ISAKAN, mainly by taking supportive roles.

Reflecting these positions, the media treated the ISAKAN as a project in progress. National media did not broadcast that there were problems in need of consideration.[53] In contrast, regional and local media frequently reported the progress of the project. However, in many cases, they were simply reporting the views of the MAFF and Nagasaki Prefecture.[54]

The potential problems remained apparent in scientific circles, where experts

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50 Japan, *Diet Debates*, Permanent Committee on Budget at the House of Representatives (Subcommittee No.5), 4 March 1983, 20–2 (中村重光 [Shigemitsu Nakamura], Socialist Party: 森実孝郎 [Takao Morizane], Director General of Agricultural Structure Improvement Bureau at the Ministry of Agriculture, Forestry and Fisheries: 金子岩三 [Iwazo Kaneko], Minister of Agriculture, Forestry and Fisheries); Japan, *Diet Debates*, Permanent Committee on Budget at the House of Representatives, 19 March 1983, 19–23 (中野鉄造 [Tetsuzo Nakano], Clean Government Party: 森実孝郎 [Takao Morizane], Director General of Agricultural Structure Improvement Bureau at the Ministry of Agriculture, Forestry and Fisheries: 金子岩三 [Iwazo Kaneko], Minister of Agriculture, Forestry and Fisheries); Japan, *Diet Debates*, Permanent Committee on Agriculture, Forestry and Fisheries at the House of Councillors, 17 May 1983, 22–3 (下田京子 [Kyoko Shimoda], Communist Party: 森実孝郎 [Takao Morizane], Director General of Agricultural Structure Improvement Bureau at the Ministry of Agriculture, Forestry and Fisheries: 金子岩三 [Iwazo Kaneko], Minister of Agriculture, Forestry and Fisheries).

51 Japan, *Diet Debates*, Permanent Committee on Agriculture, Forestry and Fisheries at the House of Representatives, 1 March 1984, 35 (中林佳子 [Yoshiko Nakabayashi], Communist Party)

52 Fund for Regional Development in Isahaya Bay, above n 5; Yamashita, above n 35; Nakashima, above n 19, 39.

53 According to the newspaper article search system at the National Diet Library (JPN), there was little coverage by national newspapers in this period.

54 Fund for Regional Development in Isahaya Bay, above n 5, 334–48, 364–89.

contributed to the Disaster Prevention Committee at the MAFF, and the environmental impact assessments conducted by the MAFF and Nagasaki Prefecture. In the former, the MAFF dissolved the Committee in the middle of the investigation and concealed its interim report.[55] In the latter, the experts who contributed to the assessments concluded that the environmental impacts would be not serious, but these experts were suspected of having been bribed by the MAFF.[56] The conclusion of the environmental impact assessment has been criticised for its under-estimation of the value of the Isahaya Bay tidal flat, due to its limited scope, lack of field research on the whole Ariake Sea region and doubtful scientific objectivity.[57]

4.2.2 From public construction work to the segregation of the Bay (1989–97)

Movements had yet to become significant in the period between the start of public construction work and the segregation. While the public construction work was underway, the signs of serious environmental damage were not obvious. Reflecting this apparent sense of calm, there was little media coverage because a 'smoothly run project' does not have news value.[58] Similarly, there is no record of any Diet Debate directly discussing the problems of the ISAKAN in this period.

Regarding the NGOs, the association of farmers regarded the project as a *fait accompli*, and celebrated the success of the project by publishing a record of its

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55 Japan, *Diet Debates*, Permanent Committee on Environment at the House of Representatives, 16 May 1997, 10–11 (藤木洋子 [Yoko Fujiki], Communist Party: 石井道子 [Michiko Ishii], Minister of the Environment); Yamashita, above n 9, 48–52.

56 横田一 [Hajime Yokota], '干拓を推進する御用学者の罪状：なぜ諫早の水門は開かないのか [Guilts of Academics who Promote the Reclamation: Why are the Gates of Isahaya not Opened?]' (2001) 356 (2001.3.23) *Weekly Kinyobi* 32, 32–3.

57 Azuma, above n 11, 59–61.

58 一柳洋 [Hiroshi Ichiyanagi], '”ギロチン”が落とされる前に警鐘を鳴らせ [Warn before being "Guillotined"]' (1997) 174 (1997.6.13) *Weekly Kinyobi* 20. According to the newspaper article search system at the National Diet Library (JPN), there were at most less than 10 mentions by major national newspapers in this period. However, the coverage of regional versions of the national newspapers was two to three times more.

history.[59] As for the association of fishers, only one fishery cooperative, located just outside the estuary dam, held demonstrations to protest the reduction in catch of *Atrina pectinata*, which is a bivalve traded for quite a high price. It was the local environmental groups that actively maintained public awareness of the problems of the ISAKAN. During this period, they built up national and international networks, raised the issue at conventions of parties of the Ramsar Convention, supported biological research of academics on the tidal flat, and continued to inform the media and politicians.[60]

It was also the local environmental groups who started environmental litigation on the ISAKAN with the *B.pectinirostris* case in July 1996. This case was an example of 'the rights of nature' litigation, in which a plaintiff sues on behalf of the lives of species whose existence is threatened by development projects.[61] This kind of lawsuit was new to Japan, and strongly influenced by similar lawsuits in America.[62] Two lawsuits were brought in Nagasaki District Court related to this case. The first utilised 'action for civil injunction' against the government (on behalf of the MAFF), and the second utilised 'action by inhabitant' against the government (on behalf of the MAFF), Nagasaki Prefecture and the Governors of Nagasaki Prefecture.[63] These actions are described fully in Subsection 3.3.2 above.

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59 Ariake Sea Network of Fishers and Citizens, above n 24. The published book was Fund for Regional Development in Isahaya Bay, above n 5.

60 Yamashita, above n 26; 日本湿地ネットワーク [Japan Wetlands Action Network], *JAWAN って何ですか？ [What is the JAWAN?]* (19 December 1999) <http://www.jawan.jp/old/jawanj/whatsjawan.html>.

61 鬼頭秀一 [Shuichi Kito], '日本における「自然の権利」運動を環境倫理学・環境社会学から意味づける [Interpret the 'Rights of Nature' Movements in Japan from viewpoints of Environmental Ethics and Environmental Sociology]' in 自然の権利セミナー報告書作成委員会 [Report Publishing Committee of the Rights of Nature Seminar] (ed), *報告 日本における「自然の権利」運動 第2集 [Report: "Rights of Nature" Movement in Japan; Volume 2]* (山洋社 [Sanyo Sha], 2004) vol 2, 97, 105–8.

62 山村恒年 [Tsunetoshi Yamamura], *検証しながら学ぶ環境法入門: その可能性と課題 [Introduction to Environmental Law and its Examination: Its Possibilities and Problems]* (昭和堂 [Showado], 2nd ed, 1999), 44–5.

63 「自然の権利」基金 [Foundation for 'Rights of Nature'], *諫早湾「自然の権利」訴訟;概要 [The Outline of Isahaya Bay 'Rights of Nature' Case]* (13 February 2009) <http://www.f-rn.org/images/pdf/isahayawan-gaiyo.pdf>

The hearing of the first lawsuit commenced in January 1997 and was finalised in March 2005. The court rejected the case based on the following interpretations: the environmental rights did not have a firm statutory basis; the destruction of the natural environment did not directly cause significant or urgent danger to the plaintiff; and the danger of flooding, which the plaintiff claimed to have been increased by the ISAKAN, remained abstract and was not specified in enough detail.[64]

The second lawsuit was filed in October 2000, the hearing commenced in January 2001 and was finalised in December 2008. As 'action by inhabitant' is the dispute resolution process specialised for examining the appropriateness of budgetary use, the main arguments in this lawsuit were about the economic efficiency of the ISAKAN.[65] Although acknowledging some inefficiency of budgetary expense, the court rejected the case. The reasoning was that the plaintiff had not exhausted an inhabitant audit, which is the prerequisite for the utilisation of 'action by inhabitant', for the full period the plaintiff they claimed. For the period in which the plaintiff had exhausted the inhabitant audit, the inefficiency of budgetary expense was not so serious as to admit illegality.[66]

4.2.3 From segregation of the Bay to the fisheries damage (1997–2000)

On 14 April 1997, the MAFF segregated one third of Isahaya Bay. This generated enormous environmental and social impacts. A nationally popular television news programme made the ISAKAN the symbol of unnecessary public construction works; on the night of the segregation, the programme opened with the scene of the shutting down of the Bay by the estuary dam. The video was so shocking that the anchor person

64 *ムツゴロウ訴訟：第一陣* [*Boleophthalmus pectinirostris'* Case: First Group], Nagasaki District Court (JPN), 平成 8(行ウ)5, 15 March 2005

65 *地方自治法* [Local Autonomy Law] (Japan) 17 April 1947, Law No 67 of S22, arts 242, 242-2; Foundation for 'Rights of Nature', above n 63, 3–4.

66 *ムツゴロウ訴訟：第二陣* [*Boleophthalmus pectinirostris'* Case: Second Group], Nagasaki District Court (JPN), 平成 12(行ウ)7, 15 December 2008

of the programme described the shutdown as a 'guillotine'. The programme also reported many of the problems of the ISAKAN, from the environmental damage potentially resulting from it, to the heavy financial burden on the national budget; the majority of citizens had not previously recognised this.[67] The broadcast caused many citizens to start questioning the appropriateness of the project.[68] After the 'guillotining' of the Bay, the media suddenly began covering the problems of the ISAKAN as one of the central issues of the day.[69] A nationwide opinion poll conducted in May 1997 showed that approximately 80 per cent of citizens (and 70 per cent of residents in Nagasaki Prefecture) demanded the revision of the ISAKAN, and approximately 60 per cent (55 per cent in Nagasaki) requested that the two gates of the estuary dam be opened.[70] The media thus took an important role in raising public awareness. However, simultaneously, much of the media reporting on this issue fell into sensationalism and exaggerated the conflict of interests between the farmers and other stakeholders.[71] This made it difficult to build a new consensus among stakeholders.

The opposition parties reacted quickly to the rising public awareness on the issue. A number of Diet Debates were held and a series of written interrogatories were

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67 テレビ朝日 [Television Asahi (JPN)], '特集：国営諫早湾干拓事業 [Feature: National Isahaya Bay Reclamation Project]', *News Station*, 14 April 1997 (久米宏 [Hiroshi Kume], Anchor person)

68 山下弘文 [Hirofumi Yamashita], '自民党政治のツケがまわった諫早湾干拓 [Isahaya Bay Reclamation; as a result of the Rule of Liberal Democratic Party]' (1997) 174 (1997.6.13) *Weekly Kinyobi* 18, 19; 辻淳夫 [Atsuo Tsuji], '諫早湾干拓事業見直しの緊急要請 [Emergent Request for Revision of Isahaya Bay Reclamation Project]' (2000) 69 (2000.10.14) *Japan Wetland Action Network News Letter* 5.

69 For instance, all national papers issued editorials that asked the revision of ISAKAN in 1997, and some of them followed up the issue in their editorials in the following years. See,eg, Editorial, 'だれのための干拓なのか [Reclamation for Whose Interests?]', *Asahi Shimbun* (National), 16 April 1997; Editorial, '諫早湾干拓：『ムツゴロウの海』を悼む [Isahaya Bay Reclamation: Lament "Sea of Boleophthalmus pectinirostris"]', *Mainichi Newspaper* (National), 23 April 1997; Editorial, '諫早干拓で失うものも多い [We Would Lose A Lot by the Isahaya Reclamation]', *Yomiuri Shimbun* (National), 13 May 1997; Editorial, '干拓地の水門開放は首相の決断で [Prime Minister should Decide to Open the Gates of the Estuary Dam]', *Nikkei Newspaper* (Tokyo), 19 May 1997; Editorial, '公共事業に撤退の法則を [Legalise the Procedure of Withdrawal from Public Construction Works]', *Sankei Newspaper* (Tokyo), 21 May 1997; Yomiuri Shimbun, above n 33; Editorial, '諫早湾堤防：水門を開ける決断を [Estuary Dam of Isahaya Bay; Decide to Open the Gates!]', *Asahi Shimbun* (National), 14 April 2000. According to the OPAC system of the National Diet Library (JPN), media coverage in journals in this period was over 97 references. Also, according to the newspaper article search system at the National Diet Library (JPN), there were 50 to 170 references by national newspapers (differs according to company) from April to July 1997.

70 '諫早湾干拓・本社世論調査 [Public Opinion Poll on Isahaya Bay Reclamation Project]', *Asahi Shimbun* (National), 28 May 1997.

71 Shindo, above n 38, 27–8, 40.

submitted.[72] The Democratic Party, which was formed in 1996, was especially active. Through the series of oral and written questions, it was revealed that there were many problems with the ISAKAN.[73] Throughout the interrogatories by the opposing parties, the government defended the suitability of the ISAKAN by claiming the discretion of the government on the budget and the local consensus on the project.[74] Although the problems revealed by the Diet were unable to stop the ISAKAN, they did provoke a minor revision of the project in 2002.[75]

Regarding the NGOs, the association of farmers was astonished by the unexpected public reaction, which strongly demanded the interruption of the project. In conjunction with the MAFF and the Nagasaki Prefecture, they recommenced promotion of the ISAKAN including gatherings, public relations efforts in the mass media and lobbying

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[72] According to the National Diet Record Research System (JPN), the number of Diet Debates held on this issue in this period was 35. The number of written interrogatories submitted in this period was six; 諫早湾・干拓事業 公式資料集 (NGO) [Isahaya Bay Reclamation Project Official Archive], *質問主意書 [Written Interrogatories]* (13 March 2004) <http://nonki.cside5.com/isahaya/seifu/seifu.html>.

[73] Japan, *Diet Debates*, Permanent Committee on Environment at the House of Representatives, 16 May 1997, 10–11 (藤木洋子 [Yoko Fujiki], Communist Party: 石井道子 [Michiko Ishii], Minister of the Environment); Japan, *Diet Debates*, Permanent Committee on Settlement of Accounts at the House of Representatives (Subcommittee No.3), 27 May 1997, 12–13 (仙石由人 [Yoshito Sengoku], Democratic Party: 山本徹 [Toru Yamamoto], Director General of Agricultural Structure Improvement Bureau at the Ministry of Agriculture, Forestry and Fisheries); Japan, *Diet Debates*, Permanent Committee on Construction at the House of Representatives, 4 June 1997, 18–20 (石井紘基 [Koki Ishii], Democratic Party: 尾田栄章 [Hideaki Oda], Director General of River Bureau of Ministry of Construction: 太田信介 [Shinsuke Ota], Director of Project Planning Division of Planning Department of Agricultural Structure Improvement Bureau at the Ministry of Agriculture, Forestry and Fisheries: 亀井静香 [Shizuka Kamei], Minister of Construction); Japan, *Written Interrogatory*, 'About National Isahaya Bay Reclamation Project', Submitted on 14 May 1997 (渡辺周 [Shu Watanabe], Democratic Party); Replied on 26 May 1997 (橋本龍太郎 [Ryutaro Hashimoto], Prime Minister); Japan, *Written Interrogatory*, 'About National Isahaya Bay Reclamation Project', Submitted on 18 June 1997 (笹山登生 [Tatsuo Sasayama], New Frontier Party: 川内博史 [Hiroshi Kawauchi], Democratic Party: 岩國哲人 [Tetsundo Iwakuni], Sun Party: 秋葉忠利 [Tadatoshi Akiba], Socialist Party: 吉井英勝 [Hidekatsu Yoshii], Communist Party); Replied on 22 July 1997 (橋本龍太郎 [Ryutaro Hashimoto], Prime Minister); Japan, *Written Interrogatory*, 'About National Isahaya Bay Reclamation Project', Submitted on 12 December 1997 (秋葉忠利 [Tadatoshi Akiba], Socialist Party: 川内博史 [Hiroshi Kawauchi], Democratic Party: 笹山登生 [Tatsuo Sasayama], New Frontier Party: 吉井英勝 [Hidekatsu Yoshii], Communist Party: 近藤昭一 [Shoichi Kondo], Democratic Party); Replied on 20 January 1998 (橋本龍太郎[Ryutaro Hashimoto], Prime Minister).

[74] See, eg, Japan, *Diet Debates*, Special Committee on Administrative Reform at the House of Representatives, 20 May 1997, 37 (梶山静六 [Seiroku Kajiyama], Chief Cabinet Secretary); Japan, *Diet Debates*, Permanent Committee on Construction at the House of Representatives, 4 June 1997, 20 (亀井静香 [Shizuka Kamei], Minister of Construction); Japan, *Diet Debates*, Permanent Committee on Health and Welfare at the House of Representatives, 16 May 1997, 22 (小泉純一郎 [Junichiro Koizumi], Minister of Health and Welfare); Japan, *Diet Debates*, Permanent Committee on Environment at the House of Representatives, 13 June 1997, 12 (石井道子 [Michiko Ishii], Minister of the Environment).

[75] See, eg, Japan, *Diet Debates*, Special Committee on Administrative Reform at the House of Representatives, 24 April 1998, 13 (川内博史 [Hiroshi Kawauchi], Democratic Party: 島村宜伸 [Yoshinobu Shimamura], Minister of Agriculture, Forestry and Fisheries).

to the Diet parties.[76] The association of fishers was not active partly because serious damage to the fisheries had not yet been revealed.[77]

In contrast, the environmental groups were very active. Local groups, while litigating the *B.pectinirostris* case, informed the media and politicians about the problems of the ISAKAN, held citizen meetings and involved experts.[78] Many national groups joined in the campaign for revision of the ISAKAN, which itself was led by local groups, and submitted a petition in October 1997 of 300 000 people who wished the gates to be opened immediately.[79] The alliance of environmental groups formed during this national campaign has remained to the present day. International groups were attracted by the national campaign because of the Ramsar Convention, the Convention on Biological Diversity and bilateral treaties on migratory birds. Consequently, the Goldman Environmental Prize — an American private foundation funded annual award for leaders in grassroots environmental protection, which is frequently cited as the 'Nobel Prize for Environment' or the 'Green Nobel Prize' — was awarded to the leader of a core local environmental group.[80]

The activities of the experts during this period centred on individual criticisms of the ISAKAN. A number of leading experts in various fields published criticisms of the

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76 Nagao, above n 46, 34; Hasegawa, above n 17, 21–2; Letter from Shigeki Yamasaki (President of Residential Proponent Group for Isahaya Bay Reclamation) to Democratic Party, 26 May 1997; available at 諫早湾・干拓事業 公式資料集 (NGO) [Isahaya Bay Reclamation Project Official Archive], *国営諫早湾干拓事業に関する公開質問状 [Open Letter about National Isahaya Bay Reclamation Project]* (26 May 1997) <http://nonki.cside5.com/isahaya/suisin/0526koukai-Q.html>.

77 Ariake Sea Network of Fishers and Citizens, above n 24.

78 See, eg, Headquarters for Emergency Rescue of Isahaya Tidal Flat, above n 3: Yamashita, above n 9: 諫早干潟緊急救済本部 [Headquarters for Emergency Rescue of Isahaya Tidal Flat] and 諫早干潟緊急救済東京事務所 [Tokyo Office for Emergency Rescue of Isahaya Tidal Flat], *Isahaya Higata Net; 活動予定・お知らせ・ニュース [Information 1997-2002]* (2 December 2007) <http://www.isahaya-higata.net/isa/contents/info-2002.html>.

79 World Wide Fund of Nature Japan Branch, *諫早湾干潟問題 [Isahaya Bay Tidal Flat Problem]* (2009) <https://www.wwf.or.jp/activities/nature/cat1122/cat1324/index.html>; 日本野鳥の会 [Wild Bird Society of Japan], '理事会声明 [Executive Board Appeal]' (Press Release, 27 May 1997); 日本自然保護協会 [The Nature Conservation Society of Japan], *諫早湾の埋め立て問題 [Isahaya Bay Reclamation Problem]* (14 December 2010) <http://www.nacsj.or.jp/katsudo/isahaya/>.

80 Goldman Environmental Prize, *Hirofumi Yamashita: Recipients* (1999) <http://www.goldmanprize.org/node/175>.

project.[81] Experts also contributed to the *B.pectinirostris* case by presenting scientific evidence as witnesses. The sudden and dramatic swing of public opinion against the ISAKAN also affected the court: in October 1999, the judges inspected evidence at the scene, which was quite an unusual step in the Japanese context.[82]

4.2.4 From fisheries damage to the change of government (2001–09)

By December 2000, the serious depletion of the fishery haul had become obvious, evident by the damage to seaweed in the Ariake Sea.[83] This further invigorated the actions of stakeholders, experts, and mechanisms for executive transparency and accountability. The association of fishers in the Ariake Sea region reacted to the new situation quickly. It campaigned to interrupt the project and open the gates, put pressure on the politicians, and blocked the construction site using ships. It also reunited with environmental groups to achieve the common objective of restoring the natural environment of Isahaya Bay.[84] Although the association of farmers organised counteractions, the pressure exerted by the association of fishers and environmental groups was much stronger, and consequently the MAFF established the Investigation Committee on Damage to Seaweed Production in the Ariake Sea (Seaweed Committee) in March 2001.[85]

The pressure from the association of fishers and environmental groups invigorated

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81 See, eg, Azuma, above n 11; 諫早干潟緊急救済本部 [Headquarters for Emergency Rescue of Isahaya Tidal Flat] (ed), *国営諫早湾干拓事業に関する検討結果報告 [Report on Results of Examinations on the National Isahaya Bay Reclamation Project]* (諫早干潟緊急救済本部 [Headquarters for Emergency Rescue of Isahaya Tidal Flat], 1997); Katayose, above n 49.

82 Foundation for 'Rights of Nature', above n 63, 1.

83 Ariake Sea Network of Fishers and Citizens, above n 24.

84 See, eg, 諫早干潟緊急救済本部 [Headquarters for Emergency Rescue of Isahaya Tidal Flat] and 諫早干潟緊急救済東京事務所 [Tokyo Office for Emergency Rescue of Isahaya Tidal Flat], *Isahaya Higata Net; Information: 「諫早湾干拓に疑問があります」街頭行動 1 月 28 日・長崎 [Demonstration for expressing question on Isahaya Bay Reclamation at Nagasaki 28 January 2001]* (2001) <http://www.isahaya-higata.net/isa/info/if010127nagasaki128.html>.

85 Fisheries Agency at the Ministry of Agriculture, Forestry and Fisheries (JPN), '農林水産省有明海ノリ不作等対策関係調査検討委員会の設置及び委員の選任について [About settlement and selected members of the Investigation Committee on Damages on Seaweed Production in the Ariake Sea at the Ministry of Agriculture, Forestry and Fisheries]' (Press Release, 26 February 2001).

the activities of the Diet further.[86] This time not only the opposition parties but also the government responded because the fishers were an important source of votes for the government.[87] In conjunction with the opposing parties, the government enacted the *Special Measures Law for Regeneration of Ariake and Yatsushiro Seas* in 2002.[88] Based on this law, the Ministry of Environment (MOE) established the Committee for Comprehensive Investigation and Evaluation of Ariake and Yatsushiro Seas (Ariake Sea Committee) in February 2003 to investigate the scientific causal relationships between the ISAKAN and damage to local fisheries.[89]

Although it did not always do so frequently or in detail, the media reported this information.[90] However, with the exception of efforts at the beginning of this period, the contribution made by the national mass media to motivate the public to join the movement was not high, partly because of its 'neutral' approach of equally reporting different positions without a critique.[91]

Conversely, the contribution of experts during this period was significant. Several leading scientists became members of the Seaweed Committee and the Ariake Sea

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86 According to the National Diet Record Research System (JPN), the number of Diet Debates held on this issue in this period was 177. The number of written interrogatories submitted in this period was 28: 諫早干潟緊急救済本部 [Headquarters for Emergency Rescue of Isahaya Tidal Flat] and 諫早干潟緊急救済東京事務所 [Tokyo Office for Emergency Rescue of Isahaya Tidal Flat], *Isahaya Higata Net; 諫早湾干拓問題関連 国会質問主意書・答弁書集 [Written Interrogatories on the Isahaya Bay Reclamation Problem]* (2008) <http://www.isahaya-higata.net/kokkai/shitsumon.shtml>; House of Representatives (JPN), *質問主意書・答弁書 [List of Written Interrogatories and Replies]* (6 April 2010) <http://www.shugiin.go.jp/index.nsf/html/index_shitsumon.htm>; House of Councillors (JPN), *質問主意書・答弁書一覧 [List of Written Interrogatories and Replies]* (6 April 2010) <http://www.sangiin.go.jp/japanese/joho1/kousei/syuisyo/171/syuisyo.htm>.

87 See, eg, Japan, *Diet Debates*, House of Representatives, 5 February 2001, 6–7 (森喜朗 [Yoshiro Mori], Prime Minister: 古賀誠 [Makoto Koga], Liberal Democratic Party).

88 *有明海及び八代海を再生するための特別措置に関する法律* [Law on Special Measures concerning Regeneration of Ariake and Yatsushiro Seas] (Japan) 29 November 2002, Law No 120 of H14. According to the National Diet Record Research System (JPN), record for the legislative process of this law, there were 93 Diet Debates in 2001 and 2002.

89 Ministry of the Environment (JPN), *有明海・八代海等総合調査評価委員会について [About the Committee for Comprehensive Investigation and Evaluation of Ariake and Yatsushiro Seas]* (2007) <http://www.env.go.jp/council/20ari-yatsu/gaiyo20.html >.

90 See, eg, Editorial, '有明ノリ異変：干拓との関係究明に全力を [Seaweed Damage in the Ariake Sea: Clarify the Causal Relationship between Isahaya Reclamation!]', *Yomiuri Shimbun* (National), 26 January 2001; Editorial, '有明海：水門を開けぬことには [Ariake Sea: Start from Opening the Gates]', *Asahi Shimbun* (National), 1 February 2001. According to the OPAC system of the National Diet Library (JPN), media coverage in journals in this period is over 242.

91 Regarding the neutral approach, see 森達也 [Tatsuya Mori] and 森巣博 [Hiroshi Morris], *ご臨終メディア [Mass Media on its Deathbed]* (集英社 [Shuei Sha], 2005), 15–17.

Committee. In March 2003, the Seaweed Committee issued its final report recommending that the MAFF open the two gates of the estuary dam, in order to verify the causal relationship between the ISAKAN and the fisheries damage in the Ariake Sea (the open-gate experiment).[92] In December 2006, the Ariake Sea Committee published its main report, which reaffirmed the necessity of the open-gate experiment.[93]

EDCC cause–effect adjudication

Regarding institutions for dispute resolution, the fishers and citizens utilised the EDCC and court during this period. In April 2003, 17 fishers in the three neighbouring prefectures tried to clarify the causal relationship between the ISAKAN and the damage to their fisheries. The chosen legal instrument for this purpose was the EDCC's cause–effect adjudication, which was designed for clarifying the causal relationship of environmental damage.[94] In general, there were three advantages to utilising the EDCC. Firstly, the EDCC conducted its investigation at its own discretion, including *ex officio* examination of evidence and *ex officio* inquiry.[95] Secondly, the EDCC had substantial

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92 農林水産省 有明海ノリ不作等対策関係調査検討委員会 [Investigation Committee on Damages on Seaweed Production in the Ariake Sea at the Ministry of Agriculture Forestry and Fisheries (JPN)], '最終報告書：有明海の漁業と環境の再生を願って [Final Report; For the Regeneration of Fishery Industry and Environment in the Ariake Sea]' (27 March 2003) <http://sy.studio-web.net/arisa/nousui/2005/nori3/ariakenori/negai/finalreport%28ariake-nori%29.htm>.

93 環境省 有明海・八代海総合調査評価委員会 [Committee for Comprehensive Investigation and Evaluation of Ariake and Yatsushiro Seas at the Ministry of the Environment (JPN)], '委員会報告 [Committee Report]' (21 December 2006) <http://www.env.go.jp/council/20ari-yatsu/rep061221/all.pdf>

94 公害等調整委員会事務局 [Secretariat of the Environmental Dispute Coordination Commission], '事件処理の経過 [Chronological Order of the Proceedings of Cause-effect Adjudication between National Isahaya Bay Reclamation Project and Fisheries Damages in the Ariake Sea]' (Media Release, 30 August 2005); *公害紛争処理法* [Law on Environmental Pollution Dispute Resolution] (Japan) 1 June 1970, Law No 108 of S45, arts 42-27–42-33; 加藤和夫 [Kazuo Kato] and 松井英隆 [Hidetaka Matsui], '和解・調停・仲裁：公害等調整委員会及び都道府県公害審査会における公害紛争の解決 [Conciliation, Mediation and Arbitration: Dispute Resolution by the Environmental DIspute Coordination Committee and Prefectural Pollution DIspute Examination Board]' in 小島武司 [Takeshi Kojima] (ed), *ADR の実際と理論Ⅱ [Theory and Practice of the ADR II]*, 日本比較法研究所研究叢書 [Japan Comparative Law Research Centre Research Series] (中央大学出版部 [Chuo University Press], 2005) 109, 121–2.

95 *公害紛争処理法* [Law on Environmental Pollution Dispute Resolution] (Japan) 1 June 1970, Law No 108 of S45, arts 27-2, 33, 40, 42-16, 42-18, 42-29–42-30, 52–5; *公害等調整委員会設置法* [Law for Establishment of the Environmental Dispute Coordination Commission] (Japan) 3 June 1972, Law No 52 of S47, arts 15–16; *鉱業等に係る土地利用の調整手続等に関する法律* [Law on Adjustment Procedures for Utilisation of Land for Mining and Other Industries] (Japan) 20 December 1950, Law No 292 of S25, art 33.

expertise on environmental issues.[96] Thirdly, the cost of utilising the EDCC was lower than that of judicial conciliation (one quarter to half the cost), and the cost of the EDCC's investigation was paid by the national budget.[97]

The ISAKAN case was one example in which the EDCC applied a dispute resolution instrument designed for civil disputes to administrative disputes. The core issue of this case was acknowledgement of the causal relationship between the segregation of the estuary and the fisheries damage to the entire Ariake Sea region. The EDCC acknowledged the existence of some of the claimed fisheries damage and the environmental alteration of the Ariake Sea because of the segregation. However, the EDCC stated that it could not conclusively prove a causal relationship between the ISAKAN and either the contamination of the Ariake Sea or the fisheries damage.[98] The ruling of the EDCC was due to the shortage of environmental data, the under-development of the scientific modelling method used by the expert members, and the low reliability of the fishers' anecdotal evidence.[99] Nevertheless, the EDCC did not conclude that the ISAKAN was not responsible for the damage; rather it emphasised that the causal relationship had not been proved.[100]

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96 *公害等調整委員会設置法* [Law for Establishment of the Environmental Dispute Coordination Commission] (Japan) 3 June 1972, Law No 52 of S47, arts 16, 18; Kato and Matsui, above n 94, 131–7; Interview with 六車明 [Akira Rokusha], former Examiner, Environmental Dispute Coordination Commission / former Judge (Tokyo, 14 July 2011).

97 *公害紛争処理法* [Law on Environmental Pollution Dispute Resolution] (Japan) 1 June 1970, Law No 108 of S45, arts 44–5; Kato and Matsui, above n 94, 139; 南博方 [Hiromasa Minami] and 大久保規子 [Noriko Okubo], *環境法 [Environmental Law]* (有斐閣 [Yuhikaku], 3rd ed, 2006), 250.

98 *諫早湾干拓漁業被害原因裁定* [Cause-effect Adjudication between the National Isahaya Bay Reclamation Project and Fisheries Damages in the Ariake Sea], Environmental Dispute Coordination Commission (JPN), 平成 15(ゲ)2・3, 30 August 2005, 13, 230–4.

99 荒井真一 [Shinichi Arai], '有明海の環境と諫早湾潮受堤防締切りによる影響: 公害等調整委員会の有明海における干拓事業漁業被害原因裁定の概要 [Environmental Impacts on Ariake-Sea by Isahaya-Bay Sea Reclamation Project: Outline of the Cause-Effect Adjudication of Fish Catches Damage by the Sea Reclamation Project in Ariake Sea by Environmental Dispute Coordination Commission]' (2006) 42(3) *Journal of Resources and Environment (JPN)* 100, 103–4; 河村浩 [Hiroshi Kawamura], '公害環境紛争処理の理論と実務：第五 公調委の過去の裁定例の検討 [Theory and Practice of Environmental Pollution Dispute Resolution: 5 Examination of the EDCC's Past Adjudication Cases]' (2007) (1243) *Law Times Report (JPN)* 23, 31–3.

100 *諫早湾干拓漁業被害原因裁定* [Cause-effect Adjudication between the National Isahaya Bay Reclamation Project and Fisheries Damages in the Ariake Sea], Environmental Dispute Coordination Commission (JPN), 平成 15(ゲ)2・3, 30 August 2005, 234–5; 加藤和夫 [Kazuo Kato], Chair of Environmental Dispute Coordination Commission (JPN), '談話 [Comments on the Cause-effect Adjudication between the National Isahaya Bay Reclamation Project and Fisheries Damages in the

'Revive Ariake Sea!' cases — phase one

In November 2002, 106 fishers from the Ariake Sea region brought the 'Revive Ariake Sea!' case (phase one) in the Saga District Court. The defendant was the government (on behalf of the MAFF).[101] This case sought to temporarily restrain the MAFF from implementing the public construction work through the action for civil injunction. However, utilising the instrument of the action for civil injunction was one of the technical problems of this case. The MAFF asserted that the implementation of public construction work could be evaluated as a part of an administrative act, and so was not appropriate for consideration under the framework of civil procedure. In the end, the court rejected this claim because the implementation of public construction work was evaluated as a real action (non-administrative act), and the temporary injunction was deemed to not seriously affect the MAFF's administrative decision made on the ISAKAN (administrative act).[102]

The key points of the case were the existence of damage in relation to the *locus standi*, and the causal relationship between the ISAKAN and the damage as a determinant of the temporary injunction. This case was brought to the Saga District Court (November 2002–August 2004), challenged in the same court (August 2004–January 2005), appealed to the Fukuoka High Court (January–May 2005), and further appealed to the Supreme Court (May–September 2005). In the former two lawsuits, the Saga District Court issued an injunction against the ISAKAN, but in the latter two lawsuits, the court dismissed the injunction.

In the first lawsuit, the Saga District Court acknowledged fisheries damage in the

Ariake Sea]' (Media Release, 30 August 2005).

101 「自然の権利」基金 [Foundation for 'Rights of Nature'], *「よみがえれ！有明」訴訟;概要 [The Outline of 'Revive Ariake Sea!' Case]* (13 February 2009) <http://www.f-rn.org/images/pdf/ariake-gaiyo.pdf>, 1.

102 *よみかえれ！有明訴訟：仮差止 (二審)* ['Revive Ariake Sea!' Case: Phase One (Second Instance)], Fukuoka High Court (JPN), 平成 17(ラ)41, 16 May 2005, reported in (H17) 53(3) Monthly Bulletin on Litigation 711.

Ariake Sea.[103] Regarding the examination of the causal relationship, the court used the 'high probability' criterion.[104] The court acknowledged the causal relationship based on the supportive evidence of the reports of the Seaweed Committee of the MAFF, the many academic studies on the Ariake Sea and the anecdotal evidence of the fishers. Consequently, the Saga District Court ordered a temporary injunction against the ISAKAN to allow the court to determine the illegality of the project itself.[105]

In the second lawsuit, the MAFF challenged the court decision in the first lawsuit by alleging that the temporary injunction, by stopping construction, would adversely affect the public interest advanced by the project. However, the Saga District Court maintained the original decision, reasoning that the claim of the MAFF had little rational basis.[106]

In the third lawsuit, the MAFF appealed to the Fukuoka High Court based on the same claim as the second lawsuit. In this lawsuit, the court denied fisheries damage by focusing on the small decline in the *amount* of seaweed production, ignoring the significant reduction in the *quality* of, and hence price obtainable for, the seaweed, and under-estimating the quantity of other fishery products. Concerning the effect on public interest in the project, the court questioned the rationality of this argument because of the negligible expected benefit, compared with the vast cost of the project and financial damage to fishers. Regarding the examination of the causal relationship, the court

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103 *よみかえれ！有明訴訟：仮差止 (一審)* ['Revive Ariake Sea!' Case: Phase One (First Instance)], Saga District Court (JPN), 平成 14(ヨ)79・86・平成 15(ヨ)3, 26 August 2004, reported in (H16) (1878) Law Cases Reports (JPN) 34.

104 The 'high probability' is the Supreme Court made criterion that 'the evidence can convince ordinary people to believe the existence of causal relationship without question', and widely applied for civil cases to acknowledge causal relationships; see *東大ルンバール事件* [Tokyo University Hospital's Lumbar Puncture Shock Case], Supreme Court of Japan, 昭和 48(オ)517, 24 October 1975, reported in (S50) 29(9) Supreme Court Reports (civil cases) 1417.

105 *よみかえれ！有明訴訟：仮差止 (一審)* ['Revive Ariake Sea!' Case: Phase One (First Instance)], Saga District Court (JPN), 平成 14(ヨ)79・86・平成 15(ヨ)3, 26 August 2004, reported in (H16) (1878) Law Cases Reports (JPN) 34.

106 *よみかえれ！有明訴訟：仮差止 (異議申立)* ['Revive Ariake Sea!' Case: Phase One (Challenge)], Saga District Court (JPN), 平成 16(モ)268, 12 January 2005, reported in (H17) 53(3) Monthly Bulletin on Litigation 766.

applied the criterion of ‘close to proof’, which is stricter than the criterion of ‘high probability’. In the examination, it admitted the rationality of the arguments based on qualitative data and emphasised the necessity of the open-gate experiment. However, the court denied the causal relationship between the ISAKAN and the damages, again citing the shortage of quantitative data. Consequently, the Fukuoka High Court reversed the original decision and discharged the injunction.[107]

In the fourth lawsuit, the fishers appealed to the Supreme Court. However, the Supreme Court maintained the decision of the Fukuoka High Court and rejected the appeal of the plaintiff. The Supreme Court also added, as a reason for its rejection of the appeal, that the injunction of the public construction work after the segregation of the estuary did not reduce the damages to the fishers.[108]

‘Revive Ariake Sea!’ cases — phase two

The rejection of the temporary injunction did not conclude the ‘Revive Ariake Sea!’ cases because some claims remained unexamined. Due to the near completion of the public construction works, there was a need to add new objectives to the action for civil injunction. By adding a new civil action, a phase two case of ‘Revive Ariake Sea!’ was begun. The main feature of the phase two case was that 1357 fishers and 1176 citizens pursued the remedy that the MAFF be ordered to remove the estuary dam (action for civil injunction) or open the gates of the dam (another civil action). The Saga District Court recommenced the ‘Revive Ariake Sea!’ case with the examination of experts on the Ariake Sea in February 2006, and delivered judgment in June 2008.[109]

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107 *よみかえれ！有明訴訟：仮差止 (二審)* ['Revive Ariake Sea!' Case: Phase One (Second Instance)], Fukuoka High Court (JPN), 平成 17(ラ)41, 16 May 2005, reported in (H17) 53(3) Monthly Bulletin on Litigation 711.

108 *よみかえれ！有明訴訟：仮差止 (最高裁)* ['Revive Ariake Sea!' Case: Phase One (Supreme Court)], Supreme Court of Japan, 平成 17(許)27, 30 September 2005, reported in (H17) 53(3) Monthly Bulletin on Litigation 773.

109 Foundation for ‘Rights of Nature’, above n 101, 2–3; 吉野隆二郎 [Ryujiro Yoshino], 'よみがえれ！有明海訴訟 ['Revive Ariake Sea!' Case]' in 日本弁護士連合会 [Japan Federation of Bar Associations]

With regards to the action for civil injunction, the court rejected the remedy of the removal of the estuary dam. As for the test of *locus standi*, the fishers, but not the citizens, passed. Regarding the examination of the causal relationship, the court applied the criterion of 'high probability', utilising the science of epidemiology to determine the causal relationship between the segregation and the environmental damage, and considered the already presented scientific evidence of academics, researchers, the Seaweed Committee, the EDCC and the Ariake Sea Committee. After a detailed examination, the court concluded that it was difficult to find clear epidemiological evidence that the ISAKAN caused the environmental alteration of the Ariake Sea, even though the court acknowledged that the project caused environmental damage within Isahaya Bay. The court then applied the test of a socially acceptable standard to decide whether the removal of the dam should be approved. The judgment was that the damages suffered by the fishers did not exceed the socially acceptable standard that would be required to approve the removal of the dam.[110]

Conversely, the court approved the remedy of opening the gates of the dam with the condition that it be limited to a five-year period. The court declared that the obstacle to verifying the causal relationship between the ISAKAN and the environmental alteration of the Ariake Sea was the refusal of the MAFF to implement the open-gate experiment. The court pointed out the huge imbalance between the plaintiff and the MAFF concerning information and financial ability to prove the causal relationship. The court also attached significance to the fact that the Seaweed Committee, the EDCC and the Fukuoka High Court had all demanded that the MAFF implement the open-gate

(ed), *公害・環境訴訟と弁護士の挑戦 [Environmental Litigation and Challenges of Barristers]* (法律文化社 [Horitsu Bunka Sha], 2010) 217, 223–4.

110 *よみかえれ！有明訴訟：開門 (一審判決)* ['Revive Ariake Sea!' Case: Phase Two (First Instance)], Saga District Court (JPN), 平成 14(ワ)467・515・平成 15(ワ)122・199・454・499・平成 16(ワ)156・375・平成 17(ワ)253・293・338・447・458, 27 June 2008, reported in (H20) (2014) Law Cases Reports (JPN) 3.

experiment to clarify the causal relationship. The refusal of the MAFF to implement the experiment was therefore regarded as an interference with the court procedure. To remedy this illegality, the court ordered the MAFF to open the gates for five years, after the finalisation of necessary preparation within three years. The court considered the possibility that the open-gate experiment might prove the non-existence of a causal relationship between the ISAKAN and the environmental alteration of the Ariake Sea, and so limited the duration to five years.[111]

The MAFF appealed to the Fukuoka High Court in July 2008, and, as a result, the case was not finalised by the judgment of the Saga District Court.[112] However, subsequently, the political situation in Japan changed in a way that the MAFF had never before experienced.

Review processes and experts

In this period, experts also actively contributed to the series of environmental dispute settlement procedures. Four experts were appointed in March 2004 as temporary members of the EDCC to examine the causal relationship between the ISAKAN and the environmental alternation of the Ariake Sea. In this case, they concluded their work in August 2005 after 10 sessions.[113] Related to this, five leading academics strongly criticised the decision of the EDCC to ignore the report of the four temporary expert members.[114] In addition, experts presented significant amounts of scientific evidence in the following 'Revive Ariake Sea' cases.[115] Academic societies further criticised the

111 Ibid.
112 Foundation for 'Rights of Nature', above n 101, 2–3.
113 Secretariat of the Environmental Dispute Coordination Commission, above n 94.
114 東幹夫 [Mikio Azuma] et al, '諫早湾干拓事業による有明海漁業の被害の原因裁定に対する意見書 [Opinion against the EDCC's Cause-effect Adjudication between Isahaya Bay Reclamation Project and Fisheries Damages in the Ariake Sea]' (Opinion Paper, 17 October 2005) <http://sy.studio-web.net/tok2-wv/docu/saitei/iken.pdf>, 1.
115 Foundation for 'Rights of Nature', above n 101.

ISAKAN because of the potential loss of a research subject.[116]

4.2.5 After the change of government (2009–)

In September 2009, Japan experienced the first effective change in democratic government since World War II. The Democratic Party, which is the main ruling party in the new government, promised the revision of large-scale public construction works in its election manifesto and was well known for questioning the ISAKAN.[117]

In March 2010, the new government and ruling parties launched a Consideration Committee on the ISAKAN that aimed to make a decision on whether the government would implement the open-gate experiment (Open-gate Committee).[118] The Minister of MAFF, who was the chair of the committee, announced that the Open-gate Committee would discuss whether the MAFF should discontinue the appeal to the High Court, and clarified that the internal interests of the MAFF bureaucracy would not rule the Committee.[119] Recalling that the *raison d'être* of the ISAKAN was the internal interests of the MAFF, rather than public interests, the stance of the new government was quite different from the former government of the Liberal Democratic Party.

At the end of April 2010, the Open-gate Committee recommended that the Minister of the MAFF implement the open-gate experiment. The final decision regarding the change of policy was supposed to be undertaken by the Minister and the Cabinet.[120]

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116 See, eg, Oceanographic Society of Japan (ed), *有明海の生態系再生をめざして [Heading for Restoration of Ecosystem in the Ariake Sea]* (恒星社厚生閣 [Koseishay Koseikakku], 2005).

117 Democratic Party of Japan, *民主党の政権政策 Manifesto2009 [Democratic Party's Manifesto 2009]* (Democratic Party of Japan, 2009), 4.

118 '諫干見えぬ「政治決断」 政府・与党検討委が初会合 地元の懸念解消が焦点 [Ambiguous Political Decision on the ISAKAN: First Meeting of the Consideration Committee that is comprised of the Government and Ruling Parties was Held; the focus is to resolve conflicts in the areas around the site]', *Nishinippon Newspaper* (Fukuoka), 10 March 2010, online <http://www.nishinippon.co.jp/wordbox/display/7264/>; Saga Prefecture (JPN), *こちら知事室です：平成 22 年 3 月 16 日(火曜日) 第 2 回諫早湾干拓事業検討委員会 [Office of Governor: 16 March 2010; the Second Consideration Committee on the Isahaya Bay Reclamation Project]* (16 March 2010) <http://www.saga-chiji.jp/genba/2010/10-3/10-3-16/index.html>.

119 Ministry of Agriculture Forestry and Fisheries (JPN), '赤松農林水産大臣記者会見概要 [Summary of Press Conference of Minister Akamatsu]' (Media Release, 9 March 2010).

120 '諫干長期開門を了承 政府・与党検討委 農相に２８日報告 [The Consideration Committee that is

However, on June 2010, the Prime Minister and Cabinet were replaced by other members of the Democratic Party, due to political reasons, so the momentum for a political resolution of the ISAKAN case was lost.[121] Nevertheless, this action by the Democratic government re-politicised the ISAKAN case, revitalised media coverage by the national mass media, and re-raised public awareness on the issue.[122]

In these circumstances, on 6 December 2010, the Fukuoka High Court delivered the judgment on the phase two lawsuit of the 'Revive Ariake Sea!' cases. The court reconfirmed the original judgment of the first instance and ordered the MAFF to implement a five-year open-gate experiment within three years. The main differences between the first and second instances were that the Fukuoka High Court acknowledged much wider damages to fisheries and the high probability of a causal relationship between the ISAKAN and fisheries damage.[123] Reflecting on the latter change of reasoning, Otsuka points out that the context of the limitation of the five-year period altered because the court had already acknowledged the causal relationship.[124]

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comprised of the Government and Ruling Parties Approved the Long Term Open-gate Experiment of the ISAKAN: Report to the Minister of Agriculture on 28th]', *Nishinippon Newspaper* (Fukuoka), 28 April 2010, online <http://www.nishinippon.co.jp/nnp/item/168268>; '諫早湾干拓、排水門の「長期開門調査が必要」 [The Long Term Open-gate Experiment is Necessary: Isahaya Bay Reclamation]', *Yomiuri Shimbun* (National), 27 April 2010, Online <http://www.yomiuri.co.jp/national/news/20100427-OYT1T01151.htm>.

121 Ariake Sea Network of Fishers and Citizens, above n 24.

122 See, eg, Japan, *Diet Debates*, Permanent Committee on Environment at the House of Councillors, 11 May 2010, 1–4 (中山恭子 [Kyoko Nakayama], Liberal Democratic Party: 郡司彰 [Akira Gunji], Vice Minister of Agriculture, Forestry and Fisheries). National newspapers followed the Open-gate Committee, and issued some editorials. Editorial, '諫早「長期開門」 解決すべき課題は少なくない [There are Obstacles to Implement the 'Long-term Open-gate' of the ISAKAN]', *Yomiuri Shimbun* (National), 29 April 2010, Online <http://www.yomiuri.co.jp/editorial/news/20100428-OYT1T01171.htm>; Editorial, '諫早の 開門調査は不可欠だ [Open-gate Experiment of the ISAKAN is Inevitable]', *Nikkei Newspaper* (Online), 2 May 2010 <http://www.nikkei.com/news/editorial/article/g=96958A96889DE2E4E5E2E0EAE2E2E2E0E2E7E0E2E3E28297EAE2E2E2;n=96948D819A938D96E38D8D8D8D8D>. According to the OPAC system of the National Diet Library (JPN), media coverage in journals in this period was 38 instances. Of these, 31 were published after this action.

123 *よみかえれ！有明訴訟：開門 (確定判決)* ['Revive Ariake Sea!' Case: Phase Two (Final Determination of Proceedings)], Fukuoka High Court (JPN), 平成 20(ネ)683, 6 December 2010, reported in (H22) (2102) Law Cases Reports (JPN) 55.

124 大塚直 [Tadashi Otsuka], '差止訴訟における因果関係と違法性の判断：諫早湾干拓地潮受堤防撤去等請求事件控訴審判決(福岡高判平成 22.12.6)を機縁として [Judgment of Causal Relationship and Illegality at Action for Injunction: Based on the Review on the Final Determination of Proceedings of the 'Revive Ariake Sea!' Case: Phase Two (Fukuoka High Court 2010.12.6)]' (2011) 83(7) *Statute Times (JPN)* 100, 101–4.

Stakeholders' reactions to this judgment were divided. While the MAFF and Nagasaki Prefecture requested a further appeal to the Supreme Court, neighbouring prefectures and the mass media demanded that the government accept the judgment.[125] On 15 December 2010, then Prime Minister Kan declared that the government had decided to accept the judgment of the Fukuoka High Court and to finalise the 'Revive Ariake Sea!' cases.[126] The Prime Minister himself took this initiative, which was evaluated by a majority of mass media and the public as a wise decision in the history of environmental governance in Japan.[127]

Since then, based on the final order of the Fukuoka High Court, the preparation for the open-gate experiment has been underway. However, at the time of writing, strong resistance from Nagasaki Prefecture and slow preparation by the MAFF were being

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[125] See, eg, 佐藤浩 [Hiroshi Sato], '諫早湾干拓事業：長期開門調査実施へ 農水省方針 [ISAKAN: the MAFF Would Express Implementation of Long-term Open-Gate Experiment, but at the same time Requests Further Appeal]', *Mainichi Newspaper* (National), 8 December 2010, Online <http://mainichi.jp/select/today/news/20101208k0000e040071000c.html >; 宮城征彦 [Masahiko Miyagi], '諫早湾干拓事業訴訟：２知事が政府に上告と上告断念を要請 [ISAKAN Lawsuit: Two Governors Requested the Government to and not to Further Appeal]', *Mainichi Newspaper* (National), 8 December 2010, Online <http://mainichi.jp/select/jiken/news/20101208k0000e010047000c.html>; Editorial, '諫早湾判決 政治の責任で開門を [Isahaya Bay Judgment:Reclamation: Open Gates by Political Accountability!]', *Mainichi Newspaper* (National), 9 December 2010, Online <http://mainichi.jp/select/opinion/editorial/news/20101209k0000m070100000c.html>; Editorial, '諫早湾干拓：開門を決断するときだ [ISAKAN: This is the Time to Decide to Open the Gates]', *Asahi Shimbun* (National), 9 December 2010, Online <http://www.asahi.com/paper/editorial20101207.html>; Editorial, '今度こそ諫早の開門調査を [This Time the Government should Implement the Open-gate Experiment of the ISAKAN]', *Nikkei Newspaper* (Online), 7 December 2010 <http://www.nikkei.com/news/editorial/article/g=96958A96889DE3EBE6EBE2E5EBE2E2E5E3E0E0E2E3E28297EAE2E2E2;n=96948D819A938D96E38D8D8D8D8D>.

[126] 菅直人 [Naoto Kan], Prime Minister (JPN), 'About the Acceptance of the Judgment of Fukuoka High Court regarding the ISAKAN Lawsuit' (Speech delivered at Emergent Press Conference, Tokyo, 15 December 2010).

[127] Japan, *Diet Debates*, Permanent Committee on Budget at the House of Representatives, 3 February 2011, 23–5 (遠山清彦 [Kiyohiko Toyama], New Clean Government Party: 菅直人 [Naoto Kan], Prime Minister: 鹿野道彦 [Michihiko Kano], Minister of Agriculture, Forestry and Fisheries); Editorial, '公共事業を問う諫早の教訓 [Lessons of the ISAKAN Require Revision of Current Scheme of Public Construction Works]', *Nikkei Newspaper* (Online), 16 December 2010 <http://www.nikkei.com/news/editorial/article/g=96958A96889DE0E2E2E3EAE5E3E2E3E4E3E0E0E2E3E28297EAE2E2E2;n=96948D819A938D96E38D8D8D8D8D >; Editorial, '諫早上告断念　開門へ向け作業を急げ [Acceptance of the High Court Judgment: Hurry the Preparation for the Open Gates!]', *Mainichi Newspaper* (National), 16 December 2010, Online <http://mainichi.jp/select/opinion/editorial/news/20101216k0000m070136000c.html>; 野口武則 [Takenori Noguchi], '毎日新聞世論調査 [Result of National Opinion Poll conducted by Mainichi News Paper on 18‐19 December 2010]', *Mainichi Newspaper* (Online), 20 December 2010 <http://mainichi.jp/select/seiji/news/20101220ddm001010082000c.html>. In this opinion poll, 59% supported the Prime Minister's decision, while 30% did not.

criticised as attempting to sabotage the implementation of the final court order.[128]

4.3 Effectiveness and efficiency of dispute resolution

When considering the resolution of an environmental dispute, it is crucial to evaluate the effectiveness and efficiency of the whole process because delay in resolution makes the recovery of environmental damages difficult. Thus, if a scheme for environmental dispute resolution does not provide a remedy in a timely manner, this implies the need for reform of the scheme. From this viewpoint, this section analyses the effectiveness and efficiency of dispute resolution of the ISAKAN case. Following this, the potential of an Environmental Ombudsman to improve environmental dispute resolution is discussed.

4.3.1 Analysis of effectiveness and efficiency

This subsection analyses the effectiveness and efficiency of the dispute resolution of the ISAKAN case from a holistic perspective. Firstly, the roles of the stakeholders and experts, as main actors in the disputes, are evaluated. Secondly, the functionalities of the Diet and the mass media, as public institutions for executive accountability and transparency, are examined. Finally, the efficacy of the EDCC and the court, as the

[128] Japan, *Diet Debates*, Permanent Committee on Agriculture, Forestry and Fisheries at the House of Councillors, 22 March 2012, 19–20 (福岡資麿 [Takamaro Fukuoka], Liberal Democratic Party: 鹿野道彦 [Michihiko Kano], Minister of Agriculture, Forestry and Fisheries: 森本哲生 [Tetsuo Morimoto], Parliamentary Secretary for Agriculture, Forestry and Fisheries); Japan, *Diet Debates*, Permanent Committee on Agriculture, Forestry and Fisheries at the House of Councillors, 28 March 2012, 15–16 (紙智子 [Tomoko Kami], Communist Party: 鹿野道彦 [Michihiko Kano], Minister of Agriculture, Forestry and Fisheries: 森本哲生 [Tetsuo Morimoto], Parliamentary Secretary for Agriculture, Forestry and Fisheries); 堀良一 [Ryoichi Hori], '諫早湾開門と、よみがえれ！有明訴訟の今 [Current Situation of the Open-gate of the ISAKAN and the 'Rivive Ariake Sea!' Lawsuit]' (2012) 8 (January) *Ramnet-J Newsletter* 1, 1; 取違剛 [Tsuyoshi Torichigai], '諫早湾干拓事業：有明訴訟原告団、九州農政局に漁業被害救済など要望 [ISAKAN: Plaintiff of the 'Revive Ariake Sea!' Lawsuit Requires Kyushu Office of the MAFF to Rescue Fisheries Damage and Clarify the Schedule for the Open-gate]', *Mainichi Newspaper* (Saga), 27 April 2012, Online <http://mainichi.jp/area/saga/news/20120427ddlk41040488000c.html>; Ministry of Agriculture Forestry and Fisheries (JPN), '鹿野農林水産大臣記者会見概要 [Summary of Press Conference of Minister Kano]' (Media Release, 6 April 2012).

review mechanisms, are analysed.

Stakeholders and experts

The role of NGOs in the ISAKAN case was central, especially in the environmental litigation in which they represented stakeholders as parties. However, as seen in Section 4.2, the association of farmers was a kind of liaison agency of the MAFF. This meant that the decision maker of the ISAKAN, — that is, the MAFF — was not neutral and its decision was strongly biased. Such lack of neutrality caused a lack of evidence-based consensus building among these stakeholders, which was the fundamental problem of public participation in the ISAKAN.

In Japanese bureaucracy, it is common for decision makers to be biased because the bureaucrats tend to take on the role of protector of certain industries, with the purpose of securing their post-retirement employment in these industries.[129] This was at the heart of the structural problems in the quality of Japanese environmental administrative decision making in the case discussed here. As mentioned in Subsection 2.1.2, biased decision making is synonymous with maladministration. Further, as detailed in Subsection 3.1.5, biased decision making contradicts with the presumption of current judicial review mechanisms; that is, the absolute reliance on the administrative branch. Therefore, dealing with such a contradicted situation was an underlying focus of this entire case.

In contrast, the NGOs, comprising the association of fishers and the local

[129] Igarashi and Ogawa, above n 14, 66–71, 142–4; 新藤宗幸 [Muneyuki Shindo], *行政指導:官庁と業界のあいだ [Administrative Guidance: Between Administrative bodies and Industries]* (岩波書店 [Iwanami Shoten], 1992), 105–29; Karel van Wolferen, *日本／権力構造の謎 上 [The Enigma of Japanese Power: People and Politics in a Stateless Nation; Volume 1]* (篠原勝 [Masaru Shinohara] trans, 早川書房 [Hayakawa Shobo], 1990), 102–5; 飯尾潤 [Jun Iio], *日本の統治構造：官僚内閣制から議院内閣制へ [The Governance Structure of Japan: From Cabinet System Dominated by Bureaucrats to Parliamentary Cabinet System]* (中央公論新社 [Chuo Koron Shinsha], 2007), 73–5; 古賀茂明 [Shigeaki Koga], *日本中枢の崩壊 [Collapse of the Pivot of Japan]* (講談社 [Kodan Sha], 2011), 90–2,146–50.

environmental groups, were the groups that have been most affected by the project. Regardless of the monopolisation of public interests by the MAFF, the fact that these genuine NGOs led the efforts to promote administrative law accountability showed how crucial their existence is in an environmental dispute resolution.

The other significant group in this case study was the scientific experts. Experts have been an on-going feature throughout the long history of the ISAKAN. Some of them manipulated data to advance the interests of the MAFF in proceeding with the public construction work.[130] However, the majority participated in a professional manner and contributed to increasing transparency around the project. Since the first environmental litigation on environmental pollution in the late 1960s, experts in Japan have made enormous voluntary contributions to clarifying the causal relationships between pollution and environmental damage.[131] The ISAKAN case is an example of this worthy tradition.

The Diet and the media

It was after the segregation of Isahaya Bay in 1997 when the Diet started to scrutinise the executive's role in the ISAKAN case. Although the pursuit of political accountability at the Diet did not directly provide the resolution, it formed the basis of Prime Minister Kan's decision to accept the judgment by the Fukuoka High Court. In addition to this, the prestige of the Diet itself played an important background role. According to barristers involved in the ISAKAN case, while the relevant agencies refused to disclose information to ordinary people, they were willing to disclose

130 Japan, Diet Debates, Permanent Committee on Environment at the House of Representatives, 3 April 2001, 25 (鮫島宗明 [Muneaki Samejima], Democratic Party).

131 See, eg, 宇井純 [Jun Ui], *公害原論 I [Philosophy of Environmental Pollution; Volume 1]* (亜紀書房 [Aki Shobo], 1971); 庄司光 [Hikaru Shoji] and 宮本憲一 [Kenichi Miyamoto], *日本の公害 [Environmental Pollution in Japan]* (岩波書店 [Iwanami Shoten], 1975); 都留重人 [Shigeto Tsuru] (ed), *世界の公害地図 上 [Global Map of Environmental Pollution; Volume 1]* (岩波書店 [Iwanami Shoten], 1977); 都留重人 [Shigeto Tsuru] (ed), *世界の公害地図 下 [Global Map of Environmental Pollution; Volume 2]* (岩波書店 [Iwanami Shoten], 1977).

information when members of the Diet requested they do so.[132]

Similarly, the contribution of the national mass media was quite limited until the segregation of the Bay. Prior to this, it was silent regarding the problems, such as those at the planning stage. Still, the role of the media was crucial in raising public awareness when it did start to broadcast concerns over the project. Importantly, however, the national mass media tended to frame the case as a stereotypical conflict of interests among stakeholders. This was especially problematic since the mass media's reports tended to rely on information contained in media releases from the MAFF and Nagasaki Prefecture, and did not reflect the facts revealed by the Diet Debates.[133] This prevented the development of sufficient public pressure on the government to stop the project.

The Environmental Dispute Coordination Commission

As shown above, the EDCC's cause–effect adjudication, which did not examine the liability of the MAFF to implement the open-gate examination, was strongly criticised by the experts in the area. The NGOs also refused to accept the EDCC's adjudication and expressed doubt about the independence of the EDCC in its handling of the case.[134]

For an administrative review mechanism, such an evaluation of their independence

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[132] Interview with 吉野隆二郎 [Ryujiro Yoshino], Barrister, 'Revive Ariake Sea!' Case (Chikushi, 18 July 2011); Interview with 魚住昭三 [Shozo Uozumi], Barrister, 'Boleophthalmus pectinirostris' and 'Revive Ariake Sea!' Cases (Nagasaki, 19 July 2011).

[133] For instance, as detailed in Subsection 4.1.2, the cause of large flooding in 1957 was not related to the Isahaya Bay tidal flat. This was confirmed at the Diet Debate on 16 May 1997. Regardless, the MAFF and Nagasaki Prefecture continued to emphasise the fear of flooding, and some mass media kept diffusing their words as if there were a risk of flooding. See, eg, Editorial, '諫早湾開門 憂いなく す備えは当然だ [Open-gate of the ISAKAN: It is Natural to Remove Worries] ', *Nishinippon Newspaper* (Fukuoka), 29 April 2010, online <http://www.nishinippon.co.jp/nnp/item/168590>; '諫早干拓ルポ:普天間問題と酷似する構図 [Report on the ISAKAN: Quite Similar Structure to the Problem of Futenma American Marines' Base]', *Sankei Newspaper* (Online), 17 May 2010 <http://sankei.jp.msn.com/politics/policy/100517/plc1005170051000-n1.htm>; Editorial, '「諫早」上告断念 見切り発車の開門では困る ['ISAKAN' Acceptance of the Fukuoka High Court Judgment Without Thorough Consideration is Troublesome]', *Yomiuri Shimbun* (National), 16 December 2010, Online <http://www.yomiuri.co.jp/editorial/news/20101215-OYT1T01126>.

[134] 有明海漁民・市民ネットワーク [Ariake Sea Network of Fishers and Citizens], '公害等調整委員会の偏向裁定に対する抗議声明 [Protest Declaration against the Environmental Dispute Coordination Commission's Self-willed Adjudication]' in 諫早干潟緊急救済東京事務所 [Tokyo Office for Emergency Rescue of Isahaya Tidal Flat] (ed), *諫早湾干拓・原因裁定を検証する：本当に「因果関係は不明」なのか [Verifying the EDCC's Cause-effect Adjudication between Isahaya Bay Reclamation Project and Fisheries Damages in the Ariake Sea; Is the causal relationship really unclear?]* (諫早干潟緊急救済東京事務所 [Tokyo Office for Emergency Rescue of Isahaya Tidal Flat], 2005) 31, 35.

is concerning. As mentioned in Subsection 3.3.1, the EDCC does not have its own permanent staff — the MAFF seconds its staff to the EDCC's secretariat and the EDCC relies on the MAFF's expertise in certain cases.[135] It is also well known that bureaucrats in Japan are primarily loyal to their ministries, and seconded personnel tend to work towards maintaining and expanding the internal interests of those ministries.[136] Even under this institutional setting, if a dispute is among purely private bodies, there might not be a serious problem. However, if one party is an administrative body, conflicts of interest become a strong possibility, such as in the EDCC's handling of administrative disputes, in which its seconded staff's mother ministries play central roles. Therefore, the Isahaya Bay case can be said to show the EDCC's limited ability to handle administrative disputes.

Disputing this, Akira Rokusha, a former Examiner at the EDCC, denied any partiality in decisions made by the EDCC.[137] However, regardless of the actual morality of individual officers at the EDCC, the apparent institutional setting, which invokes doubt about the EDCC's impartiality, is problematic.

The court

The environmental litigation discussed in this case study reveals the realities of the way in which the court is used for resolving environmental administrative disputes. The first lawsuit in the *B.pectinirostris* case shows a typical example of the difficulty of bringing public environmental litigation in the conservation domain. The legal interest

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135 河村浩 [Hiroshi Kawamura], '公害環境紛争処理の理論と実務：第一 公害紛争処理制度の俯瞰 [Theory and Practice of Environmental Pollution Dispute Resolution: 1 Overview of Resolution System of Environmental Pollution Conflicts]' (2007) (1238) *Law Times Report (JPN)* 93, 95; 六車明 [Akira Rokusha], '公害等調整委員会における環境紛争解決手続の特色: 豊島事件の調停成立を契機に考える [Distinctive Features of the Resolution Procedure of Environmental Dispute Coordination Commission; At the Conclusion of Mediation of Teshima Case] ' (2000) (1035) *Law Times Report (JPN)* 91, 96.

136 Iio, above n 129, 40–50, 67–8; Koga, above n 129, 146–7; Karel van Wolferen, *日本／権力構造の謎 下 [The Enigma of Japanese Power: People and Politics in a Stateless Nation; Volume 2]* (篠原勝 [Masaru Shinohara] trans, 早川書房 [Hayakawa Shobo], 1990), 211–12.

137 Interview with 六車明 [Akira Rokusha], former Examiner, Environmental Dispute Coordination Commission / former Judge (Tokyo, 14 July 2011).

of ordinary citizens who wished to conserve the natural environment was clearly denied. In the 'Revive Ariake Sea!' cases, it was the fishers of the Ariake Sea region who prevented the complete exclusion of the public from the lawsuits. However, without this group, it was highly likely that the test of legal interest would have closed the way for the public to utilise judicial resolutions.

In the 'Revive Ariake Sea!' cases, the central issue was who bore the burden of proof in demonstrating the causal relationship. In phase one, the MAFF held that this burden lay on the fishers, as the plaintiffs in a civil procedure. In actuality, the Fukuoka High Court had set a very high hurdle for the plaintiff to prove. However, such burden on the plaintiff was criticised from the viewpoint of the impartial treatment of parties and the stance that the precautionary principle required the shift of onus in environmental litigation with respect to cases with scientific uncertainty.[138] Further, the additional reasoning of the Supreme Court in phase one, which denied the legal interest of actual recoverability, is questionable because it would prevent practically any restoration of environmental destruction under the principle of non-stay of execution.[139]

By contrast, in phase two, the Saga District Court considered the enormous imbalance of power and information and placed the burden of proof on the MAFF. This seems to reflect the fact that a certain number of judges do not apply the rules of adversarial mechanism strictly when one party is an administrative office.[140]

Regarding the nature of the lawsuits, the ISAKAN case was located on the boundary of civil and administrative procedures because one party was an administrative office. Due to the impossibility of obtaining judicial review with respect to administrative

[138] Otsuka, above n 49, 100–4.
[139] Ibid, 103.
[140] Interview with 六車明 [Akira Rokusha], former Examiner, Environmental Dispute Coordination Commission / former Judge (Tokyo, 14 July 2011).

planning, most of the lawsuits were processed as civil procedure. However, as one lawsuit of action by inhabitants showed, their true nature was that of administrative procedure. Therefore, it is beneficial to discuss the ISAKAN case further from the viewpoint of administrative procedure.

First, the ISAKAN case reconfirmed the irrationality of denying judicial review in administrative planning cases. The exclusion of administrative planning from the subjects of judicial review has been criticised on the following basis. It is standard operating procedure for projects to revise their original plans when something unexpected happens. The refusal to allow any examination of the original plan means that once a problem has begun, the damages can become very significant. For the sake of accountability, although it might be difficult for the court to step into political issues, the court needs to be able to examine the appropriateness of administrative decision-making processes.[141]

In the ISAKAN case, regardless of the problems with public participation, local NGOs had to wait to lodge the first lawsuit 14 years after the declaration of the plan, and seven years after the commencement of the public construction work, due to the need to demonstrate concrete damage by the ISAKAN. Further, fishers had to wait an additional six years to take their first action, until concrete fisheries damage was apparent. Considering the importance of the prevention of damage in an environmental dispute, this arrangement should be considered to be ineffective.

Secondly, the ISAKAN case illustrated the irrationality of the principle of non-stay of execution. As Harada points out, the nature of the legal interest in dispute in

[141] 原田尚彦 [Naohiko Harada], '行政裁量権雑感 [Impressions on the issue of Administrative Discretion]' in 兼子仁 [Masashi Kaneko] and 宮崎良夫 [Yoshio Miyazaki] (eds), *行政法学の現状分析: 高柳信一先生古稀記念論集 [Situation Analysis of Administrative Law Studies: Essays in 70th Anniversary of Shinichi Takayanagi]* (勁草書房 [Keiso Shobo], 1991) 193, 217.

environmental litigation is the public interest rather than individual interests. Thus the application of the principle of stay of execution, which could have suspended the promotion of the public construction work at the time of lodgement of the lawsuit, is required.[142] In the ISAKAN case, if the principle of stay of execution had been applied, the court would have avoided over-complicating the situation and generated enough time for judicial examinations.

Thirdly, the ISAKAN case revealed another structural problem in the lawsuit arrangements. The state budgetary mechanism does not require payment of lawsuit costs from the ministerial budget, thereby encouraging administrative offices to appeal cases over public construction works, regardless of the burden on the national budget. Under Abe's proposal, it would be necessary to amend this financial mechanism to discourage the waste of taxes for unnecessary public construction works.[143] Due to this problem with the existing financial mechanism, the 'Revive Ariake Sea!' case took an extra year for phase one, and an extra two and a half years for phase two. Indeed, the case would have continued for much longer had Prime Minister Kan not made his decision to finalise the case at the second instance. In conjunction with the principle of non-stay of execution, this delay in resolution by the court led to significant environmental damage. The principle of non-stay of execution should only be applied when a quick resolution, unlikely to cause any serious environmental damage, is achievable. Therefore, based on the ISAKAN case, the current means by which the court is used to resolve administrative disputes in relation to the environment can be considered to be inefficient.

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142 原田尚彦 [Naohiko Harada], *環境法 [Environmental Law]* (弘文堂 [Kobundo], Revised ed, 1994), 272–4.

143 阿部泰隆 [Yasutaka Abe], '環境法(学)の(期待される)未来像 [Future Prospects of Environmental Law and Its Studies]' in 大塚直 [Tadashi Otsuka] and 北村喜宣 [Yoshinobu Kitamura] (eds), *環境法学の挑戦: 淡路剛久教授・阿部泰隆教授還暦記念 [Challenges of Environmental Law Studies: Essays in Celebration of the 60th Anniversaries of Professor Takehisa Awaji and Professor Ysutaka Abe]* (日本評論社 [Nippon Hyoron Sha], 2002) 371, 385–6.

It should be noted, however, that the independence of the court procedures, including hearing witnesses, on-site inspections and taking evidence, made it possible for the court, during the phase two lawsuits, to expose the maladministration of the MAFF in the ISAKAN case, and the court's power to apply laws remedied the illegal conduct. Thus, there can be no doubt that the court is of central importance to administrative environmental dispute resolution.

4.3.2 Potential of an Environmental Ombudsman

The fundamental question of this thesis is whether the current review mechanisms for administrative environmental decision making are effective and efficient for comprehensively resolving environmental disputes in Japan. The ISAKAN case allows the following conclusions to be drawn.

In the ISAKAN case, the two main environmental issues were the damage caused by the project and the problems with the decision-making processes. The EDCC examined the causal relationship between the project and damage. Here, the EDCC can be regarded as a substituted internal merits review. In fact, like internal merits review, its impartiality was criticised. Meanwhile, the court closely examined the damage as well. However, neither the EDCC nor the court adequately examined the decision-making processes of the project, or the rationality of the original decision itself. This was partly owing to the limitations of the civil procedure which was applied for the ISAKAN case. This suggests a need for a new review mechanism for administrative law accountability.

The creation of an Environmental Ombudsman has the potential to fill this lacuna. As detailed in Subsection 2.3.1, Ombudsman review could improve the quality of administrative law accountability. Considering the nature of environmental disputes, which require prevention of actual damage, the provision of a swift resolution via an

Ombudsman is attractive, especially in relation to the lack of speed of the current review scheme in Japan. In view of this, the expectation for an Ombudsman in the environmental field is high. Had an Environmental Ombudsman existed and functioned properly at the time, the administrative decision of the ISAKAN might have been very different from the current result.

However, to validate this claim, it is necessary to clarify the role of an Environmental Ombudsman and to examine whether such expectations of an Environmental Ombudsman are appropriate. The following chapters detail the characteristics and functionality of Environmental Ombudsman.

Chapter 5: Emergence of the Environmental Ombudsman

The Environmental Ombudsman is a specialised form of the Ombudsman institution. Although Subsection 2.3.1 outlined the role of the Ombudsman as a mechanism for administrative law accountability, further detail is needed to allow for a comprehensive understanding of this institution. Through focusing on the institutional aspects of the Ombudsman, this chapter aims to reveal the characteristics of the Environmental Ombudsman both in general and specifically in relation to the jurisdictions to be examined.

This chapter is divided into seven sections. Section 5.1 provides an overview of the history, diffusion and diversification of the Ombudsman institution. Section 5.2 explains the general characteristics of the Environmental Ombudsman. Following this, Sections 5.3–5.5 describe the specific characteristics of the Environmental Ombudsman in the three jurisdictions (the Australian Capital Territory, New Zealand and Hungary) that are studied in this thesis. Further, Sections 5.6 addresses the existing institutions that are relevant to the Ombudsman scheme in Japan. These sections examine the institutional settings of the Ombudsman institutions and review statistical data on their activities. Section 5.7 concludes the chapter.

5.1 The Ombudsman

The institution of ‘Ombudsman’ has been variously defined across a range of

jurisdictions, reflecting the rapid global penetration of the concept since the 1950s.[1] Thus, it is necessary to clarify the definition of the term 'Ombudsman' in this thesis. For this purpose, this section details the emergence of the Ombudsman, the global diffusion of the institution, the institution's development of independence and impartiality and the diversification of the Ombudsman models.

5.1.1 Emergence of the Ombudsman

The modern Ombudsman institution developed in Sweden. The origin of the modern Ombudsman is the Supreme Procurator ('*Högste Ombudsmannen*'), established by King Charles XII in 1713.[2] This innovation is thought to have been influenced by the office of Chief Justice ('*Qadi al Qudat*') of the Ottoman Empire. Charles XII defected from Sweden to the Ottoman Empire between 1709 and 1713.[3] The office of *Qadi al Qudat*, which remains much as it was in the eighteenth century in Islamic judicial systems, ensures the rule of Islamic law regarding the activities of public servants, utilising examination of complaints from people against public servants. In 1719, after the death of Charles XII, the office was renamed as Chancellor of Justice ('*Justitiekansler'* (JK)), but the main features of the *Högste Ombudsmannen* were maintained.[4]

The JK was established as a part of the executive, and is regarded as similar to the Attorney-General in common law countries. The primary task of the JK has not been to guard individual rights, but to secure the interests of the executive. Thus, its exercise of power has tended to be affected by the decisions of the government of the time.

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1 Roy Gregory and Philip Giddings, 'The Ombudsman Institution: Growth and Development' in Roy Gregory and Philip Giddings (eds), *Righting Wrongs: The Ombudsman in Six Continents*, International Institute of Administrative Sciences Monographs (IOS Press, 2000) 1, 7–11; International Ombudsman Institute, *The History and Development of the Public Sector Ombudsman Office* (2007) <http://www.law.ualberta.ca/centres/ioi/About-the-I.O.I./History-and-Development.php>.

2 Sten Rudholm, 'Sweden's Guardians of the Law: The Chancellor of Justice' in Donald Cameron Rowat (ed), *The Ombudsman: Citizen's Defender* (Allen and Unwin, 2nd ed, 1968) 17, 17.

3 Ibrahim al-Wahab, *The Swedish Institution of Ombudsman: An Instrument of Human Rights* (LiberFörlag, 1979), 24–5.

4 Victor Pickl, 'Islamic Roots of Ombudsman System' (1987) 6 *Ombudsman Journal* 101, 103–5.

Throughout the eighteenth century, Sweden experienced a process of political evolution, from a system of absolute monarchy to parliamentary democracy. In this situation, the JK was mostly appointed by the King and, as a consequence, the Parliament and the people held feelings of distrust towards it. However, from 1766 to 1772, the Parliament appointed the JK because of a temporary shift of power. The experience of having the JK appointed by the Parliament is considered a milestone, which motivated the Parliament and the people to found the modern institution of the Ombudsman.[5] At the same time, in Sweden, the *Freedom of Press Act* of 1766 (SWE) established the principle of access by the public to all governmental documents. The political shift was finalised in 1809 by the creation of a Constitution that introduced a division of power between the King and the Parliament. This Constitution established the office of the Parliamentary Ombudsman (‘*Justitieombudsman*’: henceforth referred to as JO) as an officer of the Parliament. The JO is not only independent of the government but also of the Parliament in relation to the exercise of power. The JO controls and supervises governmental officials, as does the JK, on the behalf of the Parliament. However, the 1809 Constitution did not abolish the JK. Thus, in Sweden, there are two kinds of institution that control and supervise public servants: the JO operates on behalf of the Parliament and the people, and the JK operates on behalf of the executive.[6]

A unique feature of the modern Ombudsman institution is that it is an institution of the Parliament and the people. Institutions serving the executive (or the monarch), with authority to control and supervise public servants, have existed all over the world since ancient times. For example, there were the ‘Eyes and Ears of the King’ in the Achaemenid Persian Empire (BC 522–) and Imperial Oversight Advisors (‘*Control Yuan*’) in the Qin

5 al-Wahab, above n 3, 25–6.

6 Alfred Bexelius, 'Sweden's Guardians of the Law: The Ombudsman for Civil Affairs' in Donald Cameron Rowat (ed), *The Ombudsman: Citizen's Defender* (Allen and Unwin, 2nd ed, 1968) 22, 23–5; *Tryckfrihetsförordning* [The Freedom of the Press Act] (Sweden) 2 December 1766, SFS 1949; 105.

Dynasty of China (BC 221–).[7] Even the *Qadi al Qudat*, which influenced the JK, is an example of this type of institution. However, the Parliamentary Ombudsman differs precisely because it serves a parliamentary democracy. Thus, the Ombudsman was born as a result of the development of democracy in Europe.

5.1.2 Global diffusion of the Ombudsman institution

The diffusion of the institution of the modern Ombudsman beyond Sweden's borders commenced in Scandinavia. The only country to adopt the Ombudsman institution outside Sweden before World War II was Finland. After World War II, Denmark introduced this institution in 1955, and Norway followed in 1962. The first major expansion of the institution occurred from the 1960s to the early 1980s. This was followed by a second wave in the 1990s. As a result, the number of countries with an Ombudsman at national level increased from 21 in 1983 to 120 in 2004.[8]

During the first wave of expansion, many common law jurisdictions introduced the Ombudsman: for example, New Zealand (1962); Tanzania (1966); the United Kingdom (1967); certain North American states and provinces (1967–80); Ghana (1969); Fiji (1972); Indian states (1972–76); Australian states and Commonwealth (1972–78); Zambia (1973); Nigeria (1975); Jamaica (1978) and so on. The diffusion of the Ombudsman was not limited to Scandinavian or common law countries. A significant number of civil law jurisdictions introduced an Ombudsman during the same period. These included France (1973); Austria (1976); Portugal (1976); Ireland (1981); the Netherlands (1981) and Spain (1981). [9]

The second wave of expansion, in the 1990s, followed the end of the Cold War, when

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7 Ali Farazmand, 'Administration of the Persian Achaemenid World-State Empire: Implications for Modern Public Administration' (1998) 21 *International Journal of Public Administration* 25, 47; Ulf Lundvik, 'A Brief Survey of the History of the Ombudsman' (1982) 2 *Ombudsman Journal* 85, 85.

8 International Ombudsman Institute, above n 1.

9 Gregory and Giddings, above n 1, 19–20.

many Eastern European countries introduced an Ombudsman. These countries included: Poland (1987); Hungary (1993); Russia (1996) and Romania (1997). This wave was not limited to Eastern Europe but crossed to Latin America, East Asia, Africa and back to Western Europe. The countries that applied the Ombudsman concept in this period in Latin America included Colombia (1991); Costa Rica (1992); Mexico (1993); Argentina (1993); Honduras (1995) and Peru (1995). Those in East Asia included Hong Kong (1989); Taiwan (1992); South Korea (1994) and Thailand (1999). African countries adopting an Ombudsman institution included Senegal (1991); Tunisia (1992); Cameroon (1992); South Africa (1996) and Botswana (1997). In Western Europe, the concept was accepted by Cyprus (1991); Belgium (1995); Malta (1995) and the European Union (1995).[10]

Through these two waves of global diffusion, the institution of the Ombudsman became a truly global phenomenon. It is now common to have this institution at either national or sub-national levels, especially in jurisdictions with a democratic system of government. However, there are some exceptions to adoption among countries with a highly developed democratic society, such as in the case of Japan.

Background to global diffusion

There are several reasons for the global diffusion of the Ombudsman institution. The most important of these are the two aspects of the structural evolution of modern democracy, described below. In addition to this, changes in the international political situation are thought to have triggered the two waves of global diffusion of the Ombudsman institution.

The rising awareness of the importance of human rights after World War II created the

[10] Ibid.

circumstances for the changes that resulted in the first wave of global diffusion. The wide recognition of the tragic results of neglect of individual rights during World War II led the newly created United Nations to seek to protect human rights. In 1948, the Universal Declaration of Human Rights (UDHR) proclaimed protection of human rights from abuses of state power, through the establishment of the rule of law.[11] The UDHR listed basic and universal human rights to be protected, including the right to be protected from discrimination (art 7). In 1966, general human rights treaties were adopted based on the UDHR; namely, the International Covenant on Civil and Political Rights (ICCPR), its first Optional Protocol, and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[12]

These treaties are significant to the Ombudsman institution because they regulate the relationship between government and its citizens in each jurisdiction. The effectiveness of these treaties depends on whether a country incorporates them into its domestic system of human rights law.[13] The Ombudsman institution utilises international human rights law as a standard for judgment on the fairness and rationality of administrative activities.[14] Even when some international human rights obligations are not incorporated into domestic law, the Ombudsman may use them for guidance in the interpretation of domestic law, as a basis for judgment, or as sources to fill lacunae of law.[15] The international human rights that the Ombudsman utilises include not only civil and political rights, such as the prohibition of discrimination on grounds of race, colour or sex

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11 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, Supp No 13, UN Doc A/810 at 71 (1948), Preamble.

12 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 302 (entered into force 23 March 1976); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976).

13 Linda C. Reif, *The Ombudsman, Good Governance and the International Human Rights System*, International Studies in Human Rights (Martinus Nijhoff Publishers, 2004), 112–13, 105–6.

14 Linda C. Reif, 'Ombudsman and Human Rights Protection and Promotion in the Caribbean: Issues and Strategies' in Victor Ayeni, Linda Reif and Hayden Thomas (eds), *Strengthening Ombudsman and Human Rights Institutions in Commonwealth Small and Island States: The Caribbean Experience* (Commonwealth Secretariat 2000) 160, 163.

15 Reif, above n 13, 108–110.

(ICCPR, art 2(1)), but also economic, social and cultural rights, such as the right to an adequate standard of living (ICESCR, art 11).[16] Among these rights, the protection of economic, social and cultural rights by the Ombudsman is thought to be significant because it is often the case that utilisation of the courts and administrative tribunals for securing these rights is not available or realistic. Moreover, in some jurisdictions, the Ombudsman is bestowed with the functions of a human rights commission, or its mandate includes human rights protection and promotion.[17] In other countries, the right to complain against the government is regarded as one of the basic human rights.[18]

International human rights law also had a certain influence on the diffusion of the Ombudsman institution. First, following the proclamation of the UDHR, the United Nations Commission on Human Rights (UNCHR) hosted a series of seminars that focused on the problems of the illegal exercise or abuse of administrative authority, protection of human rights in the administration of justice and the realisation of various rights. These seminar series promoted the diffusion of the Ombudsman institution to common law countries.[19] Secondly, the first Optional Protocol of the ICCPR created the individual right of submission of complaints to the UN Human Rights Committee about a state's breaches of obligations under the ICCPR.[20] This Protocol raised awareness of the concept of Ombudsman through international debates that lasted until the Optional Protocol entered into force in 1976.[21] Thirdly, an Ombudsman with the function of a human rights commission was created in Portugal and Spain. This variation then spread

16 Reif, above n 14, 167–8; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976).

17 Reif, above n 13, 99, 8–9.

18 Australia is one of such jurisdictions. See, John McMillan, 'The Ombudsman and The Rule of Law' (2005) 44 *AIAL Forum* 1, 3–4.

19 al-Wahab, above n 3,138–9; J. F. Northey, 'New Zealand's Parliamentary Commissioner' in Donald Cameron Rowat (ed), *The Ombudsman: Citizen's Defender* (Allen and Unwin, 2nd ed, 1968) 127, 131.

20 *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 302 (entered into force 23 March 1976).

21 al-Wahab, above n 3,139–40.

into other jurisdictions, exemplified by the Latin American countries.[22]

The shift from the police state to the welfare state in the middle of the twentieth century, which occurred mainly in jurisdictions that were familiar with democracy, generated the other circumstance that encouraged the diffusion of the Ombudsman. This shift dramatically increased the responsibilities of government and created the need for adjustment to the new situation. Under this expansion of governmental roles and responsibilities, there was an increased potential for conflict between the government and individuals over the influence of administrative decisions on individual rights.[23] Although breaches of human rights in welfare states might not be common, the problem of maladministration remained to be resolved through guaranteeing accountability and quality of governance.[24] However, in the welfare state, prevention of maladministration is not simple because, in many cases, statutes are not detailed enough to provide clear criteria for each cases.[25] Thus, there were demands for an Ombudsman to deal with the problem of maladministration, which courts could not handle well.[26]

From an international political perspective, the end of colonialism also influenced the first wave of diffusion. From the end of World War II to the early 1980s, decolonisation pushed newly independent countries to introduce the Ombudsman institution to build a firm basis for modern democracy.[27] In jurisdictions that were new to democracy, the protection of human rights has been the main role of the Ombudsman. It was often the

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22 Rief, above n 13, 8–9, 88–89.
23 al-Wahab, above n 3, 140.
24 Marten Oosting, 'Protecting the Integrity and Independence of the Ombudsman Institution: The Global Perspective' in Linda C. Reif (ed), *The International Ombudsman Yearbook Volume 5 2001* (Kluwer Law International, 2002) 13, 24.
25 Kerstin André, 'The Ombudsman — Meeting Today's Changing Needs' in International Ombudsman Institute and Linda C. Reif (eds), *The International Ombudsman Yearbook Volume 7, 2003* (Kluwer Law International, 2005) 42, 46.
26 Oosting, above n 24, 24–5; Marten Oosting, 'The Ombudsman and His Environment: A Global View' in Linda C. Reif (ed), *The International Ombudsman Anthology: Selected Writings from the International Ombudsman Institute* (Kluwer Law International, 1999) 1, 3–4.
27 Sir John Robertson, 'The Ombudsman Around the World' in International Ombudsman Institute and Linda C. Reif (eds), *The International Ombudsman Yearbook Volume 2, 1998* (Kluwer Law International, 1999) 112, 114.

case that the Ombudsman needed to start from education and dissemination of information about fundamental rights, which are the basis of the rule of law.[28]

The end of the Cold War played a part in the second wave of diffusion. During the Cold War, many countries were constrained in their development of democratic institutions by the power struggle between the superpowers.[29] The end of the Cold War played some part in the liberation of countries from the direct and indirect control of the superpowers.[30] The number of human rights commissions increased significantly after the end of the Cold War.[31] The diffusion of the Ombudsman to Eastern Europe, Latin America, Africa and East Asia can be explained in this context. The diffusion in Western Europe is assumed to have been influenced by the creation of the European Union Ombudsman.

5.1.3 Independence of the classical Ombudsman

The Ombudsman institution that followed the Swedish JO and diffused all over the world is often called the 'classical Ombudsman'. The role of the classical Ombudsman as a review mechanism for administrative law accountability was detailed in Subsection 2.3.3. Although the Ombudsman institution is now widespread, there is a range of differences in the powers bestowed on individual Ombudsman, reflecting the global diffusion.[32] In this subsection, other significant features of the Ombudsman — impartiality and independence — are detailed and the influence of global diffusion on

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28 Oosting, above n 24, 24–5.

29 Connie Peck, *Sustainable Peace: The Role of the UN and Regional Organizations in Preventing Conflict*, Carnegie Commission on Preventing Deadly Conflict Series (Rowman & Littlefield Publishers, 1998), 5–6.

30 Ibid, 249; Roger Normand and Sarah Zaidi, *Human Rights at the UN: The Political History of Universal Justice*, United Nations Intellectual History Project Series (Indiana University Press, 2008), 316–23.

31 Reif, above n 13, 83.

32 For instance, in the UK and France the public access to the Ombudsman has been exceptionally limited: in these countries the access to the Ombudsman requires a form of petition to the members of the Parliament. *Parliamentary Commissioner Act 1967* (UK) c 13, s 6(3); Mediator of the French Republic, *The Mediator: What are his missions?* (29 June 2011) <http://mdr.defenseurdesdroits.fr/en-citoyen-01-01-01.html>.

them is explored.

Impartiality and independence

Impartiality is a crucial factor in the classical Ombudsman model. Although the classical Ombudsman ultimately serves the public, this does not mean the Ombudsman is on the citizen's side, or on the government's.[33] Rather, the Ombudsman should make an unbiased and unprejudiced decision based on a rational assessment of the evidence.[34]

To be impartial, the classical Ombudsman needs to be independent.[35] This independence can be expressed in several ways. First, the Ombudsman should be 'independent from the executive arm of government' as a parliamentary or legislative officer.[36] Secondly, it should be free from direction by the legislature in the implementation of duties.[37] Thirdly, it should have enough powers and resources to perform its duties, which includes powers of investigation.[38] Fourthly is 'personal independence', which means the appointee's professional quality, status and remuneration are guaranteed by law.[39]

The relationship between the classical Ombudsman and Parliament is special. In general, the terms of office of the members of Parliament and the Ombudsman are different, to limit political influence of the Parliament on the Ombudsman. Usually, Parliament appoints the Ombudsman, and the Ombudsman owes responsibility to the Parliament. Thus, working relationships between these two institutions are close. The Ombudsman fulfils administrative law accountability through submitting reports to the

33 Arne Fliflet, 'Historical Development and Essential Features of the Ombudsman Worldwide' (1994) 12 *Ombudsman Journal* 117, 122.; Roy Gregory, 'Building An Ombudsman Scheme: Statutory Provisions and Operating Practices' (1994) 12 *Ombudsman Journal* 83, 86.
34 Oosting, above n 24, 20; Gregory, above n 33, 86.
35 Gregory, above n 33, 86.
36 Donald C. Rowat, 'Why a Legislative Ombudsman is Desirable' (1993) 11 *Ombudsman Journal* 127, 128.
37 Gregory, above n 33, 86.
38 Oosting, above n 24, 20.
39 Ibid, 20–1.

Parliament. In many jurisdictions, the Ombudsman may participate in parliamentary sessions and propose law reform. Further, in some jurisdictions, the Parliament is able to ask the Ombudsman to investigate a case.[40]

Influence of global diffusion on impartiality and independence

Through global diffusion, especially to the common law jurisdictions, modification was made to the impartiality and independence of the Ombudsman. The New Zealand model, for example, allowed for intervention by the executive branch in relation to the implementation of the Ombudsman's duties. In particular, the Ombudsman gives notice to the head of administrative branches before commencing investigations and, at the request of Ministers, Mayors or chairs of organisations, shall consult them after conducting investigations and before forming final opinions.[41] Also in this model, with the consent of the Chief Ombudsman, the Prime Minister can request an investigation on any issue he or she thinks necessary.[42]

The purpose of these adaptations in New Zealand seems to be the reduction of ministerial resistance to supervision by the Ombudsman.[43] However, these localisations have been criticised as being overprotective of the administrative branches and as having the potential to raise doubts about the independence and impartiality of the Ombudsman.[44]

5.1.4 Diversification of the Ombudsman models

The success of the classical Ombudsman invited further development and resulted in

40 Gabriele Kucsko-Stadlmayer, 'The Legal Structure of Ombudsman-Institutions in Europe: Legal Comparative Analysis' in Gabriele Kucsko-Stadlmayer (ed), *European Ombudsman-Institutions: A comparative legal analysis regarding the multifaceted realisation of an idea* (Springer, 2008) 1, 10–11.
41 *Ombudsmen Act 1975* (NZ), ss 18(1), (5).
42 Ibid, s 13(5).
43 Walter Gellhorn, *Ombudsmen and Others: Citizens' protectors in nine countries* (Harvard University Press, 1967), 105–7.
44 Northey, above n 19, 138: Ulf Lundvik, 'New Zealand' in Gerald E. Caiden (ed), *International Handbook of The Ombudsman: Country Surveys* (Greenwood Press, 1983) vol II, 135, 144.

diversification of the Ombudsman model. There have been two directions in this development: specialisation in areas of supervision, and deviation from appointment as an officer of the legislature. The former direction is a horizontal change and the latter a vertical change. In this subsection, these changes are explained.

Specialised Ombudsman

A specialised Ombudsman plays the role of a classical Ombudsman but in a specific field or subject area. The emergence of the specialised Ombudsman was a result of the expansion of the administrative field in welfare states; there was a need to cope with a dramatically increased workload.[45] A specialised Ombudsman could reduce the heavy workload of the classical Ombudsman, especially in highly populated jurisdictions, and help to redress disputes between the general public and administrative bodies.[46] There was also the influence of the development of subject-specific international treaties in the human rights area, such as the *Convention on the Rights of the Child* and the *Convention on the Elimination of All Forms of Discrimination against Women*, which encouraged the establishment of specialised Ombudsman institutions.[47] If workloads in the assigned specific field fell, a specialised Ombudsman could be absorbed into the classical Ombudsman, as happened in Sweden in 1968 in relation to the Military Ombudsman.[48] Therefore, it can be said that the existence of specialised Ombudsman depends on the social demands in each jurisdiction.

The emergence of the specialised Ombudsman occurred relatively early in the

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45 Bexelius, above n 6, 42–4.

46 Richard W. Taylor, 'Ombudsman Success in the Federal Republic of Germany: The Role of Specialized and General Ombudsman in a Large Federation' (1985) 4 *Ombudsman Journal* 149, 163.

47 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('*CRC*'); *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) ('*CEDAW*'). For instance, the main objective of the Children's Ombudsman in Sweden is to promote the rights and interests of children and youth as settled in the CRC. Ombudsman for Children (SWE), *About us* (2012) <http://www.barnombudsmannen.se/english/about-us/>.

48 In Sweden, the Military Ombudsman was absorbed into the Parliamentary Ombudsman in 1968, because of the reduction of the workload in this field. al-Wahab, above n 3, 30–1.

historical development of the Ombudsman. The first was the Swedish Military Ombudsman which was established in 1915 before the diffusion of the classical Ombudsman, institution had begun.[49] When the global diffusion of the classical Ombudsman commenced, the specialised Ombudsman institutions also diffused globally. Examples include the Military Ombudsman of Norway (1952); Military Ombudsman in West Germany (1959); Language Ombudsman in Canada (1970); and the Local Ombudsman in the United Kingdom (1974).[50]

The extent of diffusion of the specialised Ombudsman differs by jurisdiction. Some jurisdictions do not have specialised Ombudsman. Other jurisdictions have only specialised Ombudsman and no general Ombudsman, as in Canada and Germany. Yet other jurisdictions have both general and specialised Ombudsmen, such as in the United Kingdom, Norway and Australia.

Deviation from the classical Ombudsman model

Global diffusion popularised the notion of the Ombudsman and this invited the creation of institutions that were titled ‘Ombudsman’ but deviated from the model of a parliamentary or legislative officer. These new institutions can be categorised as ‘non-classical’ Ombudsman institutions. There is no universally accepted classification of the institutions that fall within this category. Thus, focusing on the nature of institutions, this thesis classifies this category into subcategories of ‘official bodies’ and ‘private bodies’.

The institutions that belong to the category of official bodies have a legal basis. The non-classical Ombudsman institutions in this category are varied but they can again be divided into two subcategories, according to whether they have a constitutional or

[49] Hugo Henkow, 'Sweden's Guardians of the Law: The Ombudsman for Military Affairs' in Donald Cameron Rowat (ed), *The Ombudsman: Citizen's Defender* (Allen and Unwin, 2nd ed, 1968) 51.
[50] Gregory and Giddings, above n 1 ,19–20.

statutory basis. These are the 'executive Ombudsman' (with a constitutional or statutory basis) and the 'organisational Ombudsman' (with an executive order basis).

The executive Ombudsman has a similar structure to the classical Ombudsman, but belongs to the executive branch of government. This model has a constitutional or statutory basis that authorises powers of investigation, but requires it to report to the executive branch rather than to the Parliament. A typical example is the Chancellor of Justice (JK) in Sweden, which as discussed above, supervises public servants on behalf of the executive.

There are differences of opinion about the merits of the executive Ombudsman versus the classical Ombudsman. Some criticise such distinctions for overlooking the fact that in the jurisdictions that apply a presidential system, such as France and the Latin American countries, it is often the case that the Ombudsman belongs not to the legislature but to the executive.[51] This position claims that for judging the independence of the Ombudsman in these jurisdictions, it is important to scrutinise its actual performance and the extent of interference of administrative branches over its exercise of powers.[52]

Conversely, others consider it necessary to distinguish these two institutions to avoid potential confusion between two different roles.[53] From this position, the most serious problem is the weak independence of the executive Ombudsman model.[54] Regardless of their statutory basis, it is often the case that the executive Ombudsman falls under the strong influence of the executive to whom the Ombudsman reports.[55] This could result in

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51 See, eg, Victor O. Ayeni, 'The Ombudsman around the World: Essential Elements, Evolution and Contemporary Issues' in Victor Ayeni, Linda Reif and Hayden Thomas (eds), *Strengthening Ombudsman and Human Rights Institutions in Commonwealth Small and Island States: The Caribbean Experience* (Commonwealth Secretariat 2000) 1, 14; Fliflet, above n 33, 122–4.

52 Ayeni above n 51, 14; Fliflet, above n 33, 128.

53 See, eg, Larry B. Hill, 'The Ombudsman Revisited: Thirty Years of Hawaiian Experience' (2002) 62 *Public Administrative Review* 24, 36; Rowat above n 36, 128–9.

54 Rowat above n 36, 129; Hill above n 53, 37; Gregory, above n 33, 108–9.

55 Hill, above n 53, 37.

partial and biased judgments, limitation of publicity, avoidance of criticism of executive government, and a refusal of government to follow the Ombudsman's recommendation based on the prioritisation of political considerations.[56]

Considering the fact that the executive Ombudsman exists not only in presidential systems but also in parliamentary systems, it is worthwhile distinguishing between these two institutions when assessing the feasibility of transplanting the Ombudsman to another country.

The second type of official body is the organisational Ombudsman, which has a similar structure to the executive Ombudsman, but does not have a statutory basis. Nevertheless, this model has its legal basis in executive orders or directions, and so is classified as an official body. The National Defence and Canadian Forces Ombudsman in Canada is an example of this model.[57] The legitimacy of this model might be questioned because of lack of approval from the legislative branch.

Private institutions that do not have any legislative basis could also be called 'Ombudsmen'. It is important to recognise the difference between these private bodies and public bodies to avoid confusion regarding the concept of 'the Ombudsman'. For this purpose, the following paragraphs refer to the features of private bodies. This category includes a wide range of institutions, including NGOs and industrial Ombudsmen.

Some NGOs that monitor administrative activities in the public interest call themselves 'Ombudsmen'. However there are significant differences between them and the classical Ombudsman in terms of their power, impartiality and procedures. In some countries, the lack of a classical Ombudsman and lack of information about the concept

[56] Gregory above n 33, 108–11.
[57] National Defence and Canadian Forces Ombudsman (CAN), *Our Mandate* (8 February 2008) <http://www.ombudsman.dnd.ca/au-ns/man/index-eng.asp>.

of the classical Ombudsman may lead to this phenomenon. An example is the 'Citizen Ombudsmen' in Japan, which emerged earlier than any official Ombudsman, to monitor, audit and research the activities of Japanese administrative bodies. Although the activities of these NGOs are well recognised in Japan, they do not have the power or resources of official bodies, nor do they have any ability to remedy grievances. What they can do is undertake external audits and conduct litigation as NGOs.[58] Thus, it is not possible to regard them as genuine Ombudsmen.

Another example of a private body is the industrial Ombudsman model, which again lacks a legislative basis. This institution handles complaints, manages reputation risks and establishes good governance especially in commercial areas. Their structures vary from institution to institution, from those that have formal structures and supervise whole industries, to those that are informal and supervise only one commercial body. The former could be called semi-official bodies, such as the Press Ombudsman in Sweden and the Bank Ombudsmen common in Australia and Canada.[59] Importantly, the latter can hardly be regarded as an Ombudsman at all but merely uses the title for constructing an image of impartiality and redress.[60]

Blending of the two directions

The blending of the two directions — specialisation and non-parliamentary bodies — has created further diversification of the Ombudsman institution. There is a claim that a specialised Ombudsman should have the basic features of the classical Ombudsman. This

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58 全国市民オンブズマン連絡会議 [Japan National Networking Association of Citizen Ombudsman], *よくある質問 [Frequently asked questions]* (26 March 2007) <http://www.ombudsman.jp/office/Q-A.html>; 全国市民オンブズマン連絡会議 [Japan National Networking Association of Citizen Ombudsman], *17 年の歴史 [17 years' activities]* (18 January 2011) <http://www.ombudsman.jp/office/history.html>.

59 Press Ombudsman (SWE), *How self-regulation works* (7 June 2010) <http://www.po.se/english/how-self-regulation-works>; Financial Ombudsman Service (AUS), *What we do* (2012) <http://fos.org.au/centric/home_page/about_us/what_we_do.jsp>; Ombudsman for Banking Services and Investigation (CAN), *Our Work* (2008) <http://www.obsi.ca/UI/AboutUs/OurWork.aspx>.

60 Hill, above n 53, 38.

position aims to protect the good reputation of this institution by dividing the Ombudsman and others.[61] However, in reality, as illustrated by the examples of the organisational and industrial Ombudsman above, many specialised Ombudsmen are also 'non-classical' in the sense that they are non-parliamentary.[62] Thus, there are 'non-classical specialised' Ombudsmen that share basic features of both specialised and non-classical Ombudsman institutions.[63]

Nevertheless, it is necessary to limit the range of models in this thesis to clarify focus. The objective of this thesis is to examine the role, efficacy and functionality of the Environmental Ombudsman and to consider whether such an institution could contribute to improving administrative environmental decision-making processes in Japan. From this perspective, private bodies are irrelevant, even though they are relevant to obtaining a full understanding of the Ombudsman institution. This thesis therefore focuses on public bodies; namely, classical, executive and organisational Ombudsman institutions both in general and in specific fields as shown in Table 5-1.

Table 5-1: Diversification of Ombudsman institutions

Vertical / Horizontal	General	Specialised
Classical	General classical Ombudsman	Specialised classical Ombudsman
Executive	General executive Ombudsman	Specialised executive Ombudsman
Organisational	General organisational Ombudsman	Specialised organisational Ombudsman

To avoid confusion, this thesis henceforth limits the scope of the term 'Ombudsman' to these official Ombudsman institutions, except when referring by name to an existing institution that incorporates the term 'Ombudsman' in its title.

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61 Sir Brian Elwood, 'How to Harmonize General Ombudsman Activities With Those Related to Specialized Ombudsmen' in International Ombudsman Institute and Linda C. Reif (eds), *The International Ombudsman Yearbook Volume 2, 1998* (Kluwer Law International, 1999) 198, 203–4.

62 As a typical example, there are the industry sponsored Ombudsman schemes in Australia. Commonwealth Ombudsman (Cth), *Industry sponsored Ombudsman schemes* (2010) <http://www.ombudsman.gov.au/pages/related-sites/industry-sponsored-ombudsman-schemes.php>.

63 See, eg, Taylor above n 46, 161–3.

5.2 The Environmental Ombudsman

This section examines the Environmental Ombudsman as a specialised Ombudsman institution. In Subsection 5.2.1, the merits and expectations of the Environmental Ombudsman are introduced; in Subsection 5.2.2, the historical development of environmental watchdogs and the global diffusion of the Environmental Ombudsman are reviewed; and in Subsection 5.2.3, the importance of the relationship between the general and Environmental Ombudsman is considered.

5.2.1 Specialised Ombudsman in the environmental field

The Environmental Ombudsman is an example of a specialised Ombudsman. There are several reasons for distinguishing between the roles of the environmental and the general Ombudsmen. For instance, there is a problem with the capacity of the general Ombudsman regarding not only workload but also the quality of assessment. An Environmental Ombudsman is required to have sufficient scientific expertise to supervise complex environmental administration, which the general counterpart usually does not have.[64] Further, the nature of the rights that these two institutions protect differs. In general, the Ombudsman is supposed to protect the human rights of the public from breaches by administrative authorities.[65] On the other hand, an Environmental Ombudsman is expected to protect environmental rights, which have a collective rather than individual nature, and to seek appropriate interventions by the government.[66] Whether a general Ombudsman is able to address these points requires further examination.

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64 Sylvia Allan, 'Environmental Commissioners as Ombudsmen: A Successful Role' in Gary Hawke (ed), *Guardians for the Environment* (Institute of Policy Science, Victoria University of Wellington, 1997) 53, 58–9.

65 Reif, above n 13, 86.

66 Eva Ligeti, 'The Role of the Environmental Commissioner of Ontario and the Environmental Bill of Rights in Supporting Public Participation in Environmental Decision-making' in Gary Hawke (ed), *Guardians for the Environment* (Institute of Policy Science, Victoria University of Wellington, 1997) 130, 137.

The Environmental Ombudsman is expected to play an important role in protecting the environment by improving the quality of environmental administration, securing environmental rights from abuses of power by the executive branch and assisting parliamentary control over environmental management.[67] For example, in many cases, the management of natural resources suffers from a shortage of a legal framework because of the difficulty of building a public alliance that promotes the settlement of the framework. The Environmental Ombudsman is expected to resolve the fragmentation in both the environmental administration and the public movement.[68]

5.2.2 Historical development of environmental watchdogs

Unlike the classical Ombudsman, there is no widely accepted definition of an Environmental Ombudsman. There have been institutions that regard themselves as environmental watchdogs, but not all of them have regarded themselves as Environmental Ombudsmen or had the basic features of an Ombudsman.[69] This lack of a clear definition stands to reason because this kind of institution is created according to the specific needs of an individual legal system. Here, by tracing the historical development of environmental watchdogs, the diversity of these institutions is explained.

The first environmental watchdogs emerged in the United States. In the late 1960s, a few cutting-edge jurisdictions began to establish independent watchdogs to improve the quality of environmental governance. This was the case for the Public Intervenor's Office in Wisconsin (1967–95) and the Environmental Quality Study Council in California

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67 See, eg, Klaus Bosselmann, 'The Environmental Commissioner — A Guardian of the Environment?' in Gary Hawke (ed), *Guardians for the Environment* (Institute of Policy Science, Victoria University of Wellington, 1997) 33, 34; Jeanette Fitzsimons, 'The Need for an Environmental Ombudsman' in Gary Hawke (ed), *Guardians for the Environment* (Institute of Policy Science, Victoria University of Wellington, 1997) 61.

68 James E. Krier, 'Environmental Watchdogs: Some Lessons from a Study Council' (1971) 23 *Stanford Law Review* 623, 663–4, 667–8.

69 For instance, in Australia, the Commissioner for Environmental Sustainability in the State of Victoria could be regarded as an environmental watchdog, but its main role is auditing, so it does not regards itself as an Environmental Ombudsman. *Commissioner for Environment Sustainability Act 2003* (Vic), ss 7–10; Commissioner for Environmental Sustainability (Vic), *About CfES* (18 April 2012) <http://www.ces.vic.gov.au/about-ces>.

(1968–72). The main roles of the former were to intervene in environmental litigation, to mitigate conflicts between the business sector and citizens and to draft environmental regulations. Those of the latter were to research status and problems of environmental policy, to clarify a long lasting vision for improvements and to make recommendations.[70] In 1970, the Province of Alberta in Canada followed this trend by establishing the Environment Conservation Authority. This Authority was a consultative body to the Lieutenant Governor and utilised public hearings to form recommendations regarding improvements to the quality of the environment.[71] However, this institution was abolished in 1977 because of the shift in the Province's public concern from environmental to economic matters in the mid-1970s.[72] It was not until in 1994 that a successor institution was established in Canada. This was the Environmental Commissioner for Ontario, which aimed at securing public rights to participate in administrative environmental decision-making processes through monitoring the implementation of the *Environmental Bill of Rights 1993* and promoting public education.[73] At the federal level, in 1995, the Commissioner of the Environment and Sustainable Development, which was an environmental auditor, was established as a section of the Auditor General Office.[74]

The development of environmental watchdogs in North America shows their diversity. However, it is difficult to say whether these institutions had the basic features of the Ombudsman. For instance, some of them did not have any investigatory powers, while

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70 Jodi Habush Sinykin, 'At a Loss: The State of Wisconsin after Eight Years without The Public Intervenor's Office' (2004) 88 *Marquette Law Review* 645, 650; Krier, above n 68, 625–6; State of California (USA), *Government Code: Title 2 Government of the State of California: Division 3 Executive Department: Part 14 Environmental Quality Study Council* (2004) <http://www.arb.ca.gov/bluebook/bb08/gov/gov-16050.htm>.

71 P.S. Elder, 'The Participatory Environment in Alberta' (1974) 12 *Alberta Law Review* 403, 409–14.

72 Mark Winfield, 'The Ultimate Horizontal Issue: The Environmental policy Experiences of Alberta and Ontario, 1971–1993' (1994) 27 *Canadian Journal of Political Science* 129, 141.

73 *Environmental Bill of Rights*, SO 1993, c 28, ss 49–60; Ontario (CAN), Parliamentary Debates, Legislative Assembly, 3 August 1993, 1550 (Bud Wildman, Minister of Environment and Energy).

74 Office of the Auditor General of Canada, *Commissioner of the Environment and Sustainable Development* (7 May 2008) <http://www.oag-bvg.gc.ca/internet/English/cesd_fs_e_921.html>.

others did; and none of them were authorised to investigate complaints lodged by the public.[75] Regarding this point, Krier claims that the Environmental Quality Study Council was an Environmental Ombudsman based on the fact that it fulfilled the basic features of an Ombudsman, other than complaint handling.[76] Still, it is difficult to find a similar argument for the other institutions.

Meanwhile, outside North America, a style of environmental watchdog with the basic features of the Ombudsman, such as accepting complaints from the public on administrative environmental disputes and conducting investigations to serve administrative law accountability, was developing. At the time of the field research for this thesis (2011), at least seven jurisdictions had such Environmental Ombudsman: the Australian Capital Territory (ACT), New Zealand, Kenya, Costa Rica, Greece, Austria and Hungary.[77] However, as mentioned in Chapter 1, from a comparative viewpoint, this thesis focuses on the institutions in only three of these jurisdictions: the ACT, New Zealand and Hungary.

5.2.3 Relationship between the general and Environmental Ombudsmen

Compared with the global diffusion of the general Ombudsman, the number of jurisdictions that have introduced an Environmental Ombudsman is quite limited. Various reasons for this phenomenon could be posited, including the relatively low profile of the Environmental Ombudsman. However, another reason must be considered: the establishment of the Environmental Ombudsman might not have been justified in cases where the general Ombudsman was functioning well.

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75 Sinykin, above n 70, 650; Krier, above n 68, 625–6; Elder, above n 71, 409–14; *Environmental Bill of Rights*, SO 1993, c 28, ss 61–2, 65, 70–1, 74–5, 78, 80; *Auditor General Act*, RSC 1985, c A-17, s 22.

76 Krier, above n 68, 666–7.

77 Office of the Commissioner for Sustainability and the Environment (ACT), *Our Office* (10 April 2012) <http://www.envcomm.act.gov.au/our_office>; George Pring and Catherine Pring, *Greening Justice: Creating and Improving Environmental Courts and Tribunals* (The Access Initiative 2009), 67–9.

For instance, in 1996, the creation of a specialised Ombudsman in the environmental field was discussed at the drafting stage of the *Environmental Code* in Sweden.[78] However this suggestion was ultimately rejected because it was considered unnecessary in light of the environmental role of the general Ombudsmen.[79] In Sweden, the office of the Parliamentary Ombudsmen (JO) consists of four Ombudsmen, who are individually elected by the Parliament for terms of four years.[80] Each Ombudsman has its own area of supervision, and is allocated staff for that purpose.[81] The areas of responsibility are as is seen in Table 5-2 below. Here, environmental matters are included in the first area of responsibility. Thus, one of the four incumbents is assumed to have the capacity to address administrative environmental disputes. In actuality, during the five financial years 2006/07 to 2010/11, on average, the JO accepted approximately 350 environment-related complaints per year. This represents 5.3 per cent of total complaints, and 46.4 per cent of these were investigated. In addition, the JO launched three to four self-initiated investigations in the environmental field per year.[82] These statistics may have been a factor influencing the decision not to introduce an Environmental

78 Jonas Ebbesson, 'Sweden' in Jonas Ebbesson (ed), *Access to Justice in Environmental Matters in the EU* (Kluwer Law International 2002) 443, 467; *Miljöbalken* [The Environmental Code] (Sweden) 1999.

79 Ministry for Environment (SWE), *Åhuskonventionen (Aarhus Convention)* (Ministry for Environment (SWE), 2004), 109–10.

80 *Riksdagsordningen* [The Riksdag Act] (Sweden) 1974, c 8, art 11.

81 The Parliamentary Ombudsmen (SWE), *Organisation* (14 May 2012) <http://www.jo.se/Page.aspx?MenuId=21&MainmenuId=12&ObjectClass=DynamX_Documents&Language=en>; Oosting, above n 24, 22.

82 The Parliamentary Ombudsmen (SWE), *Justitieombudsmännens ämbetsberättelse: Redogörelse 2007/08 [Annual Report 2007/08: Report for the period 1 July 2006 to 30 June 2007]* (Office of the Parliamentary Ombudsmen, 2007), 664–5; The Parliamentary Ombudsmen (SWE), *Justitieombudsmännens ämbetsberättelse: Redogörelse 2008/09 [Annual Report 2008/09: Report for the period 1 July 2007 to 30 June 2008]* (Office of the Parliamentary Ombudsmen, 2008), 667–8; The Parliamentary Ombudsmen (SWE), *Justitieombudsmännens ämbetsberättelse: Redogörelse 2009/10 [Annual Report 2009/10: Report for the period 1 July 2008 to 30 June 2009]* (Office of the Parliamentary Ombudsmen, 2009), 600–1; The Parliamentary Ombudsmen (SWE), *Justitieombudsmännens ämbetsberättelse: Redogörelse 2010/11 [Annual Report 2010/11: Report for the period 1 July 2009 to 30 June 2010]* (Office of the Parliamentary Ombudsmen, 2010), 727–8; The Parliamentary Ombudsmen (SWE), *Justitieombudsmännens ämbetsberättelse: Redogörelse 2011/12 [Annual Report 2011/12: Report for the period 1 July 2010 to 30 June 2011]* (Office of the Parliamentary Ombudsmen, 2011), 710–11. The number of complaints classified as environmental matters in this table is the sum of the JO's concerns on "Planning and building" and "Agriculture, environment, protection of animals"; while that of self-initiated investigations is the sum of the JO's concerns on "Planning and building" and "Environmental protection". The population of Sweden is 9.5 million. Statistics Sweden, *Population Statistics* (9 May 2012) <http://www.scb.se/Pages/Product____25799.aspx>.

Ombudsman.

Table 5-2: Areas of responsibility of the Parliamentary Ombudsmen in Sweden

Area of responsibility 1	Courts of law, administrative courts, National Legal Aid, cases concerning guardianship, the Enforcement Authority, planning and building, communications, income and property tax, excise duties and price-regulating fees, **environmental protection** and public health, agriculture and forestry, etc.
Area of responsibility 2	The Armed Forces, prisons and probation services, national insurance, public procurement, the Agency for Public Management, the Equality Ombudsman, cases that do not fall within the ambit of the Parliamentary Ombudsmen, etc.
Area of responsibility 3	Application of the Social Service Act, the Children's Ombudsman, health and medical care as well as dental care and pharmaceuticals, the school system, the Swedish Arts Council, etc.
Area of responsibility 4	Public prosecutors, the Police force, customs authorities, the Public Employment Service, municipal administration, cases involving aliens, housing and accommodation, cemeteries and burials, government activities outside Sweden, the Riksdag Board of Administration, cases pertaining to the Prime Minister's Office, other cases which do not fall within areas of responsibility 1–3, etc.

Source: *Administrative Directives for the Secretariat of the Parliamentary Ombudsmen* (SWE) 2012, Annex

The Swedish example clearly shows the necessity of justifying the *raison d'être* of an Environmental Ombudsman in relation to the general Ombudsman when considering the introduction of this institution. With this in mind, in the following Sections 5.3–5.5, the institutional settings of the general and Environmental Ombudsman are detailed for the ACT, New Zealand and Hungary. Further, the relationships between these institutions are analysed based on the statistics publicised in their annual reports. The duration of the statistical data to be analysed is the five financial years 2006/07 to 2010/11 or 2006–2010. A further thorough examination of the differences between the general and Environmental Ombudsman is conducted in Chapter 6.

5.3 Institutional settings in the Australian Capital Territory

Australia is one of the common law countries that introduced the modern Ombudsman system in the first wave of global diffusion. Here, the institutional settings of the Ombudsmen in the ACT are discussed in conjunction with those in the Commonwealth.

Table 5-3: Diversification of Ombudsman institutions in Australia (and the ACT)

Vertical / Horizontal	General	Specialised
Classical	Commonwealth Ombudsman (ACT Ombudsman)*	e.g., Defence Force Ombudsman, Immigration Ombudsman, Law Enforcement Ombudsman
Executive	–	e.g., Human Rights Commission, Information Commissioner (e.g., Commissioner for Sustainability and the Environment, ACT Human Rights Commission)*
Organisational	–	–

Note: * institutions in parentheses are ACT institutions.

Table 5-3 above shows the diversification of Ombudsman institutions in these two jurisdictions. As is detailed in the next subsection, this table shows the legal framework of public Ombudsmen and does not necessarily reflect actual institutional settings. However, it is clear that in these jurisdictions, the general Ombudsmen are classical Ombudsmen. In the Commonwealth, there are specialised classical Ombudsmen, such as the Defence Force Ombudsman, Immigration Ombudsman and Law Enforcement Ombudsman. The Commonwealth Ombudsman has also encouraged the creation of internal complaint-handling units within each administrative body to deal with individual cases so that the Ombudsman can concentrate on systemic problems.[83] In addition, some agencies that have complaint-handling and review functions, such as the Australian Human Rights Commission and the Information Commissioner, could be regarded as specialised executive Ombudsman institutions.[84] In the ACT, there are also some institutions that

[83] McMillan, above n 18, 9–10.
[84] Commonwealth Ombudsman (Cth), *Other complaint handling and review agencies* (2010) <http://www.ombudsman.gov.au/pages/related-sites/other-complaint-handling-review-agencies.php>.

could be regarded as specialised executive Ombudsman institutions, including the Commissioner for Sustainability and the Environment (CSE) and the ACT Human Rights Commission.[85] There is no organisational Ombudsman in these jurisdictions.

5.3.1 General Ombudsman

In Australia, in addition to the Commonwealth Ombudsman, there are State Ombudsmen in every state. In general, the jurisdiction of the Commonwealth Ombudsman is limited to matters of federal administration and the State Ombudsmen have jurisdiction on matters of state administration. However, the Commonwealth and ACT share an Ombudsman, although they are independent in law; the ACT Ombudsman is functionally part of the jurisdiction of the Commonwealth Ombudsman.[86] The Commonwealth Ombudsman and Deputy Ombudsmen are appointed by the Governor-General for terms of up to seven years and there is no limitation on re-appointment.[87] The Governor-General, at the request of Parliament, has the power to remove a person from the position of Ombudsman.[88] The Commonwealth Ombudsman has quite a wide range of jurisdictions and is also authorised to act in the roles of the six specialised Ombudsmen: the Defence Force Ombudsman, the Immigration Ombudsman, the Law Enforcement Ombudsman, the Overseas Students Ombudsman, the Postal Industry Ombudsman and the Taxation Ombudsman.[89] Environmental matters are not excluded from the general jurisdiction of the Commonwealth Ombudsman.[90]

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85 Australian Capital Territory Ombudsman (ACT), *Other complaint handling and review agencies* (2010) <http://ombudsman.act.gov.au/pages/related-sites/other-complaint-handling-review-agencies.php>

86 *Ombudsman Act 1976* (Cth), s 4(2)(c); *Ombudsman Act 1989* (ACT), ss 28(10), 29–30; Commonwealth Ombudsman (Cth), *Annual Report 2010–2011* (Commonwealth Ombudsman, 2011), 12–13; Australian Capital Territory Ombudsman (ACT), *Annual Report 2010–2011* (ACT Ombudsman, 2011), 2.

87 *Ombudsman Act 1976* (Cth), ss 21(1), 22(1).

88 Ibid, s 28(1).

89 Ibid, Pts II–IIC; Commonwealth Ombudsman (Cth), above n 86, 12.

90 Commonwealth Ombudsman (Cth), above n 86, 36.

The office of the Commonwealth Ombudsman consists of one Commonwealth Ombudsman, who is in charge of the management of the office, one Deputy Ombudsman and five Senior Assistant Ombudsmen. Each Senior Assistant Ombudsman has a different area of responsibility, and is supervised by the Deputy Ombudsman.[91] Responsibility for the ACT falls to three Senior Associate Ombudsmen: one has responsibility for day-to-day operational matters of general government departments and the other two are responsible for matters of law enforcement, exemplified by ACT Policing. Two teams of specialist staff serve these tasks, and the Commonwealth Ombudsman and a Deputy Ombudsman supervise them.[92] The Commonwealth Ombudsman has 182 staff and an AUD 19.5 million annual budget.[93] However, the portion to be used for the ACT Ombudsman is not separately identified.[94]

5.3.2 Environmental Ombudsman

In 1993, the Commissioner for the Environment was established under the provisions of the *Commissioner for the Environment Act 1993* (ACT).[95] Since 2008, as a result of amendment of the Act, this institution has been called the Commissioner for Sustainability and the Environment.[96] The current office has a full-time officeholder and five staff with an annual budget of AUD 1.6 million.[97]

The Act reflects the policy of balancing economic and environmental interests, and aims to enhance accountability of environment outcomes through the activities of the CSE.[98] Its special emphasis is to correct the imbalance caused by over-development. The

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91 Ibid, 13.
92 Australian Capital Territory Ombudsman (ACT), above n 86, 2.
93 Commonwealth Ombudsman (Cth), above n 86, 37–8, 40–1.
94 According to a staff of the Commonwealth Ombudsman, the ACT team has 4–5 staff. Interview with a staff member of the Commonwealth Ombudsman (Canberra, 23rd September 2009).
95 *Commissioner for the Environment Act 1993* (ACT).
96 Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 21 November 2007, 3600 (Jon Stanhope: Minister for the Environment, Water and Climate Change).
97 Commissioner for Sustainability and the Environment (ACT), *Annual Report 2010–11* (Office of the Commissioner for Sustainability and the Environment 2011), 2, 8.
98 Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 16 June 1993, 1957 (Lou

role model for the CSE was the general Ombudsman, and this Act was discussed in connection with the amendment of the *Ombudsman Act 1989* (ACT).[99]

The *Commissioner for the Environment Act 1993* (ACT) defines the position of the CSE and the manner of appointment of the Commissioner. The CSE is part of the Ministry for the Environment and is appointed by the Minister for a term of five years (ss 4–5). Removal or suspension of an officeholder may be done by the executive on the grounds of misbehaviour or physical or mental incapacity (s 9).

The CSE is bestowed with the following functions and powers. The CSE has the function of investigating complaints regarding administrative environmental management in the Territory, matters directed by the Minister and, on its own initiative, matters with substantial environmental impacts (s 12(1)). There are some restrictions on the subjects of investigation; exemptions from the CSE's powers of investigation include (s 12(2)): — activities of the judiciary, royal commissions, boards of inquiry, inquiry panels on environmental impact statements and the Ombudsman. The CSE, like the Ombudsman, has the right not to investigate complaints from the public (ss 13–14). CSE investigations are performed in close cooperation with the principal officers of the agencies and the responsible Ministers (s 15). The CSE is given the power to enter premises and to obtain information and documents for the purpose of conducting an investigation (s 16–17). Agencies cannot refuse written requests for information from the CSE (s 18).

The CSE also has the following duties. The results of investigations must be reported to the Minister as special reports (s 21). The CSE has a responsibility to submit a 'state of

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Westende).

99 Ibid, 1958 (Michael John Moore); Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 13 May 1993, 1402 (Bill Wood, Minister for Education and Training, Minister for the Arts and Minister for the Environment, Land and Planning).

the environment' report to the Minister at least every four years (s 19(1), (5)). This report has to cover an assessment of the condition of the environment and an evaluation of the adequacy and effectiveness of environmental management (s 19(2)). The CSE also issues annual reports on any significant environmental impact, any measures applied to implement a recommendation in a state of the environment report or special report, and any recommendation still to be implemented or fully implemented (s 20). The Minister is required to present the state of the environment report and any special report to the Legislative Assembly (s 22).

Recent moves

In the financial year 2007/08, the capacity of the office was significantly enhanced when the position became a full-time job (previously, the office consisted of a part-time officeholder and two full-time staff).[100] Since then, the CSE's capacity has continued to entrench. In 2009, the office obtained additional resources and new staff for conducting the task of advocacy.[101] In 2011, a further review for this purpose was submitted to the Minister but the result is as yet unknown.[102] However, the government's priority for resources allocation appears to be on development rather than on the environment, and the Ministry does not want the CSE to become too strong. Ian Baird, the principal policy officer of the Ministry for the Environment, estimated that entrenchment was unlikely and would be limited in any case.[103]

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100 Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 21 November 2007, 3600 (Jon Stanhope: Minister for the Environment, Water and Climate Change); Commissioner for Sustainability and the Environment (ACT), *Annual Report 2007–08* (Office of the Commissioner for Sustainability and the Environment 2008), 5, 20.

101 Interview with Sarah Burrows, Senior Manager, Commissioner for Sustainability and Environment (Canberra, 31 May 2011); Interview with Julia Pitts, Chair, Environmental Defender's Office (ACT) (Canberra, 30 May 2011).

102 Interview with Sarah Burrows, Senior Manager, Commissioner for Sustainability and Environment (Canberra, 31 May 2011); Interview with Julia Pitts, Chair, Environmental Defender's Office (ACT) (Canberra, 30 May 2011); Interview with Ian Baird, Principal Policy Officer, ACT Department of the Environment, Climate Change, Energy and Water (Canberra, 30 May 2011).

103 Interview with Ian Baird, Principal Policy Officer, ACT Department of the Environment, Climate Change, Energy and Water (Canberra, 30 May 2011).

5.3.3 CSE and the ACT Ombudsman

As discussed above, the CSE has significant powers of investigation, complaint handling and reporting that are similar to the Ombudsman on which it was modelled. Although the CSE is expected to act independently from the government,[104] the provisions of the *Commissioner for the Environment Act 1993* (ACT) do not clearly assign the CSE an independent role. For instance, in relation to the ACT Ombudsman, the CSE has an obligation to refer a complaint that overlaps with the Ombudsman's jurisdiction to the Ombudsman (s 25). Hence, there is a concern that investigations by the CSE remain within the limits of internal examination by the executive branch. Although this issue is fully examined in Chapter 6, in the following paragraphs, an overview of the activities of these institutions is provided based on the available statistical data.

Reflecting the continuing entrenchment of the office, the statistics of the CSE's activities over the five-year study period were not stable, so some data were not available. Regarding complaints from the public, the CSE separates statistics by phone and e-mail (general) or in written form (formal). During the financial years 2006/07–2008/09, on average, the CSE accepted 186 'general complaints' per year, with 9.9 per cent of them being investigated and many others redirected to appropriate agencies. In contrast, during the financial years 2006/07–2010/11, on average, there were 10 'formal complaints' per year, with 89.8 per cent of them being investigated. Formal complaints have increased since 2008/09. Since then, the CSE has conducted approximately 14 investigations per year. There were no self-initiated investigations during this period. However, there were three directions from the Minister for the Environment, all of which were investigated.[105]

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[104] Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 16 June 1993, 1960 (Bill Wood, Minister for Education and Training, Minister for the Arts and Minister for the Environment, Land and Planning).

[105] Commissioner for the Environment (ACT), *Annual Report 2006–07* (Office of the Commissioner for the Environment 2007), 7; Commissioner for Sustainability and the Environment (ACT), above n 100, 11; Commissioner for Sustainability and the Environment (ACT), *Annual Report 2008–09* (Office of

Statistics show that the ACT Ombudsman does receive complaints on environment-related matters. During the financial years 2006/07–2010/11, on average, the ACT Ombudsman accepted 607 complaints per year from the public; 37 (6.2 per cent) were environment-related complaints, of which 25.7 per cent were investigated. The numbers of complaints brought to and investigated by the ACT Ombudsman fluctuated by year. Although the number of investigated cases in the financial years 2009/10–2010/11 decreased, it is uncertain whether this relates to the entrenchment of the CSE. There were no self-initiated investigations on environment-related matters during this period. Regarding section 25 of the *Commissioner for the Environment Act 1993* (ACT), one complaint was transferred from the CSE in this period, but the two institutions agreed that the CSE would handle the case.[106]

Comparing the activities of the two institutions, in total, the CSE accepted five times as many complaints in the environmental field and investigated three times as many cases than the ACT Ombudsman. Thus, the CSE appears to be functioning well as a specialised Ombudsman. Even so, the ACT Ombudsman accepted a not insignificant number of environment-related cases, and some of them were investigated. Regarding this point, the Director of Investigations at the ACT Ombudsman explained that the CSE addresses policy matters, while the ACT Ombudsman addresses the legal compliance of individual cases.[107]

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the Commissioner for Sustainability and the Environment 2009), 14; Commissioner for Sustainability and the Environment (ACT), *Annual Report 2009–10* (Office of the Commissioner for Sustainability and the Environment 2010), 48; Commissioner for Sustainability and the Environment (ACT), above n 97, 11.

[106] Australian Capital Territory Ombudsman (ACT), *Annual Report 2006–2007* (ACT Ombudsman, 2007), 2, 24, 29; Australian Capital Territory Ombudsman (ACT), *Annual Report 2007–2008* (ACT Ombudsman, 2008), 3, 26, 29; Australian Capital Territory Ombudsman (ACT), *Annual Report 2008–2009* (ACT Ombudsman, 2009), 21, 28, 33; Australian Capital Territory Ombudsman (ACT), *Annual Report 2009–2010* (ACT Ombudsman, 2010), 3, 29, 33; Australian Capital Territory Ombudsman (ACT), above n 86, 3, 35, 41. The number of complaints classified as environmental matters in this table is the sum of the complaints regarding "ACT Land Development Agency", "ACT Planning and Land Authority" and "Environment ACT".

[107] Interview with Gabrielle Hurley, Director of Investigations, Australian Capital Territory Ombudsman (Canberra, 24th September 2009).

5.4 Institutional settings in New Zealand

New Zealand was the first common law country to introduce the modern Ombudsman system. New Zealand prohibits the use of the term 'Ombudsman' except in relation to the Parliamentary Ombudsman, which is a general classical Ombudsman, to avoid public confusion.[108] Nevertheless, as seen in Table 5-4 below, there are several official bodies that conduct investigations and grievance procedures in New Zealand that might be described as specialised Ombudsman in other countries. Examples include the Parliamentary Commissioner for the Environment (PCE), the Health and Disability Commissioner, the Children's Commissioner, and the Human Rights Commission.[109] Among these institutions, only the PCE can be classified as a specialised classical Ombudsman, while the others can be classified as specialised executive Ombudsmen. There is no organisational Ombudsman in New Zealand.

Table 5-4: Diversification of Ombudsman institutions in New Zealand

Vertical / Horizontal	General	Specialised
Classical	Parliamentary Ombudsman	Parliamentary Commissioner for the Environment
Executive	–	e.g., Health and Disability Commissioner, Children's Commissioner, Human Rights Commission
Organisational	–	–

5.4.1 General Ombudsman

In New Zealand, in addition to the duties of the classical Ombudsman, the Parliamentary Ombudsman is in charge of reviewing disputes over information

[108] *Ombudsmen Act 1975* (NZ), s 28A
[109] Parliamentary Commissioner for the Environment (NZ), *About us* (2010) <http://www.pce.parliament.nz/about-us/>; Office of the Ombudsmen (NZ), *Other complaint handling bodies* (2010) <http://www.ombudsmen.parliament.nz/index.php?CID=100025>.

disclosure and protecting whistle blowers.[110] The Parliamentary Ombudsman is appointed by the Governor-General on the recommendation of the House of Representatives for a term of five years, with no limitations on re-appointment.[111] The Governor-General may appoint one or more Ombudsmen; the current quota is two.[112] Also, upon the request of the House of Representatives, the Governor-General has the power to remove a person from the position of Ombudsman.[113]

As mentioned, the current office consists of two Ombudsmen. The Chief Ombudsman is in charge of managing the office, including appointing staff, allocating workload among the Ombudsmen and deciding the direction of activities of the office.[114] Below the Chief Ombudsman, the office is separated into two divisions; one is led by the General Manager — Corporate (administration division) and the other by the Deputy Ombudsman and four Assistant Ombudsmen (investigation division).[115] Among the two Ombudsmen, there is no division of supervision areas or geographical jurisdiction. The Deputy and Assistant Ombudsmen are staff appointed by the Chief Ombudsman. There is also no division of responsibility of supervision areas among the Deputy Ombudsman, who is the head of the investigation division, and the four Assistant Ombudsmen.[116] However, the Assistant Ombudsmen have their own geographical jurisdictions (two in Wellington, one in Auckland, one in Christchurch). Among the two in Wellington, one mainly supervises

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110 Office of the Ombudsmen (NZ), *History of the Office* (2010) <http://www.ombudsmen.parliament.nz/index.php?CID=100014>; *Ombudsmen Act 1975* (NZ); *Official Information Act 1982* (NZ), ss 28–30, 38–40, sch 1; *Local Government Official Information and Meetings Act 1987* (NZ), ss 27–31, 36, 35–6, sch 1; *Protected Disclosures Act 2000* (NZ), ss 6B, 10, 15–15E.

111 *Ombudsmen Act 1975* (NZ), ss 3(2), 5(1).

112 Ibid, s 3(1); Parliamentary Ombudsmen (NZ), *2010/2011 Report of The Ombudsmen for the year ended 30 June 2011* (Office of the Ombudsmen, 2011), 2.

113 *Ombudsmen Act 1975* (NZ), s 6(1).

114 Ibid, ss 3(4), 11.

115 Parliamentary Ombudsmen (NZ), *2008/2009 Report of The Ombudsmen for the year ended 30 June 2009* (Office of the Ombudsmen, 2009), 46: Interview with Gina-Marie Seymour, Office of the Ombudsmen (NZ) (Telephone interview, 23 November 2009).

116 Interview with Gina-Marie Seymour, Office of the Ombudsmen (NZ) (Telephone interview, 23 November 2009).

prisons, while the other mainly supervises policy and professional practice.[117]

The office currently has 66 staff (60.9 Full Time Equivalents (FTEs)) and a budget of NZD 8.7 million (AUD 7.0 million). The office has its headquarters in Wellington (45 FTEs), and outreaches in Auckland (9 FTEs) and Christchurch (6.9 FTEs). Three quarters of the staff are engaged in investigation, and one quarter in support roles.[118]

5.4.2 Environmental Ombudsman

In 1987, the PCE was established under the *Environment Act 1986* (NZ).[119] The Act was the first piece of New Zealand's reform of environmental administration and reflected a shift from a development-oriented policy to an environment-centred one. For this purpose, the Act established the Ministry for the Environment as an executive branch of government and the PCE as a watchdog.[120] The current office has 17 staff (15.9 FTEs) and a budget of NZD 2.7 million (AUD 2.1 million).[121]

The *Environment Act 1986* (NZ) defines the position of the PCE and the manner of appointing its officers. The PCE is a full-time Parliamentary Officer; the officeholder is prohibited from having another office (s 5). The officeholder is appointed by the Governor-General on the recommendation of Parliament for a five-year term (ss 4, 6). Removal or suspension of an officeholder is solely by the Governor-General with the support of the Parliament, for reasons of inability to perform the functions of the office, bankruptcy, neglect of duty or misconduct (s 7). The PCE is an independent body. The remuneration of the officeholder is guaranteed (s 9), the officeholder has the right to

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117 Parliamentary Ombudsmen (NZ), above n 115, 12, 46: Interview with Gina-Marie Seymour, Office of the Ombudsmen (NZ) (Telephone interview, 23 November 2009).

118 Parliamentary Ombudsmen (NZ), above n 112, 63, 78. Here and henceforward, NZD 1.00 is equivalent to AUD 0.80.

119 *Environment Act 1986* (NZ).

120 New Zealand, Parliamentary Debates, House of Representatives, 15 July 1986, 2980–1 (P.B. Goff, Minister of Housing, Minister for the Environment)

121 Parliamentary Commissioner for the Environment (NZ), *Annual Report for the year ended 30 June 2011* (The Parliamentary Commissioner for the Environment, 2011), 17, 31.

choose and appoint the staff of the office (ss 11, 13) and the budget of the office is determined by the Parliament (s 25).

The PCE has a wide range of powers to maintain and improve the quality of the environment and to supervise the government's environmental management. These powers include reviewing, reporting, investigating, advising and inquiring (s 16(1)). These powers are exercised to protect natural resources, including important ecosystems, from environmental pollution, natural hazards, invasive species, environmental impacts and depletion of natural resources (s 17).

The powers bestowed by the *Environment Act 1986* (NZ) are as follows. The PCE reviews the systems of agencies and their administrative procedures to report the results to the Parliament and other appropriate bodies or persons (s 16(1)(a)). The office investigates the effectiveness of the environmental planning and management of public authorities, and advises on any remedial action (s 16(1)(b)). It also investigates any matter that adversely affects the environment, and advises on preventive measures or remedial action to the appropriate public authority and any other person or body (s 16(1)(c)). The PCE can require any person to provide necessary information (s 19), and any failure to comply is an offence that is subject to a fine (s 24). Further, the office undertakes and encourages the collection and dissemination of information (s 16(1)(f)). It also encourages preventive measures and remedial action for environmental protection (s 16(1)(g)).

In addition to these self-initiated actions, under the *Environment Act 1986* (NZ), the PCE has the following duties. At the request of the Parliament, the office reports on any petition, Bill or other matter that may have a significant effect on the environment (s 16(1)(d)). At the direction of the Parliament, it must inquire into any matter that may

have a substantial and damaging effect on the environment. For this purpose, as the commission of inquiry, the PCE has the same immunities and privileges as a District Court Judge, and reports to Parliament (ss 16(1)(e), (2)–(3)). In addition, the office submits an annual report on its performance and any other matters to Parliament (s 23).

Recent moves

Budgetary limitations have had a significant impact on the entrenchment of the PCE in recent years. The size of the PCE budget had been quite stable, due partly to the efforts of the second officeholder on enhancing the transparency of the relationship between budget requirement and outputs.[122] However, although the current officeholder has been rigorous on cost, the budget was reduced by 12 per cent in 2010 as a part of the reduction in the budget across the entire public sector.[123] Despite concerns regarding under-resourcing of the office,[124] and regardless of the excellent contributions made by the office, the severe budgetary landscape and low public support means that an unconditional increase in the budget is unlikely in the near future.[125] In the case of the Ombudsman, the budget was increased based on its excellent performance. However, for the PCE to secure an increased budget, it would be necessary for the office to take on additional roles.[126]

In this context, in June 2011, the Environment Minister proposed that the PCE take on responsibility for the publication of the state of the environment report.[127] According to

[122] Interview with David Wilson, Clerk of the House of Representatives, Officers of the Parliament Committee (Wellington, 9 June 2011); Interview with Morgan Williams, former Parliamentary Commissioner for the Environment (Wellington, 10 June 2011).
[123] Interview with Sarah Clark, Office Manager, Parliamentary Commissioner for the Environment (Wellington, 9 June 2011).
[124] Interview with Klaus Bosselmann, Professor of Law, University of Auckland (Canberra, 28 May 2011).
[125] Interview with Pavan Sharma, Clerk of the House of Representatives, Local Government and Environment Committee (Wellington, 8 June 2011); Interview with David Wilson, Clerk of the House of Representatives, Officers of the Parliament Committee (Wellington, 9 June 2011).
[126] Interview with David Wilson, Clerk of the House of Representatives, Officers of the Parliament Committee (Wellington, 9 June 2011).
[127] Nick Smith, Minister for the Environment (NZ), 'The Bluegreen Agenda' (Speech delivered at the EDS National Conference, New Zealand, 2 June 2011); Nick Smith, Minister for the Environment (NZ),

the stakeholders interviewed, the underlying issue behind this proposal is the low quality of the reports produced by the Ministry.[128] The current officeholder is positively disposed to undertaking this additional role.[129] However, others who have worked for the office do not welcome the proposal because the nature of this new role is backward-looking (that is, reviewing what has already happened), and is thus contrary to the office's basic stance of looking forward (that is, making plans for the future).[130] Jenny Boshier, who has 10 years' experience in producing state of the environment reports in Australia, warned that this new role would overburden the office, without being important to it.[131]

5.4.3 PCE and the Ombudsman

The *Environment Act 1986* (NZ) does not itself refer to procedures for complaints handling, which is one of the core functions of the classical Ombudsman, and indeed environment-related Ministries are subject to the Ombudsman's supervision.[132] It would thus be unsurprising if the PCE referred all complaints about environmental administration to the Ombudsman. However, from the outset, the PCE has been expected to exercise certain functions of an Environmental Ombudsman,[133] and it is clear that the PCE has sufficient power to do so. In practice, the PCE acts as an Environmental Ombudsman when it investigates public complaints on environmental issues. To understand the actual activities of this institution, the following paragraphs discuss data on its caseload.

'Govt proposes new Environmental Reporting Act' (Media Release, 18 August 2011).

128 Interview with Sarah Clark, Office Manager, Parliamentary Commissioner for the Environment (Wellington, 9 June 2011); Interview with Helen Beaumont, Environment Commissioner, Environment Court of New Zealand (Wellington, 13 June 2011).

129 Interview with Sarah Clark, Office Manager, Parliamentary Commissioner for the Environment (Wellington, 9 June 2011).

130 Interview with Morgan Williams, former Parliamentary Commissioner for the Environment (Wellington, 10 June 2011); Interview with Jenny Boshier, former Deputy Commissioner, Parliamentary Commissioner for the Environment (Wellington, 10 June 2011).

131 Interview with Jenny Boshier, former Deputy Commissioner, Parliamentary Commissioner for the Environment (Wellington, 10 June 2011).

132 *Environment Act 1986* (NZ), s 35; *Ombudsmen Act 1975* (NZ), sch 1, pt 1.

133 New Zealand, Parliamentary Debates, House of Representatives, 15 July 1986, 2980 (P.B. Goff, Minister of Housing, Minister for the Environment).

During the financial years 2006/07–2010/11, on average, the PCE accepted 99 complaints per year. The statistics on investigated complaints in the financial year 2010/11 were partly not available, but 42.5 per cent of the complaints accepted in the financial years 2006/07–2009/10 were investigated. In addition, on average, the office conducted 8.6 self-initiated investigations per year over this period.[134]

During this period, on average, the Ombudsman accepted 9140 complaints per year, among which 7432 were complaints to the classical Ombudsman and 1121 were cases lodged about information disclosure. The Ombudsman investigated 89.6 per cent of complaints and reviewed 88.0 per cent of disputes over information disclosure. However, the statistics do not indicate how many complaints were on environment-related matters. In addition, the Ombudsman conducted approximately three own-motioned investigations per year. However, none of these were on environment-related matters.[135]

In New Zealand, it is regarded that the general Ombudsman is not very active in the environmental field partly because of the limitation of resources.[136] However, in practice, many environmental complaints were brought to the Ombudsman. For instance, Ombudsman David McGee explains that approximately 5.0 per cent of total complaints relate to challenging planning decisions.[137] Further, a few of these environment-related

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134 Parliamentary Commissioner for the Environment (NZ), *Report of the Parliamentary Commissioner for the Environment: for the year ended 30 June 2007* (The Parliamentary Commissioner for the Environment, 2007), 9–15; Parliamentary Commissioner for the Environment (NZ), *Annual Report of the Parliamentary Commissioner for the Environment: for the year ended 30 June 2008* (The Parliamentary Commissioner for the Environment, 2008), 10–15; Parliamentary Commissioner for the Environment (NZ), *Annual Report for the year ended 30 June 2009* (The Parliamentary Commissioner for the Environment, 2009), 7–13; Parliamentary Commissioner for the Environment (NZ), *Annual Report for the year ended 30 June 2010* (The Parliamentary Commissioner for the Environment, 2010), 7–14; Parliamentary Commissioner for the Environment (NZ), above n 121, 7–16. The number of self-initiated investigations is the sum of completed investigations and those under investigation.

135 Parliamentary Ombudsmen (NZ), *Report of The Ombudsmen for the year ended 30 June 2007* (Office of the Ombudsmen, 2007), 16, 88–97; Parliamentary Ombudsmen (NZ), *2007/2008 Report of The Ombudsmen for the year ended 30 June 2008* (Office of the Ombudsmen, 2008), 94–102; Parliamentary Ombudsman (NZ), above n 115, 14, 92–8; Parliamentary Ombudsmen (NZ), *2009/2010 Report of The Ombudsmen for the year ended 30 June 2010* (Office of the Ombudsmen, 2010), 22, 94–103; Parliamentary Ombudsmen (NZ), above n 112, 23–4, 109–21.

136 Gary Hawke (ed), *Guardians for the Environment* (Institute of Policy Science, Victoria University of Wellington, 1997), 70.

137 Interview with David McGee, Ombudsman (Wellington, 8 June 2011).

complaints were thoroughly investigated and noted in the annual reports, or in a special report. However, it should be noted that these investigations focused on aspects of administrative management or damage to individuals rather than those of environmental damage itself.[138] The Ombudsman recognises that expert review of environmental matters is the PCE's task.[139]

5.5 Institutional settings in Hungary

On 1 January 2012, during the time of field research and the time of writing this thesis, Hungary changed its constitution. Accordingly many social institutions within the framework for executive transparency and accountability, on which this thesis focuses, were altered. However, this does not lose the value of analysis on the empirical data collected through the field research to clarify the role, efficacy and functionality of an Environmental Ombudsman. Thus, in this section and following chapters, the situation of Hungary at the time of field research for this thesis (2011) is described and analysed.

Table 5-5 below shows the diversification of the Ombudsman institutions in Hungary at the time of 2011. In 1993, Hungary established one general and two specialised Ombudsmen: the Parliamentary Commissioner for Civil Rights, the Parliamentary Commissioner for Data Protection and Freedom of Information, and the Parliamentary Commissioner for the Rights of National and Ethnic Minorities.[140] These offices

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138 For a example for the former, see the investigation on 'Hearing Commissioners and Non-notified Consents under Resource Management Act' reported in Parliamentary Commissioner for the Environment (NZ), above n 135 (2007), 21–2. For a example for the latter, see the investigation on 'Painted Apple Moth Spray Programme' reported in Parliamentary Commissioner for the Environment (NZ), above n 135 (2008), 22–3; Parliamentary Ombudsmen (NZ), 'Report of the Opinion of Ombudsmen Mel Smitth on Complaints Arising from Aerial Spraying of the Biological Insecticide Foray 48B on the Population of Parts of Auckland and Hamilton to Destroy Incursions of Painted Apple Moths, and Asian Gypsy Moths, Respectively During 2002–2004' (Office of the Ombudsmen, December 2007).

139 Hawke, above n 136, 70; Interview with David McGee, Ombudsman (Wellington, 8 June 2011).

140 *1993. évi LIX. törvény az állampolgári jogok országgyűlési biztosáról* [Act LIX of 1993 on the Parliamentary Commissioner for Civil Rights (Ombudsman)] (Hungary), 1 June 1993, *Magyar Közlöny*, No.1993/81, 4433; *1992. évi LXIII. törvény a személyes adatok védelméről és a közérdekű*

commenced their operations in 1995.[141] In 2007, the Parliamentary Commissioner for Future Generations (PCFG) was added as a specialised Environmental Ombudsman. The PCFG commenced its operation in December 2008.[142] All of these offices were classical Ombudsmen and there was no executive or organisational Ombudsman.

Table 5-5: Diversification of Ombudsman institutions in Hungary

Vertical / Horizontal	General	Specialised
Classical	Parliamentary Commissioner for Civil Rights	Parliamentary Commissioner for Data Protection and Freedom of Information Parliamentary Commissioner for the Rights of National and Ethnic Minorities Parliamentary Commissioner for Future Generations
Executive	–	–
Organisational	–	–

5.5.1 General Ombudsman

In Hungary, up until 1 January 2012, the *Act LIX of 1993 on the Parliamentary Commissioner for Civil Rights (Ombudsman)* (HUN) was the main Act that determined the functions and powers of both the general and specialised Ombudsmen.[143] The jurisdiction of a special Ombudsman was strictly divided from that of the general Ombudsman, so that there was no overlap of jurisdictions (art 2(2)). While the position of

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141 *adatok nyilvánosságáról* [Act LXIII of 1992 on the Protection of Personal Data and the Disclosure of Data of Public Interest] (Hungary), 27 October 1992, *Magyar Közlöny*, No.1992/116, 3962, arts 23–7.

142 Parliamentary Commissioner for Data Protection and Freedom of Information (HUN), *Parliamentary Commissioners in Hungary* (2011) <http://abiweb.obh.hu/dpc/index.php?menu=gyoker/about/Pch>

143 Parliamentary Commissioner for Future Generations (HUN), *Comprehensive Summary of the Report of the Parliamentary Commissioner for Future Generations of Hungary 2008–2009* (Office of the Parliamentary Commissioners (HUN), 2010), 7–8.

1993. évi LIX. törvény az állampolgári jogok országgyűlési biztosáról [Act LIX of 1993 on the Parliamentary Commissioner for Civil Rights (Ombudsman)] (Hungary), 1 June 1993, *Magyar Közlöny*, No.1993/81, 4433. Parliamentary Commissioner for Data Protection and Freedom of Information was legislated by the *1992. évi LXIII. törvény a személyes adatok védelméről és a közérdekű adatok nyilvánosságáról* [Act LXIII of 1992 on the Protection of Personal Data and the Disclosure of Data of Public Interest] (Hungary), 27 October 1992, *Magyar Közlöny*, No.1992/116, 3962, arts 23–7.

the general Ombudsman was vacant, a specialised Ombudsman acted as deputy, and vice versa (arts 2(3)–(4)). Without separate provisions or other legal instruments, the provisions for the general Ombudsman were applied for the specialised Ombudsmen (art 2(5)).

The general Ombudsman was elected by a two-thirds majority vote of the Parliament and was responsible only to Parliament (arts 2(1)–(2)). The President of the Republic nominated a candidate to Parliament. The Ombudsman was elected for a term of six years and could be re-elected once only (art 4). Candidates were required to possess a law degree, relevant expertise and experience, and not to have been a governmental employee for four years prior to the nomination (art 3). To avoid a conflict of interest, the Ombudsman was prohibited from having another office (art 5). The remuneration of the officeholder was guaranteed (arts 9–10). Removal or suspension of an officeholder could be made solely by Parliament with a two-thirds majority vote, by reason of neglect of duty, misconduct of false reporting or being convicted of a crime (art 15).

In Hungary, the primary objective of the Ombudsman was to investigate any impropriety against the constitutional rights of citizens (art 1). The range of subjects for supervision was comprehensive. It covered almost the entire administrative branch, including central and local governments, military forces, law enforcement organs, the investigative section of the public prosecutor's office and public corporations. The exemptions were limited to the Parliament, the President of Republic, the Constitutional Court, the State Audit Office, the courts, and the non-investigative sections of the public prosecutor's office (art 29). The public had free and direct access to the Ombudsman and received the results of investigations (arts 16, 19). The Ombudsman had discretion to decide whether it investigated the lodged complaints or not, and was able to initiate investigations of its own motion (arts 16(2), 17).

The officeholder was granted quite strong investigatory powers (art 18). When the results of investigations revealed the existence of impropriety, the Ombudsman might recommend a remedy to the supervisory organ of the public authority that had caused the impropriety (art 20). In serious cases, the officeholder might issue the remedy with the head of the authority concerned, and this initiative was recorded (art 21). The Ombudsman might also make motion to the Constitutional Court, initiate judicial proceedings with public prosecutors, or propose reform of statutory instruments (arts 22–5). If the reaction of the concerned authority was unsatisfactory, the officeholder could report to the Parliament and might request a parliamentary investigation. In serious cases, the officeholder might list the case on the agenda of parliamentary debate (art 26). The general and specialised Ombudsmen also had a duty to publish annual reports separately (art 27).

For economic and organisational efficiency, the general and specialised Ombudsmen shared their administrative officers. They had the right to choose and appoint the staff of the office. The operational costs of the office were determined in a separate chapter of the state budget (art 28). As at 2011, the total number of office staff was 177. Among them, 36 were managers, 110 were expert staff, and 31 were clerical and supportive staff. The number of staff working for the general Ombudsman was 44, including seven managers and 33 experts. The PCFG had 32 staff, including eight managers and 22 experts, and the shared administrative office numbered 36.[144]

5.5.2 Environmental Ombudsman

The PCFG was established under the 2007 amendment to the *Act LIX of 1993 on the Parliamentary Commissioner for Civil Rights (Ombudsman).* (HUN) The concept of the

[144] Parliamentary Commissioner for Civil Rights (HUN), *Beszámoló: az Állampolgári Jogok Országgyűlési Biztosának Tevékenységéről 2011 [Annual Report on the Activities of the Parliamentary Commissioner for Civil Rights in 2011]* (Office of the Parliamentary Commissioner (HUN), 2012), 273.

office was launched in the early 1990s and, a national environmental NGO (Védegylet [Protect the Future]) led the preparatory work in subsequent years. In 2000, the NGO and two legal experts drafted a Bill that was aimed at the creating a guardian of environmental interests for future generations. One of the legal experts who drafted the Bill was the first president of the Constitutional Court (1990–8), Dr László Sólyom. In 2001, two MPs submitted the Bill as an individual motion, but this attempt was unsuccessful. The NGO continued its preparatory work, but it took another six years for the plans to come to fruition. Meanwhile, in 2005, Dr Sólyom was elected as the President of the Republic. In 2007, after a six-month negotiation with all parliamentary parties, the original Bill was amended and the PCFG was established in November. In May 2008, Dr Sándor Fülöp was elected as the first officeholder.[145] The annual budget of the PCFG was HUF 264.6 million (AUD 1.32 million).[146]

The primary task of the PCFG was to protect the constitutional right to a healthy environment (art 27/A).[147] The functions of the PCFG could be broadly divided into three areas: complaints investigation, parliamentary advocacy, and strategic development and research.[148] Regarding the function of 'parliamentary advocacy', the officeholder had duties both at the national and international level. At the national level, the officeholder expressed opinions on environment-related Bills or other draft instruments, proposed legislation, and expressed opinions on long-term plans and local governments'

[145] Parliamentary Commissioner for Future Generations (HUN), above n 142, 7; Benedek Jávor, 'Institutional Protection of Succeeding Generations — Ombudsman for Future Generations in Hungary' in Joerg Chet Tremmel (ed), *Handbook of Intergenerational Justice* (Edward Elgar, 2006) 282, 287–94; Interview with MP Benedek Jávor, Chair, Sustainable Development Committee at the National Assembly of Hungary (Budapest, 24 June 2011).

[146] Parliamentary Commissioner for Future Generations (HUN), *Beszámoló: A Jövő Nemzedékek Országgyűlési Biztosának 2010. évi Tevékenységéről [Report of the Hungarian Parliamentary Commissioner for Future Generations 2010]* (Office of the Parliamentary Commissioners (HUN), 2011), 329. The data is for 2010. The amount of the budget does not include the costs of the shared administrative office. Here and henceforward, AUD 1.00 is equivalent to HUF200.00.

[147] *1949. évi XX. törvény A Magyar Köztársaság Alkotmánya* [Act XX of 1949: The Constitution of the Republic of Hungary] (Hungary), 20 August 1949, as amended by *1989. évi XXXI. törvény az Alkotmány módosításáról* [Act XXXI of 1989 for Amending the Constitution], 23 October 1989, *Magyar Közlöny*, No.1989/74, 1219, art 18.

[148] Parliamentary Commissioner for Future Generations, above n 142, 8.

development plans. At the international level, the officeholder expressed opinions on obligatory international environmental agreements, contributed to the preparation of national reports to be submitted on these agreements, and monitored the incorporation of these agreements into the Hungarian legal system. The officeholder also participated in the elaboration of the Hungarian standpoint regarding environmental issues in the European Union (arts 27/B(3)(e)–(h)).

As for the function of 'complaint handling', in addition to the powers of the Ombudsman, the PCFG was bestowed with a wide range of powers to ensure sustainability and improve the quality of the environment and nature (arts 27/B(1)–(2)). These included both investigatory and remedial powers. The PCFG could ask persons or organisations conducting environmentally damaging activities to compensate, on behalf of owners or managers of state-subsidised properties (art 27/B(5)). The officeholder could disclose details of environmentally damaging activities, inclusive of business secrets, applied measures and/or recommendations that include personal data (art 27/B(6)). The PCFG could request persons or organisations to terminate environmentally damaging activities. If the reactions of the subjects were unsatisfactory, the officeholder could ask the court to prohibit such damaging activities (arts 27/B(3)a), 27/C). The officeholder could initiate the regulation or prohibition of responsible authorities against environmentally damaging activities (arts 27/B(3)b)–c), (4), 27/D). When an administrative activity was suspected of being environmentally harmful, the PCFG could issue a suspension of execution of the activity. Against such potentially harmful administrative activities, the officeholder could initiate an internal merits review or a judicial review (arts 27/B(3)d), 27/E–27/F). The PCFG was to be informed about obligatory public hearings and could initiate other public hearings for the purpose of environmental protection (arts 27/B(3)i), 27/G). For the purpose of

implementing its duties, the officeholder had free access to relevant information (including secrets) and to premises. Persons and organisations to be investigated had an obligation to cooperate (art 27/H).

Recent moves

Since the 2010 election, the Hungarian Government has promoted the reform of the Constitution and relevant law. The affected areas include the judicial system, the mechanisms for executive transparency and accountability, and the Ombudsman scheme. The content of reform includes the modernisation of provisions on human and environmental rights in the Constitution to which the PCFG contributed; there have been calls to evaluate this aspect of the reforms.[149] Moreover, these reforms are controversial and are frequently criticised as radical, partly because they were not explicitly mentioned during the latest election.[150] The EU has expressed concerns about the radical nature of the proposed constitutional reforms, which could potentially harm the independence of social institutions vital for securing executive transparency and accountability, such as the media, the judiciary and the data protection authority, from the viewpoint of deviating from EU democratic standards.[151]

At the time of the field research for this thesis (2011), the existence of the PCFG was

[149] Interview with Gyula Bándi, Jean Monnet Professor of EU Environmental Law, Pázmány Péter Catholic University (Budapest, 27 June 2011); Interview with Sándor Fülöp, Parliamentary Commissioner for Future Generations (Budapest, 28 June 2011).

[150] Interview with Csaba Kiss, Director, Environmental Management and Law Association (Budapest, 22 June 2011).

[151] See, eg, *European Parliament Resolution on the Revised Hungarian Constitution*, European Parliament Res, P7_TA-PROV(2011)0315, (5 July 2011); European Commission for Democracy through Law (Venice Commission), 'Opinion on the New Constitution of Hungary: Adopted by the Venice Commission at its 87th Plenary Session (Venice, 17–18 June 2011)' (Opinion no. 621/2011, CDL-AD(2011)016 20 June 2011) <http://www.venice.coe.int/docs/2011/CDL-AD%282011%29016-E.pdf>, 19–26; José Manuel Durão Barroso, President of the European Commission 'Statement' (Speech delivered at the press conference following the meeting of the European Commission with the Hungarian Presidency Joint press conference with Viktor Orbán, Prime Minister of Hungary, Budapest, 7 January 2011); Neelie Kroes (Vice-President of the European Commission), *Defending media pluralism in Hungary* (5 January 2012) European Union <http://blogs.ec.europa.eu/neelie-kroes/media-pluralism-hungary/>; European Commission, 'Hungary — infringements: European Commission satisfied with changes to central bank statute, but refers Hungary to the Court of Justice on the independence of the data protection authority and measures affecting the judiciary' (Press Release, IP/12/395, 30 March 2010).

endangered by these constitutional reforms.[152] It was proposed that the Ombudsman system be amended completely. First of all, it was proposed that the Parliamentary Commissioner for Data Protection and Freedom of Information become a governmental agency as in other EU countries. Under the proposed Ombudsman system, the other two specialised Ombudsmen were to be merged into the general Ombudsman. The PCFG was proposed to be a Deputy Ombudsman in charge of environmental issues.[153] The new Constitution and the Ombudsman Law entered into force on 1 January 2012.[154]

5.5.3 PCFG and the Ombudsman

In Hungary, the PCFG had all the power of the general Ombudsman and some extra powers to deal with environmental matters. For instance, the PCFG had the power to investigate the private sector, while the Ombudsman did not. Although rarely exercised in practice, this power was granted due to the Hungarian situation, where the majority of environmental problems occur in the private sector.[155] From a comparative viewpoint, this is interesting because the Environmental Dispute Coordination Commission (EDCC) of Japan, which was detailed in Subsection 3.3.1, is granted a similar power. However, as mentioned, the EDCC does not have jurisdiction in administrative environmental disputes, except in the case of mining issues. In the following paragraphs, the influence of the PCFG is examined through workload data.

Because the PCFG commenced operation in the last month of the 2008 financial year,

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152 Interview with Sándor Fülöp, Parliamentary Commissioner for Future Generations (Budapest, 28 June 2011): Interview with Gyula Bándi, Jean Monnet Professor of EU Environmental Law, Pázmány Péter Catholic University (Budapest, 27 June 2011).

153 Interview with Justice Barnabás Lenkovics, former Ombudsman (Budapest, 23 June 2011); Interview with Sándor Fülöp, Parliamentary Commissioner for Future Generations (Budapest, 28 June 2011); Interview with MP Benedek Jávor, Chair, Sustainable Development Committee at the National Assembly of Hungary (Budapest, 24 June 2011); Interview with Vajk Farkas, Lawyer, Ministry of Public Administration and Justice (Budapest, 28 June 2011).

154 *Magyarország Alaptörvénye* [The Fundamental Law of Hungary] (Hungary), 18 April 2011; *2011. évi CXI. törvény az alapvető jogok biztosáról* [Act CXI of 2011 on the Parliamentary Commissioner for Fundamental Rights] (Hungary), 26 July 2011, *Magyar Közlöny*, No.2011/88, 25435.

155 Interview with Gyula Bándi, Jean Monnet Professor of EU Environmental Law, Pázmány Péter Catholic University (Budapest, 27 June 2011); Interview with MP Benedek Jávor, Chair, Sustainable Development Committee at the National Assembly of Hungary (Budapest, 24 June 2011).

most of the statistical data for the first two years (2008 and 2009) were combined. Thus, statistical data on these two years is treated as for the financial year 2008/09. During the financial years 2008/09–10, on average, the PCFG accepted 370 complaints per year. Although statistics on investigated complaints in the 2010 financial year were not available, 64.2 per cent of complaints were investigated in the financial year 2008/09. The office also conducted 20 self-initiated investigations per year in this period, and 179 public hearings in the 2010 financial year. Further, the PCFG was actively involved in the legal reform process, submitting 18 proposals in the financial year 2008/09 and 152 proposals in the 2010 financial year, among which four related to the review of the Constitution.[156]

During the 2006–10 financial years, on average, the Ombudsman accepted 6174 complaints per year from the public. 120 lodgements (1.7 per cent) of these were environment-related complaints, and 31.3 per cent of them were investigated. The number of environmental complaints brought to the Ombudsman fluctuated by year, but there was no dramatic reduction after the establishment of the PCFG. In contrast, the number of investigated environmental cases dramatically reduced in conjunction with the establishment of the PCFG. In the 2006–07 financial years, the Ombudsman investigated 58.0 per cent of environmental complaints. In the 2008 financial year, this ratio dropped to 22.9 per cent, and in the 2009–10 financial years, this rate fell to 2.3 per cent. Meanwhile, the Ombudsman conducted 89 own-motion investigations per year in this period, but the statistics do not reveal how many of them were environment related.[157]

[156] Parliamentary Commissioner for Future Generations, above n 142, 12; Parliamentary Commissioner for Future Generations (HUN), *A Jövő Nemzedékek Országgyűlési Biztosának Beszámolója 2008–2009 [Report of the Parliamentary Commissioner for Future Generations of Hungary 2008–2009]* (Office of the Parliamentary Commissioners (HUN), 2010), 283–4; Parliamentary Commissioner for Future Generations, above n 146, 330–2; Interview with István Sárközy, Legal adviser, Office of the Parliamentary Commissioner for Future Generations (Budapest, 28 June 2011).

[157] Parliamentary Commissioner for Civil Rights (HUN), *Beszámoló: az Állampolgári Jogok Országgyűlési Biztosának és Általános Helyettesének 2006. évi Tevékenységéről [Annual Report on the Activities of the Parliamentary Commissioner and the Deputy Commissioner for Civil Rights in 2006]* (Office of the Parliamentary Commissioner (HUN), 2007), 257–77; Parliamentary Commissioner for

Regarding the Ombudsman's activities, the Honourable Justice Barnabás Lenkovics at the Constitutional Court — the former Ombudsman (2001–07) — explained that approximately one-third of complaints were directly or indirectly related to environmental matters. Thus, some own-motion investigations were environment related.[158]

From the statistical data, it is obvious that the establishment of the PCFG quite strictly divided the jurisdictions between the Ombudsmen. However, in Hungary, this strict division has also caused daily disputes between the general Ombudsman and other specialised Ombudsmen over which institution should handle a complaint from the public.[159] Against this background, the current general Ombudsman initiated the reform of the Ombudsman scheme aiming at eliminating disputes among the Ombudsmen over jurisdiction and establishing overall control by the general Ombudsman.[160] This motivation of the general Ombudsman was also deeply related to the institution's philosophy.

5.6 Institutional settings in Japan

Japan has no classical Ombudsman or specialised Ombudsman at the national level.

Civil Rights (HUN), *Beszámoló: az Állampolgári Jogok Országgyűlési Biztosának Tevékenységérõl 2007 [Annual Report on the Activities of the Parliamentary Commissioner for Civil Rights in 2007]* (Office of the Parliamentary Commissioner (HUN), 2008), 257–76; Parliamentary Commissioner for Civil Rights (HUN), *Beszámoló: az Állampolgári Jogok Országgyűlési Biztosának 2008. évi Tevékenységérõl [Report on the Activities of the Parliamentary Commissioner for Civil Rights in the Year 2008]* (Office of the Parliamentary Commissioner (HUN), 2009), 1141–52; Parliamentary Commissioner for Civil Rights (HUN), *Beszámoló: az Állampolgári Jogok Országgyűlési Biztosának 2009. évi Tevékenységérõl [Report on the Activities of the Parliamentary Commissioner for Civil Rights in the Year 2009]* (Office of the Parliamentary Commissioner (HUN), 2010), 1575–86; Parliamentary Commissioner for Civil Rights (HUN), *Beszámoló: az Állampolgári Jogok Országgyűlési Biztosának 2010. évi Tevékenységérõl [Report on the Activities of the Parliamentary Commissioner for Civil Rights in the Year 2010]* (Office of the Parliamentary Commissioner (HUN), 2011), 1376–87.

158 Interview with Justice Barnabás Lenkovics, former Ombudsman (Budapest, 23 June 2011).

159 Interview with Vajk Farkas, Lawyer, Ministry of Public Administration and Justice (Budapest, 28 June 2011); Interview with MP Benedek Jávor, Chair, Sustainable Development Committee at the National Assembly of Hungary (Budapest, 24 June 2011).

160 Interview with Vajk Farkas, Lawyer, Ministry of Public Administration and Justice (Budapest, 28 June 2011)

However, as Table 5-6 below shows, since 1990, more than 30 executive and organisational Ombudsman institutions have been established at the municipal level. The majority of these are general Ombudsman institutions, but nearly one-third of them are specialised Ombudsman institutions. The fields of specialised Ombudsman institutions include disability, children's rights, and gender equality.[161]

Table 5-6: Diversification of Ombudsman institutions in Japan

Vertical / Horizontal	General	Specialised
Classical	–	–
Executive	– (e.g., Fujisawa City Ombudsman)*	– (e.g., Hino City Disability Ombudsman, Kawanishi City Children's Rights Ombudsman)*
Organisational	– (e.g., Okinawa Prefecture Administration Ombudsman)*	– (e.g., Itami City Gender Equality Ombudsman)*

Note: * Information in parentheses refers to the municipal level, as opposed to the national level.

In addition, there are two other types of organisations that claim to be 'Ombudsman'. The first is the NGOs that call themselves 'Citizen Ombudsmen'; these were detailed in Subsection 5.1.4. The other is the Administrative Counselling Mechanism (ACM), which is the complaint-handling mechanism at the national level and is frequently described as a 'Japanese-style Ombudsman' by the government.[162] Owing to this and to the lack of a classical Ombudsman institution, there is confusion in Japan about the concept of 'Ombudsman' institutions. In particular, the institution of 'Citizen Ombudsman' is widely recognised through media reports on their activities to the extent that a lay citizen of

[161] 宇都宮深志 [Fukashi Utsunomiya], *公正と公開の行政学： オンブズマン制度と情報公開の新たな展開 [Public Administration Studies on Fairness and Disclosure: New Development of the Ombudsman System and Information Disclosure]* (三嶺書房 [Sanrei Shobo], 2001), 288–91; 外山公美 [Kimiyoshi Toyama], *カナダのオンブズマン制度:日カ比較と日本オンブズマン制度の課題 [The Ombudsman System in Canada]* (頸草書房 [Keiso Shobo], 2005), 143–53; 土屋英雄 [Hideo Tsuchiya], *公的オンブズマンの存在意義と制度設計 [The Official Ombudsman]* (花伝社 [Kaden Sha], 2010), 29–30. In Japan, 'municipality' consists of prefectures, cities, towns, villages and 23 special wards in the Tokyo Metropolis. *地方自治法* [Local Autonomy Law] (Japan) 17 April 1947, Law No 67 of S22, art 1–3.

[162] See for example, Japan, *Diet Debates*, Permanent Committee on Cabinet at the House of Councillors, 16 December 1986, 14 (山本貞雄 [Sadao Yamamoto], Director of Inspector on Administration, Agency of Internal Affairs); Japan, *Diet Debates*, Research Commission on the Constitution at the House of Representatives, 21 October 2004, 4 (赤松正雄 [Masao Akamatsu], New Clean Government Party).

Japan automatically associates the term 'Ombudsman' with 'Citizen Ombudsman'.[163] Importantly, this prevents the dissemination of a precise understanding of the classical Ombudsman model among lay citizens.[164]

To be able to discuss the introduction of a classical Ombudsman against this background of confused terminology, this section summarises the institutional settings and activities of the institutions associated with the term of 'Ombudsman' in Japan, with the exception of the NGOs detailed in Subsection 5.1.4. Subsection 5.6.1 examines the basic features of a municipal Ombudsman. Subsection 5.6.2 assesses the complaint-handling mechanisms at the national level, including the ACM. Finally, Subsection 5.6.3 analyses the institutions in the environmental field.

5.6.1 Municipal Ombudsman

In Japan, all the municipal Ombudsmen are either executive or organisational Ombudsmen. This is because article 138 of the *Local Autonomy Law* (JPN) is interpreted as tacitly prohibiting a legislative assembly from establishing its officers, with the exception of its secretariat. Conversely, article 138-4 of the law explicitly allows the establishment of various supporting agencies under the municipal government. Thus, the legislative assembly can establish an executive Ombudsman by ordinance. Further, article 153 of the law explicitly allows the head of a municipality to delegate certain powers to a special public officer. Hence, the head can establish an organisational Ombudsman by a guideline (an internal rule of the municipal government).[165] In these cases, the legal statuses of the executive and organisational Ombudsmen are different. While the former is not subject to the head of the municipality's control, the latter is

[163] Interview with 大久保規子 [Noriko Okubo], Professor, Osaka University Graduate School of Law and Politics (Osaka, 7 July 2011).

[164] Interview with 園部逸夫 [Itsuo Sonobe], former Supreme Court Judge (Tokyo, 22 July 2011); 林屋礼二 [Reiji Hayashiya], *オンブズマン制度：日本の行政と公的オンブズマン [Ombudsman Scheme: Public Administration and Official Ombudsman in Japan]* (岩波書店 [Iwanami Shoten], 2002), 73–7.

[165] *地方自治法* [Local Autonomy Law] (Japan) 17 April 1947, Law No 67 of S22; Hayashiya above n 164, 77–8; Tsuchiya, above n 161, 85. Hayashiya and Tsuchiya are former municipal Ombudsmen.

theoretically subject to control and can be abolished by the head.[166]

From the viewpoint of institutional settings, the weak independence of the office of the municipal Ombudsmen is problematic. In Japan, municipal Ombudsmen do not have the power to appoint their own staff. Thus, excepting a few part-time expert staff in a few offices, all staff are seconded from the municipal government. These seconded staff potentially have conflicts of interests, and threaten the independence of the office.[167] Further, when the status of the office within the municipal government is low, which is typical for organisational Ombudsmen, the municipal Ombudsmen tend to suffer from budgetary and resource shortage.[168] Another noteworthy feature of the institutional setting is that all municipal Ombudsmen have multiple incumbents, most of whom are part-time officers, and apply the council system. In this council system, a decision is made under the consensus of all incumbents who belong to an office.[169] In comparison with the singular system, in which a decision is made by individual incumbents, the council model prevents the swift processing of complaints. Reflecting this difference, almost all classical Ombudsmen apply the singular system.[170]

A unique feature of Japanese municipal Ombudsmen is that their functions are mostly limited to complaint handling. There are various reasons for this, such as weak independence and limited powers, weak penetration of concepts of executive accountability, and the resistance of the municipal government to supervision by internal

166 *地方公務員法* [Law on Municipal Public Officers] (Japan) 13 December 1950, Law No 261 of S25, arts 3(3)(2), 3(3)(3); *地方自治法* [Local Autonomy Law] (Japan) 17 April 1947, Law No 67 of S22, art 154; Hayashiya above n 164, 78–80; Tsuchiya, above n 161, 80.

167 Utsunomiya, above n 161, 314–15; 篠原一 [Hajime Shinohara] and 林屋礼二 [Reiji Hayashiya] (eds), *公的オンブズマン：自治体行政への導入と活動 [Official Ombudsman in Japan: Its Introduction at Municipal Level and Activities]* (信山社 [Shinzan Sha], 1999), 195–238; Tsuchiya, above n 161, 85–7; Hayashiya above n 164, 85–90.

168 Hayashiya above n 164, 87–9.

169 Toyama, above n 161, 191–2, 228; Utsunomiya, above n 161, 288–91, 310–11; Interview with 外山公美 [Kimiyoshi Toyama], Professor, Nihon University Faculty of Law (Tokyo, 26 July 2011).

170 Interview with 外山公美 [Kimiyoshi Toyama], Professor, Nihon University Faculty of Law (Tokyo, 26 July 2011)

organs.[171] Some municipalities officially limit the roles of municipal Ombudsmen, providing the reason that legislative assemblies and inhabitant audit schemes already fulfil executive accountability.[172] However, the legislative assemblies are inefficient, ineffective and lacking in capacity. Similarly, the inhabitant audit scheme has the fatal flaw of lack of impartiality.[173] Particularly, the latter is the reason why the 'Citizen Ombudsman' movement acquired a popularity not observed in other countries.[174] Importantly, this limitation of functions has had negative effects. By 2009, four municipal Ombudsmen had been abolished. The reason for one abolition was that citizens of the municipality had become dissatisfied with the Ombudsman's limited focus on complaint handling. Further, in 2003, Fukuoka City abandoned its planned introduction of a municipal Ombudsman because little effectiveness was anticipated.[175] Thus, it can be said that limitations in the functions of the municipal Ombudsman runs counter to the expectations of the public.

5.6.2 Complaint-handling mechanisms

As mentioned above, complaint handling in Japan is closely associated with the term 'Ombudsman'. Thus, understanding the complaint-handling mechanisms at the national level is a necessary part of any discussion relating to the introduction of a classical Ombudsman. The institutions to be assessed here are the ACM and the Compliance Office at the Ministry of Internal Affairs and Communications (MIC).

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171 Tsuchiya, above n 161, 40–44, 81–92; Hayashiya above n 164, 93–103.
172 Hayashiya above n 164, 97–8.
173 Hayashiya above n 164, 98–9; Tsuchiya, above n 161, 40–79.
174 園部逸夫 [Itsuo Sonobe] and 枝根茂 [Shigeru Edane], *オンブズマン法 [Ombudsman Law]*, 行政法研究双書 [Administrative Law Research] (弘文堂 [Kobundo], 2nd ed, 1997), 111–13; 潮見憲三郎 [Kenzaburo Shiomi], *オンブズマンとは何か [What is the Ombudsman?]* (講談社 [Kodan Sha], 1996), 237–41; 今川晃 [Akira Imagawa], '自治体行政と公的オンブズマンのあり方 [Municipal Administration and Activities of Official Ombudsman]' in 篠原一 [Hajime Shinohara] and 林屋礼二 [Reiji Hayashiya] (eds), *公的オンブズマン：自治体行政への導入と活動 [Official Ombudsman in Japan: Its Introduction at Municipal Level and Activities]* (信山社 [Shinzan Sha], 1999) 56, 58.
175 Tsuchiya, above n 161, 29–31, 43–4; Imagawa, above n 174, 68. Among the four abolished municipal Ombudsmen, two were executive Ombudsmen at city level and two were organisational Ombudsmen at prefectural level. Tsuchiya, above n 161, 29; Shinohara and Hayashiya, above n 167, 195–216.

Administrative Counselling Mechanism

The ACM is the representative complaint-handling mechanism in Japan.[176] The ACM is conducted by the Administrative Evaluation Bureau at the MIC.[177] Under the ACM, complaints from the public are handled primarily by conciliation.[178] However, the MIC does not have any official investigatory power. The administrative office relevant to the complaint is obliged to cooperate with the MIC because the MIC has statutory jurisdiction. The complainant is notified of the result of conciliation, but it does not legally bind the parties.[179]

One specific feature of the ACM is that the MIC accepts complaints not only directly from complainants, but also indirectly from volunteers called 'administrative counsellors'. In addition to 69 MIC contact points, 5000 counsellors nationwide also accept complaints.[180] Administrative counsellors have power to advise the complainants and to send the complaints either to the Bureau or to the relevant administrative bodies. In addition to their function as intermediaries, counsellors can state their opinions to the Minister of Internal Affairs and Communication regarding improvements of administrative activities, based on their findings.[181] The name of the ACM derives from the role of these volunteers, but the body that handles the complaints from the public is actually the MIC.

To cope with systemic problems that are extracted from individual complaints, the

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176 There are some references on this institution written in English. See, Gellhorn, above n 43, 385–404; Mark J. Christensen, 'Japan's administrative counselling: Maintaining public sector relevance?' (2000) 13 *International Journal of Public Sector Management* 610.

177 *総務省設置法* [Law for Establishment of the Ministry of Internal Affairs and Communications] (Japan) 16 July 1999, Law No 91 of H11, arts 4(21)–(22).

178 *行政苦情あっせん取扱要領* [Guideline for Mediation on Complaints to the Executive] (Japan) 6 January 2001, Ministry of Internal Affairs and Communications' Official Directive No 65 of H13

179 Ibid, r 12; Research Group on Administrative Counselling Mechanism at the Ministry of Internal Affairs and Communications (JPN), '行政相談委員制度の在り方に関する研究会報告書 [Report of the Research Group on Administrative Counselling Mechanism]' (Ministry of Internal Affairs and Communications (JPN), July 2009) <http://www.soumu.go.jp/main_content/000029719.pdf>, 42.

180 Ministry of Internal Affairs and Communications (JPN), *総務省の行政相談 [Brochure on the Administrative Counselling Mechanism]* (Ministry of Internal Affairs and Communications (JPN), 2011), 2.

181 *行政相談委員法* [Administrative Counsellors Law] (Japan) 30 June 1966, Law No 99 of S41, arts 2, 4.

ACM utilises advisory bodies belonging to the Minister or heads of branches. These bodies do not have a legal basis — the members of the advisory bodies are selected from outside the MIC and the ACM serves as the secretariat.[182] The function of these bodies is to propose resolutions regardless of the boundary of the existing legal framework; the ACM itself cannot do this because of its limitations as an administrative office.[183] In practice, the advisory bodies have a few meetings per year, so the number of proposals is quite limited relative to the total number of the ACM conciliations.[184]

The ACM accepts more than 100 000 complaints per year. In 2011, there were 185 053 complaints, of which complaints on administrative activities at the national level accounted for 10.7 per cent (19 807). The other complaints related to administrative activities at the municipal level (33.4 per cent), civil disputes (31.2 per cent) and simple inquiries (24.7 per cent).[185] The ACM, as a generalist institution, handles complaints on administrative activities at the national level regardless of jurisdictional differences between individual administrative offices. This cross-jurisdictional feature is unique for a non-Ombudsman complaint-handling mechanism. The basic policy of the ACM is to dispatch complaints if there is an appropriate specialised complaint-handling mechanism. Although, the ACM does not have expertise in the environmental field, it handles a small number of environment-related complaints, such as inappropriate management of

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182 Research Group on Administrative Counselling Mechanism at the Ministry of Internal Affairs and Communications (JPN), above n 179, 36–8; Ministry of Internal Affairs and Communications (JPN), *行政苦情救済推進会議 [Council on Promotion of Resolution of Complaints to the Executive]* (31 March 2012) <http://www.soumu.go.jp/main_sosiki/hyouka/soudan_n/kujyousuisin.html>.

183 Interview with 塚本壽雄 [Hisao Tsukamoto], former Director General, Administrative Evaluation Bureau at Ministry of Internal Affairs and Communications (Tokyo, 4 July 2011).

184 Ministry of Internal Affairs and Communications (JPN), *行政苦情救済推進会議の議事概要と付議資料 [Summary of Minutes and Attached Documents of the Council on Promotion of Resolution of Complaints to the Executive]* (17 January 2012) <http://www.soumu.go.jp/main_sosiki/hyouka/soudan_n/giji.html>; Ministry of Internal Affairs and Communications (JPN), *行政苦情救済推進会議の検討結果を踏まえたあっせん事例 [Conciliation Cases which Reflected the Outcomes of the Council on Promotion of Resolution of Complaints to the Executive]* (17 January 2012) <http://www.soumu.go.jp/main_sosiki/hyouka/soudan_n/soudan_a.htm>.

185 Research Group on Administrative Counselling Mechanism at the Ministry of Internal Affairs and Communications (JPN), above n 179, 5; Ministry of Internal Affairs and Communications (JPN), *行政相談の実績 [Statistics about the Administrative Councillors Mechanism]* (1 June 2012) <http://www.soumu.go.jp/main_sosiki/hyouka/soudan_n/jituseki.html>.

National Parks.[186] Regarding systemic problems, since 2001, no proposal has issued by the advisory bodies in the environmental field.[187]

Compliance Office

Although not directly connected to the environmental field, there have been recent developments with respect to complaint-handling mechanisms that could influence the arguments regarding the introduction of an Environmental Ombudsman in Japan. This is that the Compliance Office of the MIC has started to accept complaints on the Ministry's activities that do not comply with the expectations of society. The office is legally a part of the administrative office but belongs directly to the Minister, and was originally aimed at protecting whistleblowers within the MIC.[188] In 2009, the Democratic Party won the national election on a platform of fundamental reform of the bureaucracy. In this context, the current head, Nobuo Gohara, was recruited from outside the Ministry soon after the election. In contrast to previous heads, he had not worked as a senior bureaucrat of the MIC, but was a former public prosecutor and compliance expert. He overhauled the working mandates of the office and initiated the process for accepting complaints from the public. The main objective of the office is now to ensure that the MIC appropriately responds to social demands. For this purpose, the office investigates complaints and encourages the proper exercise of power in each division of the MIC.[189]

In practice, during the first year and a half, there were few complaints to the office due to its low profile. However, in May 2011, the office published a report on the MIC's long

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186 Interview with 白岩俊 [Suguru Shiraiwa], Director, Division of Administrative Counselling Mechanism at Ministry of Internal Affairs and Communications (Tokyo, 11 July 2011).

187 Ministry of Internal Affairs and Communications (JPN), above n 184.

188 *公益通報者保護法* [Whistleblower Protection Law] (Japan) 18 June 2004, Law No 122 of H16, art 2; Ministry of Internal Affairs and Communications (JPN), *公益通報者保護・コンプライアンス [Whistleblower Protection and Compliance]* (11 May 2012) <http://www.soumu.go.jp/menu_sinsei/koekitsuho/index.html>.

189 Interview with 郷原信郎 [Nobuo Gohara], Head, Compliance Office at Ministry of Internal Affairs and Communications (Tokyo, 5 July 2011); *コンプライアンス室設置規程* [Provision for Establishment of Compliance Office] (Japan) 17 March 2010, Ministry of Internal Affairs and Communications' Official Directive No 3 of H22.

standing mismanagement of a subsidy scheme. This report was based on the investigation of a complaint from the public, posted in February 2011. The Minister at that time evaluated this report highly and launched a working group on similar subsidy schemes. In addition, at a Cabinet meeting, the Minister recommended that other Ministers utilise similar offices in their Ministries to cope with similar problems. However, only a few offices in other Ministries have secured neutrality and independence equivalent to that offered by the Compliance Office; no environment-related Ministries are included among these. By nature of its responsibility for financial accountability, the National Auditor Board is interested in this case.[190]

5.6.3 Institutions in the environmental field

There are also some institutions associated with the term 'Ombudsman' in the environmental field. Almost all are located at the municipal level, and one at the national level.

Institutions at municipal level

There are two specialised municipal Ombudsmen; neither of which has recorded much activity.[191] Accordingly, it is difficult to examine the effectiveness of these institutions. Based on the *Law on Environmental Pollution Dispute Resolution* (JPN), municipalities handle complaints from the public, and the EDCC supervises their activities.[192] However, this scheme was established for handling disputes in the private

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190 Interview with 郷原信郎 [Nobuo Gohara], Head, Compliance Office at Ministry of Internal Affairs and Communications (Tokyo, 5 July 2011); Compliance Office at the Ministry of Internal Affairs and Communications (JPN), '補助金等に係る予算執行の適正化確保について[About Ensurement of Proper Budget Use on Subsidiary Schemes]' (Media Release, 13 May 2011); Ministry of Internal Affairs and Communications (JPN), '片山総務大臣閣議後記者会見の概要 [Summary of Press Conference of Minister Katayama after the Cabinet Meeting]' (Media Release, 17 May 2011).

191 *御嵩町環境基本条例* [Environmental Basic Ordinance of Mitake Town at Gifu Prefecture] (Japan) 1 April 2002, Town Ordinance No 9 of H14, arts 22–5; Interview with 松井 [Matsui], Officer of Mitake Town at Gifu Prefecture (Telephone interview, 19 May 2011); *逗子市景観オンブズマンに関する要綱* [Guideline on Landscape Ombudsman of Zushi City at Kanagawa Prefecture] (Japan) 1 January 2007; Interview with 三沢 [Misawa], Officer of Zushi City at Kanagawa Prefecture (Telephone interview, 19 May 2011).

192 *公害紛争処理法* [Law on Environmental Pollution Dispute Resolution] (Japan) 1 June 1970, Law No 108 of S45, arts 49–49-2; Environmental Dispute Coordination Commission (JPN), *公害苦情調査*

law sphere, and thus does not handle complaints involving administrative bodies.[193] However, there is one institution that regards itself as an executive Environmental Ombudsman: the Committee on Promotion of Environmental Autonomy at Shiga Prefecture (CPEA).

The CPEA has environmental protection as its primary objective. The Committee is a consultative body of the Governor and has powers to investigate the implementation of prefectural policies based on application by local residents and to issue recommendations.[194] Similar to the municipal Ombudsman, the CPEA does not have as much independence as an Ombudsman institution. The Committee is a part-time office, and its secretariat is comprised of prefectural officers in the environmental section. However, there are some clear differences between the CPEA and the Ombudsman institution. For instance, partly due to the head of CPEA being chosen from among former Chief Judges of High Courts, the procedure of the Committee is similar to that of the court. Like the court, proceeding for review is open to the public.[195]

The CPEA applies screening criteria quite rigidly, including an examination of the exhaustion of other available avenues. As a result, only a few applications are lodged per year. In practice, since the establishment of the Committee in 1996, only eight applications have been accepted. Five of these were reviewed in 1996 and 1997, and the latest one was reviewed in 2003. Moreover, the Committee has not issued any recommendations since the fifth case was reviewed in 1997.[196] The CPEA is not given

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193 *[Survey on Complaint Handling on Environmental Pollution]* (19 January 2012) Ministry of Internal Affairs and Communications (JPN) <http://www.soumu.go.jp/kouchoi/knowledge/report/main.html>. Interview with 六車明 [Akira Rokusha], former Examiner, Environmental Dispute Coordination Commission / former Judge (Tokyo, 14 July 2011).

194 *滋賀県環境基本条例* [Environmental Basic Ordinance of Shiga Prefecture] (Japan) 29 March 1996, Prefectural Ordinance No 18 of H8, arts 28–9. Shiga Prefecture is located next to Kyoto and has a population of 1.4 million.

195 Interview with 石川優貴 [Yuki Ishiwaka], Clerk, Committee on Promotion of Environmental Autonomy at Shiga Prefecture (Otsu, 12 July 2011); *滋賀の環境自治を推進する委員会規則* [Rule for the Committee on Promotion of Environmental Autonomy at Shiga Prefecture] 1996 (Japan), Prefectural Rule No 51 of H8, r 8–9.

196 Interview with 石川優貴 [Yuki Ishiwaka], Clerk, Committee on Promotion of Environmental

power to conduct self-initiated reviews. Thus, the nature of the Committee is more akin to an internal merits review mechanism than an Ombudsman.

First parliamentary commission

In December 2011, the National Diet of Japan Fukushima Nuclear Accident Independent Investigation Commission (NAIIC) was established to conduct a comprehensive investigation into the structural problems underlying the causes and damages of the TEPCO Nuclear Disaster. This was Japan's first parliamentary institution with statutory mandated investigatory power.[197] The NAIIC referred to the investigation commission scheme of the United States Congress as its model.[198] Hence, unlike an Ombudsman review, the Commission mainly utilised a method of hearing that was open to the public. Many important hearings were broadcast globally via the internet in Japanese and English. The key persons summoned to the hearings included the then Prime Minister and other relevant Ministers at the time of the accident.[199] However, there were also serious limitations on the NAIIC's investigatory powers; the Commission was not granted the power to require testimony from the witnesses and it was bound by the

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Autonomy at Shiga Prefecture (Otsu, 12 July 2011); Shiga Prefecture (JPN), *滋賀の環境 2011（平成 23 年版環境白書）【資料編】 [Environmental White Paper of Shiga Prefecture of H23: Reference Section]* (Shiga Prefecture, 2011), 22.

197 *東京電力福島原子力発電所事故調査委員会法* [Law on the Tokyo Electric Power Company's Fukushima Nuclear Power Plant Accident Independent Investigation Commission at the National Diet] (Japan) 7 October 2011, Law No 112 of H23; National Diet of Japan Fukushima Nuclear Accident Independent Investigation Commission, *About the Commission* (16 January 2012) National Diet of Japan <http://www.naiic.jp/en/about/>.

198 塩崎恭久 [Yasuhisa Shiozaki], *国会原発事故調査委員会：立法府からの挑戦状 [Parliamentary Investigation Commission on Tokyo Electric Power Company's Fukushima Nuclear Power Plant Accident: The Legislature's Challenge to the Bureaucracy]* (東京プレスクラブ [Tokyo Press Club], 2011), 36–51; Japan, *Diet Debates*, Permanent Committee on Budget at the House of Representatives, 16 May 2011, 12–13 (塩崎恭久 [Yasuhisa Shiozaki], Liberal Democratic Party: 菅直人 [Naoto Kan], Prime Minister).

199 *東京電力福島原子力発電所事故調査委員会法* [Law on the Tokyo Electric Power Company's Fukushima Nuclear Power Plant Accident Independent Investigation Commission at the National Diet] (Japan) 7 October 2011, Law No 112 of H23, arts 7(2), 11; *東京電力福島原子力発電所事故調査委員会運営規定* [Management Rules of the Tokyo Electric Power Company's Fukushima Nuclear Power Plant Accident Independent Investigation Commission at the National Diet] (Japan) 15 February 2012, r 7; National Diet of Japan Fukushima Nuclear Accident Independent Investigation Commission, *Video (Live・Archives)* (5 July 2012) National Diet of Japan <http://www.naiic.jp/en/video/>; National Diet of Japan Fukushima Nuclear Accident Independent Investigation Commission, *Commission Activities* (5 July 2012) National Diet of Japan <http://www.naiic.jp/en/activities/>.

severe time schedule of approximately six months.[200]

Although the NAIIC was an *ad hoc* institution with a single issue mandate and significant differences from an Ombudsman, the Commission was a truly independent institution: it had its own secretariat, which did not include any seconded staff from the executive branch, and strong investigatory powers.[201] The NAIIC has revealed the merits of having a parliamentary institution in front of a broad audience of Japanese citizens. The activities of the NAIIC provided an important precedent in considering the future implementation of an Environmental Ombudsman in Japan.

5.7 Chapter conclusion

This chapter presented the characteristics of the institution of Environmental Ombudsman. This institution is a specialised version of the Ombudsman, an institution that began in Sweden and has spread to more than 120 countries between the 1960s and 1990s. As a specialised Ombudsman in the environmental field, the Environmental Ombudsman has the capacity to address complicated environmental problems and, in so doing, enhance the quality of environmental governance. Since the late 1960s, there have been attempts to create environmental watchdogs. However not all of them have incorporated the fundamental feature of the Ombudsman of investigating complaints from the public on environmental administration. Currently, fewer than 10 countries have an Environmental Ombudsman. This represents a sharp contrast to the patterns of

200 *東京電力福島原子力発電所事故調査委員会法* [Law on the Tokyo Electric Power Company's Fukushima Nuclear Power Plant Accident Independent Investigation Commission at the National Diet] (Japan) 7 October 2011, Law No 112 of H23, arts 15, 16; Shiozaki, above n 198, 121–2; National Diet of Japan Fukushima Nuclear Accident Independent Investigation Commission (JPN), 'Press Conference', *18th Commission Meeting*, 8 June 2012 (黒川清 [Kiyoshi Kurokawa], Chair).

201 *東京電力福島原子力発電所事故調査委員会法* [Law on the Tokyo Electric Power Company's Fukushima Nuclear Power Plant Accident Independent Investigation Commission at the National Diet] (Japan) 7 October 2011, Law No 112 of H23, arts 9–14, supplementary provision 3.

adoption of the institution of the general Ombudsman, and suggests the need to justify the *raison d'être* of the Environmental Ombudsman.

The assessment of the institutional setting and activities of the Environmental Ombudsman in the ACT, New Zealand and Hungary revealed that these institutions have the capacity to handle complaints on administrative environmental decisions, which require certain expertise. All of them actively investigate such complaints. However, the relationship between the general and the Environmental Ombudsman in each jurisdiction requires further examination to draw conclusions about the importance of having a separate Environmental Ombudsman.

In relation to Japan, it was observed that the public does not understand the concept of a classical Ombudsman and its associated institutions. At the same time, some recent developments in Japan indicate that a classical Ombudsman would very likely to be accepted by the citizens if introduced.

Based on these findings, the following chapters will examine the actual activities of the existing Environmental Ombudsmen more in detail, before discussing the feasibility of introducing an Environmental Ombudsman into Japan.

Chapter 6: Functionality of the Environmental Ombudsman

The previous chapter introduced the basic characteristics of existing Environmental Ombudsmen, specifically and in general. However, such data are not sufficient to provide a comprehensive understanding of the activities and practices of active institutions. This chapter investigates the institution of Environmental Ombudsman focusing on its efficacy as a dispute resolution mechanism and functionality in the entire framework of executive transparency and accountability. Then, based on the findings, whether it is worthy to have an Environmental Ombudsman besides the general Ombudsman is discussed. The analysis presented in this chapter relies mainly on the findings of field research conducted in the Australian Capital Territory (ACT), New Zealand and Hungary in 2011.[1] As noted in Section 5.5, the situation of Hungary detailed here is that of pre-2012 system.

This chapter comprises four sections. Section 6.1 examines the efficacy of the Environmental Ombudsman as a dispute resolution mechanism and its functionality in the framework of review mechanisms on administrative environmental disputes. Section 6.2 assesses the other functionalities of the office in the wider framework of executive transparency and accountability. Section 6.3 clarifies the core elements that explain the *raison d'être* of the Environmental Ombudsman. Section 6.4 discusses the essence of this institution.

[1] For the details of the field research, see Subsection 1.4.2.

6.1 The Environmental Ombudsman as a dispute resolution mechanism

This section examines the efficacy and functionality of the Environmental Ombudsman as a dispute resolution mechanism. The matters to be examined for revealing the efficacy of the office are the three pillars of the *Aarhus Convention*; namely, review of the disputes on access to information (Subsection 6.1.1), on public participation (Subsection 6.1.2), and access to review mechanisms (Subsection 6.1.3). The focus here is on revealing the functionality of the Environmental Ombudsman across the whole framework of review mechanisms for disputes regarding environmental administrative decision making. Thus, other review mechanisms are also examined to clarify the contribution of the Environmental Ombudsman. These include the classical Ombudsman, merits review and the court. Underpinning this review is the fieldwork conducted in the ACT, New Zealand and Hungary, the results of which are reported and analysed.

6.1.1 Review on access to information

In the three jurisdictions examined, freedom of information law is vital to realising public access to environmental information. For instance, in New Zealand, the introduction of the *Official Information Act 1982* (NZ) is thought to have been the major driver in altering the culture of bureaucracy. Through the Act, New Zealand's administrative procedures became more open.[2] Similarly, in Hungary, the *Act LXIII of 1992 on the Protection of Personal Data and the Disclosure of Data of Public Interest* (HUN) had been especially effective in facilitating access to environmental information in the 1990s. This had been important because, until 1999, there were no provisions to address business and commercial confidences.[3] At the time of the field research, the Act

[2] Interview with David McGee, Ombudsman (Wellington, 8 June 2011); *Official Information Act 1982* (NZ).

[3] Interview with Csaba Kiss, Director, Environmental Management and Law Association (Budapest, 22 June 2011); Interview with Justice Barnabás Lenkovics, former Ombudsman (Budapest, 23 June

fully complied with the *Aarhus Convention*. In conjunction with the EU Directive on freedom of access to information, the efficacy of this Act was high.[4] Conversely, in the ACT, while the *Freedom of Information Act 1989* (ACT) is important, its weaknesses in disclosure of commercial confidentiality and governmental documents that are used for Cabinet decisions are widely recognised.[5] In particular, in relation to access to environmental information, Baird regards it as problematic that the Act allows the government to refuse disclosure of information.[6]

Framework of review on access to information

In the ACT, there are two avenues for reviewing disputes on access to information. A formal application goes first to the internal review of an administrative body. If not resolved, the application goes to merits review at the ACT Civil and Administrative Tribunal (ACAT). Further, some cases are then taken to the Supreme Court for judicial review.[7] Complaints on the process for accessing information go to the Ombudsman.[8] In practice, the strength of ACAT lies in its power to ask parties to submit all relevant information regardless of whether the parties are public or private bodies.[9] Although limited to public information, the Ombudsman also has investigatory power, and often ensures that administrative bodies explain the reasons for decisions to the public.[10]

2011); *1992. évi LXIII. törvény a személyes adatok védelméről és a közérdekű adatok nyilvánosságáról* [Act LXIII of 1992 on the Protection of Personal Data and the Disclosure of Data of Public Interest] (Hungary), 27 October 1992, *Magyar Közlöny*, No.1992/116, 3962.

4 Interview with Gyula Bándi, Jean Monnet Professor of EU Environmental Law, Pázmány Péter Catholic University (Budapest, 27 June 2011); Interview with Csaba Kiss, Director, Environmental Management and Law Association (Budapest, 22 June 2011); *Council Directive 90/313/EEC of 28 January 2003 on Public Access to Environmental Information and Repealing* [2003] OJ L 41/26.

5 Interview with Justice Richard Refshauge, Supreme Court of the ACT (Canberra, 30 May 2011); Interview with Linda Crebbin, General President, ACT Civil and Administrative Tribunal (Canberra, 27 May 2011); *Freedom of Information Act 1989* (ACT).

6 Interview with Ian Baird, Principal Policy Officer, ACT Department of the Environment, Climate Change, Energy and Water (Canberra, 30 May 2011).

7 Environmental Defender's Office (ACT), 'Freedom of Information' (ACT Environmental Law Fact Sheets No 2, Environmental Defender's Office (ACT), March 2010) <http://www.edo.org.au/edoact/factsheets/FS%232%20Freedom%20of%20Information.pdf>, 3; Interview with Justice Richard Refshauge, Supreme Court of the ACT (Canberra, 30 May 2011).

8 Environmental Defender's Office (ACT), above n 7, 3.

9 Interview with Linda Crebbin, General President, ACT Civil and Administrative Tribunal (Canberra, 27 May 2011).

10 Interview with John McMillan, former Commonwealth and ACT Ombudsman (Canberra, 27 May

New Zealand applies a one-stop model for reviewing all disputes on access to information. As detailed in Section 5.4, this occurs through the Ombudsman, and its effectiveness is highly rated by stakeholders.[11] Under this model, the contributions of other review mechanisms are indirect. For instance, the contribution of the court is limited to litigation proceedings. The court may accept the claim by a party that the information obtained by the other party should be released.[12]

In Hungary, under the pre-2012 system, there were two avenues to review disputes on access to information: the court and the Parliamentary Commissioner for Data Protection and Freedom of Information.[13] The number of cases that went to the former was relatively limited because most disputes were reviewed by the latter.[14] However, the contribution of the court in this area was highly regarded due to the binding power of judgments, administrative bodies' onus of proof and citizens' minimum burden of cost.[15] In addition, the court had been active in correcting any practice of administrative bodies that was contrary to the *Aarhus Convention*.[16] On the other hand, judicial review was slow, which could cause further delay for the other review mechanisms.[17] On average, the court procedure took a year for the first instance, and an additional half a year for the second instance. As a result, in some cases, court orders to disclose information became

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11 Interview with David McGee, Ombudsman (Wellington, 8 June 2011); Interview with Justice John McGrath, Supreme Court of New Zealand (Wellington, 13 June 2011); Interview with Justice Craig Thompson, Principal Environment Judge, Environment Court of New Zealand (Wellington, 13 June 2011); Interview with David Wilson, Clerk of the House of Representatives, Officers of the Parliament Committee (Wellington, 9 June 2011).

12 Interview with Justice Craig Thompson, Principal Environment Judge, Environment Court of New Zealand (Wellington, 13 June 2011).

13 *1992. évi LXIII. törvény a személyes adatok védelméről és a közérdekű adatok nyilvánosságáról* [Act LXIII of 1992 on the Protection of Personal Data and the Disclosure of Data of Public Interest] (Hungary), 27 October 1992, *Magyar Közlöny*, No.1992/116, 3962, arts 17, 27.

14 Interview with MP Benedek Jávor, Chair, Sustainable Development Committee at the National Assembly of Hungary (Budapest, 24 June 2011); Interview with Justice Péter Darák, Supreme Court of Hungary (Budapest, 24 June 2011); Interview with Justice Fruzsina Bögös, Metropolitan Court of Budapest (Budapest, 24 June 2011).

15 Interview with Vajk Farkas, Lawyer, Ministry of Public Administration and Justice (Budapest, 28 June 2011); Interview with Csaba Kiss, Director, Environmental Management and Law Association (Budapest, 22 June 2011).

16 Interview with Justice Péter Darák, Supreme Court of Hungary (Budapest, 24 June 2011).

17 Interview with Vajk Farkas, Lawyer, Ministry of Public Administration and Justice (Budapest, 28 June 2011); Interview with Csaba Kiss, Director, Environmental Management and Law Association (Budapest, 22 June 2011).

meaningless because of lost momentum.[18]

The framework of the review of disputes on access to information varies by jurisdiction. In the ACT, the main mechanism in this area is external merits review, with the Ombudsman being complementary. In New Zealand, the Ombudsman is the principle mechanism. In Hungary, the main mechanism was the specialised Ombudsman, but the court also made a significant contribution. In all jurisdictions, efficiency (that is, speed) is one of the most important attributes of the main mechanisms. The clearest example is New Zealand's one stop mechanism, although the Hungarian framework was also a good example. This also means that a key attribute of an Ombudsman institution is that it is able to process disputes quicker than a court.

Contribution of the Environmental Ombudsman

Regarding the Environmental Ombudsman, in the ACT, the main contribution of the Commissioner for Sustainability and the Environment (CSE) is to inform the local community about governmental decision-making processes.[19] The strength of the office rests in its openness to the public, which is in contrast to the frequent secrecy of the government.[20] However, administrative bodies do not always co-operate with the CSE in requests for information.[21]

In New Zealand, the Parliamentary Commissioner for the Environment (PCE) may release information that is provided by other bodies. The PCE's request for information is unlikely to be accepted by private bodies because of a lack of official power to investigate. However, in relation to public agencies, they are generally co-operative.[22] The former

[18] Interview with Csaba Kiss, Director, Environmental Management and Law Association (Budapest, 22 June 2011).
[19] Interview with Sarah Burrows, Senior Manager, Commissioner for Sustainability and Environment (Canberra, 31 May 2011).
[20] Interview with Julia Pitts, Chair, Environmental Defender's Office (ACT) (Canberra, 30 May 2011).
[21] Interview with Ian Baird, Principal Policy Officer, ACT Department of the Environment, Climate Change, Energy and Water (Canberra, 30 May 2011).
[22] Interview with Sarah Clark, Office Manager, Parliamentary Commissioner for the Environment

officeholder, Morgan Williams, explained the reason for this successful relationship with public agencies as being due to 'maintaining relationships and understandings', rather than exercising bestowed power.[23] For the PCE, an application to the Ombudsman is the last resort to draw information from administrative agencies. It is quite rare that the office utilises this. Indeed, Williams noted that over the 10-year term of his office, application to the Ombudsman was only used twice.[24]

In Hungary, the Ombudsman and the Parliamentary Commissioner for Future Generations (PCFG) contributed to keeping the public informed about environmental decisions as well due to their strong powers of investigation.[25] Before the establishment of the PCFG in 2008, under the influence of the *Aarhus Convention*, the Ombudsman contributed to the disclosure of information that had a nationwide impact on the environment.[26] For the PCFG, it was sometimes the case that the investigation or an exchange of letters with administrative agencies triggered the disclosure of environmental information.[27]

The contribution of the Environmental Ombudsman in this area is limited to the disclosure of relevant environmental information. However, when the capacity to collect of information is limited, as in the ACT, this function is weakened further. Thus, a proper investigatory power is necessary to fulfil this function, even though it may not always be

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(Wellington, 9 June 2011); Interview with Helen Beaumont, Environment Commissioner, Environment Court of New Zealand (Wellington, 13 June 2011).

23 Interview with Morgan Williams, former Parliamentary Commissioner for the Environment (Wellington, 10 June 2011).

24 Ibid.

25 Interview with Sándor Fülöp, Parliamentary Commissioner for Future Generations (Budapest, 28 June 2011); Interview with MP Benedek Jávor, Chair, Sustainable Development Committee at the National Assembly of Hungary (Budapest, 24 June 2011); Interview with Justice Barnabás Lenkovics, former Ombudsman (Budapest, 23 June 2011).

26 Interview with Justice Barnabás Lenkovics, former Ombudsman (Budapest, 23 June 2011); *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, opened for signature 25 June 1998, 2161 UNTS 447 (entered into force 30 October 2001) ('*Aarhus Convention*').

27 Interview with MP Benedek Jávor, Chair, Sustainable Development Committee at the National Assembly of Hungary (Budapest, 24 June 2011); Interview with Sándor Fülöp, Parliamentary Commissioner for Future Generations (Budapest, 28 June 2011).

directly exercised.

6.1.2 Review on public participation

The review on public participation is usually not clearly differentiated from ordinary dispute resolution. Hence, the framework of ordinary dispute resolution in each jurisdiction is summarised first before examining the contribution of each mechanism. As seen in Subsection 2.3.4, regardless of the differences between the common law and civil law systems, the basic framework for the review mechanisms of administrative disputes consists of a combination of merits review, judicial review and Ombudsman review. Here, to clarify the contribution of the Environmental Ombudsman, Ombudsman review is examined separately to the others.

Framework of the review on public participation

In the ACT, merits review is exercised by the ACAT, and judicial review by the Supreme Court.[28] The ACAT is the external merits review body for general purposes, and consists of lawyers and other experts. Although the employment of environmental experts is not mandated, some members are responsible for examining certain kinds of environmental cases. For instance, Linda Crebbin, General President of the ACAT, explained that '[there are] two registered mediators who are specialists in planning matters'.[29] It is often the case that they are also trained judges.[30] The other route is to complain to either the Ombudsman or the CSE.[31] Regarding the size of disputes, merits review and judicial review examine major issues, while the Ombudsman and the CSE

[28] Environmental Defender's Office (ACT), 'Challenging environmental decisions' (ACT Environmental Law Fact Sheets No 3, Environmental Defender's Office (ACT), March 2010) <http://www.edo.org.au/edoact/factsheets/FS%233%20Challenging%20environmental%20decisions.pdf>, 2–5.

[29] Frans H.J.M. Coenen, 'Introduction' in Frans H.J.M. Coenen (ed), *Public Participation and Better Environmental Decisions: The Promise and Limits of Participatory Processes for the Quality of Environmentally Related Decision-making* (Springer, 2009) 1, reg 6; Interview with Linda Crebbin, General President, ACT Civil and Administrative Tribunal (Canberra, 27 May 2011).

[30] Interview with Justice Richard Refshauge, Supreme Court of the ACT (Canberra, 30 May 2011).

[31] Environmental Defender's Office (ACT), above n 28, 2–5.

address minor issues.[32]

In New Zealand, most environmental disputes are reviewed by merits review and judicial review. Minor issues go to the High Court, while significant issues first go to the local council's merits review, which is a panel of three trained and independent experts. After this, any remaining significant issue is appealed to the Environment Court, which conducts both merits review and judicial review.[33] The Environment Court is a specialist institution, incorporating Environment Judges and environmental experts called Environment Commissioners.[34] Further appeal is made to the Supreme Court.[35] In addition to this, there is a route to complain to either the Ombudsman or the PCE.[36]

In Hungary, the binding review system consisted of internal merits review and judicial review. The internal merits review had two layers corresponding to the levels of local authorities and the central ministry.[37] The examining boards of local authorities frequently did not have any legal experts, while that of the central ministry encompassed a lawyer (but not a trained judge) and an environmental expert.[38] Judicial review also comprised two layers: the County Courts (including the Metropolitan Court of Budapest) and the Supreme Court.[39] If disputes related to constitutional matters, the Constitutional Court examined them.[40] There was also a route to complain to the Ombudsman and the

[32] Interview with John McMillan, former Commonwealth and ACT Ombudsman (Canberra, 27 May 2011); Interview with Sarah Burrows, Senior Manager, Commissioner for Sustainability and Environment (Canberra, 31 May 2011).
[33] Interview with Justice Craig Thompson, Principal Environment Judge, Environment Court of New Zealand (Wellington, 13 June 2011).
[34] Ministry for the Environment (NZ), *Your Guide to the Environment Court*, An Everyday Guide to the RMA (Ministry for the Environment (NZ), 2nd ed, 2009), 5.
[35] Interview with Justice John McGrath, Supreme Court of New Zealand (Wellington, 13 June 2011).
[36] Interview with David McGee, Ombudsman (Wellington, 8 June 2011); Interview with Sarah Clark, Office Manager, Parliamentary Commissioner for the Environment (Wellington, 9 June 2011).
[37] Interview with Justice Péter Darák, Supreme Court of Hungary (Budapest, 24 June 2011); Interview with Justice Fruzsina Bögös, Metropolitan Court of Budapest (Budapest, 24 June 2011); Interview with Csaba Kiss, Director, Environmental Management and Law Association (Budapest, 22 June 2011).
[38] Interview with Justice Fruzsina Bögös, Metropolitan Court of Budapest (Budapest, 24 June 2011).
[39] Interview with Justice Péter Darák, Supreme Court of Hungary (Budapest, 24 June 2011); Interview with Justice Fruzsina Bögös, Metropolitan Court of Budapest (Budapest, 24 June 2011).
[40] Interview with Botond Bitskey, Secretary General, Constitutional Court of the Republic of Hungary (Budapest, 23 June 2011).

PCFG.[41]

As this analysis reveals, the general frameworks in the three jurisdictions are similar. However, it is notable that, in addition to the Environmental Ombudsman, New Zealand and Hungary have other environmentally specialised review bodies: the local council's merits review and the Environment Court in New Zealand, and the second instance internal merits review in Hungary. Further, in the ACT, some staff at the ACAT have expertise in certain environmental disputes. These specialised arrangements are intended to enhance the quality of outcomes. In the following paragraphs, details of the practices of individual mechanisms are examined to reveal the extent to which these arrangements are effective.

Practices of merits review and judicial review

In the ACT, a specific feature of merits review by the ACAT is that mediation is set before a full hearing. Due to this combination of mediation and full hearing, the average time to complete is less than 120 days, which is the statutory maximum. Parties are required to submit all relevant documents before the mediation, which is completed by day 36. From the perspective of public participation, especially for disputes on land and planning, the mediations are quite effective. This is because the mediation is the *de facto* first opportunity for parties to exchange their views.[42] Transparency and examination on substance are the strengths of this approach.[43] In contrast, the court only examines procedural errors, so its contribution to enhancing public participation is relatively limited. On this point, the Honourable Justice Richard Refshauge, of the Supreme Court,

41 Interview with Justice Barnabás Lenkovics, former Ombudsman (Budapest, 23 June 2011); Interview with Sándor Fülöp, Parliamentary Commissioner for Future Generations (Budapest, 28 June 2011); Interview with István Sárközy, Legal adviser, Office of the Parliamentary Commissioner for Future Generations (Budapest, 28 June 2011).

42 Interview with Linda Crebbin, General President, ACT Civil and Administrative Tribunal (Canberra, 27 May 2011).

43 Interview with Linda Crebbin, General President, ACT Civil and Administrative Tribunal (Canberra, 27 May 2011); Interview with Justice Richard Refshauge, Supreme Court of the ACT (Canberra, 30 May 2011).

explained the difference between the ACAT and the court as '[the courts] generally look at whether the process has been followed rather than whether the public have actually had the opportunity to say as much as they want to say.'[44]

In New Zealand, merits review filters most cases before judicial review. Only one per cent of all cases lodged for local council's merits review are appealed to the Environment Court. Among the appealed cases, 70 per cent are processed by mediation and the balance goes to a full court hearing.[45] Further appeal of disputes on public participation to the Supreme Court is very rare. The Honourable Justice John McGrath of the Supreme Court explained the strength of the whole system when he said, 'this approach does achieve finality, and nearly always what the Environment Court decides is final because their view on the merits cannot be challenged. So, early finality is early certainty.'[46]

Regarding the strength of the Environment Court, Principal Environment Judge Craig Thompson mentioned that it 'can get into the merits of each particular case, pretty thoroughly.'[47] The main method of merits review at the Environment Court is mediation conducted by the Environment Commissioners. This approach contributes to public participation through encouraging participants to talk about their issues. Regardless of the imbalance in power and resources, more than 90 per cent of parties are willing to participate in mediation. As for the reasons for the participation of local and the other governmental bodies, Helen Beaumont, an Environment Commissioner, identified two factors. First, governmental bodies are quite responsive and open to the community. Second, the *Official Information Act 1982* (NZ) has a deterrent effect — governmental bodies are afraid of being criticised by the media for taking too legalistic an attitude with

44 Interview with Justice Richard Refshauge, Supreme Court of the ACT (Canberra, 30 May 2011).
45 Interview with Helen Beaumont, Environment Commissioner, Environment Court of New Zealand (Wellington, 13 June 2011).
46 Interview with Justice John McGrath, Supreme Court of New Zealand (Wellington, 13 June 2011).
47 Interview with Justice Craig Thompson, Principal Environment Judge, Environment Court of New Zealand (Wellington, 13 June 2011).

the community.[48]

In Hungary, the exhaustion of internal merits review was a precondition to bringing cases to judicial review.[49] Regarding the quality of internal merits review, Justice Fruzsina Bögös of the Metropolitan Court of Budapest, who had served with internal merits review prior to her appointment as a judge, regarded the lack of legal expert at the first instance was problematic.[50] Conversely, Csaba Kiss, the Director of a public interest environmental law centre, took a different view as a user. While evaluating the structure and effectiveness of the first instance merits review, which was directly connected with the affected areas, he criticised the practice of the second instance merits review, which tended to hold pro-economic positions without considering local details. In his view, it was often the case that decisions of the second instance merits review were reversed by the court.[51]

A feature of judicial review was that the court did not examine claims for damages because of the separation of administrative and civil law judges. The court focused on a review of lawfulness, which covered both claims for rights and legal interests. The first instance was able to examine the lawfulness of the administrative decision, which included the merits of the case. However, the Supreme Court only examined the lawfulness of judgments of the first instance. The court had the power to annul unlawful administrative decisions and to overrule the original decisions. However, in the environmental field, the latter power was not exercised. Regarding the exercise of the *ex-officio* power, the court exercised this power to examine whether administrative bodies had proper competencies. However, the other processes were bound by parties.

48 Interview with Helen Beaumont, Environment Commissioner, Environment Court of New Zealand (Wellington, 13 June 2011); *Official Information Act 1982* (NZ).
49 Interview with Justice Péter Darák, Supreme Court of Hungary (Budapest, 24 June 2011); Interview with Justice Fruzsina Bögös, Metropolitan Court of Budapest (Budapest, 24 June 2011).
50 Interview with Justice Fruzsina Bögös, Metropolitan Court of Budapest (Budapest, 24 June 2011).
51 Interview with Csaba Kiss, Director, Environmental Management and Law Association (Budapest, 22 June 2011).

Nevertheless the court might imply the existence of evidence leading to rational conclusions.[52] Judicial review was evaluated as being highly effective. The only shortcoming of judicial review was the lack of measures to ask the court to oblige certain administrative actions or inactions.[53]

Comparing the functionalities of these review mechanisms in the three jurisdictions, in the ACT and New Zealand, merits review is so effective that most cases are filtered out before reaching judicial review. Further, the specialised arrangements play a central role in resolving environmental disputes through ensuring public participation in the course of merits review, while the court focuses on examination of procedural errors. Conversely, in Hungary, internal merits review seemed to have certain limitations and it was unclear whether its specialised arrangements functioned effectively, in particular in terms of the enhancement of public participation. In contrast, the court played a central role; in particular, the ability of the first instance court to examine merits was crucial. The differences between the three jurisdictions partially reflect the distinctions between the common law and German-style civil law systems, as detailed in Section 2.3. More significantly, these differences suggest that independence of the review mechanism is critical for effective functioning of the specialised arrangements for resolution of administrative environmental disputes.

Practices of Ombudsman review

Turning to Ombudsman review, in the ACT, the work flow of the Ombudsman is as follows. First, the office assesses the complaints submitted, separates out the

[52] Interview with Justice Péter Darák, Supreme Court of Hungary (Budapest, 24 June 2011); Interview with Justice Fruzsina Bögös, Metropolitan Court of Budapest (Budapest, 24 June 2011); Péter Darák, *Administrative justice in Europe: Inventory and typology of review by the courts of administrative authorities in the 25 Member States of the European Union — Hungarian answers* (19 June 2006) Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union i.n.p.a. <http://www.juradmin.eu/seminars/Trier2005/Hongrie_en.pdf>.

[53] Interview with Csaba Kiss, Director, Environmental Management and Law Association (Budapest, 22 June 2011); Interview with Gyula Bándi, Jean Monnet Professor of EU Environmental Law, Pázmány Péter Catholic University (Budapest, 27 June 2011).

administrative problems and identifies the administrative agencies that are required to respond. If the problem is not serious, the means of correspondence is telephone; if it is serious, letters are exchanged to ensure natural justice. Next, the office explains the responses from the agencies to the complainants. During this process, the Ombudsman is unable to suspend the agencies' activities. There are a number of strengths in this approach. As an established organisation, the office can utilise different levels of its internal hierarchy. The discretion to choose cases to be reviewed, the power to criticise through publicity and the ability to follow up the cases already processed are some examples of the office's strengths. John McMillan, a former Commonwealth and ACT Ombudsman (2003–10), regarded review on public participation issues as one of the strengths of the Ombudsman because the office is able to convey the voices of people who do not have direct access to the head of the Ministry.[54]

Meanwhile, the key features of the CSE's complaint-handling approach are its outcome-oriented and transparent nature. The office aims to secure an effective outcome, and so always works with the governmental officials who are responsible for implementation. For this purpose, the office chooses methods deemed most suitable for resolving complaints according to their content. The range of methods is wide and includes community consultation and mediation. In terms of transparency, the working processes of the office are open to all participants. The strength of this approach is that it enables a solution that is agreeable to all parties for each specific case. Conversely, a weakness is that the timely provision of solutions depends on the co-operation of participants due to there being no time framework.[55] In addition, Baird highlighted that

[54] Interview with John McMillan, former Commonwealth and ACT Ombudsman (Canberra, 27 May 2011).
[55] Interview with Sarah Burrows, Senior Manager, Commissioner for Sustainability and Environment (Canberra, 31 May 2011).

the office does not have enough resources to conduct self-initiated investigations.[56]

In New Zealand, the approach of the Ombudsman is as follows. First, the office assesses the complaints submitted. Through this check, 30–40 per cent of complaints are eliminated. When an investigation is commenced, the Ombudsman writes to the Chief Executives of relevant agencies for consent to obtain all pertinent information and a full report. The Ombudsman then makes a decision or conducts further investigations. For the successful exercise of investigatory power, it is vital for the Ombudsman to build a good and cooperative relationship with the Chief Executives and their agencies. McGee explained the reason for this is that the office works within the governmental system.[57]

Meanwhile, the PCE does not aim to resolve operational problems in individual complaints. Rather, it focuses on identifying and correcting systemic failures through retrospectively drawing lessons from individual cases.[58] In addition, the office handles complaints on the law itself, and reports to Parliament about the necessity of changing the law.[59] The strength of this approach is that it provides a strategic solution for systemic failure by maintaining distance from the subjects of the investigation, thus allowing underlying problems to be ascertained.[60] As for the working relationship with administrative bodies, the PCE takes care to evaluate them fairly and give praise when it is due. This is because the office recognises that improvement of the status quo is a gradual educational process.[61]

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56 Interview with Ian Baird, Principal Policy Officer, ACT Department of the Environment, Climate Change, Energy and Water (Canberra, 30 May 2011).

57 Interview with David McGee, Ombudsman (Wellington, 8 June 2011).

58 Interview with Sarah Clark, Office Manager, Parliamentary Commissioner for the Environment (Wellington, 9 June 2011); Interview with Morgan Williams, former Parliamentary Commissioner for the Environment (Wellington, 10 June 2011).

59 Interview with Helen Beaumont, Environment Commissioner, Environment Court of New Zealand (Wellington, 13 June 2011).

60 Interview with Sarah Clark, Office Manager, Parliamentary Commissioner for the Environment (Wellington, 9 June 2011); Interview with Morgan Williams, former Parliamentary Commissioner for the Environment (Wellington, 10 June 2011); Interview with Helen Beaumont, Environment Commissioner, Environment Court of New Zealand (Wellington, 13 June 2011).

61 Interview with Sarah Clark, Office Manager, Parliamentary Commissioner for the Environment

In Hungary, the key feature of the Ombudsman's complaint handling was the close cooperation with administrative bodies. For the effectiveness and efficiency of processing, the Ombudsman and major departments made contracts to dispatch complaints to individual institutions according to their contents. (Environmental agencies were not included in these contracts due to their low status.) In addition, the office took care not to attack or sanction administrative bodies, but gave professional advice and tried to find a compromise to prevent serious future conflict. Justice Lenkovics offered the following explanation for the choice of this approach. Due to the tradition of the German-style civil law system, the administrative branch tended to regard the existence of the Ombudsman as an obstacle to '*Gesetzmäßigkeit der Verwaltung* [Principle of Administration by Statutes]'. Even recently, not all levels of authority appreciated the office. Although the lower levels were fond of the Ombudsman, the higher levels sometimes regarded intervention by the office as an attack or as the office acting beyond its scope.[62]

Meanwhile, to clarify underlying systemic problems from individual complaints, the PCFG adopted an 'integrated approach', which consisted of layers of analysis, as follows. First, focusing on legal aspects, the unique pattern of a case was extracted. Secondly, a problem pattern was identified based on number of similar cases, and a resolution was publicised. This could have been a guideline of dispute resolution for administrative bodies. Thirdly, non-legal aspects of the case were analysed by the non-lawyer, environmental expert team of the office. The consideration of non-legal aspects was necessary to deal with the complexity of environmental disputes. Fourthly, precedence at the European Union level on similar cases was analysed and principles were isolated. In addition, the office assessed whether national laws comported with European Union laws. The strength of such a comprehensive approach made it possible for the PCFG to issue a

(Wellington, 9 June 2011).

62 Interview with Justice Barnabás Lenkovics, former Ombudsman (Budapest, 23 June 2011). About '*Gesetzmäßigkeit der Verwaltung* [Principle of Administration by Statutes]', see Subsection 3.1.2.

fair and just recommendation, as was required of a classical Ombudsman. This approach took into account all elements, including both the complainants' and opposite sides' views, and so enabled the office to issue an exact and well-founded statement. This further enhanced the public's trust in the office's recommendations. Conversely, the weakness of the approach was its time consuming nature. This was due to the complexity of environmental law and the large number of authorities with which the office had to deal.[63] The result of this for the PCFG was that there had been criticism of the office's one-eighth capacity of complaint handling, compared with the Ombudsman.[64]

This review shows that a common feature of Ombudsmen is their cooperation with administrative bodies. Underlying this is the fact that the general Ombudsman usually does not have specific expertise in the environmental field. In contrast, the Environmental Ombudsman has the ability to conduct investigations by itself. Thus, it can be said that the Environmental Ombudsman has made qualitative contributions to the resolution of administrative environmental disputes in addition to quantitative ones (see Sections 5.3–5.5). However, it is also observed that the individual practices of Environmental Ombudsmen in the three jurisdictions are diverse in their objectives and approaches. This diversity in the identity of individual institutions needs to be carefully examined because this has a crucial importance in considering the introduction of such an institution to Japan.

6.1.3 Access to justice

The accessibility of review mechanisms is important to realising justice. This subsection examines how easy it is to access merits review, judicial review and

[63] Interview with Sándor Fülöp, Parliamentary Commissioner for Future Generations (Budapest, 28 June 2011); Interview with István Sárközy, Legal adviser, Office of the Parliamentary Commissioner for Future Generations (Budapest, 28 June 2011).

[64] Interview with Vajk Farkas, Lawyer, Ministry of Public Administration and Justice (Budapest, 28 June 2011).

Ombudsman review. To achieve this, the following aspects of these mechanisms are investigated: *locus standi* (or 'standing rules') of merits review and judicial review; screening criteria of Ombudsman review; and other barriers, including cost. The analysis will help to reveal whether an Environmental Ombudsman enhances access to justice for persons complaining of environmental problems.

Locus standi of merits review and judicial review

In the ACT, *locus standi* of the ACAT differs between individual cases and is set by related statutes. If there is no relevant provision in an individual statute, the test of broader interest is applied based on the *ACT Civil and Administrative Tribunal Act 2008* (ACT). This test examines whether the interests of a plaintiff are affected by a decision.[65] For instance, in many planning cases, the affected parties are required to join in the public consultation processes to pass the test.[66] These tests are less strict than those for judicial review.[67] The standing rule for judicial review is the test of 'a reasonable likelihood of adverse effect', which requires plaintiffs to prove some direct effect because of environmental damage.[68] *Locus standi* is a matter of legal policy, set by considering the balance between the social demands and capacity of the judiciary. Justice Refshauge regards the current rule in the ACT as reasonable.[69]

Regarding *locus standi*, New Zealand promotes an open standing rule based on the *Resource Management Act 1991* (NZ). This means that anyone who submitted objections during the original decision-making procedure has standing in both merits review and judicial review. Those who had not submitted objections have to show that they have a

65 Interview with Linda Crebbin, General President, ACT Civil and Administrative Tribunal (Canberra, 27 May 2011); *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 22Q.
66 *Planning and Development Act 2007* (ACT) , sch 1, s 156.
67 Interview with Linda Crebbin, General President, ACT Civil and Administrative Tribunal (Canberra, 27 May 2011).
68 Interview with Justice Richard Refshauge, Supreme Court of the ACT (Canberra, 30 May 2011). See also *Westfield Ltd v Commissioner for Land Planning & ORS* [2004] ACTSC 49; *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493.
69 Interview with Justice Richard Refshauge, Supreme Court of the ACT (Canberra, 30 May 2011).

greater interest in the case than ordinary citizens.[70] This rule aims to guarantee the right to be heard and to express opinions; the public is eligible to raise, at least, one appeal. Before the introduction of this rule, opponents had asserted the floodgate effect would damage the efficacy of the judicial system. However, this did not occur. Rather, this rule improved the quality of examination of substance through encouraging the public's utilisation of merits review.[71] Justice McGrath explained the underlying philosophy of the open standing rule as that, when filtering the cases by their legal importance, 'the public interest is more important than whether [an] individual has [a] strong private interest.'[72]

In Hungary, *locus standi* was widened by the *Act CXL of 2004 on the Administrative Procedures and General Rules* (HUN), under the influence of the *Aarhus Convention*.[73] The standing rule for internal merits review and judicial review was that the plaintiff had to have a very direct interest, bound by law (judicial interest).[74] For environmental litigation, individuals were required to have a house or land within the affected area.[75] In contrast, the NGO's status as the 'client' of the *Aarhus Convention* was well protected. NGOs were able to bring a class action, were able to be a party without full participation in an environmental decision-making process and were not restricted by the limitation of the affected area.[76] Further, details of *locus standi* had been enriched by the unified

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70 Interview with Justice Craig Thompson, Principal Environment Judge, Environment Court of New Zealand (Wellington, 13 June 2011); *Resource Management Act 1991* (NZ), s 274.

71 Interview with Justice John McGrath, Supreme Court of New Zealand (Wellington, 13 June 2011); Interview with Justice Craig Thompson, Principal Environment Judge, Environment Court of New Zealand (Wellington, 13 June 2011).

72 Interview with Justice John McGrath, Supreme Court of New Zealand (Wellington, 13 June 2011).

73 Interview with Justice Fruzsina Bögös, Metropolitan Court of Budapest (Budapest, 24 June 2011); Interview with Gyula Bándi, Jean Monnet Professor of EU Environmental Law, Pázmány Péter Catholic University (Budapest, 27 June 2011); *2004. évi CXL. törvény a közigazgatási hatósági eljárás és szolgáltatás általános szabályairól* [Act CXL of 2004 on the Administrative Procedures and General Rules] (Hungary), 20 December 2004, *Magyar Közlöny*, No.2004/203, 16142.

74 Interview with Justice Péter Darák, Supreme Court of Hungary (Budapest, 24 June 2011); Interview with Justice Fruzsina Bögös, Metropolitan Court of Budapest (Budapest, 24 June 2011).

75 Interview with Csaba Kiss, Director, Environmental Management and Law Association (Budapest, 22 June 2011).

76 Interview with Justice Péter Darák, Supreme Court of Hungary (Budapest, 24 June 2011); Interview with Gyula Bándi, Jean Monnet Professor of EU Environmental Law, Pázmány Péter Catholic University (Budapest, 27 June 2011); *1995. évi LIII. törvény a környezet védelmének általános*

judgments of the Supreme Court, which bound all courts of law. For instance, a recent unified judgment stated that the term 'environmental administrative decision-making processes' meant any administrative decision-making processes in which environmental authorities had rights to intervene either directly or indirectly. This judgment enabled the courts to examine a wider range of disputes on administrative environmental decision making.[77]

Meanwhile, in Hungary, the role of the Constitutional Court was to conduct abstract examinations of the law. The Hungarian Constitutional Court considered all constitutional rights, which were listed in the bill of rights of the *Constitution of the Republic of Hungary*.[78] The bill of rights determined the protection of human rights, including the right to a healthy environment.[79] Thus *locus standi* of the Constitutional Court was whether the case was about these human rights.[80]

The discussion above reveals that, in New Zealand and Hungary, *locus standi*, which has traditionally limited the public's access to justice, has been widened. New Zealand applies an open standing rule, while Hungary's *locus standi* was more widely opened, at

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szabályairól [Act LIII of 1995 on the General Rules of Environmental Protection] (Hungary), 30 May 1995, *Magyar Közlöny*, No.1995/52 (VI. 22); Supreme Court of the Republic of Hungary, *jogegységi határozatot 1/2004.KJE szám — Közigazgatási jogegységi határozatok* [Uniformity Resolution, KJE No 1 of 2004 — Administrative Decisions Uniformity], 20 January 2004; Interview with Csaba Kiss, Director, Environmental Management and Law Association (Budapest, 22 June 2011); *Aarhus Convention*, art 9(2).

77 Interview with Justice Péter Darák, Supreme Court of Hungary (Budapest, 24 June 2011); Supreme Court of the Republic of Hungary, *jogegységi határozatot 4/2010.KJE szám — Közigazgatási jogegységi határozatok* [Uniformity Resolution, KJE No 4 of 2010 — Administrative Decisions Uniformity], 20 September 2010; Interview with Gyula Bándi, Jean Monnet Professor of EU Environmental Law, Pázmány Péter Catholic University (Budapest, 27 June 2011); Interview with Csaba Kiss, Director, Environmental Management and Law Association (Budapest, 22 June 2011).

78 Interview with Botond Bitskey, Secretary General, Constitutional Court of the Republic of Hungary (Budapest, 23 June 2011); *1949. évi XX. törvény A Magyar Köztársaság Alkotmánya* [Act XX of 1949: The Constitution of the Republic of Hungary] (Hungary), 20 August 1949, as amended by *1989. évi XXXI. törvény az Alkotmány módosításáról* [Act XXXI of 1989 for Amending the Constitution], 23 October 1989, *Magyar Közlöny*, No.1989/74, 1219.

79 *1949. évi XX. törvény A Magyar Köztársaság Alkotmánya* [Act XX of 1949: The Constitution of the Republic of Hungary] (Hungary), 20 August 1949, as amended by *1989. évi XXXI. törvény az Alkotmány módosításáról* [Act XXXI of 1989 for Amending the Constitution], 23 October 1989, *Magyar Közlöny*, No.1989/74, 1219, arts 2–18. The right to a healthy environment was determined in article 18.

80 Interview with Botond Bitskey, Secretary General, Constitutional Court of the Republic of Hungary (Budapest, 23 June 2011) However, by the constitutional reform detailed in Subsection 5.5.2, the role of the Constitutional Court would be changed to conduct concrete examination of individual cases. This means the range of examination and *locus standi* are to be narrowed. Ibid.

least for NGOs. Turning to the ACT, the *locus standi* of the ACAT is equivalent to the New Zealand rules. However, it should be noted that reducing the barrier of standing has not become a global trend for judicial review. With respect to common law jurisdictions, for example, *locus standi* of the ACT courts requires plaintiffs to have special interest. In the environmental field, it is often the case that this hinders the right to have matters examined by the court.[81] Individual statutes can grant standing for certain decision-making processes. Still, among common law jurisdictions, those which comprehensively opened *locus standi* are rare, exempting some exceptions, such as New South Wales.[82]

Screening criteria of Ombudsman review

As detailed in Subsection 2.3.3, in general, the screening criteria for Ombudsman review includes the test of legitimate interest and the 'last resort test', which requires exhaustion of other avenues of dispute resolution. Further, the Ombudsman has discretion in selecting cases to investigate. However, these criteria are ambiguous; for instance, the definition of 'legitimate interest' could differ by jurisdiction. In addition, while preventing too much competition between the Ombudsman and the other review mechanisms, the last resort test could severely limit the jurisdiction of the Ombudsman. These issues raise the question of whether the screening criteria of the Ombudsman differ from the *locus standi* of merits review and judicial review. To answer this question, the following paragraphs assess the application of the screening criteria of the general and Environmental Ombudsmen.

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81 Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 4th ed, 2009), 758–61; Gerry Bates, *Environmental Law in Australia* (LexisNexis Butterworths Australia, 6th ed, 2006), 146–53; Justice Brian J Preston, Chief Judge, Land and Environmet Court of New South Wales Australia, 'Standing to Sue at Common Law in Australia' (Paper presented at the Joint Seminar on Legality of Administrative Behaviours and Types of Adjudication, Xīān, 11 April 2006), 9–10.

82 Bates, above n 81, 155–8, 161–3. See also, *Environmental Planning and Assessment Act 1979* (NSW), s 123; *Protection of the Environmental Operations Act 1997* (NSW), s 252.

In the ACT, the Ombudsman does not apply the last resort test. The screening criteria are whether the issue is unresolved, and whether the office can provide a remedy. Complaints on access to information and public participation are often about poor administration, so most cases are examined.[83] The CSE's screening criterion is that, unless the provisions of the *Commissioner for the Environment Act 1993* (ACT) prohibit review, the office will examine complaints. The requirements of the provisions include the last resort test, so the office checks the exhaustion of internal reviews by administrative agencies. No limitation is placed on the range of issues that the office can assess, thus the public can bring any matter as long as it is related to the environment and sustainability.[84]

In New Zealand, the Ombudsman's screening criteria include the last resort test and the test of whether the case is serious enough to investigate. Although the discretion is wide, the Ombudsman insists on being an agent for the weak. This means that the focus of the Ombudsman is on those cases that have not been examined by other review mechanisms.[85] Meanwhile, the PCE also applies the last resort test because complaint handling is not identified as one of its main roles.[86] The other criteria differ according to the policies of individual officeholders. For instance, in the era of the former officeholder, the criteria were the seriousness of the case, and whether it fell into one of the areas listed in the office's strategic plan.[87] The current officeholder's criteria are the size of spatial influence, the danger of irreversible environmental impact and the potential for

83 Interview with John McMillan, former Commonwealth and ACT Ombudsman (Canberra, 27 May 2011).

84 *Commissioner for the Environment Act 1993* (ACT), s 14(2); Interview with Sarah Burrows, Senior Manager, Commissioner for Sustainability and Environment (Canberra, 31 May 2011).

85 Interview with David McGee, Ombudsman (Wellington, 8 June 2011).

86 Interview with Sarah Clark, Office Manager, Parliamentary Commissioner for the Environment (Wellington, 9 June 2011); Interview with Morgan Williams, former Parliamentary Commissioner for the Environment (Wellington, 10 June 2011).

87 Interview with Morgan Williams, former Parliamentary Commissioner for the Environment (Wellington, 10 June 2011).

resolution.[88]

In Hungary, the Ombudsman's screening criterion was the 'improprieties relating to constitutional rights'. This meant that, at a high level, wider public interest came before individual interest. This criterion was beneficial for prioritising the complaints brought to the Ombudsman.[89] Meanwhile, the PCFG followed the screening criteria of the *Act LIX of 1993 on the Parliamentary Commissioner for Civil Rights* (HUN), which included the last resort test, and that the case was brought within one year of the issue of the original decision. Regardless of these criteria, when a specific danger to the environment was identified, the PCFG launched an investigation. However, when the office found no merit for future generations, the complaints were rejected.[90]

From the analysis above, it is clear that not all Ombudsmen apply the last resort test rigidly, and the other screening criteria are closely related to the identity of the individual institutions. Regarding the general Ombudsmen, the institutions in the ACT and Hungary do not apply the last resort test for screening, whereas the office in New Zealand mainly applies this test. However, in conjunction with other criteria, each office can focus on its own priorities. This structure is the same with respect to the Environmental Ombudsman, even though all three jurisdictions apply the last resort test. Thus, it is important to assess these criteria in each jurisdiction to ascertain their differences from the *locus standi* of merits and judicial review.

In this regard, the ACT Ombudsman's screening criteria are the broadest, and those of the CSE are wider than the *locus standi* of merits review and judicial review. In New

88 Interview with Sarah Clark, Office Manager, Parliamentary Commissioner for the Environment (Wellington, 9 June 2011).

89 Interview with Justice Barnabás Lenkovics, former Ombudsman (Budapest, 23 June 2011).

90 Interview with Sándor Fülöp, Parliamentary Commissioner for Future Generations (Budapest, 28 June 2011); Interview with István Sárközy, Legal adviser, Office of the Parliamentary Commissioner for Future Generations (Budapest, 28 June 2011); *1993. évi LIX. törvény az állampolgári jogok országgyűlési biztosáról* [Act LIX of 1993 on the Parliamentary Commissioner for Civil Rights (Ombudsman)] (Hungary), 1 June 1993, *Magyar Közlöny*, No.1993/81, 4433, art 16.

Zealand, as seen above, both merits review and judicial review apply the open standing rule, but the screening criteria for the Ombudsman and the PCE are designed not to overlap jurisdictions of the different review mechanisms. In Hungary, as in the ACT, the screening criteria of Ombudsman review were broader than the *locus standi* of merits review and judicial review. Although the focus areas of the Ombudsman and the Constitutional Court overlapped, their subjects of investigation were different. Further, the focus of the PCFG was unique to other review mechanisms. Thus, it can be said that the screening criteria of Ombudsman review are not identical to the *locus standi* of merits review and judicial review. Rather, these criteria enrich the subjects to be reviewed by the Environmental Ombudsman. Further when the *locus standi* of judicial review is strict, it is evident that the level of accessibility to Ombudsmen review becomes significant.

Accessibility — other barriers

As for the other barriers, in the ACT, the tight timeframe of the procedure, which must be finalised within 120 days, works against the accessibility of the ACAT. For ordinary people wishing to be self-represented applicants, the preparation of required documents within such a short time frame is difficult. Crebbin noted that, to improve the situation, it is necessary to have 'a larger, more active, environmental law centre … that is able to provide, if not representation, assistance in the preparation of documents and understanding of the process.'[91] As for judicial review, additional barriers are slowness and high cost.[92] Meanwhile, considering the cost-free nature of the service, there are no such barriers to accessing the Ombudsman and the CSE.

In New Zealand, while the mediation service of the Environment Court itself is free, if the case proceeds to judicial review, there is a fee for litigation. Moreover, there are other

[91] Interview with Linda Crebbin, General President, ACT Civil and Administrative Tribunal (Canberra, 27 May 2011).
[92] Interview with Justice Richard Refshauge, Supreme Court of the ACT (Canberra, 30 May 2011).

expenses such as obtaining expert evidence.[93] Although there is a special financial scheme that supports NGOs in high public interest cases on resource management, these expenses, especially the cost of expert evidence, often limit access to these reviews.[94] Conversely, due to the cost-free nature of accessing the Ombudsman, there is no other barrier to access in this route. Although the cost of utilising the PCE is also free, the shortage of resources is a barrier to launching investigation by this means.[95]

In Hungary, other barriers to access to merits review and judicial review included the high cost of expert witnesses.[96] There was no other barrier to access Parliamentary Commissioners.

In all three jurisdictions, the greatest barrier to accessing merits review and judicial review is the associated expenses of utilisation, including the high cost of expert witnesses. In general, the burden for accessing merits review is lower than for access to judicial review. Meanwhile, in all jurisdictions, Ombudsman review has the advantage of being comparatively cost-free. However, as in the case of the PCE in New Zealand, it is important to recognise that the limited capacity of the institution itself could be a barrier. This shows that even Ombudsman review needs sufficient resources to function properly. Another significant barrier is the timeframe, as exemplified by the ACAT. To ensure public access to justice, the public should be given enough time to prepare a case. That said, in Ombudsman review, this condition does not have a significant effect because the public's burden is limited to the lodgement of complaints.

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93 Ministry for the Environment (NZ), above n 34, 6–7, 14–15.

94 Ministry for the Environment (NZ), *Environmental Legal Assistance Fund (ELA Fund)* (6 July 2012) <http://www.mfe.govt.nz/withyou/funding/ela.html>; Interview with Justice Craig Thompson, Principal Environment Judge, Environment Court of New Zealand (Wellington, 13 June 2011).

95 Interview with Sarah Clark, Office Manager, Parliamentary Commissioner for the Environment (Wellington, 9 June 2011).

96 Interview with Csaba Kiss, Director, Environmental Management and Law Association (Budapest, 22 June 2011); Interview with Gyula Bándi, Jean Monnet Professor of EU Environmental Law, Pázmány Péter Catholic University (Budapest, 27 June 2011).

Thus, the Environmental Ombudsman enhances accessibility for those who have suffered environmental harm. However, the extent to which the accessibility is enhanced largely depends on the identity of the individual offices and the design of their screening criteria.

6.2 Functionality of the Environmental Ombudsman in the framework of executive transparency and accountability

This section examines the functionality of the Environmental Ombudsman in the wider framework of executive transparency and accountability. Subsection 6.2.1 assesses the relationship between Ombudsman review and practical mechanisms for executive transparency. Subsection 6.2.2 analyses the relationship between the Environmental Ombudsman and the other mechanisms for executive accountability. Subsection 6.2.3 addresses the further contributions of the Environmental Ombudsman to administrative law accountability. To clarify the functionality of the Environmental Ombudsman institution, the general Ombudsman is also examined.

6.2.1 Ombudsman and executive transparency

As detailed in Subsection 2.2.1, the public record management system and the media are practical mechanisms for realising executive transparency. This subsection examines the extent to which these mechanisms contribute to Ombudsman review.

Ombudsman review and the public record management

In the ACT, the record management system is determined by the *Territory Records Act 2002* (ACT) and the Territory Records Office has responsibility for management.[97]

[97] *Territory Records Act 2002* (ACT) ; Territory Records Office (ACT), *Introduction* (8 June 2012) <http://www.territoryrecords.act.gov.au/background>.

The Ombudsman emphasises the importance of record management because, regardless of the office's strong investigatory powers, the lack of public records hinders investigation. The most frequent reaction of the Ombudsman towards the absence of records is criticism of poor record management. It is a criminal offence for an official to erase a record with the intention of impeding an investigation. In this regard, McMillan emphasised the significance of the digitisation of all public documents to eliminate the problem of missing documents.[98]

In New Zealand, the *Public Records Act 2005* (NZ) provides the framework for the record management system and Archives New Zealand has the main responsibility for administration.[99] Before the enactment of the Act, on some occasions, the Ombudsman's investigation was impeded by poor record management. However, the Act has reduced this risk.[100] Consequently, the PCE regards record management as functioning well, and as not impeding its investigations.[101]

In Hungary, a records management system was established by the *Act LXVI of 1995 on Public Records, Public Archives, and the Protection of Private Archives* (HUN) and was administrated by the National Archives.[102] In practice, however, there were two categories of records. One was to be disclosed to the public, while the other was for internal use by administrative bodies. The latter was utilised for administrative decision

98 Interview with John McMillan, former Commonwealth and ACT Ombudsman (Canberra, 27 May 2011); Commonwealth Ombudsman (Cth), 'Lessons for public administration: Ombudsman Investigation of Referred Immigration Cases' (Report No. 11/2007, August 2007), 4–5.

99 *Public Records Act 2005* (NZ); Archives New Zealand (NZ), *Archives New Zealand's responsibilities* (2012) <http://archives.govt.nz/advice/public-records-act-2005/introduction-pra/archives-new-zealand-s-responsibilities>.

100 Interview with David McGee, Ombudsman (Wellington, 8 June 2011); Leo Donnelly, 'Archives and Ombudsmen: Natural Allies' (Paper presented at International Congress on Archives, Kuala Lumpur, 24 July 2008).

101 Interview with Sarah Clark, Office Manager, Parliamentary Commissioner for the Environment (Wellington, 9 June 2011); Interview with Morgan Williams, former Parliamentary Commissioner for the Environment (Wellington, 10 June 2011).

102 *1995. évi LXVI. törvény a köziratokról, a közlevéltárakról és a magánlevéltári anyag védelméről* [Act LXVI of 1995 on Public Records, Public Archives, and the Protection of Private Archives] (Hungary), 30 June 1995, *Magyar Közlöny*, No.1995/56, 3019; National Archives of Hungary, *Acts and Regulations* (2011) <http://old.mol.gov.hu/index.php?akt_menu=490>.

making, and fell under the absolute control of heads of departments.[103] Consequently, official records were often found to be missing or might not have been created in the first place. On these occasions, the Ombudsman had to rely on its investigatory powers, although it was not always able to obtain satisfactory results.[104] In the environmental field, the PCFG had not been refused provision of records, but in a few delicate cases, access to documents had been limited or delayed. Still, tenacious efforts in investigation were sometimes able to overcome such difficulties.[105]

It is obvious that a well-administrated public record management system is crucial to the success of Ombudsman investigations. However, it is not always the case that a jurisdiction has a fully effective legal framework to guarantee a comprehensive records management system. The Hungarian experience illustrates this point, demonstrating that in this situation, an Ombudsman institution was compelled to sacrifice either the quality of outcomes or efficiency of processing. To avoid this, the establishment of a comprehensive records management system is desirable.

Ombudsman review and the media

As referred to in Subsection 2.3.1, an Ombudsman does not issue a legally binding decision, but has the power to publicise its findings. Through the media, decisions of the Ombudsman can be disseminated to the public and have a strong impact. However, as detailed in Subsection 2.2.1, healthy functioning of the media is not always guaranteed. The following paragraphs will examine the relationship between the Ombudsman institutions and the media.

In the ACT, the role of the media as the disseminator of information in the public

[103] Interview with Sándor Fülöp, Parliamentary Commissioner for Future Generations (Budapest, 28 June 2011).
[104] Interview with Justice Barnabás Lenkovics, former Ombudsman (Budapest, 23 June 2011).
[105] Interview with Sándor Fülöp, Parliamentary Commissioner for Future Generations (Budapest, 28 June 2011).

arena is generally positively evaluated.[106] Reflecting this, the CSE often utilises the media.[107] However, the quality of media coverage depends on the issue at hand and the expertise of the journalist reporting the news.[108] There is some concern about the diminishing capacity of investigative journalism, which has resulted in a narrowing of the range of media coverage, especially on relatively minor issues or on highly complicated issues.[109]

In New Zealand, it is well recognised that the ability to embarrass the bureaucracy, which merits review and judicial review do not have, enables the PCE to raise public pressure to push for changes and to empower the public.[110] Williams emphasises that, in a democracy, this power is often more valuable than a legal sanction.[111] In this regard, Klaus Bosselmann, an environmental law expert, likened the function of the PCE to a clown in a European monarch's court in the Middle Ages; that is, the PCE links 'the monarch' (high levels of government power) and the public through criticism.[112]

However, whether the media functions as expected is a different matter. The two major media outlets in New Zealand (state-owned and private) are in competition over a small market, and thus focus on scandals to attract public attention. Although there is a culture of suspicion of the government, media coverage of governmental activities is not

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106 Interview with Justice Richard Refshauge, Supreme Court of the ACT (Canberra, 30 May 2011); Interview with Linda Crebbin, General President, ACT Civil and Administrative Tribunal (Canberra, 27 May 2011); Interview with Sarah Burrows, Senior Manager, Commissioner for Sustainability and Environment (Canberra, 31 May 2011); Interview with Dennis Pearce, Emeritus Professor, Australian National University College of Law (Canberra, 31 May 2011); Interview with Julia Pitts, Chair, Environmental Defender's Office (ACT) (Canberra, 30 May 2011).

107 Interview with Sarah Burrows, Senior Manager, Commissioner for Sustainability and Environment (Canberra, 31 May 2011).

108 Interview with Julia Pitts, Chair, Environmental Defender's Office (ACT) (Canberra, 30 May 2011).

109 Interview with Justice Richard Refshauge, Supreme Court of the ACT (Canberra, 30 May 2011).

110 Interview with Pavan Sharma, Clerk of the House of Representatives, Local Government and Environment Committee (Wellington, 8 June 2011); Interview with Morgan Williams, former Parliamentary Commissioner for the Environment (Wellington, 10 June 2011).

111 Interview with Morgan Williams, former Parliamentary Commissioner for the Environment (Wellington, 10 June 2011).

112 Interview with Klaus Bosselmann, Professor of Law, University of Auckland (Canberra, 28 May 2011).

so frequent, and this is an obstacle to raising public awareness.[113] For instance, the media does broadcast the contents of the PCE's reports, but extensive coverage is rare.[114] In this situation, mass media is not highly rated. Rather, it is regarded as having both favourable and unfavourable effects. While the media is good at publicising issues and gathering the attention of the public and law-makers, the contents of the news is quite often inaccurate. Correcting this requires informers to increase their care in the selection of information for release.[115] Further, a number of stakeholders are of the view that the area of administrative accountability does not fit into the logic of mass media, which tends to report issues in the context of the market or popularity. For instance, the Ombudsman's focus is on the minor issues that the media is unlikely to cover, and the Supreme Court considers its decisions on legal matters should not be affected by the popularity that the media relies on.[116]

In Hungary, it was well recognised that the media was important for accountability, especially in relation to Ombudsman institutions.[117] In the environmental field, the media was generally thought to be effective in broadcasting large-scale problems.[118] However, some negative aspects were also observed, such as the pursuit of breaking news and scandals preventing minor, but still important, issues from being broadcast. In relation to executive transparency, this meant that the input from mass media to the Parliament was

[113] Interview with David Wilson, Clerk of the House of Representatives, Officers of the Parliament Committee (Wellington, 9 June 2011).

[114] Interview with Pavan Sharma, Clerk of the House of Representatives, Local Government and Environment Committee (Wellington, 8 June 2011). A rare example of extensive media coverage is Kiran Chug, 'Environmental Watchdog's Plea: Drop more poison to save our forests', *Dominion Post* (Wellington, New Zealand), 8 June 2011, 1.

[115] Interview with Sarah Clark, Office Manager, Parliamentary Commissioner for the Environment (Wellington, 9 June 2011); Interview with Justice Craig Thompson, Principal Environment Judge, Environment Court of New Zealand (Wellington, 13 June 2011).

[116] Interview with Helen Beaumont, Environment Commissioner, Environment Court of New Zealand (Wellington, 13 June 2011): Interview with David McGee, Ombudsman (Wellington, 8 June 2011); Interview with Justice John McGrath, Supreme Court of New Zealand (Wellington, 13 June 2011).

[117] Interview with Botond Bitskey, Secretary General, Constitutional Court of the Republic of Hungary (Budapest, 23 June 2011); Interview with Vajk Farkas, Lawyer, Ministry of Public Administration and Justice (Budapest, 28 June 2011).

[118] Interview with Csaba Kiss, Director, Environmental Management and Law Association (Budapest, 22 June 2011).

inadequate.[119] In addition, sensationalism in reporting sometimes hindered the review mechanisms in resolving a case due to the media's strong influence on the public.[120] Weighing these negative impacts of media, the PCFG restricted contact with mass media to reliable journalists and limited the number of press conferences to avoid confusion about the activities of the office.[121] However, such a media policy was criticised by many stakeholders because it reduced the influence of the office and resulted in its low profile among the public.[122]

The Ombudsman institutions and the media should form alliances to enhance executive transparency and accountability. However, in reality, their relationship is largely bound by the quality of the media. As New Zealand exemplifies, even a state-owned media outlet does not always prioritise its function as a mechanism for executive transparency. Thus, it is necessary for Ombudsmen to minimise risks in utilising the media. In this regard, the mass media's deviation from the function of being a mechanism for executive transparency is of key importance, as seen in New Zealand. As the experience of the Hungarian PCFG shows, balancing the advantages and disadvantages of using the media is delicate work, and it is difficult to find an optimal position.

6.2.2 Ombudsman and executive accountability

As detailed in Subsection 2.2.2, executive accountability has a multi-layered structure and practical mechanisms are not limited to those for administrative law accountability.

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119 Interview with Gyula Bándi, Jean Monnet Professor of EU Environmental Law, Pázmány Péter Catholic University (Budapest, 27 June 2011); Interview with Csaba Kiss, Director, Environmental Management and Law Association (Budapest, 22 June 2011).

120 Interview with Justice Péter Darák, Supreme Court of Hungary (Budapest, 24 June 2011).

121 Interview with Sándor Fülöp, Parliamentary Commissioner for Future Generations (Budapest, 28 June 2011).

122 Interview with Gyula Bándi, Jean Monnet Professor of EU Environmental Law, Pázmány Péter Catholic University (Budapest, 27 June 2011); Interview with MP Benedek Jávor, Chair, Sustainable Development Committee at the National Assembly of Hungary (Budapest, 24 June 2011); Interview with Botond Bitskey, Secretary General, Constitutional Court of the Republic of Hungary (Budapest, 23 June 2011).

To understand the functionality of the Environmental Ombudsman in the entire framework of executive accountability, this subsection examines the relationship between the Ombudsman institutions and other mechanisms for executive accountability that were not addressed in Section 6.1.

Ombudsman and Parliament

As mentioned in Subsection 5.1.3, the Ombudsman and the Parliament are closely connected, as the classical Ombudsman is an officer of the Parliament. However, even for executive or organisational Ombudsmen, the relationship with the Parliament is not insignificant because, as detailed in Subsection 2.2.2, the Parliament is the central mechanism for executive accountability. In practice, it is often the case that the interface of Parliament with the Ombudsman is parliamentary committees, as discussed below.

In the ACT, parliamentary committees provide an open arena and represent an effective check on the actions of Ministers.[123] However, structural limitations remain, such as the majority of members being from the ruling parties, and the Committees having a limited number of staff.[124] For the Ombudsman, maintaining positive relationships with the Legislative Assembly is the key to securing the necessary resources for effective operation.[125] Regarding the CSE, as an executive Ombudsman, the working relationship with the Legislative Assembly is limited to attendance at the committee when asked to provide information.[126] However, the CSE and the Ministry consider that the office fulfils its administrative law accountability through reporting to the Legislative Assembly via the Minister.[127] Sarah Burrows, a senior manager of the CSE, provided a

[123] Interview with Justice Richard Refshauge, Supreme Court of the ACT (Canberra, 30 May 2011).
[124] Interview with Tim Bonyhady, Professor, Australian National University College of Law (Canberra, 31 May 2011).
[125] Interview with Dennis Pearce, Emeritus Professor, Australian National University College of Law (Canberra, 31 May 2011).
[126] Interview with Sarah Burrows, Senior Manager, Commissioner for Sustainability and Environment (Canberra, 31 May 2011).
[127] Interview with Sarah Burrows, Senior Manager, Commissioner for Sustainability and Environment (Canberra, 31 May 2011); Interview with Ian Baird, Principal Policy Officer, ACT Department of the

reason for this when she notes that it is often the case that requests for investigation from the Minister are based on discussions in the Legislative Assembly.[128]

In New Zealand, parliamentary committees play a significant role in maintaining the Parliamentary Commissioner scheme. For the institutional management, the Officers of the Parliament Committee, which is summoned according to necessity, determines the budget and resources of the Parliamentary Commissioners on behalf of the Speaker. In addition, the Committee leads the appointment process in a very transparent manner.[129] Since 2008, the contents of reports of the Parliamentary Commissioners have been examined by select committees before being sent to the House.[130] In the environmental field, reports of the PCE are submitted to the Local Government and Environment Committee.[131] Further, depending on their contents, some reports may be dispatched to other appropriate committees. For instance, the PCE's report on smart energy was sent to the Commerce Committee. In the case of special reports being issued, Members of Parliament are updated via annual reports.[132] Both the general and the Environmental Ombudsmen clearly recognise that the power to report directly to the Parliament is essential to fulfil their administrative law accountability.[133] In this context, the executive Ombudsman's 'indirect' reporting to the Parliament through the Minister is questioned. Pavan Sharma, a parliamentary clerk, highlighted the dangers of such a pathway by arguing that the Minister eventually affects the advice given by the office and removes the

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Environment, Climate Change, Energy and Water (Canberra, 30 May 2011).

128 Interview with Sarah Burrows, Senior Manager, Commissioner for Sustainability and Environment (Canberra, 31 May 2011).

129 Interview with David Wilson, Clerk of the House of Representatives, Officers of the Parliament Committee (Wellington, 9 June 2011).

130 *Standing Orders of the House of Representatives 2008* (NZ), s 387.

131 Interview with Pavan Sharma, Clerk of the House of Representatives, Local Government and Environment Committee (Wellington, 8 June 2011).

132 Interview with Sarah Clark, Office Manager, Parliamentary Commissioner for the Environment (Wellington, 9 June 2011).

133 Interview with David McGee, Ombudsman (Wellington, 8 June 2011); Interview with Pavan Sharma, Clerk of the House of Representatives, Local Government and Environment Committee (Wellington, 8 June 2011).

neutrality of the Environmental Ombudsman.[134]

However, in actuality, examination of reports by the Committee does not appear to work well. This is because the time and resources of the Committee are mainly spent working on matters of legislation, budget setting and scrutiny.[135] From the outside, it appears that the committees have a focus on legislation.[136] In this situation, the influence of the PCE on environmental decision making through select committees could be less than through public domains via mass media.[137]

In Hungary, although the officeholder was nominated by the President, each Ombudsman had a minimal connection to the President. In contrast, the role of parliamentary committees in the Ombudsman scheme was vital.[138] For instance, reports of the PCFG were examined by the Sustainable Development Committee and the relationship between them was very close. Citizens' complaints to the PCFG also served as important feedback to the administrative bodies and the Committee.[139] The strong tie with the parliamentary committees was supposed to support the effective fulfilment of the Ombudsmen's administrative law accountability. However, at the time of 2011, the formation of the Hungarian Parliament, in which more than two-thirds of seats were occupied by the ruling parties, prevented the effective function of this check on the government by Parliament.[140]

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134 Interview with Pavan Sharma, Clerk of the House of Representatives, Local Government and Environment Committee (Wellington, 8 June 2011).

135 Ibid.

136 Interview with Justice Craig Thompson, Principal Environment Judge, Environment Court of New Zealand (Wellington, 13 June 2011).

137 Interview with Pavan Sharma, Clerk of the House of Representatives, Local Government and Environment Committee (Wellington, 8 June 2011).

138 *1993. évi LIX. törvény az állampolgári jogok országgyűlési biztosáról* [Act LIX of 1993 on the Parliamentary Commissioner for Civil Rights (Ombudsman)] (Hungary), 1 June 1993, *Magyar Közlöny*, No.1993/81, 4433, art 4(1); Interview with Sándor Fülöp, Parliamentary Commissioner for Future Generations (Budapest, 28 June 2011).

139 Interview with MP Benedek Jávor, Chair, Sustainable Development Committee at the National Assembly of Hungary (Budapest, 24 June 2011).

140 Interview with Gyula Bándi, Jean Monnet Professor of EU Environmental Law, Pázmány Péter Catholic University (Budapest, 27 June 2011); Interview with Vajk Farkas, Lawyer, Ministry of Public Administration and Justice (Budapest, 28 June 2011).

In all three jurisdictions, the parliamentary committees are crucial, both to guarantee the budget and resources of the Ombudsmen and to scrutinise the matters of administrative law accountability reported by the Ombudsmen. However, in the case of the executive Ombudsman, there is doubt regarding the neutrality of its reports, which could affect the quality of parliamentary committees' examinations. At the same time, this also means that the quality of examination depends on the capacity of the committees. Further, as observed in Hungary, there is a risk that Parliament could lose its function as the central mechanism for accountability, depending on the balance of political power in the Parliament at the time. It can also be said that, compared with the unicameral system, such as in Hungary and New Zealand, the bicameral system, such as in the Commonwealth of Australia and Japan, is well prepared for this risk.

In relation to other practical mechanisms

There are also other practical mechanisms for executive accountability. Here, relationships between mechanisms active in the environmental field and the Environmental Ombudsman are examined.

In the ACT, the Auditor General is active in the environmental field, and its role in resolving systemic problems is highly regarded by many stakeholders.[141] Justice Refshauge regards the office's audit on efficiency as an element of the total function of the framework for executive accountability.[142] In addition, Tim Bonyhady, an environmental law expert, evaluates the influence of the office's reports, which he argues could improve administrative bodies' practices.[143]

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141 Interview with Justice Richard Refshauge, Supreme Court of the ACT (Canberra, 30 May 2011); Interview with Linda Crebbin, General President, ACT Civil and Administrative Tribunal (Canberra, 27 May 2011); Interview with Tim Bonyhady, Professor, Australian National University College of Law (Canberra, 31 May 2011); Interview with Ian Baird, Principal Policy Officer, ACT Department of the Environment, Climate Change, Energy and Water (Canberra, 30 May 2011); Noel Towell, 'ACT auditor slams ponds project debacle', *Canberra Times* (Canberra), 27 May 2011, 1.

142 Interview with Justice Richard Refshauge, Supreme Court of the ACT (Canberra, 30 May 2011).

143 Interview with Tim Bonyhady, Professor, Australian National University College of Law (Canberra, 31

In New Zealand, the Auditor General is well known for frequently undertaking self-initiated investigations.[144] In the environmental field, the office is responsible for resources, performance audits on environmental aspects and reporting problematic procedures of local authorities.[145] At the operational level, the institution coordinates with the PCE through joint study and staff exchange.[146]

In Hungary, the Auditor General was not as active in the environmental field.[147] Instead, the Public Prosecutors were the dominant contributors to the Hungarian accountability system. Owing to the tradition of the communist legal system, the jurisdiction of the Public Prosecutors was not limited to the criminal law area, but included the enforcement of civil and administrative laws. In practice, their jurisdiction was divided into a criminal law and civil law section, the latter being called 'Civil Law Prosecutors'. This section covered administrative law matters as well. As their prosecution was free of charge, Civil Law Prosecutors were also the 'attorney of the poor'. In the environmental field, Civil Law Prosecutors had the power to bring environmental cases to administrative review or judicial review, which was equivalent to the power of the PCFG.[148] The division of roles in these institutions was determined via discussions

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May 2011).

144 Interview with David McGee, Ombudsman (Wellington, 8 June 2011).

145 Interview with Sarah Clark, Office Manager, Parliamentary Commissioner for the Environment (Wellington, 9 June 2011); Interview with Helen Beaumont, Environment Commissioner, Environment Court of New Zealand (Wellington, 13 June 2011); Interview with Justice Craig Thompson, Principal Environment Judge, Environment Court of New Zealand (Wellington, 13 June 2011).

146 Interview with Morgan Williams, former Parliamentary Commissioner for the Environment (Wellington, 10 June 2011); Interview with Helen Beaumont, Environment Commissioner, Environment Court of New Zealand (Wellington, 13 June 2011).

147 Interview with Gyula Bándi, Jean Monnet Professor of EU Environmental Law, Pázmány Péter Catholic University (Budapest, 27 June 2011); Interview with MP Benedek Jávor, Chair, Sustainable Development Committee at the National Assembly of Hungary (Budapest, 24 June 2011); Interview with Vajk Farkas, Lawyer, Ministry of Public Administration and Justice (Budapest, 28 June 2011); Interview with Csaba Kiss, Director, Environmental Management and Law Association (Budapest, 22 June 2011). However, as a result of the constitutional reform, the Auditor General would become part of government and so would lose its independence. Interview with MP Benedek Jávor, Chair, Sustainable Development Committee at the National Assembly of Hungary (Budapest, 24 June 2011).

148 Interview with Justice Péter Darák, Supreme Court of Hungary (Budapest, 24 June 2011); Interview with Justice Fruzsina Bögös, Metropolitan Court of Budapest (Budapest, 24 June 2011); Interview with Sándor Fülöp, Parliamentary Commissioner for Future Generations (Budapest, 28 June 2011); Nóra Katalin Bonomi, 'The role of the public prosecutor in environmental enforcement' in Gyula Bándi (ed), *The Impact of ECJ Jurisprudence on Environmental Law* (Pázmány Péter Catholic University, Faculty of Law and Political Sciences, 2009) 51, 52–4.

between the PCFG and the Attorney General's Department, to which the Civil Law Prosecutors belong. The Civil Law Prosecutors took on more legal and formal cases, while the PCFG treated more innovative, new cases.[149] In practice, the Civil Law Prosecutors exercised their powers frequently, generating thousands of cases. Conversely, the PCFG did not use this power so frequently.[150]

The functionality of the other mechanisms for executive accountability in the environmental field varies by jurisdiction. In the ACT and New Zealand, the Auditor General makes certain contributions to financial accountability, and in Hungary, the Civil Law Prosecutors enrich administrative law accountability. What is noteworthy here is that the functionalities of these institutions are coordinated to avoid overlap with those of the Environmental Ombudsman, although this is not necessarily organised in the same way in each jurisdiction. While the scopes of activities in the ACT do not overlap, in New Zealand and Hungary, coordination is arranged between the offices.

6.2.3 Deterrent effect of the Ombudsman

It has been frequently pointed out that one of the merits of introducing an Ombudsman is that its existence works as a deterrent to the administrative officers' daily practices in terms of avoiding misconduct.[151] However, this can also be said about other means of realising administrative law accountability. This subsection examines the extent

[149] Interview with Sándor Fülöp, Parliamentary Commissioner for Future Generations (Budapest, 28 June 2011)

[150] Interview with Justice Fruzsina Bögös, Metropolitan Court of Budapest (Budapest, 24 June 2011); Interview with Gyula Bándi, Jean Monnet Professor of EU Environmental Law, Pázmány Péter Catholic University (Budapest, 27 June 2011); Bonomi, above n 148, 53. However, there is also a fear that the constitutional reform may inactivate the Civil Law Prosecutors' exercise of the powers because they are not completely independent from the will of the government. Interview with Gyula Bándi, Jean Monnet Professor of EU Environmental Law, Pázmány Péter Catholic University (Budapest, 27 June 2011).

[151] See, eg, Roy Gregory and P. G. Hutchesson, *The Parliamentary Ombudsman: A Study in the Control of Administrative Action* (Royal Institute of Public Administration, 1975), 389–90; Izhak E. Nebenzahl, 'Four Perspectives on the Ombudsman's Role: A. The Direct and Indirect Impact of the Ombudsman' in Gerald E. Caiden (ed), *International Handbook of The Ombudsman: Evolution and Present Function* (Greenwood Press, 1983) vol I, 59, 63–4; Roy Gregory, 'The Ombudsman: "An Excellent Form of Alternative Dispute Resolution"?' in Linda C. Reif (ed), *The International Ombudsman Yearbook Volume 5 2001* (Kluwer Law International, 2002) 98, 121.

to which this first argument is true in the environmental field by examining whether the number of disputes is reduced by the existence of an Ombudsman and its ability to solve systemic problems.

In the ACT, the Ombudsman and the CSE share the view that, although a certain number of disputes might have been reduced by the existence of the office, the total number has increased.[152] McMillan explained the background of this phenomenon as follows. The very existence of the Ombudsman has changed the agencies' attitudes from ignoring the voice of the public to dealing with complaints. The number of complaints has increased because the public has become aware of the right to complain and has started to bring their complaints. In this context, the increase in complaints should not be evaluated negatively. Especially in the environmental planning area, the nature of the administrative decision is 'once and only' and 'irreversible'; thus, the processes are more 'resource intensive' than in other areas. In this sense, complaints in this area could be evaluated as 'healthy'.[153] Moreover, both institutions recognise that the resolution of systemic problems has reduced the number of similar complaints afterwards.[154]

In New Zealand, while the Ombudsman focuses on individual complaints, the PCE focuses on systemic problems. Based on statistics, McGee argues that the existence of the Ombudsman encourages the public to lodge complaints. He found that the number of cases increased from 389 in 1962 when the office was established to approximately 10 000 in 2010. This shows that, as the office succeeds and its influence increases, the number of complaints increases.[155] Meanwhile, due to the reduction of its

[152] Interview with John McMillan, former Commonwealth and ACT Ombudsman (Canberra, 27 May 2011); Interview with Sarah Burrows, Senior Manager, Commissioner for Sustainability and Environment (Canberra, 31 May 2011).
[153] Interview with John McMillan, former Commonwealth and ACT Ombudsman (Canberra, 27 May 2011).
[154] Interview with John McMillan, former Commonwealth and ACT Ombudsman (Canberra, 27 May 2011); Interview with Sarah Burrows, Senior Manager, Commissioner for Sustainability and Environment (Canberra, 31 May 2011).
[155] Interview with David McGee, Ombudsman (Wellington, 8 June 2011).

complaint-handling role, the PCE does not recognise the deterrent effect.[156] However, in the context of the influence of the PCE, Williams is of the view that the success of the office's empowerment of the public has increased the number of challenges to environmental decisions at the local level.[157]

In Hungary, the deterrent effects of the existence of the office and the resolution of systemic problems were thought of as one set. Both the Ombudsman and the PCFG considered that the resolution of systemic problems had reduced the number of similar complaints.[158] Justice Lenkovics explained that because the Ombudsman's resolution provided administrative bodies with 'a pattern [for] how to prevent conflicts and how to handle them', the environmental awareness of administrative agencies and citizens had also been raised. In addition, it was important that when such a recommendation was accepted by the government, it would be treated as a 'precedent case' and be influential.[159] Meanwhile, Fülöp explained the cycle of the deterrent effect through the resolution of systemic problems by the PCFG's integrated approach as follows. At an early stage, the success of the office increased the number of complaints. However, the integrated approach enabled the processing of a number of similar complaints at once. As a result, if a large number of similar complaints could be gathered, the office was able to provide a systemic resolution to that specific issue and to prevent further iteration of similar complaints.[160] This cycle also contributed to one of the office's projects, which aims at creating a map of existing environmental conflicts.[161]

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156 Interview with Sarah Clark, Office Manager, Parliamentary Commissioner for the Environment (Wellington, 9 June 2011).
157 Interview with Morgan Williams, former Parliamentary Commissioner for the Environment (Wellington, 10 June 2011).
158 Interview with Justice Barnabás Lenkovics, former Ombudsman (Budapest, 23 June 2011); Interview with Sándor Fülöp, Parliamentary Commissioner for Future Generations (Budapest, 28 June 2011).
159 Interview with Justice Barnabás Lenkovics, former Ombudsman (Budapest, 23 June 2011).
160 Interview with Sándor Fülöp, Parliamentary Commissioner for Future Generations (Budapest, 28 June 2011).
161 Interview with István Sárközy, Legal adviser, Office of the Parliamentary Commissioner for Future Generations (Budapest, 28 June 2011).

Although the experiences in individual jurisdictions are slightly different, in general, the resolution of systemic problems has reduced the number of disputes of certain types, while simultaneously the existence of the office has increased the number of complaints, due to people becoming aware of their right to bring complaints. Thus, the expectation of the deterrent effect is partly realised and partly unrealised. However, the increase in the number of complaints should not be viewed negatively because it is a testament to the success of the Ombudsman in enhancing administrative law accountability and in securing public access to justice through empowerment. Among the institutions examined, the Hungarian PCFG was an excellent model, as it enabled the reduction of complaints through the resolution of systemic issues and increased the range of complaints brought because of the success of the office.

6.3 Raison d'être of the Environmental Ombudsman

As discussed in Subsection 5.2.3, it is necessary to explain the *raison d'être* of the Environmental Ombudsman in relation to the general Ombudsman when considering the introduction of a new Environmental Ombudsman institution. This section examines the three principal reasons justifying the existence of the Environmental Ombudsman institution; namely, its identity (Subsection 6.3.1), its compatibility with the general Ombudsman (Subsection 6.3.2), and its independence (Subsection 6.3.3).

6.3.1 Identity of the Environmental Ombudsman

As seen in Sections 6.1–6.2, institutional identity has a central importance to *raison d'être* because it is a key factor in determining the functionality of the Environmental Ombudsman in a framework for ensuring executive accountability. This subsection

examines the concept and main roles of the Environmental Ombudsman, which are the basic elements in its identity. Further, this subsection also assesses to what extent this identity is disseminated among the relevant stakeholders. If its identity is well recognised, the Environmental Ombudsman is in close connection with other mechanisms; if not, the Environmental Ombudsman is isolated.

Identity of the CSE

In the ACT, the object of the CSE is 'advancing sustainability', and the means to achieve this are 'advocacy, independent scrutiny, reporting and advice'.[162] The office recognises the role of complaint handling to be a significant one, but there are also other roles, such as advocacy, strategic reporting and building connection to the local community. Burrows explained that these other roles are equally important in strengthening the environmental decision-making processes.[163]

However, the activities of the CSE are not generally well recognised.[164] Those who know the office share the view that the office is not a genuine dispute resolution mechanism,[165] but, their evaluations of its main roles vary. For instance, Julia Pitts, the Chair of a public interest environmental law centre, recognised that the educational function is important because the CSE's resources are very limited.[166] Baird explained the general understanding in the government about the main roles of the office as to 'prepare the state of the environment report … and … [carry] out investigation on

[162] Commissioner for Sustainability and the Environment (ACT), *Annual Report 2010–11* (Office of the Commissioner for Sustainability and the Environment 2011), 1.
[163] Interview with Sarah Burrows, Senior Manager, Commissioner for Sustainability and Environment (Canberra, 31 May 2011).
[164] Interview with John McMillan, former Commonwealth and ACT Ombudsman (Canberra, 27 May 2011); Interview with Justice Richard Refshauge, Supreme Court of the ACT (Canberra, 30 May 2011); Interview with Dennis Pearce, Emeritus Professor, Australian National University College of Law (Canberra, 31 May 2011); Interview with Tim Bonyhady, Professor, Australian National University College of Law (Canberra, 31 May 2011).
[165] Interview with Linda Crebbin, General President, ACT Civil and Administrative Tribunal (Canberra, 27 May 2011); Interview with Ian Baird, Principal Policy Officer, ACT Department of the Environment, Climate Change, Energy and Water (Canberra, 30 May 2011); Interview with Julia Pitts, Chair, Environmental Defender's Office (ACT) (Canberra, 30 May 2011).
[166] Interview with Julia Pitts, Chair, Environmental Defender's Office (ACT) (Canberra, 30 May 2011).

particular issues when the government wants [it] … to do so'.[167] Despite this, the effectiveness of the office in improving the quality of environmental governance is generally highly regarded.[168] Importantly, however, Baird argued that approximately 85 to 90 per cent of the office's detailed recommendations are adopted because the office prioritises matters that are acceptable to the government.[169]

Identity of the PCE

In New Zealand, the office reflects the flexible structure of the *Environment Act 1986* (NZ), which allows the officeholder to decide the focus of activities.[170] Throughout its 25-year history, the concept and main roles of the PCE have shifted. From the establishment of the office in 1987 to 2011, there were three officeholders: Helen Hughes (1987–96), Morgan Williams (1997–2007) and Jan Wright (2007–). Hughes faced a major challenge in establishing the system and its procedures of resource management and planning through investigations and recommendations.[171] She also contributed to establishing the complaint-handling function of the PCE.[172] Subsequently, Williams refocused the office on an analysis of governmental systems, to build optimal environmental administration, while reducing the auditing role.[173] The current officeholder's focus is 'to maintain or improve the quality of the environment by

[167] Interview with Ian Baird, Principal Policy Officer, ACT Department of the Environment, Climate Change, Energy and Water (Canberra, 30 May 2011).
[168] Interview with Julia Pitts, Chair, Environmental Defender's Office (ACT) (Canberra, 30 May 2011); Interview with Ian Baird, Principal Policy Officer, ACT Department of the Environment, Climate Change, Energy and Water (Canberra, 30 May 2011).
[169] Interview with Ian Baird, Principal Policy Officer, ACT Department of the Environment, Climate Change, Energy and Water (Canberra, 30 May 2011).
[170] Interview with Pavan Sharma, Clerk of the House of Representatives, Local Government and Environment Committee (Wellington, 8 June 2011); *Environment Act 1986* (NZ).
[171] David Young, *Keeper of the Long View: Sustainability and the PCE* (The Parliamentary Commissioner for the Environment, 2007), 18.
[172] Helen Hughes, 'Ten Years On' in Gary Hawke (ed), *Guardians for the Environment* (Institute of Policy Science, Victoria University of Wellington, 1997) 155, 157; Sylvia Allan, 'Environmental Commissioners as Ombudsmen: A Successful Role' in Gary Hawke (ed), *Guardians for the Environment* (Institute of Policy Science, Victoria University of Wellington, 1997) 53, 54; Ton Bührs, 'Barking Up Which Trees? The Role of New Zealand's Environmental Watchdog' (1996) 48 *Political Science (VUW)* 1, 9–11.
[173] Young, above n 171, 34–5.

providing robust independent advice that influences decisions'.[174] Here, the main role of the office is its advisory function, rather than dispute resolution.[175] This advocacy-centred identity is shared among relevant stakeholders.[176]

Although not explicitly mentioned here, the office also takes a view aimed at protecting the environment in the long term.[177] Williams regarded a central function of the office as 'empower[ing] [people] to look forward', which drives the office to present a 'very long view' through highly qualified reports.[178] Although the acceptance of recommendations based on this view depends on the government,[179] it is often the case that the government accepts the recommendations five to seven years after their publication.[180]

Identity of the PCFG

In Hungary, the PCFG followed the statutory mandate that was the 'guardian of the constitutional right to healthy environment'.[181] In addition, as its name showed, working for the interests of future generations was another central theme of the office.[182] In this

174 Parliamentary Commissioner for the Environment (NZ), *Annual Report for the year ended 30 June 2011* (The Parliamentary Commissioner for the Environment, 2011), 6.

175 Interview with Sarah Clark, Office Manager, Parliamentary Commissioner for the Environment (Wellington, 9 June 2011); Interview with Morgan Williams, former Parliamentary Commissioner for the Environment (Wellington, 10 June 2011).

176 Interview with Justice John McGrath, Supreme Court of New Zealand (Wellington, 13 June 2011); Interview with Justice Craig Thompson, Principal Environment Judge, Environment Court of New Zealand (Wellington, 13 June 2011); Interview with Helen Beaumont, Environment Commissioner, Environment Court of New Zealand (Wellington, 13 June 2011); Interview with Klaus Bosselmann, Professor of Law, University of Auckland (Canberra, 28 May 2011); Interview with Pavan Sharma, Clerk of the House of Representatives, Local Government and Environment Committee (Wellington, 8 June 2011); Interview with David Wilson, Clerk of the House of Representatives, Officers of the Parliament Committee (Wellington, 9 June 2011).

177 Interview with Sarah Clark, Office Manager, Parliamentary Commissioner for the Environment (Wellington, 9 June 2011).

178 Interview with Morgan Williams, former Parliamentary Commissioner for the Environment (Wellington, 10 June 2011).

179 Interview with Sarah Clark, Office Manager, Parliamentary Commissioner for the Environment (Wellington, 9 June 2011).

180 Interview with Morgan Williams, former Parliamentary Commissioner for the Environment (Wellington, 10 June 2011).

181 *1993. évi LIX. törvény az állampolgári jogok országgyűlési biztosáról* [Act LIX of 1993 on the Parliamentary Commissioner for Civil Rights (Ombudsman)] (Hungary), 1 June 1993, *Magyar Közlöny*, No.1993/81, 4433, art 27/A; Parliamentary Commissioner for Future Generations (HUN), *Comprehensive Summary of the Report of the Hungarian Parliamentary Commissioner for Future Generations 2010* (Office of the Parliamentary Commissioners (HUN), 2011), 6.

182 Interview with Sándor Fülöp, Parliamentary Commissioner for Future Generations (Budapest, 28 June 2011); Parliamentary Commissioner for Future Generations (HUN), above n 181, 5; Interview with

context, Gyula Bándi, an environmental law expert, interpreted the concept of the office as to remind the state of the rights of future generations.[183] However, the latter concept was not recognised by all relevant stakeholders. As mentioned in Subsection 5.5.2, during the negotiation of the establishment of the office, the abilities and means of the office had become limited to handling environmental problems.[184] Thus, some stakeholders criticised that the name did not reflect the reality.[185]

As noted in Subsection 5.5.2, the main roles of the PCFG were dispute resolution, providing advice on policy and legislation, and strategic development and research. All of these were well recognised by relevant stakeholders. For instance, the second role was exemplified by the office's advice on taking a precautionary approach to a symptom of environmental harm, such as developers' attempts to avoid implementing environmental impact assessments, to the government and Parliament.[186] To enhance the influence of this role, the office was eager to build broad support networks nationally and internationally.[187] As for the third role, among relevant stakeholders and experts, the PCFG was known as an active research institution.[188] For instance, in cooperation with administrative judges, the office held conferences on how to handle environmental disputes, to which they also invited administrative officers.[189]

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183 Vajk Farkas, Lawyer, Ministry of Public Administration and Justice (Budapest, 28 June 2011).

184 Interview with Gyula Bándi, Jean Monnet Professor of EU Environmental Law, Pázmány Péter Catholic University (Budapest, 27 June 2011).

185 Interview with MP Benedek Jávor, Chair, Sustainable Development Committee at the National Assembly of Hungary (Budapest, 24 June 2011); Interview with Gyula Bándi, Jean Monnet Professor of EU Environmental Law, Pázmány Péter Catholic University (Budapest, 27 June 2011); Interview with István Sárközy, Legal adviser, Office of the Parliamentary Commissioner for Future Generations (Budapest, 28 June 2011).

186 Interview with Botond Bitskey, Secretary General, Constitutional Court of the Republic of Hungary (Budapest, 23 June 2011); Interview with Csaba Kiss, Director, Environmental Management and Law Association (Budapest, 22 June 2011).

187 Interview with Gyula Bándi, Jean Monnet Professor of EU Environmental Law, Pázmány Péter Catholic University (Budapest, 27 June 2011); Interview with Vajk Farkas, Lawyer, Ministry of Public Administration and Justice (Budapest, 28 June 2011).

188 Interview with Sándor Fülöp, Parliamentary Commissioner for Future Generations (Budapest, 28 June 2011).

189 Interview with Gyula Bándi, Jean Monnet Professor of EU Environmental Law, Pázmány Péter Catholic University (Budapest, 27 June 2011).

Interview with Justice Péter Darák, Supreme Court of Hungary (Budapest, 24 June 2011); Interview with Sándor Fülöp, Parliamentary Commissioner for Future Generations (Budapest, 28 June 2011).

The most highly regarded role of the office was its primary role: many stakeholders shared the view that the creation of the PCFG had enriched the framework of dispute-resolution mechanisms in the environmental field.[190] Specifically, the Ombudsman complemented the high formality of the Court system. The Ombudsman's ability to investigate an administrative decision from an early stage (either by self-initiated inquiry or in response to a complaint) was regarded as pivotal because, in the environmental field, a delay in judgment can result in irreversible damage.[191] Further, the power of the PCFG to initiate or intervene in judicial review was recognised as especially effective.[192] For example, when the rationality of granting permission for a North Atlantic Treaty Organisation (NATO) radar base was disputed, intervention of the office took a crucial role in the dispute.[193] The Honourable Justice Péter Darák of the Supreme Court praised the quality of the office's argument as directly quotable in the final judgment.[194] Further, as a statistical example of the influence of the establishment of the PCFG, Kiss indicated that the number of court cases brought to his public interest environmental law centre had dramatically reduced from approximately 50 to five or six per year.[195]

Analysis on identity

As shown above, the identities of the Environmental Ombudsmen vary by jurisdiction.

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190 Interview with Botond Bitskey, Secretary General, Constitutional Court of the Republic of Hungary (Budapest, 23 June 2011); Interview with Justice Péter Darák, Supreme Court of Hungary (Budapest, 24 June 2011); Interview with Justice Fruzsina Bögös, Metropolitan Court of Budapest (Budapest, 24 June 2011); Interview with MP Benedek Jávor, Chair, Sustainable Development Committee at the National Assembly of Hungary (Budapest, 24 June 2011); Interview with Csaba Kiss, Director, Environmental Management and Law Association (Budapest, 22 June 2011).

191 Interview with Justice Péter Darák, Supreme Court of Hungary (Budapest, 24 June 2011); Interview with Vajk Farkas, Lawyer, Ministry of Public Administration and Justice (Budapest, 28 June 2011).

192 Interview with Justice Fruzsina Bögös, Metropolitan Court of Budapest (Budapest, 24 June 2011); Interview with Gyula Bándi, Jean Monnet Professor of EU Environmental Law, Pázmány Péter Catholic University (Budapest, 27 June 2011); Interview with Vajk Farkas, Lawyer, Ministry of Public Administration and Justice (Budapest, 28 June 2011).

193 Parliamentary Commissioner for Future Generations (HUN), *Comprehensive Summary of the Report of the Parliamentary Commissioner for Future Generations of Hungary 2008–2009* (Office of the Parliamentary Commissioners (HUN), 2010), 21.

194 Interview with Justice Péter Darák, Supreme Court of Hungary (Budapest, 24 June 2011).

195 Interview with Csaba Kiss, Director, Environmental Management and Law Association (Budapest, 22 June 2011).

However, it is possible to classify their concepts and roles by utilising a few indicators. One indicator is whether the concept anticipates not only the resolution of current environmental issues, but also the realisation of inter-generational equity through taking into account the interests of future generations. The other is whether the primary role of the office is thought to be dispute resolution or the provision of advice.

For the former, it is unclear whether the CSE takes into account the interests of future generations. Conversely, the PCE and PCFG take at least some consideration of inter-generational equity. For the latter, the main roles of the CSE include both the dispute resolution and advisory functions, but it remains ambiguous as to which is more heavily weighted. Similarly, the PCFG took dispute resolution and advisory functions as its primary roles. In contrast, the PCE clearly favours the advisory function. However, as the PCE's history shows, the concept and main roles of these offices are relatively flexible and may shift according to the demands of the time.

Regarding perceptions of identity, the CSE is not precisely acknowledged among the relevant stakeholders, while the PCE and PCFG are generally well recognised. This suggests that the CSE is isolated in the framework for ensuring administrative accountability.

6.3.2 Compatibility of the Environmental Ombudsman

As seen in Sections 5.3–5.5, the relationship between the general and Environmental Ombudsmen is significant to justify why these institutions should be separated. To answer this question, this subsection examines the compatibility of these institutions in the three jurisdictions.

Compatibility of the CSE and the Ombudsman

In the ACT, McMillan explained the differences between the general and Environmental Ombudsmen as follows. First, the CSE can concentrate on environmental cases full time, whereas the Ombudsman cannot. Secondly, the CSE has 'a promotional role' of environmental philosophy, while the Ombudsman is 'not the advocate for anything'. Thirdly, the CSE works only with the environmental agencies and is thus in danger of being captured by them. Conversely, the Ombudsman works with the whole government, acquiring general respect. Regarding compatibility, McMillan concluded that, from the Ombudsman side, having a specialised Ombudsman has its advantages. This is because the general Ombudsman's capacity is limited, and there is the necessity for 'very strong oversight systems for the environmental disputes'.[196]

Thus, in the ACT, the two institutions are thought to be compatible. In actuality, there is no conflict over the jurisdiction of the CSE and the Ombudsman. In addition to the differences of speciality and capacity mentioned above, there is also a difference in the focus on investigation. While the Ombudsman's focus is limited to procedural matters, the CSE covers substantive issues.[197] Moreover, the Ombudsman and CSE do cooperate where necessary.[198]

Compatibility of the PCE and the Ombudsman

In New Zealand, the Ombudsman and the PCE are compatible. There is a strong philosophy of separation of functions among Parliamentary Officers at the institutional design level. McGee explained the underlying context when he said that preventing the

[196] Interview with John McMillan, former Commonwealth and ACT Ombudsman (Canberra, 27 May 2011).
[197] Interview with Julia Pitts, Chair, Environmental Defender's Office (ACT) (Canberra, 30 May 2011).
[198] Interview with John McMillan, former Commonwealth and ACT Ombudsman (Canberra, 27 May 2011); Interview with Sarah Burrows, Senior Manager, Commissioner for Sustainability and Environment (Canberra, 31 May 2011).

'danger of duplication of the work … [is] a better use of public resources.'[199] Reflecting this, many stakeholders regard the Ombudsman as having the ability to intervene in disputes on governmental decision making, while the PCE focuses on governmental policies and ensuring environmental standards.[200] Such differences of institutional design also explain why the PCE is not officially bestowed with the power of investigation.[201] In relation to the PCE, the Ombudsman has emphasised the necessity of the distinction between the advocacy and complaint handling roles.[202] This means that the Ombudsman does not focus on systemic issues in order to concentrate on handling individual cases that are not covered by other specialist reviewers. McGee expressed this stance of the office as being the 'ambulance at the bottom of the cliff … [for] people who [had] fallen off'.[203] In contrast, Beaumont, another former Deputy Commissioner of the PCE, explained that the PCE's review range covers issues that are 'legal but [where] the complainant believes there are poor outcomes for the environment'.[204]

Further, the two institutions cooperate to keep these divisions of function. For instance, complaints coming to the PCE can be dispatched to the Ombudsman according their contents.[205] In addition, the PCE and the Ombudsman meet approximately six times per year for the purpose of sharing experience and avoiding clash of jurisdiction.[206]

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199 Interview with David McGee, Ombudsman (Wellington, 8 June 2011).

200 Interview with Justice John McGrath, Supreme Court of New Zealand (Wellington, 13 June 2011); Interview with Pavan Sharma, Clerk of the House of Representatives, Local Government and Environment Committee (Wellington, 8 June 2011); Interview with David Wilson, Clerk of the House of Representatives, Officers of the Parliament Committee (Wellington, 9 June 2011).

201 Interview with Sarah Clark, Office Manager, Parliamentary Commissioner for the Environment (Wellington, 9 June 2011); Interview with Morgan Williams, former Parliamentary Commissioner for the Environment (Wellington, 10 June 2011); Interview with David McGee, Ombudsman (Wellington, 8 June 2011); Interview with Pavan Sharma, Clerk of the House of Representatives, Local Government and Environment Committee (Wellington, 8 June 2011); Interview with David Wilson, Clerk of the House of Representatives, Officers of the Parliament Committee (Wellington, 9 June 2011).

202 Gary Hawke (ed), *Guardians for the Environment* (Institute of Policy Science, Victoria University of Wellington, 1997), 70.

203 Interview with David McGee, Ombudsman (Wellington, 8 June 2011).

204 Interview with Helen Beaumont, Environment Commissioner, Environment Court of New Zealand (Wellington, 13 June 2011).

205 Interview with Sarah Clark, Office Manager, Parliamentary Commissioner for the Environment (Wellington, 9 June 2011); Interview with Morgan Williams, former Parliamentary Commissioner for the Environment (Wellington, 10 June 2011).

206 Interview with Morgan Williams, former Parliamentary Commissioner for the Environment

Compatibility of the PCFG and the Ombudsman

As seen in Subsection 5.5.3, in Hungary, the compatibility of the general and Environmental Ombudsmen was controversial. The reason for the conflict between the two institutions was the differences of their institutional philosophies. The Ombudsman's main concern was balancing environmental and other rights, with a focus on interests of present generation. The strength of this approach was that it allowed for compromise and consensus.[207] Conversely, as detailed above, the PCFG's priority was the protection of environmental rights, with a focus on protecting the environment for future generations. The differences between these stances affected the decisions of the two institutions. For instance, when both institutions investigated the problem of air pollution by emissions from automobiles in Budapest city, they reached opposite conclusions.[208]

From the Ombudsman's viewpoint, it was unacceptable to focus on just one right and not to consider other rights.[209] Conversely, as detailed in Subsection 5.5.2, there were specific reasons for establishing the PCFG. Although both stances have supporters, stakeholders regard the conflicts between the two Ombudsmen as undesirable.[210]

Key factors for comparability

Comparing the three jurisdictions, the following factors seem to be important in securing the compatibility of the general and Environmental Ombudsmen. First, the two institutions should have mutual understandings about, and respect for, the differences of identity and functionality. Second, it is desirable that there be coordination of institutional

(Wellington, 10 June 2011).

207 Interview with Justice Barnabás Lenkovics, former Ombudsman (Budapest, 23 June 2011).

208 Interview with Csaba Kiss, Director, Environmental Management and Law Association (Budapest, 22 June 2011).

209 Interview with Justice Barnabás Lenkovics, former Ombudsman (Budapest, 23 June 2011).

210 Interview with MP Benedek Jávor, Chair, Sustainable Development Committee at the National Assembly of Hungary (Budapest, 24 June 2011); Interview with Csaba Kiss, Director, Environmental Management and Law Association (Budapest, 22 June 2011); Interview with Vajk Farkas, Lawyer, Ministry of Public Administration and Justice (Budapest, 28 June 2011); Interview with Botond Bitskey, Secretary General, Constitutional Court of the Republic of Hungary (Budapest, 23 June 2011).

design. Thirdly, regular communications needs to be maintained between the two institutions. As seen in the ACT, not all of these factors are necessary to secure compatibility. However, as seen in Hungary, the first factor is essential. As McMillan indicated, logically there is no reason to prevent two institutions from working compatibly. However, an emotional factor exists that cannot be ignored.

6.3.3 Independence of the Environmental Ombudsman

As is seen in Subsection 5.1.3, independence and impartiality are crucial for any Ombudsman institution and the Environmental Ombudsman is no exception. This subsection examines the independence of the Environmental Ombudsman with a view to revealing differences between the independence of executive and classical Ombudsmen, the practical meaning of impartiality and the impact of losing independence.

Independence of the CSE

In the ACT, the CSE belongs to the Environment Minister and it is classified as an executive Ombudsman. Baird explained the situation that the office is 'not completely independent' and 'is generally given the terms of reference and time period [in] which to report' from the Minister.[211] However, the CSE denies the existence of ministerial intervention in its operation, and claims that independence from the mother ministry is secured because of the Commissioner's control in appointing staff. Burrows explained that, unlike Japan, no senior staff are seconded from the mother ministry, which has the effect of compelling the office to follow the directions of the ministry.[212] The office and ministry recognise that supervision by the Minister is not problematic, and also has certain merits in connecting the local community and the government, and in securing finance and resources for the office. Thus, neither of these parties wishes for the CSE to

[211] Interview with Ian Baird, Principal Policy Officer, ACT Department of the Environment, Climate Change, Energy and Water (Canberra, 30 May 2011).
[212] Interview with Sarah Burrows, Senior Manager, Commissioner for Sustainability and Environment (Canberra, 31 May 2011).

become an Officer of Parliament.[213]

The perspectives of stakeholders on this issue vary. McMillan did not insist on the necessity of the CSE being an Officer of Parliament, as long as the office functions as a part of the framework for executive accountability.[214] Conversely, Dennis Pears, who was an administrative law expert and a former Ombudsman (1988–91), held the traditional view that this kind of institution should be an Officer of Parliament.[215]

Independence of the PCE

In New Zealand, as an Officer of Parliament, the PCE has the highest constitutional status.[216] Reflecting this status, the independence of the office provides authenticity in its activities, promoting its impartiality.[217] Stakeholders recognise neutrality as the key factor that divides the Officers of the Parliament and the executive.[218] In practice, the success of the PCE in improving the quality of environmental governance can be found in the fact that the office is an independent institution, operating at highest levels of policy. For instance, the neutrality of the office both for the ruling and opposition parties is well evaluated by Parliamentarians as a source of future policy.[219]

Independence of the PCFG

In Hungary, as detailed in Section 5.5, the independence of the Ombudsmen was fully secured and quite respected. However, the independence of the PCFG has been

213 Interview with Sarah Burrows, Senior Manager, Commissioner for Sustainability and Environment (Canberra, 31 May 2011); Interview with Ian Baird, Principal Policy Officer, ACT Department of the Environment, Climate Change, Energy and Water (Canberra, 30 May 2011).
214 Interview with John McMillan, former Commonwealth and ACT Ombudsman (Canberra, 27 May 2011).
215 Interview with Dennis Pearce, Emeritus Professor, Australian National University College of Law (Canberra, 31 May 2011).
216 Interview with David McGee, Ombudsman (Wellington, 8 June 2011).
217 Interview with Sarah Clark, Office Manager, Parliamentary Commissioner for the Environment (Wellington, 9 June 2011).
218 Interview with Helen Beaumont, Environment Commissioner, Environment Court of New Zealand (Wellington, 13 June 2011); Interview with Pavan Sharma, Clerk of the House of Representatives, Local Government and Environment Committee (Wellington, 8 June 2011).
219 Interview with Sarah Clark, Office Manager, Parliamentary Commissioner for the Environment (Wellington, 9 June 2011).

threatened by constitutional reform, which degraded the PCFG to a Deputy Ombudsman. In the proposed scheme, decisions on investigation and publicity were supposed to be made at the discretion of the general Ombudsman and the competence of the Deputy Ombudsman was unclear.[220] However, considering the fact the new scheme was proposed by the general Ombudsman, the competency of the Deputy Ombudsman was expected to be small.[221] Thus, it was worried that this would have amounted to the *de facto* abolition of the PCFG by depriving it of its functions and independence. Stakeholders criticised this change as a major step backwards in environmental policy.[222] Fülöp worried that the disappearance of the office would be 'the biggest failure'.[223]

Significance of independence

The CSE model shows that the executive Ombudsman can be independent in its operation. Although the CSE emphasised the advantages of being an executive Ombudsman, the danger of being captured is not explicitly recognised. Thus, it is difficult to remove doubts about its impartiality. Conversely, the PCE's practice clearly demonstrates the significance of absolute independence and impartiality of the classical Ombudsman in enhancing the quality of environmental governance. In particular, this is vital for the office to maintain its report's influence in the long term, which is also the key to securing the interests of future generations. In this regard, as the PCFG's experience demonstrates, the loss of independence is a serious threat to the *raison d'être* of the Environmental Ombudsman. The merging of the Environmental with the general

[220] Interview with Vajk Farkas, Lawyer, Ministry of Public Administration and Justice (Budapest, 28 June 2011); Interview with Sándor Fülöp, Parliamentary Commissioner for Future Generations (Budapest, 28 June 2011); Interview with István Sárközy, Legal adviser, Office of the Parliamentary Commissioner for Future Generations (Budapest, 28 June 2011).

[221] Interview with Vajk Farkas, Lawyer, Ministry of Public Administration and Justice (Budapest, 28 June 2011).

[222] Interview with Gyula Bándi, Jean Monnet Professor of EU Environmental Law, Pázmány Péter Catholic University (Budapest, 27 June 2011); Interview with MP Benedek Jávor, Chair, Sustainable Development Committee at the National Assembly of Hungary (Budapest, 24 June 2011); Interview with Csaba Kiss, Director, Environmental Management and Law Association (Budapest, 22 June 2011).

[223] Interview with Sándor Fülöp, Parliamentary Commissioner for Future Generations (Budapest, 28 June 2011).

Ombudsman may not automatically mean the complete loss of the functionality of the PCFG. However, considering that the PCFG as an independent institution has the ability to conduct a more thorough investigation on systemic environmental failure in comparison with the Ombudsman, the rationality of merging the institutions remains questionable.

6.4 Essence of the Environmental Ombudsman

This chapter has examined the efficacy and functionality of the Environmental Ombudsman as a mechanism for administrative law accountability. The examination confirmed that this institution is part of the framework of executive transparency and accountability. The functionality of the Environmental Ombudsman is largely determined by its identity and capacity, as well as through other practical mechanisms. Without understand these elements in each jurisdiction, it would be difficult to achieve a precise understanding of the functionalities of individual Environmental Ombudsmen.

This is especially true for the functionality of the Environmental Ombudsman as a dispute resolution mechanism. Still, some general common remarks can be observed. For instance, regarding disputes over access to information, the function of the office is to enhance disclosure of environmental information. In addition, its basic function in relation to disputes over public participation is to make qualitative judgements as part of Ombudsman review. Further, the Environmental Ombudsman has high accessibility when compared with merits review and judicial review, and in comparison with the Ombudsman, its screening criteria are optimised for its objectives.

Similarly, the functionality of the Environmental Ombudsman in the framework of executive transparency and accountability is affected by the elements mentioned above.

However, in many aspects, the influence of other practical mechanisms is stronger than the office's identity and capacity. For example, the quality of the associated record management system, the media and parliamentary committees largely determines the functions of the office in fulfilling executive accountability. An exception is the specific contribution of the office to administrative law accountability; that is, its deterrent effect. This is mostly affected by the office's capacity, as detailed in Chapter 5.

The identity of the Environmental Ombudsman forms the foundation of the office's *raison d'être*. This element is comprised of concept and main roles, varying by jurisdiction. Still, it is possible to categorise identity by some indictors, such as the Environmental Ombudsman's orientation to protecting future generations and its institutional focus on either dispute resolution or advisory functions. As discussed above, identity has a significant influence on the functionality of the office. For instance, the CSE, whose identity is present-generation oriented, focuses on resolving individual complaints, rather than addressing systemic failures. The PCE, whose identity is pro-future generations and advisory oriented, sets priority on clarifying systemic failures and resolving them, while taking little interest in the resolution of individual disputes. Meanwhile, the PCFG, whose identity was pro-future generations but both dispute resolution and advisory oriented, was aimed at resolving both systemic failures and individual complaints.

The other elements addressed in this chapter were compatibility and independence of the office. The former indicates the healthiness of the relationship between the general and Environmental Ombudsmen. In this regard, what is particularly important is the mutual recognition and respect for the different functionalities of the counterpart institution. Independence is the basis of the effective functioning of the office. Strong independence has advantages because of higher reliability. Conversely, weak

independence invites doubts about the impartiality of the office. As seen in the Hungarian example, loss of independence resulted in the abandonment of the office. Such risk is not always predictable and, when faced with it, the officeholder may not have many options. One of the few things that an Ombudsman can do to prepare for this eventuality is to cultivate a wide support base among the public.

The essence of the Environmental Ombudsman is that there is no unified standard for the identity and capacity of the office. This flexibility makes it possible for a jurisdiction to design an Environmental Ombudsman institution optimised for the existing framework of mechanisms for executive transparency and accountability. However, the core functions of the office should be guaranteed. The individual elements assessed in this chapter provide a framework for designing an effective institution. The next chapter examines the feasibility of introducing of an Environmental Ombudsman in Japan.

Chapter 7: Introduction of an Environmental Ombudsman in Japan

This chapter examines the feasibility of introducing an Environmental Ombudsman in Japan. As the previous chapter outlined, the functionality of this institution is affected by its institutional settings and the other mechanisms in the framework of executive transparency and accountability within which it operates. Thus, the necessity of introducing an Ombudsman institution needs to be judged primarily through the examination of the efficacy of the existing framework. Following this, the institutional settings of an Environmental Ombudsman have to be carefully considered. In addition, due to the institution of classical Ombudsman being new to Japan, it is necessary to assess the feasibility of the introduction of this institution. The analysis of these elements presented in this chapter largely relies on the findings of field research conducted for this study in Japan in 2011.[1]

This chapter is structured in four sections. Section 7.1 introduces suggestions and recommendations for Japan made by stakeholders from the jurisdictions with Environmental Ombudsmen regarding the introduction of an Ombudsman in the environmental field. Section 7.2 analyses the necessity of introducing an Ombudsman. Section 7.3 assesses the feasibility of introducing a classical Ombudsman. Finally, Section 7.4 examines the design of an Ombudsman institution that is suitable for improving executive transparency and accountability in the environmental field in Japan.

[1] For the details of the field research, see Subsection 1.4.2.

7.1 Suggestions for Japan

Before starting the examination of the feasibility of introducing an Environmental Ombudsman in Japan, it is necessary to summarise the suggestions offered from jurisdictions with existing Environmental Ombudsmen. These recommendations come from stakeholders in the Australian Capital Territory (ACT), New Zealand and Hungary on the essential elements to consider in regards to the institutional settings of an Ombudsman. Although not all of these suggestions match with the current interests of stakeholders in Japan, it is beneficial to learn lessons from the experiences of pioneers. The topics covered by the recommendations include the introduction of classical, general and Environmental Ombudsmen, and optimisation of the institution for Japan.

Suggestions for introducing a classical Ombudsman

Regardless of specific differences between the general and Environmental Ombudsmen, for the classical Ombudsman institution, the importance of securing full independence from governmental control was highly emphasised by stakeholders.[2] It is essential that the Parliament leads the appointment of the officeholder and decisions about budgets and resources.[3] Regarding the appointment, McGee argued that the long-term nature of the office (seven to 10 years) with no re-appointment is the key to maintaining the neutrality of the office, as the possibility of re-appointment could harm neutrality.[4] It is also vital that the removal of the officeholder is limited by statute,[5] and

[2] Interview with David McGee, Ombudsman (Wellington, 8 June 2011); Interview with Pavan Sharma, Clerk of the House of Representatives, Local Government and Environment Committee (Wellington, 8 June 2011); Interview with David Wilson, Clerk of the House of Representatives, Officers of the Parliament Committee (Wellington, 9 June 2011); Interview with Klaus Bosselmann, Professor of Law, University of Auckland (Canberra, 28 May 2011); Interview with MP Benedek Jávor, Chair, Sustainable Development Committee at the National Assembly of Hungary (Budapest, 24 June 2011); Interview with Sándor Fülöp, Parliamentary Commissioner for Future Generations (Budapest, 28 June 2011).

[3] Interview with David Wilson, Clerk of the House of Representatives, Officers of the Parliament Committee (Wellington, 9 June 2011).

[4] Interview with David McGee, Ombudsman (Wellington, 8 June 2011).

[5] Interview with Sándor Fülöp, Parliamentary Commissioner for Future Generations (Budapest, 28 June 2011); Interview with MP Benedek Jávor, Chair, Sustainable Development Committee at the National Assembly of Hungary (Budapest, 24 June 2011).

that the prestige of the office is established, for independence and long term existence.[6] For the latter, acquiring the support from traditional sources of authority, such as the Emperor of Japan, is desirable.[7] Another crucial factor is that the office should have adequate resources and a sufficient budget.[8]

McMillan highlighted that, for the establishment of a new institution, a connection with and support from the international associations of that institution are quite helpful.[9]

There is no counter argument against the general Ombudsman being the classical Ombudsman.[10] Regarding competence, McGee recommended that the general Ombudsman has to have strong investigatory power, but that its method to resolve problems should be limited to persuasion. In this context, he regarded cooperation with administrative bodies as having central importance for this purpose.[11] However, while emphasising that support from the Parliament and the Prime Minister and his/her office are vital for the operation of the general Ombudsman, Pearce noted that the very first Ombudsman should be combative and tough, to establish the institution against the resistance of bureaucrats. For this purpose, he recommended that the position be held by someone with experience as a public prosecutor.[12] In relation to the selection of potential

6 Interview with István Sárközy, Legal adviser, Office of the Parliamentary Commissioner for Future Generations (Budapest, 28 June 2011); Interview with Klaus Bosselmann, Professor of Law, University of Auckland (Canberra, 28 May 2011).

7 Interview with Klaus Bosselmann, Professor of Law, University of Auckland (Canberra, 28 May 2011).

8 Interview with Pavan Sharma, Clerk of the House of Representatives, Local Government and Environment Committee (Wellington, 8 June 2011); Interview with Klaus Bosselmann, Professor of Law, University of Auckland (Canberra, 28 May 2011); Interview with Csaba Kiss, Director, Environmental Management and Law Association (Budapest, 22 June 2011); Interview with István Sárközy, Legal adviser, Office of the Parliamentary Commissioner for Future Generations (Budapest, 28 June 2011).

9 Interview with John McMillan, former Commonwealth and ACT Ombudsman (Canberra, 27 May 2011).

10 Ibid; Interview with Ian Baird, Principal Policy Officer, ACT Department of the Environment, Climate Change, Energy and Water (Canberra, 30 May 2011); Interview with Dennis Pearce, Emeritus Professor, Australian National University College of Law (Canberra, 31 May 2011); Interview with David McGee, Ombudsman (Wellington, 8 June 2011); Interview with David Wilson, Clerk of the House of Representatives, Officers of the Parliament Committee (Wellington, 9 June 2011); Interview with Justice Barnabás Lenkovics, former Ombudsman (Budapest, 23 June 2011); Interview with Vajk Farkas, Lawyer, Ministry of Public Administration and Justice (Budapest, 28 June 2011).

11 Interview with David McGee, Ombudsman (Wellington, 8 June 2011).

12 Interview with Dennis Pearce, Emeritus Professor, Australian National University College of Law (Canberra, 31 May 2011).

candidates for the officeholder, David Wilson, a clerk of the New Zealand Parliament, highlighted that in addition to a suitable personality, ability and expertise, it is crucial that a candidate has highly developed communication skills.[13]

Suggestions for introducing an Environmental Ombudsman

Although some respondents in Hungary recommended the establishment of only one general Ombudsman,[14] the majority of interviewees in the ACT, New Zealand and Hungary recommended establishing a separate Environmental Ombudsman.[15] Regarding the model of the Environmental Ombudsman, the ACT does not apply the classical Ombudsman model. However, this does not mean the executive Ombudsman model is preferred. In actuality, the importance of independence is strongly emphasised by stakeholders in that jurisdiction.[16] Pitts even expressed preference for the Parliamentary Commissioner for Future Generations (PCFG) in Hungary.[17] In this regard, Bonyhady explained that any kind of environmental dispute resolution mechanism is more desirable than having nothing.[18] These views suggest that the introduction of a classical Ombudsman should be prioritised.

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13 Interview with David Wilson, Clerk of the House of Representatives, Officers of the Parliament Committee (Wellington, 9 June 2011).

14 Interview with Justice Barnabás Lenkovics, former Ombudsman (Budapest, 23 June 2011); Interview with Vajk Farkas, Lawyer, Ministry of Public Administration and Justice (Budapest, 28 June 2011).

15 Interview with John McMillan, former Commonwealth and ACT Ombudsman (Canberra, 27 May 2011); Interview with Klaus Bosselmann, Professor of Law, University of Auckland (Canberra, 28 May 2011); Interview with Julia Pitts, Chair, Environmental Defender's Office (ACT) (Canberra, 30 May 2011); Interview with Sarah Burrows, Senior Manager, Commissioner for Sustainability and Environment (Canberra, 31 May 2011); Interview with Pavan Sharma, Clerk of the House of Representatives, Local Government and Environment Committee (Wellington, 8 June 2011); Interview with Sarah Clark, Office Manager, Parliamentary Commissioner for the Environment (Wellington, 9 June 2011); Interview with Morgan Williams, former Parliamentary Commissioner for the Environment (Wellington, 10 June 2011); Interview with Jenny Boshier, former Deputy Commissioner, Parliamentary Commissioner for the Environment (Wellington, 10 June 2011); Interview with Csaba Kiss, Director, Environmental Management and Law Association (Budapest, 22 June 2011); Interview with MP Benedek Jávor, Chair, Sustainable Development Committee at the National Assembly of Hungary (Budapest, 24 June 2011); Interview with Gyula Bándi, Jean Monnet Professor of EU Environmental Law, Pázmány Péter Catholic University (Budapest, 27 June 2011); Interview with Sándor Fülöp, Parliamentary Commissioner for Future Generations (Budapest, 28 June 2011); Interview with István Sárközy, Legal adviser, Office of the Parliamentary Commissioner for Future Generations (Budapest, 28 June 2011).

16 Interview with Julia Pitts, Chair, Environmental Defender's Office (ACT) (Canberra, 30 May 2011); Interview with Sarah Burrows, Senior Manager, Commissioner for Sustainability and Environment (Canberra, 31 May 2011).

17 Interview with Julia Pitts, Chair, Environmental Defender's Office (ACT) (Canberra, 30 May 2011).

18 Interview with Tim Bonyhady, Professor, Australian National University College of Law (Canberra, 31 May 2011).

Concerning the competence of the Environmental Ombudsman, there are various recommendations. In New Zealand, Bosselmann proposed the creation of a large office, able to report on the state of the environment, investigate and visit administrative agencies, hold conferences, speak about future generations, and have veto right against policies affecting future generations, such as those relating to nuclear material.[19] Conversely, Sarah Clark, the office manager of the Parliamentary Commissioner for the Environment (PCE) in New Zealand, suggested creating a small office, with the potential to expand. A smaller office, in her view, would make it possible to work closer to issues.[20] In Hungary, Fülöp emphasised the importance of the office having both the short range vision of an attorney and the long-term vision of various experts. In addition, the office should clarify environmental standards to society.[21] István Sárközy, a legal advisor of the PCFG, added that if the office is aimed at serving future generations, wider powers than just coping with environmental disputes are necessary.[22] Meanwhile, MP Benedek Jávor, the Chair of Sustainable Development Committee at the National Assembly of Hungary, recommended that the office have the power to investigate the private sector. Although a practical suggestion rather than one on competence, he also emphasised that it is crucial to ensure the office uses public communication and has the media on its side.[23]

Turning to the practical elements of institutional settings, stakeholders made several remarks regarding the establishment of an Environmental Ombudsman. Jávor highlighted the importance of obtaining all parties' support to create an Environmental

[19] Interview with Klaus Bosselmann, Professor of Law, University of Auckland (Canberra, 28 May 2011).
[20] Interview with Sarah Clark, Office Manager, Parliamentary Commissioner for the Environment (Wellington, 9 June 2011).
[21] Interview with Sándor Fülöp, Parliamentary Commissioner for Future Generations (Budapest, 28 June 2011).
[22] Interview with István Sárközy, Legal adviser, Office of the Parliamentary Commissioner for Future Generations (Budapest, 28 June 2011).
[23] Interview with MP Benedek Jávor, Chair, Sustainable Development Committee at the National Assembly of Hungary (Budapest, 24 June 2011).

Ombudsman.[24] Considering the appointment of an Ombudsman in most countries requires a two-thirds majority of the Parliament, this is a natural starting point. Next, at the creation stage, it is recommended to amend every related law to integrate the office into the existing system.[25] Further, based on the Hungarian experience, it is recommended that a proper, unambiguous name is selected for the new institution.[26] A network of international cooperation should also be created to help in the establishment of the institution and to protect the longevity of the office.[27] For instance, the creation of an Environmental Ombudsman at the United Nations or other international level would encourage the creation and protection of the offices in individual countries.[28] In this regard, it should be remembered that the empowerment of the public through such institutions frequently results in pushback by the pro-development side.[29] For example, in the ACT, the success of the environmental dispute resolution mechanisms resulted in the curtailment of the institutions' powers.[30]

Suggestions for optimising institutional settings in the Japanese context

The following is recommended specifically for Japan. Firstly, the Japanese model should consider how to cope with that country's vast population. In this context, it is

24 Ibid.

25 Interview with Csaba Kiss, Director, Environmental Management and Law Association (Budapest, 22 June 2011).

26 Interview with Botond Bitskey, Secretary General, Constitutional Court of the Republic of Hungary (Budapest, 23 June 2011); Interview with Csaba Kiss, Director, Environmental Management and Law Association (Budapest, 22 June 2011). According to Kiss, the title of the PCFG caused confusion among ordinary Hungarians because they tend to associate the term 'future generation' not with equity among generations, but with abortion or childcare.

27 Interview with Sándor Fülöp, Parliamentary Commissioner for Future Generations (Budapest, 28 June 2011); Interview with Csaba Kiss, Director, Environmental Management and Law Association (Budapest, 22 June 2011); Interview with MP Benedek Jávor, Chair, Sustainable Development Committee at the National Assembly of Hungary (Budapest, 24 June 2011).

28 Interview with Sándor Fülöp, Parliamentary Commissioner for Future Generations (Budapest, 28 June 2011).

29 Interview with Tim Bonyhady, Professor, Australian National University College of Law (Canberra, 31 May 2011); Interview with Linda Crebbin, General President, ACT Civil and Administrative Tribunal (Canberra, 27 May 2011); Interview with Csaba Kiss, Director, Environmental Management and Law Association (Budapest, 22 June 2011).

30 Interview with Tim Bonyhady, Professor, Australian National University College of Law (Canberra, 31 May 2011); Interview with Linda Crebbin, General President, ACT Civil and Administrative Tribunal (Canberra, 27 May 2011).

necessary to consider local and municipal levels.[31] At the national level, in 1983, Rowat recommended the adoption of the council system for Japan to cope with its large population. The only jurisdiction that applies the council system for the Ombudsman is Austria; others apply the singular system. As detailed in Subsection 5.6.1, in general, the latter is thought to be much more effective than the former, because unlike the former, the latter does not require forming consensus between multiple incumbents (if they exist) to make a decision. However, Rowat considered that to cope with a large population in a unitary state, such as is the case in Japan, the council system might have an advantage. This is because it allows for 'decid[ing] minor cases individually but important cases collectively' and for establishing unified guidelines for case management.[32] Secondly, regarding the introduction of a general Ombudsman, it is emphasised that a strong Ombudsman is necessary for checking a strong bureaucracy and protecting civil rights.[33] Pearce highlighted that a robust and effective controlling body that can access any governmental file is necessary to persuade the strong bureaucracy in Japan to cease inappropriate conducts.[34] Thirdly, regarding the introduction of an Environmental Ombudsman, it is stressed that the new institution should be optimised for the Japanese legal system to improve the quality of environmental decision making.[35] In particular, the competence of the office should be well defined, and that competence should underpin the powers bestowed on the office to accomplish its objectives.[36] In this regard, an

[31] Interview with Pavan Sharma, Clerk of the House of Representatives, Local Government and Environment Committee (Wellington, 8 June 2011); Interview with Csaba Kiss, Director, Environmental Management and Law Association (Budapest, 22 June 2011); Interview with MP Benedek Jávor, Chair, Sustainable Development Committee at the National Assembly of Hungary (Budapest, 24 June 2011).

[32] Donald C. Rowat, 'A Critique of the Japanese Study Group's Report on the Ombudsman' (Ombudsman Occasional Paper # 22, International Ombudsman Institute, April 1983), 13–14.

[33] Interview with David McGee, Ombudsman (Wellington, 8 June 2011); Interview with Dennis Pearce, Emeritus Professor, Australian National University College of Law (Canberra, 31 May 2011); Interview with Justice Barnabás Lenkovics, former Ombudsman (Budapest, 23 June 2011).

[34] Interview with Dennis Pearce, Emeritus Professor, Australian National University College of Law (Canberra, 31 May 2011).

[35] Interview with Vajk Farkas, Lawyer, Ministry of Public Administration and Justice (Budapest, 28 June 2011).

[36] Interview with Sarah Clark, Office Manager, Parliamentary Commissioner for the Environment (Wellington, 9 June 2011); Interview with István Sárközy, Legal adviser, Office of the Parliamentary Commissioner for Future Generations (Budapest, 28 June 2011).

adapted institution is recommended, rather than an identical copy of an existing model, for facing Japan's specific challenges.[37] More radical, but worth considering, is the fact that some Parliamentary Commissioners have suggested that the TEPCO Nuclear Disaster might drive a social movement for restructuring the state.[38]

7.2 Need for an Ombudsman

The presumption behind the recommendations presented in the previous section is that there is a need to introduce an Ombudsman in Japan. To clarify the validity of this presumption, this section examines the efficacy of the current framework of executive transparency and accountability in the environmental field. Subsections 7.2.1–7.2.3 examine the functionality of the review mechanisms on administrative law accountability in accordance with the three pillars of the *Aarhus Convention*; namely, review on access to information, review on public participation and access to review mechanisms. Subsection 7.2.4 analyses the functionality of other practical mechanisms for executive transparency and accountability.

7.2.1 Review on access to information

As mentioned in Subsection 3.1.2, the *Law on Disclosure of Information Possessed by the Executive Branch* established the freedom of information (FOI) system in Japan. Although there is a practical difficulty in specifying the exact documents, in general, the law is regarded as having improved public access to government information.[39]

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[37] Interview with Csaba Kiss, Director, Environmental Management and Law Association (Budapest, 22 June 2011).

[38] Interview with Justice Barnabás Lenkovics, former Ombudsman (Budapest, 23 June 2011); Interview with Sándor Fülöp, Parliamentary Commissioner for Future Generations (Budapest, 28 June 2011); Interview with Dennis Pearce, Emeritus Professor, Australian National University College of Law (Canberra, 31 May 2011).

[39] *行政機関の保有する情報の公開に関する法律* [Law on Disclosure of Information Possessed by the Executive Branch] (Japan) 14 May 1999, Law No 42 of H11; Interview with 吉野隆二郎 [Ryujiro

However, this does not mean that the government has become forwardly disposed towards disclosing environmental information. As seen in the examples of the 'SPEEDI' case in the TEPCO Nuclear Disaster (see Subsection 3.2.3) and the environmental contaminations in the 1960s (see Subsection 3.2.1), the bureaucracy has hidden vital information, which could have prevented danger to human lives at times of environmental disaster. Under these circumstances, the citizens active in the environmental field in Japan have suffered from the secretiveness of bureaucrats. In practice, the most effective method of overcoming this obstacle would be to mobilise members of the Diet. When MPs ask an administrative office to disclose information, bureaucrats usually submit that information. However, this method is only applicable when the case is sufficiently politicised. In other words, this method is not available for general public use.[40] In view of this, it is emphasised that the main role of an Environmental Ombudsman in this area is in the dissemination of environmental information (see Subsection 6.1.1). In particular, it is important that the utilisation of an Ombudsman is open to all citizens.

In reality, however, Japan does not have a classical Ombudsman. Thus, to realise access to information, practitioners are required to utilise the FOI system. This means that an examination of how the review mechanisms secure the functionality of the FOI system becomes significant.

Practices of the current scheme

As introduced in Subsection 3.3.1, the review mechanisms on access to information are the Examination Board on Information Disclosure and Privacy Protection and the

Yoshino], Barrister, 'Revive Ariake Sea!' Case (Chikushi, 18 July 2011); Interview with 大久保規子 [Noriko Okubo], Professor, Osaka University Graduate School of Law and Politics (Osaka, 7 July 2011).

[40] Interview with 吉野隆二郎 [Ryujiro Yoshino], Barrister, 'Revive Ariake Sea!' Case (Chikushi, 18 July 2011); Interview with 魚住昭三 [Shozo Uozumi], Barrister, 'Boleophthalmus pectinirostris' and 'Revive Ariake Sea!' Cases (Nagasaki, 19 July 2011).

court. In practice, the Board processes approximately 500 to 800 cases per year and environment-related administrative offices dealt with some of these cases.[41] In the financial year 2010/11, administrative offices transferred 706 cases that were lodged by the public to the Board. The number of reviewed cases in the same period was 683, and in 28.7 per cent of these the Board corrected the original administrative decision. Regarding the processing speed, half of all cases were processed within seven months, and two-thirds were processed within 10 months. The average processing time was 263 days, with the shortest being 41 days and the longest, 1354 days.[42]

Noriko Okubo, an administrative environmental law expert and member of the Board, evaluated the practice of the Board as effective because it has frequently contributed to disclosure of information by reversing original decisions; this is exceptional among the Japanese internal merits review mechanisms.[43] Further, although not officially granted the power to do so, based on examinations of individual cases, the Board may recommend improvements in the daily practices of administrative offices on information handling. For instance, in the financial year 2010/11, in 68 cases, the Board reminded administrative offices of the necessity of much swifter transfer of cases. In the worst cases, the duration between the lodgement of the case by the public and the administrative office's transfer of the case to the Board took two to three years.[44]

Regarding environmental disputes, the Board's power of in-camera examination is especially effective in the waste domain. This is because, unlike in the European Union, in Japan, administrative bodies can refuse to disclose information on private bodies'

41 Cabinet Office (JPN), *情報公開・個人情報保護審査会 諮問・答申等件数 [Statistics on the number of consultations and replies of the Examination Board on Information Disclosure and Privacy Protection]* (24 August 2011) <http://www8.cao.go.jp/jyouhou/kensu/kensu.html>.

42 Cabinet Office (JPN), *情報公開・個人情報保護審査会 活動概況 平成 22 年度 [Summary of activities of the Examination Board on Information Disclosure and Privacy Protection in 2010]* (24 August 2011) <http://www8.cao.go.jp/jyouhou/sonota/katudou_22.pdf>, 10–11.

43 Interview with 大久保規子 [Noriko Okubo], Professor, Osaka University Graduate School of Law and Politics (Osaka, 7 July 2011).

44 Cabinet Office (JPN), above n 42, 17–22.

environmental discharges because of the existence of commercial secrets, even though information on discharge relevant to health damage is an exception.[45]

Conversely, the contribution of the court in this area is relatively limited, partly because it is rare that access to information is central to disputes in environmental litigation.[46] In addition, the court does not have the power of in-camera examination.[47] However, the recent trend of promoting information disclosure might increase the influence of the court in this area.[48] For instance, anticipated law reform of the court is expected to grant the power of in-camera examination.[49]

Effectiveness of the current scheme and the necessity of an Ombudsman

Examination of current practices in Japan reveals that most disputes on access to information are processed by the Examination Board on Information Disclosure and Privacy Protection, with the court's contribution being small. The practice of the Board could be characterised by its high effectiveness (that is, the rate of asking administrative offices to disclose information) and relatively low efficiency (that is, speed). There are two main reasons for the latter; one is the part-time nature of the Board, and the other is its institutional setting as a consultative body, which prevents the public from directly accessing it.[50] To improve the Board's efficiency, these two factors must be revised.

In relation to the efficacy of the Ombudsman in this field, Uga admits that the

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45 *情報公開・個人情報保護審査会設置法* [Law for Establishment of the Examination Board on Information Disclosure and Privacy Protection] (Japan) 30 May 2003, Law No 60 of H15, art 9; Interview with 大久保規子 [Noriko Okubo], Professor, Osaka University Graduate School of Law and Politics (Osaka, 7 July 2011).

46 Interview with 六車明 [Akira Rokusha], former Examiner, Environmental Dispute Coordination Commission / former Judge (Tokyo, 14 July 2011).

47 Interview with 大久保規子 [Noriko Okubo], Professor, Osaka University Graduate School of Law and Politics (Osaka, 7 July 2011).

48 Interview with 六車明 [Akira Rokusha], former Examiner, Environmental Dispute Coordination Commission / former Judge (Tokyo, 14 July 2011).

49 Interview with 大久保規子 [Noriko Okubo], Professor, Osaka University Graduate School of Law and Politics (Osaka, 7 July 2011); 宇賀克也 [Katsuya Uga], *新・情報公開法の逐条解説 [New Commentary on Information Disclosure Laws]* (有斐閣 [Yuhikaku], 5th ed, 2010), 28–9.

50 For the part-time nature of the Board, see, Cabinet Office (JPN), above n 42, 5; for its unique features as a consultative body, see Subsection 3.3.1.

Ombudsman model was the alternative to the Board. He explains that the Board model was selected as the legislators gave greater weight to the Board's comparative superiority in effectiveness than to efficiency. This means that the council system that the Board applies enables a more thorough examination of the cases than the singular system that the Ombudsman applies, while the processing speed of the former is slower than that of the latter.[51]

However, this argument needs to be examined. For this purpose, the practice of the New Zealand model, which was detailed in Subsection 6.1.1, is used for comparison. Regarding effectiveness, the New Zealand Ombudsman formally reviewed 723 cases in the financial year 2010/11, and corrected the original administrative decisions in 18.5 per cent of them. In addition, another 302 cases were resolved informally.[52] Although the correction rate in the formally reviewed cases was lower than in the Japanese model, when considering the number of informally resolved cases, it cannot be said that the Board has comparative superiority when viewed against the New Zealand Ombudsman. As for efficiency, although the statistical data for the financial year 2010/11 is yet to be disclosed, in 2000–10, the New Zealand Ombudsman processed disputes on access to information in, on average, 60 to 120 days.[53] The processing speed of the New Zealand model is less than half that of the Japanese model. This comparison between the New Zealand and Japanese models shows that the Ombudsman model has comparative superiority both in effectiveness and efficiency. As detailed in Subsection 6.1.1, a key feature of the review mechanisms on disputes over access to information is the processing speed. Therefore, it can be said that the introduction of an Ombudsman is a feasible and desirable alternative when considering the potential for improvement of the review

51 Uga, above n 49, 212–3.
52 Parliamentary Ombudsmen (NZ), *2010/2011 Report of The Ombudsmen for the year ended 30 June 2011* (Office of the Ombudsmen, 2011), 34, 117.
53 Parliamentary Ombudsmen (NZ), *2009/2010 Report of The Ombudsmen for the year ended 30 June 2010* (Office of the Ombudsmen, 2010), 102.

mechanisms on access to information in Japan.

7.2.2 Review on public participation

As discussed in Subsection 3.2.2 and 4.1.3, the system of public participation is undeveloped in Japan. The largest structural problem underlying poor public participation is that the public is excluded from the environmental decision-making processes. In other words, most environmental decisions are totally dependent on administrative discretion.[54] This means that merits review and judicial review are required to control administrative discretion properly, as the review on public participation is not clearly divided from ordinary dispute resolution. As detailed in Subsection 3.1.5, the basic framework of dispute resolution in Japan is a combination of internal merits review and judicial review. This subsection examines the efficacy and functionality of these institutions.

Practice of merits review

Regarding the internal merits review, although the individual mechanisms vary, as detailed in Subsection 3.1.5, the *Administrative Appeal Law* determines the basic rules of procedure.[55] In practice, the total number of applications for internal merits review in the financial year 2009/10 was 38 009, with applications to the national administrative offices accounting for 61.7 per cent (23 456) of these. The rest of the applications were made to municipalities. The success rate of these applications at the national level was 11.9 per cent.[56] Regarding processing speed, 37.1 per cent of applications were processed within three months, but 15.0 per cent took three to six months, 15.0 per cent took six

[54] Interview with 大久保規子 [Noriko Okubo], Professor, Osaka University Graduate School of Law and Politics (Osaka, 7 July 2011).

[55] *行政不服審査法* [Administrative Appeal Law] (Japan) 15 September 1962, Law No 160 of S37.

[56] Ministry of Internal Affairs and Communications (JPN), '平成 21 年度における行政不服審査法等の施行状況に関する調査結果(ポイント) [Result of Research on Enforcement of the Administrative Appeal Law and Relevant Legal Instruments in 2009: Main Points]' (Ministry of Internal Affairs and Communications (JPN), October 2010) <http://www.soumu.go.jp/main_content/000085876.pdf>, 2–3.

months to a year, and 32.8 per cent took more than a year.[57]

Although there are no detailed data on how many of the applications were about environment-related cases, the number of applications to administrative offices closely related with environmental decision making (that is, the Ministry of the Environment (MOE), Ministry of Agriculture, Forestry and Fisheries (MAFF) and Ministry of Land, Infrastructure, Transport and Tourism (MLIT)) was 326. The number of closed cases applied to these three administrative offices was 233, and the success rate of the applicants was 14.6 per cent. Regarding processing speed, 18.9 per cent of these applications were processed within three months, 7.3 per cent took three to six months, 19.7 per cent took six months to a year, and 54.1 per cent took more than a year.[58] These figures suggest that the success rate of environment-related cases is slightly higher than average, although review of these cases takes more time.

Although at the national level the number of applications to internal merits review is slightly greater than those to the Administrative Counselling Mechanism (ACM), considering the large population of Japan, the utilisation rate of the internal merits review scheme is low. This is because of the mechanism's low profile, low prospect of redress and high complexity.[59] For instance, Okubo highlighted that internal merits review mainly examines illegality rather than merits and this results in the relatively low success rate. Thus, she concluded that, in many cases, the internal merits review scheme functions poorly in the environmental field.[60] In addition, the legislation of the *Administrative Procedure Law* in 1993 and revision of the *Code of Administrative Procedure* in 2004

[57] Ministry of Internal Affairs and Communications (JPN), '平成 21 年度における行政不服審査法等の施行状況に関する調査結果: 国における状況 [Result of Research on Enforcement of the Administrative Appeal Law and Relevant Legal Instruments in 2009: At National Level]' (Ministry of Internal Affairs and Communications (JPN), October 2010) <http://www.soumu.go.jp/main_sosiki/gyoukan/kanri/pdf/fufuku/heisei21_kuni_houkoku.pdf>, 8.

[58] Ibid, 14.

[59] 塩野宏 [Hiroshi Shiono], *行政法 II：行政救済法 [Administrative Law II: Administrative Remedy Law]* (有斐閣 [Yuhikaku], 4th ed, 2005), 37. About the practice of the ACM, please see Subsection 5.6.2.

[60] Interview with 大久保規子 [Noriko Okubo], Professor, Osaka University Graduate School of Law and Politics (Osaka, 7 July 2011).

made this scheme out of date.[61] Consequently, the *Administrative Appeal Law* is undergoing reform.[62]

Against this general trend, the Appeal Committee on Compensation of Health Damage by Environmental Contamination examines the merits of cases. Based on the extensive expertise of members, the Appeal Committee is able to review the merits of individual cases, especially on medical aspects, and so its efficacy is highly evaluated.[63] It should be emphasised that the Appeal Committee is an outstanding and exceptional mechanism. The compensation to obvious victims of past major environmental pollutions and asbestos problems is one of the few strong points of Japanese environmental policy.[64] In these cases, however, the causal relationship between health damage and environmental pollutions had been clarified through a number of lawsuits. Moreover, the disputes handled by the Appeal Committee are *ex post*, but not *ad-hoc* at all. Considering the nature of most environmental disputes is *ad-hoc*, there are qualitative differences between the subjects the Appeal Committee handles and those the other institutions handle.

Practices of judicial review

The limited efficacy and functionality of internal merits review enhances the importance of an effective process of judicial review. In practice, the total number of

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61 Shiono, above n 59, 37–8; 阿部泰隆 [Yasutaka Abe], *行政法解釈学Ⅱ：実効的な行政救済の法システム創造の法理論 [Administrative Law Hermeneutics II: Legal Theory to Create an Effective Legal Framework for Administrative Remedies]* (有斐閣 [Yuhikaku], 2009), 354–5.

62 Abe, above n 61, 362–72; 内閣府 行政救済制度検討チーム [Investigation Team on Administrative Remedy System at the Cabinet Office (JPN)], '取りまとめ [Direction for the Reform of the Administrative Appeal Law]' (December 2011) <http://www.cao.go.jp/sasshin/shokuin/gyosei-kyusai/pdf/fin/fin_docu_01.pdf>; 総務省 行政不服審査制度検討会 [Committee for Revision of Administrative Appeal Mechanism at the Ministry of Internal Affairs and Communications (JPN)], '最終報告：行政不服審査法及び行政手続法改正要綱案の骨子 [Final Report: Blue Print for Reform of the Administrative Appeal Law and Administrative Procedure Law]' (17 July 2007) <http://warp.ndl.go.jp/info:ndljp/pid/258151/www.soumu.go.jp/s-news/2007/pdf/070717_3_2.pdf>.

63 Interview with Anonymous interviewee, Office of the Appeal Committee on Compensation of Health Damage by Environmental Contamination (Tokyo, 6 July 2011).

64 Interview with 大久保規子 [Noriko Okubo], Professor, Osaka University Graduate School of Law and Politics (Osaka, 7 July 2011).

cases lodged in the court in 2010 was 4 317 901, among which cases reviewed in civil and administrative procedures accounted for 50.5 per cent (2 179 351). The others were criminal cases (26.8 per cent), family law cases (18.9 per cent) and juvenile law cases (3.8 per cent).[65] Regarding the civil and administrative cases, 1.9 per cent were lodged in the High Courts and 0.3 per cent were lodged in the Supreme Court. Among these cases, only 0.4 per cent (8884) were lodged as administrative cases. However, this rate increases to 8.2 per cent (3390) at the High Courts and 15.0 per cent (1112) at the Supreme Court. In 2010, the number of closed administrative cases at the first instance (in which the plaintiff was the public) was 2136, and among these the success rate was 9.3 per cent.[66] However, as mentioned in Subsection 4. 3.1, when the plaintiff wins a case, the relevant administrative offices tend to appeal. Thus, the final success rate of the public can be estimated as much lower.[67]

Regarding the processing speed, the court is well known for its slowness of review. To resolve this problem, the *Law on Hastening Court Procedures*, which aims at finalising all first instance lawsuits within a two-year period, was enacted in 2003. The Supreme Court is obliged to examine the enforcement of the law and issue biannual reports for the public.[68] According to the latest report, in 2010, the average length of first instance administrative procedures was 14.6 months; down by 24.4 per cent from 19.3 months in 2001. However, 15.1 per cent of cases still took more than two years.[69] The average length at the second instance in 2006 was 7.7 months, and 13.5 per cent of cases took

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65 Supreme Court of Japan, *グラフで見る司法統計情報 [Visualised Judicial Statistics by Graphes and Tables 2010]* (3 August 2011) <http://www.courts.go.jp/sihotokei/graph/pdf/B22No1-1.pdf>.

66 Supreme Court of Japan, *司法統計 平成 22 年 [Judicial Statistics 2010]* (9 August 2011) <http://www.courts.go.jp/sihotokei/nenpo/pdf/B22DMIN.pdf>, 2–7.

67 Abe, above n 61, 52–3.

68 *裁判の迅速化に関する法律* [Law on Hastening Court Procedures] (Japan) 16 July 2003, Law No 107 of H15, arts 1–2, 8.

69 Supreme Court of Japan, *裁判の迅速化に係る検証に関する報告書 (第 4 回): 概況編 [Fourth Report on Examination of Hastening of Court Procedures: Report Section]* (Supreme Court of Japan, 2011), 46–7.

more than a year.[70] The average length at the final instance in 2010 was 5.3 to 6.0 months, with 13.3 per cent of cases taking more than a year.[71]

Turning to environmental cases, there are no statistical data on what percentage of administrative cases were environment-related. However, as noted in Subsection 3.3.2, in Japan, the boundary of administrative and civil cases is not always clear. Regarding civil cases, closed cases at the first instance in 2010 totalled 227 435, with 60 of these relating to environmental pollution. A further 3.0 per cent of these closed civil cases were not classified, so the actual number of environment-related cases may be higher.[72] However, it is difficult to estimate the actual load of environmental cases from this limited data. The average processing period of the 60 civil cases concerning environmental pollution was 20.8 months. 10.0 per cent of these took more than five years. In contrast, the average length of a civil procedure at the first instance in 2010 was 6.8 months.[73] Considering that processing time in civil cases is less than half that of administrative cases, environmental administrative cases can be said to require an even longer duration. Okubo explained that, in the environmental field, an administrative case in the first instance often takes two to three years.[74]

These data reveal the relatively low efficacy of judicial review in Japan. With the background of a television journalist, MP Hiroyuki Moriyama of the House of Representatives noted that historically most plaintiffs lost administrative cases, and as a matter of course, people have been discouraged to bring cases to court. However, where someone does bring a case to court, due to the low expectation of success, the media will find news value in the lodgement of the administrative case. From his viewpoint, the

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70 Supreme Court of Japan, *裁判の迅速化に係る検証に関する報告書(第2回) [Second Report on Examination of Hastening of Court Procedures]* (Supreme Court of Japan, 2007), 167–8.
71 Supreme Court of Japan, above n 69 224–5.
72 Ibid, 251–4.
73 Ibid, 251–2.
74 Interview with 大久保規子 [Noriko Okubo], Professor, Osaka University Graduate School of Law and Politics (Osaka, 7 July 2011).

responsibility of such a low appeal rate must be on the court, but not on the people.[75] As is detailed in Subsection 3.1.5, there are various causes for this.

However, focusing on procedural aspects, the administrative procedure has some advantages. For example, the *Code of Administrative Procedure* amends the adversarial mechanism to reduce the burden on plaintiffs. In practice, judges are conscious of respecting the tenor of the law.[76] Attorneys, on the other hand, do not recognise these procedural advantages and feel that the procedural difficulties of the administrative procedure are equivalent to those of the civil procedure.[77] For instance, Ryujiro Yoshino, a barrister in the 'Revive Ariake Sea!' case, regarded the power of *ex officio* examination of evidence as not significant because 'unless it is a self-represented case, barristers of the plaintiff can examine the evidence that the court may point out.'[78]

Regarding the contribution of judicial review on public participation in the environmental field, Rokusha highlighted that public participation in an environmental impact assessment has been hardly focused on in a lawsuit. However, the increase of the number of public hearings from one to two by the amendment of the *Environmental Impact Assessment Law* in 2011 is expected to change the current situation in the future through evoking new environmental litigation.[79]

As for judicial control of administrative discretion, as detailed in Subsection 3.1.5, the court has applied the position of negativism on reviewing first instance decisions of

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75 Interview with MP 森山浩行 [Hiroyuki Moriyama], Democratic Party, House of Representatives (Tokyo, 29 July 2011).

76 *行政事件訴訟法* [Code of Administrative Procedure] (Japan) 16 May 1962, Law No 139 of S37; Interview with 六車明 [Akira Rokusha], former Examiner, Environmental Dispute Coordination Commission / former Judge (Tokyo, 14 July 2011).

77 Interview with 吉野隆二郎 [Ryujiro Yoshino], Barrister, 'Revive Ariake Sea!' Case (Chikushi, 18 July 2011); Interview with 魚住昭三 [Shozo Uozumi], Barrister, 'Boleophthalmus pectinirostris' and 'Revive Ariake Sea!' Cases (Nagasaki, 19 July 2011).

78 Interview with 吉野隆二郎 [Ryujiro Yoshino], Barrister, 'Revive Ariake Sea!' Case (Chikushi, 18 July 2011).

79 Interview with 六車明 [Akira Rokusha], former Examiner, Environmental Dispute Coordination Commission / former Judge (Tokyo, 14 July 2011); *環境影響評価法の一部を改正する法律* [Law for Partially Amendment of the Environment Impact Assessment Law] (Japan) 27 April 2011, Law No 27 of H23.

administrative offices. Through comparison with German practice, Okubo analysed the unwillingness of judges to control administrative discretion, arguing that this prevents the thorough examination of administrative discretion and results in the low success rate of plaintiffs. One of the underlying causes of such unwillingness is the shortage of expert judges on administrative procedures. Thus, she emphasised the need to improve the quality of judges in Japan.[80] Other views on the causes of negativism include that of Itsuo Sonobe, a former Supreme Court Judge (1989–99), who identified lack of expertise as preventing judges from examining the merits of a case. As a result, the court tends to respect the exercise of administrative discretion. To improve such a situation in environmental litigation, he emphasised that it is necessary to establish a scheme in which an independent expert body examines the facts in environmental disputes and is empowered to draw conclusions that bind the court.[81] In contrast, Rokusha, a former judge, regarded the influence of social common sense on value formation of individual judges as significant, and explained that the mass public's shallow recognition of the development of legal governance narrows judges' ways of thinking.[82] Further, political science offers an analysis that highlights the structural problem of the weak independence of individual judges in the judiciary, which prevents effective control of administrative discretion.[83]

There is another structural problem in relation to administrative discretion that is typical in lawsuits over large-scale public construction works with huge environmental impacts. Even when plaintiffs win their case, the administrative bodies regard it as an exceptional error in the specific procedure. Thus, the administrative offices tend to

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80 Interview with 大久保規子 [Noriko Okubo], Professor, Osaka University Graduate School of Law and Politics (Osaka, 7 July 2011).

81 Interview with 園部逸夫 [Itsuo Sonobe], former Supreme Court Judge (Tokyo, 22 July 2011).

82 Interview with 六車明 [Akira Rokusha], former Examiner, Environmental Dispute Coordination Commission / former Judge (Tokyo, 14 July 2011).

83 新藤宗幸 [Muneyuki Shindo], *司法官僚：裁判所の権力者たち [Bureaucrats in the Judiciary: Those Who Exercise Strong Influence in the Courts]* (岩波書店 [Iwanami Shoten], 2009), 165–83.

reissue the same decision in the same case but utilising another approach. As a result of such an attitude, judicial review is limited in preventing environmental destruction.[84]

Effectiveness of the current scheme and the necessity of an Ombudsman

From the above discussion, it is clear that, in Japan, neither internal merits review nor judicial review effectively functions in the environmental field. The most obvious causes of this situation are the lack of expertise and capacity of the review mechanisms. If there were a specialised institution in Japan that covered all kinds of administrative environmental disputes, such as is the case with the Environment Court of New Zealand, the situation would be quite different. However, as mentioned in Subsection 3.1.1, the Constitution prohibits the creation of any specialised court, apart from the hierarchy under the Supreme Court. Theoretically, as long as any newly created specialised court falls under the supervision of the Supreme Court, such a development is possible. However, this is highly unlikely in practice considering that even the rebuilding of the Administrative Court, which operated for more than half a century before World War II, has not been attempted.[85] In this context, the creation of an Environment Court is quite difficult.

However, this also means that there is a niche for an Environmental Ombudsman. Many stakeholders feel there is a need to introduce an Environmental Ombudsman. For instance, there are expectations that an Environmental Ombudsman would improve the quality of administrative environmental dispute resolution because the office takes a different perspective from the court.[86] Further, the importance of establishing an

[84] Interview with 吉野隆二郎 [Ryujiro Yoshino], Barrister, 'Revive Ariake Sea!' Case (Chikushi, 18 July 2011).

[85] *日本国憲法* [Constitution of Japan] (Japan) 3 November 1946, art 76; 藤田宙靖 [Tokiyasu Fujita], *行政法Ⅰ：総論 [Administrative Law I: General Remarks]* (青林書院 [Seirin Shoin], 4th Revised ed, 2005), 362–3.

[86] Interview with 大久保規子 [Noriko Okubo], Professor, Osaka University Graduate School of Law and Politics (Osaka, 7 July 2011): Interview with 園部逸夫 [Itsuo Sonobe], former Supreme Court Judge (Tokyo, 22 July 2011).

institution through which ordinary citizens can bring administrative environmental disputes cannot be over-emphasised.[87] Among its many advantages, Yuki Ishikawa, a clerk of the Committee on Promotion of Environmental Autonomy at Shiga Prefecture (CPEA), highlighted that an external review mechanism is necessary to minimise environmental damage caused by administrative decisions.[88]

7.2.3 Access to justice

Accessibility is another important aspect of review mechanisms. This subsection considers the accessibility of merits review and judicial review in Japan through an examination of *locus standi* and other barriers. As the basic features of *locus standi* were explained in Subsection 3.1.5, the focus here is on the practical aspects.

***Locus standi* of merits review and judicial review**

There is no difference in *locus standi* between internal merits review and judicial review in Japan.[89] The environmental experts and practitioners interviewed shared the view that the severe standing rules are the greatest obstacle in applying for judicial review.[90] As referred to in Subsection 6.1.3, *locus standi* is a legal policy matter and the capacity of the judiciary is an important factor to be considered. In Japan, the fear of the floodgates of litigation is one factor that has been used to justify the severe standing rules.[91] In actuality, some practitioners worry that, due to the principle prohibiting double

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87 Interview with 塚本壽雄 [Hisao Tsukamoto], former Director General, Administrative Evaluation Bureau at Ministry of Internal Affairs and Communications (Tokyo, 4 July 2011).

88 Interview with 石川優貴 [Yuki Ishiwaka], Clerk, Committee on Promotion of Environmental Autonomy at Shiga Prefecture (Otsu, 12 July 2011).

89 Shiono, above n 59, 19–20; Abe, above n 61, 346–7; *主婦連ジュース不当表示事件* [Case on Misleading Description of Contents of Juice, which was accused by the Housewives' Association], Supreme Court of Japan, 昭和 49(行ツ)99, 14 March 1978, reported in (S53) 32(2) Supreme Court Reports (civil cases) 211.

90 Interview with 大久保規子 [Noriko Okubo], Professor, Osaka University Graduate School of Law and Politics (Osaka, 7 July 2011); Interview with 六車明 [Akira Rokusha], former Examiner, Environmental Dispute Coordination Commission / former Judge (Tokyo, 14 July 2011); Interview with 吉野隆二郎 [Ryujiro Yoshino], Barrister, 'Revive Ariake Sea!' Case (Chikushi, 18 July 2011); Interview with 魚住昭三 [Shozo Uozumi], Barrister, 'Boleophthalmus pectinirostris' and 'Revive Ariake Sea!' Cases (Nagasaki, 19 July 2011).

91 大久保規子 [Noriko Okubo], '団体訴訟 [Class Action]' (2006) 57(3) *Liberty & Justice: Japan Federation of Bar Associations* 31, 36–7.

jeopardy, if the first and not directly affected plaintiff were to fail under an open standing policy, the rights of directly affected stakeholders might not be protected.[92] However, many others consider such risk is avoidable by organising a large number of plaintiffs.[93] Hence, the floodgate theory is doubtful.

Regardless, it is well recognised that the capacity of the judiciary is inadequate to provide sufficient judicial review.[94] Shozo Uozumi, another barrister in the 'Revive Ariake Sea!' case, pointed out that social investment in the judiciary is insufficient to be able to hire enough judges and to realise the rule of law.[95] As mentioned in Subsection 3.3.2, the budget of the judiciary in the financial year 2010/11 was approximately AUD 3.91 billion, which accounts for only 0.21 per cent of the national budget.[96] The number of judges is 2805 (2010); 82 less than in Hungary (2008) which has a population one-thirteenth that of Japan.[97] With such limited personnel, Rokusha explained that the burden on individual judges is quite heavy and this creates an incentive to not review cases. He regarded it as problematic that judges suffer from a conflict of interests between the protection of the public's right to seek review by the court and the evaluation of themselves within the judiciary. If a judge filters out cases by standing rules, he/she is

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92 Interview with 吉野隆二郎 [Ryujiro Yoshino], Barrister, 'Revive Ariake Sea!' Case (Chikushi, 18 July 2011).

93 Interview with 園部逸夫 [Itsuo Sonobe], former Supreme Court Judge (Tokyo, 22 July 2011).

94 Interview with 六車明 [Akira Rokusha], former Examiner, Environmental Dispute Coordination Commission / former Judge (Tokyo, 14 July 2011); Interview with 大久保規子 [Noriko Okubo], Professor, Osaka University Graduate School of Law and Politics (Osaka, 7 July 2011); Interview with 魚住昭三 [Shozo Uozumi], Barrister, 'Boleophthalmus pectinirostris' and 'Revive Ariake Sea!' Cases (Nagasaki, 19 July 2011).

95 Interview with 魚住昭三 [Shozo Uozumi], Barrister, 'Boleophthalmus pectinirostris' and 'Revive Ariake Sea!' Cases (Nagasaki, 19 July 2011).

96 Supreme Court of Japan, *平成 22 年度裁判所決算 [The Judiciary's Settlement of Accounts in the Financial Year of 2010-11]* (9 February 2012) <http://www.courts.go.jp/vcms_lf/203008.pdf>; Ministry of Finance (JPN), '平成 22 年度 国の財務書類 [Japan's Finacial Statements in the Financial Year of 2010-11]' (28 May 2012) <http://www.mof.go.jp/budget/report/public_finance_fact_sheet/national/fy2010/2010_01a.pdf http://www.mof.go.jp/budget/report/public_finance_fact_sheet/national/fy2010/2012_01b.pdf http://www.mof.go.jp/budget/report/public_finance_fact_sheet/national/fy2010/2010_01c.pdf>, 86–7. Here, AUD 1=JPY 80.

97 Japan Federation of Bar Associations, *法曹人口政策に関する緊急提言: 関連資料 [Emergent Proposal for the Policy on the Number of Legal Professionals: Statistics]* (29 March 2011) <http://www.nichibenren.or.jp/library/ja/opinion/report/data/110327_shiryou.pdf>,1; Courts of Hungary, *The Judicial System in Hungary* (2010) <http://www.birosag.hu/engine.aspx?page=birosag_english_03_judicial>.

able to process more cases and becomes highly valued within the judiciary. Conversely, if he/she exercises judicial review, the case becomes a burden for him/her and all of the parties, although the outcome for the public may be better. Concerning this dilemma, Rokusha warned that judges should be aware of the danger of producing low quality judgments.[98]

Accessibility — other barriers

Regarding the other barriers of access to justice, cost is an important element. For internal merits review, there is no utilisation fee and the informality of the procedure further reduces the costs to the applicant. Of course, the applicant is still burdened with the cost of securing legal representation and/or preparing the necessary documents.[99] In contrast to merits review, the high cost of use, representation, expert witnesses and other relevant costs are a substantial problem for applicants to judicial review. Although, in Japan, the party that loses a case is not obliged to pay the other party's legal costs, there is also no access to legal aid for environment-related lawsuits. In conjunction with the strict *locus standi*, this reduces public access to the court.[100] This is balanced somewhat by the fact that, at least for major environmental disputes, grass-roots support for plaintiffs is relatively strong, enabling some public interest environmental litigation to proceed. One aspect of this support is that, in major environmental lawsuits, certain barristers and expert witnesses are willing to work for the plaintiff on a *pro-bono* basis. Underling this grass-roots support is the philosophy of pursuing social fairness. Regarding barristers, the *Attorney Law* requires attorneys to work for the protection of human rights and the

98 Interview with 六車明 [Akira Rokusha], former Examiner, Environmental Dispute Coordination Commission / former Judge (Tokyo, 14 July 2011).

99 Ministry of Internal Affairs and Communications (JPN), *行政不服審査法とは？ [What is the Administrative Appeal Law?]* (13 April 2009) <http://www.soumu.go.jp/main_sosiki/gyoukan/kanri/fufuku/what_fufuku.html>; *行政不服審査法* [Administrative Appeal Law] (Japan) 15 September 1962, Law No 160 of S37, art 12.

100 *民事訴訟費用等に関する法律* [Law on Costs of Civil Procedure, Administrative Procedure and Relevant Court Procedures] (Japan) 6 April 1971, Law No 40 of S46; Interview with 魚住昭三 [Shozo Uozumi], Barrister, 'Boleophthalmus pectinirostris' and 'Revive Ariake Sea!' Cases (Nagasaki, 19 July 2011); Interview with 大久保規子 [Noriko Okubo], Professor, Osaka University Graduate School of Law and Politics (Osaka, 7 July 2011).

realisation of social justice; some literally follow this provision. As for expert witnesses, some academics in public universities hold that their contribution to lawsuits is a form of feedback of their research outcomes into society. In practice, in environmental litigation, it is often the case that the rewards from past successful cases are pooled and utilised to offset the costs of new public environmental litigation.[101]

Effectiveness of the current scheme and the necessity of an Ombudsman

From the above analysis, it is clear that the severe *locus standi*, very limited capacity of the courts and high cost of utilisation prevent the public from accessing justice effectively. Moreover, in comparing the slow processing speed of the review mechanisms in Japan with the standards of the *Aarhus Convention*, Okubo highlighted that the current scheme does not provide effective and timely access to justice. For example, such slowness makes the action for administrative injunction meaningless because, during the lawsuit, the site in dispute is likely to be irreversibly destroyed.[102] This problem of slow processing speed is not limited to the environmental field; it is obvious that enlargement of the capacity of review mechanisms is required to improve the slowness of processing disputes. Although the court recognises this problem, it has not yet actively promoted an increase in the number of judges.[103]However, the creation of a classical Ombudsman could resolve this problem. Based on his experience of field research in Denmark, Sonobe argued that an Ombudsman can resolve the problem of slow processing speed.[104] Further, this alternative is economical and provides enough preparatory time for the court to

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101 *弁護士法* [Attorney Law] (Japan) 10 June 1949, Law No 205 of S24, art 1; Interview with 魚住昭三 [Shozo Uozumi], Barrister, 'Boleophthalmus pectinirostris' and 'Revive Ariake Sea!' Cases (Nagasaki, 19 July 2011); Interview with 大久保規子 [Noriko Okubo], Professor, Osaka University Graduate School of Law and Politics (Osaka, 7 July 2011).

102 Interview with 大久保規子 [Noriko Okubo], Professor, Osaka University Graduate School of Law and Politics (Osaka, 7 July 2011); *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, opened for signature 25 June 1998, 2161 UNTS 447 (entered into force 30 October 2001) ('*Aarhus Convention*'), art 9(4).

103 Supreme Court of Japan, *裁判の迅速化に係る検証に関する報告書(第4回): 施策編 [Fourth Report on Examination of Hastening of Court Procedures: Resolution Section]* (Supreme Court of Japan, 2011), 67–75.

104 Interview with 園部逸夫 [Itsuo Sonobe], former Supreme Court Judge (Tokyo, 22 July 2011).

increase the number of judges to an optimal level.

7.2.4 Functionality of other mechanisms for executive transparency and accountability

This subsection examines the functionalities of the public record management system and the media as mechanisms for executive transparency, and those of the Diet and the Board of Audit as mechanisms for executive accountability. As the basic features of these institutions were introduced in Subsections 3.1.3 and 3.1.4, the focus here is on the practical aspects. The effectiveness of these mechanisms for executive accountability is also discussed in relation to the necessity of introducing an Ombudsman.

Public record management system and executive transparency

First, the functionality of the public record management system in the context of access to information is considered. As seen in Subsection 7.2.1, Japanese bureaucracy is famous for its high degree of secretiveness. Gohara highlighted that, as a legacy of the rapid economic growth of the 1960s, the first priority of the bureaucracy is to protect the conventional regime. This irrational custom, according to him, rests on a fear that disclosed information might threaten the status quo. To protect the status quo, the Japanese bureaucracy resists information disclosure and has even exercised counter-measures, such as exclusion of memorandums from the category of official documents to be stored, reducing the duration for which documents must be stored, and discarding documents before the FOI law entered into force.[105] More recently, on 1 April 2011, the *Law for Management of Public Documents* that obligates governmental bodies to create and preserve official documents entered into force.[106] However, the government's practice not to create records of the meetings coping with the TEPCO

[105] Interview with 郷原信郎 [Nobuo Gohara], Head, Compliance Office at Ministry of Internal Affairs and Communications (Tokyo, 5 July 2011).

[106] *公文書等の管理に関する法律施行令* [Order for Enforcement of the Law on Management of Public Documents] (Japan), 22 December 2010, Cabinet Order No 250 of H22, supplementary provision 1. For the details of the *Law for Management of Public Documents*, see Subsection 3.1.3.

Nuclear Disaster from 11 March 2011 to 25 January 2012 has been strongly criticised.[107] Obviously these measures harm the functionality of the record management system, creating a need to correct the attitudes of the bureaucracy.

In the environmental field, there is a question of whether official documents should be stored for longer. From the viewpoint of practitioners, Yoshino identifies a hurdle in utilising the current record management system to disclose old public documents in that administrative offices do not store public documents for long enough. For instance, during the lawsuits on the ISAKAN, documents on ecological survey on fishery in late 1970s, which was used for the environmental impact assessment of the Nagasaki Development Plan in 1979, were unable to be disclosed because they had not been preserved.[108] Although the new system under the *Law for Management of Public Documents* assumes a limited number of documents will be stored in the National Archives; in practice, no environment-related documents with historical importance have been recognised as part of this process.[109] Considering the tendency for public interest environmental litigation to take a long time, it would be rational to require that environment-related official documents are preserved for a long enough period to permit environmental litigation, if begun, to conclude.

Media and executive transparency

It is true that mass media has occasionally drawn public attention to environmental

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[107] Cabinet Office (JPN), '東日本大震災に対応するために設置された会議等の議事内容の記録の作成・保存状況調査について [About the Result of Investigation on the Creation and Preservation of Records of Meetings for Coping with the Disaster caused by the Earthquake that hit Tohoku Region]' (Media Release, 27 January 2012); Japan, *Diet Debates*, House of Councillors, 8 February 2012, 2 (山田俊男 [Toshio Yamada], Liberal Democratic Party); 磯山友幸 [Tomoyuki Isoyama], *原子力災害対策本部「議事録ナシ」は氷山の一角:国会事故調が挑む「政府による情報隠し」の壁 [Nuclear Emergency Operation Centre's 'No Record' is the Tip of an Iceberg: Parliamentary Investigation Commission on Tokyo Electric Power Company's Fukushima Nuclear Power Plant Accident's Challenge to the Cover-up of Information by the Government]* (1 February 2012) 現代ビジネス（講談社）[Gendai Business-Kodansha] <http://gendai.ismedia.jp/articles/-/31685>.

[108] Interview with 吉野隆二郎 [Ryujiro Yoshino], Barrister, 'Revive Ariake Sea!' Case (Chikushi, 18 July 2011).

[109] Interview with 大久保規子 [Noriko Okubo], Professor, Osaka University Graduate School of Law and Politics (Osaka, 7 July 2011).

problems and encouraged their solutions.[110] However, this does not automatically mean that the media functions well as a mechanism for executive transparency. As detailed in Subsection 3.1.3, the mass media in Japan has functioned instead as a public relations arm of the government. In this regard, Gohara considered that under the long-standing cooperation with the mass media, administrative bodies have avoided public criticism.[111]

However, the first governmental change as a result of election, which occurred in 2009, shook the absolute supremacy of the mass media. The newly elected Democratic government opened press conferences at more than a half of the ministries to journalists who had previously been excluded.[112] In addition, the Democratic government introduced a new method of live internet broadcasting of governmental meetings, at which issues of public concern are discussed.[113] These new policies improved administrative accountability through activating alternative media, such as magazines and internet journalism. The importance of these changes became widely apparent as a result of the TEPCO Nuclear Disaster. Through live internet broadcast of daily press conferences at the emergency operations centre, the public obtained much more accurate information than was available through the mass media, which was not presenting the whole story and leading the public to under-evaluate the seriousness of the disaster.[114]

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110 Interview with 南部義典 [Yoshinori Nanbu], Secretariat, MP study group on the Parliamentary Ombudsman (Tokyo, 29 July 2011); Interview with 吉野隆二郎 [Ryujiro Yoshino], Barrister, 'Revive Ariake Sea!' Case (Chikushi, 18 July 2011); Interview with Anonymous interviewee, Office of the Appeal Committee on Compensation of Health Damage by Environmental Contamination (Tokyo, 6 July 2011).

111 Interview with 郷原信郎 [Nobuo Gohara], Head, Compliance Office at Ministry of Internal Affairs and Communications (Tokyo, 5 July 2011).

112 Ministry of Foreign Affairs (JPN), '大臣会見等に関する基本的な方針について [Notice on Change of Rules about Press Conferences]' (Media Release, 29 September 2009); Financial Service Agency (JPN), '亀井内閣府特命担当大臣閣議後記者会見の概要 [Summary of Minister Kamei's Press Conferences after the Cabinet Meeting]' (Media Release, 29 September 2009); Ministry of Internal Affairs and Communications (JPN), '原口総務大臣閣議後記者会見の概要（その 2）[Summary of Press Conference of Minister Haraguchi after the Cabinet Meeting: Part 2]' (Media Release, 30 March 2010).

113 This new policy was introduced in November 2009. The symbolic first subject was the internal budgetary examination on individual governmental projects. See Government Revitalization Section at the Cabinet Office (JPN), *事業仕分け [Intenal Budgetary Examination on Individual Governmental Projects]* (20 January 2012) <http://www.cao.go.jp/gyouseisasshin/contents/01/shiwake.html>.

114 BLOGOS 編集部 [Editorial Department of BLOGOS], *ネットメディアはジャーナリズムを変えられていない [Internet Media Has not Changed Journalism in Japan]* (20 January 2012) BLOGOS <http://blogos.com/article/29871/?axis=&p=1>; 大谷広太 [Kota Otani], *特集・震災から 1 年 マスコミ学会で東大総長に会場から激しいヤジ震災・原発報道で見えたマスコミの限界とは？ [Feature, One Year*

Nevertheless, internet journalism has certain limitations of its own, especially in regards to its capacity. Therefore, the improvement of the quality of mass media is necessary.

In the field research, the interviewees from within the executive branch expressed irritation regarding the media and criticised the inaccuracy of news content.[115] Although this suggests the change of government in 2009 has had some influence on the relationship between the government and the mass media, it is too early to judge whether the media has genuinely started to function as a mechanism for executive transparency. Environmental law experts do not anticipate any improvement in executive transparency by mass media, although there are hopes that the media will contribute to the environmental education of the public.[116]

Diet and executive accountability

Although the Diet should be the central mechanism for executive accountability, as discussed in Subsection 3.1.4, its role is limited mainly to the check of political accountability. This is not because the power granted to the Parliamentary Committees is weak. Theoretically, the Committees can exercise strong powers of investigation on national administration matters, even though the creation of an investigation report is not obligatory.[117] However, the high self-evaluation of the MPs on the contribution of the

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After the TEPCO Nuclear DIaster: Severe Critcism to the Chancellor of Tokyo University at the Symosium of Mass Communications Society, What was the Limitation Revealed by the Broadcasting of the Earthquake and the TEPCO Nuclear Disaster?] (6 March 2012) BLOGOS <http://blogos.com/article/33329/?axis=&p=1>; OurPlanet-TV, *徹底検証！テレビは原発事故をどう伝えたか？ [Thorough Examination: How Television Reported the TEPCO Nuclear Disaster?]* (6 April 2012) <http://www.ourplanet-tv.org/?q=node/1341>.

115 Interview with MP 田島一成 [Issei Tajima], former Vice Environmental Minister (Tokyo, 26 July 2011); Interview with 白岩俊 [Suguru Shiraiwa], Director, Division of Administrative Counselling Mechanism at Ministry of Internal Affairs and Communications (Tokyo, 11 July 2011).

116 Interview with 大久保規子 [Noriko Okubo], Professor, Osaka University Graduate School of Law and Politics (Osaka, 7 July 2011): Interview with 六車明 [Akira Rokusha], former Examiner, Environmental Dispute Coordination Commission / former Judge (Tokyo, 14 July 2011).

117 Interview with 塚本壽雄 [Hisao Tsukamoto], former Director General, Administrative Evaluation Bureau at Ministry of Internal Affairs and Communications (Tokyo, 4 July 2011); *日本国憲法* [Constitution of Japan] (Japan) 3 November 1946, art 62; *国会法* [National Diet Law] (Japan) 30 April 1947, Law No 79 of S22, arts 45, 104; *議院における証人の宣誓及び証言等に関する法律* [Law on Witness's Testemony under Oath at the Diet] (Japan) 23 December 1947, Law No 225 of S22; House of Representatives of Japan, *衆議院規則* [Rules of the House of Representatives] (Japan) 28 June 1947, arts 76–85-2, 94; House of Councillors of Japan, *参議院規則* [Rules of the House of Councillors] (Japan) 28 June 1947, arts 60–71; 大石眞 [Makoto Oishi], *議会法 [Parliamentary Law]* (有斐閣

Committees to administrative law accountability is not widely shared by others.[118] For instance, Sonobe highlighted that, in practice, the Committees do not frequently exercise the investigatory powers represented by public hearing, instead devoting themselves to political games.[119] Kimiyoshi Toyama, an Ombudsman expert, explained that the shortage of staff and resources of the Committees, and the low awareness of MPs, contribute to this phenomenon.[120] In addition, as shown in Subsection 4.3.1, the poor quality of media coverage of parliamentary debates prevents public awareness of Committee outcomes.

Board of Audit and executive accountability

As mentioned in Subsection 3.1.4, the Board of Audit is responsible for the examination of the executive's financial accountability, but its influence is relatively limited due to the capacity problem of the Diet. Nevertheless, some stakeholders valued the Board's ability to follow up cases and trials to introduction of qualitative audit.[121] The Board is also active in the environmental field; it actually signalled concerns over the financial aspects of the National Isahaya Bay Reclamation Project (ISAKAN).[122] However, such audits do not focus on environmental impacts, so the contribution of the Board in this field is not well recognised.[123]

[Yuhikaku], 2001), 67, 119–20.

118 Interview with MP 田島一成 [Issei Tajima], former Vice Environmental Minister (Tokyo, 26 July 2011); Interview with MP 森山浩行 [Hiroyuki Moriyama], Democratic Party, House of Representatives (Tokyo, 29 July 2011).

119 Interview with 園部逸夫 [Itsuo Sonobe], former Supreme Court Judge (Tokyo, 22 July 2011).

120 Interview with 外山公美 [Kimiyoshi Toyama], Professor, Nihon University Faculty of Law (Tokyo, 26 July 2011).

121 Interview with MP 田島一成 [Issei Tajima], former Vice Environmental Minister (Tokyo, 26 July 2011); Interview with 塚本壽雄 [Hisao Tsukamoto], former Director General, Administrative Evaluation Bureau at Ministry of Internal Affairs and Communications (Tokyo, 4 July 2011).

122 Interview with 吉野隆二郎 [Ryujiro Yoshino], Barrister, 'Revive Ariake Sea!' Case (Chikushi, 18 July 2011); Board of Audit of Japan, *平成 14 年度 国営諫早湾干拓事業の実施について [Report of Audit about Impremention of National Isahaya Bay Reclamation Project in the Financial Year 2002-3]* (2003) <http://report.jbaudit.go.jp/cgi-bin/infobee/marking.cgi?target=http%3a%2f%2freport%2ejbaudit%2ego%2ejp%2forg%2fh14%2f2002%2dh14%2d0726%2d0%2ehtm&key=%e6%7c%91%81+%8a%b1%91%f1&cat=>.

123 Interview with MP 森山浩行 [Hiroyuki Moriyama], Democratic Party, House of Representatives (Tokyo, 29 July 2011); Interview with 大久保規子 [Noriko Okubo], Professor, Osaka University Graduate School of Law and Politics (Osaka, 7 July 2011).

Effectiveness of the other mechanisms for executive accountability and the necessity of an Ombudsman

Based on the above discussion, the Parliamentary Committees have not made a sufficient contribution to realising administrative law accountability. However, this has not been well recognised by the majority of citizens. Only recently, in its final report, the National Diet of Japan Fukushima Nuclear Accident Independent Investigation Commission (NAIIC) drew attention to the shortcomings in the Diet's function and efficacy in administrative law accountability. The NAIIC asked the Diet to fill this gap.[124] Although the NAIIC's recommendation does not identify the introduction of an Ombudsman, it is clear that an Ombudsman is one of the most desirable and suitable options for this purpose.

In particular, the introduction of an Environmental Ombudsman would improve administrative accountability through encouraging the legislative branch to account for environmental values in decision making.[125] Moriyama highlighted that regular reporting on environmental administration from the office to the Diet would raise environmental awareness among members of the Diet and entrench the *ex post facto* examination of national projects, which is currently very weak compared with preparatory examination. Further, he believed that if the office focuses on securing environmental values as a counter-part of the Board of Audit, its necessity would be acknowledged by many

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124 国会 東京電力福島原子力発電所事故調査委員会 [National Diet of Japan Fukushima Nuclear Accident Independent Investigation Commission (NAIIC) (JPN)], '報告書 [The Official Report of the Fukushima Nuclear Accident Independent Investigation Commission]' (5 July 2012) <http://naiic.tempdomainname.com/pdf/naiic_honpen.pdf>, 5–8, 20–3; テレビ朝日 [Television Asahi (JPN)], '原発事故「原因は人災」: 生出演、黒川委員長に聞く [Nuclear Accident 'Caused by Human Neglect': Live Broadcasting, Asking Dr. Kurokawa, Chair of the NAIIC]', *報道ステーション [Hodo Station]*, 5 July 2012 (古舘伊知郎 [Ichiro Furutachi], Anchor person, 黒川清 [Kiyoshi Kurokawa], Chair of the NAIIC); 塩崎恭久 [Yasuhisa Shiozaki], *ボールは国会に投げ返された。国会事故調の報告書に全力で向き合い、その提言を如何に実行に移していくか、これからがスタートだ! [Ball is Backed to the Diet. Facing the Report of the NAIIC, it is the Responsibility of the Diet to Realise the Report's Recommendations. This is the Start!]* (10 July 2012) 現代ビジネス（講談社）[Gendai Business-Kodansha] <http://gendai.ismedia.jp/articles/-/32981>.

125 Interview with 塚本壽雄 [Hisao Tsukamoto], former Director General, Administrative Evaluation Bureau at Ministry of Internal Affairs and Communications (Tokyo, 4 July 2011).

members of the Diet.[126]

7.3 Feasibility of introducing a classical Ombudsman

The previous section revealed the relatively poor efficacy of the current framework for executive transparency and accountability and clarified the need for introducing an Ombudsman in Japan for dealing with environment-related disputes. This section discusses the next logical question, which is whether such an Ombudsman should be a classical Ombudsman. On this issue, there are several strong arguments that support the introduction of a classical Ombudsman in Japan. Firstly, the existing scheme of supervision of administrative activities is weak and lacks neutrality, so an external and neutral supervision mechanism is necessary.[127] Secondly, a classical Ombudsman would secure the fundamentals of democracy, such as the protection of human rights, the control of administrative discretion and the realisation of the rule of law.[128] Thirdly, a classical Ombudsman improves public access to information, especially for those who have a non-politicised conflict with the government.[129] Finally, a classical Ombudsman could be the last resort to recover the lost public trust in the government and legal system after the TEPCO Nuclear Disaster.[130]

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126 Interview with MP 森山浩行 [Hiroyuki Moriyama], Democratic Party, House of Representatives (Tokyo, 29 July 2011).

127 Interview with 六車明 [Akira Rokusha], former Examiner, Environmental Dispute Coordination Commission / former Judge (Tokyo, 14 July 2011); Interview with 郷原信郎 [Nobuo Gohara], Head, Compliance Office at Ministry of Internal Affairs and Communications (Tokyo, 5 July 2011); Interview with 外山公美 [Kimiyoshi Toyama], Professor, Nihon University Faculty of Law (Tokyo, 26 July 2011); Interview with 南部義典 [Yoshinori Nanbu], Secretariat, MP study group on the Parliamentary Ombudsman (Tokyo, 29 July 2011); Interview with 塚本壽雄 [Hisao Tsukamoto], former Director General, Administrative Evaluation Bureau at Ministry of Internal Affairs and Communications (Tokyo, 4 July 2011).

128 Interview with 園部逸夫 [Itsuo Sonobe], former Supreme Court Judge (Tokyo, 22 July 2011); Interview with 塚本壽雄 [Hisao Tsukamoto], former Director General, Administrative Evaluation Bureau at Ministry of Internal Affairs and Communications (Tokyo, 4 July 2011).

129 Interview with 吉野隆二郎 [Ryujiro Yoshino], Barrister, 'Revive Ariake Sea!' Case (Chikushi, 18 July 2011); Interview with 魚住昭三 [Shozo Uozumi], Barrister, 'Boleophthalmus pectinirostris' and 'Revive Ariake Sea!' Cases (Nagasaki, 19 July 2011).

130 Interview with 塚本壽雄 [Hisao Tsukamoto], former Director General, Administrative Evaluation

This section also examines the feasibility of introducing a classical Ombudsman institution in Japan. In regards to this, Japan has conducted three trials to introduce an Ombudsman at the national level. Although each trial can be regarded as a step in the right direction, a classical Ombudsman has not yet been introduced in Japan. Through these trials, some influential arguments against the introduction of a classical Ombudsman have been revealed; namely, those related to the legal and cultural aspects of introduction, and the compatibility of the Ombudsman with existing complaint-handling mechanisms. This section assesses whether these counter-arguments are valid.

This section is divided into five subsections. Subsections 7.3.1 summarises the history of past trials of introducing an Ombudsman in Japan. Subsections 7.3.2–7.3.4 examine the counter-arguments on the legal aspects, efficacy and functionality of the complaint-handling mechanisms and cultural aspects, respectively. Finally, Subsection 7.3.5 discusses the feasibility of introducing a classical Ombudsman in Japan.

7.3.1 Past attempts to introduce a classical Ombudsman

The concept of the Ombudsman was introduced into Japan in the early 1960s. However, until the mid-1970s, it was merely a research topic within the closed circles of researchers, barristers and bureaucrats. In 1976, the Lockheed bribery scandal, which involved many leading politicians of the ruling party and high-level bureaucrats in Japan, changed the situation. In relation to preventing a repetition of the scandal, the classical Ombudsman suddenly attracted the attention of the opposition parties and the public through a number of Diet Debates.[131] Reflecting this, in 1980, the government launched the Study Group on the Ombudsman Scheme at the Administrative Management Agency. In 1981, the Group issued its interim report, which proposed the introduction of an

Bureau at Ministry of Internal Affairs and Communications (Tokyo, 4 July 2011).

[131] 園部逸夫 [Itsuo Sonobe] and 枝根茂 [Shigeru Edane], *オンブズマン法 [Ombudsman Law]*, 行政法研究双書 [Administrative Law Research] (弘文堂 [Kobundo], 2nd ed, 1997), 39–41 ; 潮見憲三郎 [Kenzaburo Shiomi], *オンブズマンとは何か [What is the Ombudsman?]* (講談社 [Kodan Sha], 1996), 173–5, 181–5.

executive Ombudsman, applying a council system comprising three to five Ombudsmen. Following this, another council body with higher authority discussed the same issue. The publication of the Group's final report occurred in 1986, but its main contents were the same as the interim report.[132] The Group's proposal to create an executive Ombudsman scheme was thoroughly criticised for lack of independence and the ambiguous distinction of its function from the already existing Administrative Counselling Mechanism (ACM).[133] Whether because of these criticisms or not, the Group's plan was not realised.[134] Instead, in 1987, advisory bodies were attached to the ACM to cope with systemic problems, as detailed in Subsection 5.6.2.[135]

Although this first trial was not successful, at least at the level of the Diet, the establishment of an institution to supervise the administrative branch became recognised as a policy necessary for the future. Later, the introduction of an Ombudsman was occasionally discussed at the Diet in the context of the reform of administrative governance. The most notable example was in relation to the empowerment of the Diet's function of supervising the executive branch in the mid- to late 1990s. Here, the introduction of an Ombudsman institution was discussed as an option. However, the outcome of this second trial was the creation of the Permanent Committees on the supervision of administrative activities in both Houses of the Diet. These Committees were expected to act like an Ombudsman by utilising the investigatory power of the Permanent Committee and processing petitions.[136] In practice, however, these Committees have not been active, partly due to capacity shortages. In particular,

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132 宇都宮深志 [Fukashi Utsunomiya], *公正と公開の行政学： オンブズマン制度と情報公開の新たな展開 [Public Administration Studies on Fairness and Disclosure: New Development of the Ombudsman System and Information Disclosure]* (三嶺書房 [Sanrei Shobo], 2001), 284; Sonobe and Edane, above n 131, 41–5; Shiomi, above n 131, 186–7.

133 Rowat, above n 32, 6–7, 11–13; Sonobe and Edane, above n 131, 58–9.

134 Sonobe and Edane, above n 131, 61; Shiomi, above n 131, 187–8; Utsunomiya, above n 132, 284–5.

135 Shiomi, above n 131, 188.

136 Sonobe and Edane, above n 131, 62–71; Utsunomiya, above n 132, 285–7; 寺沢泰大 [Yasuhiro Terasawa], '議会による行政統制の制度設計 [An Institutional Design for Parliamentary Control of the Executive]' (2000) 2000 (28 Jan 2000) *Public Policy (JPN)* ppsaj/200001028, 3–5. At the House of the Representatives, the Committee also has the mandate of examination of the enforcement of the budget.

reflecting the low profile of the Committees, petitions are seldom submitted to them, and almost none of them are formally processed.[137]

The practical reality of the Committees means that the introduction of an Ombudsman has remained an option for the further improvement of administrative governance. Between 2000–2005, the introduction of a classical Ombudsman was discussed at the Research Commission on the Constitution at the House of Representatives, which aimed at a comprehensive examination of the Constitution. In 2005, the Commission issued its final report, which noted that, while the majority were proponents of the introduction, there were also minor opponent opinions.[138] Although there has not been a concrete movement at the Diet yet, a non-partisan MPs' study group on the Parliamentary Ombudsman has been active since 2009. In addition, a few researchers have proposed rough blueprints of a desirable scheme. This small group of parliamentarians and experts share the view that the introduction of a classical Ombudsman is necessary. However, their views on the details of the institutional setting differ.[139] It is noteworthy that some arguments in these proposals apply the logics of some counter-arguments against the introduction of a classical Ombudsman without criticism. Thus, to assess the optimal institutional settings for the introduction of a classical Ombudsman, it is necessary to examine the counter-arguments thoroughly.

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137 Utsunomiya, above n 132, 286–7; Interview with 南部義典 [Yoshinori Nanbu], Secretariat, MP study group on the Parliamentary Ombudsman (Tokyo, 29 July 2011). According to Nanbu, the average number of petitions submitted to the House of Representatives is one to two per month, the number submitted to the House of Councillors is far less. To his knowledge, none of them were formally processed. As for other obstacles common to the Parliamentary Committees, please see Subsection 3.1.4.

138 Research Commission on the Constitution at the House of Representatives (JPN), '報告書 [Final Report]' (April 2005) <http://www.shugiin.go.jp/itdb_kenpou.nsf/html/kenpou/houkoku.pdf/$File/houkoku.pdf>, 400–1.

139 南部義典 [Yoshinori Nanbu], '議会オンブズマン調査研究会における議論と今後の課題 [Discussion in the MP Study Group on the Parliamentary Ombudsman and Remaining Issues]' (2011) 22 *Administrative Grievance Resolution & Ombudsman (JPN)* 65, 65–9; 外山公美 [Kimiyoshi Toyama], '衆議院憲法調査会におけるオンブズマン制度に関する議論 [A Discussion of the Ombudsman System at the Research Commission on the Constitution of the House of Representatives in Japan]' (2006) 72 *Journal of Law: Nihon University (JPN)* 335, 352; 塚本壽雄 [Hisao Tsukamoto], '国レベルにおけるオンブズマンの制度設計 [Plan for Institutional Settings of a Classical Ombudsman at the National Level in Japan]' (2010) 21 *Administrative Grievance Resolution & Ombudsman (JPN)* 1, 4–6.

7.3.2 Legal issues

Since the 1970s, there has been strong opposition, mainly from the executive branch, towards the introduction of a classical Ombudsman in Japan. As seen in the previous subsection, the influence of this group has been diminishing since the 2000s. However, it is important to understand the legal basis of these counter-arguments, and to examine their validity.

The legally based counter-arguments can be summarised into a single claim: that the existence of a classical Ombudsman is contrary to the principle of the separation of powers, which underlies the Constitution. This claim relies on a controversial interpretation of article 65 of the Constitution, which was detailed in Subsection 3.1.4. Based on this interpretation, the argument has been made that the investigatory power should belong to the executive branch, making its exercise by the legislative branch anti-constitutional.[140] However, this argument does not make sense considering that most parliamentary democracies built on the principle of separation of powers have the Ombudsman. In general, the separation of powers and parliamentary accountability are not discussed in the same dimension. These are separate factors, not only in the common law system, but also in the German-style civil law system.[141] Further, in his criticism of the 1981 proposal for the creation of an executive Ombudsman, Rowat highlights that the argument omits the view that the executive branch owes accountability to the Parliament. He consequently argues that resistance stems from the executive branch's fear of losing authority. Further, he explains that the Ombudsman's decisions are not legally binding,

[140] See, eg, 小林節 [Setsu Kobayashi], '日本の行政相談制度とオンブズマン [Administrative Counselling Mechanism of Japan and the Ombudsman]' (1994) (1054) *Jurist (JPN)* 17, 22; Japan, *Diet Debates*, Permanent Committee on Budget at the House of Councillors, 10 December 1996, 19–20 (斎藤文夫 [Fumio Saito], Liberal Democratic Party: 大森政輔 [Masasuke Omori], Director-General of the Cabinet Legislation Bureau); Nanbu, above n 139, 67.

[141] Patrick Birkinshaw, 'The Separation of Powers in the Changing Environment' in N Douglas Lewis and David Campbell (eds), *Promoting Participation: Law or Politics?* (Cavendish, 1999) 229, 233; Christoph Gusy, 'Parliaments and the Executive: Old Control Rights and New Control Contexts in Germany' in Katja S Ziegler, Denis Baranger and Anthony W Bradley (eds), *Constitutionalism and the Role of Parliaments*, Studies of the Oxford Institute of European and Comparative Law (Hart Publishing 2007) 127, 131–2.

and thus do not deprive the administrative offices of the power of making the first instance decisions.[142] More recently, the trend among Japanese academics has shifted towards emphasising the necessity of enhancing the Diet's function of supervising the administrative branch.[143]

Another argument of the opponents is that the exercise of the Diet's investigatory power should be limited to an examination of political accountability.[144] In conjunction with another argument, which claims a classical Ombudsman should not exceed the Diet's investigatory power,[145] the intention of this argument seems to be to not bestow upon an Ombudsman the power to review administrative law accountability. However, in this regard, there is a strong contrasting argument that the supervision of the Diet should encompass all aspects of executive accountability, reflecting article 41 of the Constitution, which defines the Diet as the highest organ of the government.[146] Judging from the creation of Permanent Committees on administrative accountability in both Houses, the claim of the opponents seems to have lost its logical basis.

Reflecting the opponents' narrow view on the role of the Diet, the question of whether the introduction of a classical Ombudsman requires constitutional reform has also been raised.[147] On this matter, academics agree that the establishment of a classical Ombudsman only requires legislation, and does not require an amendment of the Constitution, even though it is desirable that the Ombudsman has a constitutional

142 Rowat, above n 32, 7–8.
143 See, eg, 高田篤 [Atsushi Takada], '行政機関との関係における議会：行政統制を中心にして [The Parliament and Its Relationship with the Executive Power]' (2010) 72 *Public Law Review (JPN)* 36, 54.
144 Japan, *Diet Debates*, Permanent Committee on Budget at the House of Councillors, 10 December 1996, 19–20 (斎藤文夫 [Fumio Saito], Liberal Democratic Party: 大森政輔 [Masasuke Omori], Director-General of the Cabinet Legislation Bureau); 浅野善治 [Yoshiharu Asano], '国政調査権の本質と限界 [Nature and Limits of Parliamentary Power to Investigate Government Matters]' (2006) 78 *Parliamentary Politics Review (JPN)* 17, 23–4.
145 Nanbu, above n 139, 69.
146 大石眞 [Makoto Oishi], *憲法講義Ⅰ [Japanese Constitutional Law Ⅰ]* (有斐閣 [Yuhikaku], 2004), 119–20; 孝忠延夫 [Nobuo Kochu], '国政調査権の「憲法的性質」再論 [Nature of Parliamentary Power to Probe]' (2006) 55 *Law Review of Kansai University (The)* 1113, 1114–5; *日本国憲法* [Constitution of Japan] (Japan) 3 November 1946, art 41; Takada, above n 143, 42–3.
147 Utsunomiya, above n 132, 306.

basis.[148] At the Diet, the Research Commission on the Constitution at the House of Representative investigated this issue. The topic was discussed as part of an argument on the necessity of introducing a classical Ombudsman. The report of the Commission noted different opinions regarding the necessity of a constitutional amendment. When carefully examined, the debates revealed that, despite the majority emphasising the importance of acknowledging the Ombudsman formally in the Constitution, among those supporting introduction, no one completely rejected the establishment of a classical Ombudsman by statute.[149] Since the publication of the Commission's 2005 report, it has come to be regarded as practical to create a classical Ombudsman by a statute first, and then add a new provision to the Constitution when the amendment becomes possible.[150] In this sense, it is significant that, the first parliamentary investigation commission was established by legislation, without any amendment of the Constitution. As precedence, the NAIIC model can be followed for the establishment of a classical Ombudsman.

The opponents' counter-arguments regarding the legal aspects of introducing a classical Ombudsman in Japan thus lack a rational foundation. Instead of being genuine arguments, the opposition views can be seen as attempts to argue against the administrative offices being supervised by the Parliament. There is no legal obstacle to

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148 Secretariat of the Research Commission on the Constitution at the House of Representatives (JPN), '「人権擁護委員会その他の準司法機関・オンブズマン制度」に関する基礎的資料 [Basic References on the Human Rights Commission, Other Quasi-Judicial Institutions and the Ombudsman]' (衆憲資第 42 号 [Reference No. 42], March 2004) <http://www.shugiin.go.jp/itdb_kenpou.nsf/html/kenpou/shukenshi042.pdf/$File/shukenshi042.pdf>, 24–5.

149 Research Commission on the Constitution at the House of Representatives (JPN), above n 138, 401–2; Japan, *Diet Debates*, Research Commission on the Constitution at the House of Representatives (Investigatory Subcommittee on Governance System), 11 March 2004, 4–5 (宇都宮深志 [Fukashi Utsunomiya], Witness), 6 (鹿野道彦 [Michihiko Kano], Democratic Party: 宇都宮深志 [Fukashi Utsunomiya], Witness]), 7–8(山口富男 [Tomio Yamaguchi], Communist Party, 宇都宮深志 [Fukashi Utsunomiya], Witness]), 13(玄葉光一郎 [Koichiro Genba], Democratic Party); Japan, *Diet Debates*, Research Commission on the Constitution at the House of Representatives, 21 October 2004, 3 (辻恵 [Megumu Tsuji], Democratic Party), 7 (枝野幸男 [Yukio Edano], Democratic Party), 10 (山口富男 [Tomio Yamaguchi], Communist Party), 11, 15, (山花郁夫 [Ikuo Yamahana], Democratic Party), 12–3 (鈴木克昌 [Katsumasa Suzuki], Democratic Party), 13 (園田康博 [Yasuhiro Sonoda], Democratic Party).

150 Nanbu, above n 139, 68; Tsukamoto, above n 139, 7; Interview with 塚本壽雄 [Hisao Tsukamoto], former Director General, Administrative Evaluation Bureau at Ministry of Internal Affairs and Communications (Tokyo, 4 July 2011).

introducing a classical Ombudsman in Japan.

7.3.3 Can existing complaint-handling mechanisms substitute for the classical Ombudsman?

Since the 1970s, the central focus of discussions about the Ombudsman in Japan has been its complaint-handling function, and the most controversial topic has been whether an Ombudsman would be compatible with the existing ACM.[151] The opponents have argued that the creation of an Ombudsman would duplicate the well-functioning ACM, making it unnecessary and uneconomical.[152] Conversely, proponents have highlighted the comparative superiority of the classical Ombudsman in terms of impartiality and objectivity, which enables it to examine a wider range of issues than the ACM and provide fairer remedies to the public.[153]

As detailed in Subsection 5.6.2, in addition to the ACM, recently a new type of complaint-handling mechanism (the Compliance Office at the Ministry of Internal Affairs and Communications (MIC)) has emerged. Although complaint handling is not the only function of an Ombudsman, it is important to examine the complaint-handling functions of these two sections of the MIC to clarify whether they could substitute for the classical Ombudsman. To answer this question, the similarities and differences between the ACM, the Compliance Office and the classical Ombudsman are discussed. The elements to be examined here are the screening criteria, approach to complaints and

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151 See, eg, 小島武司 [Takeshi Kojima] et al, '行政管理機関等による行政苦情処理制度に関する調査研究：オムブズマン制度を中心として [Research on Administrative Complaint Handling Mechanisms by Administrative Management Institutions and Others: Focusing the Ombudsman Scheme]' (1977) 4 *Administrative Management Research (JPN)* 21, 112–3, 124–5; Study Group on the Ombudsman Scheme at the Agency of Internal Affairs (JPN), '報告書 [Final Report]' (June 1986), 5–6, 49; Research Commission on the Constitution at the House of Representatives (JPN), above n 138, 400–1; Nanbu, above n 139, 66–9.

152 See, eg, Kojima, et al, above 151, 151–2; Shiomi, above n 131, 177; Japan, *Diet Debates*, Permanent Committee on Cabinet at the House of Councillors, 16 December 1986, 14 (山本貞雄 [Sadao Yamamoto], Director General of Administrative Inspection Bureau, Agency of Internal Affairs); Japan, *Diet Debates*, Research Commission on the Constitution at the House of Representatives (Investigatory Subcommittee on Governance System), 11 March 2004, 13 (古屋圭司 [Keiji Furuya], Liberal Democratic Party).

153 See, eg, Rowat, above n 32, 11–12; Sonobe and Edane, above n 131, 58–9; Japan, *Diet Debates*, Research Commission on the Constitution at the House of Representatives, 21 October 2004, 7 (枝野幸男 [Yukio Edano], Democratic Party).

impartiality in operation.

Screening criteria

Considering the differences between the complaint-handling mechanisms and the classical Ombudsman, it is fundamental to understand the differences of the subjects to be reviewed. As mentioned in Subsection 5.6.2, the subjects of the ACM's conciliation are the activities of national administrative bodies and agencies supervised by the national administrative bodies; those of the Compliance Office are the administrative activities of the Ministry of Internal Affairs and Communication. However, to understand what these institutions actually review, it is necessary to outline the screening criteria.

As detailed in Subsection 5.6.2, the ACM handles systemic issues in a different channel from an ordinary complaint-handling scheme. Regarding the screening criteria, the ACM applies those for individual complaints first, with further criteria applied for systemic issues. The ACM's screening criteria for individual complaints eliminate certain types of complaints; namely, those on lack of knowledge of law or misunderstandings on facts, having the nature of request and appeal, which do not fit into the context of conciliation, and have already been processed by internal merits review or judicial review.[154] In particular, the ACM does not review cases involving politically complicated issues and cases in which the boundary of illegality or unfairness is ambiguous. Hisao Tsukamoto, a former Director General of the Administrative Evaluation Bureau (2000–03), explained the reason for the latter being that the ACM does not work for justice, but rather as part of an administrative office bound by existing legal

[154] *行政苦情あっせん取扱要領*[Guideline for Mediation on Complaints to the Executive] (Japan) 6 January 2001, Ministry of Internal Affairs and Communications' Official Directive No 65 of H13, rr 2, 6–8; *行政苦情あっせん取扱要領の解釈* [Interpretation of the Guideline for Mediation on Complaints to the Executive] (Japan) 31 March 2004, Director General of the Administrative Evaluation Bureau at the Ministry of Internal Affairs and Communications' Circular Notice No 42 of H16, notices 2, 6–7.

framework.[155]

The ACM's screening criteria for systemic issues exists because the ACM does not have the power to launch self-initiated investigations. Suguru Shiraiwa, the Director of the ACM, explained that there are two criteria to select systemic issues for review. One is when many people complain about the same administrative activity, and the rationality of the activity is difficult to understand from the viewpoint of volunteer councillors. The other is when, regardless of the legal appropriateness of an administrative activity, the advisory bodies propose an idea to improve the underlying causes of the complaints about the activity.[156]

Meanwhile, the Compliance Office has a single screening criterion: whether an activity about which a complaint has been received complies with the social demands of the Ministry. This criterion sorts complaints not by legality, but by social purpose.[157]

Comparing the screening criteria of the two institutions and the classical Ombudsman, those of the ACM for individual complaints have a partial similarity to the Ombudsman's screening criteria, such as in the case of application of the last resort test. However, the underlying idea of the ACM's criteria is different from that of the Ombudsman. As for the ACM's criteria for systemic issues, the contents are similar to those of the Ombudsman, but the Ombudsman has the power to launch self-initiated investigation. It is noteworthy that the ACM's criteria for individual cases and systemic issues are asymmetrical. This means that these subjects have qualitative differences. Conversely, the screening criterion of the Compliance Office has a single focus which is similar to that of the Ombudsman.

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155 Interview with 塚本壽雄 [Hisao Tsukamoto], former Director General, Administrative Evaluation Bureau at Ministry of Internal Affairs and Communications (Tokyo, 4 July 2011).

156 Interview with 白岩俊 [Suguru Shiraiwa], Director, Division of Administrative Counselling Mechanism at Ministry of Internal Affairs and Communications (Tokyo, 11 July 2011).

157 *コンプライアンス室設置規程* [Provision for Establishment of Compliance Office] (Japan) 17 March 2010, Ministry of Internal Affairs and Communications' Official Directive No 3 of H22, r 3; Interview with 郷原信郎 [Nobuo Gohara], Head, Compliance Office at Ministry of Internal Affairs and Communications (Tokyo, 5 July 2011).

Approaches to complaints

As internal complaint-handling mechanisms, the ACM and Compliance Office share basic features, such as the inquisitorial nature of investigation and the objective of improving the quality of administrative activities. However, this does not mean these institutions are identical. Thus, their approaches to complaints need to be addressed in detail. As the basic work flows of the two institutions were detailed in Subsection 5.6.2, here the basic stances and practical features of their methods are the focus.

As a section of the executive branch, the ACM presumes the legitimacy of existing administrative procedures and customs, and it aims to enhance the efficiency of administration through resolution of complaints within the existing legal framework.[158] In practice, the ACM handles complaints sincerely. For instance, Shiraiwa highlighted that the ACM strategically creates situations in which the relevant administrative offices have to cooperate.[159] However, whether this manner of complaint handling is efficient is not clear because there is no referable data on the processing speed.

As a notable practical feature, the ACM handles systemic issues by utilising private advisory bodies. Tsukamoto explained that the advantage of this scheme is that the advisory bodies can raise an issue of justice, which administrative officers cannot.[160] However, the efficacy of these advisory bodies is also questionable because the basic

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158 *行政苦情あっせん取扱要領*[Guideline for Mediation on Complaints to the Executive] (Japan) 6 January 2001, Ministry of Internal Affairs and Communications' Official Directive No 65 of H13, r 1; *行政苦情あっせん取扱要領の解釈*[Interpretation of the Guideline for Mediation on Complaints to the Executive] (Japan) 31 March 2004, Director General of the Administrative Evaluation Bureau at the Ministry of Internal Affairs and Communications' Circular Notice No 42 of H16, notice 1; Interview with 白岩俊 [Suguru Shiraiwa], Director, Division of Administrative Counselling Mechanism at Ministry of Internal Affairs and Communications (Tokyo, 11 July 2011).

159 *行政苦情あっせん取扱要領の解釈* [Interpretation of the Guideline for Mediation on Complaints to the Executive] (Japan) 31 March 2004, Director General of the Administrative Evaluation Bureau at the Ministry of Internal Affairs and Communications' Circular Notice No 42 of H16, notices 8–9; Interview with 白岩俊 [Suguru Shiraiwa], Director, Division of Administrative Counselling Mechanism at Ministry of Internal Affairs and Communications (Tokyo, 11 July 2011).

160 Interview with 塚本壽雄 [Hisao Tsukamoto], former Director General, Administrative Evaluation Bureau at Ministry of Internal Affairs and Communications (Tokyo, 4 July 2011).

stance of the ACM presumes the protection of the status quo.[161] There is another route by which a complaint submitted to the ACM may indirectly contribute to the resolution of a systemic issue. At the upper level of the ACM, the Administrative Evaluation Bureau has the competence to perform evaluation and supervision of administrative activities.[162] Based on this competence, the Bureau is able to advocate on any issue, regardless of the existing legal framework. Complaints to the ACM are one source for evaluation and supervision. However, the topics of evaluation and supervision are chosen by the Minister at the beginning of each financial year and fixed throughout the year. Hence, whether a systemic issue behind a complaint can be addressed by this route in a timely fashion depends, to a large degree, on coincidence.[163]

Conversely, while holding legality, the Compliance Office tries to alter the daily practice of administrative officers, from clinging to the status quo to responding and adjusting to much broader social demands.[164] For instance, in its report of May 2011, the Office scrutinised problems in an administrative contract.[165] From the traditional viewpoint of the administrative law jurisprudence of Japan, as seen in Subsection 3.1.2, administrative contract is a minor topic exempt from the subjects of administrative law. Thus, it is assumed that the approach of the ACM, which presumes the legitimacy of administrative customs, is unlikely to handle such an issue. Although not clearly mentioned in its basic stance, the Office seems to regard efficiency as important. From the limited data available, the Office processes investigations within three months.

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161 土屋英雄 [Hideo Tsuchiya], *公的オンブズマンの存在意義と制度設計 [The Official Ombudsman]* (花伝社 [Kaden Sha], 2010), 24–5.

162 *総務省設置法* [Law for Establishment of the Ministry of Internal Affairs and Communications] (Japan) 16 July 1999, Law No 91 of H11, art 4(18).

163 Interview with 塚本壽雄 [Hisao Tsukamoto], former Director General, Administrative Evaluation Bureau at Ministry of Internal Affairs and Communications (Tokyo, 4 July 2011).

164 *コンプライアンス室設置規程* [Provision for Establishment of Compliance Office] (Japan) 17 March 2010, Ministry of Internal Affairs and Communications' Official Directive No 3 of H22, r 2; Interview with 郷原信郎 [Nobuo Gohara], Head, Compliance Office at Ministry of Internal Affairs and Communications (Tokyo, 5 July 2011).

165 Compliance Office at the Ministry of Internal Affairs and Communications (JPN), '補助金等に係る予算執行の適正化確保について[About Ensurement of Proper Budget Use on Subsidiary Schemes]' (Media Release, 13 May 2011).

Regarding the type of cases to be handled, the Office mainly conducts investigations on individual complaints. However, as shown in Subsection 5.6.2, a result could trigger a further investigation on a systemic issue. By the nature of the pursuit of compliance, investigations on systemic issues are part of the Office's competence. However, the Office does not clearly have the competence to launch a self-initiated investigation.[166]

Comparing the approaches of the ACM and the Compliance Office, the approach of the Compliance Office is exactly what the Commonwealth and ACT Ombudsman in Australia have promoted.[167] In contrast, the approach of the ACM is more trivial, and can be viewed as equivalent to the internal complaint-handling mechanisms in Australian ministries. Although the ACM has avenues to process systemic issues, whether they can fill the shortages in the handling of individual complaints is uncertain. Considering these qualitative differences, it could be said that the Compliance Office is more similar to an Ombudsman than the ACM. However, it should be noted that neither the ACM nor the Compliance Office has the competence to launch self-initiated investigation. Thus, neither of them could substitute for the full functionality of an Ombudsman.

Impartiality in operation

Both the ACM and the Compliance Office lack institutional independence. This does not automatically mean that they also lack impartiality in their operations. Here, impartiality of operation is examined through assessing whether the Minister intervenes in the operation and whether the institutions have the power to publicise their findings. This latter measure is also important in determining the influence of the institutions.

Regarding the ACM, there is no intervention from the Minister about acceptance of

[166] *コンプライアンス室設置規程* [Provision for Establishment of Compliance Office] (Japan) 17 March 2010, Ministry of Internal Affairs and Communications' Official Directive No 3 of H22.

[167] Interview with John McMillan, former Commonwealth and ACT Ombudsman (Canberra, 27 May 2011).

complaints. However, the handling of complaints may be affected by the will of the Minister or the results of negotiation with the other administrative offices that have equivalent authority to the MIC.[168] This is natural because the ACM is part of the hierarchy of bureaucracy.

In the same context, the ACM does not have any freedom to publicise its findings under its name.[169] Although quite limited information about statistics of its activities and best practices are available from its website, most of these are just brief abstracts making it difficult to know the details. Moreover, there is no official annual report.[170] Consequently, it is impossible to get a comprehensive picture of the ACM's daily practices, although the results of discussions at the advisory committees for systemic issues are publicised.[171] Reflecting this lack of publishing power, the ACM is little known among ordinary citizens.[172] Tsukamoto emphasised that it is the fate of an internal complaint-handling mechanism to have difficulty in raising its profile among the public. He proposed the introduction of a classical Ombudsman to address this, even if the efficacies of these institutions were not very different.[173]

Unlike an ordinary section of an administrative office, the Compliance Office is a

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168 Interview with 塚本壽雄 [Hisao Tsukamoto], former Director General, Administrative Evaluation Bureau at Ministry of Internal Affairs and Communications (Tokyo, 4 July 2011).

169 Ibid.

170 Ministry of Internal Affairs and Communications (JPN), *行政相談の実績 [Statistics about the Administrative Councillors Mechanism]* (1 June 2012) <http://www.soumu.go.jp/main_sosiki/hyouka/soudan_n/jituseki.html>; Ministry of Internal Affairs and Communications (JPN), *行政相談の解決事例 [Examples of Resolved Cases by the Administrative Councillors Mechanism]* (31 March 2012) <http://www.soumu.go.jp/main_sosiki/hyouka/soudan_n/kaiketujirei.html>.

171 Ministry of Internal Affairs and Communications (JPN), *行政苦情救済推進会議の議事概要と付議資料 [Summary of Minutes and Attached Documents of the Council on Promotion of Resolution of Complaints to the Executive]* (17 January 2012) <http://www.soumu.go.jp/main_sosiki/hyouka/soudan_n/giji.html>; Ministry of Internal Affairs and Communications (JPN), *行政苦情救済推進会議の検討結果を踏まえたあっせん事例 [Conciliation Cases which Reflected the Outcomes of the Council on Promotion of Resolution of Complaints to the Executive]* (17 January 2012) <http://www.soumu.go.jp/main_sosiki/hyouka/soudan_n/soudan_a.htm>.

172 Study Group on the Ombudsman Scheme at the Agency of Internal Affairs (JPN), above n 151, 49; Shiomi, above n 131, 32; Utsunomiya, above n 132, 301.

173 Interview with 塚本壽雄 [Hisao Tsukamoto], former Director General, Administrative Evaluation Bureau at Ministry of Internal Affairs and Communications (Tokyo, 4 July 2011).

part-time organisation. The head is a part-time position and the legal advisors are appointed from among barristers who do not belong to the Ministry. The other staff are administrative officers who also belong to other sections within the Ministry.[174] Partly due to the hybrid nature of the Office, and partly due to keeping a close relationship with the Minister, there has been no intervention from the Minister in the Office's operations.[175]

In contrast to the ACM's case, the publication of findings by the Compliance Office is the obligation of the Minister.[176] In practice, on behalf of the Minister, the head occasionally holds press conferences and publicises the Office's findings. This is possible because of daily close communications between the Office and the Minister.[177] Detailed records are also available from the Office's website.[178] This openness makes the Office influential, especially in the era of the internet. For instance, in April 2011, when a section of the MIC announced confusing information regarding restrictions on freedom of speech via the internet, the Office immediately corrected it.[179] Through this case, the profile of the Office was suddenly raised.[180]

Comparing the impartiality of the operations of the two institutions with the

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174 *コンプライアンス室設置規程* [Provision for Establishment of Compliance Office] (Japan) 17 March 2010, Ministry of Internal Affairs and Communications' Official Directive No 3 of H22, rr 4–5.

175 Interview with 郷原信郎 [Nobuo Gohara], Head, Compliance Office at Ministry of Internal Affairs and Communications (Tokyo, 5 July 2011).

176 *総務省についての法令違反行為等に関する通報の処理等に関する訓令* [Official Directive on Handling Procedures of Complaints on Compliance Matters at the Ministry of Internal Affairs and Communications] (Japan) 17 March 2010, Ministry of Internal Affairs and Communications' Official Directive No 4 of H22, r 12.

177 Interview with 郷原信郎 [Nobuo Gohara], Head, Compliance Office at Ministry of Internal Affairs and Communications (Tokyo, 5 July 2011).

178 Ministry of Internal Affairs and Communications (JPN), *公益通報者保護・コンプライアンス [Whistleblower Protection and Compliance]* (11 May 2012) <http://www.soumu.go.jp/menu_sinsei/koekitsuho/index.html>.

179 郷原信郎 [Nobuo Gohara], Head, Compliance Office at the Ministry of Internal Affairs and Communications (JPN), '「東日本大震災に係るインターネット上の流言飛語への適切な対応に関する要請」について[Reminding about the MIC's 'Request for Taking Proper Action against Rumours on the Internet about the Disaster caused by the Giantic Earthquake that hit the Tohoku Region']' (Media Release, 8 April 2011).

180 See, eg, 前屋毅 [Tsuyoshi Maeya], *ネット狙い打ちの情報統制なのか？原口議員が「容認できない」とつぶやいた総務省要請 [Restriction of Freedom of Speech in the Internet?: The Request of the MIC, to which the Former Minister MP Haraguchi Tweeted Disapproval of It']* (16 May 2011) Japan Business Press <http://jbpress.ismedia.jp/articles/-/7686>.

Ombudsman, it is obvious that the ACM's impartiality is under the strong control of the Minister. In particular, the lack of power to publicise findings makes it impossible to regard the ACM as the equivalent of the Ombudsman. Conversely, the Compliance Office has some impartiality in operation, and its power to publicise findings enhances the influence of the Office and raises public awareness of the Office.

In summary, the Compliance Office has more potential to substitute for the Ombudsman than does the ACM. However, it should be kept in mind that the Office has several shortages and serious problems in its institutional independence. In actuality, the legal basis of the Office is the ministerial directive, which can be amended at the discretion of the Minister.[181] This means that there is a danger that the Office might be abolished by a change of Minister. Considering the frequency with which Ministers change in Japan, the Office should not be considered legally secure. Therefore, the Compliance Office, the ACM and a classical Ombudsman are compatible institutions.

7.3.4 Cultural issues

The remaining major counter-argument against the introduction of a classical Ombudsman in Japan is concerns about the cultural aspect. In 1988, Hiramatsu listed cultural obstacles to introducing a classical Ombudsman, based on analysis of the nature of the traditional consensus-based decision making in Japan.[182] His argument is well organised and effectively explains the structure and functionality of the executive state, which was not well recognised at the time of his writing. However, the obstacles he listed remain unexamined. Are Hiramatsu arguments still meaningful after 25 years?

Hiramatsu argues that Japanese laws are not based on the realisation of justice. He

[181] *コンプライアンス室設置規程* [Provision for Establishment of Compliance Office] (Japan) 17 March 2010, Ministry of Internal Affairs and Communications' Official Directive No 3 of H22.

[182] Tsuyoshi Hiramatsu, 'Why an Ombudsman May Not Be Introduced in Japan: Japan's Unique Manner of Decision-Making and Complaint-Handling' (Ombudsman Occasional Paper # 43, International Ombudsman Institute, 1988).

explains that the most fundamental problem of the consensus-based decision making in Japan is that it serves the rule of power by compelling people to compromise in the interests of the influential. While such decision-making mechanisms prevent the realisation of justice, the immaturity of society allowed laws to develop as a tool of the privileged to control society. As such, Japanese laws have not played central roles in society. Instead, at the centre of society, the important decisions have been made through consensus-based decision making. He outlines the following structural problems caused by this situation. Firstly, due to the nature of the mechanism as serving the rule of power, an examination of objectivities is neglected and only information that supports the opinion of the influential is collected. Secondly, opinions of minorities are excluded. Thirdly, in an effort to compromise to form a majority, the responsibility for a decision is quite vague.[183]

Hiramatsu claims that the introduction of a classical Ombudsman is difficult because the rule of law and realisation of justice, which are the fundamental principles of the Ombudsman, contradict with the rule of power, which is the norm of Japanese society. The other important factor he identifies is that the concept of 'neutrality of administration' in Japan differs from that in the common law countries, where it means the non-biased examination of all relevant facts. In the Japanese context, the same term means the equal distance from stakeholders and being free from direct connection to individual conflicts of interest. Hiramatsu argues that this unique interpretation of 'neutrality' would prevent an Ombudsman from working as a mechanism of check and balance under the Diet. Further, he states that the control of the executive by the legislature is unlikely to be realised in Japan because the tradition of rule by dominant majorities has been firmly maintained under the long-lasting rule of the Liberal

[183] Ibid, 3–4, 6–9.

Democratic Party since 1955. Therefore, it is unlikely that Japanese society can be released from the yoke of the traditional decision-making mechanism.[184]

Hiramatsu's analysis of the structure of power in Japan is historically accurate and effective. His analysis explains why the Japanese government has made a series of irrational decisions concerning the TEPCO Nuclear Disaster. However, his argument regarding the difficulty of introducing a classical Ombudsman, based on the idea that the rule of power in Japan would not be threatened, is no longer valid. The 25 years since his writing have seen a fundamental social change. The critical factor was the end of the Cold War era, which evoked the collapse of formal and *de facto* one-party systems all over the world and encouraged the infiltration of democracy, including into Japan. Democracy's impact is symbolically marked by the first change of government by election in Japan, in 2009. This change reflected the disillusionment with the legitimacy of the traditional rule of power, the desire for the establishment of the rule of law, and the public's move towards democracy.

The TEPCO Nuclear Disaster has been a catalyst for the rise of a movement to establish true democracy in Japan. As detailed in Subsection 5.6.3, in December 2011, the very first institution with statutory mandated investigatory powers, attached to the legislative branch in Japan, was established.[185] Through its inquisitorial process, which was opened to the world, and its final report, the NAIIC revealed that the foundation of the rule of power in Japan is the presumption of absolute reliance on the administrative branch, which is the underlying theme of Japanese jurisprudence in administrative law. The NAIIC also called on the public to establish a firm basis of the rule of law to prevent

184 Ibid, 16–17, 20–1.

185 *東京電力福島原子力発電所事故調査委員会法* [Law on the Tokyo Electric Power Company's Fukushima Nuclear Power Plant Accident Independent Investigation Commission at the National Diet] (Japan) 7 October 2011, Law No 112 of H23; National Diet of Japan Fukushima Nuclear Accident Independent Investigation Commission, *About the Commission* (16 January 2012) National Diet of Japan <http://www.naiic.jp/en/about/>.

a repetition of the tragedy of the TEPCO Nuclear Disaster.[186] Consequently, the public has been enlightened. Now, it is obvious to everyone that, to build the foundation of the rule of law, absolute reliance on the administrative branch should be renounced. As such, the cultural obstacles Hiramatsu listed no longer have a firm basis in Japanese governance.

7.3.5 Feasibility of introducing a classical Ombudsman

In the previous subsections, the arguments opposing the introduction of a classical Ombudsman in Japan were shown to lack rationality in the current Japanese context. The remaining obstacles are practical ones, namely, obstacles to the passage of an Ombudsman law, and obstacles for institutional settings. This section examines these remaining obstacles, and discusses the feasibility of introducing a classical Ombudsman in Japan.

Remaining obstacles

The enactment of an Ombudsman law depends on political will. Thus, for successful legislation, it is necessary not only to acquire public support but also to meet the objections of potential opponents. For the former, the largest problem is that in Japan the classical Ombudsman's profile is relatively low. The interviewees in the field research who were not Ombudsman experts lacked detailed knowledge on the role and functionality of the classical Ombudsman. Among ordinary citizens, this ratio would be lower. Thus, there is a need to raise awareness of the concept of the classical Ombudsman.[187] The confusion over the title 'Ombudsman', which was discussed in

[186] National Diet of Japan Fukushima Nuclear Accident Independent Investigation Commission, *Video (Live・Archives)* (5 July 2012) National Diet of Japan <http://www.naiic.jp/en/video/>; National Diet of Japan Fukushima Nuclear Accident Independent Investigation Commission (NAIIC) (JPN), above n 124, 5–6, 630–9.

[187] Interview with 大久保規子 [Noriko Okubo], Professor, Osaka University Graduate School of Law and Politics (Osaka, 7 July 2011); Interview with MP 田島一成 [Issei Tajima], former Vice Environmental Minister (Tokyo, 26 July 2011).

Section 5.6, also needs to be resolved.[188] In regards to convincing opponents, administrative offices, including the ACM and some MPs, remain likely to resist; they are afraid that the creation of a classical Ombudsman could reduce their competencies and change the status quo. This group needs careful convincing.[189] Tsukamoto highlighted that, compared with the past, the resistance from bureaucrats has weakened because they have come to understand the merit of having a classical Ombudsman in terms of reducing the burden of their accountability at the Diet. He also explained that the ACM's primary concern is dissolution of the entire existing mechanism. Therefore, if allowed to be compatible with the Ombudsman, this resistance would be diminished.[190] It is noteworthy that Shiraiwa did not reject the creation of a specialised Ombudsman by statute, if it would not overtake the entire jurisdiction of the ACM.[191]

How to disseminate the concept of the classical Ombudsman among the public is crucial since — if the idea acquires support from the public — opposition will dissipate.[192] There are two broad approaches to achieving this. One is to publicise a clear blueprint for the introduction in the context of a fundamental reform to catch up with the global trend of democracy, and to persuade others based on this design.[193] Although this

188 Interview with 園部逸夫 [Itsuo Sonobe], former Supreme Court Judge (Tokyo, 22 July 2011); Interview with 外山公美 [Kimiyoshi Toyama], Professor, Nihon University Faculty of Law (Tokyo, 26 July 2011).

189 Interview with 園部逸夫 [Itsuo Sonobe], former Supreme Court Judge (Tokyo, 22 July 2011); Interview with 外山公美 [Kimiyoshi Toyama], Professor, Nihon University Faculty of Law (Tokyo, 26 July 2011); Interview with 南部義典 [Yoshinori Nanbu], Secretariat, MP study group on the Parliamentary Ombudsman (Tokyo, 29 July 2011); Interview with 郷原信郎 [Nobuo Gohara], Head, Compliance Office at Ministry of Internal Affairs and Communications (Tokyo, 5 July 2011); Interview with 六車明 [Akira Rokusha], former Examiner, Environmental Dispute Coordination Commission / former Judge (Tokyo, 14 July 2011); Interview with MP 田島一成 [Issei Tajima], former Vice Environmental Minister (Tokyo, 26 July 2011); Interview with 白岩俊 [Suguru Shiraiwa], Director, Division of Administrative Counselling Mechanism at Ministry of Internal Affairs and Communications (Tokyo, 11 July 2011).

190 Interview with 塚本壽雄 [Hisao Tsukamoto], former Director General, Administrative Evaluation Bureau at Ministry of Internal Affairs and Communications (Tokyo, 4 July 2011).

191 Interview with 白岩俊 [Suguru Shiraiwa], Director, Division of Administrative Counselling Mechanism at Ministry of Internal Affairs and Communications (Tokyo, 11 July 2011).

192 Interview with 大久保規子 [Noriko Okubo], Professor, Osaka University Graduate School of Law and Politics (Osaka, 7 July 2011).

193 Interview with 園部逸夫 [Itsuo Sonobe], former Supreme Court Judge (Tokyo, 22 July 2011); Interview with 塚本壽雄 [Hisao Tsukamoto], former Director General, Administrative Evaluation Bureau at Ministry of Internal Affairs and Communications (Tokyo, 4 July 2011); Interview with 外山公美 [Kimiyoshi Toyama], Professor, Nihon University Faculty of Law (Tokyo, 26 July 2011); Interview with 南部義典 [Yoshinori Nanbu], Secretariat, MP study group on the Parliamentary Ombudsman

approach seems the most rational, the custom of debate is lacking in Japan. This means that decision-makers tend to take criticism as a personal attack, pushing them to take a narrow-minded and biased view.[194] The other approach is to launch a pilot project in a small area and build up sufficient achievements to persuade opponents of the desirability of formal introduction on a broader scale.[195] The successes of the Compliance Office and the NAIIC make it easier to take this line.

Regarding the technical obstacles for the institutional settings, the main issues are problems of personnel management. Significantly, due to the narrow career path in Japan, it is difficult to find candidates who are qualified for the office, have a wide knowledge in administrative law, enough experience in administrative dispute resolution, are well known in society and have not been captured by the bureaucracy.[196] The result is that, at the time of the field research, the only highly supported candidate was Sonobe. At 82 years of age, finding his successor will be a problem in the near future.[197] In light of this inflexible public servant staffing system, a shortage of candidates for staff working for the Ombudsman also needs to be considered.[198] However, this concern was proven groundless by the NAIIC, which appointed most of its own staff from among non-public servants, with the exception of some parliamentary clerks.[199]

(Tokyo, 29 July 2011).

194 Interview with 園部逸夫 [Itsuo Sonobe], former Supreme Court Judge (Tokyo, 22 July 2011).

195 Interview with 郷原信郎 [Nobuo Gohara], Head, Compliance Office at Ministry of Internal Affairs and Communications (Tokyo, 5 July 2011); Interview with 六車明 [Akira Rokusha], former Examiner, Environmental Dispute Coordination Commission / former Judge (Tokyo, 14 July 2011).

196 Interview with 園部逸夫 [Itsuo Sonobe], former Supreme Court Judge (Tokyo, 22 July 2011).

197 Interview with 外山公美 [Kimiyoshi Toyama], Professor, Nihon University Faculty of Law (Tokyo, 26 July 2011); Interview with 園部逸夫 [Itsuo Sonobe], former Supreme Court Judge (Tokyo, 22 July 2011).

198 Interview with 外山公美 [Kimiyoshi Toyama], Professor, Nihon University Faculty of Law (Tokyo, 26 July 2011); Interview with Anonymous interviewee, Office of the Appeal Committee on Compensation of Health Damage by Environmental Contamination (Tokyo, 6 July 2011).

199 *東京電力福島原子力発電所事故調査委員会法* [Law on the Tokyo Electric Power Company's Fukushima Nuclear Power Plant Accident Independent Investigation Commission at the National Diet] (Japan) 7 October 2011, Law No 112 of H23, art 9; 塩崎恭久 [Yasuhisa Shiozaki], *国会原発事故調査委員会：立法府からの挑戦状 [Parliamentary Investigation Commission on Tokyo Electric Power Company's Fukushima Nuclear Power Plant Accident: The Legislature's Challenge to the Bureaucracy]* (東京プレスクラブ [Tokyo Press Club], 2011), 119.

Feasibility of introduction

Although practical problems exist, these can be resolved. The work of the NAIIC in particular has dramatically reduced the practical obstacles to the introduction of a classical Ombudsman in Japan. Before the NAIIC, it was quite difficult to have a concrete blueprint and image for the institutional settings of a truly independent officer of the Parliament in Japan.[200] More importantly, the NAIIC has clarified the necessity of enhancing the Diet's function of promoting executive accountability. As seen in the previous subsections, no other obstacles remain. Therefore, considering the strong demand for this kind of institution, the introduction of a classical Ombudsman is feasible.

7.4 Introduction of an Environmental Ombudsman

Building on the findings of the previous sections, which revealed that the introduction of a classical Ombudsman in Japan is both feasible and necessary to improve executive transparency and accountability in the environmental field, this section examines the institutional settings of Ombudsmen to determine which is the most suitable for Japan. Subsection 7.4.1 assesses the nature of the Ombudsman institution to be introduced, such as the compatibility of the general and Environmental Ombudsmen. Subsection 7.4.2 examines which Ombudsman institution would be the most suitable design to be introduced, focusing on identity and capacity. Finally, Subsection 7.4.3 concludes the thesis.

7.4.1 Nature of the Ombudsman institution to be introduced

When considering the nature of the Ombudsman institution to be introduced in Japan,

[200] Interview with 吉野隆二郎 [Ryujiro Yoshino], Barrister, 'Revive Ariake Sea!' Case (Chikushi, 18 July 2011); Interview with 魚住昭三 [Shozo Uozumi], Barrister, 'Boleophthalmus pectinirostris' and 'Revive Ariake Sea!' Cases (Nagasaki, 19 July 2011).

consideration must be given to whether it should be an Environmental Ombudsman, as distinct from a general Ombudsman. Further, it needs to be determined whether a classical Ombudsman model should be applied for the new institution in relation to its independence.

Establishment of an Environmental Ombudsman

Regarding the compatibility of general and Environmental Ombudsmen in Japan, there is a risk that the large population of the country and the corresponding volume of complaints, complexity of the environmental disputes and requirements for specific expertise to resolve environmental disputes would burden a general Ombudsman such that it would not function properly. The current lack of a classical Ombudsman in Japan already accounts for a number of administrative problems other than environmental issues that require the intervention of the general Ombudsman. For instance, recently, corruption within the Public Prosecutor's Office has received attention.[201] It is obvious that such issues should be handled by a general Ombudsman with high priority.[202] Thus, from the viewpoint of capacity, it is better to separate an Environmental Ombudsman from a general Ombudsman.

Indeed, the majority of stakeholders who acknowledge the necessity of introducing a classical Ombudsman in Japan are supportive of establishing both institutions.[203] The

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[201] 郷原信郎 [Nobuo Gohara], *組織の思考が止まるとき：「法令遵守」から「ルールの創造」へ [When Organisation Stops Thinking: From 'Blindly following the Texts of Rules' to 'Creation of Rules']* (毎日新聞社 [Mainich Shinbun Sha], 2011), 70–80; 郷原信郎 [Nobuo Gohara], *「正義」を失った検察の今後 [Future of the Public Prosecutors Office that Has Lost its 'Justice']* (15 July 2012) 郷原信郎が斬る [Nobuo Gohara's Critics] <http://nobuogohara.wordpress.com/2012/07/15/%E3%80%8C%E6%AD%A3%E7%BE%A9%E3%80%8D%E3%82%92%E5%A4%B1%E3%81%A3%E3%81%9F%E6%A4%9C%E5%AF%9F%E3%81%AE%E4%BB%8A%E5%BE%8C/>.

[202] Supervision of the Public Prosecutors is a traditional jurisdiction of the Swedish Ombudsman, and in many countries, at least the administration of Public Prosecutors is included in the jurisdiction of the Ombudsman. See, eg, Sten Rudholm, 'Sweden's Guardians of the Law: The Chancellor of Justice' in Donald Cameron Rowat (ed), *The Ombudsman: Citizen's Defender* (Allen and Unwin, 2nd ed, 1968) 17, 24–6; *Administrative Directives for the Secretariat of the Parliamentary Ombudsmen* (SWE) 2012; Gabriele Kucsko-Stadlmayer, 'The Legal Structure of Ombudsman-Institutions in Europe: Legal Comparative Analysis' in Gabriele Kucsko-Stadlmayer (ed), *European Ombudsman-Institutions: A comparative legal analysis regarding the multifaceted realisation of an idea* (Springer, 2008) 1, 30.

[203] Interview with 園部逸夫 [Itsuo Sonobe], former Supreme Court Judge (Tokyo, 22 July 2011); Interview

establishment of a separate Environmental Ombudsman is thought to be desirable for administrative control in the environmental field.[204] For example, Tsukamoto emphasised that, by separating these institutions, it becomes clear to the bureaucrats that the Ombudsman's eye is on the environmental field. In this respect, it is an option that the same person could occupy the positions of incumbents of the two institutions, as is typical at the Australian Commonwealth level.[205]

However, some stakeholders worry about the practical difficulty of developing the firm will of the government to introduce an Environmental Ombudsman because governmental priorities have usually been economics, not the environment.[206] It is true that public awareness on this issue has been low and it would be necessity to develop enough public support.[207] In this regard, Okubo assumed that pressure from international society would be effective to raise public awareness.[208] In contrast, Sonobe expected that the creation of an Environmental Ombudsman itself would raise public awareness.[209] Sonobe's judgment appears to be correct. As mentioned in Subsection 7.2.4, the activities of the NAIIC raised public awareness on this issue. Meanwhile, the success of the NAIIC

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with 塚本壽雄 [Hisao Tsukamoto], former Director General, Administrative Evaluation Bureau at Ministry of Internal Affairs and Communications (Tokyo, 4 July 2011); Interview with 六車明 [Akira Rokusha], former Examiner, Environmental Dispute Coordination Commission / former Judge (Tokyo, 14 July 2011); Interview with 大久保規子 [Noriko Okubo], Professor, Osaka University Graduate School of Law and Politics (Osaka, 7 July 2011); Interview with MP 森山浩行 [Hiroyuki Moriyama], Democratic Party, House of Representatives (Tokyo, 29 July 2011); Interview with 吉野隆二郎 [Ryujiro Yoshino], Barrister, 'Revive Ariake Sea!' Case (Chikushi, 18 July 2011); Interview with 魚住昭三 [Shozo Uozumi], Barrister, 'Boleophthalmus pectinirostris' and 'Revive Ariake Sea!' Cases (Nagasaki, 19 July 2011); Interview with 石川優貴 [Yuki Ishiwaka], Clerk, Committee on Promotion of Environmental Autonomy at Shiga Prefecture (Otsu, 12 July 2011); Interview with Anonymous interviewee, Office of the Appeal Committee on Compensation of Health Damage by Environmental Contamination (Tokyo, 6 July 2011).

204 Interview with 園部逸夫 [Itsuo Sonobe], former Supreme Court Judge (Tokyo, 22 July 2011); Interview with 塚本壽雄 [Hisao Tsukamoto], former Director General, Administrative Evaluation Bureau at Ministry of Internal Affairs and Communications (Tokyo, 4 July 2011).

205 Interview with 塚本壽雄 [Hisao Tsukamoto], former Director General, Administrative Evaluation Bureau at Ministry of Internal Affairs and Communications (Tokyo, 4 July 2011).

206 Interview with 吉野隆二郎 [Ryujiro Yoshino], Barrister, 'Revive Ariake Sea!' Case (Chikushi, 18 July 2011); Interview with Anonymous interviewee, Office of the Appeal Committee on Compensation of Health Damage by Environmental Contamination (Tokyo, 6 July 2011).

207 Interview with 大久保規子 [Noriko Okubo], Professor, Osaka University Graduate School of Law and Politics (Osaka, 7 July 2011); Interview with 六車明 [Akira Rokusha], former Examiner, Environmental Dispute Coordination Commission / former Judge (Tokyo, 14 July 2011).

208 Interview with 大久保規子 [Noriko Okubo], Professor, Osaka University Graduate School of Law and Politics (Osaka, 7 July 2011).

209 Interview with 園部逸夫 [Itsuo Sonobe], former Supreme Court Judge (Tokyo, 22 July 2011).

raised the question of why an Environmental Ombudsman is necessary, instead of a single issue Investigatory Commission at the Diet, such as the NAIIC. The answer is that there is a demand for a generalist institution to improve administrative law accountability in the environmental field; a single issue institution cannot cope with this task. Therefore, the introduction of an Environmental Ombudsman is necessary and feasible.

Independence of the Environmental Ombudsman

The next question is whether the Environmental Ombudsman to be introduced in Japan should be in the model of the classical Ombudsman. The key issue here is which model of Ombudsman is most appropriate for securing independence and accountability. In this regard, as seen in Subsection 7.4.1, the experiences in the jurisdictions with existing Environmental Ombudsmen show that the executive Ombudsman model is less preferable to the classical Ombudsman model. The only institution that applies the executive Ombudsman model is the Commissioner for Sustainability and Environment (CSE) in the ACT. Similarly, the Japanese municipal Ombudsmen also apply the executive Ombudsman model. However, the nature of their independence has qualitative differences. As detailed in Subsection 6.3.3, the CSE secures certain operational independence from the government. Conversely, as detailed in Subsection 5.6.1, the Japanese municipal Ombudsmen have difficulties in securing the same level of operational independence. Thus, it seems that the executive Ombudsman model is even less preferable. In actuality, this results in the low efficacy of municipal Ombudsmen, which imparts a bad image to some stakeholders and members of the public.[210]

According to Ishikawa, the disadvantages of an internal review mechanism (such as the CPEA, as described in Subsection 5.6.3) can be exemplified by the fact that the lack

[210] Interview with 大久保規子 [Noriko Okubo], Professor, Osaka University Graduate School of Law and Politics (Osaka, 7 July 2011).

of independence makes the exercise of investigatory power difficult. In the case of the CPEA, staff of the Committee are also lifelong employees of the Prefecture, so an officer belonging to the section to be investigated could be tomorrow's boss. This could affect the impartiality of the office's operation. On the other hand, he noted that one of the advantages of an internal merits review is that public officers know how other public servants hide information, which would help the Ombudsman's investigation.[211] However, this advantage would also advocate in favour of the classical Ombudsman, which appoints former public servants as staff. Further, as seen in Subsections 5.6.1, 5.6.3 and 7.3.3, a problem common to all internal review mechanisms in Japan is that they do not have the power to launch self-initiated investigations. Thus, it is desirable for the Environmental Ombudsman to be introduced into Japan, according to the model of the classical Ombudsman.

7.4.2 Institutional settings of the Environmental Ombudsman

The next question to consider is what design would be suitable for an Environmental Ombudsman in Japan. This subsection seeks the most appropriate identity and competences for the office. In this process, the institutional settings of existing models are referred to. Further, once a suitable model is presented, this section assesses the efficacy of the model, by measuring its potential influence in past cases.

Identity of the Environmental Ombudsman

As detailed in Subsection 6.3.1, identity is the keystone of the institutional setting of the Environmental Ombudsman. Two axes in particular have a significant influence in determining the office's identity. One is whether the concept of the office includes the protection of interests of future generations or focuses on the resolution of current

[211] Interview with 石川優貴 [Yuki Ishiwaka], Clerk, Committee on Promotion of Environmental Autonomy at Shiga Prefecture (Otsu, 12 July 2011).

environmental issues. The other is whether the primary role of the office is dispute resolution, advocacy or both. Thus, it is necessary to examine which combination is the most suitable in the design of an Environmental Ombudsman for Japan.

Regarding the concept of the office, it should be remembered that, as detailed in Section 3.2, Japan has a long history in which the non-application of the precautionary principle has enlarged environmental damage. In the long run, this also means that decision makers have ignored the interests of future generations. However, after the TEPCO Nuclear Disaster, it is obvious that decision makers will not be allowed to repeat the same mistakes. Based on this recognition, Ishikawa highlighted that the ability of the Environmental Ombudsman to pursue long-term value is essential to resolving most environmental problems.[212] Thus, the concept of the new office should include the protection of the interests of future generations.

In relation to this, the primary role of the office needs to include the advocacy function because future generations require their agent in the present. Further, the necessity of dispute resolution function needs to be assessed. As seen in Section 7.2, the review mechanisms in Japan suffer from low efficacy and shortages in capacity. This means that the creation of an Environmental Ombudsman is expected to fill the gaps in the current framework. Therefore, both dispute resolution and advocacy should be the primary roles of the new office.

Competence of the Environmental Ombudsman

The most suitable identity for the Japanese Environmental Ombudsman, detailed above, is identical to that of the PCFG in Hungary. Thus, it is rational that the other institutional settings should follow the PCFG model. Indeed, from the viewpoint that the

[212] Ibid.

proper resources, budget and powers of a classical Ombudsman should be bestowed on the office, many aspects of the institutional settings of the PCFG are applicable to Japan.[213] However, as highlighted in Section 7.1, it is necessary to optimise some aspects of this model to fit the Japanese context.

Firstly, in the field research, some stakeholders made concrete proposals on the functions of the Environmental Ombudsman suitable to Japan. All of them relate to the function of dispute resolution. As mentioned in 7.2.2, Sonobe proposed that the outcomes of the office's investigations should bind the examination on evidence by the court, to realise effective control on administrative discretion. Rokusha advocated for the office to conduct policy review of court practices based on detailed examination of judgments, in cooperation with the Secretariat of the Supreme Court, which would contribute to improving the quality of environmental judgments.[214] These are brand new elements that cannot be found in the PCFG model, and seem to be unique as powers for a classical Ombudsman. However, keeping in mind the low quality of judicial review of administrative discretion, as detailed in Subsection 3.1.5, these proposals from former judges cannot be lightly dismissed. Another suggestion was Tsukamoto's recommendation that the office be granted the power to issue a tentative administrative injunction to prevent irreversible environmental damage.[215] As seen in Subsection 5.5.2, this is one of the powers of the PCFG.

Secondly, there is a need to optimise the screening criteria of the Environmental Ombudsman. As detailed in Subsection 7.2.3, access to the court is quite limited in Japan. Thus, if directly applying the PCFG's criteria, which require final court judgment (see

[213] For instance, the PCFG's power to be involved in law reform process is one of the competences that the Japanese institutions, such as the EDCC, have wished to have but could not. See, Subsection 3.3.1.

[214] Interview with 六車明 [Akira Rokusha], former Examiner, Environmental Dispute Coordination Commission / former Judge (Tokyo, 14 July 2011).

[215] Interview with 塚本壽雄 [Hisao Tsukamoto], former Director General, Administrative Evaluation Bureau at Ministry of Internal Affairs and Communications (Tokyo, 4 July 2011).

Subsection 6.1.3), this would mean the *de facto* refusal of any remedy. The experience of the CPEA, which applied very rigid selection criteria, provides evidence of the legitimacy of this concern (see, Subsection 5.6.3). To expand public access to justice, and if aiming at having the Environmental Ombudsman filter cases to reduce the already heavy burden of the court, the last resort test should be omitted from the office's screening criteria.

Thirdly, there is the need to coordinate the Environmental Ombudsman's competence with other bodies.[216] In this regard, the power of the PCFG model to investigate the private sector overlaps with that of the Environmental Dispute Coordination Commission (see Subsection 3.3.3). This power is therefore unnecessary for the Japanese Environmental Ombudsman. Rather, the office should concentrate on administrative disputes.

Finally, the size of the office needs to be considered. However, this is difficult without more data on the number of potential administrative environmental disputes. Upon launching, the office should have at least the same capacity as that of the PCFG.

Potential resolution of environmental disputes on decision-making processes

From the above discussion, a suitable model for the Japanese Environmental Ombudsman is revealed. Below a closer examination of the issue and the potential influence of the office on an actual case of the ISAKAN is undertaken. As detailed in Section 4.2, the final resolution of the ISAKAN case was brought about through a series of lawsuits. However, as discussed in Section 4.3, none of the existing review mechanisms fully examined the problems in the decision-making processes of the project, which was the central issue of the case. Further, the provision of the remedy was not

[216] Ibid; Interview with Anonymous interviewee, Office of the Appeal Committee on Compensation of Health Damage by Environmental Contamination (Tokyo, 6 July 2011); Interview with 白岩俊 [Suguru Shiraiwa], Director, Division of Administrative Counselling Mechanism at Ministry of Internal Affairs and Communications (Tokyo, 11 July 2011).

timely due to the rigid rules of *locus standi*. The focus here is on whether an Environmental Ombudsman could have solved these problems.

Yoshino considered that there have been at least three occasions on which the office could have intervened in poor decision-making processes prior to the commencement of lawsuits. The first was when the MAFF started the ISAKAN without rationality in 1982, the second was when the environmental assessment was improperly done in 1986, and the third was when the assessment was made for the damage on seaweed production in 2002.[217] By the nature of the Minister's decision, the intervention in 1982 might have been difficult. However, the other two opportunities could have been investigated by the office.

As Uozumi highlighted, one of the largest obstacles hindering proper public participation in the ISAKAN project was the manipulation of information by the MAFF. It is his view that if an Environmental Ombudsman had contributed to information disclosure earlier, the poor decision making caused by insufficient public participation would have been prevented.[218] As detailed in Subsection 6.1.1, information disclosure is one of the strong points of the office. If the Environmental Ombudsman had disclosed the fact that the Isahaya Bay tidal flat did not cause the 1957 flood before 1986 (see Subsection 4.1.2), the fishers would have never agreed with the promotion of the project in 1987.

An Environmental Ombudsman could have issued a suspension order on the segregation of the Isahaya Bay in 1997 that caused the irreversible environmental damages. Although other methods could also have been used to secure a more desirable

[217] Interview with 吉野隆二郎 [Ryujiro Yoshino], Barrister, 'Revive Ariake Sea!' Case (Chikushi, 18 July 2011).
[218] Interview with 魚住昭三 [Shozo Uozumi], Barrister, 'Boleophthalmus pectinirostris' and 'Revive Ariake Sea!' Cases (Nagasaki, 19 July 2011).

outcome, those listed here show that an Environmental Ombudsman has the ability to address problems of decision-making processes from an early stage and could prevent serious environmental damage if implemented. Yoshino also expected the Environmental Ombudsman's check on national public construction works to be significant in reducing environmental damages.[219] This would also be achieved by the office.

7.4.3 Conclusion

This thesis has examined whether the introduction of an Environmental Ombudsman is feasible and effective for improving environmental decision-making processes in Japan. To achieve this goal, three research questions have been addressed. These are namely; 'what is an Environmental Ombudsman?', 'how can an Environmental Ombudsman improve administrative decision making?', and 'Is the introduction of an Environmental Ombudsman feasible for Japan?'

Regarding the first research question, as seen in Section 1.2, the conventional understating of an Environmental Ombudsman was mainly based on analysis of the New Zealand mode. This thesis identified a more general and detailed definition of this institution through the examination of existing Environmental Ombudsmen in the ACT, New Zealand and Hungary. The analysis of this thesis revealed that an Environmental Ombudsman has the capacity and certain expertise to handle complaints on administrative environmental decisions. Also this thesis clarified that the general and Environmental Ombudsmen are fully compatible. Turning to institutional settings, this thesis highlighted that there are two axes that have a significant influence in determining the office's identity. One is whether the concept of the office includes the protection of interests of future generations or focuses on the resolution of current environmental

[219] Interview with 吉野隆二郎 [Ryujiro Yoshino], Barrister, 'Revive Ariake Sea!' Case (Chikushi, 18 July 2011).

issues. The other is whether the primary role of the office is dispute resolution, advocacy or both. As shown, these factors are not fixed, and can be optimised according to the situation in each jurisdiction. However, the independence of the office, which is another key element of institutional settings, should be strong enough to achieve its objectives.

To answer the second research question, it was necessary to first identify how to ensure sound administrative environmental decision making. Focusing on the relationship between a sound process, a sound decision and a sound outcome, this thesis clarified the significance of reduction of maladministration to achieve sound administrative environmental decision making. In the wider administrative law context, it has been well recognised that the promotion of executive transparency and accountability is crucial to reduce maladministration. Theoretically it was expected that an Environmental Ombudsman would contribute to the reduction of maladministration as a mechanism for ensuring administrative law accountability. Through the examination of the functions and practices of existing Environmental Ombudsmen in the three jurisdictions, this thesis highlighted that the Environmental Ombudsman is highly effective not only in resolving disputes on access to information and public participation, but also in reducing maladministration by resolving systemic problems. Importantly, this thesis also revealed that such functionality of the Environmental Ombudsman does not overlap with those of merits review and judicial review, thus these institutions complement each other within the framework of promoting executive transparency and accountability.

Before answering the third research question, this thesis examined the efficacy of the existing framework of promoting executive transparency and accountability in Japan. The analysis of both doctrinal and empirical data not only on the structure of the framework, but also on actual cases, such as the TEPCO Nuclear Disaster and the

ISAKAN, clearly presented low efficacy and shortages in capacity of the existing framework. This demonstrates that there is a need and a niche for an Environmental Ombudsman. Considering it significant that Japan is new to the classical Ombudsman institution, this thesis, then assessed the feasibility of introducing a classical Ombudsman in Japan. The assessment of obstacles, which had been proclaimed since the 1970s, identified that the arguments opposing the introduction of a classical Ombudsman have lost their validity. In conjunction with this, it is significant that the empirical research of this thesis revealed a strong need for introducing a classical Ombudsman to cope with problems in the environmental field. Further, this thesis clarified that, in Japan, an Environmental Ombudsman should be distinct from a general Ombudsman because of the anticipated large numbers of applications from the large population to the latter institution, and the merits of the former institution's expertise to cope with highly complicated environmental issues.

Through the comprehensive analysis and arguments of this thesis, it has been shown that the introduction of an Environmental Ombudsman in Japan is feasible, and that this institution would help resolve the current flaws in the administrative environmental decision-making processes by enhancing executive transparency and accountability.

The recommended design of a suitable Environmental Ombudsman for Japan is as follows. Firstly, regarding the identity of the institution, the concept of the office should include the protection of the interests of future generations and the resolution of current environmental problems. The primary roles should be both dispute resolution and advocacy. Secondly, while basically following the institutional settings of the PCFG in Hungary, the Environmental Ombudsman should also optimise some aspects of the model to suit the demands of the Japanese context. For example, support for the improvement of the court judgments, the widening of the screening criteria to permit easy

public access and a focus on administrative environmental problems — should be encouraged to flourish. Thirdly, the office must practice swift processing from an early stage in the decision-making processes.

If an Environmental Ombudsman is introduced in Japan, some details of its institutional setting will remain to be decided, such as the size of the office. However, the key attributes of the institution should comply with the model articulated in this thesis in consultation with key stakeholders. Finally, it must be emphasised that the introduction of an Environmental Ombudsman, as detailed above, will be an important milestone in the rebuilding of environmental governance in Japan after the TEPCO Nuclear Disaster.

Appendix 1: List of interviewees

Interviewees in the ACT

Name	Position as interviewee [Other positions, if any]	Date of interview	Place
Ms. Sarah Burrows	Senior Manager/ Commissioner for Sustainability and the Environment (CSE)	31.05.2011	Canberra
Professor John McMillan	Former ACT and Commonwealth Ombudsman (2003–2010) [Australian Information Commissioner (2010–)]	27.05.2011	Canberra
Ms. Linda Crebbin	General President/ ACT Civil and Administrative Tribunal	27.05.2011	Canberra
The Honourable Justice Richard Refshauge	Supreme Court of the ACT	30.05.2011	Canberra
Emeritus Professor Dennis Pearce	Administrative law expert/ Australian National University [Former ACT and Commonwealth Ombudsman (1988–1991)]	31.05.2011	Canberra
Professor Tim Bonyhady	Environmental law expert/ Australian National University	31.05.2011	Canberra
Mr. Ian Baird	Policy Officer/ ACT Department of the Environment, Climate Change, Energy and Water	30.05.2011	Canberra
Ms. Julia Pitts	Chair/ Environmental Defender's Office (ACT) [Former officer of the CSE]	30.05.2011	Canberra

Interviewees in New Zealand

Name	Position as interviewee [Other positions, if any]	Date of interview	Place
Ms. Sarah Clark	Office Manager/ Parliamentary Commissioner for the Environment (PCE)	09.06.2011	Wellington
Dr. J. Morgan Williams	Former Parliamentary Commissioner for the Environment (1997–2007)	10.06.2011	Wellington
Ms. Jenny Boshier	Former Deputy Commissioner (first and second Commissioners)/ PCE	10.06.2011	Wellington
Dr. David McGee	Ombudsman	08.06.2011	Wellington
Ms. Helen Beaumont	Environment Commissioner/ Environment Court of New Zealand [Former Deputy Commissioner / PCE (second Commissioner)]	13.06.2011	Wellington
Justice Craig Thompson	Principal Environment Judge/ Environment Court of New Zealand	13.06.2011	Wellington
The Honourable Justice John McGrath	Supreme Court of New Zealand	13.06.2011	Wellington
Professor Klaus Bosselmann	Environmental law expert/ Auckland University	28.05.2011	Canberra
Mr. Pavan Sharma	Clerk of the House of Representative/ Local Government and Environment Committee	08.06.2011	Wellington
Mr. David Wilson	Clerk of the House of Representative/ Officers of Parliament Committee	09.06.2011	Wellington

Interviewees in Hungary

Name	Position as interviewee [Other positions, if any]	Date of interview	Place
Dr. Sándor Fülöp	Parliamentary Commissioner for Future Generations (PCFG)	28.06.2011	Budapest
Dr. István Sárközy	Legal advisor/ PCFG	28.06.2011	Budapest
The Honourable Justice Dr. Barnabás Lenkovics	Former Ombudsman (2001–2007) [Constitutional Court (2007–)]	23.06.2011	Budapest
Dr. Botond Bitskey	Secretary General/ Constitutional Court	23.06.2011	Budapest
The Honourable Justice Dr. Péter Darák	Supreme Court of the Republic of Hungary	24.06.2011	Budapest
Justice Dr. Fruzsina Bögös	Metropolitan Court of Budapest	24.06.2011	Budapest
Professor Dr. Gyula Bándi	Environmental law expert/ Pázmány Péter Catholic University	27.06.2011	Budapest
MP. Dr. Benedek Jávor	Chair/ Sustainable Development Committee at the National Assembly of Hungary	24.06.2011	Budapest
Mr. Vajk Farkas	Lawyer/ Ministry of Public Administration and Justice	28.06.2011	Budapest
Dr. Csaba Kiss	Director/ Environmental Management and Law Association	22.06.2011	Budapest

Interviewees in Japan

Name	Position as interviewee [Other positions, if any]	Date of interview	Place
Mr. Suguru Shiraiwa	Director/ Division of Administrative Counselling Mechanism at Ministry of Internal Affairs and Communications	11.07.2011	Tokyo
Professor Hisao Tsukamoto	Former Director General/ Administrative Evaluation Bureau at Ministry of Internal Affairs and Communications (2000–2003) [Public management expert/ Waseda University]	04.07.2011	Tokyo
Professor Nobuo Gohara	Head/ Compliance Office at Ministry of Internal Affairs and Communications	05.07.2011	Tokyo
Anonymous interviewee	Appeal Committee on Compensation of Health Damage by Environmental Contamination	06.07.2011	Tokyo
Mr. Yuki Ishikawa	Clerk/ Committee on Promotion of Environmental Autonomy at Shiga Prefecture	12.07.2011	Otsu
Professor Dr. Itsuo Sonobe	Former Supreme Court Judge (1989–1999) :Former Judge (1970–1985) [Administrative law and Ombudsman expert]	22.07.2011	Tokyo
Professor Akira Rokusha	Former Examiner/ Environmental Dispute Coordination Commission (1998–1999) : Former Judge (1978–1998) [Environmental law expert/ Keio University]	14.07.2011	Tokyo
Professor Dr. Noriko Okubo	Environmental administrative law expert/ Osaka University [Member/ Examination Board on Information Disclosure and Privacy Protection]	07.07.2011	Osaka
Professor Dr. Kimiyoshi Toyama	Ombudsman expert/ Nihon University	26.07.2011	Tokyo
Mr. Yoshinori Nanbu	Secretariat/ MP study group on the classical Ombudsman	29.07.2011	Tokyo

Interviewees in Japan (continued)

Name	Position as interviewee [Other positions, if any]	Date of interview	Place
MP Mr. Issei Tajima	Member of the House of Representatives (Democratic Party) [Former Vice Environmental Minister (2009–2010)]	26.07.2011	Tokyo
MP Mr. Hiroyuki Moriyama	Member of the House of Representatives (Democratic Party)	29.07.2011	Tokyo
Mr. Ryujiro Yoshino	Barrister/ 'Revive Ariake Sea!' Case	18.07.2011	Chikushi
Mr. Shozo Uozumi	Barrister/ 'Boleophthalmus pectinirostris' and 'Revive Ariake Sea!' Cases	19.07.2011	Nagasaki

Appendix 2: List of interview questions

Questions for Environmental Ombudsmen

Code	*Interview Question (common)*
EO/01	Do you think your office improves the quality of environmental decision-making? Why/Why not?
EO/02/s	What has been the greatest success of your office in this area?
EO/02/f	Have there been any memorable failures and if so what lessons can be learned from them?
EO/03	Do you think your office effectively handles disputes regarding access to information and public participation in environmental decision-making? Why/Why not?
EO/04/a	What is the standard approach to handling complaints on such disputes (especially, planning case)?
EO/04/sw	What are the strengths/weaknesses of this approach?
EO/05/c	What are the criteria of your screening to decide investigate a complaint or not?
EO/05/d	Do you think the criteria regarding screening complaints cause difficulties in reviewing disputes on access to information and public participation in environmental decision-making? Why/Why not?
EO/06/p	Do you think the very existence of your office has reduced the number of environmental disputes? Why/Why not?
EO/06/s	Do you think the resolution of systemic problems by your office has reduced the number of environmental disputes? Why/Why not?
EO/07	Do you think there is a need to secure the resources available to your office, or to entrench the office itself? Why/Why not?
EO/08	What do you think are the strengths and weaknesses of your office in resolving environmental disputes compared with other mechanisms such as merits/ judicial review? Why?
EO/09	Do you think, as a system, collaboration with other administrative review mechanisms works well in improving the quality of environmental decision-making? Why/Why not?
EO/10	Do other accountability mechanisms, such as the auditor general, national archives, freedom of information law, Parliamentary Committees and media, effectively support the work of your office in enhancing the quality of environmental decision-making? Why/Why not?

EO/11	Do you have any advice/suggestions about the introduction of an Environmental Ombudsman/ General Ombudsman into other jurisdictions including Japan?
	Interview Question (specialised)
EO/12 /ACT	Do you think your office should belong to the Legislative Assembly? Why/Why not?
EO/13 /ACT	Do you find having a sort of ministerial intervention, such as infringement on independence or ability to function? Why/Why not?
EO/12 /NZ	Do you think your office's ombudsman function should be legislated? Why/Why not?
EO/12 /HUN	What do you think about the potential influence of new constitution to your institution?
EO/01 /JPN	N.Q.
EO/06 /JPN	Are you aware that in some other countries there is Environmental Ombudsman /Ombudsman as alternative administrative review mechanism in the environmental field? If so, what is your understanding of these institutions?
EO/07 /JPN	What do you think about the Environmental Ombudsman's strengths/weaknesses in handling disputes on access to information and on public participation in environmental decision-making?
EO/08 /JPN	Do you think if there were an Environmental Ombudsman / (national) Ombudsman in Japan, they could improve the quality of environmental decision-making? Why/Why not?
EO/11 /JPN	Do you think is there any need to introduce a national (full time) Environmental Ombudsman /Ombudsman in Japan? Why/Why not?
EO/12 /JPN	Do you think it is feasible to introduce the Environmental Ombudsman/Ombudsman in Japan? Why/Why not?

*In Japan, these questions were applied for the Committee on Promotion of Environmental Autonomy at Shiga Prefecture.

Questions for General Ombudsmen

Code	*Interview Question (common)*
GO/01	Do you think your office improves the quality of environmental decision-making processes? Why/Why not?
GO/02/s	What has been the greatest success of your office in this area?
GO/02/f	Have there been any memorable failures and if so what lessons can be learned from them?
GO/03	Do you think your office effectively handles disputes regarding access to information and public participation in environmental decision-making? Why/Why not?
GO/04/a	What is the standard approach to handling complaints on such disputes (especially, planning case)?
GO/04/sw	What are the strengths/weaknesses of this approach?
GO/05/c	What are the criteria of your screening to decide investigate a complaint or not?
GO/05/d	Do you think the criteria regarding screening complaints cause difficulties in reviewing disputes on access to information and public participation in environmental decision-making? Why/Why not?
GO/06/p	Do you think the very existence of your office has reduced the number of environmental disputes? Why/Why not?
GO/06/s	Do you think the resolution of systemic problems by your office has reduced the number of environmental disputes? Why/Why not?
GO/07	What do you think are the strengths and weaknesses of your office in resolving environmental disputes compared with other mechanisms such as merits/ judicial review? Why?
GO/08	What are the key differences between your office and the Environmental Ombudsman?
GO/09	Are you satisfied with division of functions between your office and the Environmental Ombudsman? Why/Why not?
GO/10	Do you think there is a need to secure the resources available to the Environmental Ombudsman, or to entrench the office itself? Why/Why not?
GO/11	Do you think, as a system, collaboration with other administrative review mechanisms works well in improving the quality of environmental decision-making? Why/Why not?

GO/12	Do other accountability mechanisms, such as the auditor general, national archives, freedom of information law, Parliamentary Committees and media, effectively support the work of your office in enhancing the quality of environmental decision-making? Why/Why not?
GO/13	Do you have any advice/suggestions on the introduction of an Environmental Ombudsman/ General Ombudsman into other jurisdictions including Japan?
	Interview Question (specialised)
GO/08/ HUN	From your viewpoint, what was the main purpose of creating a new specialised Environmental Ombudsman?
GO/14/ HUN	What do you think about the meaning of having Ombudsman in German style civil law system?

Questions for merits review and judicial review mechanisms

Code	*Interview Question (common)*
RM/01	Do you think your institution effectively handles disputes regarding access to information and public participation in environmental decision-making? Why/Why not?
RM/02/s	What has been the greatest success of your institution in this area?
RM/02/f	Have there been any memorable failures and if so what lessons can be learned from them?
RM/03/a	What is the standard approach to handling complaints on such disputes (especially, planning case)?
RM/03/sw	What are the strengths/weaknesses of this approach?
RM/04	What test does your institution apply to applicants in planning disputes to determine if they have standing? / Does an applicant have to show a high probability of damage?
RM/05	Do you think the rules regarding standing cause difficulties in reviewing disputes on access to information and public participation in environmental decision-making? Why/Why not?
RM/06	What is your understanding of the role of the Environmental Ombudsman and the Ombudsman as dispute resolution mechanisms in the environmental field?
RM/07	What do you regard as their strengths/weaknesses in dispute resolution compared with your institution?
RM/08	Do you think the Environmental Ombudsman/ Ombudsman effectively handles disputes on access to information and public participation in environmental decision-making? Why/Why not?
RM/09	Do you think, as a system, collaboration with other administrative review mechanisms works well in improving the quality of environmental decision-making? Why/Why not?
RM/10	Do other accountability mechanisms, such as the auditor general, national archives, freedom of information law, Parliamentary Committees and media, effectively support the work of your institution in enhancing the quality of environmental decision-making? Why/Why not?

Code	***Interview Question (specialised)***
RM/11/ HUN	What do you think about the potential influence of new constitution to your institution?
RM/06/ JPN	Are you aware that in some other countries there is Environmental Ombudsman /Ombudsman as alternative administrative review mechanism in the environmental field? If so, what is your understanding of these institutions?
RM/07/ JPN	What do you think about the Environmental Ombudsman's strengths/weaknesses in handling disputes on access to information and on public participation in environmental decision-making?
RM/08/ JPN	Do you think if there were an Environmental Ombudsman / (national) Ombudsman in Japan, they could improve the quality of environmental decision-making? Why/Why not?
RM/11/ JPN	Do you think is there any need to introduce a national (full time) Environmental Ombudsman /Ombudsman in Japan? Why/Why not?
RM/12/ JPN	Do you think it is feasible to introduce the Environmental Ombudsman/Ombudsman in Japan? Why/Why not?

Questions for other relevant stakeholders

Code	*Interview Question (common)*
SH/01	What is your understanding of the Environmental Ombudsman and the Ombudsman as dispute resolution mechanisms in environmental field?
SH/02	Do you think the Environmental Ombudsman/Ombudsman improves the quality of environmental decision-making? Why/Why not?
SH/03	Do you think the Environmental Ombudsman/Ombudsman effectively handles disputes on access to information and on public participation in environmental decision-making? Why/Why not?
SH/04	What do you think about their strength/weakness in handling environmental disputes (especially in planning cases)?
SH/05	Do you think there is a need to secure the resources available to the Environmental Ombudsman, or to entrench the office itself? Why/Why not?
SH/07	How do you evaluate the function of merits/judicial review institutions regarding disputes on access to information and public participation in environmental decision-making?
SH/08	Do you think the current administrative review mechanisms work well in improving the quality of environmental decision-making? Why/Why not?
SH/09	Do other accountability mechanisms, such as the auditor general, national archives, freedom of information law, Parliamentary Committees and media, effectively support the work of your office in enhancing the quality of environmental decision-making? Why/Why not?
SH/10	Do you have any advice/suggestions on the introduction of an Environmental Ombudsman/ General Ombudsman into other jurisdictions including Japan?
	Interview Question (specialised)
SH/06/ACT	Do you think that the Commissioner for Sustainability and Environment should be an organ of the Legislative Assembly? Why/Why not?
SH/06/NZ	Do you think that the Parliamentary Commissioner for the Environment's Ombudsman function should be legislated? Why/Why not?
SH/06/HUN	What do you think about the potential influence of new constitution to the PCFG?
SH/01/JPN/a	Do you think the "access to justice", which is a key pillar of the Aarhus Convention, is fully guaranteed in Japan? Why/Why not?
SH/01/JPN/b	Do you think is there any necessity of improving the quality of environmental governance from the mid to long term of view as a part of innovation of the governance after the first governmental change in 2009 and as a lesson learned from Fukushima Nuclear Disaster?

SH/01 /JPN/ c	How do you think about the possibility that the improvement of quality of compliance, which you are doing, results in the improvement of quality of administrative environmental decision-making?
SH/02 /JPN	Are you aware that in some other countries there is Environmental Ombudsman /Ombudsman as alternative administrative review mechanism in the environmental field? If so, what is your understanding of these institutions?
SH/03 /JPN	What do you think about the Environmental Ombudsman/ Ombudsman's strengths/weaknesses in handling disputes on access to information and public participation in environmental decision-making processes?
SH/04 /JPN	Do you think if there were an Environmental Ombudsman / (national) Ombudsman in Japan, they could improve the quality of environmental decision-making? Why/Why not?
SH/05 /JPN	What do you think about the possibility of the Environmental Ombudsman/Ombudsman in improving the quality of administrative environmental decision-making by entrenching and supporting the capacity of Parliamentary Committee on Administrative Review?
SH/06 /JPN	Do you think is there any need to introduce a national (full time) Environmental Ombudsman /Ombudsman in Japan? Why/Why not?
SH/10 /JPN	Do you think it is feasible to introduce an Environmental Ombudsman/Ombudsman in Japan? Why/Why not?

*These questions were applied for experts, MPs, governmental officials and parliamentary clerks.

Questions for complaint handling mechanisms

Code	***Interview Question (specialised)***
CH/01/d	What is the similarity and difference between your office and the Ombudsman?
CH/01/a	Isn't the separation of notification function from mediation process ineffective? Why/Why not?
CH/02/p	How do you deal with the lack of investigatory powers?
CH/02/i	How do you deal with the lack of independence?
CH/02/i2	Do you find having a sort of ministerial intervention, such as infringement on independence or ability to function? Why/Why not?
CH/03	Do you think your office effectively handles disputes on access to information and public participation in environmental decision-making? Why/Why not?
CH/04/s	What has been the greatest success of your office in this area?
CH/04/f	Have there been any memorable failures and if so what lessons can be learned from them?
CH/05/a	What is the standard approach to handling complaints on such disputes (especially, planning case)?
CH/05/sw	What are the strengths/weaknesses of this approach?
CH/06/c	What are the criteria of your screening to decide investigate a complaint or not?
CH/06/d	Do you think the criteria regarding screening complaints cause difficulties in reviewing disputes on access to information and public participation in environmental decision-making? Why/Why not?
CH/07	How do you divide jurisdiction and duties with the Environmental Dispute Coordination Commission (EDCC)?
CH/08	Do you think, as a system, collaboration with other administrative review mechanisms works well in improving the quality of environmental decision-making? Why/Why not?
CH/09	Do other accountability mechanisms, such as the auditor general, national archives, freedom of information law, Parliamentary Committees and media, effectively support the work of your office in enhancing the quality of environmental decision-making? Why/Why not?
CH/10	Are you aware that in some other countries there is Environmental Ombudsman /Ombudsman as alternative administrative review mechanism in the environmental field? If so, what is your understanding of these institutions?

CH/11	What do you think about the Environmental Ombudsman's strengths/weaknesses in handling disputes on access to information and on public participation in environmental decision-making?
CH/12	Do you think if there were the Environmental Ombudsman /Ombudsman, they could improve the quality of environmental decision-making? Why/Why not?
CH/13	Do you think is there any need to introduce an Environmental Ombudsman /Ombudsman in Japan? Why/Why not?
CH/14	Do you think it is feasible to introduce an Environmental Ombudsman/Ombudsman in Japan? Why/Why not?
CH/15-T	How do you evaluate the function of merits/judicial review institutions regarding disputes on access to information and public participation in environmental decision-making?

*These questions were only applied for Japanese complaint handling mechanisms.

Questions for potential users

Code	*Interview Question (specialised)*
PU/01	Do you think the EDCC effectively handles disputes on access to information and public participation in administrative environmental decision-making? Why/Why not?
PU/02	Do you think the judicial review mechanism effectively handles disputes on access to information and public participation in administrative environmental decision-making processes? Why/Why not?
PU/03	Did you feel that the test of standing makes it difficult for applicants to access to justice? Why/Why not?
PU/04	Do you think the current administrative review mechanisms work well in improving the quality of environmental decision-making? Why/Why not?
PU/05	Do other accountability mechanisms, such as the auditor general, national archives, freedom of information law, Parliamentary Committees and media, effectively enhancing the quality of environmental decision-making? Why/Why not?
PU/06	Are you aware that in some other countries there is Environmental Ombudsman /Ombudsman as alternative administrative review mechanism in the environmental field? If so, what is your understanding of these institutions?
PU/07	What do you think about the Environmental Ombudsman /Ombudsman's strengths/weaknesses in handling disputes on access to information and public participation in environmental decision-making processes?
PU/08	Do you think if there were an Environmental Ombudsman /Ombudsman, they could improve the quality of environmental decision-making in Japan? Why/Why not?
PU/09	Do you think if there were Environmental Ombudsman/Ombudsman in Japan, cases could be resolved earlier? Why/Why not?
PU/10	Do you think is there any need to introduce an Environmental Ombudsman /Ombudsman in Japan? Why/Why not?
PU/11	Do you think it is feasible to introduce an Environmental Ombudsman/Ombudsman in Japan? Why/Why not?

*These questions were applied for potential users in Japan only.

Appendix 3: Final ethics approval letter

Approved - Issues Addresses - 520100378(D)

from: Faculty of Arts Research Office <artsro@mq.edu.au>
to: Mr Brian Opeskin <brian.opeskin@mq.edu.au>
cc: Faculty of Arts Research Office <artsro@mq.edu.au>, Mr Mahito Shindo <mahito.shindo@mq.edu.au>
date: 21 April 2011 10:26

Ethics Application Ref: (5201100378) - Final Approval

Dear Mr Opeskin,

Re: ('Evaluating the efficacy of the Environmental Ombudsman - Implications for Japan')

Thank you for your recent correspondence. Your response has addressed the issues raised by the Faculty of Arts Human Research Ethics Committee and you may now commence your research.

The following personnel are authorised to conduct this research:

Mr Brian Opeskin
Mr Mahito Shindo

Please note the following standard requirements of approval:

1. The approval of this project is conditional upon your continuing compliance with the National Statement on Ethical Conduct in Human Research (2007).

2. Approval will be for a period of five (5) years subject to the provision of annual reports. Your first progress report is due on (insert date one year from today).

If you complete the work earlier than you had planned you must submit a Final Report as soon as the work is completed. If the project has been discontinued or not commenced for any reason, you are also required to submit a Final Report for the project.

Progress reports and Final Reports are available at the following website:

http://www.research.mq.edu.au/for/researchers/how_to_obtain_ethics_approval/human_research_ethics/forms

3. If the project has run for more than five (5) years you cannot renew approval for the project. You will need to complete and submit a Final Report and submit a new application for the project. (The five year limit on renewal of approvals allows the Committee to fully re-review research in an environment where legislation, guidelines and requirements are continually changing, for example, new child protection and privacy laws).

4. All amendments to the project must be reviewed and approved by the Committee before implementation. Please complete and submit a Request for Amendment Form available at the following website:

http://www.research.mq.edu.au/for/researchers/how_to_obtain_ethics_approval/human_research_ethics/forms

5. Please notify the Committee immediately in the event of any adverse effects on participants or of any unforeseen events that affect the continued ethical acceptability of the project.

6. At all times you are responsible for the ethical conduct of your research in accordance with the guidelines established by the University. This information is available at the following websites:

http://www.mq.edu.au/policy/

http://www.research.mq.edu.au/for/researchers/how_to_obtain_ethics_approval/human_research_ethics/policy

If you will be applying for or have applied for internal or external funding for the above project it is your responsibility to provide the Macquarie University's Research Grants Management Assistant with a copy of this email as soon as possible. Internal and External funding agencies will not be informed that you have final approval for your project and funds will not be released until the Research Grants Management Assistant has received a copy of this email.

If you need to provide a hard copy letter of Final Approval to an external organisation as evidence that you have Final Approval, please do not hesitate to contact the Faculty of Arts Research Office at ArtsRO@mq.edu.au

Please retain a copy of this email as this is your official notification of final ethics approval.

Yours sincerely

Dr Mianna Lotz

Chair, Faculty of Arts Human Research Ethics Committee

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