**To Special Rapporteur on the promotion and protection of human rights in the context of climate change**

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**Questionnaire**

**Supporting Climate Change Litigation:**

**5. How are human rights considerations being incorporated into climate change litigation?**

**5.1 Violations of human rights are the legal basis for climate litigation of Japan's new coal plant.**

The problems with Japan’s climate change policies are that the national emission reduction target (46% reduction compared to 2013 by 2030) and renewable energy target (36% to 38% of electricity mix by 2030) are low. In addition, current these targets are not likely to be achieved because with lack of appropriate policy such as carbon pricings which are only ineffective and superficial attempt.

Major factors behind these climate policies of Japan are that the coal-fired and nuclear power plants have been regarded as base-load power generation in the electricity sector.

After the Fukushima Daiichi Nuclear Power Plant accident, Japanese Government has promoted the construction of new coal-fired and natural gas-fired power plants more than ever. In Japan, authorization is not required for construction of a new coal-fired power plant, and even in environmental impact assessment procedures, if a plant’s efficiency has USC level performance, the Minister of Economy, Trade and Industry (METI) will approve its operation because it is regarded consistent with the government's CO2 target. The government has also strengthened economic support for electric power companies,1 with GX-related legislation being passed during the ordinary session of the Diet in 2023.

A half of the coal-fired power plants installed capacity of approximately 45 GW has been built since 2000, and some more plants are under construction even now. Then, the government and power companies plan to continue using these coal-fired power plants event beyond 2050, through ammonia co-firing and CCS.

Since environmental NGOs have no standing to the justice courts in Japan, as described below, the residents around the new Kobe Steel coal-fired power plants (1,300 MW(650MW×2 )) filed a civil lawsuit to Kobe District Court in September 2018 seeking an injunction against the operation as climate change litigation and also filed an administrative lawsuit to the Osaka District Court in November 2018 calling for the cancellation of notice of finalization of the environmental impact assessment for the Power Plants. In May 2019, another administrative lawsuit was filed to the Tokyo District Court on JERA’s Yokosuka Coal-fired Power Plants (1,300 MW).

In these lawsuits, the plaintiffs who are local residents argued that the dangerous climate change impact threaten human rights, including life, health and livelihoods of them, and that coal-fired power plants are the most important cause of climate change.

5.2 **The administrative litigation** regarding the environmental impact assessments was dismissed.

Under Article 9(1) of Japan’s Administrative Case Litigation Act, a plaintiff who has “legal interest in the disposition act of the administrative agency” may only filed. On April 26 2022, the Osaka High Court denied the plaintiffs’ standing to sue, stating the following:

“The Japanese judicial system requires that plaintiffs that claim for revocation of a certain disposition must be at least a risk of infringement of the individual interests. However, no related provisions can be unambiguously interpreted as granting individuals a legal interest in avoiding natural disasters caused by C02 emissions that may endanger the lives and bodies of the victims. First, the Basic Act on the Environment defines “global environmental conservation” and “pollution” separately, and the issue of global warming is placed under “global environmental conservation” (Article 2, Paragraph 2) instead of “pollution” (Article 2, Paragraph 3) that causes damage to human health or living environment. Second, any provisions do not guarantee the involvement of individuals affected by global warming in these measures, nor provide clues to the specific scope and content of interest that are not affected by global warming among related laws including the Basic Act on the Environment, EIA Act, regulations of EIA in Basic Act on the Environment, Act on Promotion of Global Warming Countermeasures, Basic Act on Energy Policy, Act on Rationalizing Energy Use, and Act on Promotion of Utilization of Non-Fossil Energy Sources and Effective Utilization of Fossil Energy by Energy Suppliers. Comprehensively, the abovementioned legislations such as the Basic Act on the Environment, Act on Promotion of Global Warming Countermeasures, **cannot be unambiguously interpreted to mean that each individual has their own right not to be damaged caused by CO2 emissions. Rather, they may intend that issue to be handled as political matters through realizing global environmental preservation. It is difficult to understand that this is a blanket guarantee of individual interest**.”

The Court also denied the plaintiffs’ claims of infringement of human rights (impacts on life and health), stating the following:

“Substantially, C02 is not a toxic substance in itself. Indeed, the appellants insist that C02 emissions affect global warming that causes natural disasters and related phenomena, which may endanger the lives and bodies of appellants through natural disasters. In general, **such kind of indirect damage** often has, as opposed to the direct interests, ambiguous scope of protection and the substance. Also, in the case of C02, the damage caused by global warming is attributed to the global increase in C02 emissions. There, **each emission by a single business, regardless of its business type, is considered to be negligible**. The causal relationship between such tiny C02 emissions and individual damage caused by climate change is not clear. In the international community, global and national C02 reduction targets have been set in various ways, but whether they are appropriate or not, and even if they are appropriate, how they should be realized is not univocally determined, not only from a scientific perspective but also from a policy perspective to keep balance other interests to be protected. Each country’s policy on infrastructure also matters on the condition that certain business that relates to infrastructure is on the issue. In addition, the achievement of carbon neutrality is not only related to C02 emissions, but also to absorption measures, and the reduction target may change due to future technological development or contingencies such as large-scale disasters. Under these circumstances, more national and global discussions are required to reach the point that univocal standpoints of the abovementioned issues are shared. Consequently, it is difficult to admit at present that social basement has been established to the extent that rights not to be damaged by CO2” emissions can be recognized as a legally protected individual right, under the best interpretations of related regulations in a purposive manner.”

However, the ruling also stated the following.

“Therefore, **this interest is not sufficient to establish standing**. Simultaneously, **we do not deny the possibility that the substance of the interest not to be harmed by C02 emissions may be determined and recognized as a personal interest in the future**, according to the social changes in Japan and abroad. We issue this judgment on the premise of the current social situation.”

On March 9, 2023 the Supreme Court rejected the appeal as the final decision on this case.

5.3 **In the administrative litigation** concerning JERA’s Yokosuka Coal-fired Power Plants which is similar to Kobe case, in addition to judgments similar to those of the Osaka High Court, The Tokyo District Court stated the following concerning the subject of assessment of the “environmental load” of the impact of CO2 in the environmental impact assessment, and ruled that it was not necessary to investigate the impact, predict, and assess of CO2 emissions:

“The (Assessment) Ministerial Ordinance stipulates “methods for assessing the amount of environmental load” (Article 6, Item 6; Article 22(1), Item 6) separately from “methods for assessing the environmental impact on health, the living environment, or the natural environment” and “human health” (Article 6(1), Item1, Article 22(1), Item 1), and “environmental load” is defined in Article 2(1) of the Basic Act on the Environment as “negative effects [of human activities] on the environment which may cause hindrances to the environmental conservation,” so since “environmental impact on the natural environment” is mentioned separately from actual “hindrances to the environmental conservation” which would be understood to include “environmental impact on the natural environment,” **it would be natural to interpret “environmental load” as not including the occurrence of “environmental impact on health, the living environment, or the natural environment.**”

5.4 **In the Kobe’s civil case** seeking an injunction, the Kobe District Court ruling (March 20, 2023) also failed to recognize human rights violations due to the impacts of climate change. The court ruling on the civil case recognized, in general terms, the possibility of issuing an injunction based on human rights violations, and recognized that

“It could be said that CO2 emissions from these new power plants can contribute to global warming, and in that sense, it could be said that this act carries an abstract risk of damage as stated in (1) above to the lives, bodies, and health of the plaintiffs through its contribution to global warming and climate change,”

but dismissed the case, stating as follows,

“(the court) **could not go as far as recognizing that there is a specific risk of damage to the lives, bodies, and health of the plaintiffs due to CO2 emissions emitted from these new power plants.**”

The case is currently being appealed.

**5.5 Brief summary**

As outlined above, the view of the courts is that (1) in the administrative case, the interest of not being harmed in relation to CO2 emission is not protected as an individual person’s legal interest under Japanese legislation; (2) environmental impact assessments only assess CO2 emissions amount a year and do not include investigations, predictions, or assessments of impacts on human life or health; (3) in the civil case, an individual specific risk is required for something to be declared an infringement of human rights, but their risk by climate change is not seen as a specific risk; (4) climate change is an issue that should be addressed through democratic political processes, not through the judiciary.

**6. Are there issues with making the link between human rights and climate change litigation?**

In Japan, a plaintiff seeking an injunction against the defendant’s actions is required to establish a specific risk to the life and health of the individual concerned so far. Therefore, it is extremely important to point out that the impacts of climate change are a violation of human rights. In the way in which climate change damage is perceived in the judiciary in terms of its structure of occurrence and its legal causation, the courts should be taken that climate change is already a real, imminent and specific hazard of human rights, as suggested by the Urgenda ruling. At present, the Japanese courts have not accepted this premise.

**7. What do you think are the major barriers to initiating climate change litigation?**

In Japan, there are many obstacles to initiating climate change litigation.

7.1 Although litigation seeking to avoid dangerous climate change is a matter of public interest, Japan is one of the few countries that do not recognize the legal standing of environmental NGOs to sue as plaintiffs. Japan has not yet ratified the Aarhus Convention.

7.2 In terms of litigation cases demanding compensation for individuals for damage caused by environmental deterioration, Japan has made financial payments to victims in cases such as Minamata disease and air pollution. However, no injunctions have ever been issued. As for climate change, litigations to seek injunction will not be admissible as long as individual plaintiffs are required to establish the existence of current and specific damage, and the specific and significant attribution of the specific emission source to that damage as Kobe coal-fired power plants case.

7.3 In Japan, besides heavy costs plaintiff must pay when file and maintain the case and the burden of proof, there are significant psychological barriers in the case of climate litigation, in terms of attracting public opinion as well as for citizens to become plaintiffs in litigation that would target the government or companies, considering the fact that they would be challenging the national economic and energy policies.

**8. Are the barriers different in different parts of the world? What are they?**

Japan is one of the few countries in the world where environmental NGOs are not granted the right to initiate legal proceedings, and I believe it could have the highest barriers to climate litigation due to the extremely strict litigation requirements related to climate change.

**9. Is the judiciary in your country well equipped to understand the connection between human rights and climate change?**

In Japan, it is widely recognized that the judiciary is strongly constrained by government and political policy and act with deference to the government. There are many concerns about the independence of the judiciary (for example, media recently reported on a case of meddling involving sitting and former Supreme Court chief justices in Osaka Airport noise-related litigation in the 1980s[[1]](#footnote-1)). The Supreme Court controls judicial positions by means of a system in which judges are transferred roughly every three years. Personnel exchanges are conducted between judges and litigation prosecutors who represent the government in administrative litigation cases, so it is common for persons who have experience as litigation prosecutors to later be handling administrative litigation cases as judges.

**10. How could this be improved?**

It is also a problem of Japanese democracy, but we expect to encourage global scrutiny of Japan's judicial independence and legislation to secure access to justice for citizens and NGOs.

1. https://mainichi.jp/english/articles/20230422/p2a/00m/0na/026000c [↑](#footnote-ref-1)