

March 18, 2023

Joint Statement by Plaintiffs and Attorneys on the Supreme Court's Ruling to Dismiss Administrative Claim for Injunction against Kobe Coal-fired Power Stations

On March 9, 2023, the Supreme Court of Japan ruled to dismiss the plaintiffs' appeal and rejected their petition for acceptance of appeal in the case claiming for revocation of the final notice of environmental impact assessment (EIA) for Kobe Steel's new coal-fired power plants. The ruling did not provide any specific reason for the dismissal, providing the stereotyped phrases, noting that their appeal and petition did not fall under the lawful grounds.

Consequently, the Osaka High Court's decision issued on April 26, 2022, was finalized. It dismissed the appeal, upholding the Osaka District Court's decision, which is the first instant, issued on March 15, 2021.

The Osaka High Court's judgment includes two issues: the claim for infringement of their right to health, and the claim for interests not to be harmed by CO2 emissions. Regarding the former, Osaka High Court admitted the standing of the residents, considering the risk of exposure to air pollutants. However, it stated that the Minister of Economy, Trade and Industry (METI) did not abuse its discretion by examining the submitted EIA reports to be appropriate, which did not include PM2.5's inspection, forecasts, and assessments., and found them to be appropriate.

Regarding the claim for interests not to be harmed by CO2 emissions, it denied the residents' standing. It noted that such an interest belongs to the general public to preserve the global environment, but it can't be regarded as an individual interest under the current laws and social conditions. Also, the judgment stated that Article 10 of the Administrative Case Litigation Act excludes grounds for revocation irrelevant to the plaintiffs' interest, which prohibits the plaintiffs from standing based on the right with claiming damages caused by climate change.

The result shows that for the time being none of the Japanese are eligible to claim liability of business operators who omit due consideration to the environmental impacts of enormous CO2 emissions through administrative litigation, while people can still contest the final notice of EIA regarding air pollution from thermal power plants. This is because the courts ruled that the benefit of not being harmed by CO2 emissions could not be regarded as an individual right and interest of residents, but as the public interest as the preservation of the global atmospheric environment.

The current Japanese legal system does not still allow non-profit organizations including environmental NGOs to initiate lawsuits. Consequently, the Supreme declared that citizens are by no means allowed to challenge the government's decision to allow massive CO2 emissions through administrative litigation at this moment.

Furthermore, regarding the exclusion of PM2.5 from evaluative items of the EIA of coal-fired power plants, the Supreme Court confirmed the governmental practice of skipping the assessment of PM2.5, broadly recognizing the professional and technical discretion of the METI. Worth noting is that some foreign countries including the U. S. count PM2.5 as evaluative items of EIA.

We firmly protest this unjust conclusion.

Several issues are in common among the three decisions in this case. Firstly, the courts lack both a sense of urgency about climate change and an understanding of climate science. Attorneys have repeatedly emphasized at almost every hearing that the amount of residual CO2 in alignment with the 1.5° C target of the Paris Agreement and the Glasgow Climate Agreement and that it is getting tighter every year (carbon budget theory), based on the development of climate science. However, all three decisions did not mention anything of this point.

Secondly, all three decisions did not finally reach legal awareness that global warming and climate change is an urgent challenge in human history where the judiciary is supposed to take the due role, locating it as a political issue. In contrast, many Supreme Courts abroad have shown the abovementioned recognitions in their judgments, noting that the ongoing climate crisis is not only causing serious human rights violations in the present but also deteriorating such situations.

Thirdly, the maximum respect for discretion in administrative decisions and refraining from judicial checks are commonly observed through three decisions. The court locates Japan's misguided policy of constructing and operating a large number of coal-fired power plants as a matter of policy choice, where the judiciary should not intervene, under the excuse of energy security, which goes against the global trend after the Paris Agreement. The same can be said for the EIA that does not rigorously evaluate the long-term and significant environmental impacts of coal-fired power plants. Such attitude hinders *trias politica* from functioning, which puts Japan's human rights remedy system in crisis.

Finally, all three courts secluded themselves in the national legislation and its traditional hermeneutics. In the era of innovation in all fields including politics, economics, and technology in order to address the global crisis, many foreign courts, led by EU, have skillfully applied traditional legal theory to the climate change issue, rendering new judgments and fulfilling their role as a bastion of judicial human rights. In contrast, the Japanese judiciary may be regarded to abandon its role.

Still, such lack of a sense of urgency about climate change and insensitivity to the flaws in EIA may not be seen only in the judiciary, but also in the general Japanese people, including the media.

In fact, the Kishida cabinet has proposed a return to dependence on nuclear power generation, as well as continuing utilization of existing coal-fired power plants (and future co-firing of ammonia and hydrogen) in its GX policy, aiming for zero carbon by 2050. This policy considerably hinders Japan from achieving either a 46%

reduction by 2030 or the 2050 carbon neutrality target.

This decision honestly reflects Japan's current lapsed and passive response to the climate crisis.

However, notwithstanding this decision, the Japanese court is required to take its role in human rights violations through climate change caused by enormous CO2 emissions by issuing appropriate decisions in the future, which is possible.

This case concerned the illegality of an administrative disposition by the METI as of May 2018. We are in 2023 today. During the past five years, climate science on climate has significantly progressed, which promoted clarification of the relationship between CO2 emissions and climate change damage. This spread the recognition that massive CO2 emissions are a violation of human rights throughout the world. In the meantime, the Japanese government also declared the year 2050 carbon neutral. The Osaka High Court ruled that "the content of the interest of not being harmed by CO2 emissions will be determined by future changes in domestic and international social conditions, and the possibility that such benefit will be recognized as an individual legal interest is open". Now that five years have passed since the alleged deposition was issued, as well as that the social conditions have changed as described above, the interest of not being harmed through CO2 emissions should already be recognized as an important right of each individual in Japan.

Following this Supreme Court decision, a decision will be made on the civil injunction lawsuit against the project operator regarding the new power plant project in this case. The court is expected to make a responsible decision in light of the global situation regarding climate change.

We pledge that we will not be intimidated by this decision and will continue to move forward by all means, including urging individual businesses to drastically reduce their CO2 emissions, raising public opinion, and proposing new legislation, so that we do not pass it over to future generations a world of hunger and conflict over resources caused by climate change.