Japanese Administrative ADR In Environmental Matters: Its Developments And Challenges

Noriko Okubo[1]

ABSTRACT

Japanese administrative environmental ADR is quite a unique model of an environmental tribunal. It has not only general features of ADR compared to court procedures, but also some advantages as an administrative organ. In addition, the administrative ADR body at the national level has the potential for judicial review. This paper analyses the legal system and practise of the Japanese model and clarifies its characteristics and challenges.

Keywords: Japan. Environmental Law. Administrative Law. ADR

1. Introduction

Recently, more and more countries have established specialised environmental courts and tribunals (ECTs). Usually, there are various hurdles for victims and other concerned members of the public in resolving environmental disputes through ordinary court procedure, such as narrow legal standing, high costs, delayed procedures, and insufficient remedies. The main purpose of establishing ECTs for environmental cases is to eliminate such disadvantages on the part of the public and to provide quick and proper resolution of environmental disputes.

According to the first global study on ECTs in 2009[2], there were 354 ECTs

[1] Professor of Osaka University. Master in Law at Hitotsubashi University and University Giessen in Germany. Doctor in Law at Hitotsubashi University.

in 41 countries. As of 2016, over 1,200 ECTs are operating at the national and state/provincial level in 44 countries[3]. The number of ECTs has increased dramatically over the last 10 years.

The term 'court' is used in this article to indicate a body in the judicial branch and 'tribunal' is used to indicate all executive or ministerial bodies for dispute resolution in environmental matters[4]. There are many different models of ECTs, including environmental chambers within an ordinary court and quasi-judicial commissions under the jurisdiction of a government[5].

Article 76(2) of the Constitution of Japan prohibits the establishment of any specialised court. However, there is a specialised administrative organisation for environmental dispute resolution in Japan. The Japanese model is quite a unique and old model among ECTs. Basically, it has operated as a system of alternative dispute resolution (ADR). This paper analyses the legal system and practise of the Japanese model and clarifies its characteristics and challenges.

2. Development of administrative environmental ADR in Japan

ADR in environmental matters includes civil conciliation by the courts and dispute settlement by the administrative organisations. Civil conciliation by the courts is based on the Civil Conciliation Act (Act No. 222 of 1951). Article 33-3 of the Civil Conciliation Act stipulates that the court has jurisdiction over a conciliation case involving a dispute over damages arising

2 George Pring and Catherine Pring, *Greening Justice: Creating and Improving Environmental Courts and Tribunals* (The Access Intiative, 2009), 1.

3 George Pring and Catherine Pring, *Environmental Courts & Tribunal: A Guide for Policy* (UNEP, 2016), 1.

4 G. Pring and C. Pring, *Greening Justice*, 3.

5 G. Pring and C. Pring, *Environmental Courts & Tribunal*, 13.

from pollution or infringement of a person's interest in enjoying sunlight, ventilation, or other life interest. Dispute resolution by administrative organisations is governed by the Act on the Settlement of Environmental Pollution Disputes (hereinafter referred to as the 'Settlement Act') (Act No. 108 of 1970). In practice, administrative organisations have played a more important role in the settlement of environmental disputes than the courts.

In 1967, the Basic Law on Anti-Pollution Countermeasures stipulated that the State shall take necessary measures to effectively implement mediation, conciliation, etc. with regard to disputes related to environmental pollution, and take other necessary measures to smoothly resolve problems arising from environmental pollution[6]. As a result, the Settlement Act was enacted in 1970. At that time, Japan suffered from serious environmental pollution, and the number of environmental disputes was increasing, such as the Minamata case in Kumamoto and Niigata Prefectures. Also, there was a demand from the business community for prompt dispute resolution through active involvement of the state.

As a dispute settlement body at the national level, the Central Pollution Review Commission was established under the jurisdiction of the Prime Minister based on the Settlement Act. However, the Central Pollution Review Commission was an organ with a council system through consultation with experts with the relevant knowledge and experience based on Article 8 of the National Government Organization Act (Act No. 120 of 1948). Compared to the quasi-judicial commissions based on Article 3 of the National Government Organization Act, it did not have as much power and only had the competence to settle disputes by agreement of the parties. As a result, there had been a growing consensus that it was necessary to strengthen the

[6] The current Basic Environmental Act (Act No. 91 of 1993) has the same provision (Article 31 (1)).

independence and authority of the Commission and its members to settle disputes in a proper manner where the issues were strongly contested and had a serious social impact[7].

In 1972, the Central Pollution Review Commission was integrated with the Land Use Coordination Commission, and the Environmental Dispute Coordination Commission (EDCC), which is the 'Kogaitou Chousei Iinkai' in Japanese (and the 'Kochoui' for short), was established under the Prime Minister's Office as a commission based on Article 3 of the National Government Organization Act. In addition, the competence to settle disputes thorough an arbitration system was granted to the EDCC, and thus the authority of the administrative environmental ADR was strengthened. Due to the reorganisation of the ministries and agencies in January 2001, the EDCC was positioned as an external agency of the Ministry of Internal Affairs and Communications.

3. System of Administrative environmental ADR and its advantage

3-1 ADR Bodies

The administrative environmental ADR bodies consist of the EDCC at the national level and the Prefectural Pollution Review Boards (Review Boards) at the local (prefecture) level.

3-1-1 EDCC

The EDCC is a panel formed by seven full-time and part-time members, including the chairperson. To ensure the fairness of dispute settlement, the EDCC is organised as a quasi-judicial and independent body. It has the

7 Kogai Hunso Shori Mondai Kenkyu-kai (ed.) , *Kogai Hunso Shoriho Kaisetsu* (Ichiryu-sha, 1975) (in Japanese), 4.

following organisational features and unique competences[8].

First, the chairperson and commission members of the EDCC are appointed from amongst persons of upstanding character and insight by the Prime Minister with the consent of the Diet (Article 7 of the Act for Establishment of the EDCC [Act No. 52 of 1972]). The EDCC members exercise their authority independently and their status is guaranteed: the committee members shall not be dismissed against their intention during their tenure, except in cases where certain dismissal requirements are met (Article 5 and 9 of the Act for Establishment of the EDCC). In addition, depending on the case, the EDCC may appoint a maximum of 30 expert members (Article 18 of the Act for Establishment of the EDCC).

Second, the EDCC has the authority to establish its own rules concerning affairs under its jurisdiction (quasi-legislative authority) (Article 13 of the Act for Establishment of the EDCC).

Third, the EDCC has its own secretariat, and some of its officials must have legal qualifications (Article 19 of the Act for Establishment of the EDCC) (Independence of the EDCC). There are examiners in the secretariat to support the EDCC members. In practise, persons with judicial experience and director-class persons from the relevant ministries are usually appointed as examiners. This leads to increased expertise of the secretariat and strengthened cooperation with the relevant administrative organisations that handle environmental problems.

Fourth, the EDCC may, if necessary, request that relevant administrative agencies submit materials, express opinions, provide technical knowledge, and provide other necessary cooperation (Article 15 of the Act for Establishment of the EDCC). In addition, the EDCC may entrust technical

[8] See, for example, Kogaitou Chousei Iinkai Jimukyoku (ed.), *Kaisetsu Kogai Hunso Shoriho* (Gyosei, 2002) (in Japanese), 27-32.

investigations to research organisations at its own expense (Article 16 of the Act for Establishment of the EDCC).

Fifth, the EDCC may hold public hearings to obtain public opinion (Article 14 of the Act for Establishment of the EDCC).

Finally, the EDCC shall report to the Diet the status of its cases and publish its outline every year (Article 17 of the Act for Establishment of the EDCC).

These are unique characteristics of the EDCC as an administrative ADR body at the national level.

3-1-2 Prefectural Pollution Review Board

At the local level, any prefecture may establish a Prefectural Pollution Review Board pursuant to the Prefectural Ordinance (Article 13 of the Settlement Act) [9]. In a prefecture that does not have a Review Board, the prefectural governor shall delegate candidates for Pollution Review Commissioner and prepare a list thereof (Article 19 of the Settlement Act). As of August 2018, 37 of Japan's 47 prefectures have a Review Board.

Members of a Review Board are appointed by the prefectural governor from among persons of upstanding character and insight with the consent of the Prefectural Assembly (Article 16 of the Settlement Act). In contrast to the EDCC, all members are part time. The status of Review Board members is guaranteed the same as the EDCC members. However, a Review Board does not have rule-making power or a secretariat. Similar to the EDCC, a Review Board may request that relevant administrative agencies submit materials, open up opinions, provide technical knowledge, and provide other necessary cooperation (Article 43 of the Settlement Act).

---

[9] See, for example, Noriko Okubo, Kankyo Hunso niokeru Gyoseigata ADR, *Jichitaigaku Kenkyu,* No.91 (2005) (in Japanese), 33-34.

Any prefecture may cooperate with other prefectures to establish a Federal Pollution Review Board to settle a specific trans-prefectural case that encompasses two or more prefectures (Article 20 of the Settlement Act). However, a Federal Board has never been established.

In addition, prefectures and municipalities have consultation desks to handle complaints about environmental pollution, which they may assign to the pollution complaint counsellors (Article 49(2) of the Settlement Act). Environmental pollution is an issue that is closely related to local residents. It is a critical for local government to grasp and understand local environmental problems and to promptly take necessary measures. Local governments endeavour to process environmental complaints appropriately in cooperation with the relevant administrative organs (Article 49(1) of the Settlement Act). If appropriate, the counsellors publicise information about the EDCC and/or Review Board so that the public can bring a case to the EDCC or Review Board.

3-2 Jurisdiction

Both the EDCC and Review Board settle disputes pertaining to environmental pollution ('Kogai' in Japanese) (Article 3 of the Settlement Act). According to the definition in the Basic Environmental Act, 'environmental pollution' means damage to human health or the living environment caused by (i) air pollution, (ii) water contamination, (iii) soil contamination, (iv) noise, (v) vibrations, (vi) land subsidence, or (vii) offensive odours, generated by business or other human activities and spread throughout a considerable area. These seven types of pollution are called the 'Seven Major Types of Pollution' (Article 2(3)). This means that the concept of 'Kogai' does not cover all environmental problems.

These local and national bodies do not have the same relationship as the

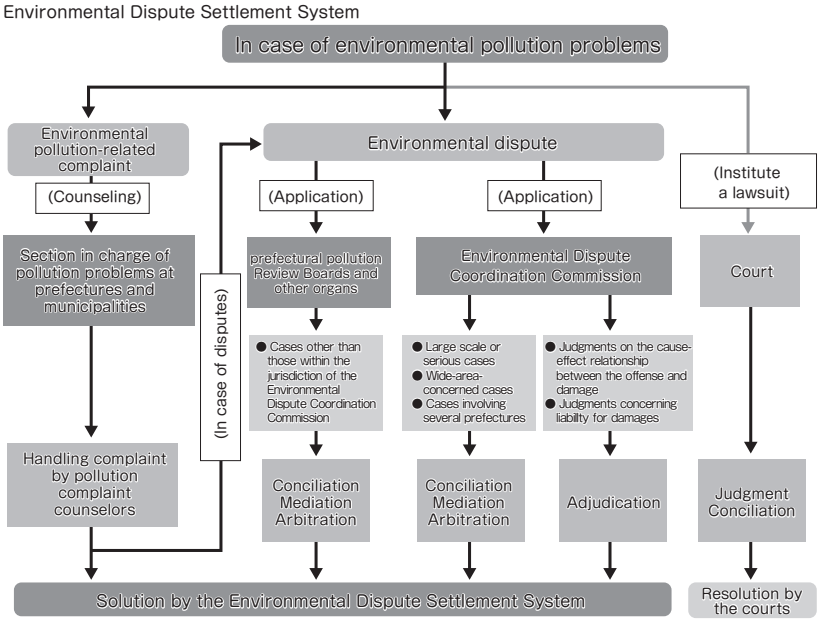

Fig.1 Environmental Dispute Settlement System
(Source: Kogaitou Chousei Iinkai, *Prompt and Appropriate Settlement of Environmental Disputes*)

district courts and higher courts (see Figure 1). They handle disputes independently, according to the jurisdiction set forth in the Settlement Act, but the EDCC can also provide guidance, etc. on local governments' settlement of complaints concerning environmental pollution (Article 3 of the Settlement Act). The EDCC organises meetings and provides the Review Boards with information based on its experience to ensure the smooth operation of the system.

The EDCC has jurisdiction to mediate, conciliate, and arbitrate the following three categories of disputes (Article 24(1) of the Settlement Act, Article 1 and 2 of the Cabinet Order on Settlement Act [No. 253 of 1970]):

(i) large scale or serious cases that cause considerable damage to human

health due to air pollution or water contamination, or that cause a total financial damage exceeding 500 million yen,

(ii) wide-area-concerned noise cases caused by aircraft or Shinkansen bullet trains, and

(iii) inter-prefecture cases.

In addition, the EDCC has jurisdiction to adjudicate all environmental pollution disputes (Article 3 of the Settlement Act).

The Review Board has jurisdiction to mediate, conciliate, and arbitrate any dispute other than those within the jurisdiction of the EDCC.

3-3 Types of settlement

The administrative environmental ADR bodies provide mediation, conciliation, arbitration, and adjudication services[10]. As mentioned above, only the EDCC has the jurisdiction to adjudicate. Conciliation and adjudication play an important role among these four types in practise.

Mediation is a procedure wherein the EDCC or a Review Board intervenes to encourage voluntary settlement of a dispute between the parties. Arbitration is a procedure wherein the parties entrust dispute settlement to the EDCC or a Review Board based on an agreement to follow the decision issued by the EDCC or Review Board.

Conciliation is a procedure wherein the EDCC or a Review Board intervenes and actively leads negotiations between the parties to facilitate them reaching an agreement based on their mutual concession. The Conciliation Committee consists of three members. Basically, the conciliation procedure is commenced upon an application filed by a party. However,

[10] See, Kogaitou Chousei Iinkai, *Prompt and Appropriate Settlement of Environmental Disputes*, available at < http://www.soumu.go.jp/main_content/000490746.pdf > (last accessed on 20 August 2018).

considering the social impact of environmental pollution, the EDCC or a Review Board may commence mediation or conciliation procedures *sua sponte*[11]. If an environmental pollution dispute has arisen that causes considerable damage to a wide area and the parties' negotiations are not progressing smoothly, the EDCC or a Review Board may conduct mediation after researching the actual situation and hearing opinions from the parties (Article 27-2 of the Settlement Act). Also, when the EDCC or a Review Board finds it difficult to settle a dispute through mediation, it may conduct conciliation after hearing opinions from the parties (Article 27-3 of the Settlement Act). Although this competence has not been exercised in practise, it is a unique characteristic of administrative environmental ADR.

The Conciliation Committee of the EDCC has stronger competences than those of the Review Board. It may order the parties to submit documents and inspect the parties' factories or other places to clarify the cause of the dispute in certain important cases (Article 33 of the Settlement Act).

When the parties reach an agreement, it has the same effect as a contract under the Civil Code, while an agreement based on conciliation by a court has the same effect as a judicial settlement and therefore is enforceable as a title of obligation. This means that the obligee has to take action in court if the obligor does not perform an obligation specified in the conciliation of an administrative ADR. However, the EDCC or the Review Board may recommend performing the obligation and follow up the performance by requesting the obligor to report or by investigating the status of performance (Article 43-2 of the Settlement Act).

Adjudication consists of two types, i.e., adjudication of liability for damages and adjudication of the cause of damage. Adjudication of liability for damages

11 See, Kogaitou Chousei Iinkai Jimukyoku (ed.), ibid., 96-106.

is a procedure to determine the existence or non-existence of liability for damages (Article 42-12 of the Settlement Act). Adjudication of the cause of damage is a procedure to determine the causal relationship between offending actions and damage (Article 42-27 of the Settlement Act).

The adjudication process is also commenced upon application of a party. The Adjudication Committee consists of three or five EDCC members (Article 42-2 of the Settlement Act). In contrast to conciliation, the hearing procedure is disclosed to the public (Article 42-15 of the Settlement Act). The Committee holds a hearing to have the parties state their allegations, conduct fact-finding investigations, and make an adjudication. These procedures are equivalent to civil litigation procedures.

When no action is filed concerning damages related to an adjudication of liability within 30 days of the service of the original written adjudication to the parties, it is deemed that an agreement on damages to the same effect as the adjudication of liability has been reached between the parties (Article 42-20 of the Settlement Act). When the parties are highly likely to reach an agreement in the process of adjudication of liability, the Committee may transfer the case to conciliation on its own authority (Article 42-24 of the Settlement Act).

With regard to adjudication of the cause of damage, the Committee only determines the causal relationship and does not determine the rights and obligations of the parties. However, the EDCC shall notify the head of the relevant administrative organ or local government of the result of the adjudication without delay. In addition, the EDCC shall state its opinion about necessary measures to the relevant administrative organ or local government, to prevent the spread of environmental pollution (Article 42-31 of the Settlement Act). This offering of opinions is of a different character than the statement of opinions based on Article 48 of the Settlement Act (see 3-4), because it is related to concrete measures in individual cases, and therefore,

the EDCC may give its opinion to local government too.

It is also remarkable that there is a connection between civil proceedings and adjudication. According to Article 42-32(1) of the Settlement Act, the court may commission an adjudication of the cause of damage by the EDCC in civil cases concerning environmental pollution. The first case in which this procedure was applied was the Dashidaira Dam case[12], in which the Toyama District Court commissioned the EDCC to adjudicate the causal relationship between the sand washout from the Dashidaira Dam in the marine area through Kurobe River and the fishery damage. Through investigation by experts, in March 2007, the Commission rendered an adjudication partially recognising the causal relationship, finding that the poor harvest of cultivated seaweed attributed to the sand washout.

3-4 Characteristics of the administrative environmental ADR

Compared to judicial and adversary proceedings, generally, environmental ADR by both court and administrative bodies has advantages such as simplified procedures and cheaper, proper, and more flexible settlement of disputes by agreements between the parties.

In addition, the administrative environmental ADR has remarkable advantages compared to civil conciliation by a court[13]. First, it is a lower-cost alternative. In the administrative ADR, the government bears the majority of the costs of the proceedings. Furthermore, application fees are low (about 20% to 30% of the fees for civil conciliations by judicial courts) to minimise the financial burden to the parties.

---

12 Kogaitou Chousei Iinkai, *Prompt and Appropriate Settlement of Environmental Disputes*, ibid., 10.

13 See, for example, Hiromasa Minami, *Hunso no Gyosei Kaiketsu Shuho* (Yuhikaku, 1993) (in Japanese), 158-160.

Second, it is possible to appoint technical experts as technical members to investigate professional matters, and their knowledge and expertise contribute to the fact-finding and proper settlement of disputes.

Third, the administrative ADR bodies can initiate a fact-finding process *sua sponte*. In addition, the EDCC can entrust technical investigations to research organisations at its own expense. This helps alleviate the financial burdens to the parties and facilitates difficult fact-finding processes.

Fourth, to promote consensus building, the Conciliation Committee may publish the conciliation proposal. Basically, administrative ADR conciliation procedures are not disclosed in the same way as conciliation by courts (Article 37 of the Settlement Act). However, the disputes handled by the Committee are often related to public interest. Therefore, the Conciliation Committee not only prepares a conciliation proposal and recommends that the parties accept it (Article 34(1) of the Settlement Act), but also can publish the conciliation proposal together with its supporting reasons (Article 34-2 of the Settlement Act), for the purpose of exposing the proposal to criticism of public opinion. The parties can refer to its reaction when deciding whether to accept the proposal. If either party does not reject the proposal within the designated period, an agreement identical to the conciliation proposal shall be deemed to be concluded between the parties (Article 34 (3) of the Settlement Act).

Fifth, there is a way to reflect the experience and knowledge of ADR bodies in environmental policy. Namely, the EDCC may present its opinions on the improvement of environmental pollution control measures, based on experiences gained through handling environmental disputes, to the Minister of Internal Affairs and Communication and the head of the relevant administrative organ. Similarly, the Review Board may provide its opinions to the prefectural governor (Article 48 of the Settlement Act). This is the

general provision to link administrative environmental ADR and environmental policy. Although this formal competence has not been actively exercised until recently, several important concrete cases have led to the revision of relevant laws as a result of dispute resolution[14]. For example, several cases concerning road dust generated by traffic using studded tires in Nagano and other prefectures triggered the enactment of the Law on the Prevention of the Generation of Particulates from Studded Tires (Act No. 55 of 1990). National manufacturers agreed to discontinue manufacturing studded tires, and this led to new legislation to regulate the manufacture of all studded tires, including imported one.

4. Performance of administrative environmental ADR and its characteristics

4-1 Performance of administrative environmental ADR

4-1-1 Performance of the EDCC

Between 1970 and 2017, the total number of registered cases of the EDCC was 1,019, and the total number of finalised cases was 996[15]. Big cases against governmental organisations that are related to infrastructure projects, such as the construction of the bullet train 'Shinkansen' and airports, are included in the totals.

Conciliation has been used most frequently (731). However, there is a trend towards the selection of adjudication over the last ten years. The total number of registered adjudications between 1970 and 2017 was 277; between

14 H. Minami, ibid., pp.143-144, 147-148.

15 Kogaitou Chousei Iinkai, *Kogaitou Chousei Iinkai Nenji Hokoku* 2017, available at < http: //www. soumu. go. jp/kouchoi/knowledge/nenji/H29nend_menu. html > (last accessed on 20 August 2018) (in Japanese), 7.

2008 and 2017, 196 of 228 of the registered cases were adjudications. In contrast, there have been only three mediations and one arbitration in the past.

According to the EDCC's 2017 Annual Report[16], the recent trends are summarised in the following four points. First, among the Seven Major Types of Pollution, the proportion of noise cases is quite high, including disputes concerning low frequency noise. Fifty percent of all newly registered cases in 2017 were noise cases. Second, users' preference for settlement measures is still shifting from conciliation to adjudication. In 2017, 12 of the 14 newly registered cases were adjudications. Third, the number of smaller cases is increasing. Finally, the number of commissioned cases for adjudication by courts is increasing.

All of these recent trends are closely related to one another. As mentioned above, the EDCC does not have jurisdiction over conciliation in smaller cases. However, with regards to adjudication, the EDCC has jurisdiction over all environmental pollution disputes including smaller cases. Additionally, recent smaller cases include more difficult cases in terms of identification of causal relationships, such as cases alleging health damage caused by low frequency noise generated by, for example, outdoor air conditioner units. Like the EDCC, a Review Board at the prefectural level can appoint technical members and initiate a fact-finding process *sua sponte* at its own expense. However, Review Boards typically have considerably less financial resources than the EDCC. In practise, it is normal for a Review Board to ask the environmental division of its prefecture to investigate the site, measure noise, etc. However, Review Boards do not entrust technical investigations to research organisations at their own expense. In addition, it is not always easy

16 Kogaitou Chousei Iinkai, ibid., 8.

for a Review Board, especially in small prefectures, to find an appropriate expert member for each particular case.

In contrast, the EDCC has more experience and knowledge, appoints expert members more often, and conducts investigations on its own[17]. In fiscal year 2017, expert members were appointed in 13 of the 35 pending cases. In many cases, it would be inconvenient for an applicant to go to Tokyo for a hearing, which is where the EDCC is located. Therefore, the EDCC often has onsite hearings depending on the circumstances. The EDCC disseminates information about its advantages and performance, and the possibility of commissioning adjudications to the EDCC has become well known within the courts. This may be the reason for the increase in adjudications.

4-1-2 Performance of the Review Board

The total number of registered cases at all Review Boards between 1970 and 2017 was 1,566[18]. Most cases were handled by the Review Boards in metropolitan areas: 255 in Tokyo, 215 in Osaka, and 90 in Aichi. Also, most of them were conciliation cases (1,511)[19].

The main claim in Review Board cases is a claim for damages and an injunction. In over 90% of cases, the applicants demanded that countermeasures be taken to prevent pollution, such as a change of facility operation method, installation of additional pollution control equipment, shortening the operation time, etc. The parties have reached agreement in 625 of the 1,529 finalised cases, and 699 cases have resulted in a discontinuance[20].

---

17 Kogaitou Chousei Iinkai, ibid., 10-12.

18 Kogaitou Chousei Iinkai, ibid., 15.

19 Kogaitou Chousei Iinkai, , *Kogaitou Chousei Iinkai Nenji Hokoku (Sanko Shiryo) 2017*, available at < http: //www. soumu. go. jp/kouchoi/knowledge/nenji/29nend_menusankou_00001.html > (last accessed on 20 August 2018) (in Japanese), 41.

20 Kogaitou Chousei Iinkai, ibid., 40.

In fiscal year 2017, the total number of newly registered cases was 41, 28 of which were noise cases. Ten cases were environmental disputes arising before any concrete damage had occurred, and seven cases related to governmental organisations. Of the 43 cases finalised in 2017, 16 were finalised by agreement of the parties. The parties agreed to take the countermeasures in 14 cases and to pay compensation in two cases. The countermeasures included a change of plan or improvement of the operation method in 14 cases, and shutdown or relocation in two cases[21].

4-1-3 Performance of Consultation Services for Environmental Complaints

Consultation services are offered through 1, 712 pollution complaint counsellors and another 9,251 public officials in Japan (as of March 2017)[22].

The number of complaints have gradually decreased since a peak in 2003 (100,323)[23]. However, there were still 70,047 complaints in fiscal year 2016, which is much higher than the total number of ADR cases at the EDCC and the Review Boards.

Of the Seven Major Types of Pollution cases (48, 840) in 2016, noise complaints (16,016) were most frequent, followed by air pollution (14,710) and offensive odours (9, 620) complaints. There were also many complaints concerning environmental problems that are not one of the Seven Major Types of Pollution (21,207), including 9,216 waste dumping cases.

Complaint response time is relatively quick. In 2016, 63,253 complaints (85%) were finalised, and 30,184 cases concerning the Seven Major Types of Pollution were directly processed by the officials in the consultation division

---

21 Kogaitou Chousei Iinkai, ibid., 39, 49.

22 Kogaitou Chousei Iinkai, *Heisei 28nendo Kogai Kujyo Chosa* (2017), available at < http://www.soumu.go.jp/main_content/000519412.pdf > (last accessed on 20 August 2018) (in Japanese), 25.

23 Kogaitou Chousei Iinkai, ibid., 2-7.

within one week. Of the complaints, 14.2% were violations of pollution control laws. It is normal for the consultation division to provide administrative guidance to the polluter, other relevant persons, and/or companies (61%) and to investigate the cause of pollution (23.5%)[24].

4-2 Major cases related to governmental organisations

4-2-1 Hokuriku Shinkansen bullet train case

Construction of the Shinkansen railway has resulted in wide-area-concerned noise cases. In the case of Hokuriku Shinkansen[25], local residents in Nagano and Gunma Prefecture filed an application for conciliation seeking to change the construction plan and an injunction of public work, against former Japan Railway Construction Public Corporation (JRCPC), a kind of quasi-governmental corporation.

It is difficult to reach agreement in cases involving a large infrastructure project. Usually, the relevant administrative body does not intend to change its original plan. In this case, then Minister for Transportation had the authority to make a basic construction plan, and JRCPC did not have wide discretion to change its construction implementation plan. The Conciliation Committee made a conciliation proposal and recommended that the parties accept it in 1993. This was the first case in which the EDCC recommended acceptance of a conciliation proposal. JRCPC and some of the applicants accepted the proposal. This was also the first case where there was an agreement between private persons and a quasi-governmental corporation.

The agreement included several important concrete clauses. JRCPC

---

[24] Kogaitou Chousei Iinkai, ibid., 18-24.

[25] Noriko Okubo, Kogaitou Chousei Iinkai niyoru Hokuriku Shinkansen Choutei Jiken no Kaiketsu to sono Igi, *Hanrei Times*, No. 856 (1994) (in Japanese), 59-66; Koji Iwata, Kogaitou Chousei Iinkai niyoru Kogai Chotei no Genzai Vol.1, Vol.2, *Hanrei Jiho*, No. 1507 (in Japanese) , 3-10, No. 1508 , 11-17.

agreed, for example, to install a sound insulation wall of 2 meters or more and to adopt improved pantograph equipment to reduce noise. JRCPC adopted these countermeasures in other Shinkansen construction as the minimum standard.

4-2-2 Teshima Case

The most successful conciliation experience was the Teshima case[26]. Japan has been confronted with issues over the location and construction of waste disposal sites, while illegal dumping has been a problem, particularly in the 1990's.

In Teshima Island, in the Seto Inland Sea, approximately 500,000 tons of vehicles, shredded dust, and other industrial residues had been illegally dumped and incinerated for over a decade, despite the opposition of local residents. The waste contaminated the island's soil and the surrounding marine area, and estimates report that the clean-up costs will total at least 30 billion yen.

A total of 549 local residents filed an application for conciliation against the polluters, the waste generating companies, and the local government (i.e. Prefecture Kagawa) who neglected to control the violator. Local residents demanded compensation, the removal of all illegally dumped waste from Teshima, and restoration of the site.

As the site of the incident covered areas of multiple prefectures, this case was transferred to the EDCC. The EDCC appointed three technical experts to investigate the pollution of the site at its own costs, which came to 236,000,000

[26] See, for example, Hiromasa Minami, Teshima Sangyo Haikibutsu Choutei no Seiritsu to Igi, *Jurist*, No.1184 (2000) (in Japanese), 64-68; Akira Rokusya, Kogaitou Chousei Iinkai ni okeru Kankyo Hunso Kaiketsu Tetsuzuki no Tokusyoku, *Hanrei Times*, No.1035 (2000) (in Japanese), 91-99.

yen.

On 6 June 2000, the parties accepted the conciliation with an agreement to build a new facility in Naoshima, a small island adjacent to Teshima, to bring and treat the dumped waste there. The agreement included the proper treatment of all dumped waste with financial support from the national government, the establishment of the Teshima Waste Disposal Council to negotiate the recovery plan of this area and to monitor the re-treatment project.

The Council consisted of the local government, local residents, and scholars. First chair was a lawyer, who was a member of the Conciliation Committee of the Teshima case. This Council represents a new trend toward the control of waste management through partnership.

In addition, the Teshima case prompted the revision of the Waste Disposal and Public Cleansing Law (Act No. 137 of 1970) to consolidate the violator's responsibility. The government also recognised that the establishment of extended producer responsibility (EPR) was necessary.

This example illustrates how an administrative ADR system can complement the legal system with flexible solutions that promote environmental policy.

4-2-3 Suginami Disease case

Chronic health damage caused by various kinds of chemical substances, such as chemical hypersensitivity and sick house syndrome, has become a serious problem. However, there are more than 20 million chemical substances, and their toxicity is unknown in many cases. Therefore, for this type of damage, it is difficult to clarify the causal relationship between certain chemical substances and health damage. Moreover, in the case of a garbage disposal facility, even the operator of the facility does not have sufficient

information or knowledge about the type and nature of the substances contained in the garbage. The Suginami Disease case is one of these cases[27].

Tokyo Metropolitan constructed a plastic waste compacting plant in Suginami Ward in 1996. Immediately after operations began at the plant, more than 100 local residents complained of various health issues, such as sore throats, headaches, dizziness, and palpitations. In 1997, 18 local residents filed an application for adjudication of the cause of damage.

In 2002, the Adjudication Committee determined a causal relationship between chemical substances discharged from this plant and health damage for a certain period of time. In addition to the epidemiological factors, such as the relationship between damage and the location and the timing of the plant's operations, the Committee took into account that there were no other environmental impact factors to explain the damage and inferred the causal relationship. It was remarkable that the Committee recognised causality without identifying the causative substances.

Tokyo Metropolitan had not regarded this kind of plant as hazardous before this incident because its purpose was just to compact plastic waste. However, this plant was abolished in 2009.

5. Future perspectives

Japanese administrative environmental ADR is a unique model of an environmental tribunal. In the past, conciliation has been most frequently chosen by applicants. However, recent data indicates that the EDCC is moving toward a more adjudicatory model.

Although no environmental court exists in Japan, ordinary courts can

[27] Noriko Okubo, Suginami-byo Genin Saitei Jiken, *Kankyo Hanrei Hyaku-sen* (Ver.2) (2011) (in Japanese), 246-247.

utilise the knowledge and experience of the EDCC by commissioning adjudications. The administrative ADR bodies, especially the EDCC, also have some measures to reflect their knowledge and experience in environmental policy.

Due to the limited resources of the Review Boards at the prefectural level, closer cooperation between the EDCC and Review Boards is indispensable. According to the current system, the national and local bodies, in principle, handle disputes independently. However, a Review Board has sometimes cooperated with the EDCC by utilising adjudications by the EDCC in conciliation cases of its own, in a way similar to courts' commissioning adjudications. According to Article 38 of the Settlement Act, the Review Board may, if appropriate, hand any of its conciliation cases over to the EDCC with the consent of the parties and in consultation with the EDCC. This Article could be applied more flexibly. For example, a conciliation case concerning construction of a mega coal plant is now pending at the Review Board in Hyogo Prefecture. The applicants demand reduction of not only emissions of air pollution substances, but also CO_2 emissions from the viewpoint of national and international climate change policy. This type of case would be more appropriately handled by the EDCC.

The EDCC also faces various challenges. First, its jurisdiction does not cover all environmental problems. The EDCC has handled cases flexibly, including disputes involving pollution other than the typical Seven Major Types Pollution, as long as the case is related to pollution. However, it could be difficult for the EDCC to handle a genuine biodiversity case. Therefore, it is worth considering expanding the jurisdiction of the EDCC and Review Boards to encompass all environmental disputes.

Second, there are cases in which it is difficult, even for the EDCC, to clarify the causal relationship, such as disputes concerning chemical hypersensitivity

and the ecosystem. In such cases, it is necessary to reduce the burden of proof, for example, by applying the precautionary principle.

Some environmental courts in Asia, as well as in other regions, have special procedural rules for environmental litigation that stipulate application of environmental principles, including the precautionary principle. Internationally, the application of the *in dubio pro natura* principle, which has already been applied in some Brazilian court cases, has been discussed. In this context, it would be useful to refer to international developments in ECTs and to share their knowledge and experiences with each other.