

ESG DEVELOPMENT: NEW CLIMATE CHANGE LAWSUIT FILED IN JAPAN

On 6 August 2024, Japan's first climate change lawsuit whose claimants are exclusively young people was filed with the Nagoya District Court. The claimants, known as Youth Climate Case Japan, seek injunctive relief to limit the CO2 emissions of 10 utility companies. This case is significant given Japan's significant use of fossil fuels, despite continued efforts by the Japanese government and major corporations towards decarbonisation. It may also represent a turning point in climate change litigation in Japan, given that the legal arguments are the first of their kind and appear to take inspiration from other jurisdictions where the courts have been more amenable to climate-related claims.

BACKGROUND OF CLIMATE CHANGE ACTIVISM IN JAPAN

Compared to other countries, Japan has not been home to many climate-related lawsuits. Only a handful have been filed to date, most of which failed due to issues with establishing legal standing or proximity to the alleged harm. As key examples, in 2018, citizens of Kobe City grouped together to file civil and administrative lawsuits concerning the construction and operation of coal-fired power plants in the region. The administrative lawsuit was ultimately dismissed, among other reasons, on the basis that there was no "legal relationship" between the claimants and the state to justify an examination of the legality of the environmental impact assessment in question¹. The civil claim against the relevant power company was also rejected in 2023 on the basis that there was "no specific danger to the lives, bodies, and health"² of the claimants stemming from the power plants, nor any "reasonable causation"³ between the alleged violation of human rights and harm to the

Key takeaways

- The new youth climate case demonstrates the continuing rise of climate change activism in Japan
- Japanese courts are increasingly the subject of efforts to further the objectives of activist organisations in addition to other strategies such as shareholder activism
- Japan is likely to implement tighter and more wide-ranging ESG rules and regulations on business, particularly in the energy sector
- ESG activists in Japan maintain significant connections to ESG activists in other jurisdictions

¹ Request for cancellation of environmental impact assessment final notification (administrative claim) / 環境影響評価書確定通知取消等請求事件, Osaka District Court judgment (15 March 2021), p.109 「本件確認の訴えについては、行政事件訴訟法 4 条の当時者訴訟として許される訴訟類型に該当せず本件確認は不適法である。」

² Request for injunction against the construction of coal-fired power plants (civil claim) / 石炭火力発電所建設等差止請求事件, Kobe District Court judgment (20 March 2023), p.101 「本件新設発電所の稼働により原告らの生命、身体、健康が侵害される具体的危険が存在すると認めることはできず」

³ Ibid, 「温暖化に起因する気候変動による気象・気候被害の激甚化によって原告ら個人に生ずるおそれのある被害との間に相当因果関係があると認めることもできない」

claimants. The Osaka High Court is scheduled to render a judgment on the appeal in April 2025⁴. So far, the case law seems to indicate that Japanese courts consider climate change to be a public policy matter, and therefore individuals may only bring a claim regarding climate inaction if they can establish that they are both directly and especially affected.

However, the recent claim is more expansive than prior claims. Not only are the respondents multiple utilities companies (alleged "large-scale emitters"⁵), but the claim is based on widespread environmental damage rather than localized harm. Further, although the tort law basis of the claim is reminiscent of past actions, there is a notable departure from the usual approach of relying on "personal rights" (*jinkakuken*) under Japan's constitution to establish human rights related to environmental stability. Instead of the Constitution, the claimants in the recent action primarily refer to international instruments such as the OECD Guidelines for Multinational Enterprises, the Paris Agreement, and United Nations Guiding Principles on Business and Human Rights, arguing that the emission reduction targets in those instruments constitute "principles of international public order"⁶ and that private companies have a duty to uphold human rights related to climate change⁷. This international human rights narrative has been the backbone of a number of climate change cases in other jurisdictions such as the UK and EU but as this line of argument is largely unprecedented in Japan, it is too early to tell how the Japanese courts will approach it.

In addition to the development of climate litigation, in recent years, an increasing number of ESG activist groups have been established in Japan, including those with international links. By purchasing small amounts of shares in Japanese corporations, some of these groups have made shareholder proposals which effectively demand reduced emissions or other sustainability focused demands.

In 2020, Japanese NGO Kiko Network filed the nation's first shareholder proposal on climate change at the AGM of a Japanese bank, and every year since, similar proposals have been filed by NGOs such as Rainforest Action Network and Market Forces, whose headquarters are outside of Japan. To date, no proposals have received enough support to be adopted but shareholder activism remains a popular form of activism and attracts publicity (which may be the primary goal of the activists). Moreover, while generally the focus of climate activism has tended to be utilities or energy companies, it is noteworthy that financial institutions such as banks are also being subject to this form of climate activism.

JAPAN'S EFFORTS TO IMPLEMENT ESG-RELATED POLICIES

Over the past few years, Japan's climate policy framework has also undergone significant changes. In 2020, the Ministry of Economy, Trade and Industry (METI) announced an ambitious Green Growth Strategy to achieve

⁴ Kobe Climate Case website (<https://kobeclimatecase.jp/>) (裁判のお知らせ)

⁵ "Youth Climate Lawsuit to Live for Tomorrow" Carbon Emissions Reduction Case, Official Complaint, p.112 「被告らのような大規模排出事業者」

⁶ "Youth Climate Lawsuit to Live for Tomorrow" Carbon Emissions Reduction Case, Official Complaint, p.74 「世界の平均気温の上昇を 1.5 °C に抑えるために科学の要請する水準での CO2 排出削減は国際的公序であること」

⁷ "Youth Climate Lawsuit to Live for Tomorrow" Carbon Emissions Reduction Case, Official Complaint, p.95 「国際公序に基づく大規模排出企業の排出削減が法的義務であること (企業の人権尊重義務)」

carbon neutrality by 2050.⁸ The purpose of the strategy is to create an industrial structure based on green energy and move away from fossil fuels, and a number of regulatory initiatives have already been implemented to encourage investment in clean energies such as nuclear power and renewables. As key examples, the Industrial Competitiveness Enhancement Act was reformed in 2021, introducing tax credits and deductions for carbon neutral investments;⁹ and in May 2023, the GX Promotion Act came into force, resulting in the issuance of the Japan Climate Transition Bond by the Government of Japan, the world's first sovereign transition bond issuance. Also, in April 2024, the Japan Fair Trade Commission (JFTC) updated its Green Guidelines to provide further clarity on the application and enforcement of Japanese antitrust law to various types of ESG-related commercial conduct.

Both ESG disclosure regulations and the volume of voluntary ESG related disclosures are increasing in Japan. In 2021, the Corporate Governance Code was revised to require listed organisations to report on the progress of their climate-related initiatives to the Task Force on Climate-related Financial Disclosures,¹⁰ and further disclosure requirements are expected to be introduced in 2025 by the Sustainability Standards Board, which recently outlined a plan for the development of prescriptive climate-related disclosure standards.¹¹ It is likely that ESG activists will be monitoring companies' reports and disclosures made in compliance with such ESG rules and guidelines.

CONCLUSION

It appears that ESG (including climate change) activists in Japan will continue to become more aggressive and creative in their efforts to hold companies accountable, making use of both the courts and shareholder rights. A key consideration in this regard is the increasing volume of climate-related regulations and disclosure requirements, as the availability of defined targets and statistics may make it easier for activists to make sophisticated claims. It is also likely that ESG activists in Japan will continue to adopt strategies used by activists in other jurisdictions.

As the regulatory landscape undergoes further changes, it will be important for companies operating in Japan to keep track of the strategies employed by climate change activists and be prepared to respond to attacks. In doing so, it will be crucial to develop robust compliance systems to keep up with the growing number of ESG regulations in Japan. Both global companies with operations in Japan or Japanese companies operating overseas should factor ESG activism into their due diligence and risk assessments.

⁸ METI, "Green Growth Strategy Through Achieving Carbon Neutrality in 2050"

(https://www.meti.go.jp/english/policy/energy_environment/global_warming/ggs2050/index.html)

⁹ EY, Tax News Update (15 April 2021), "Japan's 2021 Tax Reform introduces tax incentives for carbon neutrality and digital transformation" (<https://globaltaxnews.ey.com/news/2021-5443-japans-2021-tax-reform-introduces-tax-incentives-for-carbon-neutrality-and-digital-transformation>)

¹⁰ Sawaji Osamu, "Revision of the Japanese Corporate Governance Code and Guidelines for Investor and Company Engagement" (November 2021) (https://www.gov-online.go.jp/pdf/hlj/20211101/hlj202111_24-25_Revision_of_Japans_Corporate_Governance_Code_and_Guidelines_for_Investor_and_Company_Engagement.pdf)

¹¹ Sustainability Standards Board news release, "The Sustainability Standards Board of Japan issues Exposure Drafts of Sustainability Disclosure Standards to be applied in Japan" (March 2024) (https://www.ssb-j.jp/en/wp-content/uploads/sites/7/news_release_20240329_e.pdf)

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