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Administrative Alternative Dispute Resolution for Environment in Japan: Achievements and Challenges of 50 Years of Activities

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Abstract

In Japan, environmental dispute resolutions can be divided into two main categories: actions within the court system and out-of-court procedures. Civil and administrative litigations are the most frequently used forms of resolution. However, the hurdles in resolving environmental disputes in court are high, especially on the plaintiffs' side. Therefore, Japan has established an alternative dispute resolution (ADR), led by administrative agencies, to resolve environmental disputes; this process is inexpensive and efficient. In fact, many cases have reached complete resolution. These administrative ADRs are handled by the Environmental Dispute Coordination Commission (EDCC), a national agency, and the Prefectural Pollution Review Boards (Review Boards), local agencies. The purpose of this study is to identify the significance and challenges of 50 years of activities of the EDCC and Review Boards as administrative ADR.

Key Words: Administrative ADR, environmental matters, Environmental Dispute Coordination Commission (EDCC), Prefectural Pollution Review Boards (Review Boards)

1. Introduction

According to the United Nations Environmental Program (UNEP), there are 2,115 operational Environmental Courts and Tribunals (ECTs) in 67 countries.[1] ECTs include judicial courts, administrative tribunals, and other dispute-resolution forums. Pring and Pring identified three types of environmental courts: freestanding courts, green chambers within general courts, and designated green judges in general courts.[2] Three types of environmental tribunals were identified: independent tribunals (completely separate from another agency or ministry), quasi-independent ones (under the supervision of a different agency than the one whose decisions they review), and "captive" tribunals (within the control of the agency whose decisions they review).[3] Other types can include special commissions, alternative dispute resolution (ADR) programs, ombudsmen, and human rights bodies.[4]

Which of these types can be applied to resolve pollution disputes in Japan? Japan has demonstrated a preference for ADR[5] in environmental cases. The Japanese model is unique and longstanding among ETCs.[6] Administrative

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[1] UNEP, *Environmental Courts and Tribunals – 2021: A Guide for Policymaker* (2022), p. 11.

[2] George Pring and Catherine Pring, *Environmental Courts and Tribunal: A Guide for Policy* (UNEP, 2016), p. 21.

[3] *Ibid*.

[4] *Ibid*.

[5] According to the Act on Promotion of Use of Alternative Dispute Resolution [*Saibangai hunso kaiketsu tetsuzuki no riyo no sokushin ni kansuru horitsu*] (Act No. 151 of 2004) enacted in 2004 in Japan, ADR is "procedures for resolution of a civil dispute between parties who seek, with the involvement of a fair third party, a resolution without using litigation" (Article 1). When we refer to ADR in this paper, we use this definition. In addition to cost and time constraints, the following points have been pointed out as factors that make ADR more suitable for resolving environmental disputes than litigation. First, environmental matters often encompass a wide range of social, economic, and highly technical issues, which limits the ability of courts to address such complex issues. Second, environmental disputes are often characterized by the involvement of a wide variety of stakeholders, many of whom may be excluded from the courtroom due to their lack of standing as plaintiffs. Third, it is difficult for the court to provide a solution that is satisfactory to all parties through the so-called "win-win approach" (a method in which the court tries to resolve the dispute so that both parties can benefit without creating a loser). Mayumi Ohashi, "Kankyo ADR ni okeru gyouseikikan no kanyo," *Seijo Hogaku*, Vol. 74 (2005) (in Japanese), p. 87; Lawrence Susskind and Alan Weinstein, "Towards a Theory of Environmental Dispute Resolution," *Boston College Environmental Affairs Law Review*, Vol. 9(2) (1980), pp. 317–321.

[6] Noriko Okubo, "Japanese Administrative ADR in Environmental Matters: Its Developments and Challenges," *Shinshudaigaku hokei ron-shu*, No. 5 (2019), p. 118.

environmental ADR bodies consist of the Environmental Dispute Coordination Commission (EDCC)[7] at the national level and the Prefectural Pollution Review Boards (Review Boards) at the local (prefecture) level. In practice, administrative organizations have played a more important role in the settlement of environmental disputes than the courts in Japan.[8]

The central and local government-led ADR for the appropriate handling and resolution of environmental matters implemented in Japan was institutionalized as the Pollution Dispute Settlement System under the Pollution Dispute Settlement Law [*Kogai funso shori-ho*] enacted in 1970 (hereinafter referred to as the "Settlement Act"; Act No. 108 of 1970).

Why is administrative ADR used more frequently in Japan than are judicial courts to resolve environmental matters? This study elucidates the characteristics of Japanese-style ADR regarding the resolution of environmental matters and the activities of the EDCC and Review Boards over the past 50 years. In addition, this paper clarifies the challenges that Japanese ADR for environmental matters is currently facing.

This study first describes the background that led to the establishment of the EDCC and the Review Board and the institutional and procedural features of these bodies (Section 2). Next, it identifies trends in the treatment of environmental matters by the EDCC and Review Boards from a statistical and chronological perspective (Section 3). Furthermore, this study refers to the Pollution Complaint Consultation Offices established in prefectures and municipalities, apart from the EDCC and Review Boards, for the prompt and proper resolution of complaints about environmental matters (Section 4). Finally, Section 5 highlights the characteristics and challenges of Japanese-styled ADR in resolving environmental issues.

2. Pollution Dispute Settlement System

2-1 Historical Background

There were several conflicts over pollution prior to World War II, including

[7] EDCC is called "Kogaitou Chousei Iinkai" in Japanese (and the "Kou-chou-i" for short).
[8] Okubo, N., 2019, *supra* note 6, p. 119.

the *Ashio* Copper Mine poisoning incident.[9] However, just after the 1950s, it began to be seen as a major social problem, and its solution became a national issue. During this period, Japan achieved high economic growth, and the occurrence of pollution increased, represented by four major pollution incidents: the *Minamata* disease incidents in Kumamoto and Niigata; the asthma incident in Yokkaichi, Mie Prefecture; and the *Itai-itai* disease incident in Toyama Prefecture.[10] As these incidents show, tragic diseases caused by air and water pollution occurred frequently in Japan at that time, and large-scale disputes broke out between the affected residents and the companies that caused them.

Judicial settlement has traditionally been the main means of resolving pollution disputes, but it is not suitable for victim relief, and there are limits to the speedy and proper resolution of pollution disputes.[11] In other words, in civil lawsuits, (i) it is often difficult for the victim to prove the causal relationship between the cause and occurrence of damage; (ii) litigation requires a large amount of money; and (iii) because of the strictness of the procedures, it takes a considerable amount of time to reach a final resolution through a final judgment.

Under these social conditions, the Settlement Act was enacted in 1970. Apart from judicial settlement through civil courts, a dispute settlement system was established through an administrative committee.[12] There were

[9] Shiro Kawashima, "A Survey of Environmental Law and Policy in Japan," *North Carolina Journal of International Law*, Vol. 20(2) (1995), pp. 234–236.

[10] *Ibid*., pp. 239–242.

[11] Kogaitou Chousei Iinkai, Kogai kujou soudan to kogai funso shori＞"Kogai" towa? (in Japanese), available at https://www.soumu.go.jp/kouchoi/knowledge/how/e-dispute.html (last accessed April 21, 2023); Hiroshi Ueno et al., "Zadankai: Kogai funso shori seido no jujitsu to hatten," *Jurist*, No. 1008 (1992) (in Japanese), p. 10.

[12] At that time, apart from civil courts, administrative dispute resolution systems such as the Act Concerning Conservation of Water Quality in Public Waters [*Kokyoyosuiiki no suishitsu no hozen ni kansuru horitsu*] (Act No. 181 of 1958), the Air Pollution Control Act [*Taiki osen boshi-ho*] (Act No. 97 of 1968), and the Noise Regulation Act [*Soon kisei-ho*] (Act No. 98 of 1968) each had a mediation system for settlements. However, this was not a unified system for pollution in general. As a result, the number of cases used was low and did not produce much success. Therefore, the Basic Act for Environmental Pollution Control, enacted in 1967, stipulated in Article 21, paragraph 1, that necessary measures must be taken to establish a dispute resolution system, including mediation and conciliation of pollution disputes. Based on this, the Settlement Act was enacted in 1970 after deliberations at the Central Council and other bodies. This act was amended in 1972 to allow for legal decisions (adjudication) regarding pollution disputes as well. Kogaitou Chousei Iinkai, Kogai kujo sodan to kogai funso shori＞"Kogai" towa (in Japanese), available at https://www.soumu.go.jp/kouchoi/knowledge/how/e-dispute.html (last accessed May 6, 2023); Takuya Fukayama, "Kogaitou Chousei Iinkai," *Hanrei times*, No. 728 (1990) (in Japanese), p. 34; Takehisa Awaji, "Kogai funso no shihoteki kaiketsu to kogai funso shori seido ni yoru kaiketsu," *Rikkyo hogaku*, No. 65 (2004) (in Japanese), pp. 35–36.

three main reasons for establishing this system.[13] The first was to correct substantive inequalities due to disparities in ability between parties due to differences in social and economic status through the examination of evidence and fact-finding *sua sponte*. The second was to reduce petitioners' cost burden. Application fees are relatively low compared to legal costs (fees for applying for conciliation are approximately one-quarter of those for civil conciliation by the court). The third is to speed up the resolution of disputes by relaxing the rigidity of the hearing procedure compared to civil litigation.

This system deals only with civil pollution disputes between victims and perpetrators (the definition of pollution is described below; Article 26(1) of the Settlement Act).[14] In contrast to civil disputes, administrative disputes may arise between victims and government agencies regarding the exercise of licensing or regulatory power related to perpetration. However, the Pollution Dispute Settlement System did not cover administrative disputes.

2-2 Administrative ADR Bodies

Administrative ADR for resolving pollution disputes consists of the EDCC at the national level and the Review Boards at the local (prefecture) level. Although the EDCC and the Review Boards are independent in resolving disputes according to their respective jurisdictions, they mutually exchange information, liaise, and consult closely with each other to ensure the smooth operation of the Pollution Dispute Resolution System.[15]

2-2-1 EDCC

The EDCC is an administrative commission established as an external

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[13] Kogaitou Chousei Iinkai Jimukyoku (ed.), *Kaisetsu kogai funso shori-ho* (Gyosei, 2002) (in Japanese), pp. 18–19.

[14] "Civil dispute" here refers to disputes concerning legal relationships between private parties over pollution, and includes not only disputes over compensation for damages but also disputes over all forms of acts or omissions, such as suspension of operations, injunctions such as plant relocation, replacement of equipment, changes in operating hours, and changes in raw materials. Fukayama, T., 1990, *supra* note 12, p. 36; Kogaitou Chousei Iinkai Jimukyoku, 2002, *supra* note 13, pp. 83–84. In the actual processing of cases, the EDCC interprets the applicability to "civil disputes" in a flexible manner. In other words, even if the content of the applicant's request cannot be regarded as a civil claim, it can be applied for operationally. In particular, there are many cases in which the government is the direct opponent and administrative or legislative measures are sought.

[15] Hiromasa Minami, "20 shunen wo mukaeta Kogaitou Chousei Iinkai," *Jurist*, No. 1008 (1992) (in Japanese), p. 28.

bureau of the Ministry of Internal Affairs and Communications that aims to ensure the prompt and appropriate resolution of pollution disputes through conciliation and adjudication (Articles 2 and 3 of the Act for the Establishment of the EDCC [*Kogaitou Chousei Iinkai sechi-ho*] (Act No. 52 of 1972)). Therefore, the EDCC is guaranteed a high degree of independence.[16] The EDCC is a panel comprising seven full- or part-time members, including a chairperson. The committee consists of qualified legal professionals (former judges and lawyers), doctors, and experts in various domains such as administration and chemistry. Members of the EDCC are appointed by the Prime Minister with the consent of the Diet (terms of office are five years; Articles 6–8 of the Act for Establishment of the EDCC).

When deemed necessary, the EDCC may request that relevant administrative agencies submit materials, state their opinions, and provide technical knowledge or other necessary cooperation; it may also request other administrative agencies of the state, local governments, schools, testing laboratories, business operators, or academic experts to conduct necessary investigations (Articles 15 and 16 of the Act for Establishment of the EDCC).

2-2-2 Review Boards

At the local level, any prefecture can establish a Prefectural Pollution Review Board pursuant to the Prefectural Ordinance (Article 13 of the Settlement Act). Whether to establish this Review Board has been left to the discretion of each prefecture, and in prefectures that do not establish a Review Board, the prefectural governor shall delegate candidates to the Pollution Review Commissioner and prepare a list thereof (Article 18 of the Settlement Act). Members of the Review Board are appointed by the prefectural governor with the consent of the assembly. The committee consists of 9 to 15 members (Article 15 of the Settlement Act).

As of March 2022, 37 prefectures have Review Boards.[17] Although the EDCC and the Review Boards resolve disputes independently according to

[16] Kogaitou Chousei Iinkai Jimukyoku, 2002, *supra* note 13, p. 27.

[17] Kogaitou Chousei Iinkai, *Kogaitou Chousei Iinkai nenji hokoku (Sanko shiryo) Fiscal Year 2021* (in Japanese), p. 2, available at https://www.soumu.go.jp/kouchoi/knowledge/nenji/r3nend_menusankou.html (last accessed April 21, 2023).

their respective jurisdictions, they cooperate with each other through information exchange and other means to ensure the smooth operation of the system.

2-3 Scope of cases handled by the EDCC and the Review Boards

2-3-1 Definition of Environmental Pollution

Both the EDCC and Review Boards settle disputes pertaining to "environmental pollution" ("Kogai" in Japanese; Article 3 of the Settlement Act). The Basic Environment Act [*Kankyo kihon-ho*] defines "environmental pollution" as damage to human health or the living environment caused by (i) air pollution, (ii) water pollution (including the deterioration of the quality and other conditions of water as well as of the beds of rivers, lakes, the sea, and other bodies of water...), (iii) soil pollution, (iv) noise, (v) vibration, (vi) ground subsidence (except for subsidence caused by drilling activities for mining...), and (vii) offensive odors, which arise over a considerable area as a result of industrial or other human activities (Article 2(3)). These seven types, (i) to (vii), are called the Seven Major Types of Pollution. The Environmental Dispute Settlement System addresses disputes related to these types of environmental pollution. This means that the concept of "Kogai" does not cover all environmental problems.[18]

However, the EDCC and the Review Boards have adopted a relatively loose interpretation of what constitutes pollution. For example, disputes caused by low-frequency sound, which by itself does not constitute pollution as described above, are covered if they are considered to be related to noise and vibration.[19] The term "a considerable area" is intended to treat damage that is widespread in terms of both personnel and geographical areas of pollution.[20] Therefore, even if there is only one victim, the case will be subject to examination by the EDCC and the Review Boards if the damage is spread over a certain area. Ultimately, it is necessary to make a judgment on a case-by-case basis as to whether or not there is "a considerable area." Furthermore, damage includes destruction that has already occurred as well as any that may occur in the future.

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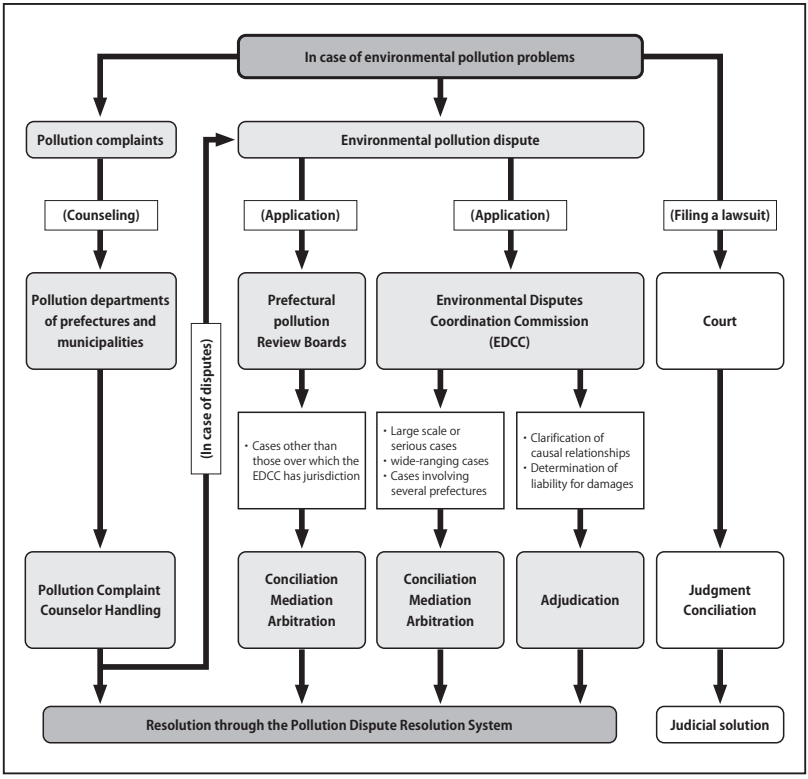
[18] Okubo, N., 2019, *supra* note 6, p. 123.

[19] Kogaitou Chousei Iinkai, 2021, *supra* note 17, p. 3.

[20] *Ibid.*; Kogaitou Chousei Iinkai Jimukyoku, 2002, *supra* note 13, pp. 20–21.

2-3-2 Jurisdiction Concerning Environmental Dispute Cases

The EDCC has jurisdiction to mediate, conciliate, and arbitrate the following three categories of disputes (Article 24(1) of the Settlement Act): (i) large-scale or serious cases that cause considerable damage to human health due to air pollution or water contamination or that cause total financial damages 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 ("Kogai") disputes (Article 3 of the Settlement Act). The EDCC may handle all adjudicated cases.



Source: Kogaitou Chousei Iinkai, Prompt and Appropriate Settlement of Environmental Disputes, available at https://www.soumu.go.jp/kouchoi/english/definition.html (last accessed May 8, 2023)

Figure 1: Environmental Pollution Dispute Resolution Process

The Review Boards have jurisdiction to mediate, conciliate, and arbitrate any dispute other than those within the jurisdiction of the EDCC. Even if the case does not conform to any of the above three types, the Review Board may transfer the case to the EDCC upon the agreement of the parties, if there is a reason to do so (Article 38 of the Settlement Act). The Review Board may not handle adjudicated cases.

2-3-3 Types of Environmental Dispute Settlement Procedures

Most environmental dispute cases are settled through conciliation or adjudication procedures. Both procedures commence with applications filed by the interested parties. Administrative environmental ADR bodies provide for mediation, conciliation, arbitration, and adjudication. Only the EDCC has the jurisdiction to adjudicate.

2-3-3-1 Conciliation (“調停”)

Conciliation is a procedure wherein the EDCC or a Review Board intervenes and actively leads negotiations between the parties to facilitate the reaching of an agreement based on their mutual concession. Conciliation is settled by a conciliation committee consisting of three conciliation members appointed from among the members of the EDCC or the Review Board (Articles 31–33 of the Settlement Act).

When the conciliation committee presents a conciliation proposal, the parties can accept or reject it. However, if the parties accept the proposal and conciliation is concluded, an agreement is reached between the parties. The agreement here does not have the same effect as a final and binding judgment as in the case of civil conciliation but has the nature of a settlement agreement under civil law. The conciliation conducted by the EDCC is characterized by its flexibility and variety compared to civil conciliation conducted by the courts, since it can include effort clauses and spirit clauses in addition to those related to rights and obligations in the conciliation clauses.[21]

[21] Hiromasa Minami, “Kogai funso no tokushoku to shori no hoho,” *Hitotsubashi ronso*, Vol. 107(4) (1992) (in Japanese), p. 527.

2-3-3-2 Adjudication (“裁定”)

Adjudication is a procedure in which the adjudication committee, consisting of three or five adjudicators appointed from among the members of the EDCC, makes a legal decision by examining the evidence and other prescribed procedures. The significance of adjudication, compared to a court, is that a professional administrative board makes a decision based on its expertise. Adjudication consists of two types: adjudication of liability for damages and adjudication of the cause of damage.

The adjudication of liability for damages is a procedure used to determine the existence or non-existence of liability for damages (Article 42-12 of the Settlement Act). Adjudication of the cause is a procedure to determine the causal relationship between the offending actions and damage (Article 42-27 of the Settlement Act). When no action is filed concerning damages related to an adjudication of liability within 30 days of 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).

For the adjudication of liability and conciliation procedures, there is a system of recommendations for the fulfillment of obligations (Article 43-2 of the Settlement Act). In such cases, if the other party in the dispute is found to be negligent in the performance of obligations stipulated in the liability award or conciliation procedure, or if the content of the obligations is found to be in dispute, a recommendation for the fulfillment of obligations may be submitted to the EDCC.

On the other hand, for the adjudication of the cause, the Committee only determines the causal relationship and not the rights and obligations of the parties. Therefore, there are no further measures that the EDCC can take to implement the contents of the award. In such cases, it is necessary to file a separate civil suit and implement the award through a final and binding judgment. However, adjudication of the cause has the following advantages: First, it allows specialized and focused adjudication of the issue of causation and a decision to be made at an early stage. Second, it allows the parties to resolve the issue through conciliation or other means based on the results of adjudication.

The number of days it takes to process an adjudicated case varies from case to case, but except for large or special cases, the EDCC sets the standard trial period as (i) approximately one year and three months for cases that do not require special investigations and (ii) approximately two years for cases that require special investigations.[22]

If the adjudication committee deems it appropriate, it may transfer the adjudication case to conciliation proceedings on its own authority (Article 42-24 of the Settlement Act). The EDCC may adjudicate the cause based on a commission from a court in which a civil lawsuit concerning damage related to environmental pollution is pending (Article 42-32 of the Settlement Act). This system is intended to allow the EDCC to investigate unknown causes of pollution damage.[23] Why was such a system introduced in the EDCC? What is the difference between the EDCC's adjudication process and the civil court process? Victims of environmental pollution often lack expertise and resources in this regard. If the causal relationship were to be investigated in court, it would place a very heavy financial burden on the victims, and victims who lacked the resources and knowledge would hesitate to take the matter into litigation. Thus, the EDCC, with its secretariat staffed by experts in the field, can investigate and determine the cause at no cost to the parties, allowing victims to resolve the dispute voluntarily on that basis, use liability rulings, or move to litigation.[24]

A typical example of the commissioning of cause adjudication is the *Dashidaira* Dam case, the first case in which the adjudication of the cause was commissioned by the EDCC.[25] Prior to this commissioning, fishermen and others had filed a lawsuit in the Toyama District Court against the power company, demanding an injunction against the discharge of sand from the dam, claiming that the fish catch had decreased because of the discharge of sand. The EDCC appointed expert committee members, conducted on-site investigations, and collected the evidence necessary to

[22] Kogaitou Chousei Iinkai, Kogai kujo sodan to kogai funso shori > Q&A (in Japanese), available at https://www.soumu.go.jp/kouchoi/knowledge/faq/faq_04.html (last accessed May 6, 2023).

[23] Masao Otsuka, "Kogai funso shori-ho ni tsuite," *Hanrei jiho*, No. 1220 (2006) (in Japanese), p. 9.

[24] *Ibid*., pp. 9–10.

[25] Jun Harizuka, "Toyama-Ken Kurobegawa kakokaiiki ni okeru dashidaira damu haisa gyogyo higai genin saitei shokutaku jiken ni tsuite," *Cousei*, No. 102 (2020) (in Japanese), p. 3.

determine the causal relationship *sua sponte*.[26] Based on this, in 2007, the EDCC made a ruling recognizing a causal relationship between poor harvests in wakame seaweed farming and sand discharge from the dam. A subsequent court ruled on the basis of that ruling.[27]

2-3-3-3 Mediation and Arbitration（“あっせん”及び“仲裁”）

Mediation is a procedure wherein the EDCC or a Review Board intervenes to encourage the voluntary settlement of a dispute between the parties.[28] 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 a Review Board.[29]

3. Achievements and Challenges in Using the Pollution Dispute Resolution System

3-1 EDCC

3-1-1 Dispute Resolution Experience

The most recent officially published applications to the EDCC are as follows: In the fiscal year 2021, the EDCC accepted 24 cases, which were added to the 36 cases carried over from the previous year, for a total of 60 pending cases.[30] Of these, 12 were closed. Of the 24 cases received, 17 were for noise, 7 for offensive odors, 5 for air pollution, 3 for vibration, 1 each for soil contamination and water pollution, and 0 for ground subsidence (duplicate totals).[31]

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[26] *Ibid*., p. 5.

[27] *Ibid*., pp. 8–9.

[28] Mediation is conducted by up to three mediation members appointed from among the chairman and members of the EDCC (Article 28 of the Settlement Act).

[29] Arbitration is a procedure in which an arbitration panel consisting of three arbitrators appointed from among the chairman and members of the EDCC makes an arbitral award based on an arbitration agreement between the parties and upon application by one or both parties. An agreement to arbitrate here means that both parties to a dispute waive their right to a trial in court and agree to entrust the resolution of a civil dispute between the parties concerning environmental pollution to an arbitration panel and to abide by its decision. The arbitration award of the arbitration panel shall have the same effect as a final and binding judgment. Kogaitou Chousei Iinkai, 2021, *supra* note 17, p. 5.

[30] *Ibid*.

[31] *Ibid*.

How many cases have been received since the EDCC began its activities in the fiscal year 2021 (March 31, 2022)? Since the Settlement Act came into effect in November 1970, 1,094 environmental pollution dispute cases have been filed with the EDCC (called the Central Environmental Pollution Control Board before June 1972) by the end of March 2022.[32] These included 3 mediation cases, 735 conciliation cases, 1 arbitration case, and 355 adjudication cases (210 liability adjudication cases and 145 cause adjudication cases).[33] Of these, a total of 1,046 cases have been closed: 3 mediation cases, 734 conciliation cases, 1 arbitration case, and 308 adjudication cases (186 liability adjudication cases and 122 cause adjudication cases).[34]

How has the number of public records received by the EDCC changed over time? Figure 2 shows the number of cases received by the EDCC in each decade.

	mediation	conciliation	arbitration	adjudication			total
					liability	cause	
Nov. 1970 – Jun. 1972		11	0				11
Jul. 1972 – Mar. 1982	0	398	1	12	10	2	411
Apr. 1982 – Mar. 1992	0	259	0	10	6	4	269
Apr. 1992 – Mar. 2002	1	29	0	26	23	3	56
Apr. 2002 – Mar. 2012	2	16	0	113	61	52	131
Apr. 2012 – Mar. 2022	0	22	0	194	110	84	216
total	3	735	1	355	210	145	1,094

Source: Kogaitou Chousei Iinkai Jimukyoku, "Kogaitou Chousei Iinkai no 50-nen," *Chousei*, No. 110 (2022) (in Japanese), p. 28

Figure 2: Number of cases received by the EDCC (totals for each decade since 1972)

[32] *Ibid*., p. 10.

[33] *Ibid*..

[34] *Ibid*.

The following four points should be added to Fig. 2[35]: First, the figure from November 1970 to June 1972 represents the number of cases received when the EDCC was known as the Central Environmental Pollution Control Board. Second, mediation began on November 1, 1974, and adjudication began on September 30, 1972. Third, of the 735 medication cases, 620 were related to *Minamata* disease. Fourth, of the 145 cases of adjudication of the cause, 13 cases were commissioning of adjudication of the cause.

Figure 2 suggests that the number of new cases accepted for conciliation has shown a declining trend since the early 1990s, whereas the number of new cases accepted for adjudication has been increasing since the 2000s. Why have these changes occurred? Two points have been noted as to why mediation has declined.[36] First, the amount of pollution compensation is often large, and the parties are not likely to reach an agreement. Second, conciliation only has the effect of a settlement agreement.

Why, on the other hand, is the number of adjudicated cases increasing? The obvious reason for the increase in adjudication cases is that the weight of "large-scale industrial type" pollution disputes that cause direct and serious damage to health, as was the case when the EDCC was first established, has decreased, while "urban and lifestyle-based pollution" cases, such as pollution due to waste, air, and noise pollution from roads and railroads, as well as health damage caused by noise, smell, air, and water pollution within neighborhoods, have increased.[37] In short, the current pollution problem is that the scope and extent of damage and the causal relationship are not necessarily clear (scientific uncertainty), which is why there has been an increase in the number of applications for adjudication-seeking clarification of causal relationships.[38] Although there is a question regarding the extent to which the parties can compromise, a method of exploring compromises and forming solutions among the parties would be beneficial

[35] Kogaitou Chousei Iinkai Jimukyoku, "Kogaitou Chousei Iinkai no 50-nen," *Chousei*, No. 110 (2022) (in Japanese), p. 28.

[36] Tadashi Otsuka, *Kankyo-ho Basic*, 4th ed. (Yuhikaku, 2023) (in Japanese), p. 577.

[37] Takashi Taniguchi, "Kogaitou Chousei Iinkai no 30-nen," *Jurist*, No. 1233 (2002) (in Japanese), pp. 41–42. "Urban and lifestyle-based pollution" problems are characterized by the following two points. First, causal relationships are difficult to elucidate because the pollution comes from an unspecified number of sources, and second, the victims themselves can also be the perpetrators. These factors may explain why adjudicated cases are on the rise.

[38] Yasutaka Abe and Takehisa Awaji, *Kankyo-ho*, 4th ed. (Yuhikaku, 2011) (in Japanese), p. 448.

for resolving recent environmental issues involving scientific uncertainty.[39] Other factors contributing to the increase in the number of adjudication applications are thought to include the high number of small-scale pollution disputes.[40]

The following three points are the most recent features of environmental pollution dispute resolution[41]: The first is the increase in "urban and lifestyle-based pollution" disputes. In particular, there has been a noticeable trend toward the pendency of relatively small-scale cases in urban areas with dense populations and housing, such as noise from neighboring residences and stores and offensive odors from restaurants. The second is the high percentage of adjudicated cases; since fiscal 2009, the number of adjudicated cases received has generally remained around 20, and adjudications account for a high percentage of the cases received. Adjudicated cases accounted for 95% of all cases pending in fiscal year 2021. The third is the increase in cases involving noise, which accounted for the highest percentage of cases pending in fiscal year 2021 (approximately 60 %).[42]

In the following sections, we discuss representative pollution disputes handled by the EDCC in line with these changing times.

3-1-2 Case Studies in the EDCC

3-1-2-1 Large-Scale Industrial Pollution Applications in the 1970s

When the EDCC was first established, there were many cases of large-scale industrial pollution, and many conciliation cases between victims who claimed serious health damage and the offending companies were pending. This study focuses on the following three large-scale industrial pollution disputes that characterized the 1970s:

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[39] Hidetsugu Shimomura, "Kogai funso shori to kogai higai hosho," in Nobutaka Takahashi et al. (eds.), *Kankyo hozen no ho to riron* (Hokkaido daigaku shuppankai, 2014) (in Japanese), p. 497.

[40] Abe, Y., and T. Awaji, 2011, *supra* note 38, p. 448.

[41] Kogaitou Chousei Iinkai Jimukyoku, 2022, *supra* note 35, p. 32; Kogaitou Chousei Iinkai, *Kogaitou Chousei Iinkai 50-nen-shi* (2022) (in Japanese), p. 31, available at https://www.soumu.go.jp/kouchoi/50th_anniversary.html (last accessed April 21, 2023).

[42] The most prominent recent disputes are cases of noise in the familiar living environment, such as noises related to daily life such as outdoor units of air conditioners and heat pump water heaters in the neighborhood, supermarkets and convenience stores open late at night, voices of children and students at daycare centers and schools, and voices of users of parks and sports facilities.

(a) *Minamata* diseases case (EDCC, Conciliation No. 4 of 1971)

In this case, fishermen and others along the coast of the *Shiranui* Sea sought conciliation against the *Chisso* Corporation for compensation for *Minamata* disease, claiming that they had suffered mental and property damage due to *Minamata* disease caused by effluent from the *Minamata* factory of *Chisso* Corporation. From December 1971 to March 2022, there were 620 applications (1,556 patients).[43] The EDCC conducted a conciliation on which of the three ranks (A, B, and C) specified in the compensation agreement (concluded between the patient group and the *Chisso* Corporation) was applicable to an application from a patient who had been certified as having *Minamata* disease.[44] As a result, since the first mediation in fiscal year 1973, the conciliation committee has conducted 55 rounds of mediation, resulting in 609 cases (1,466 patients) by the end of fiscal year 2021.[45] The EDCC includes the following provisions for conciliation. It provided that if, in the future, the applicant' s condition changed in such a way as to require an increase in the fee, the applicant may apply to the conciliation committee for a modification of said amount. Based on this conciliation clause, the EDCC processed 570 applications to modify compensation fees by the end of fiscal year 2021.[46]

(b) *Watarase* River mining pollution case (EDCC, Conciliation No. 8 of 1972)

Furukawa Mining Co., Ltd., which has mining rights over the *Ashio* Copper Mine, discharged mineral poisons into the *Watarase* River in Tochigi Prefecture. As a result, the applicants, who farmed downstream, suffered crop damage. A total of 973 affected residents applied to the EDCC for conciliation, claiming approximately 3.9 billion yen in damages.[47] This case was an application for conciliation by farmers who had been suffering from the *Ashio* Copper Mine poisoning, which is said to be the origin of pollution

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[43] Kogaitou Chousei Iinkai, 2021, *supra* note 17, p. 12.

[44] *Ibid*. In March 1973, the Kumamoto District Court ruled in favor of the plaintiffs on the issue of compensation for *Minamata* disease patients, finding *Chisso* Corporation liable for tortious behavior and ordering it to pay compensation based on the degree of symptoms. The conciliation in this case was based on the framework for compensation for damages created by this judgment. In other words, conciliation by the EDCC served as a complement to the court. Awaji, T., 2004, *supra* note 12, p. 42.

[45] Kogaitou Chousei Iinkai, 2021, *supra* note 17, pp. 12–13.

[46] *Ibid*., p. 13.

[47] Kogaitou Chousei Iinkai, Watarase gawa ni okeru kodoku ni yoru nosakubutsu higai ni kakaru songaibaisho jiken (in Japanese), available at https://www.soumu.go.jp/kouchoi/activity/watarasegawa.html (last accessed May 8, 2023).

problems in Japan, for approximately 100 years due to the inadequate legal system of the Meiji era. Under the conciliation, it was agreed in 1974 that the farmers would be paid 1.55 billion yen in compensation. However, the farmers were dissatisfied with the conciliated amount, as it was reduced to less than half the amount claimed without any basis for the calculation.[48] Nevertheless, this conciliation was the very first case in which *Furukawa* Mining Co. was found liable for damage caused by mineral poisoning over approximately 100 years.[49] However, there has been criticism that the conciliation was not open to the public and that the EDCC worked behind closed doors.[50]

(c) Osaka International Airport noise case
(EDCC, Conciliation No. 1 of 1973; Conciliation No. 16 of 1981)

This case is large, with more than 20,000 applicants.[51] At the time of the case, noise standards had not been established by law. While the management and operation of a highly public facility, such as an international airport, was also a point of contention, conciliation regarding noise abatement measures was reached in 1975, conciliation regarding airport use prohibition issues in 1980, and conciliation regarding the claim for compensation, etc. in 1986.

The following three points are unique features of the handling of this case by the conciliation committee. First, the conciliation committee had three claims (the issue of the need for the airport, the issue of aircraft noise, and the issue of compensation for damages to residents living near the airport); however, it is noteworthy that it decided to give priority to the issue of aircraft noise.[52] The committee's flexible decisions contributed to the early resolution of the case.

Second, the committee demonstrated a flexible attitude toward whether the airport should remain or be eliminated.[53] This means that the suspension of

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[48] Nobuko Iijima, "Watarase gawa engan kodoku nosakubutsu higai jiken," in Akio Morishima and Takehisa Awaji (eds.), *Kogai kanyo hanrei hyaku-sen* (Yuhikaku, 1994) (in Japanese), p. 217.

[49] *Ibid*.

[50] *Ibid*.

[51] Kogaitou Chousei Iinkai, 'Kogai' towa > Osaka kokusai kuko soon jiken (in Japanese), available at https://www.soumu.go.jp/kouchoi/activity/oosakakokusai.html (last accessed May 8, 2023).

[52] Taniguchi, T., 2002, *supra* note 37, p. 43.

[53] *Ibid*.

airport operations, one of the applicants' claims, did not originally fall under the category of "civil disputes" that the EDCC can handle. However, the EDCC was not bound by whether the case constituted a "civil dispute" and proceeded with the proceedings, seeking to resolve the case through agreement of the parties. However, the EDCC did not strictly interpret "civil disputes" and gave priority to the realization of a resolution by agreement of the parties. The conciliation clause stipulated that the national government had the right to decide whether to continue operating Osaka International Airport. Consequently, the issue was resolved such that the EDCC was not directly involved in the national government's aviation administrative authority.

Third, the EDCC was involved in the implementation of the conciliation clauses even after they were reached by performing a follow-up function of monitoring and coordinating the clauses.[54] By performing this function, the EDCC adjusted opinions in the presence of the EDCC staff when discussions between the parties became necessary after the conclusion of the conciliation, thereby realizing the conclusion of a new agreement.

3-1-2-2 Diversification of Pollution Disputes Since the 1980s

The establishment of the EDCC under the Pollution Dispute Settlement System was envisioned to deal with civil pollution disputes involving a large number of victims, such as *Minamata* disease, which was a social problem at that time. This system was intended to avoid the various limitations of civil litigation, such as the burden of proving negligence, the length of time and cost required for trial, and the difficulty of various resolution methods other than monetary compensation, and to resolve cases in a simple, rapid, and flexible manner. However, since the 1980s, after a period of rapid economic growth (from approximately 1955 to 1973, when the real economic growth rate averaged approximately 10% per year), pollution disputes have become more diverse.

Since the 1980s, a common characteristic of cases filed with the EDCC has been an increase in "urban and lifestyle-based pollution." Examples of applications to the EDCC include road noise, spike-tire dust, golf course pesticide damage, railroad noise, waste, chemical substance, and low-

[54] *Ibid.*

frequency noise problems. Of these cases, this study presents a representative sample of cases handled by the EDCC.

(a) Spike tires road dust case (EDCC, Conciliation No. 17 of 1987)

The issue in this case was pollution control measures arising from spike tires (a type of tire with hard special alloy pins embedded in the surface, which is exceptionally effective for driving on icy roads). The problem at the time was that the road surface was scraped by vehicles equipped with spike tires during the low-snow season, and the dust from the scraping was a hazard to human health. As a countermeasure, in April 1987, 62 lawyers for the victims of spiked tire pollution filed an application with the EDCC against seven major spike-tire manufacturers in Japan to stop the manufacture and sale of spike tires. As a result of conciliation by the EDCC in June 1988, the parties agreed to the following conciliation: the manufacture of spike tires was to cease as of the end of December 1990, and the sale of spike tires was to cease as of the end of March 1991.[55] This conciliation agreement led the Director General of the Environmental Agency (now the Ministry of the Environment) to announce in August 1988 a policy legislating a ban on the use of spike tires. Finally, in June 1990, the Diet passed the "Law to Prevent the Generation of Particulates from Studded Tires [*Supaiku taiya funjin no hasei no boshi ni kansuru horitsu*]."[56]

The following two points can be identified as characteristics of the conciliation in this case: First, the EDCC made a policy proposal for a drastic solution to the problem, rather than a black-and-white decision as in a court of law.[57] This is a good example of administrative ADR. This is because the EDCC, as an administrative committee, was able to resolve issues with a strong policy flavor.[58] Second, although the type of pollution that the EDCC may conciliate is limited to "civil disputes," the EDCC interpreted this requirement loosely in this case.[59] The driver of the vehicle equipped with spike tires was the primary cause of the dust damage, and

[55] Yoichiro Yamato, "Supaiku taiya funjin higaitou choutei shinsei jiken ni tsuite," *Chousei*, No. 101 (2020) (in Japanese), p. 3.

[56] *Ibid*., pp. 4–5.

[57] Jyochi Daigaku Kankyo-ho Kyojyudan (ed.), *Vijuaru tekisuto kankyo-ho* (Yuhikaku, 2020) (in Japanese), pp. 18–19.

[58] Fukayama, T., 1990, *supra* note 12, p. 45.

[59] Mai Kenmochi, "Supaiku taiya seizo hanbai jiken," in Tadashi Otsuka and Yoshinobu Kitamura (eds.), *Kankyo hanrei hyaku-sen*, 3rd ed. (Yuhikaku, 2018) (in Japanese), p. 223.

seeking an injunction in the manufacture and sale of spiked tires from the tire manufacturer was beyond the scope of a "civil dispute." However, the EDCC flexibly concluded that a "civil dispute" existed based on the view that the most effective way to prevent dust damage would be to stop the manufacture and sale of spiked tires altogether, rather than to improve the way individual drivers use spiked tires.

(b) Yamanashi and Shizuoka Prefectures golf course pesticide damage case (EDCC, Conciliation No. 12 of 1990)

This case was filed in April 1990 by 30 residents of Shizuoka Prefecture against a golf course company; the residents demanded that the construction of a golf course be stopped, claiming that the golf course could be contaminated by groundwater and pesticides.[60] As a result of the conciliation by the EDCC, the parties were not able to reach an agreement to stop the construction of the golf course as originally requested by the applicants. However, as an alternative measure, the conciliation clause stipulated the avoidance of the use of pesticides to the extent possible and their minimum necessary use to prevent environmental damage.[61] Hence, the conciliation in this case has certain limitations in that it is predicated on the construction of a golf course.[62] However, the important significance of this case as a precedent is that it was interpreted that even so-called "threat cases," in which damage had not occurred at the time of application, were included in disputes subject to the Pollution Dispute Resolution System.[63] After this case, the number of applications to the EDCC increased.[64]

Notably, the conciliation in this case clearly demonstrated the follow-up function of the EDCC.[65] Although the case ended in conciliation, the conciliation committee determined that the EDCC's continued involvement was necessary to implement the terms of conciliation in an amicable cooperative relationship with the applicant. Accordingly, the following were stipulated in the conciliation clause: The staff of the EDCC Secretariat shall

[60] Kazuho Hareyama, "Yamanashi-Shizuoka goruhujyo noyaku higai jiken," in Akio Morishima and Takehisa Awaji (eds.), *Kogai kanyo hanrei hyaku-sen* (Yuhikaku, 1994) (in Japanese), pp. 222–223.

[61] *Ibid*.

[62] *Ibid*., p. 223.

[63] Taniguchi, T., 2002, *supra* note 37, p. 44.

[64] *Ibid*.

[65] *Ibid*.

attend explanatory meetings held by the respondent regarding the implementation of the conciliation clause, and the respondent shall periodically submit materials to the EDCC Secretariat regarding the establishment, management, and operation of the golf course.[66]

(c) *Odakyu* Railway noise case
(EDCC, Adjudication of liability No. 1 of 1992)

This case was brought in May 1992 by 325 residents of Tokyo against the *Odakyu* Electric Railway Co. for payment of damages for noise and vibrations caused by running trains.[67] The EDCC proceeded with the adjudication procedure in the adjudication committee; however, in April 1998, the case was transferred *sua sponte* to the adjudication procedure.[68] In May of the same year, a conciliation agreement was reached between 78 residents and the Respondent, the main content of which was that the Respondent would take noise and vibration countermeasures in the operation of its trains.[69] In July of the same year, a liability adjudication was issued to partially approve the applications of 224 residents who had failed to reach a conciliation agreement, and the case was closed.[70]

This case is characterized by the following two points. First, the *sua sponte* investigation by the EDCC played a major role in conciliation and adjudication in this case.[71] To clarify what measures should be taken by the Respondent, the EDCC appointed expert members in the fields of noise and vibration and sought their opinions. Additionally, the EDCC commissioned a

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[66] Kogaitou Chousei Iinkai, "Yamanashi-Shizuoka gorufujyo noyaku higai jiken," (in Japanese), available at https://www.soumu.go.jp/kouchoi/activity/yamashizugolf3_5.pdf (last accessed May 8, 2023).

[67] Kogaitou Chousei Iinkai, "Odakyu-sen soon higaitou sekinin saitei jiken," (in Japanese), available at https://www.soumu.go.jp/kouchoi/activity/odakyusen10_7.pdf (last accessed May 10, 2023).

[68] In this case, the applicant sought payment of damages, but the adjudication committee, considering that improving the deteriorating living conditions for the applicant would be the true solution to the problem, moved the case sua sponte to the conciliation procedure. Taniguchi, T., 2002, *supra* note 37, p. 45.

[69] The content of the conciliation clause includes: (i) *Odakyu* Electric Railway shall set a target LAeq 24h (A-Weighted Equivalent sound pressure level for 24 h) of 65 dB or less and work to achieve it, and (ii) as noise and vibration countermeasures, measures for roadbed, rail, wheels, rolling stock, and other sources, as well as operating speed control and train schedule changes for operation-related matters. Kogaitou Cousei Iinkai Jimukyoku, "Zadankai: Odakyu-sen soon higaitou sekinin saitei jiken," *Cousei*, No. 97 (2019) (in Japanese), p. 1.

[70] This adjudication found that the applicant, who was exposed to noise with an LAeq 24h of 70 dB or more or an LAmax (the maximum value of noise) of 85 dB or more, suffered damage in excess of the tolerable limit. *Ibid*.

[71] Taniguchi, T., 2002, *supra* note 37, p. 45.

private testing and research institute to conduct an analytical study on noise and vibration. Thus, despite the lack of environmental standards for conventional rail noise, the EDCC indicated the limits that neighborhood residents could tolerate and worked to resolve the dispute.[72]

Second, based on the nature of the case, the EDCC conducted follow-up even after the closure of the case.[73] To facilitate the conciliation clause, the EDCC Secretariat set up a mechanism to request reports on the activities of the *Odakyu* Line Environmental Conservation Council as a forum for discussion with residents based on the conciliation clause. The Council was established under a conciliation clause as a forum for discussion with residents, and the Council was required to report its activities to the Public Regulation Commission.

(d) *Teshima* industrial waste illegal dumping case (EDCC, Conciliation No. 4 of 1993)

In this case, a waste disposal company brought large amounts of industrial waste to *Teshima* Island (Kagawa Prefecture) in the *Seto* Inland Sea, resulting in contamination of the surrounding area. Several industrial waste contractors, including *Teshima* Development Co., brought waste comprising automobile shredder and oil to *Teshima*, but the prefectural government took no action and accepted the company's argument that these were raw materials and not waste.[74] As a result, over 500,000 tons of waste were illegally dumped on the island. Therefore, in 1993, 549 residents applied to the EDCC for conciliation to seek the removal of waste and compensation for damages against Kagawa Prefecture, which had not properly exercised its authority under the Waste Management and Public Cleansing Act

[72] In determining the limits of what residents can tolerate, the Committee identified the following factors to be considered: (1) the manner and extent of the infringement, (2) the nature and content of the infringed benefit, (3) the nature and extent of the public nature of the infringement, (4) the circumstances of the commencement and subsequent continuation of the infringement, (5) the nature of measures taken to prevent harm, and (6) public law standards. Kogaitou Chousei Iinkai, "Odakyu-sen soon higaitou sekinin saitei jiken," *supra* note 67.

[73] Taniguchi, T., 2002, *supra* note 37, p. 45.

[74] The industrial waste contractor in this case explained that it purchased the shredder dust for the purpose of extracting the metal contained in the shredder dust and, in fact, sold the metal extracted. There was a loophole in the Waste Management and Public Cleansing Act that made it difficult for the government to regulate the waste if the discharger strongly insisted that it was a raw material and a valuable resource. Therefore, Kagawa Prefecture, the permitting authority, considered this raw material and interpreted the operator in question as not being required to apply for a waste treatment business permit. Yoshinobu Kitamura, *Kankyo-ho*, 2nd ed. (Yuhikaku, 2019) (in Japanese), p. 37.

[*Haikibutsu no shori oyobi seiso ni kansuru horitsu*] (Act No. 137 of 1970), and against the waste disposal company that had illegally dumped waste. An investigation *sua sponte* was conducted at a cost of approximately 236 million yen in government funds (taxes). As a result, in June 2000, a conciliation agreement was reached with the prefecture in which all dumped waste would be removed from the island and properly disposed of by the end of the fiscal year 2016. Another agreement was reached with the waste discharger that it would bear part of the cost of the countermeasures.[75] The waste was finally removed from the island in March 2017. The final processing volume amounted to approximately 900,000 tons.

The historical value of this conciliation lies in the fact that despite the difficulty in applying the Waste Management and Public Cleansing Act, the parties were able to reach a conciliation that required the discharger to pay a portion of the disposal costs.[76] In the past, there have been no cases in which waste generators have agreed to bear the costs of illegal dumping of waste; in this respect, the conciliation in this case is a pioneering step. In the past, there have been no cases in which waste generators agreed to bear the costs of illegal dumping for the purpose of dispute resolution. In this respect, the conciliation in this case is pioneering.

In this case, the following three points have been highlighted as reasons for using the conciliation method of the pollution dispute resolution system instead of litigation.[77] First, when the residents demanded the removal of waste dumped on the land of the processor, various difficulties were expected in a lawsuit, such as the legal basis for the residents' claim (whether the residents could claim on the grounds of pollution of the *Seto* Inland Sea) and whether the prefecture and discharger could be required to remove the waste and bear the costs. However, the conciliation process allowed priority to be given to resolving these situations, and indeed did so. Second, it is extremely difficult for residents to prove, at their own expense, the nature and extent of the toxicity of the dumped waste and its impact on the environment, but in a lawsuit, this is, in principle, the plaintiff's burden. By contrast, in the conciliation process, expert committee members can be

[75] Ryoichi Yoshimura, *Kogai to kankyo sosho kogi* (Horitsu bunka sha, 2018) (in Japanese), p. 217

[76] Taniguchi, T., 2002, *supra* note 37, p. 46.

[77] Yoshimura, R., 2018, *supra* note 75, p. 218.

used and all investigations are conducted at the government's expense. Third, the content of the conciliation has the advantage of including details that are difficult to achieve in litigation, such as removal methods that minimize environmental impact and the establishment of a council with the participation of residents regarding the implementation of waste disposal.

(e) *Kamisu* City arsenic health hazard case (EDCC, Adjudication of liability No. 2 of 2006)

In July 2006, 39 residents of *Kamisu* City, Ibaraki Prefecture, filed a liability adjudication against the Japanese government and Ibaraki Prefecture, seeking payment of damages for health problems caused by groundwater contamination with diphenylarsinic acid (DPAA). In May 2012, the EDCC issued an adjudication that partially approved the application after conducting a field investigation and health survey of the applicants.[78] In this adjudicated situation, the EDCC denied any responsibility of the Japanese government. This was because the direct causal act in this case was presumed to be the illegal dumping of the DPAA by a third party, and it was difficult to find a breach of the Japanese government's duty of control to prevent such acts.[79] However, the EDCC accepted part of the applicant's claim regarding the prefecture's responsibility, stating that the prefecture failed in its duty to inform the public, despite the fact that DPAA was detected at levels far exceeding the standard values.[80] This adjudication has important significance in the history of the activities of the EDCC as the first liability ruling that recognized the responsibility of a municipality for the health hazards of its residents.

(f) *Suginami* diseases case (EDCC, Adjudication of case No. 1 of 1997)

In this case, 18 residents in the vicinity of a plastic waste compacting plant in Suginami Ward, Tokyo, had been suffering from health problems such as sore throats, headaches, dizziness, nausea, and palpitations since the facility was installed and filed a case against the Tokyo Metropolitan Government with the EDCC, seeking a ruling on the cause. In June 2002, the EDCC adjudicated in favor of a causal relationship with health problems. This

[78] Kogaitou Cousei Iinkai Jimukyoku, "Zadankai: Kamisu-shi ni okeru hiso ni yoru kenko higaitou sekinin saitei jiken," *Cousei*, No. 99 (2019) (in Japanese), p. 2.

[79] Kogaitou *Chousei* Iinkai, "Kamisu-shi ni okeru hiso ni yoru kenko higaitou sekinin saitei jiken," (in Japanese), available at https://www.soumu.go.jp/main_content/000158827.pdf (last accessed May 10, 2023).

[80] *Ibid*.

adjudication is significant for pollution victims because it shows that there are cases in which a causal relationship can be affirmed even when the causal substance cannot be identified, which eases the burden of proof of the causal relationship for the petitioner rather than the judicial court.[81]

3-1-2-3 Implications of the Case Studies

What is the role of the EDCC as suggested by the above cases? It can be pointed out from the experience of the EDCC's activities that the following types of cases can be handled in a manner clearly more appropriate than a civil court system: The first involves cases that require extremely high costs to prove damage and causal relationships.[82] It is not uncommon for the EDCC to commission investigations and appraisals that cost several million yen. The second is a case in which the number of parties involved is extremely large and difficult to handle in litigation.[83] The third category includes cases that require an extremely high level of natural science expertise in the determination of disputed facts.[84] Fourth, there are cases in which the central or local government is the perpetrator.[85] Fifth, conciliation by the EDCC promotes national administrative policies and sometimes new legislation.[86]

What is common to the handling of all nine cases is that the EDCC actively investigated the facts,[87] collaborated with relevant administrative agencies

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[81] Hiromasa Minami, "Suginami-byo to kou-chou-i no genin saitei," *Jurist*, No. 1230 (2002) (in Japanese), p. 5; Noriko Okubo, "Suginami-byo genin saitei jiken," in Tadashi Otsuka and Yoshinobu Kitamura (eds.), *Kankyo hanrei hyaku-sen*, 3rd ed. (Yuhikaku, 2018) (in Japanese), pp. 224–225.

[82] *See* the *Minamata* diseases conciliation, the *Watarase* River mining pollution conciliation, the Osaka International Airport conciliation, the *Odakyu* Railway noise liability adjudication, the *Teshima* dumping conciliation, and the *Suginami* diseases cause adjudication.

[83] *See* the Osaka International Airport conciliation.

[84] *See* the Yamanashi and Sizuoka Prefectures golf course conciliation, the *Kamisu* City arsenic health liability adjudication, and the *Suginami* diseases cause adjudication.

[85] *See* the Osaka International Airport conciliation, the *Teshima* dumping conciliation, and the the *Kamisu* City arsenic health liability adjudication.

[86] Specifically, the *Minamata* disease conciliation had a significant impact on the central government's health and welfare administration, and the Osaka International Airport conciliation had a significant impact on the state of national aviation policy. The spike-tire conciliation contributed to the enactment of the Law to Prevent the Generation of Particulates from Studded Tires. The golf course conciliation prompted local governments to review their large-scale resort development policies. Thus, the activities of the EDCC have strengths that only the government can provide.

[87] The EDCC conducts investigations on its own authority, something that courts would never be able to do. The only way for a court to conduct such an investigation is for a judge to do it. Since the EDCC is an administrative agency, it can conduct investigations as an organization. Ueno, H., et al., 1992, *supra* note 11, p. 15 (Masao Otsuka's statement).

and organizations as necessary, and made efforts to reach a consensus among the parties by adopting not only compensation for damages but also a solution that combines various measures. Undoubtedly, the EDCC, an administrative agency, is better at this task of resolving disputes by building consensus among the parties than the courts.

3-2 Review Boards

Since the enactment of the Settlement Act, 1,722 environmental pollution dispute cases had been filed with the Review Board by the end of March 2022,[88] and of these, 1,680 have been closed. The Review Board's procedures for resolving pollution-related disputes include mediation, conciliation, arbitration (as mentioned above, the Board cannot make adjudication), and recommendations for the fulfillment of obligations.[89] To date, more than 90% of the cases accepted by review boards have been conciliation cases. The largest number of cases pending the Review Board by the end of March 2022 was 242 in Tokyo, followed by 241 in Osaka, 99 in Aichi, 92 in Saitama, and 89 in Chiba.[90]

The number of new cases of conciliation received by the Review Boards has remained stable, averaging 32.7 cases per year over the past 50 years. In the fiscal year 2021, the Review Board accepted 32 cases (all conciliation), plus 45 cases carried over from the previous year, for a total of 77 cases pending in fiscal year 2021.[91] Of these, 36 were closed during fiscal year 2021, and the remaining 41 were carried over to the following year. In terms of the 32 conciliation cases received in fiscal year 2021, by the seven typical pollution categories, there were 22 cases of noise, 9 cases of odor, 8 cases of vibration, 5 cases of air pollution, and 1 case each of water and soil pollution (duplicate totals).[92]

[88] Kogaitou Chousei Iinkai, 2021, *supra* note 17, p. 49.
[89] *Ibid.*
[90] *Ibid.*
[91] *Ibid.*
[92] *Ibid.*

4. Pollution Complaints

4-1 Purpose of the System

Additionally, prefectures and municipalities have consultation desks to handle complaints about pollution, which they may assign to pollution complaint counselors (Article 49(2) of the Settlement Act). Pollution complaints are closely related to local residents and solving them promptly and appropriately is extremely important in creating a better living environment. Therefore, consultation desks for pollution complaints have been established in prefectures and municipalities as part of the environmental dispute settlement system. Environmental pollution disputes are usually first referred to the complaint counseling counter (pollution complaint counselor, etc.) of the prefecture or municipality[93], and if the case cannot be resolved there, it is sent to the EDCC or the Review Boards.

Pollution Complaint Counselors are expected to handle complaints about pollution consistently from receipt to resolution by consulting with residents, conducting investigations necessary to handle complaints, communicating with relevant administrative agencies, and providing guidance and advice on remedial measures to the parties concerned.[94] According to the 2020 Pollution Complaint Survey, there are a total of 10,842 employees available to respond to pollution complaints nationwide.[95] The problem, however, is that there are only 17 counselors nationwide primarily devoted to work related to complaint handling.[96] In other words, the majority of the staff are either counselors who also perform other tasks or staff members (not counselors) who are engaged in the work of handling pollution complaints.[97] With such a weak system, it is difficult to respond carefully to the large number of pollution complaints received from residents.

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[93] However, due to the lack of provisions regarding complaint handling in the Settlement Act, there is no established procedure for addressing such grievances. As a result, local government officials handle complaints in an ad hoc manner, relying on their own knowledge and experience. Mayumi Ohashi, *Gyosei ni yoru funso shori no shindoko* (Nippon Hyoron Sha, 2015) (in Japanese), p. 138.

[94] Hikaru Ogita, "Chiho jichitai ni okeru kogai funso shori no jisai to tenbo," *Jurist*, No. 1008 (1992) (in Japanese), p. 40.

[95] Kogaitou Chousei Iinkai, 2021, *supra* note 17, p. 78.

[96] *Ibid*.

[97] *Ibid*.

4-2 Trends in Pollution Complaint Handling

The number of new pollution complaints received by municipalities in fiscal year 2020 was 81,557.[98] In fiscal year 2003, the number of cases exceeded 100,000 for the first time since the survey began in 1966, followed by a decrease in fiscal year 2004. However, the number increased again in fiscal years 2005 and 2006. Although it has been decreasing every year since fiscal year 2007, it increased for the first time in 13 years in fiscal year 2019 and for the second consecutive year in fiscal year 2020.[99] Thus, the number of pollution complaint consultations was much higher than the number of cases received by the EDCC and the Review Boards. This means that the existence of the EDCC and the Review Boards is not well known to the public, despite the fact that environmental problems closely related to our daily lives are on the rise.[100] Additionally, institutional improvements should be considered, such as linking Review Boards with municipal complaint offices.[101]

Looking at the number of pollution complaints received (56,123) by type of environmental pollution, "noise" accounted for the largest number at 19,769 (35.2% of the total number of pollution complaints received), followed by "air pollution" at 17,099 (30.5%) and "offensive odors" at 11,236 (20.0%).[102] Looking at the number of pollution complaints received (81,557) by source, "incineration (burning in the open)" accounted for 15,987 (19.6% of the total number of pollution complaints received), followed by "construction work" for 11,865 (14.5%) and "waste dumping" for 11,058 (13.6%).[103]

In general, a single pollution complaint has two aspects: a complaint against the local administration itself, and an element of counseling in which the complainant seeks administrative assistance and cooperation in resolving the dispute.[104] Depending on which of these two elements is more important, the processing methods differ. The success or failure of a pollution complaint does not lie solely in the regulation of the source of pollution by

[98] *Ibid*., p. 64.

[99] *Ibid*.

[100] Noriko Okubo, "Kankyo funso ni okeru gyoseigata ADR," *Jichitaigaku Kenkyu*, No. 91 (2005) (in Japanese), p. 35.

[101] Otsuka, T., 2023, *supra* note 36, p. 579.

[102] Kogaitou Chousei Iinkai, 2021, *supra* note 17, p. 66.

[103] *Ibid*., p. 69.

[104] Ogita, H., 1992, *supra* note 94, pp. 42–43.

law but rather in how to make people aware of the problem and encourage voluntary cooperation at the source.

5. Conclusion

In particular, it must be pointed out that one of the most serious deficiencies of the EDCC is its inability to respond adequately to the diversification of pollution disputes. At the time of its establishment, the EDCC was dominated by applications seeking relief for damage caused by pollution, but it has gradually shifted to a form of dispute that seeks to preserve and create a more favorable environment and prevent damage before it occurs. In response to these changes, the EDCC has expanded the scope of pollution that is the subject of dispute resolution, and has allowed applications for conciliation at the stage of the threat of damage before it occurs. Thus, EDCC has attempted to respond to the needs of "urban and lifestyle-based pollution."

The number of new cases accepted for conciliation has been extremely low at the EDCC, especially since the 1990s. This means that the EDCC was unable to respond adequately to the diversification of pollution disputes. In other words, the biggest challenge facing EDCC is that the scope of cases it can handle is limited to the Seven Major Types of Pollution. The EDCC cannot cover issues related to the protection and preservation of nature and ecosystems, urban issues[105] such as daylight or landscape disputes. The Settlement Act has not been amended significantly since 1974. If the EDCC could cover a broader range of environmental matters, its role would be dramatically enhanced.[106] Referring to studies pointing to comprehensive jurisdiction as a condition for the success of environmental courts,[107] there is an urgent need to reform the system by expanding the scope of cases that can be handled by the EDCC.

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[105] For example, the problem of dumping industrial waste that does not lead to water pollution is expected to be resolved through conciliation by the EDCC and Review Boards, but this type of case does not fall under the category of "environmental pollution" that the EDCC and Review Boards can handle. Tetsushi Kurokawa and Shinichi Okuda (eds.), *Kankyo-ho eno apurochi*, 2nd ed. (Seibundo, 2012) (in Japanese), p. 226.

[106] Toshihiro Ochi, *Kankyo sosho-ho*, 2nd ed. (Nippon Hyoron Sha, 2020) (in Japanese), p. 117.

[107] Brian J. Preston, "Characteristics of Successful Environmental Courts and Tribunals," *Journal of Environmental Law*, Vol. 26(3) (2014), pp. 367, 372–377.

Additionally, liability adjudication is limited to disputes concerning damages. This makes it difficult to distinguish between the adjudication and the court system. If the current system, which limits the scope of liability adjudication to cases involving damages, remains unchanged, the difference between liability adjudication and litigation will become unclear, and there is concern that the system will become half-baked. As there is only one EDCC in Japan, it is costly and inconvenient for applicants to have to come to Tokyo for cases in rural areas. Some have suggested that the Review Board be given adjudicatory authority to remedy this problem.[108]

Furthermore, because conciliation is not enforceable, a new lawsuit must be filed if the contents of the conciliation clause are not fulfilled, which means that the parties must go through the process twice. Because of the nature of pollution and environmental damage, once damage has occurred, it is irreversible. Therefore, the extension to disputes seeking injunctions must be considered. Comprehensive and integrated reform and development are desirable, taking advantage of 50 years of accumulated experience.

[108] Minami, H., 1992, *supra* note 15, p. 31.