Japan’s Comments on the

Draft General Comment on Land and Economic, Social and Cultural Rights

In response to the Note Verbale of the Office of the High Commissioner for Human Rights (CESCR/2021/1) dated 27 April 2021, the Government of Japan would like to submit the following comments on the Draft General Comment on Land and Economic, Social and Cultural Rights (the Covenant), after careful consideration of the draft from a legal perspective.

1 Overview

The Government of Japan understands that the General Comments of the Committee on Economic, Social and Cultural Rights are the Committee’s views on interpretation of the Covenant, and they do not change or revise the provisions of the Covenant and are not legally binding to the State parties. The Government of Japan also believes that careful consideration is required when the General Comments refer to fields and matters stipulated by other treaties. It is important for the Committee to produce additional value when making its General Comments, within the scope of the Covenant, taking into consideration the above-mentioned aspects.

 The Government of Japan would like to submit the following non-exhaustive comments, especially regarding points that are thought to differ starkly from the position of the Government of Japan.

2 Specific Comments

 In paragraph 4, it is stated that “Other relevant soft law instruments have been developed to describe the obligations and responsibilities of States and other actors relating to land use of specific groups. Such soft law instruments provide help in the interpretation of the legally binding obligations of States parties under the Covenant and address a broad range of Covenant rights.” We are of the view that it is not appropriate to use such wording that can be interpreted as if obligations or responsibilities of States or other actors were to arise generally in accordance with the “soft law”. It is even more so if declarations which are not legally binding or international agreements which do not impose duties upon non-contracting States are branded as “soft law”. It is also inappropriate to use expressions that can be understood as if such “soft law” confines each State party in a legally binding manner when it interprets the Convention. Therefore, the above mentioned two sentences should be deleted.

 In paragraph 10, it is stated that “The Committee is of the view that effective agrarian reforms aiming at equitable access to land will ensure the realization of the right to adequate food and that such reforms should include special measures to address the situation of landless persons, indigenous peoples and other disadvantaged and marginalized groups, …”. This sentence asks States parties to take “special measures”, but it is inappropriate because it can be understood that this sentence requires States parties to take measures including new legislation. Moreover, in paragraph 8.1 of the Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security from which this expression is taken, it does not go so far as to require States parties to take “special measures”. Therefore, “special measures” should be revised to “special attention”, which is the expression used in paragraph 8.1 of the Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security.

 In paragraph 11, “The right to water” is referred to. While we understand the importance of water, a consensus has not yet been reached as to whether to recognize access to water itself as an “inherent right”. Moreover, in our understanding, many countries consider that the right to water should be guaranteed to the extent where it is within the scope of the Covenant.

 Regarding the entirety of paragraph 15 and the parts of paragraphs 20, 23 and 24 mentioned below, we are of the view that the concept of “collective human rights” in this context is not widely recognized as a well-established concept in general international law. It is also our view that land tenure rights and other rights of land usage, as well as the way these rights are exercised, should be subject to reasonable limitations from the perspective of harmonization with and protection of third party interests and other public interests. Therefore, they should be deleted altogether.

 Furthermore, the sentence, “International law recognizes the right of indigenous peoples over the lands and territories that they have traditionally occupied”, in paragraph 23, is mentioned in Article 14 of the ILO Indigenous and Tribal Peoples Convention, 1989 (No.169). However, since there are currently only 24 States parties to this Convention, it cannot necessarily be stated that the contents stipulated in the Convention are widely recognized in the international community.

(Corresponding parts in paragraph 20)

Considering that most land tenure systems are based on the rights of individuals with respect to land, States parties should recognize and protect communal dimensions of tenure, particularly in relation to indigenous peoples, peasants and other traditional communities who have a material and spiritual relationship with their traditional lands indispensable to their existence, well-being and full development. That includes the collective rights of access to, use of and control over lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

(Corresponding parts in paragraph 23)

 International law recognizes the right of indigenous peoples over the lands and territories that they have traditionally occupied. International human rights law provides for the respect and protection of the relationship of indigenous communities with their lands, territories and resources, requiring States to demarcate their lands, protect them from encroachment and respect the right of the communities concerned to manage the lands according to their internal modes of organization. The requirements applicable to indigenous peoples have now been extended to at least certain traditional communities that maintain a similar relationship to their ancestral lands centred on the community rather than the individual. Therefore, indigenous peoples have the right to have their lands demarcated, and relocation is allowed only under narrowly defined circumstances and, in principle, with the prior, free and informed consent of the groups concerned. Laws and policies should protect indigenous peoples from the risk of State encroachment on their land, for instance for the development of industrial projects or for large-scale investments in agricultural production.

(Corresponding parts in paragraph 24)

 It is important that traditional institutions for collective tenure systems ensure the meaningful participation of all members, including women and young people, in decisions regarding the distribution of user rights. Ensuring access to natural resources, as concerns the Covenant, cannot be limited to specific protections granted to the lands and territories of indigenous peoples. Among those groups are those that depend on the commons. Fisher folk need access to fishing grounds, yet strengthening individual property rights might entail fencing off the land that gives them access to the sea or to rivers.

 Regarding “collective rights” in paragraph 17, the concept of “collective human rights” in this context is not widely recognized as a well-established concept in general international law. Therefore, it should be deleted.

 In paragraphs 20, 27 and 52, peasants and “collective rights” are mentioned. However, the concept of “collective human rights” in this context is not widely recognized as a well-established concept in general international law. Also, even though we recognize that the protection of the human rights of peasants and people living in rural areas are important, there is not necessarily a convergence of opinions in the international community regarding whether we should establish “peasants’ rights” as a new individual right in addition to the individual rights stipulated in human rights treaties. Furthermore, we are of the view that in protecting the rights of these people, it is effective to utilize existing human rights mechanisms. Therefore, these references should be deleted.

 Regarding “Policies aimed at granting tenure rights of publicly owned land to landless peasants” in paragraph 27 and “giving particular regards to peasants and others through placing laws and policies of informal tenure” in paragraph 28, the position of the Government of Japan on peasants is as stated above. Therefore, these references should be deleted.

 In paragraph 32, human rights due diligence is mentioned. With the growing interest in respect for human rights in business activities in the international community, we are also seeking to promote respect for human rights in business activities by launching Japan’s National Action Plan on Business and Human Rights and raising awareness of human rights due diligence. In this field, as it is probable that each country has their own way to realize the objectives, it is not desirable to encourage each country to adopt a legal framework in a uniform manner, but rather to encourage each country to promote the implementation of human rights due diligence by business entities in accordance with its own circumstances. Therefore, the phrase, “States parties should adopt a legal framework requiring business entities to exercise human rights due diligence”, should be revised to the following phrase: “States parties should ensure that business enterprises exercise human rights due diligence by introducing relevant policies or measures”.

 Regarding “III. D. Extraterritorial Obligations” (paragraphs 38 to 44), we would like to bring the Committee’s attention to the point that when a State applies extraterritorial jurisdiction (for example, when a State applies its own domestic laws to regulate business activities conducted in other countries), it is necessary for the State to make sure that the sovereignty of other states is not infringed upon by the application.

 Regarding “as a result of international investment negotiations, agreements and practices” in paragraph 38, the phrase “international investment agreements” generally refers to investment-related agreements. However, bearing in mind that there are references to public-private partnerships in the latter half of the paragraph, it is reasonable to consider that the phrase “international investment negotiations, agreements and practices” intends to imply international investment activities. Therefore, “as a result of international investment negotiations, agreements and practices” should be revised to “as a result of international investment activities”.

 Regarding paragraph 41, international agreements which include commitments on economic liberalization may more or less have some kind of impact on access of local entities to resources. For this reason, the ambiguous phrase “do not have an adverse impact on access to productive resources in other countries” is inappropriate, and should be replaced with “do not deprive access to productive resources in the territories of other Contracting parties in an illegitimate or discriminatory manner”.

 Regarding the last sentence of paragraph 55, in general, the consent of the relevant stakeholders should always be respected in carrying out policies. However, the target to gain consent may not be limited to indigenous people. Rather, the target may include other relevant stakeholders. Therefore, a more general expression such as “of the relevant stakeholders” should be used instead of “of indigenous peoples”.