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Amendments to the Whistleblower Protection Act



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1. Introduction

The Whistleblower Protection Act¹ was enacted in 2004 and enforced in 2006 in Japan (the “**2004 Act**”) to protect whistleblowers and thereby encourage potential whistleblowers to report any misconduct of certain business operators,² such as their employers, and to encourage such business operators, through whistleblowing, to comply with laws and regulations.

In 2020, the Act was amended (the “**2020 Act**”) to enhance the protection of whistleblowers by not only expanding the scope of protected whistleblowing but also enhancing the obligations of business operators. The 2020 Act will take effect by June 1, 2022, but a more specific date will be provided in a government regulation. Government regulations and guidelines with further details will also be issued by then.

2. Enhancement of Whistleblowing Protection

(1) Outline of the whistleblowing protection under the 2004 Act

In the 2004 Act, if a worker, without the purpose of acquiring a wrongful gain, causing damage to others, or any other wrongful purpose, reports the wrongdoing of certain business operators as provided in the said act, such as his/her employer or a business operator to which the worker has been dispatched under the Worker Dispatching Act³ (collectively, the “**Employer**”), to the Employer; an administrative organ (e.g., government agency) with the authority to impose a disposition, make a recommendation, etc., regarding the reportable fact; or any person to whom reporting the reportable fact is recognized as necessary to prevent the occurrence thereof or the spread of the damage caused thereby (e.g., consumers’ group and the media) (“**Other External Recipients**”) (such act of reporting, the “**whistleblowing**”), and if the whistleblowing meets the following requirements (depending on the recipient of the whistleblowing), then the dismissal of, or termination of the worker dispatch contract of, such whistleblower on account of such whistleblowing shall be void, and any demotion, salary cut or any other disadvantageous treatment of

1. Act No. 122 of 2004.

2. “Business operators” means corporations and other organizations as well as individuals who are engaged in business (2004 Act, art. 2, para.1).

3. 2004 Act, art. 2, para. 1.

4. *Id.*, arts. 2 to 5.



the whistleblower based thereon is prohibited:⁴

- (a) If to the Employer, the whistleblower considers that the reportable fact has occurred, is occurring, or is about to occur.
- (b) If to an administrative organ, there are reasonable grounds for the whistleblower to believe that the reportable fact has occurred, is occurring, or is about to occur.
- (c) If to any Other External Recipient, there are reasonable grounds for the whistleblower to believe that the reportable fact has occurred, is occurring, or is about to occur, and any of the following applies:
 - (i) the whistleblower has reasonable grounds to believe that he/she will be subject to dismissal or any other disadvantageous treatment if he/she whistleblows to the Employer or an administrative organ;
 - (ii) the whistleblower has reasonable grounds to believe that evidence pertaining to the reportable fact might be concealed, counterfeited or altered if he/she whistleblows to the Employer;
 - (iii) the whistleblower was requested by the Employer, without any just cause, not to whistleblow to the Employer or an administrative organ;
 - (iv) the whistleblower does not receive notice from the relevant Employer about the commencement of an investigation on the reportable fact within 20 days from the day the whistleblowing was made in writing to the Employer, or such Employer does not investigate the reportable fact without any just cause; or
 - (v) the whistleblower has reasonable grounds to believe that harm to the life or body of an individual is being caused or is about to be caused.

(2) Expansion of the scope of whistleblowers

In the 2004 Act, the worker protected thereunder refers to any worker as provided for in Article 9 of the Labor Standard Act and does not include retired workers and executives. In the 2020 Act, however, workers who have retired within one year before the whistleblowing are also protected. Executives have also been included, although the requirements for their protection are stricter than other whistleblowers as described in section (6) below.⁵

(3) Expansion of the scope of protected reportable facts

The 2004 Act protects whistleblowers only when they report facts pertaining to the criminal acts of the Employer under certain laws. In the 2020 Act, acts which are subject to administrative penalties under certain laws are now also protected.⁶ The Whistleblowing Protection Act, which imposes both criminal and administrative penalties, has also been added as one of the laws covered by the scope of protected reportable facts.

(4) Expansion of recipients of the whistleblowing

The 2004 Act expressly stipulates that whistleblowing can be made to a person designated by the Employer but it did not state that it can be made to a person designated by an administrative organ. The 2020 Act now expressly states that whistleblowing can also be made to a person designated by an administrative organ.⁷

5. 2020 Act, art. 2, para. 1.

6. *Id.*, art. 2, para. 3.

7. *Id.*, art. 2, para. 1.



(5) Expansion of the scope of whistleblowing protection

The 2020 Act expands the scope of whistleblowing protection as follows:

- (a) For whistleblowing to an administrative organ, in addition to whistleblowing by a whistleblower who meets the requirement described in section (1)(b) of paragraph 2 above, the 2020 Act further protects whistleblowing by a whistleblower who merely considers that a reportable fact has occurred, is occurring, or is about to occur, and reports such fact by submitting a written form stating his/her name and address, the details of the reportable fact, the reason why he/she considers that the reportable fact has occurred, is occurring, or is about to occur, and the reason why he/she considers that measures pursuant to the law or other appropriate measures must be taken with respect to the reportable fact.⁸ Thus, if a whistleblower simply considers that a reportable fact has occurred, is occurring, or is about to occur, even without reasonable grounds, he/she will be protected by submitting the above described form.
- (b) For whistleblowing to any Other External Recipient, the following item has been added to section (1)(c) of paragraph 2 above: there is a reasonable ground for the whistleblower to believe that the Employer is leaking information that identifies the whistleblower. In addition, item (v) in section (1)(c) above has been amended to state that the whistleblower has reasonable grounds to believe that harm to the life or body of an individual, or damage to the property of an individual (i.e., one that cannot be cured, or a substantial amount of damage to a significant number of individuals, which must be directly caused by the reportable fact,) has been or is about to be caused.⁹

(6) Expansion of protection measures

In addition to the nullity of any dismissal and the prohibition of any disadvantageous treatment of the whistleblower, the 2020 Act prohibits the Employer from making claims against whistleblowers for damages caused by the whistleblowing that meets the requirements thereunder.¹⁰ As to executives, they can be dismissed; however, they can claim for damages caused by such dismissal, provided that they meet certain additional requirements, such as making an effort to take the necessary measures to investigate and rectify the reportable facts in advance of the whistleblowing when they report the reportable facts to the administrative organ or Other External Recipients.¹¹

3. Enhancement of Business Operators' Obligations

To ensure the protection of whistleblowers, the 2020 Act now obliges all business operators (other than those who have hired only 300 or less regular employees, who are only obliged to make an effort to take these actions) to take the following measures:¹²

8. *Id.*, art. 3, item 2.

9. *Id.*, art. 3, item 3.

10. *Id.*, art. 7.

11. *Id.*, art. 6.

12. *Id.*, art. 11.



- (i) Designate a person to take charge of receiving whistleblowing, investigating the reported fact(s), and taking the necessary measures to rectify thereported fact(s); and
- (ii) Establish a necessary system to appropriately receive and report any whistleblowing.

Under the 2004 Act, these measures were recommended to be voluntarily taken pursuant to the guidelines issued by the Consumers Affairs Agency. They must now be taken under the 2020 Act. To ensure the effective enforcement of these provisions, the administrative organs may take administrative measures, such as giving advice, guidance or recommendations to the business operators, and publish the names of those who do not follow the administrative recommendations.¹³ Guidelines will be issued for the details of the measures to be taken by the business operators.¹⁴ According to the draft guidelines recently published for public comment, there are also a few new measures which need to be taken by the business operators who have already taken measures in accordance with the current guidelines, such as the creation of records of whistleblowing and the storage thereof for an appropriate period of time.

In addition, the 2020 Act specifies the confidentiality obligation of the person in charge of whistleblowing work as mentioned in item (i) above with respect to information that can identify a whistleblower. The breach of such obligation will be subject to criminal penalty.¹⁵

4. Conclusion

With the enhanced scope of whistleblower protection, business operators in Japan are encouraged to review their internal rules and systems to align them with the foregoing amendments that are about to take effect next year as well as the guidelines to be issued thereon.

13. *Id.*, arts. 15 to 17.

14. *Id.*, art. 11, para. 4.

15. *Id.*, arts. 12 and 21.



Offshore Wind Power Projects and the Rights of People Engaged in Fishery



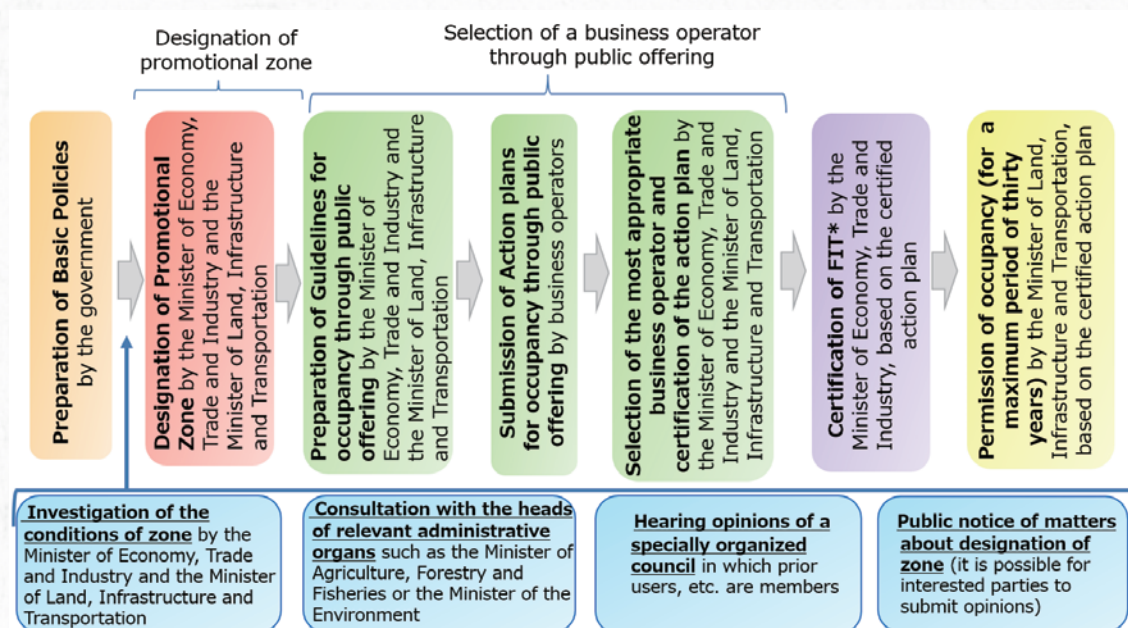
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1. Introduction

In October 2020, the Japanese government announced that it would reduce carbon dioxide emissions to zero by 2050, and in December of the same year, the "Green Growth Strategy through Achieving Carbon Neutrality in 2050" (the "GGS"),¹ which can be said to be its roadmap, was formulated. In the GGS, the decarbonization of the electric power sector is essential, and offshore wind generation is considered as one of the growing fields.

The introduction in Japan of offshore wind power generation was delayed due to the following two problems: (i) there had been no uniform rule on the occupancy of sea areas; and (ii) there had been no framework for coordination with prior users. On April 1, 2019, however, the Act on Promoting the Utilization of Sea Areas for the Development of Marine Renewable Energy Power Generation Facilities (the "Act")² took effect. The flow of concrete procedures based on the Act is illustrated below. At present, 5 locations have been designated as promotional zones, including three in Akita, one in Nagasaki, and one in the Chiba prefecture.



Source: Agency for Natural Resources at https://www.enecho.meti.go.jp/en/category/special/article/detail_152.html.

1. See https://www.meti.go.jp/english/press/2020/1225_001.html.

2. Act No. 89 of 2018.



Evaluation standards have been established for the selection of the business operator in the "Guidelines for the Public Offering System for Occupancy of General Sea Areas."³ One of the evaluation criteria is "cooperation and symbiosis with local stakeholders such as fishery operators," i.e., "how dialogues and understandings are made with local stakeholders such as fishery operators, etc."⁴

In the case of offshore wind power projects in Japan, unlike projects in the Netherlands and Denmark, the business operator, and not the government, is responsible for obtaining consensus from the local stakeholders, including fishery operators. For this reason, it is extremely important for business operators to properly understand the rights of fishery-related persons or stakeholders and to take the best measures to avoid *ex post facto* disputes or problems arising after the commencement of the project in order to smoothly move forward with the project. In the worst case, in the event of a backlash from some local residents, including fishery operators, a lawsuit for an injunction against the construction work for the project can be filed by them, which would make it difficult for the business operator to borrow funds from lenders, and which could then have a significant impact on the entire project.

In this article, therefore, I will discuss the key rights of people engaged in fishery in Japan, with reference to a court case involving a demand for an injunction against an offshore wind power generation project, which was brought by fishery operators, and which specifically targeted the foreign stakeholders involved in the said project.

2. The Rights of People Engaged in Fishery

Japan is an island country surrounded by sea on all sides, and fishing has been actively engaged in since the ancient times. Regulations on fishery have changed over time, and the revised Fishery Act (the "**Fishery Act**") took effect on December 1, 2020. The rights of people engaged in fishery are very complicated, but an outline thereof is provided below.

A) Types of fishery

In general, fishery can be classified into the following three types. Among them, fishery based on fishery rights and free fishery are particularly important for the offshore wind power generation business.

Type	Fishery Based on Fishery Rights	Permitted Fishery	Free Fishery
Basis	License granted by the prefectural governor	Permission by the prefectural governor, or the Minister of Agriculture, Forestry and Fisheries	None
Location	Coastal area	Offshore area	No restriction
Protection	In case of an infringement of fishery rights (decrease in fishing catch), compensation for damages and an injunction may be demanded.	It is merely an interest, but if exercised continuously for many years, it can ripen into a "customary right" and be considered compensable for damages.	

3. See <https://www.mlit.go.jp/kowan/content/001380398.pdf> (in Japanese).

4. In the selection of the business operator, the evaluation items for feasibility of the project are up to 120 points, of which 20 points are allocated to "coordination with local communities."



B) Status of establishment of fishery rights and their types

The status of the establishment of fishery rights in Japan can be confirmed by referring to the MDA (Maritime Domain Awareness) Situational Indication Linkages (commonly called "*umishiru*"),⁵ which is operated by the Japan Coast Guard. Based thereon, it can be seen that fishery rights have been established in almost all of the coastal areas facing Japan.

Fishery rights are broadly divided into the following three categories:

	Fixed Gear Fishery Right	Demarcated Fishery Right	Common Fishery Right
Description	Fishery conducted mainly for the purpose of gathering and catching migratory fish by laying nets in certain places.	Aquaculture conducted within a certain area.	Fishery operated by sharing certain waters.
Entity to be Licensed	Any person who directly operates the subject fishery (subject, however, to certain exceptions to the demarcated fishery right)		Fisheries cooperative association (or federation of fisheries cooperative associations)
Relationship with Free Fishery	A fixed gear fishery and a demarcated fishery (with certain exceptions) must be based on a fishery right or piscary (Fishery Act, art. 68) and cannot be implemented as free fishery (because it cannot be technically established unless a certain water area is used exclusively).		Free fishery shall be permitted in the subject fishing grounds to the extent that it does not infringe any common fishery right.
Rights of a Member of a Fisheries Cooperative Association	The licensee is not the fisheries cooperative association but the person who directly manages the subject fishery.		Each member shall have the right to operate a fishery within the scope of the fishery right exercise rule established by the fisheries cooperative association (or federation of fisheries cooperative associations) (" Member Operating Right ") (Fishery Act, art. 105). Each member may seek an injunction against an act of infringement of the Member Operating Right (see the case below).
Others	Fishery rights shall be registered in the License Fishery Registry (Fishery Act, art. 117, para. 1), including the following information: license number, address and name of the fishery right holder, type of fishery right, location and area of the fishing ground, type of fishery, time of fishery, duration, restriction or condition, etc.		

5. See

https://www.msil.go.jp/msil/Htm/main.html?centerx%3D139.35649951740922%26centery%3D35.698677637921904%26cacheLevel%3D5%26BaseMap%3D1%26VisibleLayers%3Dm415_1_100_1_1%2Cm414_1_100_1_2%2Cm413_1_100_1_3%26Lang%3D0%26BaseMap2%3D1%26VisibleLayers2%3D%26active%3D0%26polarId%3D1 (in Japanese).

6. The Act, art. 8, para. 1, item 5.



C) Relationship with offshore wind power projects

One of the standards in designating a promotional zone under the Act is "that it is expected that the operation of the marine renewable energy power generation business will not hinder fisheries."⁶ In this sense, such designation as a promotional zone can be viewed as a certain guarantee by the government that it will not affect any fishery. In addition, offshore wind projects notably do not reclaim the sea surface or make the fishing grounds disappear.

Nevertheless, it cannot be completely denied that the implementation of an offshore wind power generation project may affect fishery-related rights, such as people's catches, etc. It is thus necessary to accurately understand (i) who is engaged in fisheries based on (ii) what rights and (iii) what kind of fisheries are being engaged in, on the premise that business operators must obtain the consensus of fishery-related people or stakeholders.

As mentioned above, fishery rights can be easily verified by checking the License Fishery Registry. However, it should be noted that if the fishery has been continuously operated in the form of free fishery for many years, then it is necessary to confirm the actual condition of the fishing grounds, and in such a case, it would be difficult to clarify the fishery-related rights through just a superficial survey.

3. Fishery Case in Shimonoseki City, Yamaguchi Prefecture⁷

A) Outline of the case

The three plaintiffs, who were members of the Yamaguchi Prefectural Fisheries Cooperative Association (the "**Prefectural Fisheries Cooperative Association**"), asked the defendant, who was planning construction work for certain offshore wind power generation facilities⁸ (the "**Construction**") off the coast of Yasuoka, to stop the Construction based on the plaintiffs' Member Operating Right. The plaintiffs claimed that the Construction would have an irreversible adverse effect on their fisheries.⁹ In conclusion, however, the claims of the plaintiffs were dismissed.

B) Outline of the judgment

The main issues and the rulings thereon can be summarized as follows:

	Point at Issue	Ruling
1	Can the plaintiffs exercise the right to demand an injunction against the infringement of their free fishery? • The plaintiffs have engaged in fishery within the scope of the fishery right exercise rule established by the Prefectural Fisheries Cooperative Association, and have done so repeatedly and continuously in the form of free fishery to the extent that exceeded the scope of the fishery right exercise rule.	The free fishery carried out by the plaintiffs is essentially different from illegal fishing, and can be subject to compensation for damages or fishery compensation as a right or interest deserving of legal protection. However, since property right protection was not recognized in this case, the right to demand an injunction could not also be exercised.

7. Yamaguchi District Court, Shimonoseki Branch, 2016 (Wa) No. 96.

8. An offshore landing type with a total output of 60,000 kW and 15 wind turbines with an installation depth of 8m to 23m.

9. The Yamaguchi Prefectural Fisheries Cooperative Association has a common fishery right, and the plaintiff members thereof have a Member Operating Right within the scope of the fishery right exercise rule established thereby.



2	<p>Is there a risk that the plaintiffs' Member Operating Right will be violated in each of the following items?</p> <p>A) The inability to operate fishery in areas where vessels come and go for the Construction;</p> <p>B) Turbidity of the seawater due to seafloor excavation, etc.;</p> <p>C) The Construction has destroyed the relevant fishing grounds, which cannot be restored by installing fishing reefs;</p> <p>D) The destruction of the fishing grounds due to the laying of transmission cables; or</p> <p>E) The vibrations and noise caused by the wind turbines may cause fish and shellfish to escape.</p>	<p>The environmental impact assessment report prepared by the defendant was found to be basically reliable. Based thereon, the plaintiffs' claimed risks in items (A) to (E) in the left column were not upheld, and thus, there was no risk of infringement of the plaintiffs' Member Operating Right.</p>
3	<p>Will the exercise of the plaintiffs' Member Operating Right be restricted by the execution of the Indemnification Agreement?</p> <ul style="list-style-type: none"> • The defendant executed a contract with the Prefectural Fisheries Cooperative Association concerning the fisheries compensation associated with the Construction ("Indemnification Agreement"), which included the following matters: <p>A) The said association shall cooperate in the implementation of the Construction and the smooth implementation of preliminary surveys, etc.;</p> <p>B) The defendant shall pay the said association up to 800 million yen as compensation;</p> <p>C) The defendant shall install a fishing reef worth a total of 100 million yen around the base of the wind turbines; and</p> <p>D) The said association shall not make any claim against the defendant of any kind whatsoever other than for the indemnity provided in the Indemnification Agreement.</p>	<p>The exercise of the plaintiff's Member Operation Right was not restricted for the following reasons:</p> <ul style="list-style-type: none"> • The plaintiffs are members of the Prefectural Fisheries Cooperative Association, but they are not direct parties to the Indemnification Agreement. Therefore, they are not directly subject to the restrictions on the exercise of their fishery rights. • Although the Member Operating Right is a right recognized within the scope of a fishery right, the Indemnification Agreement does not limit the fishery right held by the Prefectural Fisheries Cooperative Association itself, nor does it include a restriction on the exercise of a fishery right (no provision restricted the time and place of the fishery to be implemented and covered by the fishery right in question). However, the execution of the Indemnification Agreement is a factor in considering the tolerance limit when determining whether or not there is an infringement of the Member Operation Right.

C) Some noteworthy points

In this case, the plaintiffs' claims were ultimately dismissed, but it took about five years from the filing of the lawsuit in 2016 until the decision was finalized by the Supreme Court. It can thus be inferred that the impact on the project was extremely significant. In this project, during the environmental assessment conducted by the defendant, the equipment that was used for the measurement was destroyed by someone, and it can be assumed that the relationship between the business operator and the surrounding residents, including those involved in fishery, was extremely bad.¹⁰

10. See <https://www.chosyu-journal.jp/yamaguchi/11915> (in Japanese). The defendant filed a lawsuit against the neighboring residents to seek compensation for the cost of repairing the equipment.



In sum, the following points can be learned from the above case and should be noted by business operators:

Item	Points to Note
Rights of People Engaged in Fishery	<ul style="list-style-type: none">• A member of a fisheries cooperative association may demand an injunction against the construction of an offshore wind power generation in the event of an infringement of the Member Operating Right. For this reason, sufficient consideration must be given not only to the directors of the said association but also to the interests of its individual members.• For free fishery, if a customary right is recognized, then compensation for damages and fishery compensation would be required, however, an injunction against the infringement of such rights would not be allowed. Accordingly, it is important for a business operator to accurately grasp the actual conditions of the fisheries in the fishing grounds that may be impacted by the project.
Environmental Impact Assessment Report	<ul style="list-style-type: none">• When introducing an offshore wind power generation project, an environmental assessment is carried out and an environmental impact assessment report is prepared. In such a case, unless there are special circumstances for considering the methodology and conclusions thereof inappropriate in light of modern scientific knowledge, the contents thereof would essentially be considered reliable, and based on such report, it can be judged that there is no risk of infringement of the Member Operating Right.• The environmental impact assessment of an offshore wind power generation project in Japan is done in the developing stages,¹¹ but as long as it is properly conducted on the basis of the findings at the time, the court will likely respect the results thereof.
Indemnification Agreement	<ul style="list-style-type: none">• Even if an indemnification agreement is executed with a fisheries cooperative association, there is a possibility that a member thereof may file a demand for an injunction against the project construction work.• When executing an indemnification agreement with a fisheries cooperative association, it is necessary to confirm, with the advice of a legal expert, whether the exercise of the common fishery right of the fisheries cooperative association is restricted, and whether the said association is duly authorized by each of its members to conclude such contract.

4. Conclusion

Offshore wind power generation will be an indispensable and socially significant project for Japan as it aims to reduce carbon dioxide emissions. However, this would not justify having a significant adverse impact on the surrounding population, including fisheries-related people.

If a business operator does not fully understand the rights related to fishery, and is not equipped with the proper knowledge and research, then there would be a high possibility for a backlash to occur from some of the local residents, including fishery operators, which would eventually harm the stability of the project.

It is hoped that all stakeholders involved in the offshore wind power generation business in Japan will fully understand the rights of fisheries-related people, including those engaged in free fishery, and build relationships with them that will be a win-win for both sides in advancing such business.

11. See <https://www.env.go.jp/press/files/jp/105476.pdf> (in Japanese). In particular, knowledge of the effects of underwater sounds and the dynamics and ecosystems in the sea area is considered to be limited.



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