



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

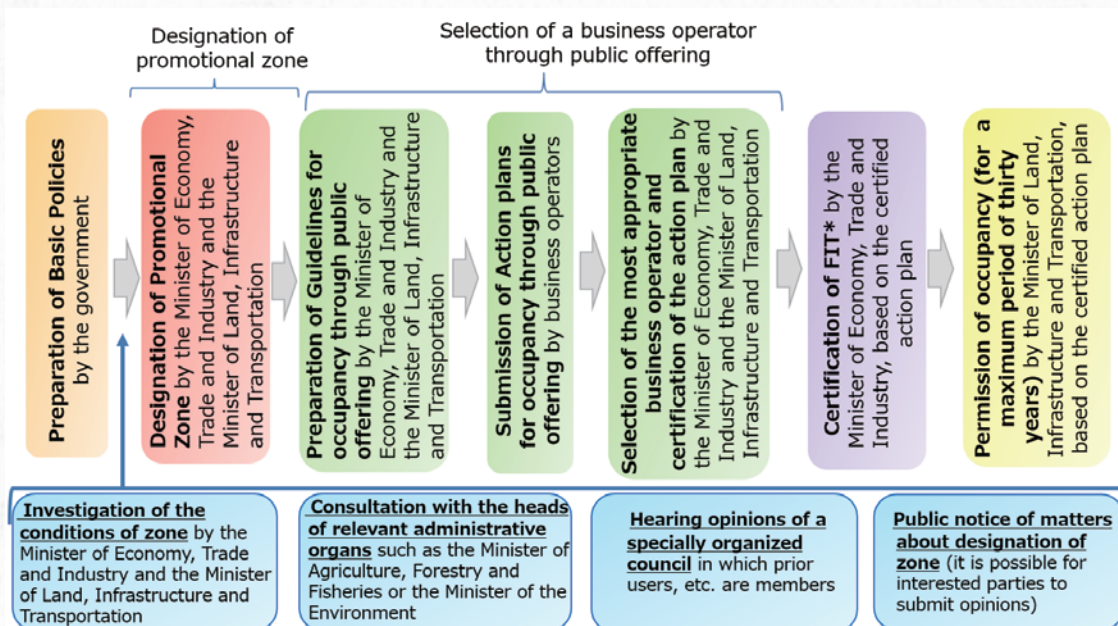


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1. Introduction

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.