

ENERGY & INFRASTRUCTURE BULLETIN

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New bill to promote offshore wind power

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I. Background of the Bill

On March 9, 2018, the "Bill on Promotion of Use of Marine Areas for Development of Marine Renewable Energy Generation Facilities" (the "Bill") was submitted to the 196th ordinary session of the Japanese Diet.

This Bill is part of the Japanese government's policy to promote offshore wind power at various levels, which has become a priority in the government's maritime policies, in its efforts to address carbon emissions and encourage industrial development.

The government amended the Ports and Harbors Act two years ago to include provisions for regulation of the use of marine areas around ports (*kouwan kuiki*) for renewable energy projects. However, until now, there has not been any legal framework at the national level regarding the use of General Marine Areas¹ (*ippan kai-iki*), despite the fact that such areas generally have much larger areas available to accommodate the installation of power generation facilities. Accordingly, it has been widely pointed out that (i) financing of offshore wind power projects is difficult due to a lack of legal framework to ensure the long-term occupancy of such General Marine Areas, and (ii) it is difficult to reach agreement with the local community due to the absence of a framework to accommodate the interests of relevant stakeholders (including existing users of such General Marine Areas).

Recently, various governmental departments and agencies have held active discussions as to how to promote offshore wind power (as shown in Table 1 below). In these discussions, some participants referred to the so-called "central

¹ According to the official outline of the Bill, "General Marine Areas" means the territorial sea and inland water other than the areas regulated by other specific legislation such as port areas.

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system" adopted in Europe, where a government presents a clear plan for the development of offshore wind power, leads and supports developers in procedures in the planning phase (including the environmental impact assessment procedures and the securing of permissions and grid connections). In addition, the Japan Wind Power Association submitted a petition to the government to legislate for the use of General Marine Areas for offshore wind power projects.

As a result of such movements, the government drafted the Bill to establish a legal framework to ensure the long-term occupancy of General Marine Areas and to accommodate the interests of a developer as well as existing users of marine areas targeted for the development of marine renewable energy projects².

Table 1: Recent Movements in Promotion of Offshore Wind Power

Timing	Agency/Council/Organisation	Overview of discussion
March 2017	Agency for Natural Resources and Energy, Ministry of Economy, Trade and Industry	<ul style="list-style-type: none"> - Released the "Guide on Adjustment of Use of General Marine Areas" - Collected examples of pilot projects (led by local governments) and demonstration experiments (led by governmental agencies).
April 2017	Ministerial Council on Renewable Energy, Hydrogen and Related Issues (inaugural meeting)	- Released the "Action Plan for Cooperation between Relevant Ministries and

² According to the definition in the Bill, the applicable energy sources are not limited to wind power, but include other renewable energy sources stipulated in Article 2, Paragraph 4 of the Act on Special Measures Concerning Procurement of Electricity from Renewable Energy Sources by Electricity Utilities (the "Renewable Energy Act") as designated by an ordinance as being available for electricity energy sources in sea areas (Article 2, Paragraph 3). However, as wind power seems to be the main form of marine renewable energy being targeted by the Bill for the time being, we will focus our commentary in this bulletin on the application of this Bill to offshore wind power projects.

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		<p>Agencies to Expand the Introduction of Renewable Energy"</p> <p>- A roadmap in the Action Plan which indicated that the government would discuss the establishment of rules for the use of General Marine Areas in FY2017.</p>
May-July 2017	Study Group on Policy Issues in the Era of Introduction of Large-Volume Renewable Energy	- Recommended the establishment of rules for use of General Marine Areas, referring to the "central systems" adopted in Europe.
December 2017 onwards	Subcommittee on Introduction of Large-Volume Renewable Energy and Next Generation Electric Power Networks (the "Subcommittee")	- Currently discussing policies for the promotion of offshore wind power (with geographic restrictions)

II. Main features of the Bill

The Bill has two main features, which are summarized as follows:

1. The Bill establishes special zones for the development of marine renewable energy generation facilities (each a "Promotion Zone") and introduction of systems to approve occupancy plans and grant occupancy approval.

In relation to such Promotion Zones, the Bill:

- (1) provides for the procedures for the designation of a Promotion Zone, the tendering of an operator, and the approval of occupancy.

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- (2) grants authority to the Minister of Land, Infrastructure, Transport and Tourism ("MLIT Minister") to approve an occupancy plan and to supervise the operator.
 - (3) provides for the procedure for the approval of an occupancy plan through a public tender process (and, as the occupancy plan includes the procurement price, such tender process would also include the tender for the procurement price under the feed-in tariff program for renewable energy); and
 - (4) provides that the maximum occupancy period of a "Promotion Zone" is 30 years.
2. The Bill also sets out the process for the establishment of a Council in respect of each Promotion Zone.
- (1) The members of a Council will include relevant authorities who will confirm whether the proposed project is consistent with their respective regulations.
 - (2) The Council carries out consultation with existing users of the relevant marine areas and other stakeholders.
 - (3) The Council's opinion will be considered in the process of designating a Promotion Zone (see section 2(4) of part III below).

In the following sections, we will introduce the details of the Bill and discuss the remaining issues. Unless otherwise stated, a reference to an article hereafter means an article of the Bill.

III. Designation of Promotion Zone

1. Standards for Designation of Promotion Zone

The Ministry of Economy, Trade and Industry (the "METI Minister") and MLIT Minister will designate a Promotion Zone in accordance with the government's "basic policy" to be published by the government under the Bill (Article 8, Paragraph 1).

An area designated as a "Promotion Zone" must conform to the following standards:

- (1) The marine and other environmental conditions of the area are appropriate for the proposed project;

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- (2) It is possible to properly locate power generation facilities in the area without hindering sea routes and the use, maintenance and management of ports in and around the Promotion Zone;
- (3) It is possible to use the area and the ports near the area in an integrated manner;
- (4) The connection to the Electricity Utilities' power grids will be properly secured in the area;
- (5) Fisheries in and around the area will not be affected; and
- (6) The area is not currently subject to any other zoning laws.

2. Procedures for Designation of Promotion Zone

A Promotion Zone will be designated pursuant to the following procedures (Articles 8, paragraph 2 to 6):

- (1) Investigation of the proposed area;
- (2) Prior announcement of an area to be designated as a Promotion Zone (the announcement will include the proposed designation plan and the reason for the designation, which is exhibited for two weeks);
- (3) Submissions from stakeholders during the two-week disclosure period;
- (4) Consultation with the relevant authorities, hearing of opinions from relevant prefectural governors and the Council (see part IV below);
- (5) Designation of the Promotion Zone; and
- (6) Announcement of the designation of the Promotion Zone.

3. Issues relating to Designation of Promotion Zone

One issue raised by the abovementioned process for the designation of the Promotion Zone is the grid connection requirement. It is unclear at this stage how the requirement as to grid connection (see section 1(4) above) will operate. Based on the materials which the government submitted to the Subcommittee³, it seems unlikely that an operator developing an offshore wind power project in the Promotion Zone would receive favorable treatment in respect of the grid connection. In addition, it also seems unlikely that the government would ensure that all permissions and approvals necessary for such project can be obtained, although discussion with relevant regulators will

³ See Subcommittee (4th meeting), material No.4 "Promoting Introduction of Power with Geographic Restrictions – the meaning and promotion plans of introduction of offshore wind power" (February 22, 2018) on page 12.

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be held to some extent in the Council.

Certainty of occupancy is another issue. Occupancy of marine areas within the Promotion Zone by an Appointed Operator (*Sentei Jigyousha*) is secured to some extent under the Bill: once the Promotion Zone has been designated, the MLIT Minister's approval is required for all occupancies of the marine areas within the Promotion Zone (Article 10, Paragraph 1), and where the Occupancy Plan (which is explained in section 2 of part III below) has been approved, only the Appointed Operator may apply for such approval (Article 19, Paragraph 3). However, there are no provisions which forfeit or restrict the rights of stakeholders who did not provide written submissions during the public notice period (see section 2(2) above). Therefore, even after the Promotion Zone is designated, it is theoretically possible that persons who claim a right to use the Promotion Zone (or any other rights in respect of the Promotion Zone) will come forward.

It should also be noted that the written stakeholder submissions (referred to in section 2(3) above) will be merely attached to the material used for the consultations with the relevant authorities (which are referred to in section 2(4) above). Therefore, it will be necessary to consider how such submissions will be dealt with in the course of the actual operation of the Council.

IV. Council

1. Establishment of Council

The Bill provides that the METI Minister, the MLIT Minister, and the governors of the relevant prefectures may organize a Council to carry out the necessary consultations for the designation of a Promotion Zone and the development of a marine renewable energy project within the Promotion Zone (Article 9, Paragraph 1). A Council may also be formed upon request by the governors of the relevant prefectures, in which case the METI Minister and the MLIT Minister should respond to the request (Article 9, Paragraphs 3 and 4). Given this, it is expected that, in practice, a Council would be established in respect of every Promotion Zone.

2. Members of the Council

The Council will consist of the following members (Article 9, Paragraph 2):
(1) the METI Minister, MLIT Minister, and the governors of the relevant

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prefectures;

- (2) the Minister of Agriculture, Forestry and Fisheries and the mayors of relevant municipalities; and
- (3) the relevant local fishery association and other stakeholders, academic experts and other persons deemed necessary by the METI Minister, the MLIT Minister and the governors of the relevant prefectures.

Members of the Council are required to respect the outcome of the Council's consultation process (Article 9, Paragraph 6).

3. Advantages and challenges of the Council

The establishment of the Council is expected to facilitate the development of marine renewable energy projects within the relevant Promotion Zone, as the participants will have an opportunity to voice their interests (and accommodate other participants' interests) in the Council and will be required under the Bill to respect the results of discussions in the Council. However, the Council also presents some challenges in the development of projects, which we explain further below.

(1) Relationship with relevant authorities

The Council framework should enable the Appointed Operator to expect to smoothly obtain permission and approvals for the project, given that the relevant authorities participate in the Council and discuss regulatory issues in that forum.

However, it should be noted that the occupancy approval framework under the Bill is not designed to grant all the necessary permissions and approvals required for a marine renewable energy project. The result of the consultations at the Council does not legally bind the authorities in charge of such permissions and approvals (other than the obligation of the Council members to "respect" the outcome of the consultations in the Council under Article 9, Paragraph 6). In addition, some permissions and approvals may be required from authorities who are not members of the Council, and accordingly developers must obtain such permissions and approvals independently of the Council process. For example, as the Minister of Environment may not necessarily participate in the Council, developers may need to complete environmental impact assessment procedures separately from the Council if the Minister of the Environment is not included as a Council member.

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(2) Relationship with stakeholders

It is expected that, by having existing users of the marine areas (such as fishermen and shipping companies) participate in the Council, the Appointed Operator and the stakeholders would have an opportunity to better understand each other's respective interests.

However, the framework for Council consultations under the Bill does not guarantee that agreements will be achieved among the Council members.

Moreover, as the Appointed Operator will need to negotiate with non-members of the Council outside of the Council consultation process, it will be critical to ensure that, to the extent possible, all stakeholders participate in the Council consultation process.

V. Selection of Appointed Operator

1. Formulation of Occupancy Guideline

A developer of a renewable power project in a marine area within a Promotion Zone will be selected and appointed through a public tender process.

The METI Minister and the MLIT Minister will provide guidelines on the implementation of the public tender process and on the occupancy of a marine area for the purpose of marine renewable energy generation facilities within a certain Promotion Zone (the "Occupancy Guideline" (*Koubo Senyo Shishin*)) (Article 13, Paragraph 1).

The Occupancy Guideline will stipulate the following items (Article 13, Paragraph 2):

- (1) type of power generation facilities;
- (2) the area that is to be occupied;
- (3) commencement date of occupancy;
- (4) proposed output capacity of power generation facilities;
- (5) criteria for qualifications of participants in the public tender process;
- (6) amount of the guarantee to be provided by bidders;
- (7) maximum amount of tariff (per kilowatt);
- (8) method of determining the tariff (which will be based on the tenders received);
- (9) procurement term under the feed-in tariff program;
- (10) deadline for application for approval pursuant to the Renewable Energy

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Act by the successful bidder (the “Appointed Operator”);

- (11) matters concerning the use of a port;
- (12) matters concerning the removal of power generation facilities at the end of the occupancy period;
- (13) the effective period for approval of the Occupancy Plan;
- (14) matters concerning coordination between the developer of the power project and the relevant authorities;
- (15) the evaluation criteria to be used for the selection of the Appointed Operator; and
- (16) other matters concerning the implementation of the public tender process and other necessary matters.

2. Selection of Appointed Operator and Approval of Occupancy Plan

A developer who intends to operate a power project in a marine area within a Promotion Zone must submit an Occupancy Plan (*Koubo Senyo Keikaku*) in accordance with the public tender process (Article 14, Paragraph 1). The METI Minister and the MLIT Minister will, after examining whether the proposed Occupancy Plan meets certain standards (such as its appropriateness in light of the Occupancy Guideline), evaluate the Occupancy Plan and select an Appointed Operator based on the Occupancy Plan. Selection of the successful Appointed Operator will take into consideration the plan most appropriate to enable the long-term, stable and efficient implementation of the marine renewable energy project (Article 15, Paragraphs 1 to 3).

The METI Minister and the MLIT Minister will, in designating the area and period of occupancy, certify that the Occupancy Plan submitted by the Appointed Operator is appropriate (Article 17, Paragraph 1).

An Occupancy Plan should contain, for example, the following items (Article 14, Paragraph 2):

- (1) area and period of occupancy;
- (2) details, including the timing of implementation, of the power project;
- (3) method and schedule of construction;
- (4) type, structure, output, and methods of maintenance and management of power generation facilities;
- (5) the applicable tariff;
- (6) system and ability to coordinate with relevant ministries and agencies

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and local governments; and

- (7) finance plan and business projection.

3. Effect of Selection and Approval

The Appointed Operator will be required to install, maintain and manage the marine renewable energy generation facilities in accordance with its certified Occupancy Plan (Article 19, Paragraph 1).

The MLIT Minister will, upon application for approval by an Appointed Operator, approve an occupancy based on a certified Occupancy Plan (Article 19, Paragraph 2). It is important to note that only the Appointed Operator may apply for approval of occupancy during the period of occupancy of the Appointed Operator (Article 19, Paragraph 3).

The procurement prices (tariff) and procurement periods for marine renewable power generation facilities will be determined based on the results of the public tender process under the Bill, instead of the provisions of Article 3, Paragraph 1 and Article 4 of the Renewable Energy Act (Article 16).

4. Issues concerning the selection process of the Appointed Operator

The report of the Committee on the Calculation of the Procurement Price⁴ suggested that, once the Bill is implemented, the public tender process will be used for the determination of the procurement price (i.e. the tariff under the feed-in tariff program for renewable energy) of the renewable energy generated by projects to which this Bill applies. The committee seems to have taken into account the current circumstances of the application process for grid connections, the current offshore wind power market in Europe and the need to minimize, to the extent possible, the public financial burden of the renewable surcharge for the feed-in tariff program for renewable energy. However, the immediate introduction of such public tender processes to offshore wind power projects at this stage may be controversial in the current Japanese market, as there have not been any commercial offshore wind power projects implemented so far and the related industries are not yet well-developed in Japan.

⁴ The Committee on the Calculation of the Procurement Price, "Opinions on Procurement Prices from FY2018" (February 7, 2018), page 26.

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VI. Remaining issues related to offshore wind power

In relation to wind power projects (including offshore wind power), developers face the significant challenge in ensuring grid connection within reasonable cost, as well as securing the rights to use project sites. As mentioned above, the Bill does not address these issues. The discussions to introduce the Japanese version of “connect and manage” and the efforts to reduce grid connection costs are being considered separately to this Bill⁵.

In addition, offshore wind power projects need to separately implement the necessary environmental impact assessment procedure, which in itself has a considerable time and cost. As this is also the case with offshore wind power projects to which the Bill applies, the acceleration of such procedures remains a challenge to be addressed in the Japanese government’s endeavors to promote offshore wind power⁶.

It should also be noted that the Bill establishes rules which apply to those marine renewable energy projects proposed to be located in General Marine Areas within a Promotion Zone, and does not apply to marine renewable energy projects in General Marine Areas outside a Promotion Zone (i.e., this Bill neither prohibits nor approves such projects). This point has been left for future discussion.

VII. Conclusion

Despite the issues outlined above, this Bill is definitely a first step towards the development of commercial offshore wind power projects in General Marine Areas. We welcome the Bill as it will introduce the legal framework regarding the use of General Marine Areas, which have not been subject to any clear legal rule until now. We are hopeful that the Bill will pass in parliament as soon as possible.

⁵ See Subcommittee (4th meeting) material No.4 on page 12.

⁶ See Subcommittee (4th meeting) material No.4 on page 12.

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PUBLICATIONS

- Book "Real Estate Law in Asia-Guidance for Real Estate and Infrastructure Business" (February 16, 2018)
Publisher Shojihomu Co., Ltd.
Author [Author and Editor]Ryutaro Kawamura, Susumu Hanawa
[Co-Author]Takeshi Mukawa, Yohei Koyama, Hidetomo Futami, Hideaki Umetsu, Masahito Saeki, Takaya Sato, Atsushi Inoue, Yoshinori Usui, Hiroki Kishi, Mikio Sonoda, Tetsu Takeuchi, Kenjiro Yamaguchi, Satoshi Tatsugawa, Ryoichi Inoue, Shutaro Kuwahara, Yoshihiko Abe

NEWS

- **41 new lawyers joined Mori Hamada & Matsumoto**
41 lawyers who qualified in December 2017 joined Mori Hamada & Matsumoto.

- **Twelve new partners and seven new of counsels**
As of January 1, 2018, twelve lawyers became partners of the firm.

[Partners]

Aruto Kagami, Sachiko Omuro, Yuko Kanamaru, Yusuke Suehiro, Mikio Sonoda, Tetsu Takeuchi, Yohsuke Higashi, Takahiro Homma, Yusuke Murakami, Hiroshi Yamauchi, Seijun Lee and Yuta Kawashima

Also, seven lawyers became of counsels as of January 1, 2018.

[Of Counsels]

Takaya Sato, Katsuyuki Tainaka, Hiroyuki Tanaka, Tomoya Fujita, Takuto Ichimura, Mikito Ishida and Yumi Kanamaru

The firm appreciates your continued support.

- **Top Ranking Received From Chambers Global 2018**
Mori Hamada & Matsumoto and our lawyers are recognized in the practice areas named below in Chambers Global 2018. Our Yangon Office was again the only Japanese firm to receive rankings in the categories "General Business Law – Myanmar" and "General Business Law: International Firms - Myanmar." Our Bangkok Office (Chandler MHM Limited) and its lawyers have also received prestigious rankings as shown below. For more information, please refer to the Chambers' website.

JAPAN

- Banking & Finance: Domestic(Band 1)
- Capital Markets: Domestic (Band 1)
- Capital Markets: Domestic Securitisation & Derivatives (Band 1)
- Corporate/M&A: Domestic (Band 1)
- Corporate/M&A (Foreign Expertise): China
- Dispute Resolution: Domestic (Band 2)
- Intellectual Property: Domestic (Band 2)

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MYANMAR

- General Business Law (Band 4)
- General Business Law: International Firms (Band 3)

THAILAND (Chandler MHM Limited)

- Banking & Finance (Band 2)
- Corporate/M&A (Band 2)
- Projects & Energy (Band 1)

[Lawyers]

JAPAN

- Banking & Finance: Domestic
Leading Individual: Satoko Kuwabara, Masanori Sato, Takahiro Kobayashi, Hiroki Aoyama
- Banking & Finance: Domestic Firms: Financial Services Regulation
Leading Individual: Toru Ishiguro
- Capital Markets: Domestic
Leading Individual: Toru Ishiguro, Katsumasa Suzuki, Taro Omoto
- Capital Markets: Domestic: Securitisation & Derivatives
Leading Individual: Masanori Sato, Akira Ehira
- Capital Markets: J-REITs
Leading Individual: Yasuhiko Fujitsu, Taro Omoto
- Corporate/M&A: Domestic
Leading Individual: Shin Kikuchi, Satoko Kuwabara, Hajime Tanahashi, Tomohiro Tsuchiya, Gaku Ishiwata, Atsushi Oishi, Yuto Matsumura, Takayuki Kihira, Yoshihiro Kojima
- Corporate/M&A (Foreign Expertise) - Japan : China
Leading Individual: Yoshio Iteya, Shigehiko Ishimoto, Shi Kang
- Dispute Resolution: Domestic
Leading Individual: Mugi Sekido
- Dispute Resolution: Arbitration (Foreign Expertise) - Japan : China
Leading Individual: Yoshio Iteya
- Intellectual Property: Domestic
Leading Individual: Yutaka Miyoshi
- Intellectual Property (Foreign Expertise) - Japan : China
Leading Individual: Yoshifumi Onodera

CHINA

- Corporate/M&A (International Firms) (Expertise Based Abroad) - China : Japan
Leading Individual: Yoshio Iteya, Shi Kang
- Intellectual Property (International Firms) (Expertise Based Abroad) - China : Japan

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Leading Individual: Yoshifumi Onodera

MYANMAR

- General Business Law
Leading Individual: Win Naing
- General Business Law: International Firms
Recognised Practitioner: Takeshi Mukawa
- General Business Law: International Firms (Expertise Based Abroad)
Leading Individual: Albert T. Chandler (Thailand, Chandler MHM Limited)

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