

**Summarised Translation of the Complaint,
Citizens' Committee on the Kobe Coal-Fired Power Plant v. Japan¹**

Information on the Cover Page²

Jurisdiction: Osaka District Court in Japan

Filing date: 19 November 2018 (19 November, Heisei 30th)

Legal counsels to the Plaintiffs: Naoki Ikeda, Mie Asaoka, Juta Wada, Kimiko Yoshie, Masayuki Kanazaki, Shunsuke Sugita

Value of the subject matter of the suit: 38,400,000 JPY

Amount of stamp duty: 137,000 JPY

¹Translated by Y (Grace) Nishikawa, LLM, for the purposes of (legal) research; this is a summary focusing on the legal arguments and excludes repetitive sentences and detailed explanation of evidence presented.

²Osaka District Court in Japan, Complaint, 19 November 2018, Citizens' Committee on the Kobe Coal-Fired Power Plant v Japan 1-2 <http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2018/20181119_NA_complaint.pdf> accessed 4 October 2021.

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Object of the Complaint

The Plaintiffs seek the following judgment.

1. The Notice of Finalization, dated 21st May 2018 issued by the Minister of Economy, Trade and Industry in accordance with Article 46 (17) (ii) of the Electricity Business Act affirming the environmental impact statement (EIS) by Kobelco Power Kobe No. 2 Inc. (Kobelco Power Kobe No.2) regarding the thermal power plants below shall be revoked.

The name of the power plant: Kobe Coal-Fired Power Plant (tentative name) (under planning)

Fuel used: coal

Electric power generated: 1,300,000 kW in total

Method of power generation: micro charcoal-fired power generation with ultra-supercritical pressure

Starting date of power supply: Unit 3 (New Coal-Fired Power Unit 1) in 2021

Unit 4 (New Coal-Fired Power Unit 2) in 2022

Planned construction site: Nadahamahigashi-cho 2, Nada-Ward, Kobe, Hyogo

2. The omission of establishing regulations concerning the CO₂ emission by thermal power plants, which are consistent with the Paris Agreement, based on Article 39 (1) of the Electricity Business Act is illegal.
3. The court costs shall be borne by the Defendant.

(Summarised Translation of the Complaint, p3)

1 Introduction

The world is striving for the phase-out of coal-fired power generation under the Paris Agreement in order to combat global warming and prevent air pollution. However, Kobe Steel Ltd. (Kobe Steel) proceeded with its plan to build new coal-fired power plants and started the construction on 1st October 2018. The construction started because the State [Japan] had not implemented effective regulations concerning the Environmental Impact Assessment (EIA) procedures based on the Environmental Impact Assessment Act. Moreover, the EIA for the New Coal-Fired Power Units ended even though there was no appropriate consideration of the environmental conversation.

The Plaintiffs may suffer damage related to the emissions of CO₂ and air pollutants. Thus, they seek the appropriate environmental consideration by reducing the CO₂ and air pollutant emissions by the New Coal-Fired Power Units through the revocation of the Notice of Finalization by the Minister of Economy, Trade and Industry. This complaint institutes a lawsuit demanding the regulations of the CO₂ emission by recognising the illegality of the omission of establishing regulative standards that are consistent with the Paris Agreement.

(p 6)

2 Parties and Related Persons

Plaintiffs

The Plaintiffs are those persons who live in Hyogo Prefecture and may suffer damage from the air pollution and global warming (climate change) if the New Coal-Fired Units are built. (p6)

Defendant

The Defendant, the Minister of Economy, Trade and Industry, is an administrative authority that is competent to regulate and supervise the installation and management of the electric facilities based on the Electricity Business Act and has *jus disponendi* concerning the EIA based on the Environmental Impact Assessment Act and Electricity Business Act. (pp 6-7)

Related companies

Kobe Steel Ltd. (Kobe Steel) is a steel manufacturing corporation that planned to build and operate new coal-fired power plants at Nadahamahigashi-cho 2, Nada-Ward, Kobe, Hyogo. It is also the body that carried out the EIA. (p7)

Kobelco Power Kobe No. 2 Inc. (Kobelco Power Kobe No.2) is a pure subsidiary of Kobe Steel established through a company split in April 2018 for the power generation business at the New Coal-Fired Units. It succeeded to the rights and obligations concerning the power generation business at the New Coal-Fired Units from Kobe Steel. The Notice of Finalization was addressed to Kobelco Power Kobe No.2, and it is currently constructing the New Coal-Fired Units. (p7)

3 The Impact of the New Coal-Fired Units on the Plaintiffs

3.1 Electric power supply and power generation in Japan

The proportion of the coal-fired power generation in Japan expanded under the national policy of reducing the dependence on oil after the oil crisis. The use of coal causes a large amount of CO₂ emissions and air pollutants and has a significant impact on the environment. However, coal is widely utilized as it is relatively cheaper than other fuels, such as natural gas. Additionally, the energy liberalisation and the temporary power shortage due to the shutdown of the nuclear power plants following the 2011 Tohoku Earthquake and Tsunami led to the planning of the construction of new coal-fired power plants. (pp7-8)

Nonetheless, the construction of new power plants is not necessary, considering the effort made by the citizens and providers to save energy and the increasing use of renewable energy after the enactment of the Act on Special Measures Concerning Procurement of Electricity from Renewable Energy Sources by Electricity Utilities in July 2012. Further, developed countries are trying not to only avoid the construction of new coal-fired power plants but also abolish the existing coal-fired power plants because of their negative impact on the environment and incompatibility with renewable energy. (pp7-8)

3.2 Backgrounds

The construction plan [of the New Coal-Fired Units] was made during the power storage after 2011. Specifically, the plan is to build two large-scale coal-fired units with the total amount of 1,300,000 kW of power generated, which is as much as the power generated by the existing plant. Since the New Coal-Fired Units both generate 650,000 kW each, they are considered to be ‘class-1 project’ within the meaning of Article 2 (2) of the Environmental Impact Assessment Act. Accordingly, the EIA procedure was initiated based on the Environmental Impact Assessment Act and Electricity Business Act. In 2014, the procedures to prepare a document on primary environmental impact consideration at the early stage (document on primary environmental impact consideration), a scoping document on environmental impact assessment (scoping document), and a draft environmental impact statement (draft EIS) started. (pp9-10)

The overview of the EIA procedure is shown below.

December 2014: [submission of] the document on primary environmental impact consideration

-consideration of the location, scale, etc. during the planning

February 2015: the opinions by citizens, the Mayor, and the Governor

June 2015: the scoping document

-indicating the methods of the EIA and items to be examined

November 2015: the opinions by citizens, the Mayor, and the Governor

July 2017: draft EIS

-shows the outcomes of the investigation, prediction, and evaluation of the environmental impact

-indicates measures for environmental conservation

August 2017: the public hearing by Kobe City

August 2017: the opinions by citizens

March 2018: the opinions by the Mayor and the Governor

March 2018: the opinion by the Minister of Environment

April 2018: recommendation by the Minister of Economy, Trade and Industry

11th May 2018: the EIS

22nd May 2018: Notice of Finalization by the Minister of Economy, Trade and Industry confirming the EIS

30th August 2018: Notification of the construction plan

1st October 2018: Construction started

(p10)

The planned construction site is an area that suffered from serious air pollution in the past and is still in the process of improving its environmental conditions. Accordingly, citizens who have been concerned with the air quality and global warming strongly disagreed with the planned construction. Moreover, the Mayor of Kobe City, the Governor of Hyogo Prefecture, and the Minister of the Environment pointed out environmental issues and expressed the need to re-consider the construction. (p10)

481 people in the neighbourhood instituted a mediation against Kobe Steel and others before the Examination Committee for Pollution in Hyogo Prefecture and have been requesting

a review of the construction plan since December 2017. However, Kobe Steel and others did not review the construction plan. Kobelco Power Kobe No.2, which took over the construction project after the company split, submitted the EIS to the Minister of Economy, Trade and Industry on 11th May 2018. The Minister did not order any changes and made the Notice of Finalization confirming the EIS on 22nd May. On 30th August, Kobelco Power Kobe No.2 made a notification of the construction plan in accordance with Article 48 (1) of the Electricity Business Act (it can only start the construction after 30 days of the notification). On 14th September, about 40 citizens filed a complaint requesting an injunction of the construction and operation of the New Coal-Fired Units claiming that their personal rights are violated by air pollution and global warming (Citizens' Committee on the Kobe Coal-Fired Power Plant v. Kobe Steel Ltd., et al.). The 30-day period lapsed without the Minister ordering revision of the construction plan based on Article 48 (4) of the Electricity Business Act. Consequently, Kobelco Power Kobe No. 2 started the construction on 1st October 2018. (pp10-11)

3.3 Operation of the New Coal-Fired Units, Global-Warming, and Air Pollution

The operation of the New Coal-Fired Units will cause a large amount of CO₂ emission, and there is no carbon capture and storage (CCS) installed. The amount of the emission is expected to rise to 6,920,000 tons per year according to the EIS. This amount is 0.61 % of the national CO₂ emission caused by power generation in Fiscal Year (FY) 2016 and approximately 1/5000 of the global emission of energy-derived CO₂. If the emission by the existing power plants (about 7.9 million tons) is added to the calculation, the total amount of the CO₂ emission is expected to be more than 1.3 % and 1/2300 respectively. Moreover, the expected amount of emission is 60% of the indirect CO₂ emissions in Kobe City (in FY 2015) and is equivalent to the emission by 1.5 million ordinary households. This amount of CO₂ emission will certainly accelerate global warming and cause serious damage. (pp11-13)

Sulfur oxides, dust, and soot (suspended particulate matters) cause respiratory diseases, such as asthma and pneumonia. Nitrogen oxides also causes respiratory diseases when inhaled. NO_x, dust, and soot produce PM 2.5 that can worsen respiratory diseases, cardiovascular diseases, and lung cancer. Moreover, PM 2.5 can be dispersed and pollute remote places. Furthermore, NO_x causes acid rain and ozone. The Plaintiffs' health is likely to be damaged by those pollutants. (pp14-15)

As explained, the New Coal-Fired Units certainly have adverse effects on the environment by the emissions of CO₂ and air pollution. However, they are about to be operated because

- 1) the EIA was not corrected even though there was no consideration for the environment, and
- 2) there is no legislation regulating the CO₂ emission by power plants nor appropriate measures regulating the pollution and environmental impacts of electric facilities based on the Electricity Business Act.

If the Minister of Economy, Trade and Industry adequately exercised its authority to supervise and regulate [the construction and operation of the New Coal-Fired Units], the aforementioned damage could have been prevented. Nonetheless, the Minister of Economy, Trade and Industry omitted to exercise its authority. (p15)

4 Necessity to Regulate Coal-Fired Power Plants

4.1 Worsening climate change

The concentration of CO₂ [in the atmosphere] increased from 278 ppm before the industrialization to 410 ppm in April 2018. The average temperature increased by 0.85 degrees Celsius between 1880 and 2012 globally and by 1.19 degrees in 100 years since 1889 in Japan. (p16)

Currently, climate change is causing a lot of damage to life, health, and property worldwide, through landslide due to extreme rainfall, storm surge due to a huge typhoon, heatstroke due to the high temperature, and other disasters caused by abnormal weather. (pp16-17)

The Fifth Assessment Report by the Intergovernmental Panel on Climate Change (IPCC) states that the human influence on the climate system and global warming is clear and the average temperature and precipitation have been increasing. (p17)

Japan has also suffered a lot of human and property damage from the abnormal weather. Effects of global warming and climate change caused by CO₂ and other greenhouse gas emissions are now apparent. (p17)

4.2 International development towards the net zero CO₂ emission

The IPCC was established in 1988 and has published 5 assessment reports since 1990. In response to the scientific warning, the United Nations Framework Convention on Climate Change (the UNFCCC) was adopted in 1992, and the Kyoto Protocol, clarifying the responsibilities of developed countries, was adopted in 1997. The Kyoto Protocol entered into force in 2005, and the world made the transition towards the use of renewable energy and energy saving. (p18)

On the other hand, the emission of greenhouse gases continued, and climate change is worsening. The IPCC's Fourth Assessment Report (from 2007) stated that developed countries must reduce the CO₂ emission by 25-40 % (compared with the 1990 level) by 2020 and by 80-95 % by 2050 in order to keep the temperature increase below 2 degrees Celsius. (p18)

Moreover, the Fifth Assessment Report states that

- 1) the seriousness of global warming in the late 21st century is determined by the cumulative emission of CO₂,
- 2) the remaining carbon budget is only a trillion, and

3) the world needs to largely reduce the emissions of CO₂ and greenhouse gases; there must be a 40-70% reduction compared with the 2010 level by 2050; the emission needs to be zero or less by 2100.

Developed countries, including Japan, have declared to reduce greenhouse gas emissions by 80% by 2050 in response to those IPCC reports and the agreements made at UNFCCC COP. (p18)

The Paris Agreement was adopted in December 2015 to limit the increase in the global average temperature well below 2, or preferably 1.5, degrees. In order to achieve this reduction target, the Paris Agreement obliges the Parties to balance the anthropogenic emissions and removals {Article 4 (1)}, prepare, communicate, and maintain Nationally Determined Contributions (NDCs) {Article 4 (2)}, and implement them with domestic measures. The Paris Agreement entered into force on 4th November 2016, and Japan ratified it on 8th November 2018. There are currently 184 state parties, and the international community agreed to aim for the net zero CO₂ emission in order to minimise the influence on climate change. (p19)

An article published in the Proceedings of the National Academy of Science of the United States of America on 6th August 2021 indicated the possibility of the world reaching the ‘tipping point’ that leads to the ‘Hothouse Earth’. (pp19-20)

Moreover, the IPCC’s report on the Global Warming of 1.5 °C illustrated the consequences of the 1.5-degree increase [in the average temperature], such as extremely high temperatures, heavy rainfall, and more frequent drought. (p20)

Further, our efforts for the next 10 years are especially important [for the future of the environment]. (p20)

4.3 Global warming and coal-fired power plants

One of the ways to prevent climate change is to quit coal-fired power generation. Even though the use of coal is highly efficient in power generation, the amount of CO₂ emission per one unit of generated power is about twice as much as the emission by natural gas power generation. Thus, it is essential to abolish coal-fired power generation in order to achieve the net zero CO₂ emission. (p20)

Similarly, the United Nations Environment Programme stresses the necessity to avoid the construction of new coal-fired power plants without the CCS and to gradually reduce the use of existing coal-fired power plants. (p20)

On the other hand, CO₂ emission in Japan amounted to 92% of the total greenhouse gas emission (1,307 million tons) in FY 2016, of which energy-derived was 94%, and the CO₂ emission by industrial electric power generation accounted for 42% thereof (39% for the total CO₂ emission). (p21)

Japan's policy to continue increasing the number of coal-fired power plants is absurd and incompatible with the Paris Agreement. (p21)

4.4 CO₂ reduction targets in Japan and the Paris Agreement

The Japanese Government made a cabinet decision aiming for an 80 % reduction in greenhouse gas emissions (the 4th Basic Environmental Plan). This long-term goal was confirmed by the Intended Nationally Determined Contributions (INDCs) in FY 2030 (formulated in 2015) and the Plan for Global Warming Countermeasures (formulated in 2016). (p23)

However, the Government withdrew the reduction target for 2020 in 2013 (25% reduction compared with FY 2005) and replaced it with the 3.8% reduction compared with FY 1990). The Ministry of Economy, Trade and Industry declared in July 2015 that coal and nuclear power were the baseload power sources. It further made energy supply plans for FY 2030 where the coal-fired power generation amounts to 26% and submitted an INDC with a 26% reduction target of greenhouse gas emissions compared to FY 2013 based on those plans. (pp23-24)

Following the adoption of the Paris Agreement, the government decided in May 2016 to aim for an 80% reduction in greenhouse gas emissions by 2050 and formulated the Plan for Global Warming Countermeasures as well as the aforementioned FY 2030 Target of 26% reduction. On 8th November [2016], Japan reported its NDC in accordance with Article 4 (2) of the Paris Agreement. In June 2018, the Cabinet decided on the Basic Energy Plan that incorporated the long-term prediction of energy supply made by the Ministry of Economy, Trade and Industry in June 2015. The Plan for Global Warming Countermeasures was formulated on the basis of this long-term energy supply prediction. The plan for the transition from the FY 2030 Target to FY 2050 Target is not clarified. (p24)

CO₂, which accounts for 92% of [the total] greenhouse gas in Japan, stays in the atmosphere for a long time, and its cumulative amount proportionally influences the increase in the average temperature. Considering this, the reduction target of 26% by FY 2030 is too low, and the measures planned/taken to achieve the goal are insufficient. (p24)

According to the abovementioned energy supply prediction by the Ministry of Economy, Trade and Industry, the proportion of coal-fired power in the energy mix should be 26% in FY 2030 while the amount of coal-fired power amounted to 32% in FY 2016. Subsequently, coal-fired power generation needs to be reduced rapidly, in 14 years. (p24)

However, there are currently 35 construction plans for new coal-fired power plants, including the New Coal-Fired Units by Kobe Steel. Even though only 70% of the [coal-fired] facilities are utilized, the use of coal exceeds 26% in the energy mix in FY 2030. Therefore, if the construction of new coal-fired power plants is tolerated, the State [Japan] cannot even realise the predicted energy mix. Consequently, it is impossible to achieve the FY 2030 Target. (pp24-26)

Moreover, in the long-term, the 80% reduction target needs to be achieved by 2050, and there is no room to allow for additional CO2 emission by the New Coal-Fired Units. Therefore, the CO2 emission by the New Coal-Fired Units must be regulated for the achievement of the FY 2030 and 2050 Targets to comply with the Paris Agreement. The existing coal-fired power plants should also be regulated and gradually abolished. (p26)

Nevertheless, the construction of new coal-fired power plants has continued without any regulations. The number of coal-fired power plants before the Fukushima Daiichi nuclear disaster was 100 (= 4.2million kW). The plans to build additional coal-fired power plants were made under the circumstances explained in Section 3 (2011 Tohoku Earthquake and Tsunami). (pp26-27)

According to the investigation by NPO Kiko Network, the installed capacity of the existing coal-fired power plants in FY 2017 was 4.4 million kW and is expected to increase to 51,370,000 kW in FY 2026 if additional 35 coal-fired power plants are built. The installed capacity is then predicted to decrease, but it is predicted to remain 20 million kW in FY 2050. Based on the prediction by Kiko Network, the CO2 emission by the 35 new coal-fired power plants alone amounts to 110 million tons in FY 2050 while the FY 2050 Target aims for an 80% reduction. (pp27-28)

Consequently, the construction of new coal-fired power plants makes it impossible to even achieve the insufficient FY 2030 and 2050 Targets. (p28)

4.5 Current situations: regulations over the construction and operation of coal-fired power plants

A basic energy policy was adopted in June 2002 with the objective to contribute towards local and global environmental conservation, and it stressed the need for energy policies to be compatible with the measures dealing with climate change. (p28)

The Kyoto Protocol entered into force in 2005, and the reduction in greenhouse gas emissions became an international obligation. Subsequently, it became an urgent matter to reduce the CO₂ emission from the power generation sector, especially the emission by the coal-fired power generation, which amounts to more than one-third of the total CO₂ emission. (p28)

However, the CO₂ emission has been left to the voluntary self-regulation of the electric power industry. According to the Outline of Voluntary Framework (自主的枠組みの概要), electric power companies only aim for the emission intensity of 0.37kg/kWh. Further, the Electricity Business Act does not regulate the CO₂ emission intensity at thermal power plants. (p28)

Moreover, the standards of judgment for business operators regarding the rationalisation of the use of energy in factories under the Act on the Rational Use of Energy (known as the Energy Saving Act) were revised and came into force on 30th March 2018. The power generation efficiency standard for new coal-fired power plants was changed from 41% to 42% while the efficiency for natural gas-fired power plants is tolerated to be 50.5% or lower (initially 48%). (pp28-29)

Furthermore, in order to achieve the 0.37kg/kWh, it was agreed between the Minister of Economy, Trade and Industry and the Minister of Environment,

- 1) to continue to promote the improvement of the effectiveness of the voluntary framework of the electric power industry, and
- 2) to adopt policies implementing and strengthening the standards laid down in the Energy Saving Act and the Energy Supply Structure Advancement Act (Non-fossil to fossil energy ratio 44%).

Those show that there are no effective measures to discourage the construction of new coal-fired power plants in Japan. (p29)

4.6 Measures that the state should take to prevent the damage from climate change

The Paris Agreement is a treaty pertaining the climate change. The state [Japan] ratified the Paris Agreement and is obliged to establish policy measures to achieve its FY 2030 and 2050 Targets for the CO₂ emission reduction. (p29) In addition, Article 5 of Basic Act on the Environment states that global environmental conservation shall be actively promoted through international cooperation.³ Consequently, the State must take necessary measures to realise the FY 2030 and 2050 Targets and exercise its regulative authority in a timely and appropriate manner to restrict the business that prevents the state from achieving the targets.

Specifically, effective measures must be taken through the EIA concerning coal-fired power plants since the EIA applies to electric facilities for business use according to the Electricity Business Act. As coal-fired power plants emit CO₂ when being operated, necessary regulations must be implemented in the same way as the emission of dust and soot by specific facilities is regulated by the Air Pollution Control Act. Hence, at least the State is obligated to exercise its authority to regulate the CO₂ emission by coal-fired power plants based on the existing law in order to perform its obligations under the Paris Agreement. (pp29-30)

Moreover, as it is scientifically established that CO₂ emission threatens people's life, body, and property, the State must exercise its authority immediately to regulate the CO₂ emission by coal-fired power plants. The discretion not to exercise its authority cannot be accepted. (p30)

³環境基本法 (Basic Act on the Environment/The Basic Environment Law) 1993, art5, '[g]lobal environmental conservation must be actively promoted in cooperation with other countries, utilizing Japan's capacities and resources, and in accordance with Japan's status in the international community, given the fact that global environmental conservation is the common concern of humankind, which is a requirement for ensuring the wholesome and cultured living of the people into the future, and that the Japan's economy and society is run in deeply interdependent world'
<<http://www.japaneselawtranslation.go.jp/law/detail/?ft=1&re=2&dn=1&x=0&y=0&co=01&ia=03&ja=04&ky=basic+environmental+act&page=4>> accessed 20 December 2021.

5 Illegality of the EIS: The Notice Should be Annulled

5.1 EIA and the authority of the Minister of Economy, Trade and Industry

5.1.1 Purposes of the EIA

The Environmental Impact Assessment Act obliges business operators of certain industries to investigate, predict, and assess the environmental impact of their business operation in advance. The EIA aims to promote appropriate consideration from the perspective of environmental conservation.⁴ (p30)

Business operators must formulate better business plans by investigating, predicting, and evaluating the environmental impact and by making the outcomes public and gathering opinions from the general public and local public bodies. (p30)

Therefore, business operators shall

- 1) , in accordance with the legal procedures,
- 2) predict the environmental impact by investigating and collecting appropriate information on which the prediction is based,
- 3) evaluate the environmental impact rationally by taking into account the opinions of governors, mayors, and citizens, and
- 4) determine the measures for environmental conservation based on the assessment.

(p30-31)

Subsequently, the business operators must implement the environmental conservation measures that are determined on the basis of the appropriate investigation, prediction, and evaluation. If the EIA is not carried out properly, without following the abovementioned process, it is clear that no appropriate environmental conservation measures can be implemented. Under such a circumstance, the relevant administrative bodies must correct the

⁴環境影響評価法 (Environmental Impact Assessment Act) art 1, '[t]he purpose of this Act is, in recognition of the fact that it is extremely important, in terms of protecting the environment, that the project proponent conduct an environmental impact assessment in advance of a project that changes the shape of the terrain or that involves the construction of a new structure, or that is engaging in other similar activities, to set forth procedures and other provisions designed to define clearly the responsibilities of the government, etc., regarding environmental impact assessments and to ensure that the environmental impact assessments are conducted properly and smoothly with respect to large-scale projects that could have a serious impact on the environment, and to ensure proper consideration for environmental conservation in related to the project, by prescribing process to reflect the result of the environmental impact assessment in determining the measures for environmental conservation in implementing the project and in determining the other contents of the project, thereby contributing to the healthy and cultural life of the Japanese people, both now and in the future' <<http://www.japaneselawtranslation.go.jp/law/detail/?re=2&dn=1&x=0&y=0&co=1&ia=03&ja=04&yo=&gn=&sy=&ht=&no=&bu=&ta=&ky=environmental+impact+assessment+act&page=8>> accessed 20 December 2021.

inappropriately carried out procedures or/and assessment by exercising their authority and make sure that the business operators make appropriate consideration for the environment. (p31)

5.1.2 Application of the EIA Act to thermal power plants

Thermal power plants, including the New Coal-Fired Units concerned, are regulated by the EIA Act as they are regarded as electric facilities for business use within the meaning of Article 38 (3) of the Electricity Business Act.⁵ (p31)

Moreover, the EIA procedures must be followed before the installation [or modification] of thermal power plants of a certain scale [large-scale thermal power plants] according to Article 46 (2) and others of the Electricity Business Act. (p31)

The EIA based on the Electricity Business Act is different from the general EIA procedures (for example, opinions by governors and mayors are submitted to the Minister of Economy, Trade), yet the basic flow of the procedures are the same. (p31)

Regarding the New Coal-Fired Units, the EIA has been carried out based on the Electricity Business Act and EIA Act since they are thermal power plants of more than 150,000 kW-scale that fall under the category of Class 1 projects within the meaning of Article 2(2)(i)(e) of the EIA Act. (p31)

5.1.3 The EIA procedures applicable to the Class 1 power plants

First of all, business operators must prepare *a document on primary environmental impact consideration at the early stage (document on primary environmental impact consideration)* in order to determine the aspects where necessary consideration should be taken with regard to environmental conservation in the area where the project is implemented at the planning stage. The outcomes of the consideration are stated in the *document on primary environmental impact consideration*. The Ministry of Environment and the Competent Minister can state their opinions. Additionally, business operators must try to seek opinions from the perspective of environmental conservation in general and by the relevant administrative bodies regarding the

⁵電気事業法 (Electricity Business Act) <

<http://www.japaneselawtranslation.go.jp/law/detail/?ft=1&re=01&dn=1&x=0&y=0&co=01&ia=03&ja=04&ky=electricity+business+act&page=42>> accessed 21 December 2021.

(draft) *document on primary environmental impact consideration* {Article 3 (2) and others of the EIA Act}. (p32)

Secondly, the business operators must prepare and provide a *scoping document on environmental impact assessment (scoping document)* for the public notices and general inspections and hold briefing sessions. They submit the document to the relevant municipality/prefecture and report it to the Minister of Economy, Trade and Industry. The Minister of Economy, Trade and Industry makes recommendations on the scoping document by paying attention to the opinions of citizens and views/responses by the business operators and by taking into account the opinions of Governors, which are based on the opinions of Mayors. The business operators select the items to be considered in the EIA based on the recommendation(s) by taking into account the opinions of the Governors and paying attention to the opinions of citizens {Article 5 and others of the EIA Act and Article 46(4) and others of the Electricity Business Act}. (p32)

Thirdly, the business operators prepare and state the outcomes of the EIA and measures for environmental conservation on a *draft environmental impact statement (draft EIS)* by carrying out the EIA [based on the scoping document]. (p32)

Finally, the business operators prepare an *environmental impact statement (EIS)* by considering the recommendations and opinions described above and report it to the Minister of Economy, Trade and Industry {Article 14 and others of the EIA Act and Article 46(9) and others of the Electricity Business Act}. (pp32-33)

The Minister of Economy, Trade and Industry evaluates the EIS and may order revision of the EIS within 30 days from the day when the notification is accepted if it is necessary and appropriate to ensure proper consideration of environmental conservation {Article 46(17)(i) Electricity Business Act; Article 61(10) Electricity Business Act Enforcement Regulation}. When a revision is not necessary, the Minister of Economy, Trade and Industry must notify the business operator concerned affirming the EIS without delay {Article 46(17)(ii) Electricity Business Act}. When the Minister of Economy, Trade and Industry issues an affirmative notice, a copy of the confirmed EIS is sent to the Ministry of Environment [by the Minister of Economy, Trade and Industry] The business operator needs to submit the EIS, its summary, and a document stating the content of the order to the relevant Mayor and Governor {Article 46(18) Electricity Business Act}. The business operator makes the EIS available for public inspection {Article 27 EIA Act; Article 46(19) Electricity Business Act}. The EIA procedures end here. (p33)

When the project is implemented, the business operator must maintain and operate the facilities by making the appropriate consideration stated in the confirmed EIS {Article 38(1) EIA Act; Article 46(20) Electricity Business Act}. Hence, the confirmed EIS has significant importance in determining the content of the environmental conservation measures that the business operator is legally obliged to implement. (p33)

5.1.4 Involvement of the Minister of Economy, Trade and Industry and the possible exercise of authority

The Minister of Economy, Trade and Industry is involved in the determination of the environmental conservation measures by checking the content of the data, analysis, and assessment [of the EIA] provided by the business operator and expressing its opinions on the appropriateness thereof. Moreover, the Minister confirms the EIS that determines the content of the environmental conservation measures through the evaluation of the EIS and the notice of finalization. Substantially, the Minister *permits* the implementation of the project under the environmental conservation measures. In other words, the Minister is in the position to correct the business operators if the consideration and evaluation of the environmental impact and environmental conservation measures are inappropriate by ordering revision of the EIS. Accordingly, if the Minister omits to exercise its authority to correct the inappropriate assessment, consideration, or procedures and issues a notice to confirm the EIS with inappropriate content, this act is considered to be illegal and the notice must be annulled. (p34)

5.2 Fault relating the consideration of the greenhouse gases and environmental conservation measures

5.2.1 Measures against the greenhouse gases at the New Coal-Fired Units

The EIS concerning the New Coal-Fired Units indicates that the coal is used as fuel for power generation and the CO₂ emission amounts to 6.92 million tons. Nonetheless, Kobelco Power Kobe No.2 only raises the adoption of USC power generation facilities, the maintenance of the power generation efficiency, and the improvement and maintenance of the net thermal efficiency as countermeasures. (pp34-35)

Surprisingly, Kobelco Power Kobe No.2 states that the environmental impact by CO₂ [emitted by the New Coal-Fired Units] is little notwithstanding that they utilize coal as their fuel. Thus, it can be said that Kobelco Power Kobe No.2 made the plan for the New Coal-Fired Units based on the recognition that the fuel has little impact on the environment. (p35)

5.2.2 Lack of the examination of fuel type is illegal

Coal-fired power generation emits more than twice as much CO₂ as the emission by natural gas-fired power generation while it is essential to reduce the CO₂ emission to achieve the climate goals. Choosing coal as the fuel [for power generation] without considering its adverse effects on the environment and determining the minimum environmental conservation measures based on the use of coal are irrational since they suggest that the environmental impact was not assessed appropriately. (p36)

At the stage of preparing the document on primary environmental impact consideration, it is essential for business operators to consider alternative proposals including the type of fuel used from the perspective of the reduction in greenhouse gas emissions. (p36)

The methods of the EIA for electric power plants are laid down in the Power Plants Assessment Ordinance⁶ based on the EIA Act and also found in the Basic Matters relating to the Guidelines to be Established by the Competent Minister in Accordance with the Provisions of the Environmental Impact Assessment Act (the Basic Matters).⁷ See Articles 3(8), 4(10), 13, and 38(2)(iii) of the EIA Act. (p36)

There is also Guidelines for the EIA of Power Plants (Guidelines) [provided by the Minister of Economy, Trade and Industry] explaining the Ordinance and EIA procedures. (pp36-37)

The EIA of the New Coal-Fired Units was carried out on the basis of those indicated. (p37)

The Guidelines excludes the impact of the greenhouse gas emissions by the construction of a thermal power plant from the items to be considered at the planning stage. Moreover, the Guidelines states that greenhouse gas emissions by the operation of general business do not have a large impact on the environment as the adverse effects can be reduced by taking environmental conservation measures. As an environmental conservation measure, it gives an example of the introduction of the technology that is at the highest level with regard to thermal efficiency and others. (p37)

⁶Full name: 発電所の設置又は変更の工事の事業に係る計画段階配慮事項の選定並びに当該計画段階配慮事項に係る調査、予測及び評価の手法に関する指針、環境影響評価の項目並びに当該項目に係る調査、予測及び評価を合理的に行うための手法を選定するための指針並びに環境の保全のための措置に関する指針等を定める省令。

⁷環境影響評価法の規定による主務大臣が定めるべき指針等に関する基本的事項(The Basic Matters relating to the Guidelines to be Established by the Competent Minister in Accordance with the Provisions of the Environmental Impact Assessment Act) <http://www.japaneselawtranslation.go.jp/common/data/notice/163004_m.html> accessed 20 December 2021.

However, even if the highest level of thermal efficiency technology is installed, coal-fired power plants still emit more than twice as much CO₂ as natural gas-fired power plants, and the environmental impact thereof is huge. Based on the premise that the CCS technology is not commercialised, the amount of greenhouse gas emissions is almost solely dependent on the choice of carbon fuel. (p37)

Furthermore, the revision of the EIA Act in 2011, which introduced the system of environmental consideration at the planning stage, aimed at promoting environmental consideration from the early stage of the business operation [=planning]. Hence, from the purpose of the revision, the State must require business operators to set the greenhouse gas emission as a point of consideration at the planning stage, examine multiple proposals with regard to the choice of fuel, and state the outcome of the examination. (p37)

The greenhouse gas emission is recognised in the Guidelines as an assessment item in the [EIA] procedures after the document on primary environmental impact consideration. (pp37-38)

However, the amount of CO₂ emission that can be reduced is limited once the fuel to be utilized is fixed. The choice of fuel is the most important element, and thus, it must be included in the consideration items at the planning stage. Therefore, the EIA procedures laid down in the Guidelines has faults/lacks, and they are illegal in the sense that they are against the objectives of the EIA Act and the Basic Matters, which demand the investigation, prediction, and evaluation of the environmental impact. (p38)

In any case, it is illegal that Kobelco Power Kobe No. 2 has not considered the use of fuels other than coal at the stage of preparing the document on primary environmental impact consideration. (p38)

In addition, it is still possible to reconsider the choice of fuel even after the planning stage as the business operator gathers more information through its investigation during the EIA procedures. Business operators must, for the purpose of the EIA, reconsider in order to give appropriate consideration. (p38)

Kobelco Power was, of course, aware of the global situations and national policies surrounding the CO₂ emission reduction. At the stage of the draft EIS, 1,199 opinions were submitted by citizens, including many dissenting opinions. (p38)

The Minister of Environment expressed his opinion (on 23rd March 2018) pointing out the following.

- 1) The CO₂ emission by coal-fired power plants in FY 2016 already exceeded the level which would need to be achieved in FY 2030, and a large number of existing construction and expansion plans of new coal-fired power plants will seriously hinder the achievement of the reduction targets.
- 2) If all the construction plans are implemented and even if aged coal-fired power plants stop working after 25 years, the capacity factor of the remaining power plants in FY 2030 would be around 54% and the capacity factor would be limited (the average capacity factor in FY 2016 was 80%).
- 3) The project on hand newly installs an electric power facility with a relatively high CO₂ emission factor under the struggling global and national circumstances. There is a high business risk from the viewpoint of environmental conservation since the additional emission of CO₂ amounts to 7 million tons per year.
- 4) It is important for the business operator to recognise that the business risk associated with coal-fired power generation is extremely high from the perspective of environmental conservation. If it is not possible to take/think of countermeasures to the CO₂ emission for the FY 2030 and future, reconsideration of the business operation is crucial. (pp38-39)

It was obvious through the EIA that there was no prospect of reducing the CO₂ emission since the coal is selected as fuel without any foreseeable countermeasures like the installation of CCS. Thus, Kobelco Power Kobe No.2 omitted to reconsider its project plan while it had to examine the use of alternative fuels at the stage of preparing the scoping document and later. (p39)

The Guidelines can be interpreted as saying that ‘the introduction of the most thermally efficient technology’ is the only evaluation method for greenhouse gas emissions at the stages of the document on primary environmental impact consideration and scoping document. (pp39-40)

The Basic Matters states, under the section of the ‘examination of the compatibility with national or local environmental conservation measures’, that the compatibility between the outcomes of the investigation and prediction and the environmental targets must be considered while conducting the EIA when the standards or targets relating the environmental

factors are indicated by the environmental conservation measures by the State or local public bodies. (pp39-40)

The Plan for Global Warming Countermeasures (decided by the Cabinet in May 2016) set the greenhouse gas reduction target of 26% by the FY 2030 compared to the FY 2013 level. The long-term prediction of energy supply (July 2015) similarly states that the coal-fired power should be 26% in the energy mix in FY 2030 by considering the [impact of] CO2 emission. (p40)

In order to secure the compatibility with the national policy targets, installation of the thermally most efficient technology is insufficient as environmental consideration if certain fuels (like coal) are utilized. (p40)

Regarding this point, Kobelco Power Kobe No.2 stated that it was not able to consider the installation of the CCS at that moment due to the [still] developing legal systems and costs for technological development. It further stated that it adopted USC as the best technology and Kansai Electric was putting some effort to contribute to the reduction targets. In otherwise, Kobelco Power Kobe No.2 says that its act of emitting a huge amount of CO2 can be tolerated by the efforts put by Kansai Electric without explaining how the compatibility with the national CO2 emission targets and plans. This argument lacks rationality. (pp40-41)

In short, the omission of Kobelco Power Kobe No.2, not considering the option of natural gas whose CO2 emission level is less than half of the emission by coal, during the EIA process is clearly against the purposes of the EIA Act. No environmental conservation measures that are necessary for the achievement of the reduction targets provided by the Paris Agreement and national decisions are adopted. There has been a serious fault during the EIA procedures since there was no comparison with alternatives and no necessary environmental conservation measures were adopted. (p41)

5.3 Lack of consideration concerning air pollution

5.3.1 Choice of the fuel was wrong

Lack of environmental consideration concerning the CO2 emission is explained above, and this point is the same for the evaluation of air pollutants, including Sox, NOx, dust, and soot. The New Coal-Fired Units emit a huge amount of air pollutants, much more than the amount of emission by the use of natural gas, by using coal. The amounts of air pollutants emitted by coal and liquefied natural gas are compared and shown in the bar chart on Page 42. (pp41-42)

According to the Opinion by the Minister of Environment, the planned construction site is an environmentally developing area where the Automobile NO_x/PM Countermeasure Act is applicable, the total amount of air pollutant emission is regulated by the Air Pollution Control Act,⁸ and the PM emission by automobiles is regulated based on the Hyogo Prefecture Ordinance. Further, schools, hospitals, and other institutions which particularly require the consideration for environmental conservation are located in this area. (p42)

It is unacceptable that Kobe Steel and Kobelco Power Kobe No.2 chose to use coal without considering alternatives while the area has worsening environmental situations as it is against the purposes of the EIA Act. (p43)

5.3.2 PM2.5 and photochemical oxidants were not assessed

Moreover, the environmental standards for PM 2.5 and photochemical oxidants are not achieved around the planned construction site. PM 2.5 is not included in the assessment items in the Guidelines. (p43)

However, it became clear that PM 2.5 causes respiratory diseases, cardiovascular diseases, and lung cancer. Accordingly, in September 2009, environmental standards were set to keep the PM2.5 level below the annual average of 15 µg/m³ and the daily average of 35 µg/m³. Even though no fixed methods of predicting the production, emission, and spread of PM 2.5 are established, there is still a need for assessing its environmental impact by using methods proposed by academia or utilized overseas. (p43)

The environmental standard for photochemical oxidants is set at 0.06 ppm or below per hour. Since photochemical oxidants are produced by NO_x and volatile organic compounds through photochemical reaction and the New Coal-Fired Units emit a large amount of NO_x, the assessment of environmental impact is necessary. (p44)

Kobe Steel did not assess the environmental impact related to PM2.5 for the reason that there is no precise prediction method, yet not performing the prediction at all is against the purposes of the EIA system and violates the obligation to perform appropriate EIA as the business operator that plans to construct large-scale facilities that emit air pollutants. Similarly,

⁸大気汚染防止法(Air Pollution Control Act)

<http://www.japaneselawtranslation.go.jp/law/detail/?ft=1&re=01&dn=1&x=0&y=0&co=01&ia=03&ja=04&ky=%E5%A4%A7%E6%B0%97%E6%B1%9A%E6%9F%93%E9%98%B2%E6%AD%A2%E6%B3%95&page=4> accessed 20 December 2021.

not performing any investigation, prediction, and evaluation of photochemical oxidants is problematic. (pp44-45)

5.3.3 Procedural issues

Kobe Steel had been explaining to the residents around the planned construction site that the air quality would improve for the blast furnace was abolished and that they would reduce the environmental impact from the current level. While the residents requested Kobe Steel to disclose the total amount of air pollutants quantitatively, it did not respond at all. The residents were intentionally made to believe that the emission of air pollutants would decrease even if the New Coal-Fired Units were built. Citizens' opinions regarding the draft EIS were submitted based on this wrong belief. It later became clear that the amounts of emissions of SO_x, NO_x, dust, and soot would largely increase (the emission increases by 36-72% for SO_x, 10-56% for NO_x, and 43-351% for dust and soot). (p45)

Kobe Steel did not reply to citizens' enquiries regarding the amount of emission of air pollutants and showed poor attitude and accountability. (p46)

The public notice inspection procedure of the draft EIS is based on the premise that the draft EIS illustrates the important information related to environmental conservation. However, the draft EIS did not provide the crucial information, and the business operator made it impossible for the citizens to correctly assess the draft EIS by not disclosing the amount of air pollutant emissions. (p46)

Moreover, there was information manipulation by omitting to state that the planned construction site had a constantly high level of pollution and only referring to the environmental standard of 0.06 ppm [maximum day average per hour]. (p47)

Furthermore, the emission [of air pollutants] by the power plants increases the pollution concentration in the air, the NO₂ concentration increases by 1.6 times and SO₂ gets doubled, when a ground inversion layer develops. Thus, the business operator's assertion that the environmental impact would be lowered is incorrect. (pp47-48)

Omitting to collect the important information that affects the EIA suggests that there was no appropriate investigation, prediction, evaluation, or consideration of environmental conservation measures. The decision to affirm the compatibility of the EIA and not ordering any changes/revisions [of the construction plan] are illegal. (See, Tokyo District Court, Judgment, June 9, 2011; 59 Shoumugeppou (6) 1482. (p48)

The intentional concealment of the information related to the amount of air pollutant emissions and concluding the draft EIS procedure without allowing an opportunity [for the public] to submit opinions are against the purposes [of the EIA Act]. The EIS that was subsequently prepared is illegal for not following the EIA procedures. This fault cannot be corrected unless the procedures, including the general inspection, briefing sessions, and public hearings are carried out (again). (p48)

5.3.4 Issues associated with the investigation, prediction, and evaluation points

The investigation, prediction, and evaluation points of the draft EIS were all *general air pollution monitoring stations* (monitoring points of air pollution which are selected as the representing points and are not affected by a particular source of emission). However, the objective of the EIA system is to examine the level of the environmental impact of the new source of pollution, and *automobile exhaust gas measurement stations* (monitoring points which experience more pollution than the former points by traffic-originated air pollutant emissions, such as intersections, roads, and surrounding areas) must have been included in the points of assessment. There are many national highways around the planned construction site, and the New Coal-Fired Units will emit additional air pollutants in such an area. Thus, the reconsideration [of the project plan] is necessary. This fault cannot be overlooked. (pp49-50)

5.4 Illegality of the Notice Confirming the EIS

The Electricity Business Act incorporates the EIA system based on Article 46(2). The Minister of Economy, Trade and Industry examines the scoping document and makes recommendations to ensure the appropriate consideration for environmental conservation {Article 46(8)}. Similarly, Article 46(14) provides for the examination of the draft EIS and recommendations for environmental consideration. The need for ensuring the appropriate consideration for environmental conservation at the stage of the EIS, as well as the possibility of the revision order, is found in Article 46 (17). The appropriate consideration for environmental conservation here is determined by the circumstances at the time when the EIA was carried out, environmental conservation measures which will be needed, scientific views, global and nationwide discussions, and targets. (p50)

Currently, meeting at least the FY 2030 and 2050 targets is crucial under the Paris Agreement. Further, the Basic Act on Energy Policy (エネルギー政策基本法) states in Article 1 that its aim is to conserve the local and global environment. Article 3 states that energy

supply that allows for the prevention of global warming and the preservation of the local environment must be realised by improving the efficiency of the energy consumption and promoting the use of renewable energy resources. (p50)

In the EIA concerning the New Coal-Fired Units, however, no alternatives regarding the type of fuels were examined. The environmental impact by the CO₂ and air pollutant emissions was not appropriately assessed considering the Paris Agreement and national reduction targets. Therefore, the EIS in question is illegal. (p50)

When there are recommendations by the Minister of Economy, Trade and Industry {Article 21 (1) the EIA Act}, the business operator must take into account the opinions of the Governor and consider the opinions of the citizens in preparing an EIS {Article 46 (15) the Electricity Business Act}. (pp51-52)

With regard to the opinion of the Governor, he demanded [the business operator] not to worsen the NO₂ concentration and to indicate the total annual amount of mercury and other heavy metals. (p52)

Nevertheless, the New Coal-Fired Units will largely increase the emission of NO₂, and Kobelco Power Kobe No.2. did not disclose the total annual amount of mercury and other heavy metal. Additionally, Kobelco Power Kobe No.2. did not respond to the Governor's demand to not increase the total amount of CO₂ emission. (p52)

Similarly, the business operator did not consider the opinions of the citizens who were concerned by the emission of air pollutants and mercury. (p52)

Kobelco Power Kobe No.2 was obliged to take into account the following points expressed in the recommendation on the draft EIS by the Minister of Economy, Trade and Industry.

1. consider the business plan by sufficiently understanding the national and global situations regarding the coal-fired power plants and conservation
2. carry out the business with good planning to reduce the CO₂ emission towards 2030
3. take appropriate environmental conservation measures, including the measures to reduce the CO₂ emission
4. take into account the opinions of the relevant local governments and provide sufficient explanation to the residents
5. consider the business plan with the aim to introduce the CCS by 2030
6. take appropriate measures concerning the emission of mercury based on the Revised Air Pollution Control Law Enforcement Regulations (大気汚染防止法施行規則の一

部を改正する省令) and Notice on the Mercury Measurement Method in Exhaust Gas (排出ガス中の水銀測定法)

7. take additional measures concerning PM 2.5 where necessary based on the latest knowledge (pp52-53)

However, the EIS only added a sentence stating that the business operator would continuously consider CO2 emission reduction measures, including the development of technology aiming for the installation of CCS facilities, and there were no concrete plans. The EIS did not include any examination/consideration related to mercury and PM2.5 nor additional environmental conservation measures. In addition, it only took a month for the business operator to submit the EIS after the Minister submitted his recommendations. This period (from 4th April to 11th May) is too short, and thus, it can be said that no substantive examination was carried out. It is therefore against Article 46 (15) of the Electricity Business Act. (p54)

The Notice of Finalization by the Minister of Economy, Trade and Industry confirms the environmental impact and content of environmental conservation measures and has significant importance. Hence, when the content or procedures of the EIA were irrational, the Minister of Economy, Trade and Industry must correct the business operator by exercising his authority. Ultimately, the Minister must assess the EIS and order a revision when there is no appropriate consideration for environmental conservation. As the Minister of Economy, Trade and Industry overlooked a number of issues, the Notice of Finalization must be annulled. (pp54-55)

5.5 Disposability of the Notice of Finalization

Articles 48 (1) and 48 (2) of the Electricity Business Act state that construction of an electric facility for business use can only start after 30 days from the date that the notification of the construction is accepted. Article 66 of the Electricity Business Act Enforcement Regulation sets out the necessary documents to be attached to the notification. It requires [the business operator] to state the environmental conservation measures and to attach the documents explaining the measures, yet Kobelco Power Kobe No.2 only attached the EIS and the Notice of Finalization. (pp54-55)

Moreover, Articles 48 (4), 48 (4), and 47(3)(3) of the Electricity Business Act state that the Minister of Economy, Trade and Industry can order changes or discontinuation of the construction project (revision order) within the 30-day period. (p55)

As the project without a confirmed EIS would receive an order of revision, the Notice of Finalization is a necessary element for a business operator to start the construction. The Notice of Finalization is an act constituting disposition or exercise of public authority by an administrative authority within the meaning of Article 3 (2) of the Administrative Case Litigation Act.⁹ Consequently, the Notice of Finalization addressed to Kobelco Power Kobe NO.2 falls under the scope of Article 3 (2) regulating the action for the revocation of the original administrative disposition. (p55)

5.6 Standing

A person who has legal interest(s) under Article 9 (1) of the Administrative Case Litigation Act refers to a person whose right or legally protected interest is violated or is likely to be violated by disposition. If the purpose of administrative regulation that prescribed the disposition is interpreted in the way to define the interests of undefined persons as not merely the public interests but also as legally protected interests of individuals, those interests can be protected by law. Subsequently, the person whose interest is (likely to be) violated by the disposition has standing for the action for the revocation. (Supreme Court, Judgment, 7th December, 1942; 59 Minshu (10) 2645 (p57)

The Notice of Finalization in question is disposition based on the Electricity Business Act, and the Electricity Business Act aims to protect not only the interests of the consumers but also the public safety and environmental conservation (Article 1). (p57)

Moreover, a person that installs electric facilities for business use must maintain the electric facilities for business use to ensure that they conform to the technical standards established by order of the competent ministry {Article 39 (1) the Electricity Business Act}. (p57)

The Ordinance on Technical Standards demands compliance with the Air Pollution Control Act and Act on Special Measures against Dioxins (Article 4 of the Ordinance on Technical Standards) in order to make sure that electric facilities for business use dot not pose

⁹行政事件訴訟法 (Administrative Case Litigation Act) <

<http://www.japaneselawtranslation.go.jp/law/detail/?re=01&dn=1&x=0&y=0&co=1&ia=03&ja=04&yo=%E8%A1%8C%E6%94%BF&gn=&sy=&ht=&no=&bu=&ta=&ky=%E8%A1%8C%E6%94%BF%E6%B3%95&page=3>> accessed 21 December 2021.

a risk of inflicting bodily or damage to objects {Article 39 (2) (1) of the Electricity Business Act}. Having this in mind, the regulation pertaining to the installation of an electric facility under the Electricity Business Act is interpreted as aiming to protect the interests of residents' life, health, and living environment as individual interests. (p57)

Furthermore, the EIA Act aims at securing the appropriate consideration for environmental conservation and contributing to the healthy and cultural life of people in the future (Article 1 EIA Act). The Electricity Business Act and the EIA Act try to realise the conservation of the environment and due consideration through the EIA. From the purposes of the Electricity Business Act and the EIA Act, individual interests of the residents whose health and living environment are likely to be damaged should be protected. Thus, the residents who are affected by the environmental impact are said to have standing in the revocation of the Notice of Finalization made pursuant to Article 46 (17) (ii) of the Electricity Business Act. (pp57-58)

The Plaintiffs who live in Kobe and Ashiya have standing as they live in the areas that are environmentally impacted by the project concerned within the meaning of Article 15 of the EIA Act. (p59)

Nevertheless, the environmental impact is not limited to those areas as air pollution and global warming can affect a wide range of areas. Especially, global warming can cause worldwide damage. The Electricity Business Act and the EIA Act also concern the impact on global warming and are interpreted as protecting the interests of the Plaintiffs not to be damaged by global warming. Further, as explained earlier, the scientific view demonstrated in the IPCC reports and others is that global warming certainly threatens all people's life, health, and living environment, not only those of the Plaintiffs who live close to the planned project area. Consequently, the Electricity Business Act and the EIA Act should be interpreted as providing standing for those who do not live in the vicinity [directly affected area]. (p59)

In short, the Plaintiffs have standing for the revocation of the Notice of Finalization. (p59)

5.7 Interest in the revocation of the Notice of Finalization

Consideration for environmental conservation in maintaining and operating an electric facility for business use is not merely a non-binding target but a legal obligation laid down in the Electricity Business Act. When there are substantive and/or procedural issues in the EIS, it cannot serve as a base for appropriate consideration of environmental conservation. If the notice of finalization is revoked, the content of the environmental conservation obligations

under Article 46 (2) of the Electricity Business Act will change based on the new EIS. It subsequently means that the methods of the maintenance and operation of the electric facility change as well as the amount of emissions of air pollutants and CO₂. Consequently, the environmental impact changes, and the protection of the rights of the individuals (prevention of the violation of rights) can be realised. Since the notice of finalization directly affects the rights of people whose environment is impacted by the business operator through the changes in the content of the obligations, those people have the interest in seeking the revocation of the notice. (pp59-61)

The EIS regarding the New Coal-Fired Units is both substantively and procedurally illegal. If the Notice of Finalization on hand is revoked, the content of the obligations of Kobelco Power Kobe NO.2 relating to environmental conservation would change. The methods of the maintenance and operation of the New Coal-Fired Units change accordingly, and the protection of the legal interests of the Plaintiffs (life, health, and living environment) can be realised through the reduction in the amount of air pollutant and CO₂ emissions. Therefore, the Plaintiffs have the interest in the revocation of the Notice of Finalization. In conclusion, the Plaintiffs demand the revocation of Notice of Finalization by the Minister of Economy, Trade and Industry addressed to Kobelco Power Kobe NO.2. (p61)

6 Confirming the Illegality of Not Establishing the Regulations relating the CO2 emission in 1997 Ministry of International Trade and Industry Ordinance No. 51; Ministerial Ordinance That Sets Technical Standards for Thermal Power Generation Equipment

There are no standards regulating the CO2 emission by thermal power plants. The omission to set out the regulation by the Minister of Economy, Trade and Industry is illegal as it is against the obligations of the state under the Paris Agreement. The Plaintiffs request the Minister of Economy, Trade and Industry to recognise the illegality and establish regulative standards based on the Electricity Business Act. (p62)

According to Articles 39 (1), 48 (1), 48 (3) (i), and 47 (3) (i) of the Electricity Business Act, and the Ministerial Ordinance that sets technical standards for thermal power generation equipment, a business operator must install, maintain, and manage the electric facilities for business use in accordance with the technical standards before and during the construction. Regarding air pollutant emissions, the Ordinance on the thermal power technical standards includes a provision on the prevention of pollution in Article 4. The provision also requires compliance with the Air Pollution Control Act and other regulative standards relating to the emission of dust and soot {Article 46 (1)-(3)}, compliance with the Act on Special Measures against Dioxins {Article 46 (4)(5)}, and compliance with the Mine Safety Act {Article 46 (6)(7)}. (pp62-63)

There are general regulative standards aiming for pollution prevention, yet there are no other technical standards restricting the emission of air pollutants and there is no regulation concerning CO2 emission. (p63)

The Electricity Business Act aims to not only secure public safety but also environmental conservation. The ‘environmental conservation’ in Articles 1 and 3 of the Basic Act on Energy Policy includes not only the conservation of the local environment but also the conservation of the global environment, meaning that measures against global warming must be included [in the environmental conservation measures]. (p63)

The contribution to the local and global environmental conservation was initially recognised as an objective in the Basic Act on Energy Policy (2002), by ratification of the Kyoto Protocol, and the Marrakesh Accords (2001). Then the fossil fuel phase-out became a [necessary] measure as a result of the ratification of the Paris Agreement. (p63)

Moreover, by keeping the Basic Act on Energy Policy and Paris Agreement in mind, the ‘bodily damage’ under Article 39 (2) of the Electricity Business Act must be interpreted as

including the damage to health by global warming. The CO2 emission certainly worsens global warming and causes climate change. Climate change leads to abnormal weather and natural disasters, which damage people's life, body, and health. Consequently, technical standards must regulate the CO2 emission as it causes bodily damage. However, the existing legal framework lacks such regulative standards. (pp63-64)

The CO2 emission by thermal plants is not regulated by the existing law, including the Air Pollution Control Act. As the CO2 is emitted by the operation by thermal plants, which are electric facilities for business use, its emission should be regulated by the technical standards pertaining to the electric power generation facilities. (pp64-65)

Accordingly, the Minister of Economy, Trade and Industry, who is an administrative authority in charge of the disposition of the Defendant, is obliged to regulate the CO2 emission and prevent the damage thereof in accordance with the Paris Agreement by appropriately exercising its regulative authority based on Article 9 (1) of the Electricity Business Act. If such authority is not exercised, the omission should be considered illegal. In other words, the Minister of Economy, Trade and Industry is obliged to take necessary measures, including the establishment of the technical standards that are compatible with the Paris Agreement, to achieve the FY 2030 and 2050 Targets. It was pointed out by the Minister of Environment that even the FY 2030 Target could not be realised with the Outline of Voluntary Framework, Energy Saving Act, and the Energy Supply Structure Advancement Act. Due to the seriousness of the damage caused by climate change, no discretion not to establish CO2 emission regulations is accepted. Hence, the omission is a breach of Article 39 of the Electricity Business Act and is illegal. (p65)

If the emission of CO2 is regulated, Kobelco Power Kobe No.2. must make modifications to [the plan of] the New Coal-Fired Units in order to comply with the regulations. If the regulations are then implemented by Kobelco Power Kobe No.2 or enforced by authority, the amount of CO2 emission would largely decrease (if the operation is restricted) or become zero (if the operation is stopped). The damage to the Plaintiffs would subsequently decrease, and the content of damage to the Plaintiffs' life, body, and others would differ. Since the Plaintiffs suffer damage from the lack of regulations of CO2 emission, they have standing under Article 4 of the Administrative Case Litigation Act. (pp66-67)

Lastly, the Plaintiffs claim for the declaration that the omission of the regulation of the CO2 emission by the Minister of Economy, Trade and Industry is illegal. (p67)

7 Conclusion

In conclusion, the Plaintiffs demand the Minister of Economy, Trade and Industry to revoke the Notice of Finalization dated 21st May 2018 and to recognise the illegality of not setting out the regulations on CO2 emission in its ordinances. (p67)

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