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■ Energy and Environment

5th Strategic Energy Plan Setting Tone for Japan's Future Energy Mix**- Doubt on Nuclear/Coal Power Plant; Reemphasize Importance of Renewables for Japan's Future Energy -**I. Introduction

At least every three years in Japan, the national government is required by the Basic Act of Energy Policy to review its existing strategic energy plan regarding energy supply and demand (the "Strategic Energy Plan") and make amendments as necessary. On May 16, 2018, the Ministry of Economy, Trade and Industry ("METI") officially announced a draft of the 5th Strategic Energy Plan, and conducted an open public consultation process from May 19, 2018 to June 17, 2018. After having reviewed and taken all the received submissions into consideration, METI sought approval from the Cabinet and officially announced the 5th Strategic Energy Plan approved by the Cabinet (the "5th Plan") on July 3, 2018.

Although the Strategic Energy Plan itself does not have binding legal power over the general public or obligates administrative agencies to take specific actions, it imposes a general obligation on the national government to make necessary efforts to arrange the smooth implementation of the Strategic Energy Plan (for example, by appropriations in its budget each fiscal year) and is considered one of the most important documents setting forth the energy policy of the Japanese government.

For example, in response to the 4th amendment to the Strategic Energy Plan in 2014, METI set forth several policy announcements and long term target figures, including:

- targeted energy mix (power source mix) for the year 2030 (the "Energy Mix");
- ratio of renewable energy sources of 22% to 24% in 2030; and
- ratio of nuclear energy source of 20% to 22% in 2030.

These target figures have been often referenced by the FIT Price Calculation Committee and have had an influence over the FIT price determination mechanism.

Although the 5th Plan basically follows the same position taken in the 4th amendment in terms of the power generation sector, recent changes in the surrounding environment in Japan have cast some doubts over the practical feasibility of some of these policies.

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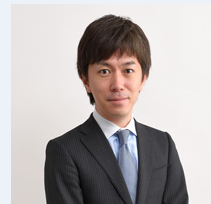
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II. Nuclear Power Plants

The 5th Plan reconfirmed the importance of nuclear power plants as a base-load power source, which can be operated stably regardless of whether it is day or night, and maintained the target figure of “20% to 22% in 2030.”

However, there are serious doubts regarding the feasibility of this target. In fact, after the announcement of the Energy Mix in 2015, this “20% to 22%” target has been severely criticized as unrealistic. After the disaster of TEPCO’s Fukushima nuclear power plants, a new authority regulating the safety of nuclear energy sector called the “Nuclear Regulation Authority” was established, and new regulatory safety standards, which are said to be the most stringent in the world, went into effect. Since the new safety standards also apply to existing nuclear power plants, all nuclear power plants in Japan had to suspend their operations until they had completed the review process to confirm conformity with the new safety standards.

Due to these stringent new standards, among all the nuclear power plants that underwent the review process, only fourteen (14) nuclear power plants passed the review and only nine (9) of them have successfully resumed their operations so far (there are twelve (12) nuclear power plants that are still in the review process). To achieve the target figure of 20% to 22% in 2030, all of these 26 nuclear power plants need to resume their operations but, considering the negative view of nuclear power plants by the general public, it would be very difficult for electric companies (including TEPCO) to resume the operation of their nuclear power plants without serious political disturbance.

In addition, although the relevant statute sets forth forty (40) years as the operation period for nuclear power plants, which can be extended once for an additional period of twenty (20) years, the 5th Plan does not contain any statement regarding the construction of new plants or replacement of the existing plants in the future. Some Japanese news outlets have criticized the omission of a future plan in the 5th Plan on this issue as “intentional evasion” to avoid politically unpopular discussions.

III. Coal Thermal Power Plants

(i) Recent Increase in Coal Thermal Power Plant Projects

The 5th Plan also adhered to the government’s current stance regarding coal thermal power plants and indicated its target ratio as being 26% in 2030.

As explained earlier, after the Fukushima disaster, all nuclear power plants in Japan had to suspend their operation until they had completed the safety review process. This took a substantial amount of time for most plants and approximately half have not yet finished. In order to set off the decrease of power supply from nuclear power plants, electric companies increased the operating rates of their coal thermal power plants and launched plans to construct new coal thermal power plants after 2013. In addition, deregulation in the power retailing sector in 2016 increased the number of companies newly entering the power retail market which also enhanced the need for stable and cheap power supply from coal thermal power plants in Japan.

As a result, as of March, 2018, there are more than thirty (30) construction plans (18,500,000 kW in total power output) for coal thermal power plants in Japan. However, according to calculations published by the Ministry of Environment (“MOE”), if all of these plants are actually constructed as currently planned, Japan will overrun its greenhouse gas reduction target in 2030, which was pledged by Japanese government in accordance with the Paris Agreement, by approximately 7%. Japan’s attitude as a “promoter” of coal thermal power plants has gradually attracted growing attention and criticism from a number of environmental groups domestically and internationally.

Backed by the global trend condemning coal thermal power plants, organizations opposed to coal thermal power plants appear to be gaining momentum and support from relevant local communities recently. In fact, two of new coal thermal power plant projects (namely, Sendai City in Miyagi

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Prefecture and Ichihara City in Chiba Prefecture) were recently forced to be cancelled due to the level of opposition in the relevant local communities.

(ii) Latest Trend regarding Fossil Fuel Divestment in Japan's Banking Sector

The latest global trend of opposing coal thermal power plants is also affecting Japanese banking institutions. Japan's three mega-bank groups (namely, MUFJ Bank, Ltd., Sumitomo Mitsui Banking Corporation and Mizuho Bank, Ltd.) have been considered dominant players in the project finance market in Japan, and have arranged project financing for a number of coal thermal power projects in the past. Although the concepts of ESG investment and fossil fuel divestment are still not necessarily well known by the general public in Japan, these three banks seem to be endorsing the recent surge of ESG and divestment in the global market and have recently announced their new financing policies for coal thermal power projects to that effect.

Firstly, on May 15, 2018, MUFJ Bank, Ltd. announced in its new "Environment Policy" that it will carefully assess whether or not it provides new financing to coal thermal power projects by referring to international guidelines, such as the OECD Public Export Credits Arrangement, and considering the relevant global and local situations surrounding coal thermal power generation.

Mizuho Bank, Ltd. also announced its new finance policy on June 13, 2018 and stated therein that with respect to financing coal thermal power projects, it will make its credit decision by assessing whether or not the contemplated technology is an appropriate choice, regarding the level of greenhouse gas emissions, compared to alternative feasible technologies with the same level of energy efficiency and economic reasonableness.

Sumitomo Mitsui Banking Corporation went one step further and announced in its "Response to Environmental and Social Risks" on June 18, 2018 that as a transitional step to a low carbon society, it will limit financing for coal thermal power projects to only those using USC (Ultra-supercritical) or higher efficiency technologies, regardless of country or region.

Although these new lending policies published by the three mega-bank groups do not rule out the continuation of financing to coal thermal power projects, it is doubtful whether these banks will be able to maintain their hedged stance in the next 5 to 10 years; particularly, if the global trend of opposing coal thermal power plants becomes more dominant.

IV. Future Energy Mix

The 5th Plan states that Japan should make renewable energy its "main power source" in the future. This is the first time that the Japanese government has regarded renewable energy as a main power source in the Strategic Energy Plan. Although the 5th Plan maintained the previous target figure for renewable energy of "22% to 24% in 2030", uncertainty surrounding the future use of nuclear and coal as a power source is likely to increase Japan's future reliance on renewable energy to levels higher than contemplated in the 5th Plan.

■ Employment Law / Dispute Resolution

The Supreme Court of Japan rules on treatment of different working conditions for employees rehired after reaching the retirement age

I. Introduction

Traditionally, Japanese companies have adopted a so called “lifetime employment system,” where companies hire new graduates from high school or university as non-fixed-term employees with the expectation that they will remain with the company until their retirement. For the most part, companies adopting a lifetime employment system include a mandatory retirement age in their work rules, by which their employees are automatically terminated when they reach such age. The Act on Stabilization of Employment of Elderly Persons (the “Act”), however, prohibits a mandatory retirement age from being set below the age of 60. Further, in response to the growing aged society in Japan and the financial necessity of raising the pensionable age from 60 to 65 to finance the public pension fund, the Act requires employers who set a mandatory retirement age under the age of 65 to take at least one of the following measures:

- raise the mandatory retirement age to 65 or over;
- introduce a continuous employment system where employers or relevant entities continue to hire their current employees after the mandatory retirement age, if such employees wish to be employed; or
- abolish the mandatory retirement age.

In accordance with the requirement above, many companies have chosen the second option and introduced a continuous employment system where the companies typically rehire their employees as fixed-term employees subsequently following the termination of their original employment once they reach the mandatory retirement age. One of the controversial issues here is whether and to what extent employers are allowed to differentiate working conditions, such as salaries, bonuses and allowances, when they rehire their employees, who were once non-fixed term employees, as fixed term employees. The Supreme Court of Japan handed down a significant decision to address this issue on June 1, 2018.

II. Decision of the Supreme Court

In this case, drivers of tanker trucks, who were rehired after reaching the mandatory retirement age, sued the company, asserting that their new salaries, bonuses and allowances as fixed term employees were unreasonably different from the same benefits received by non-fixed term employees. They argued that such difference violates Article 20 of the Labor Contracts Act, which provides that,

“if a labor condition of a fixed-term labor contract for a worker is different from the counterpart labor condition of another labor contract without a fixed term for another worker with the same employer due to the existence of a fixed term, it is not to be found unreasonable, considering the content of the duties of the workers and the extent of responsibility accompanying the said duties, the extent of changes in the content of duties and work locations, and other circumstances.”

As there was no difference in the content of the duties and the extent of responsibilities given to the employees prior to their termination and after being rehired as fixed term employees, the Supreme Court focused on the fact that the employees were rehired after reaching the mandatory retirement age and the different nature between such rehired employment and non-fixed term employment. In that context, the court proceeded to determine the reasonableness of the differences regarding each item of the employees’ salaries, bonuses and allowances, ruling in effect that the difference in the total amount of the employees’ salaries and benefits was not a decisive factor.

In conclusion, the Supreme Court held that, other than with respect to allowances for full attendance and overtime, the differences in working conditions regarding salaries, bonuses and allowances between the rehired employees and non-fixed term employees, were not unreasonable. In its decision, the court referred to the fact that the employees in suit were rehired after the mandatory retirement age and were entitled to receive their pension upon fulfillment of certain conditions, and that the company also pays an adjustment allowance to the employees as a result of collective bargaining between the company and a labor union.

III. Comment

Because the decision of the Supreme Court is still fresh, its implications should be carefully examined and will require further analysis going forward. Nonetheless, the key takeaway from the ruling is the fact the court distinguished between the nature of rehiring-employment and non-fixed term employment and confirmed that different treatment can apply to each notwithstanding Article 20 of the Labor Contracts Act.

It should also be noted that the Supreme Court adopted an item-by-item approach to evaluate the reasonableness of

the differences in salaries, bonuses and allowances, and did not draw its conclusion directly from the difference in the total amount of annual salaries between rehired employees and non-fixed term employees even though the total amount of annual salaries and other benefits was reduced after being rehired. This item-by-item approach was similarly adopted by the Supreme Court in another decision handed down on the same day, which also involved a disputed difference in working conditions between fixed term employees and non-fixed term employees.

Given that the Supreme Court adopted the item-by-item approach to evaluating the reasonableness of the differences regarding salaries, bonuses and allowances, employers who intend to rehire their employees after reaching the mandatory retirement age in accordance with the statutory requirement under the Act mentioned above should ensure they have sufficient explanation to support the reasonableness of any difference in each item of salaries, bonuses and allowances between their rehired employees and non-fixed term employees in order to best prepare for any possible disputes with their rehired employees who complain about differing treatment on those items.

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