

Introduction

We are filing this TCR to draw attention to the unlawful conduct of the Japan International Cooperation Agency (JICA), which has materially harmed U.S. investors and threatens to exacerbate climate change by financing coal-fired power generation despite its explicit assurances that it would refrain from doing so.

In its Prospectus Supplement dated April 20, 2021 (Prospectus Supplement, attached as Exhibit A), JICA represents that it “will not knowingly allocate any proceeds from the sale of the bonds to activities related to coal-fired power generation.” (Ex. A p. S-53.) This representation is false, however, as JICA is currently financing multiple large-scale coal-fired power generation projects, and the evidence available to us indicates that it is doing so—at least in part—by using proceeds from the sale of the bonds at issue.

This misrepresentation is material, given the significant climate-related financial risks concerning these bonds, which are detailed below. JICA’s conduct therefore violates Section 10(b) of the Securities Exchange Act¹; Rules 10b-5 and 12b-20 promulgated thereunder; and Rule 408 promulgated under the Securities Act of 1933², which collectively prohibit issuers from making statements that are materially false and misleading.

Jurisdiction

The SEC has jurisdiction over this matter, despite JICA being a foreign state entity, through a well-recognized exception to the Foreign Sovereign Immunities Act (FSIA). Namely, by issuing bonds to be purchased in the U.S. capital markets,³ JICA acted as a commercial entity, erasing any legal immunity it would presumptively have under the FSIA.

In *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992), the Supreme Court held that “when a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign’s actions are ‘commercial’ within the meaning of the FSIA.” The Court concluded that by issuing bonds into the U.S. capital markets, the foreign government’s conduct was “the type of action[] by which a private party engages in ‘trade and traffic or commerce’” such that the FSIA’s protections did not apply. *Id.*

¹ 17 CFR § 230.408.

² 17 CFR § 240.10b-5.

³ As of September 30, 2021, we are aware of significant bond purchases by U.S. entities, including but not limited to 25 million by TIAA; 9.6 million by the Vanguard Group; 9.2 million by Fidelity Investments; and 1.3 million by Lazard Ltd.

Here, JICA acted as a private player within the market, engaging in commercial conduct by issuing bonds in an effort to raise \$580 million to fund a variety of projects, including the coal-fired power-generation projects detailed below. As such, it cannot invoke the FSIA to shield itself from the consequences of its misconduct, under *Weltover* and its progeny.

1. JICA Has Misrepresented the Use of Proceeds of These Bonds

The April 20, 2021 Prospectus Supplement states that JICA “will not knowingly allocate any proceeds from the sale of the bonds to activities related to coal-fired power generation.” (Ex. A p. S-53.) And yet JICA continues to finance coal-fired power generation, contrary to its unambiguous representation.

Specifically, JICA is currently funding the construction of a 1,200 MW coal-power station in coastal Bangladesh, known as “Matarbari Phase 1,” having agreed in June 2019⁴ to provide 143 trillion yen (1.3 billion USD) for the project. (Exhibit B.) While some of the funds have already been disbursed, it was reported November 22, 2021 that the parties had signed a USD \$2.665-billion follow-on loan agreement for the sixth installment of the loan for Matarbari Phase 1 in October 2021.⁵ (Exhibit C.) The power station JICA is funding, including with the proceeds of this bond issuance, has been met by forceful pushback from local communities who allege harm to their health and loss of livelihoods.⁶ (Exhibit D.)

JICA has also approved an engineering service loan for a proposed 1,000 MW coal project in Indonesia, known as “Indramayu.” Under this service loan, JICA has been providing disbursements from 2016 to present, and can provide further disbursements at any time.⁷ (Exhibit E.) As with Matarbari Phase 1 in Bangladesh, local communities to be impacted by Indramayu have complained that their farmland and fishing grounds will be destroyed, and they have even been criminalized for participating in protests against the station.⁸ (Exhibit F.)

Making matters worse, JICA has now advised community organizations that it is considering financing “Matarbari Phase 2,” an additional proposed 1,200 MW coal-fired power project in

⁴ https://www.jica.go.jp/english/news/press/2019/20190701_31_en.html.

⁵ <https://unb.com.bd/category/bangladesh/bangladesh-signs-2665bn-loan-deal-with-japan-for-implementing-development-projects/82789>.

⁶ <https://www.marketforces.org.au/stop-matarbari-coal-power-projects/>.

⁷ <https://www.foejapan.org/aid/jbic02/indramayu/180322.html>. The attached Exhibit E has the original Japanese as well as a Google Translation into English.

⁸ <https://www.climatechangenews.com/2020/11/11/java-japanese-financed-coal-plant-threatens-health-livelihoods/>.

Bangladesh⁹ (Exhibit G) based on a request from the Bangladeshi government.¹⁰ (Exhibit C.) While it has reportedly not yet received an official request from the Indonesian government to finance the main construction of Indramayu, neither has JICA committed to abstaining from the project.

In both the Prospectus Supplement and in the Japanese government’s public comments following the June 2021 G7 Summit, the public has been led to believe that Japan (namely JICA) would stop funding unabated new coal-power infrastructure.¹¹ (Exhibit H.) So JICA’s actual and anticipated financing of Matarbari Phases 1 and 2 and Indramayu would come as a rude surprise to investors following the news and reading the bonds’ offering documents.

Article 32 of the JICA Act prescribes that proceeds from bond issuances are to be paid to JICA’s Finance and Investment account.¹² (Exhibit I.) And a close reading of JICA’s annual financial statements show payments for construction loans are made from the very same account.¹³ (Exhibit J.) To the best of our understanding, there is no mechanism by which JICA can segregate the funds in this single account. And there is no reason to believe that bondholders would be aware of this critical fact—i.e., that the bond sale proceeds are placed into the exact account from which coal investments are made. It is only reasonable to conclude that climate-sensitive investors would never have chosen to purchase these bonds had they known the truth.

2. This Misrepresentation Is Material to Purchasers of the Bonds

Climate-related risks are often material financial risks that an issuer should disclose, as the SEC recognized in its climate guidance to issuers, published in 2010.¹⁴ (Exhibit K.) This 2010 guidance was recently echoed and amplified by the SEC. Just two months ago, on September 22, 2021, the staff of the SEC’s Division of Corporation Finance issued guidance that included a letter with “sample comments that the Division may issue to companies regarding their climate-related disclosure or the absence of such disclosure.” (Exhibit L.) So, it is unquestioned that the Commission views truthful and complete disclosure of issuers’ climate-related risk as non-

⁹ <https://nocoaljapan.org/japan-must-not-be-allowed-to-violate-the-g7-leaders-statement-supporting-new-coal-plants-in-indonesia-and-bangladesh-goes-against-the-agreement/>.

¹⁰ <https://www.tbsnews.net/economy/bangladesh-set-seal-280bn-jica-loan-deal-6-projects-313282>

¹¹ <https://www.reuters.com/business/sustainable-business/japan-tighten-rules-coal-power-exports-meet-g7-vow-2021-06-18/>.

¹² <https://www.jica.go.jp/joureikun/act/frame/frame110000002.htm>.

¹³ https://www.jica.go.jp/english/ir/financial/c8h0vm0000c65af0-att/FY2019_fia.pdf (statement of cash flows), <https://www.jica.go.jp/english/publications/reports/annual/2020/index.html>.

¹⁴ SEC Release Nos. 33-9106; 34-61469; FR-82 (Feb. 8, 2010).

negotiable if those companies are to comply with their obligation to provide “such further material information, if any, as may be necessary to make the required statements, in light of the circumstances under which they are made, not misleading.”¹⁵ (*Id.*)

In 2017, the Task Force on Climate-Related Financial Disclosures (TCFD)¹⁶ issued recommendations for improved disclosure of climate-related information by the financial sector. (Exhibit M.) This disclosure “would enable stakeholders to understand better the concentrations of carbon-related assets in the financial sector and the financial system’s exposures to climate-related risks,” in order to make “informed financial decisions.”¹⁷ Banks can accumulate these climate-related risks and opportunities through their operations and financial intermediary activities including project finance lending.¹⁸ (Exhibit N.) Where these climate-related risks are disclosed, investors are able to make more informed decisions about capital allocation.

Of carbon-related assets, coal-power generation has been singled out as a major concern for investors, with 156 financial institutions (as of August 2021) specifically restricting funding to coal.¹⁹ (Exhibit O.) For example, Black Rock, which holds the JICA bonds at issue, is on this list.²⁰

Former bondholders of JICA have raised concerns about JICA’s financing of coal power. In fact, according to JACSES, the explicit limitations around the use of proceeds in this current bond issuance were made in direct response²¹ (Exhibit P) to concerns raised by investors about JICA’s financing of coal-power projects. (Letter to JICA Bondholders and Underwriters dated 3-24-21, attached as Exhibit Q.)

By simple logic, a statement that JICA would not allocate these bond proceeds to coal would almost certainly have been determinative of whether certain investors chose to invest in the bond issuance. As such, a misrepresentation giving the impression that the capital would not be used for coal would, by definition, be material. And as noted above, these JICA bonds have been purchased by large institutional U.S. bond holders including Vanguard, such that they now certainly sit in the

¹⁵ Rule 408 under the Securities Act of 1933 (“Securities Act”) and Rule 12b-20 under the Securities Exchange Act of 1934 (“Exchange Act”).

¹⁶ The TCFD is an initiative of the G20 Financial Stability Board. *See* Task Force on Climate Related Financial Disclosures, *available at* <https://www.fsb-tcfd.org/about/>.

¹⁷ TCFD recommendations.

¹⁸ *Id.*

¹⁹ <https://ieefa.org/finance-leaving-thermal-coal/>.

²⁰ Information collected from Bloomberg Terminal on Japan International Cooperation Agency (JICA)–issued bonds (accessed October 20, 2021).

²¹ <http://jacses.org/en/228/>.

accounts of retail investors who have specified that they are unwilling to invest in securities that contribute to climate change by financing coal power. Therefore, U.S. investors have been materially impacted by the misrepresentation that the bonds would not be used to fund coal-fired power generation.

Conclusion

The misstatement detailed in this TCR would be a material concern to purchasers of JICA's bonds. We urge the SEC to investigate these issues as soon as possible, and to impose on JICA appropriate sanctions for its material misrepresentations. Given the seriousness of this claim and the reports of imminent spending on coal, we ask the SEC seek that JICA makes no further investments in coal, pending investigation. As described above, time is of the essence if JICA is to be prohibited from financing the very coal-powered projects it promised to forego.