

Fukushima: liability and compensation

by X. Vásquez-Maignan*

On 11 March 2011, Japan endured one of the worst natural disasters in its history when a massive earthquake struck the Pacific coast of the country and was followed by a tsunami which led to considerable loss of lives. It also led to a major accident¹ at the Fukushima Daiichi nuclear power plant. Soon afterwards, the operator of the plant, Tokyo Electric Power Company (TEPCO), assumed responsibility and liability for the nuclear accident. On 28 April 2011, TEPCO established a dedicated contact line to provide consulting services for financial compensation related to the damage caused.²

Third party nuclear liability principles

The compensation procedure set up by TEPCO complies with the Japanese legislation governing third party liability for nuclear activities. Even though Japan is not party to any of the international nuclear liability conventions, it has solid national third party liability legislation whose main principles are as follows:

- The operator of the nuclear power plant where the nuclear accident occurred is strictly liable (which means that the operator is held liable regardless of fault, negligence or intention to harm).
- The operator is exclusively liable for the damages (i.e., no other person may be held liable for the damages caused by the nuclear accident).
- The operator's liability is not limited in amount.
- The operator is obliged to financially secure its liability up to a certain amount (JPY 120 billion for nuclear power plants, or approximately EUR 1.16 billion or USD 1.57 billion as of 27 September 2011).
- Where nuclear damage exceeds the financial security amount, the government may help a nuclear operator to compensate the damage to the extent authorised by the National Diet.
- All rights of action are fully extinguished 20 years following the date of the tort and the actions must be brought within three years from the date at which the person suffering damage had knowledge both of the damage and of the person liable.
- The victims may refer their claims directly to the operator concerned, to a local court or to the Dispute Reconciliation Committee for Nuclear Damage Compensation (the Reconciliation Com-

mittee), which the Japanese Ministry for Education, Culture, Sport, Science and Technology (MEXT) may establish following an accident and whose function is, on the one hand, to draft instructions to establish the scale of the nuclear damage as well as to actually assess them and, on the other hand, to mediate disputes concerning compensation claims.

In the case of the Fukushima accident, MEXT established the Reconciliation Committee in early April 2011.

Nuclear damage

According to the Act on Compensation for Nuclear Damage (the Compensation Act), nuclear damage means “any damage caused by the effects of the fission process of nuclear fuel, or of the radiation from nuclear fuel... however, any damage suffered by the nuclear operator who is liable for such damage... is excluded.”

Damages to the operator concerned are explicitly excluded, with the operator having to assume the loss or damage to his own property (such as the nuclear installation itself). The purpose is to avoid the financial security being used to compensate the operator to the detriment of the victims.

As the law does not clearly define the nature of the damages to be compensated by the operator, the Reconciliation Committee has adopted guidelines that are not legally binding to determine the type of damages which give right to compensation. The “Preliminary guidelines for determination of the scope of nuclear damage due to TEPCO's Fukushima Daiichi and Daini nuclear power stations” adopted on 28 April 2011 defined the damages resulting from instructions issued by the central and local governments which may be compensated (e.g. evacuation instructions; restrictions of marine areas; restrictions of shipments of agricultural products and marine products).

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Summary of liability and compensation

National third party liability legislation	Nuclear power plant operator subject to strict, unlimited liability and required to financially secure JPY 120 billion (EUR 1.16 billion) per site. Can be completed by government funds if approved by the Diet.
Indemnity agreement	Amount paid by the government to TEPCO: JPY 120 billion (EUR 1.16 billion).
Nuclear Damage Compensation Facilitation Corporation Established September 2011	Amount received by TEPCO from the Nuclear Damage Compensation Facilitation Corporation: JPY 558.7 billion (EUR 5.39 billion).
TEPCO	Estimated provisional compensation paid thus far: <ul style="list-style-type: none"> - JPY 52 billion (EUR 0.5 billion) to households; - JPY 43 billion (EUR 0.4 billion) to individuals for evacuation fees; - JPY 63 billion (EUR 0.6 billion) to farmers, fishermen and small- and medium-sized companies.

The “Second Guidelines” adopted on 31 May 2011 provide the method of calculating the damages listed in the first guidelines and define additional types of damages, such as damage suffered by workers, bankruptcies, costs of decontamination measures and damage caused by unfounded rumors. On 5 August 2011, the Reconciliation Committee adopted the “Interim guidelines governing nuclear disaster compensation due to the accident at Fukushima Daiichi and Daini Power Plants” pursuant to which TEPCO has drawn up the procedure to pay the “permanent compensation” amounts (as opposed to the “provisional compensation” which were paid up until recently as a measure of urgency).

Despite the official mandate of this Committee, it is the Japanese courts that will have the final decision on what qualifies as nuclear damage. However, in the past, out-of-court settlements have been successful in Japan thanks to the guidelines of the committees and the help of local governments. On 30 September 1999, a criticality accident took place in a uranium processing facility of JCO Co. Ltd. at Tokai-mura. As a result, approximately 8 000 claims were raised, most of which were compensated in out-of-court settlements according to the compensation guidelines.

As regards the Fukushima accident, it will be a challenge to distinguish damages directly linked to radiation exposure risks from those that were caused by the earthquake and tsunami. Evacuations were ordered, at first, to protect the population from the inundation, and one major difficulty will be to draw a clear line between victims of the natural disaster and those who have suffered nuclear damage in a stricter sense.

Exoneration of liability

The Compensation Act provides that the operator may be exempted from liability when “...the damage is caused by a grave natural disaster of an exceptional character...”. Where this exoneration applies, the government shall take, pursuant to the Compensation Act, “the necessary measures to relieve victims and to prevent the damage from spreading”.

In light of the massive earthquake and the ensuing tsunami which led to the Fukushima accident, the question arises of a potential exoneration of TEPCO’s liability. However, the government’s current position does not suggest that TEPCO will be exonerated from liability due to the “exceptional” character of this natural disaster. When the Compensation Act was enacted, the conditions for the exemption due to natural disasters were described in the Congress as a “huge natural disaster beyond all expectations of humankind”. As an earthquake-prone archipelago, Japan has a rather unique perception of what qualifies as a “grave natural disaster of an exceptional nature”. For example, the earthquake in Kobe on 17 January 1995, which registered at 6.9 on the Richter scale and resulted in over 5 000 deaths, did not qualify as a grave natural disaster of an exceptional character.

Courts in civil proceedings will decide if the earthquake of 11 March 2011 qualifies as a natural disaster beyond all expectations of humankind, but only if TEPCO decides to invoke this exemption against claimants. TEPCO’s latest statements do not suggest that it will invoke the application of this provision in its favour.

Liability amount

Pursuant to the Compensation Act, the operator has an unlimited liability and must maintain financial security either through i) a private nuclear liability insurance contract (the most common means of financial security) combined with an indemnity agreement to be entered into with the government for non-insurable risks (for which the operator shall pay a fee to the government), ii) a deposit (in cash or in security) or iii) any other arrangement approved by MEXT.

The six units at Fukushima Daiichi are treated as one site; the same applies to the four units at Fukushima Daiini. As a result, the financial security amounts to JPY 120 billion for each site.

Should damages exceed the JPY 120 billion of financial security, the operator still remains liable (unlimited liability). However, in that event and if approved by the National Diet, the government shall give the nuclear operator concerned such aid as required to compensate the (excess) damage when the government deems it necessary in order to attain the purpose of the Compensation Act.

Compensation of the Fukushima victims

As the Fukushima accident will have consequences which will exceed JPY 120 billion, on 13 May 2011 the Japanese government issued a framework for government financial support to TEPCO in which it recognises its social responsibility and essentially aims to minimise the burden to be placed on the public. This plan was then submitted to and approved by the National Diet on 3 August 2011 under the bill for the “Establishment of a Nuclear Damage Compensation Facilitation Corporation” (the Facilitation Corporation). This corporation, established in September 2011, will manage a fund which shall receive contributions from the government and the Japanese nuclear installation operators, and will support operators in providing compensation to victims of nuclear accidents. The operator requesting such support will be required to implement cost-cutting measures as a pre-requisite to benefit from this fund and will be expected to pay back over the years the amounts received.

On 28 October 2011, TEPCO applied in order to benefit from the Facilitation Corporation financial support and submitted to that effect a business plan with cost-cutting measures which was approved on 4 November 2011. According to TEPCO, on 15 November 2011 it received JPY 558.7 billion (EUR 5.39 billion or USD 7.2 billion) from the Facilitation Corporation pursuant to the approval of its business plan. Furthermore, on 22 November 2011 it received JPY 120 billion from the government under the indemnity agreement for non-insurable risks.

TEPCO has been paying “provisional compensation” amounts to the victims, but as from October 2011, “permanent compensation” shall be paid pursuant to new procedures that were established by TEPCO on 30 August 2011³ (for the procedure applicable to damages suffered by individuals) and on 21 September 2011⁴ (for the procedure applicable to damages suffered by sole proprietors and corporations).

According to the press, TEPCO has so far paid about JPY 52 billion (EUR 0.5 billion or USD 0.7 billion) in “provisional compensation” to 56 400 households, and an additional JPY 43 billion (EUR 0.4 billion or USD 0.56 billion) to individuals for fees they had paid to be evacuated. It has also paid about JPY 63 billion (EUR 0.6 billion or USD 0.8 billion) to farmers, fishermen and small- and medium-sized companies as “provisional compensation”.⁵

Notes

1. For the technical description of the event, see *NEA News* No. 29.1.
2. www.tepco.co.jp/en/index-e.html.
3. www.tepco.co.jp/en/press/corp-com/release/11083007-e.html.
4. www.tepco.co.jp/en/press/corp-com/release/11092109-e.html.
5. *Reuters*, 26 September 2011.