

CONCLUSION OF THE CSC AND ITS DOMESTIC IMPLEMENTATION IN JAPAN

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Table of Contents

I. Introduction: the circumstance for the conclusion and entry into force of the CSC in Japan.....	2
II. Legal examinations concerning Japan's conclusion of the CSC.....	3
A. Examinations concerning the issues from Japanese legal points of view.....	3
B. Enactment and revision of domestic law for CSC implementation.....	5
III. Compensation for nuclear damage of the Fukushima incident and the CSC.....	6
A. The compensation system for nuclear damage in Japan after the Fukushima incident.....	6
B. With a view to increasing the amount of compensation for nuclear damage.....	7
C. Re-examinations concerning nuclear liability in Japan and the CSC.....	8
IV. Conclusion.....	8

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I. Introduction: the circumstance for the conclusion and entry into force of the CSC in Japan

On 15th April 2015, an important step to strengthen the global nuclear liability regime was taken.

It is the entry into force of the Convention on Supplementary Compensation for Nuclear Damage (hereinafter the "CSC")².

The CSC was adopted with "the Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage" in 1997. The CSC had not entered into force for a long time because the CSC comes into force when the number of Contracting Parties reaches five or more and their installed nuclear capacity exceeds 400,000 MWt. Japan concluded the CSC on 15th January 2015 and the conditions of the entry into force of the CSC were satisfied with Japan's conclusion.

In this paper, I would like to outline the conclusions of the CSC with Japanese legal points of view, and consider domestic implementation with reference to the compensation system for nuclear damage after the incident which occurred on 11th March 2011 at the Fukushima Daiichi nuclear power plant (hereinafter the "Fukushima incident") in Japan.

Before the Fukushima incident occurred, when Japan was reviewing the best way to handle their nuclear damage compensation system, Japan examined the possibility of Japan joining a global regime of nuclear damage compensation³. At that time, the examination showed that Japan could expect the CSC to be a legal foundation of international expansion of the Japan-U.S. common nuclear industry. There were three reasons for Japan expecting the CSC to be a legal foundation. The first is that the contents of the CSC are easy to conclude for many states including Japan as compared with other international regimes, such as the Vienna Convention and the Paris Convention. The second is that the CSC prepares the system to supplement a lack of financial security with contributions by the Contracting Parties. And the third is that the Contracting Parties of the Vienna Convention, not parties to the international convention and newly introduced countries of nuclear power may join the CSC universally. And the USA which has a close relationship with Japan and its nuclear industry was led to ratify the CSC. The examination also showed that Japan was not in a situation where it must immediately join a global regime in 2008 because Japan had a domestic compensation system suitable as advanced nuclear countries, but it was important to promote issues of the organization and to prepare for future full-scale investigation about the CSC, as a realistic choice for Japan.

¹ The opinions expressed herein are the author's and not necessarily those of the institute.

² IAEA Doc. INFCIRC/567 = 36 ILM 1473.

³ The First Report by the Panel on Reviewing the Nuclear Compensation System, 15th December 2008, pp.29-31.

After that, in the Japan-U.S. Summit Meeting on April 2012, President Obama mentioned his hopes for Japan's involvement in the CSC. The U.S. had repeatedly asked for Japan's ratification of the CSC and the Government of Japan noted that the conclusion and the entry into force of the CSC is meaningful in terms of the possibility of contribution to the construction of an international compensation system of nuclear damage, enhancement of the compensation at the time of a nuclear incident, quick and equitable relief of victims, and improvement of legal predictability. On 19th November 2014, the CSC was approved by the National Diet.

When the CSC was approved, the relationship between the domestic law and the CSC were discussed. In addition, in order to ensure proper implementation of the CSC, related law had been enacted and amended. I think these are interesting in terms of watching the domestic implementation of the CSC in Japan. I describe their details below;

II. Legal examinations concerning Japan's conclusion of the CSC

A. Examinations concerning the issues from Japanese legal points of view

As I mentioned before, the CSC has easier contents to conclude than other international conventions concerning compensation for nuclear damage for Japan. For example, within domestic law in Japan, "the Act on Compensation for Nuclear Damage"(hereinafter the "Act on Compensation") provides that a case where damage is caused by a grave natural disaster of an exceptional character is an exception to the liability of the nuclear operator. The 1997 Vienna Convention and the 2004 Paris Convention don't allow exemption from compensation for nuclear damage by a natural disaster, but states can join the CSC even if they have domestic law which allows exemption by a "grave natural disaster of an exceptional character".

In this way, I can say that the CSC, as an international regime which Japan has joined, has an affinity with the Act on Compensation, but of course, Japan needed some of examination and measure concerning domestic law when Japan joined the CSC. I'd like to first introduce the views seen in the Government of the Diet for the main legal issues pointed out before the conclusion of the CSC⁴, and then introduce the enactment and amendment of the law for its domestic implementation.

Concerning the first point of legal issues, there is a difference in the definition of nuclear damage in the CSC and the Act on Compensation. In Article I (f) of the CSC, it specifically lists certain types of damages that fall under the definition of nuclear damage, but the Act on Compensation prescribes it as "any damage caused by the effects of the fission process of nuclear fuel, or of the radiation from nuclear fuel, etc., or of the toxic nature of such materials (which means effects that give rise to toxicity or its secondary effects on the human body by ingesting or inhaling such materials)" only. The Government judged that the description of the definition of nuclear damage in the Act on Compensation was different from the one in the CSC, but the scope of nuclear damage in the Act on Compensation was consistent with

⁴ Terabayashi, Y. (2015), "On conclusion of the Convention on Supplementary Compensation for Nuclear Damage", *Legislation and Researches*, Vol.361, Office of House of Councillors of the National Diet of Japan, Tokyo, pp.46-51.

the one in the CSC and even if Japan joins the CSC, the scope of compensation for nuclear damage wouldn't change.

In the second point of mandatory financial security, the Annex to the CSC prescribes that the Installation State, having regard to the nature of the nuclear installation or the nuclear substances involved and to the likely consequences of an incident originating there from, may establish a lower amount of financial security of the operator, provided that in no event shall any amount so established be less than 5 million SDRs, and provided that the Installation State ensures the payment of claims for compensation for nuclear damage which have been established against the operator by providing necessary funds to the extent that the yield of insurance or other financial security is inadequate to satisfy such claims and up to a limit of the financial security; as stated in Article 5.1(a). The Act on Compensation prescribes that the Cabinet Order may provide for a lesser amount than JPY 120 billion as the financial security amount in the case of such reactor operation, etc., and the Cabinet Order provides for the lesser amount as JPY 24 billion or JPY 4 billion. According to the CSC, if a nuclear incident occurs during reactor operations etc., 300 million SDRs are ensured. This amount is more than the financial security of JPY 24 billion and JPY 4 billion provided by the Act on Compensation. As a result, there occurs a difference of account. But for securing of funds of this difference, the Act on Compensation prescribes that the Government shall give a nuclear operator aid as is required for him and the Government judged that the point required by the CSC is secured.

In the third point of channelling of jurisdiction, according to the Code of Civil Procedure in Japan, an action relating to tort, where the place where the tort took place is located in Japan, may be filed with a court of Japan. But in Article 13, the CSC prescribes that jurisdiction over actions concerning nuclear damage from nuclear incidents shall lie only with the courts of the Contracting Party within which the nuclear incident occurs. Thus, for example, if nuclear damage caused by a nuclear incident in a Contracting Party other than Japan occurs in Japan, victims in Japan must carry out the action in the Contracting Party, not in Japan. In this regard, the Government mentioned that in case of pursuit of tort liability on the Civil Code because of not being able to apply the Act on Compensation to a foreign nuclear operator, it is extremely difficult for victims to prove claims of negligence of the nuclear operator and even if the victims obtain a judgement of success in a domestic trial, it doesn't mean that they can enforce it. And the Government explained that it thought channelling of jurisdiction by the CSC was reasonable and positive because the Contracting Parties of the Convention have prepared the compensation system conforming to international standards, ensured financial support of damage, and ensured enforcement of a judgement the court ruled.

In the fourth point of applicable law, Article 14.2 of the CSC prescribes that the applicable law shall be the law of the competent court. According to this, if nuclear damage caused by a nuclear incident in Japan occurs in a Contracting Party other than Japan, it can apply Japanese law too, but because in Article 17 of the Act on General Rules for Application of Laws in Japan prescribes that "the formation and effect of a claim arising from a tort shall be governed by the law of the place where the result of the wrongful act occurred", it is thought that the law of the place where the result of the wrongful act occurred, that is, the law of the Contracting Party other than Japan is applied. But in Article 20, it prescribes that the formation and effect of a claim arising from a tort shall be governed by the law of the place with which the tort is obviously more closely connected, and the Government explained that

to apply "the law of the place with which the tort is obviously more closely connected", which is the Act on Compensation, fits within the spirit of the Convention.

In addition to these discussions, upon conclusion of the CSC, to enable the implementation of the CSC in accordance with domestic law, Japan has given the following three reservations:

- With respect to nuclear installations and small quantities of nuclear material, any exclusion by an Installation State satisfies the criteria by the Board of Governors of the IAEA.
- The operator is liable in accordance with the national laws and regulations of Japan in the case of where a nuclear incident involving nuclear material carried between a Japanese operator and an operator of another Contracting Party occurs within the territory of the area of the exclusive economic zone of Japan.
- The operator is liable for nuclear damage to any property on that same site which is used or to be used in connection with any such installation except the operator's damage in accordance with the national laws and regulations of Japan.

B. Enactment and revision of domestic law for CSC implementation

In the following, I would like to describe the enactment and amendment of relevant law to ensure proper implementation of the CSC.

With the implementation of the CSC, the act on the aid of funds of compensation for nuclear damage, etc. attendant upon the enforcement of the "Convention on Supplementary Compensation for Nuclear Damage" was enacted as the law to determine the aid of funds and other necessary matters in order to compensate for nuclear damage. The act prescribes that if the total amount of claims of nuclear damage of a nuclear operator exceeds 300 million SDRs, the Government aids a part of the fund of compensation for nuclear damage, and the Government collects special contributions from a nuclear operator who receives claims of nuclear damage for more than 300 million SDRs in order to cover the cost of contributions to which the amount is calculated by the provisions of the CSC article IV.1(b) and collects general contributions from nuclear operators who operate a reactor each year in order to cover the cost of contributions to which the amount is calculated by the provisions of article IV.1(c).

In addition, in order to adapt the compensation system of Japan to the CSC, the Act on Compensation and the Act on Indemnity Agreements for Compensation of Nuclear Damage (hereinafter the "Act on Indemnity Agreements") were amended. Their specific contents are that:

- Special agreement of matters relating to liability for nuclear damage in accordance with transportation of nuclear fuel material, etc. between nuclear operators shall be in writing (Article 3.2 in the Act on Compensation),
- An operator shall have a right of recourse when nuclear damage occurs by intent of "individuals", special agreement of a right of recourse shall be in writing (Article 5 in the Act on Compensation).
- A liability insurance contract or indemnity agreement with the Government in accordance with the transportation of nuclear fuel material, etc., cannot be cancelled

during transportation (Article 9 of 2 in the Act on Compensation, Article 16 in the Act on Indemnity Agreements).

III. Compensation for nuclear damage of the Fukushima incident and the CSC

A. The compensation system for nuclear damage in Japan after the Fukushima incident

I would like to consider the CSC as an international nuclear damage compensation system with reference to the compensation system for nuclear damage after the Fukushima incident. The CSC is not applied retrospectively to the Fukushima incident, but I think that it is significant to put the Fukushima incident in mind as one of the cases of compensation for nuclear damage.

According to the New Comprehensive Special Business Plan of the Tokyo Electric Power Company (hereinafter "TEPCO"), the prospect of the Required Amount of Compensation is a total of JPY 7,658.5 billion⁵ and it is necessary to compensate for the huge amount of damage that far exceeds the financial security amount. In the Act on Compensation, the liability of a nuclear operator is unlimited, but at the same time the Act on Compensation, according to Article 16, prescribes that the Government shall give a nuclear operator such aid as is required for him to compensate the damage, when the actual amount which he should pay for the nuclear damage exceeds the financial security amount and when the Government deems it necessary in order to attain the objectives of this Act.

After the Fukushima incident, on 10th May 2011, TEPCO requested aid of the Government by reason of the difficulty in funding on the basis of Article 16 of the Act on Compensation. In response to this, the Government examined the framework of aid on the assumption that TEPCO has the liability uniquely, and as the framework for embodiment of the Government's aid on the basis of Article 16 of the Act on Compensation, the "Nuclear Damage Compensation Facilitation Corporation Act"(after the revision, the "Nuclear Damage Compensation and Decommissioning Facilitation Corporation Act") (hereinafter the "Corporation Act") was enacted in August, in the same year.

The compensation scheme on the basis of the Corporation Act is briefly stated below:

- If the Required Amount of Compensation is expected to exceed the amount of financial security, the nuclear operator may make an application for financial assistance to the Nuclear Damage Compensation and Decommissioning Facilitation Corporation (hereinafter the "Corporation"). If the Corporation has received the application, the Corporation decides whether to provide financial assistance as well as deciding the substance and the amount of such financial assistance.
- The Corporation prepares a Special Business Plan for the nuclear operator's implementation of compensation as well as for the financial assistance, working jointly with the nuclear operator. The Special Business Plan receives the approval of the competent minister.

⁵ Tokyo Electric Power Company (2016), "Outline of Change of Special Business Plan", http://www.tepco.co.jp/en/press/corp-com/release/betu16_e/images/160331e0201.pdf (accessed 11th July 2016).

- The Corporation receives delivery of government bonds for the necessary funds to conduct granting funds in connection with the financial assistance based on the Approved Special Business Plan.
- The nuclear operator receiving the financial assistance pays the Special Contribution and nuclear operators engaged in reactor operation, etc. including the nuclear operator receiving the financial assistance pay the General Contribution to the Corporation.
- The Corporation receiving the payment of contribution pays the difference of the profit and loss calculation to the Treasury.

As a result, TEPCO receives JPY 7,469.5 billion after deducting the received amount of money, which is the amount of financial security, from JPY 7,658.5 billion, which is the prospect of the Required Amount of Compensation to the Corporation. According to the 2015 Fiscal Year Report of TEPCO⁶, TEPCO had paid a cumulative total of approximately JPY 6,043.8 billion as of the 31st March 2016.

In contrast, the Special Contribution and the General Contribution have been paid to the Corporation every year. It is worth noting, in Fiscal Year 2015 the amount of the Special Contribution paid by TEPCO was JPY 70 billion, and the total amount of the General Contribution was JPY 163 billion. It can be said that the mechanism by the Corporation Act is a mechanism of mutual assistance⁷ including irrelevant nuclear operators to an incident and nuclear damage by the Fukushima incident have been compensated under the mechanism of mutual assistance. In addition to this, the Corporation is the largest shareholder of TEPCO holding about 54% of its shares. The Corporation is planning to pay a percentage of its profit from sale of shares as a benefit, in addition to the contribution of nuclear operators.

B. With a view to increasing the amount of compensation for nuclear damage

As stated in the Preamble of the CSC, the Contracting Parties recognizing the importance of the measures concerning compensation for nuclear damage, desirous of establishing a worldwide liability regime to supplement and enhance these measures with a view to increasing the amount of compensation for nuclear damage, have agreed with the CSC.

The CSC prescribes that the Installation State shall ensure the availability of 300 million SDRs as compensation in respect of nuclear damage per nuclear incident in Article III (a) (i). Japan, one of the Contracting Parties, sets the amount of financial security to more than 300 million SDRs (actual amount: JPY 120 billion) except for the small amount of financial security described above. This has come about based on what the 2004 Paris Convention has raised the amount of financial security to EUR 700 million and the underwriting capacity of private liability insurance and was adopted in Japan in 2010.

But if JPY 7 trillion of the Required Amount of Compensation occurs, it is clear that the amount of financial security is insufficient even if the amount of financial security is JPY 120 billion or 300 million SDRs. As a countermeasure to this, it is conceivable that the CSC will

⁶ Tokyo Electric Power Company Holdings, "Report for the 2015 Fiscal Year", <http://www2.tse.or.jp/disc/95010/140120160527403721.pdf> (accessed 11th July 2016).

⁷ Japan Energy Law Institute (JELI). (2014), "Future's subject of investigation on nuclear liability systems: focusing on the accident of the Fukushima Daiichi nuclear power plant of the Tokyo Electric Power Company", JELI-R-129, JELI, Tokyo, p. 55.

raise the amount of financial security from 300 million SDRs, but in light of the current insurance market, it is not realistic to set such a huge financial security as a countermeasure of an incident like the Fukushima incident. Even if the CSC decides that the amount of financial security is set to a little more than EUR 700 million, which the 2004 Paris Convention set, it is necessary to consider carefully because raising the amount of financial security might create a hurdle to join the CSC. In considering increasing the amount of compensation for nuclear damage, it is significant to put the Fukushima incident in mind, on the other hand, excessive awareness of the Fukushima incident may make us lose sight of a desirable figure of a nuclear damage compensation system.

In addition, Japan established the compensation scheme based on the Corporation Act after the Fukushima incident. I think it is important to examine, well in advance, the compensation scheme in the case of the Required Amount of Compensation far exceeding the amount of financial security.

C. Re-examinations concerning nuclear liability in Japan and the CSC

The Corporation Act prescribes that as soon as possible after the enforcement of this act, the Government shall review the best way of addressing such matters as State responsibility under the system of compensation for nuclear damage, etc., and also review the establishment of organizations for the prompt and appropriate resolution of disputes involving compensation for nuclear damage, and shall take necessary measures based on the results of these reviews, including a fundamental re-examination of the amendment, etc., of the Act on Compensation in Article 6 of the Supplementary Provisions. In response to this, the Japan Atomic Energy Commission established an expert committee on the compensation system for nuclear damage, and the best way of the compensation system for nuclear damage has been examined from professional and comprehensive points of view since May, 2015.

Concerning the discussion of the best way of nuclear damage compensation system in Japan, with respect to the CSC, strict liability, channelling of liability and limitation of a right of recourse are the common principles of international conventions, including the CSC, and will be maintained in light of the CSC, which Japan joined. The core discussion in the expert committee seems to be whether liability of a nuclear operator should be limited or not and how to design a system that best fits a State responsibility in light of the scope of nuclear operator's liability.

And there is also an opinion that the compensation scheme based on the Corporation Act can be sustainable, but after the electricity market's liberalization, it will be difficult to continue to maintain the system of contribution based on the fully distributed cost method before the electricity market is liberalized.

IV. Conclusion

Japan originally had domestic law not inferior to the demands of the international nuclear damage compensation system. In addition to this, when Japan joined the CSC, it carried out the development of some of its legal system with an awareness of being consistent with domestic law and the CSC, and further enhanced consistency with the CSC. And Japan constructed the scheme of mutual assistance based on the Corporation Act for huge

compensation for nuclear damage by the Fukushima incident and is going to pay the compensation. On the other hand, re-examination of the best way to handle the new nuclear damage compensation system in light of the Fukushima incident is still being developed in the framework of the CSC.

The Government of Japan, being the State that caused the Fukushima incident, thought it is the responsibility of our country to contribute to the construction of an international nuclear damage compensation system and therefore joined the CSC. Currently, nuclear reactors which are applicable to the CSC are more than those which are applicable to the Vienna Convention or the Paris Convention⁸. It can be said that the presence of the CSC as an international nuclear damage compensation system is very high. In the future, it will be required to focus on the further universalization of the international nuclear damage compensation system.

In recent years, nuclear power use in Asian countries has expanded, but on the other hand, the Asia Pacific Ocean Zone usage of the international nuclear damage compensation system had been obsolete for a long time. In the sense of taking one step forward, it can be said that the entry into force of the CSC in 2015 and India's joining the CSC are indeed gratifying. It may not be easy for Japan to request neighboring countries such as China and Korea to join the CSC, but I hope that the international frameworks, including the CSC, become more functional globally and the lessons learned from the Fukushima incident by Japan is utilized more globally.

⁸ McRae, B. (2015), "Entry into force of the Convention on Supplementary Compensation for Nuclear Damage: Opening the umbrella", *Nuclear Law Bulletin*, No.95, NEA, Paris, pp. 7-8.