

# Fukushima: Potential nuclear liabilities

## Introduction

As a result of the earthquake and subsequent tsunami in the Tohoku region of Japan on 11 March 2011 (the "**Tohoku Earthquake**"), nuclear power plants operated by The Tokyo Electric Power Company, Incorporated ("**TEPCO**") sustained damage that has led to the release of radioactive materials (the "**Nuclear Accident**"). In this briefing, we look at TEPCO's potential liability arising out of the Nuclear Accident.

## Nuclear Damage Compensation Law

### 1. Reasoning for the law

In 1961, Japan enacted the *Law on Compensation for Nuclear Damage* (Law No. 147 of 1961, as amended, the "**Nuclear Damage Compensation Law**"). The purpose for enacting the law was twofold - (i) to protect victims by making it easier for them to obtain compensation from nuclear business operators; and (ii) to encourage the development of nuclear business by clarifying an operator's liability in the event of a nuclear accident.

### 2. Exemption for liability

The Nuclear Damage Compensation Law is a strict liability law: nuclear business operators are liable for any "nuclear damage" arising from the operation of a nuclear reactor, regardless of whether they are at fault. There is however one exemption - a nuclear business operator will be exempt from liability for nuclear damage if such damage arose from an "*extraordinarily enormous natural disaster or social convulsion*".

The Japan Atomic Energy Commission of the Cabinet Office, whose responsibilities include the planning, examination and determination of nuclear usage policies, has released materials containing its view on the meaning of "*extraordinarily enormous natural disaster*". In those materials, the Commission expresses the view that an earthquake would need to be on a considerably greater scale than, for example, the Great Kanto Earthquake of 1923 or the Great Hanshin Earthquake of 1995 to qualify as an "*extraordinarily enormous natural disaster*". Based upon this view, it is possible that the Tohoku Earthquake will also not qualify as an "*extraordinarily enormous natural disaster*". In fact, the media has already reported that the government's position is that TEPCO will not be able to avail itself of the exemption and that TEPCO itself holds a similar view<sup>1</sup>.

## Key Issues

### Introduction

### Nuclear Damage Compensation Law

### Insurance policies

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<sup>1</sup> Nikkei, 24 March 2011, morning edition.

### 3. Scope of "Nuclear Damage"

The Nuclear Damage Compensation Law defines "nuclear damage" as damage arising from an action of the process of atomic fission of nuclear fuel material, an action of radiation or a toxic action of nuclear fuel materials. To get a better understanding of what type of damage this could include, one can refer to the Final Report issued by the Nuclear Damage Investigation Group<sup>2</sup> on 29 March 2000 about the Tokai Village JCO Nuclear Accident (the "**Report**"). The Report lists the following items as qualifying as "nuclear damage":

- (i) bodily injury;
- (ii) costs of testing;
- (iii) costs of evacuation;
- (iv) property contamination;
- (v) damage due to taking leave from work; and
- (vi) damage to business.

### 4. Security of payment

The Nuclear Damage Compensation Law also includes a mechanism for securing the payment of damages payable by nuclear business operators. Specifically, the Nuclear Damage Compensation Law requires operators to execute an insurance agreement and a government indemnification agreement such that each nuclear plant has a secured sum of JPY 120 billion for the payment of nuclear damage claims (the "**Secured Amount**"). Nuclear business operators do continue to be liable to business establishments for sums in excess of the Secured Amount, but such amounts are unsecured. The Nuclear Damage Compensation Law does however oblige the government to give necessary support to nuclear business operators in the event of nuclear damages in excess of the Secured Amount if it is recognised that such support is necessary to accomplish the purpose of the Nuclear Damage Compensation Law.

Although the full picture of the nuclear damage arising from the Nuclear Accident will not be clear for some time, the media has reported that it may amount to many trillions of yen. The government has already stated<sup>3</sup> that it will support TEPCO in providing compensation to victims if the amount of nuclear damage exceeds the Secured Amount and TEPCO is unable to provide effective compensation to the victims.

### Insurance policies

Many individuals and companies do have their own insurance policies. However, a common exclusion of liability in insurance policies is for loss relating to contamination by radioactive material. Consequently, many individuals and businesses will find that they do not have adequate insurance coverage to cover their losses.

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<sup>2</sup> This group was established by the Japanese government to determine the damage caused by the JCO Nuclear Accident. A Japanese court would likely find the Report persuasive material when considering the question of damage for other nuclear accidents.

<sup>3</sup> Nikkei, 24 March 2011, morning edition

*Where Japanese legal concepts have been expressed in the English language, the concepts concerned may not be identical to the concepts described by the equivalent English terminology as they may be interpreted under the laws of other jurisdictions.*

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