Catastrophic Nuclear Accidents: Mass Tort Claims in a Transboundary Context

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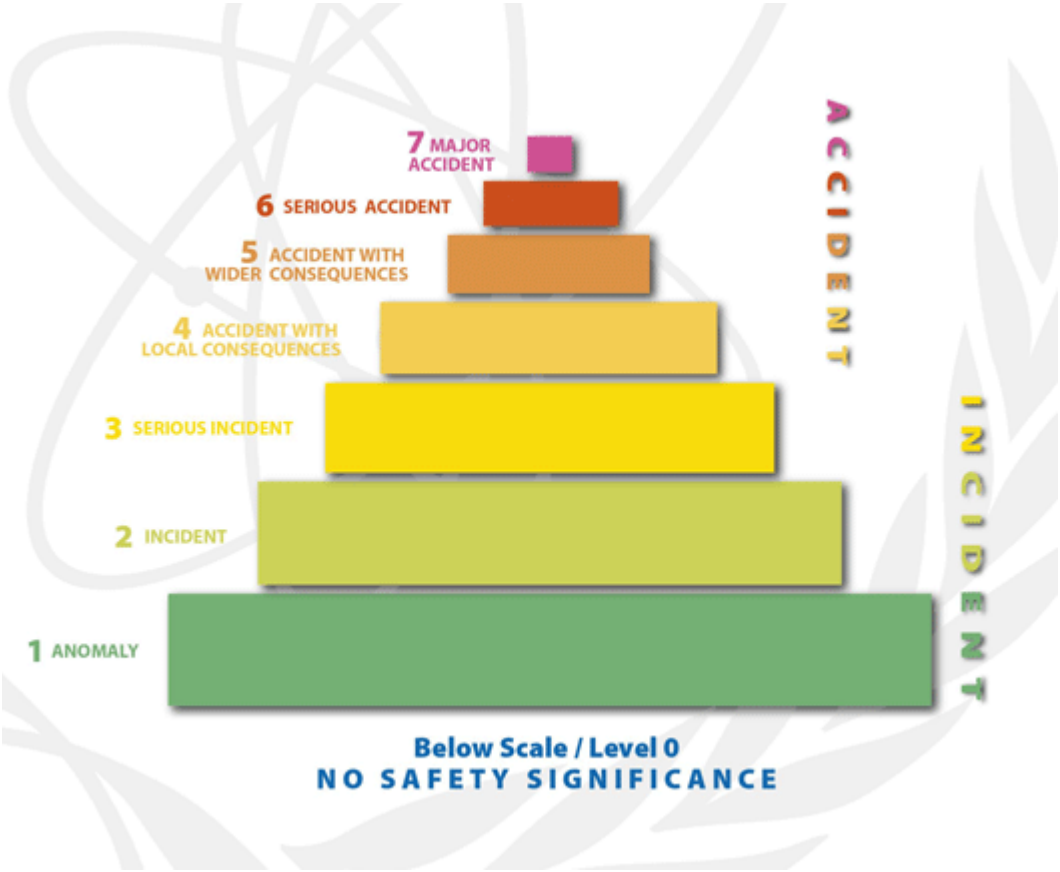
Preliminaries

- "Catastrophic" worse than a INES-7 "major nuclear accident"

  "Major release of radioactive material with widespread health and environmental effects requiring implementation of planned and extended countermeasures"

- Some critics of INES would argue that both Fukushima and Chernobyl would qualify as "level 10 or 11 events"

“Major nuclear accident”-- The International Nuclear and Radiological Event Scale



The Procedural Challenge posed by Catastrophic nuclear accidents

- Very large number of claimants
- The complexity of assessing "damage compensable"
- The need for financial resources beyond those specifically planned for
- Transboundary context

Hence, the need for a simplified and expedited claims settlement process

Number of claimants/amount of damages

- Chernobyl
  - Difficult to assess number of potential claimants;
  - Few actual claimants since no special domestic nuclear compensation legislation (although Union and Ukrainian SFSR tort legislation applicable; USSR not a party to either Vienna or Paris Conventions)
  - Forced the evacuation of over 300,000; affected 3 million people
  - Estimated costs: “hundreds of billions of dollars”
- Fukushima
  - As of August 2013, 655,000 applications for compensation

The “real cost” of Fukushima

Official estimates of the costs clean-up and compensation of victims of the accident

- Original: $50 billion
- 2014: $ 100 billion
- November 2016: $180 billion
- **April 2017**: “the total cost of the Fukushima disaster could reach ¥70 trillion (US $626 billion), or more than three times the government’s latest estimate.” (The Japan Times, April, 2017)

The initial, basic policy question

Domestic law-based private recovery effort,
recourse to international claims settlement process or
hybrid approach?

Why, should this question arise at all?

Does not a country's treaty-based "civil liability" system of nuclear compensation automatically imply **recovery through private litigation involving the application of domestic procedural law**?

Recall: most nuclear installation countries -- though not China, Republic of Korea, or Taiwan -- are parties to a treaty-based civil liability system for nuclear damage

Countries w/NPP	Contracting party to
Argentina	VC; RVC; CSC
Armenia	VC;
Belgium	PC; BSC; RPC; RBSC
Brazil	VC
Bulgaria	VC; JP
Canada	CSC
China	
Czech Republic	VC; JP; (CSC signed)
Finland	PC; BSC; JP; RPC; RBSC
France	PC; BSC; RPC; RBSC
Germany	PC; BSC; JP; RPC; RBSC
Ghana	(CSC signed)
Hungary	VC; JP
India	CSC
Iran	
Japan	CSC
Kazakhstan	RVC
Korea	
Lithuania	VC; JP; (CSC signed)
Mexico	VC
Netherlands	PC; BSC; JP; RPC; RBSC
Pakistan	
Romania	VC; JP; RVC; CSC
Russia	VC
Slovakia	VC; JP
Slovenia	PC; BSC; JP; RPC; RBSC
South Africa	
Spain	PC; BSC; RPC; RBSC
Sweden	PC; BSC; JP; RPC; RBSC
Switzerland	PC; RPC; BSC; RBSC
Taiwan	
Ukraine	VC; JP; (CSC signed)
UAE	RVC; CSC
United Kingdom	PC; BSC; RPC; RBSC
United States	CSC

Possible state intervention scenarios

The impact state ***has always the option of intervening in the claims process*** *to secure compensation* for individual victims, by invoking:

- the installation state's accountability under international law
  - Diplomatic claims procedure – espousal of nationals' claims of damage – in the absence of strict liability the issue of whether installation state is internationally responsible, etc.
    - Some hesitant and unsuccessful attempts in the aftermath of Chernobyl
- the *parens patriae* doctrine
  - Union of India brings suit in US court on behalf of all Indian victims of the Bhopal accident

Conversely, the installation state might negotiate/offer a lump sum payment for distribution among victims by the impact state

Or, the states concerned agree to an international claims adjudication/settlement process proper

- UN Compensation Commission

Is private litigation inherently superior to state intervention in the claims process?

- **Established & tested judicial processes; parties' familiarity with institutions & procedures**

- **Are trends in mass torts claims settlement indicative of the merits of the procedure used?**

  - "Privatization" of what would be typical environment-related international state claims and proceedings:

    - 1986 *Sandoz*-Rhine pollution case

    - 2000 Baia Mare pollution incident

    - 2004 "Round 2" of the *Trail Smelter* ("*Teck Cominco* Metals") case, and

    - May 2017, Indonesia's Montara spill-related initiation of proceedings against the Australian rig operator and its Thai parent company (rather than against Australia).

… and yet:

- Private law-based efforts in cases with transnational legal ramifications can be **cumbersome, time-consuming and expensive**
  - **Notorious examples include:**
    - *Seveso*
    - *Bhopal*
    - *Amoco Cadiz*
    - *Montara*
- **The ILC Commentary on "Allocation" Principle 6** expressly recognizes "the practical difficulties, such as expenses and time-lags involved, in pursuing [civil liability-based] claims in a transnational context …."
- **Alan Boyle:** "**Particularly where the damage is widespread, and the victims are poor, it may be that governmental action at interstate level is the only realistic option."**

State Intervention in the Domestic Process of Handling Nuclear Mass Tort Claims

A sampling of relevant practice

States' discretion in setting the procedural parameters of the claims process

The **nuclear civil liability instruments themselves do not address procedural aspects** of compensating claims for nuclear damage, except for:

- Establishment of exclusive jurisdiction over claims under respective conventions in the courts of the contracting party

In essence, domestic procedural law determines the nature & format of how mass torts claims will be handled

Inherent limits of states' discretion?

- The procedural import of nuclear civil liability instruments

  States' "unstated, accessory obligation" under the conventions (Norbert Pelzer) to be prepared to make the conventions fully workable….

- International Law Commission, Principles on Allocation of Harm, Principle 6, para.1

  States *shall* provide their domestic judicial and administrative bodies with the necessary jurisdiction and competence and ensure that these bodies have prompt, adequate and effective remedies available

- *Access to Justice* as a human right to an effective remedy*

  More than a human right, "one of the basic mainstays … of the Rule of Law in a democratic society…." Inter-American Court of Human Rights, *Awas Tigni* case

*in terms of ensuring that legal and judicial outcomes are just and equitable.

Threshold requirements for state intervention *in claims process* and a priori established liability levels

- China – 2007 Reply of the State Council
  - if damage results from "extraordinary nuclear accident" and to the extent the increase in indemnity is approved by the State Council
    - operator's liability capped at 300 (100) million RMB
    - government indemnity up to 800 million RMB
      - Tort Liability Law of 2009 –relevance unclear

- Japan – Act on Compensation of Nuclear Damage
  - if damages for which the operator liable threaten operator's insolvency
    - operator's unlimited liability;
    - amount of financial security capped at 120 billion yen;

      (to be provide through contract of insurance coverage; indemnity agreement with government; or deposit approved by MEXT)

Threshold requirements for state intervention *in claims process* (2)

- India -- Civil Liability for Nuclear Damage Act, 2010
  - no specific threshold – any incident qualifies, unless risk involved in nuclear incident is "insignificant" in which case no notification of a nuclear incident by the Atomic Energy Regulatory Board
    - NPP operator's liability capped at approx. US $ 231 million; if damages exceed limit, Central government is liable for the excess amount
- Canada – Nuclear Liability & Compensation Act, 2017
  - if in public interest, *having due regard to the extent and the estimated cost of damage*
- US – AEA , 1954 as amended
  - whenever damages are likely to exceed the amount of aggregate public liability (approx. $ 12 billion)
    - This include "primary financial protection" through private sources and contributions from an industry-wide insurance pool

Corresponding special procedural rules for handling of “excess” nuclear damage claims?

- No specific provisions
  - China

- “Stand-by” statutory authorization for ad hoc *regulatory action*:
  - Germany

Countries establishing Special Process/Institutional Arrangements (1)

- Japan – Sec. 18(1) Act on Compensation
  - Permits establishment of Dispute **Reconciliation Committee** for Nuclear Damage – to facilitate prompt and smooth settlement of claims
    - Legally non-binding guidelines re general rules regarding compensation disputes & mediation of disputes
  - In 2011, the government, drawing on DRCND's Sec.18 authority, established an ADR mechanism, the Nuclear Claim **Dispute Resolution Center**

- Result, post-Fukushima three ways to obtain compensation:
  1. "Direct route" compensation: shaped by DRCND guidelines, administered by TEPCO – "ten thousand person bureaucracy"
  2. ADR system designed to handle cases outside TEPCO's compensation criteria
  3. Litigation – open to all

Systemic issues

- Direct route
  - TEPCO's involvement presents the typical 'the fox guarding the hen-house problem'
  - The huge discrepancy between TEPCO's pay-outs (by 2015 5 trillion yen) and TEPCO's financial security limit of 120 billion yen) – with the Government stepping in to prevent TEPCO's declaration of insolvency
    - Likely reason: Government reluctant to run the compensation system itself – unappealing & expensive -- and to directly pay Fukushima victims and thereby implicitly take responsibility for the accident (Feldman, 141)
- ADR
  - Becoming to rigid; parties' increasingly "lawyer up"; undermining the very ADR goal of expediency
- Litigation
  - Open to any party unwilling to use the TEPCO process or ADR, or unhappy with result of either

Special Process/Institutional Arrangements (2)

- Canada – Sec. 36 Nuclear Liability & Compensation Act, 2017
  - Governor-in-Council may declare the need for, and establish an administrative Tribunal

- India – Secs. 9 (2) & 19 Civil Liability for Nuclear Damage Act, respectively:
  - Central government appoints:
    - one or more Claims Commissioners; or,
    - **if "expedient in public interest,"** a Claims Commission

- US – 42 USC § 2210
  - Compensation plan(s) to ensure full and prompt compensation: – NRC/Sec – Court -- President -- Congress
  - Chief judge of competent court may appoint special caseload management panel (to coordinate & assign -- not hear -- compensation cases)
  - Plan for distribution of funds (to be submitted by NRC or Secretary of Energy to the competent court)

Country	Normative basis	Threshold of State Intervention	Elements of special claims process	Exclusive competence or parallel mechanism?	Nature of special proceedings	Judicial review of decisions?
China	2007 State Council Reply	If damages beyond RMB 800 million	not specified	unclear	undetermined	undetermined
India	Civil Liability for Nuclear Damage Act	No specific threshold – any incident qualifies, unless risk is "insignificant"	Single Claims Commissioner or Claims Commission	exclusive	"Judicial", but rules of civil procedure inapplicable; CCs	limited
Japan	Act on Compensation Nuclear Damage	Damages exceed 120 B yen & intervention necessary to achieve goals of Act	Dispute Reconciliation Committee for Nuclear Damage & Nuclear Claim Dispute Resolution Center	parallel	TEPCO Process: administartive ADR	yes
Canada	Nuclear Liability and Compensation Act	Declaration of public interest in having administrative tribunal deal with claims	(claims) Tribunal	exclusive	Mixed – quasi-judicial	limited
US	Price Anderson Act	When public liability exceeds financial protection required, i.e, $ 12 billion	Compensation Plan Special Case Load Management Panel & Distribution of Funds plan	parallel	administrative	yes

Controversial aspects of special procedures for handling “excess” nuclear compensation claims

- The **decision** to apply special procedural arrangements is a political one, rather than based on well-defined legal criteria (Canada, India, China

- **Potential separation of powers issue** (Canada, India): By executive fiat, jurisdiction over compensation is shifted from courts to other bodies, and are either non-reviewable (India) or only to a limited degree (Canada)

- **Impartiality/competence** of key decision-makers
  - India’s Claims Commissions/Commission

- **Fairness issues: Over- & under-compensation**
  - Consistency of awards (ADR, Japan)
  - Discounting of claims/awards (ARD, Japan)
  - Different outcomes depending compensation avenue (Japan)

Controversial aspects (2)

- Uncertainty re compensation parameters
  - Accentuated by the lack of clear understanding of the accident and the evolving compensation challenge
  - Periodic adjustments of guidelines (TEPCO process, Japan)

- Parallel, non-exclusive avenues towards compensation
  - Japan: Proceedings covering the same issue might proceed simultaneously in different venues! (Nomura, 25).

- Conversely, when special procedures are exclusive: absent or severely limited of right of appeal to a court of law compensation decisions rendered by non-judicial bodies
  - India, Canada

Compensation Procedures for Fukushima: The final judgment?

Prof. Takao Suami, Waseda University, Faculty of Law, Tokyo, at an expert briefing in Brussels, May 19, 2017

"Among the basic issues still to be settled are who qualifies for compensation, who should pay, how much they should pay and where the money should come from."

Conclusions

- Special procedural arrangements for nuclear mass tort claims must ensure prompt, full/adequate & effective compensation

- Presently, the legal systems of most of the few NPP countries with such arrangements, do not or may not meet this goal

- In advance clarification of the applicable process, rather than “decision-making on the fly” or ad hoc is an absolute necessity!

  - This ought to include an assessment/specification of the circumstances in which an internationalized approach might be feasible and preferable

- Where significant transboundary nuclear harm is a possibility, concerned states ought to reach understanding as to how claims for compensation might be handled expeditiously and fairly in accordance with the requirements of international law.

- Where processing of claims is entrusted to technical/administrative bodies with exclusive jurisdiction, to right of appeal to a court of law ought to be guaranteed

Thank you for your attention!