論説

Japan's ADR System for Resolving Nuclear Power-Related Damage Disputes

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Abstract: This paper has dual aims. First, it introduces the Nuclear Power-Related Damage Claim Resolution Center, established in 2011 to handle disputes arising out of the March 2011 meltdown at the Fukushima Daiichi nuclear power plant. After first examining the genesis of that Center, this paper describes its structure and roles and discusses its performance, including the challenges it has faced and the accomplishments it has achieved. Second, this paper seeks to place that Center into the broader context of the overall development of alternative dispute resolution (ADR) in Japan and to assess its impact. Two major themes recur throughout this discussion: the heavy weight placed on standardization and uniformity throughout the Japanese approach to dispute resolution, and the dominant role in the development and provision of ADR played by the Japanese bar.

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Note regarding name order: For cites in footnotes to works published in English, I have used the name order that appears in the publication. Otherwise, for Japanese names I have followed the order normally used in Japan: *i.e.*, family name first, followed by given name.

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Introduction: Alternative Dispute Resolution and Japan

This paper has dual aims. First, it introduces the Nuclear Power-Related Damage Claim Resolution Center, established in 2011 to handle disputes arising out of the March 2011 meltdown at the Fukushima Daiichi nuclear power plant. Second, it seeks to place that Center into the broader context of the development of alternative dispute resolution (ADR) in Japan.

Internationally, Japan has long had an image as being at the forefront in the ADR field. Dating back at least to Kawashima Takeyoshi's 1963 essay "Dispute Resolution in Contemporary Japan,"[1] accounts abound of the vaunted "Japanese preference" for informal, non-adversarial resolution of disputes.[2] In Japan, court-annexed conciliation, administered and supervised by the judiciary, is widely used for civil and family cases. At least with respect to extrajudicial ADR bodies, however, the reality differs considerably from the image.

In a few specific fields, extrajudicial ADR bodies handle large numbers of cases. Of these, the most prominent is in the traffic accident context.[3] Two major nationwide traf-

1) Takeyoshi Kawashima, *Dispute Resolution in Contemporary Japan*, in LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY 41(Arthur Taylor von Mehren ed., Harvard University Press, 1963).

2) A prominent example of the impact of the Kawashima view is the 1983 article by then-Harvard University President Derek C. Bok, *A Flawed System of Law Practice and Training*, 33 J. LEG. EDUC. 570 (1983) (contrasting the United States with Japan). More recently, Robert Kagan offered Japan's informal, non-adversarial approach as a counterpoint to the "adversarial legalism" of the United States, ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 123, 135-38 (Harvard Univ. Press, 2003). In his justly celebrated rejoinder to Kawashima, "The Myth of the Reluctant Litigant," John Haley took issue with Kawashima's view that the low litigation rates in Japan were largely attributable to a Japanese cultural preference for harmony. Yet, as one of the institutional factors he offered as a counter-explanation for the low litigation rates, Haley pointed to the widespread use of informal, extrajudicial dispute resolution mechanisms. *See* John O. Haley, *The Myth of the Reluctant Litigant*, 4 J. JAPANESE STUD. 359, 378-379 (1978).

3) For three views of the traffic accident dispute resolution process, see J. Mark Ramseyer & Minoru Nakazato, *The Rational Litigant: Settlement Amounts and Verdict Rates in Japan*, 18 J. LEG. STUD. 263 (1989); Takao Tanase, *The Management of Disputes: Automobile Accident Compensation in Japan*, L. & SOC'Y REV., Vol. 24, No. 3, at 651 (1990); and Daniel H. Foote, *Resolution of Traffic Accident Disputes and Judicial Activism in Japan*, 25 LAW IN JAPAN 19 (1995). For a more recent work, revisiting the traffic accident dispute resolution process and offering it as an example of the value of the relative certainty provided by the Japanese approach to private law, see J.

fic accident ADR bodies, each with local branches, together perform over 60,000 consultations and nearly 8,000 successful mediations per year.[4] Many regional bar associations have established dispute resolution centers, with the more active ones handling over one hundred cases per year.[5] In recent years, moreover, new ADR bodies for handling disputes related to financial services have been carving out a significant niche.[6]

On the whole, however, use of formal extrajudicial ADR bodies has been limited. In fact, the Justice System Reform Council, a major government advisory council established in 1999 and charged with investigating all aspects of Japan's justice system, identified the relative lack of effective ADR mechanisms as one of the issues to be addressed. In its final Recommendations, issued in 2001, the Reform Council set forth the following finding: "In reality, with the exception of some organizations, ADR mechanisms are not fully functioning."[7] To remedy that situation, the Reform Council called for "efforts … to expand and vitalize ADR, [so] the people can choose from among diversified dispute resolution methods according to individual needs."

The Reform Council's recommendations led to the establishment of eleven separate follow-up advisory councils focused on specific categories of recommended reforms, of which one was charged with considering how to promote expansion and invigoration of ADR mechanisms.[8] The debate within that advisory council was highly contentious, with major issues including whether to require certification of ADR institutions and the organized bar's insistence that lawyer participation be required for all ADR panels. The deliberations ultimately resulted in the enactment, in 2004, of the Act to Promote the Use of ADR Procedures (hereinafter, ADR Promotion Act).[9] According to its purposes statement, the goal of the Act is: "To facilitate the parties' choice of suitable methods for re-

MARK RAMSEYER, SECOND BEST JUSTICE: THE VIRTUES OF JAPANESE PRIVATE LAW (Univ. of Chicago Press, 2015).

4) *See* Kōtsū jiko funsō shori sentā [The Japan Center for Settlement of Traffic Accident Disputes], Heisei 27nendo toriatsukai jian bunrui [Categories of Matters Handled in the 2015 Business Year], available at: http://www.jcstad.or.jp/disclosure/documents/27toriatukaijianbunrui.pdf, visited December 11, 2016; Nichibenren Kōtsū jiko sōdan sentā [Nichibenren Traffic Accident Consultation Center], Goannai [Guide], http://www.n-tacc.or.jp/about/files/pamphlet_l.pdf, visited December 11, 2016.

5) *See* IRIE HIDEAKI, GENDAI CHŌTEIRON: NICHIBEI ADR NO RINEN TO GENJITSU [Modern Mediation: A Comparative Study of Japan and the U.S.] 193-199 (University of Tokyo Press, 2013).

6) *See, e.g.*, Kin'yū toraburu renraku chōsei kyōgikai [Liaison Coordination Council on Financial Troubles], Kin'yūchō [Financial Services Agency] (Japan), Shitei funsō kaiketsu kikan no kujō shori tetsuzuki jisshi jōkyō (Heisei 27nen 4gatsu 1nichi – 28nen 3gatsu 31nichi) [Circumstances of Proceedings for Handling of Complaints by Specified ADR Institutions (April 1, 2015 to March 31, 2016)], available at http://www.fsa.go.jp/singi/singi_trouble/siryou/20160609/01.pdf, visited September 8, 2017 (over 8,000 cases resolved, by a total of eight specified institutions).

7) SHIHŌ SEIDO KAIKAKU SHINGIKAI [Justice System Reform Council], SHIHŌ SEIDO KAIKAKU SHINGIKAI IKENSHO – 21 SEIKI NO NIHON WO SASAERU SHIHŌ SEIDO - [Recommendations of the Justice System Reform Council – For a Justice System to Support Japan in the Twenty-First Century], June 12, 2001, *available in Japanese at* http://www.kantei.go.jp/jp/sihouseido/report-dex.html, visited September 8, 2017; *available in English at* http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html, visited September 8, 2017. Quotes are from the English version.

8) *See* Shihō seido kaikaku suishin honbu jimukyoku [Secretariat for the Headquarters for Promotion of Justice System Reform], Shushō kantei [Prime Minister's Office] (Japan), Kentōkai no kaisai ni tsuite [Regarding the establishment of expert advisory councils], Dec. 17, 2001, *available at* http://www.kantei.go.jp/jp/singi/sihou/kentoukai/kaisai.html, visited September 8, 2017 (listing ten of the eleven advisory councils, including the ADR council; an eleventh council, on intellectual property, was established separately thereafter).

9) Saibangai funsō kaiketsu tetsuzuki no riyō no sokushin ni kansuru hōritsu [ADR Promotion Act] [Act to Promote the Use of Alternative [literally, Extrajudicial] Dispute Resolution Procedures], Act No. 151 of 2004.

solving disputes ... by establishing a system for certifying ADR bodies, suspending the statute of limitations, and other measures to improve ease of use." As that statement reflects, the Act calls for certification of ADR bodies, by the Minister of Justice[10] (although previously existing bodies do not need to obtain certification); and one of the requirements for certification is that, if the ADR proceedings are conducted by someone other than a lawyer, provision must be made for obtaining advice from a lawyer with regard to matters of legal interpretation that arise in the course of the proceedings.[11] In practice, the bar has continued to insist that every ADR panel should include at least one lawyer.[12]

The ADR Promotion Act evidently has had some impact. Nearly one hundred fifty ADR bodies have now been certified.[13] Some had been in existence previously, but the list includes many new institutions. (It bears note that the traffic accident centers referred to earlier, which remain the largest extrajudicial providers of mediations, have not registered under this new system.) Quite a few of the registered bodies provide a substantial number of consultations; in fiscal year 2014, of the 133 certified institutions in operation as of that time, 27 handled over 100 consultations, led by a body for securities and financial-related matters, with nearly 10,000 consultations that year.[14] In general, however, the level of utilization for mediation remains low; over 80% of the certified ADR institutions handle fewer than ten mediation cases per year, and some have yet to handle even one concrete dispute resolution matter.[15] In fiscal year 2015, the 140 certified institutions in operation as of that time received a total of 1,045 new mediation cases and successfully resolved only 363 cases.[16]

In 2011, an important development for the ADR field in Japan occurred: the establishment of a major new ADR institution, the aforementioned Nuclear Power-Related Damage Claim Resolution Center (hereinafter, ADR Center or simply Center).[17] After first examining the genesis of that Center, this paper describes its structure and roles and discusses its performance, including the challenges it has faced and the accomplishments it has achieved. The paper closes by seeking to place the ADR Center into the context of the overall development of ADR in Japan and to assess its impact. As we will see, two major themes recur throughout this discussion: the heavy weight placed on standardization and uniformity throughout the Japanese approach to dispute resolution, and the domi-

10) *Id*., art. 5.

11) *Id*., art. 6, item 5.

12) *See* Irie, *supra* note 5, at 133-136 (quoting bar association guidelines).

13) *See* Ministry of Justice (Japan), Kaiketsu sapōto ichiran [List of Resolution Support [Institutions]], http://www.moj.go.jp/KANBOU/ADR/jigyousya/ninsyou-index.html, visited September 8, 2017 (148 institutions listed, as of September 2017; four more bodies had registered but later suspended their registration).

14) *See* Ministry of Justice (Japan), Ninshō funsō kaiketsu sābisu [Certified Dispute Resolution Services], Ninshō funsō kaiketsu jigyōsha no toriatsukai kensū (zentai) [Numbers of Cases Handled by Certified Dispute Resolution Institutions (Overall)] and Ninshō funsō kaiketsu jigyōsha no toriatsukai kensū (jigyōshabetsu) [Numbers of Cases Handled by Certified Dispute Resolution Institutions (by institution), *available at* http://www.moj.go.jp/KANBOU/ADR/images/kensu.pdf, visited September 8, 2017 (latest figures reported were for the 2015-16 fiscal year).

15) *See id*.

16) *See id*. Of the remaining cases, 5 were withdrawn by agreement of both sides, in 103 one side withdrew, in 282 one side declined to participate, and in 226 there were no prospects for successful resolution.

For summaries of the results for prior years, as well, *see id*..

17) As discussed below, this Center was established pursuant to separate legislation and is not included under the ADR Promotion Act.

nant role in the development and provision of ADR played by the Japanese bar.

Ⅰ. Genesis of the ADR Center

On March 11, 2011, three interconnected disasters struck Eastern Japan: an earthquake (or, more precisely, a series of earthquakes), a tsunami, and a meltdown at the Fukushima Daiichi (No. 1) nuclear power plant of the Tokyo Electric Power Co. (TEPCO). Of the three, the tsunami caused the most widespread devastation and loss of life, and the road to recovery remains steep. In terms of long-term ongoing impact, though, the nuclear meltdown represents an even greater concern. In the areas where radiation was most severe, approximately 160,000 residents were instructed to evacuate. Many more residents of surrounding and even fairly distant regions decided to leave on their own out of concern over the radiation. In total, it has been estimated that over one million former residents took refuge.[18] Large numbers continue to take refuge, in many cases with no concrete timetable for when, if ever, they will be able to return to their homes. Substantial areas are, in effect, dead zones, with no prospects for becoming habitable in the foreseeable future. Needless to say, many businesses within the directly affected regions were devastated. Outside the regions that suffered high radiation levels, as well, many businesses suffered losses, including damages from loss of customers or suppliers, and from what is known in Japanese as "reputational damage" (*fūhyō higai*). Many consumers, for example, have avoided fish and agricultural products from areas anywhere near the directly affected region. Even in rather distant locations, tourism has fallen because of concern over radiation.

By soon after the disaster, it had become apparent that the scope of damage from the nuclear meltdown would be extensive. Early estimates placed the likely number of victims in at least the tens of thousands – a number that would quickly swell. While direct negotiation with and lawsuits against TEPCO remained options for the victims, the scope of the damage and number of victims involved led to early recognition of the need to establish an effective mechanism for dealing with the anticipated claims, outside the judicial system: in short, an ADR center dedicated to resolution of claims arising out of the nuclear meltdown.

Given the unprecedented scope of the impact from the Fukushima meltdown and widespread recognition of the need for an efficient dispute resolution system, the process for planning and implementation moved rapidly. On May 31, 2011, somewhat over two and a half months after the disaster, then-Chief Cabinet Secretary Edano Yukio (who is himself a lawyer) noted the need for a dispute resolution mechanism and requested the relevant bodies to consider the proper scheme. Just over three weeks later, on June 23, it was formally announced that a mediation committee, with numerous mediation panels, would be established to handle claims resulting from the meltdown.

From the outset, the Japanese bar played a central role in the planning process. During the early discussions, the bar reportedly pushed for one or more "independent" ADR centers, with the term "independent" signifying that the centers would lie under the auspices of local bar associations, rather than a governmental body. That approach was quickly dropped. One reason reportedly was the desire to ensure uniformity in outcomes, and the concern that having separate ADR

18) *See* Imai Akira, *Genpatsu saigai hinansha no jittai chōsa (3ji)* [Survey of Circumstances for Those Taking Refuge from the Nuclear Disaster (3rd survey)], 402 JICHI SŌKEN 24, 25 (April 2012).

bodies in each prefecture would make it difficult to do so. Another reason was political feasibility. Such an approach would have required new legislation; but at the time control of the Upper House and Lower House of the Japanese Diet was split, and legislative gridlock might well have resulted.

Instead, an approach was adopted that did not require new legislation. Under the Act relating to Compensation for Nuclear Power-Related Damages, enacted in 1961,[19] the statutory basis for establishing an ADR center already existed. Pursuant to that Act, for each damage-causing nuclear power incident, a Nuclear Power-Related Damage Compensation Dispute Investigation Council is to be established, under the aegis of what is now the Ministry of Education, Sports, Science and Technology (MEXT). The Act further stipulates that the relevant Dispute Investigation Council has authority to promulgate compensation guidelines and conduct dispute mediation.[20] This provision had been used on only one prior occasion, the Tokaimura Nuclear Accident in 1999, which involved an accident in a uranium reprocessing facility in Ibaraki Prefecture (northeast of Tokyo). In that accident, two workers died and it has been estimated that over six hundred workers and nearby residents were exposed to excessive radiation.[21] The accident resulted in direct negotiations for damages and several lawsuits, but only two mediation cases under the authority of the Dispute Investigation Council. Still, the Act and the Tokaimura accident provided clear statutory authority and precedent for establishing a dispute resolution mechanism, and that approach was chosen for the Fukushima disaster.

By early July 2011, concrete planning had begun; and a budget appropriation on July 25 included ¥1 billion earmarked for the ADR center. In August, representatives from MEXT, the judiciary, the Ministry of Justice (MOJ), and the Japan Federation of Bar Associations (JFBA), among others, consulted on the concrete plans for the ADR Center. The bar reportedly played the leading role in the planning process, with Suzuki Isomi, a lawyer who earned an LL.M. at UC Berkeley, providing the inspiration for what turned out to be the key model. That model was based on Suzuki's experiences as a commissioner for the United Nations Compensation Commission, which was responsible for handling claims related to Iraq's 1990 invasion of Kuwait.[22] On September 1, 2011, less than six months after the disaster and just three months after Edano had issued the call for discussions, the ADR Center commenced operations and began accepting filings.

Ⅱ. Overview of the ADR Center's Structure and Procedures[23]

In terms of formal status, the ADR Center is a subsidiary body under the Nuclear Pow-

19) Genshiryoku songai no baishō ni kansuru hōritsu [Act on Compensation for Nuclear Damage], Act No. 147 of 1961.

20) *Id.*, art. 18.

21) *See, e.g.*, WISE Uranium Project, Criticality accident at Tokai nuclear fuel plant (Japan) (last updated 14 Dec 2010), available at http://www.wise-uranium.org/eftokc.html, visited September 8, 2017.

22) *See, e.g.*, Shimin kaigi [Citizens' Council], Nihon bengoshi rengōkai [Japan Federation of Bar Associations], Minutes of 31st Session (Sept. 8, 2011), *available at* http://www.nichibenren.or.jp/library/ja/judical_reform/shiminkaigi/data/shiminkaigi31.pdf, visited September 8, 2017. Information regarding the United Nations Compensation Commission is available at that Commission's Website, http://www.uncc.ch, visited September 8, 2017.

23) For an overview of the ADR Center by the initial Deputy Chief of the Secretariat, see Naoki Idei, *The Nuclear Damage Claim Dispute Resolution Center*, JCAA Newsletter, No. 28, Sept. 2012, at 1.

er-Related Damage Compensation Dispute Investigation Council (Investigation Council) established for the Fukushima Daiichi incident, which in turn lies under the auspices of MEXT. A three-member Steering Committee (*sōkatsu iinkai*), initially comprised of a lawyer and former judge as chair (Ōtani Yoshio), a lawyer (Suzuki), and an academic with expertise in civil procedure and dispute resolution (Yamamoto Kazuhiko), oversees the Center's operations. The Steering Committee's responsibilities include setting procedural standards – and, since February 2012, substantive standards – and selecting mediators for specific cases. A Secretariat, the Settlement Mediation Coordination Office (*wakai chūkai shitsu*), with a seconded judge (initially Noyama Hiroshi) as Chief and a lawyer (initially Idei Naoki) and MEXT official as Deputy Chiefs, assisted by an administrative staff that started at somewhat over 30 members and subsequently rose to over one hundred fifty,[24] handle the day-to-day operations. Initially, the Center operated from a head office in Tokyo and a single branch office in Fukushima Prefecture. In response to rising caseload and concerns over access, a second office in Tokyo and four additional branch offices in Fukushima Prefecture were established, with the Fukushima branch offices commencing operations from July 2012.

The Center's sole mission is to conduct mediations for nuclear damage compensation claims arising from the Fukushima Daiichi incident. To conduct the mediations, the Center utilizes a staff of registered mediators, all of whom are experienced lawyers serving on a part-time basis. In the early stages, the Center had about 130 registered mediators. In response to growing needs, the roster of registered mediators was expanded, reaching somewhat over 200 mediators by the end of 2012 and over 280 by the end of 2014.[25] Initially, the mediators sat in three-member panels. As the caseload grew and as standards became more settled, the Center increasingly shifted to use of sole mediators or, on occasion, two-member panels.

To assist the mediators, the Center employs a group of investigative staff members (*chōsakan*). Most of the investigative staff members are registered lawyers (primarily younger lawyers with considerably less experience than the mediators); some are qualified to become lawyers but are not registered with a local bar association.[26] The investigative staff members also work on a part-time basis; but I have been told that, in reality, by mid-2012 their duties entailed full-time work (and often more). To meet the needs for investigation (discussed further below), and to reduce the burden on the existing staff, the Center undertook a campaign to recruit more investigative staff members. The expansion in the number of investigative staff members was even more dramatic than the rise in the number of mediators. As of December 2011,

24) The number of administrative staff increased greatly as operations of the Center expanded, rising from 34 in December 2011 to 112 in December 2012 and to 161 by December 2014, of whom 28 were located in the branch offices. Thereafter, the number dropped slightly, to 151 as of December 2016. *See* Genshiryoku songai baishō funsō kaiketsu sentā [ADR Center], Katsudō jōkyō hōkokusho – Heisei 28nen ni okeru jōkyō ni tsuite (gaikyō hōkoku to sōkatsu) [Report on Circumstances of Operations – Regarding Circumstances in 2016 (Report on General Situation and Summary)], March 2017, at 3, *available at* http://www.mext.go.jp/component/a_menu/science/detail/__icsFiles/afieldfile/2017/09/05/1374251_01.pdf, visited September 8, 2017.

25) *See id.* (283 mediators as of December 2014, dropping slightly to 278 as of December 2016).

26) *See id.* (note below chart). For discussions of the role of the investigative staff members, see Yamamura Kōichi, "[Monbukagakushō]" ([MEXT]), in Okamoto Tadashi, rep. ed., KŌMUIN BENGOSHI NO SUBETE [All about Government Lawyers] 91 (LexisNexis Japan, 2016); OKAMOTO TADASHI, SAIGAI FUKKŌ HŌGAKU [An Encouragement of Disaster Recovery and Revitalization Law] 207-211 (Keiō Gijuku Daigaku Shuppankai, 2014).

there were fewer than 30; by December 2012 the number had more than tripled, to 91; and by December 2013 the number had more than doubled yet again, to 193.[27)]

On paper, the claim procedure is quite straightforward.[28)] The Center prepared rather simple claim forms (for individual and business use, respectively), which initially were available at any of the Center's offices, at various public bodies, and over the Internet, and which now is also sent by mail upon request. After filling out the form, the claimant submits it, together with required documentation, to the Center. Initially, claims were to be submitted to the Center's head office in Tokyo. Later, the Center began to accept submissions at its branch offices, as well. Notably, while the claim forms are available over the Internet, the forms and documentation must be submitted in hard copy, either in person or by mail. After a claim is submitted, Center staff members review it; if insufficiencies are discovered in the claim form itself, they may request further revisions before accepting the filing. (Insufficiencies in documentation may necessitate supplementation at the review stage, but do not prevent acceptance of the filing.)

After the filing has been accepted, the next formal step in the process is mediation, conducted either by a mediation panel or sole mediator. In practice, however, an important intermediate step is investigation of the facts by an investigative staff member. For a considerable number of cases, that investigation entails additional research, at times necessitating visits to meet with the claimant, site visits, or searches for relevant documentation. The need for investigation has been exacerbated by the relatively low level of claimants with legal representation. As discussed in more detail later, for the first several months after the Center began operations, claimants in over 80% of the claims were self-represented. Although the level of representation has risen since then, even thereafter a majority of the claims have been filed on a self-represented basis.

For each case, the mediator or mediation panel conducts one or more hearings. In addition to conducting mediation sessions in Tokyo and at the branch offices, the Center has utilized conference calls. As of my visit to the Center's head office in May 2012, claimants in distant locations participated in the conference calls by telephone; thereafter, the Center introduced videoconference facilities, enabling the claimants not only to hear but to see the other participants.

The ADR Center procedure calls for the

27) *See* ADR Center, *supra* note 24, at 3 (thereafter, the number dropped slightly, to 189 as of December 2015 and 184 as of December 2016). *See also* NIHON BENGOSHI RENGŌKAI [JAPAN FEDERATION OF BAR ASSOCIATIONS], CHŪSAI ADR TŌKEI NENPŌ (ZENKOKUBAN), 2012NENDO (HEISEI 24NENDO) BAN [ANNUAL STATISTICAL REPORT ON ADR (NATIONAL EDITION), 2012 EDITION], at 49 (Genshiryoku songai baishō funsō kaiketsu sentā ni okeru mōshitatekensū no kekka tō, taisei no genjō [Results of the number of cases filed with the Nuclear Power-Related Damage Claim Resolution Center, etc., and circumstances of its structure]). In mid-2012 I was told that, in part due to the very heavy workload, the Center found it difficult to attract sufficient numbers of qualified candidates. Given the need for investigative staff, though, the Center undertook efforts to recruit more. See Suzuki Isomi & Ono Yasuhito, *Genshiryoku songai baishō funsō kaiketsu sentā no mōshitate gaikyō to shinri no kadai* [The Circumstances of Claims at the Nuclear Power-Related Damage Claim Resolution Center and Issues for Hearings], NIBEN FRONTIER, Oct. 2012, at 24, 26; OKAMOTO, *supra* note 26, at 209-211. Evidently reflecting in part the efforts to achieve a more manageable workload by recruiting more investigative staff members, presumably coupled with the tight job market for young Japanese lawyers, the Center was able to steadily increase the number of investigative staff thereafter.

28) A summary of the procedures is set forth in Genshiryoku songai baishō funsō kaiketsu sentā [ADR Center] [Nuclear Power-Related Damage Claim Resolution Center], Wakai no chūkai rīfuretto [Leaflet regarding Mediation of Settlements], *available at* http://www.mext.go.jp/component/a_menu/science/detail/__icsFiles/afieldfile/2016/04/05/1329118_001_02.pdf, visited September 8, 2017.

mediator or panel to make a settlement proposal. As the initial Deputy Secretariat Chief Idei explained, "the mediation proceedings tend to be like a mini-arbitration aiming at giving the mediator's non-binding ruling, rather than mediation seeking compromise and agreement among the parties."[29] The proposal is voluntary, not binding; but TEPCO pledged that it would comply with settlement proposals made by the Center.[30] If both sides accept the proposal, in whole or in part, TEPCO will make a payment of the amount agreed upon. If either side rejects the proposal, in whole or in part, the claimant may make a second effort at mediation through the Center or may pursue civil litigation in the courts. Direct negotiation with TEPCO represents a third option. In another notable feature, settlements achieved through Center mediation are not exclusive; claimants may pursue litigation, negotiations, or even additional mediation proceedings at the Center, for additional claims.

While the parties are responsible for the costs of consulting lawyers or other advisors, copying materials, and the like, the Center's mediation services are free. Two other procedural aspects bear note.

First, under the original framework, the running of the statute of limitations was not suspended during processing of claims by the Center. Under the Civil Code, the standard statute of limitations for tortious acts is three years from the time when the victim comes to know of the damages and the identity of the tortfeasor or twenty years from the time of the tortious act.[31] Given the latency period, great questions surrounded the date on which victims should be deemed to know of health damages from radiation exposure; and, even for property damage, relocation expenses, loss of employment, emotional pain and suffering and other elements of damages, there was some debate over the precise date on which victims should be deemed to have known of the damages and the identity of the tortfeasor. Still, given the standard three-year statute of limitations, there were fears the Japanese courts would be overwhelmed by a flood of new claims in advance of March 11, 2014, the three-year anniversary of the disaster.

To assuage these concerns and provide victims more time to file claims, in 2013 the Diet enacted two special exception laws relating to the statute of limitations. The first of these measures, the Special Exceptions Act relating to Suspending the Statute of Limitations,[32] was aimed at claimants who had filed claims with the ADR Center. That Act provided that, in the event the proceedings before the ADR Center were terminated, if

29) *See* Idei, *supra* note 23, at 2.

30) *See id.* at 1. TEPCO has not always honored this pledge, as then-Secretariat Chief Noyama pointed out in testimony before the Investigation Council, *see* Genshiryoku songai baishō funsō shinsakai [Investigation Council], Minutes of 27th Meeting, Aug. 3, 2012, *available at* http://www.mext.go.jp/b_menu/shingi/chousa/kaihatu/016/gijiroku/1324790.htm, visited September 8, 2017, and as the Steering Committee has highlighted through the Center's Website, with concrete details from five problem cases, *see* Genshiryoku songai baishō funsō kaiketsu sentā [ADR Center], Tōkyō denryoku kabushiki kaisha no taiō ni mondai no aru jirei no kōhyō ni tsuite [Regarding the Public Disclosure of Cases in which There Have Been Problems with Tokyo Electric Power Company's Handling] [Public Disclosure of Problem Cases], *available at* http://www.mext.go.jp/a_menu/genshi_baisho/jiko_baisho/detail/1329350.htm, visited September 8, 2017.

31) MINPŌ [Civil Code], Act No. 89 of 1896, art. 724.

32) Higashi Nihon daishinsai ni kakaru genshiryoku songai baishō funsō ni tsuite no genshiryoku songai baishō shinsakai ni yoru wakai chūkai tetsuzuki no riyō ni kakawaru jikō no chūdan no tokurei ni kansuru hōritsu [Act relating to Special Exceptions for Suspension of the Statute of Limitations with respect to Utilization of Mediation Procedures by the Nuclear Power-Related Damage Investigation Council, in connection with the East Japan Disaster], Act No. 32 of 2013.

the claimant filed a lawsuit relating to the same claim within one month after receiving notification of the termination of the ADR proceedings, the date the original claim was filed with the ADR Center would be deemed to be the date of commencement for the lawsuit. The second measure, the Special Exceptions Act relating to the Statute of Limitations for Nuclear Power-Related Claims,[33] extended more broadly to all victims, regardless of whether they had filed claims with the ADR Center. For claims related to the Fukushima nuclear power plant incident, that Act extended the standard statute of limitations from three to ten years from the date on which the victim came to know of the damages and identity of the tortfeasor, and further amended the alternative approach, "twenty years from the time *of the tortious act*," to "twenty years from the time *on which the damage occurred*."[34]

A second noteworthy procedural aspect is that, in principle, the process is confidential. If the mediator(s) and the parties agree, however, proceedings may be opened to the public.[35] More significantly, even without the consent of the parties, if the Steering Committee deems appropriate, a summary of the results may be disclosed once a case has been closed.[36]

In August 2011, before the ADR Center commenced operations, the Investigation Council issued a set of Interim Guidelines regarding compensation.[37] Those Interim Guidelines extended to over sixty pages. While the details are omitted here, one especially noteworthy guideline related to emotional pain and suffering. According to the guidelines, those who had evacuated and were taking refuge pursuant to official instructions were entitled to payments, for emotional pain and suffering, of ¥100,000 per month for the first six months after the accident (or ¥120,000 per month for those forced to live in gymnasiums, etc.), with the payments cut to ¥50,000 for the subsequent six months (months seven through twelve after the accident). The guidelines left many other issues unresolved, including the proper amount of compensation for those who relocated on their own volition. However, the guidelines contained the express stipulation that failure to list an item did not necessarily mean it would be excluded from compensa-

33) The rather unwieldy full title of the Act is: Higashi Nihon daishinsai ni okeru genshiryoku hatsudensho no jiko ni yori shōjita genshiryoku songai ni kakawaru sōki katsu kakujitsu na baishō wo jitsugen suru tame no sochi oyobi tōgai genshiryoku songai ni kakawaru baishō seikyū no shōmetsu jikōtō no tokurei ni kansuru hōritsu [Special Exceptions Act for Measures to Ensure Prompt and Effective Damages with respect to Nuclear Power-Related Damages Arising from the Nuclear Power Plant Accident in the East Japan Disaster and the Statute of Limitations for Exercise of Damage Claims in connection with Said Nuclear Power-Related Damages, etc.], Act No. 97 of 2013.

34) Emphasis added.

35) Genshiryoku songai baishō funsō kaiketsu sentā [ADR Center], Wakai chūkai gyōmu kitei [Nuclear Power-Related Damage Claim Resolution Center Operating Regulations] (Aug. 26, 2011, as last revised March 28, 2012), art. 30, para. 1, *available at* http://www.mext.go.jp/a_menu/genshi_baisho/jiko_baisho/detail/1329128.htm, visited September 8, 2017.

36) *Id.*, para. 2. Pursuant to this provision, the Steering Committee must ask the views of the mediator(s) and parties prior to disclosing the summary of results, but their consent is not required.

37) Genshiryoku songai baishō funsō shinsakai [Nuclear Power-Related Damage Claim Investigation Council] [Investigation Council], Tōkyō denryoku kabushiki kaisha Fukushima daiichi, daini genshiryoku hatsudensho jiko ni yoru genshiryoku songai no han'i no hanteitō ni kansuru chūkan shishin [Interim Guidelines regarding Assessment of the Scope of Nuclear Power-Related Damage Arising from the Accident at the Fukushima Daiichi and Daini Nuclear Power Plants of Tokyo Electric Power Company and Other Matters], Aug. 5, 2011, *available at* http://www.mext.go.jp/b_menu/shingi/chousa/kaihatu/016/houkoku/1309452.htm, visited September 8, 2017. The Interim Guidelines have been supplemented on four occasions, in December 2011, March 2012, and January and December 2013. *See* OKAMOTO, *supra* note 26, at 208-209.

tion.

Ⅲ. Trends in Caseload and Processing

At the start, the number of claims filed was considerably below initial projections, with only 261 claims in total filed during the first three months.[38] Thereafter the number of claims began to rise. After reaching 355 new claims in the month of February 2012, the monthly numbers through the end of 2015 ranged between a low of 240 to a high of 549. For the period from 2012 through 2015, the annual totals were 4,542 in 2012, 4,091 in 2013, 5,217 in 2014, and 4,239 in 2015.[39] Although the pace slowed in 2016, by the end of 2016 a total of 21,404 claims had been filed with the Center.[40] Estimates of the number of potential claims also rose dramatically, however. In testimony before the Investigation Council in February 2012, then-Secretariat Chief Noyama estimated that, including potential claims by those who had voluntarily relocated, there might be as many as 1.5 million potential cases for compensation. Of those, he opined, tens of thousands, and perhaps over 100,000 cases, were likely to involve disputes (*funsōsei no aru anken*).[41]

Based on data through the end of 2016, 77.9% of the claims have been from individuals and 22.1% from business enterprises.[42] According to detailed breakdowns of the 5063 claims filed through the end of 2012, damages for emotional suffering were included in nearly 53% of all claims, costs for relocating and taking refuge in over 47%, damage to business in over 34%, loss of employment in 23%, and loss of property value in 17.5%.[43] (As these percentages reflect, many claims included multiple grounds for damages.) While the respective percentages have declined somewhat, those five categories remained the top five, in the same order, in years 2013 through 2015, with damages for emotional suffering included in over 40% of the claims in each subsequent year.[44] Many of the so-called individual claims include multiple family members or claimants. After December 2011, the ADR also began receiving more and more collective claims, covering industry groups, for example, or neighborhood groups with numerous households from the same area.[45]

38) *See* Idei, *supra* note 23, at 3.

39) *See* ADR Center, *supra* note 24, at 4.

40) *See id.*

41) *See* Genshiryoku songai baishō funsō shinsakai [Investigation Council], Minutes of 23rd Meeting, Feb. 17, 2012, *available at* http://www.mext.go.jp/b_menu/shingi/chousa/kaihatu/016/gijiroku/1317307.htm, visited December 11, 2016.

42) *See* ADR Center, *supra* note 24, at 4 (between 2011 and 2016, the annual percentage of claims filed by business enterprises ranged from a low of 19.3% to a high of 25.1%).

43) *See* Genshiryoku songai baishō funsō kaiketsu sentā [ADR Center], Katsudō jōkyō hōkokusho – Heisei 24nen ni okeru jōkyō ni tsuite – (gaikyō hōkoku to sōkatsu) [Report on Circumstances of Operations – Regarding Circumstances in 2012 – (General Circumstances and Summary)], Feb. 2013, at 11, *available at* http://www.mext.go.jp/component/a_menu/science/detail/__icsFiles/afieldfile/2017/03/17/1374250_08.pdf, visited September 8, 2017.

44) *See* ADR Center, *supra* note 24, at 10. In 2016, for the first time, the percentage of claims seeking damages for emotional suffering dropped below 40%, to 37.5%; and that category was displaced at the top by claims for damage to business, included in 37.8%, *id.*

45) According to the website for a leading team of lawyers representing claimants in nuclear power-related cases, as of January 2015, the team had filed 547 separate claims with the ADR Center and was preparing 59 more, on behalf of a total of 1,367 persons and 91 business enterprises, and 43 additional collective claims, on behalf of a total of 5,936 persons and 16 business enterprises, as well as two lawsuits on behalf of a total of 70 persons. *See* Genpatsu hisaisha bengodan [Team of Lawyers for Nuclear Power Victims], [Oshirase] Tōbengodan no junin kensū tō

One other aspect of the claims deserves special note: the high level of self-represented claimants.[46] This pattern was especially pronounced in the early days of the ADR Center. For claims filed prior to February 2012, over 81% were self-represented.[47] Thereafter, the level of representation by lawyers steadily increased, reaching 33% in 2012 and 2013, 39.3% in 2014, 41.1% in 2015, and 43.2% in 2016.[48] It bears note, moreover, that self-representation has been most common for claims involving single claimants, with the level of representation higher for claims involving multiple claimants. When viewed in terms of number of claimants, rather than number of claims, the level of representation stood at 49% for 2012 and 81% for 2013.[49]

We next turn to statistics on the processing of claims. When the ADR Center was established, it was announced that the anticipated time required for resolution would be three months from the date of filing. Initially, the processing was considerably slower than that estimate. By the end of December 2011, mediation panels had held discussions regarding all 118 cases filed in September and October, but oral hearings had been held for only thirty-eight cases, and only six cases had been completed (of which only two were settled, with the other four withdrawn). By the end of January 2012 only eight more cases had been completed (of which only two were settled, with the other six either withdrawn or discontinued).[50]

As with the number of claims, here too the pattern changed. By March 2012, the number of claims completed had begun to rise, with forty-nine cases completed that month and ninety-one in April. From May 2012 on, well over one hundred claims were closed each month,[51] and the number continued to rise thereafter, reaching over 300 closed cases per month by early 2013.[52] Despite this increase in the pace of processing, as the number of new claims shot up, the backlog of cases initially rose. By December 2012, the Center faced a backlog of over 3,200 claims.[53] That said, as the pace of processing rose, the rate of widening in the gap between new claims and completed claims gradually eased; and by early 2013, in some months the number of closed cases began to exceed the number of newly filed cases. By the end of 2015, the backlog was down to 2,746 cases;[54] and in 2016 the pace of processing continued to exceed the number of

ni tsuite (Heisei 27nen 1gatsu 22nichi genzai) [[Notice] Regarding the number of cases being handled by this team of lawyers, etc. (as of Jan. 22, 2015)], *available at* http://ghb-law.net/?p=593, visited September 8, 2017.

46) *See* Suzuki & Ono, *supra* note 27, at 24, 25. For claims up to ¥1.4 million, representation by shihō shoshi is also permitted, but lawyers reportedly have handled almost all of the representation to date.

47) *Id.*

48) *See* ADR Center, *supra* note 24, at 4.

49) *See* Genshiryoku songai baishō funsō kaiketsu sentā [ADR Center], Katsudō jōkyō hōkokusho – Heisei 25nen ni okeru jōkyō ni tsuite (gaikyō hōkoku to sōkatsu) [Report on Circumstances of Operations – Regarding Circumstances in 2013 (Report on General Situation and Summary)], February 2014, at 3, *available at* http://www.mext.go.jp/component/a_menu/science/detail/__icsFiles/afieldfile/2017/03/17/1374250_06.pdf, visited September 8, 2017 (comparable statistics not included in the annual reports for 2014 and thereafter).

50) *See* Suzuki & Ono, *supra* note 27, at 25.

51) *Id.*

52) Suzuki Isomi, Genshiryoku songai baishō funsō kaiketsu sentā no katsudō jōkyō – Zenkai (sakunen9gatsu) hōkoku wo fumaete no genjō to kadai – [Circumstances of Operations of the Nuclear Power-Related Damage Claim Resolution Cenger – Current Circumstances and Issues, with Reference to the Prior Report (of Sept. 2012) –], PowerPoint presentation presented at the Annual Meeting of the Japanese Association for Sociology of Law, May 11, 2013.

53) *See* ADR Center, *supra* note 24, at 12.

54) *See id.*

new claims, with the number of pending cases down to 2,137 by the end of 2016.[55] Through 2016, the average time for resolution continued to be about six months.[56]

In another notable development, of the closed cases, the percentage of claims that have been settled fully has continued to rise. Through April 2012, of the closed cases, the number of cases withdrawn or discontinued was considerably higher than the number settled; in May 2012, the number of settled cases exceeded the number withdrawn or discontinued, but just barely: 64 to 63. Since then, however, the proportion of fully settled cases has risen substantially. Of the 1558 claims concluded between June and December 2012, over 65% were settled fully;[57] and of the more than 17,750 claims closed between the start of 2013 and the end of 2016, over 83% were settled fully.[58]

Ⅳ. Challenges

As the above summary reflects, the ADR Center has faced numerous challenges. One set of concerns related to the low level of claims submitted during the Center's first several months. Numerous reasons have been suggested for the initial low utilization. These include lack of knowledge regarding mediation and the Center; burdensome claim requirements; lack of access to required documentation; the location of the hearing panels (which, initially, were limited to Tokyo or one branch office in Fukushima Prefecture); concern that, notwithstanding the announced target of a three-month resolution period, the mediation process would be time consuming and subject to delays; and lack of access to advice (as reflected in the high level of self-representation, especially during the early months).

Another set of reasons suggested for the low utilization relates to concern over the prospects. As mentioned earlier, the Center is situated as a subsidiary body under the Investigation Council. There was widespread anger at how low some of the standards for compensation were in the Interim Guidelines announced by that Council, and it was widely assumed the Center would simply follow those standards in its settlement proposals. One focus for anger was the standard for damages for emotional suffering of evacuees. Many regarded the figure of ¥100,000 or ¥120,000 per month for the first six months for those who had been instructed to evacuate as too low even as a starting point, with some teams of lawyers reportedly demanding that the base should be ¥350,000 per month[59]; and evacuees were especially upset at the stipulation that the damages for emotional suffering would be cut to ¥50,000 per month after the first six months and that those who had taken refuge on their own volition were not included. Although the Interim Guidelines contained the stipulation that failure to list an item did not necessarily mean it would be excluded from compensation, TEPCO representatives reportedly took a very hard line, arguing forcefully that any items not specifically identified in the guidelines were outside the scope of compensation, and insisting on very narrow interpreta-

55) *See id.*

56) *See id.* at 14. This is about the same level as in 2013. *See* testimony of then-Secretariat Chief Noyama, Investigation Council, Minutes of 36th Meeting, Oct. 25, 2013, *available at* http://www.mext.go.jp/b_menu/shingi/chousa/kaihatu/016/gijiroku/1341578.htm, visited September 8, 2017.

57) Percentage calculated from figures reported in Suzuki, *supra* note 52.

58) Percentage calculated from figures contained in ADR Center, *supra* note 24, at 12.

59) *See* testimony of then-Secretariat Chief Noyama, Investigation Council, Minutes of 23rd Meeting, Feb. 17, 2012, *supra* note 41.

tions even of items that were expressly included. Furthermore, when potential claimants contacted TEPCO, TEPCO representatives reportedly painted a very pessimistic picture of prospects for mediation by the ADR Center. For all of these reasons, many potential claimants evidently felt mediation through the Center was unlikely to yield acceptable settlements.

The slow resolution of claims, especially during the first half-year of the Center's existence, constituted another concern. In testimony before the Investigation Council in February 2012, the Chief of the ADR Center Secretariat discussed in considerable detail various factors that had led to the slow processing;[60] and in later writings and interviews Center officials highlighted other relevant factors.[61] For the first few months, one factor was simply inevitable startup delays. Another factor was the difficulty in coordinating schedules of parties, representatives (if involved), mediators and investigators. While coordination of schedules undoubtedly continues to be an issue, it was even more difficult in the early months, when all mediations were handled by three-member panels.

Another aspect of coordination was at least equally time-consuming: coordination of results. Arguably, one of the benefits of mediation is the flexibility to adjust awards depending on the individual circumstances of each case. The Center was deeply concerned, however, that if similarly situated claimants received different awards, it would lead to dissatisfaction and might make it more difficult to achieve settlements in the future. Accordingly, the Center was acutely conscious of the likely precedential impact of settlements. One reason for utilizing three-member panels during the first few months was to help ensure attention to all relevant considerations. Even with the three-member panels, though, the Center undertook careful review and coordination of settlement proposals across panels. Indeed, this coordination continued beyond the initial period. At a meeting in late July 2012, mediators reported that ensuring consistency in mediation results remained an important concern, one that frequently entailed considerable research by staff members into whether other mediators had faced similar issues and, if so, how they had resolved them. That task, they noted, was made more challenging by the fact that, at least as of that time, the ADR Center's files were maintained in paper format only, not digital.[62]

Insufficient information and documentation posed another set of difficulties for processing claims. In an effort to reduce the burden on potential claimants, soon after the ADR Center commenced operations it introduced the option of using simplified claim forms. Many of the claim forms submitted contained only cursory information, though, with little or no supporting documentation. This pattern was exacerbated by the high percentage of self-represented claimants. In many cases, the lack of sufficient information necessitated extensive investigation of the facts by investigative staff members of the Center.

The impact of the relatively limited amount of information and documentation available may have been especially great given the setting. One of the Center Commissioners observed to me that the mediators, all of whom are experienced lawyers, are deeply accustomed to Japanese civil litigation procedure, which often entails multiple hearings over several months, with the court at times ex-

60) *Id.*

61) *See, e.g.*, Suzuki & Ono, *supra* note 27; Idei, supra note 23.

62) Discussions at Jissen hōkyōiku kenkyūkai [Study Group on Practical Legal Education], Sophia University, Tokyo, July 26, 2012.

amining even rather minute factual details unlikely to affect the ultimate outcome of the case. Given their background, he commented, many mediators felt the urge to explore the facts in great detail and were reluctant to streamline the fact finding process.[63]

The high level of self-representation – and, conversely, the low level of represented claimants – relates to several factors. Presumably, lack of familiarity with lawyers and the services they provide is one factor. Some observers would also cite a cultural predisposition to avoid lawyers, with such assertions frequently accompanied by claims that the resistance to getting involved with lawyers is especially great in the Tohoku region (where the disaster was centered) and other rural areas. Access is another major issue. As of March 2014, Japan had slightly over 35,000 lawyers in total (for a nation of 128 million people).[64] Of that total, only 176 lawyers were registered in all of Fukushima Prefecture (which, as of 2010, prior to the disaster, had a total population of over 2 million).[65] As a formal matter, lawyers from outside Fukushima Prefecture are permitted to practice in that prefecture and to represent clients located there; and the largest team of lawyers representing claimants against TEPCO is centered in Tokyo and comprised of some three hundred lawyers from the Tokyo area.[66] Nevertheless, quite apart from the distance and other logistical matters, unwritten norms of comity and deference to the local bar reportedly pose barriers to representation of claimants by lawyers from outside the prefecture.

Another factor influencing representation levels is the willingness and ability of the claimants to pay for legal representation. Many lawyers, with the encouragement of the JFBA, have provided free or low-cost consultations to victims of the disaster. Understandably, though, lawyers typically do not view it as their responsibility to take on representation of claimants in litigation or the ADR Center proceedings for free. Japan does not have an established tradition of contingent fee litigation, however, and resistance to contingent fee arrangements remains strong among lawyers and, reportedly, potential clients as well.[67] One vehicle that might have enabled claimants without substantial financial resources to cover the costs of representation is a civil legal aid system administered by the Japan Legal Support Center. For those meeting the eligibility requirements, in addition to free legal consultations that Center (known in Japanese as *Hō terasu*) provides interest-free loans to cover lawyers' fees and other costs of representation. By virtue of having received relief payments from the government, though, most victims of the disaster would have been unable to satisfy the eligibility requirements; and many of those who evacuated after the nuclear meltdown

63) Interview with Yamamoto Kazuhiko, ADR Center Commissioner, May 28, 2012.

64) *See* NIHON BENGOSHI RENGŌKAI [Japan Federation of Bar Associations], BENGOSHI HAKUSHO 2015NENBAN [White Paper on Lawyers, 2015 edition], 42.

65) Numbers calculated from list of registered lawyers maintained by the Bar Association for Fukushima Prefecture, *available at* http://www.f-bengoshikai.com/guide/580.html, visited April 6, 2014.

66) *See* Maruyama Teruhisa, *Mōshitate dairinin kara mita genshiryoku songai baishō funsō kaiketsu sentā no genjō to tenbō* [The Current Situation and Prospects for the Nuclear Power-Related Damage Compensation Dispute Resolution Center, as Viewed by a Representative of Claims], JIYŪ TO SEIGI, vol. 63, no. 7, July 2012, at 68, 69.

67) A member of the leading team of lawyers representing claimants told me of the following episode, which reflects the difficulty of trying to achieve acceptance of the contingent fee approach. In one proceeding before the Center, the claimants had agreed to pay the team of lawyers 5% of the amount of compensation determined through the mediation. However, after the Steering Committee issued a General Standard calling for TEPCO to pay 3%, in addition to the compensation amount, for lawyers' fees (discussed in text at notes 70-71 *infra*), the claimants balked at paying a further 2%.

had assets that they left behind, even though they could not make use of those assets. Furthermore, victims who had lost family members, homes and livelihoods found it offensive to have to answer questions such as "How many members are there in your family?" and "What is your income?"[68] So, during the early stages after the ADR Center commenced operations, this legal aid system went largely unused.

Among the many other factors that slowed the processing of claims, one bears special mention: TEPCO's attitude. Those involved with the Center cite numerous examples of resistance and delaying tactics by TEPCO and its representatives. These include resistance to compensating for items not clearly specified in the Interim Guidelines (such as compensation for lost value of property, damage to tourism outside the area or time period specified in the Guidelines, compensation for movables or real property, etc.); resistance to accepting any increase in the compensation amounts set forth in the Guidelines; steadfast insistence on their own narrow interpretation of ambiguities in the Guidelines; and deferring responses to factual or legal assertions of the claimants.

V. Achievements

Despite all the challenges, the number of claims has been climbing steadily, the pace of processing has improved greatly, and, by the end of 2016, the Center had fully resolved nearly 16,000 claims. What happened?

For both the number of claims and speed of processing, part of the explanation lies in the cumulative impact of several seemingly modest developments and refinements. In part as a result of outreach efforts, knowledge and understanding of the Center and its services increased. The streamlined claim form facilitated filing of claims; and while that may have had the effect of imposing added burdens on the Center's investigative staff members, the availability of their assistance made it easier to bring claims. Establishing branch offices made access easier. (That said, the four additional branch offices in Fukushima Prefecture did not open until July 2012, so they played no role in the earlier increase in claims.) And, presumably, the increase in the number of claims successfully settled helped foster awareness of the potential for resolving cases through Center mediation.

In terms of efficiency in processing cases, one important factor is simply the accumulation of experience by the Center's administrative staff, the mediators, and the investigative staff members. Procedural steps to improve efficiency included early coordination of schedules and the use of conference calls and videoconferencing, which enabled claimants to participate in hearings from distant locations and, conversely, allowed mediators to hold hearings without having to travel long distances. The opening of the branch offices in Fukushima Prefecture also helped ease the distance factor. The utilization of sole mediators, rather than three-member panels, naturally increased the Center's capacity to process cases. Moreover, while there are still exceptions, in most cases only a single hearing is now held, rather than multiple sessions.

As one strategy to avoid drawn out series of hearings, the Center has promoted the use of partial settlements and interim payments. Moreover, as discussed in Part VI below, a major factor enabling the shift to processing in a single hearing, as well as the shift to sole mediators, lies in standard setting by the

68) *See* Michi Ayumi, *Minji hōritsu enjo no genjō to kadai* [The Current Situation of and Challenges for Civil Legal Aid], NIBEN FRONTIER, Nov. 2012, at 28, 31.

Center. Another factor enabling the expedited hearings, however, appears to be a shift in mediator mindset, away from the urge to explore all facts and toward a greater willingness to dispense with detailed fact finding. In testimony before the Investigation Council in August 2012, then-Secretariat Chief Noyama highlighted this shift, stating: "In a word, simplification of hearings amounts to … quickly finding a rough estimate of about the amount of damages that would be awarded in the event of a court judgment, and quickly proposing that amount. The mindset of rapidly making a rough estimate, without getting caught up trying to find out details that aren't needed for the rough estimate, that's what simplification of hearings is."[69)]

It goes without saying that the doubling in the number of mediators, from about one hundred thirty to about two hundred eighty, and the even more dramatic rise in the number of investigative staff members, from under thirty to nearly two hundred, greatly raised the Center's capacity to process claims. The very heavy burdens placed on administrative staff members were eased in another important way, as well: the increase in the percentage of claimants represented by lawyers. In this connection, two developments bear especial note. In mid-March 2012, the ADR Center promulgated a General Standard[70)] pursuant to which TEPCO is responsible for paying lawyers' fees in addition to the compensation amount, with the standard for the lawyers' fees in the typical case being 3% of the compensation amount.[71)] Later that same month, the Diet passed the Special Act for Support for Victims of the East Japan Disaster,[72)] which exempts victims of the disaster from having to establish that they meet the financial eligibility standards for legal aid from the Japan Legal Support Center. This enabled the disaster victims to obtain free legal consultations as well as loans to cover the costs of legal representation and other costs for litigation or ADR proceedings, repayable on an interest-free basis at the rate of ¥5,000 to ¥10,000 per month, without regard to the loan recipient's financial need.

VI. Standard Setting by the ADR Center

A major reason for the rise in both new claims and resolved claims almost certainly lies in one set of developments: standard setting. As mentioned above, over the first few months of operation, the ADR Center undertook efforts to promote uniformity by coordinating the handling of common issues through cross-panel consultations. In February 2012 the Center began taking a more proactive approach. That month, the Steering Committee issued four so-called General Standards (*sōkatsu kijun*), designed as standards to be referred to by the mediators in applying the Interim Guidelines to concrete mediation cases. Later that year, the Steering Committee issued ten more General Standards (two each in March, April, July and August, and one each in November and December). Each of the General Standards was accompanied by an explanation of the underlying reasoning; the Standards, together with

69) *See* Investigation Council, Minutes of 27th Meeting, Aug. 3, 2012, *supra* note 30.

70) For a discussion of the General Standards, see Part VI *infra*.

71) Sōkatsu kijun [General Standard (regarding lawyers' fees)], reprinted in Suzuki & Ono, *supra* note 27, at 32. The percentage may be reduced if the amount of damages is very high or the mediator or mediators determine that the lawyer(s) made little contribution to the proper and prompt resolution of the case, or may be increased if the mediator or mediators determine the matter involved particularly difficult issues.

72) Higashi Nihon daishinsai hisaisha enjo tokurei hō [Special Act for Support for Victims of the East Japan Disaster], Act No. 6 of 2012.

explanation, run from one to four pages each.[73)]

The ADR Center's official role is to conduct dispute mediation under the auspices of the Investigation Council. As such, mediation by the Center in principle is governed by the standards contained in the Interim Guidelines issued by the Investigation Council. Accordingly, as a matter of theory the General Standards constitute interpretations of ambiguous items in the Interim Guidelines or supplementary standards for items not addressed in those Guidelines.

In some respects, however, the General Standards not only supplement but in effect override some of the more controversial elements of the Interim Guidelines. This is especially apparent from the first General Standard issued, which deals with compensation, for months seven through twelve after the accident, for those from the designated evacuation zones who were forced to take refuge. As mentioned earlier, pursuant to the Interim Guidelines, the damages for emotional suffering for refugees from the designated evacuation zones were set at ¥100,000 or ¥120,000 per month for the first six months, but were to be reduced to ¥50,000 per month for months seven through twelve. That guideline had led to considerable anger among the refugees. Without directly contradicting the guideline, the first General Standard issued by the ADR Center in effect maintained the existing ¥100,000 or ¥120,000 per month figure even after the first six months; the Steering Committee justified that approach by pointing to the increased stress from the long period of relocation and the uncertainty regarding when, if ever, the refugees would be able to return to their own homes (circumstances which, according to the Steering Committee's rationalization, had changed from the time the Interim Guidelines were issued).

As noted above, another General Standard, issued in March 2012, provides for payment by TEPCO of lawyers' fees in addition to the compensation amount (albeit at the rather modest level of 3% of the award). Other General Standards deal with factors justifying higher damages for emotional suffering (such as for those with chronic diseases, pregnant women or those caring for infants, or those forced to relocate on multiple occasions); damages for those who took refuge on their own volition; the timing of compensation for property damage; damage to businesses catering to foreign tourists; damage to tourism in neighboring prefectures (including businesses catering to Japanese tourists); methods for calculation of lost revenue; treatment of revenue or wages obtained by those taking refuge (in principle not offset from compensation amounts); and other matters.

General Standard 9, issued on July 5, 2012, clearly reflects the Center's anger at TEPCO recalcitrance and delaying tactics. That Standard authorizes imposition of additional damages, calculated at the interest rate of 5% and computed from October 1, 2011, for cases in which TEPCO improperly delayed the proceedings. As concrete examples of such improper delaying attitudes, the accompanying explanation cited "failing to comply with request for explanation made by mediator or investigative staff member or not observing the deadline for response, not observing the deadline for responding to a settlement proposal, raising trivial arguments such as the absence of specific reference in the Interim Guidelines …, or ignoring established media-

73) The General Standards, together with the explanatory statements, are available through a link on the ADR Center Homepage: Sōkatsu kijun ni tsuite [Regarding the General Standards], http://www.mext.go.jp/a_menu/genshi_baisho/jiko_baisho/detail/1329129.htm, visited September 8, 2017.

tion precedent."[74] While General Standard 9 carries the weight of financial sanctions, the Steering Committee conveyed its displeasure with TEPCO even more forcefully in a Statement of Views issued on the same date, announcing the Steering Committee's decision to publicly disclose details of cases in which TEPCO's behavior in the mediation proceedings had been especially objectionable.[75]

These steps appear to have had a rapid impact; in testimony before the Investigation Council in early August 2012, then-Secretariat Chief Noyama reported that from the spring of 2012 through early July, just about every week he had received reports of some problem with how TEPCO was handling cases, but those reports had stopped right after the Steering Committee went public with its criticisms. Noyama added, though, that he remained very concerned TEPCO still might be treating victims who were negotiating directly with the company in a highhanded manner.[76]

The reference to established mediation precedent in General Standard 9 reflects another approach to standard setting adopted by the ADR Center: announcement of precedents. As mentioned earlier, under the Center's Operating Regulations, the Steering Committee has authority to disclose summaries of mediation results once cases have been closed; and the Steering Committee has not been shy about using this authority. In a statement issued on April 27, 2012, the Steering Committee set forth a basic policy favoring disclosure.[77] Results would not be disclosed if, after hearing the views of the parties, the Steering Committee concluded that either there was no necessity for disclosure or that disclosure would be inappropriate. Otherwise, however, the Steering Committee expressed its intention to disclose, via the Center's Web page, the settlement agreements and the mediators' reasons for the settlement proposals, for completed cases in which settlements were reached, and the mediators' proposals and their reasons for those proposals, for completed cases in which settlements were not reached (in all instances with the names of the claimants redacted, but with concrete compensation amounts included).

While cautioning that the precedents relate to specific factual situations so, even if the precedents refer to what appear to be generally applicable standards, those standards may not be relevant for other cases, the policy statement expresses the Steering Committee's expectation that broad dissemination of the results of mediations conducted by the Center will contribute to prompt and appropriate compensation of victims by TEPCO. As of September 2017, the Center has released, via its Web page, the relatively detailed reasons for the settlement proposals in thirty-eight cases and the settlement agree-

74) Genshiryoku songai baishō funsō kaiketsu sentā [ADR Center], Sōkatsu kijun (9) (Kagaisha ni yoru shinri no futō chien to chiensongaikin ni tsuite) [General Standard (9) (Regarding Improper Delay of Proceedings by the Wrongdoer [*kagaisha*])], *available at* http://www.mext.go.jp/component/a_menu/science/anzenkakuho/micro_detail/__icsFiles/afieldfile/2012/07/06/1316595_14.pdf, visited September 8, 2017.

75) Sōkatsu iinkai [Steering Committee] Genshiryoku songai baishō funsō kaiketsu sentā [ADR Center], Tōkyō denryoku no taiō ni mondai no aru jirei no kōhyō ni atatte no sōkatsu iinkai shoken [Statement of Views of the Steering Committee concerning Public Disclosure of Cases in which There Have Been Problems with TEPCO's Handling], July 5, 2012, *available at* http://www.mext.go.jp/component/a_menu/science/anzenkakuho/micro_detail/__icsFiles/afieldfile/2012/07/06/1323270_1.pdf, visited September 8, 2017.

76) *See* Investigation Council, Minutes of 27th Meeting, Aug. 3, 2012, *supra* note 30.

77) Sōkatsu iinkai [Steering Committee], Genshiryoku songai baishō funsō kaiketsu sentā [ADR Center], Wakai jirei no kōhyō ni tsuite [Regarding Disclosure of Settlement Precedents], April 27, 2012, *available at* http://www.mext.go.jp/component/a_menu/science/anzenkakuho/micro_detail/__icsFiles/afieldfile/2012/04/27/1320291_1_1.pdf, visited September 8, 2017.

ments in over 1240 cases.[78] In accordance with its decision to publicly shame TEPCO by disclosing cases in which the company's behavior has been especially problematic, the Center also has released summaries and relevant documents from five other cases.[79]

In connection with collective claims filed on behalf of groups of similarly situated claimants, the Center has adopted a more targeted approach to the setting of standards. In that context, the Center has utilized what it refers to as the "champion method" of selecting a few representative cases for initial processing, with the aim of setting benchmarks that will expedite resolution of the rest of the claims, ideally by direct settlement without the need for further action by Center mediators.[80]

Thus, the ADR Center has pursued a wide range of efforts aimed at standardizing results. It also has undertaken considerable efforts to disseminate information about those standards. The Center has publicized the General Standards and the precedents on its Web page. In addition, representatives of the Center have introduced the General Standards and precedents in various fora, including publications aimed at the legal profession.[81]

One way in which the establishment of the General Standards and the publication of those Standards and the precedents have led to a rise in new claims is simply by promoting knowledge about the substantive standards being utilized by the ADR Center. An even more important reason for the rise in claims lies in the content of the Standards and precedents. Many claimants reportedly first contacted TEPCO directly to seek compensation but were dissatisfied with the settlement offers they received. Upon seeing that the standards being utilized by the Center were more favorable than the offers they had received from TEPCO (and more favorable than what they might have expected based on what they had heard about the Interim Guidelines), many claimants evidently decided to file claims with the Center.

The standard setting also has facilitated processing of claims. As the standards have become more and more clear and concrete, and as standards and precedents have become available not only for common fact situations, but for more and more of the unusual or problematic fact situations, the task for the mediators increasingly has shifted from having to consider policy implications and make judgment calls to applying fixed standards in a relatively mechanical fashion. That shift is a key reason the Center has been able to move from three-mediator panels to sole mediators and to dispose of cases with only a single hearing. Furthermore, as the standards have become clearer and the precedents more firmly established, the claimants and TEPCO presumably have become more willing to abide by the mediators' settlement proposals.

78) *See* Genshiryoku songai baishō funsō kaiketsu sentā [ADR Center], Wakai jitsurei no kōkai ni tsuite [Regarding Disclosure of Actual Settlement Precedents], *available at* http://www.mext.go.jp/a_menu/genshi_baisho/jiko_baisho/detail/1329134.htm, visited September 8, 2017.

79) *See* Public Disclosure of Problem Cases, *supra* note 30.

80) *See, e.g.*, Idei, *supra* note 23, at 3.

81) *See, e.g.*, Suzuki & Ono, *supra* note 27; Suzuki Isomi, *Genshiryoku songai baishō no jinsoku/tekisei na jitsugen wo mezashite* [Aiming at the Realization of Prompt and Appropriate Compensation for Nuclear Power-Related Damage], JIYŪ TO SEIGI, vol. 63, no. 7, July 2012, at 30; Idei Naoki, *Genpatsu jiko songai baishō seikyū to ADR no katsuyō* [Claims for Damages for Nuclear Accidents and Utilization of ADR], JIYŪ TO SEIGI, vol. 63, no. 7, July 2012, at 72.

Ⅶ. Reflections on the ADR Center's Basic Philosophy and Broader Implications

A. Standardization and Uniformity as Tool for Ultimate Goal: Resolution by Direct Negotiation

While the standard setting has helped facilitate the processing of claims, the ADR Center's ultimate goal is not simply to promote efficiency in handling mediations. The ultimate aim is to establish such clear and widely accepted standards that the victims and TEPCO will be able to resolve the vast majority of matters through direct negotiation, without necessitating the involvement of the ADR Center or the judiciary. As the concluding section of the ADR Center's January 2012 Report on the Circumstances of Operations stated, while continuous efforts would be needed to develop and implement a dispute resolution model suitable for meeting the special circumstances presented, the Center's goals were to "lead the way to appropriate and prompt resolution of claims, through accumulation of settlement precedents and preparation and public announcement of general standards," and to "establish an environment that promotes resolution of compensation matters by direct negotiation between victims and TEPCO, in accordance with the general standards and settlement precedents."[82] Then-Deputy Secretariat Chief Idei put the goal in more concrete terms: "Ideally," he wrote, "80 to 90% of the claims will be settled through direct negotiation. … From a broad and long-term perspective, what is expected of the Center is to set the standards of settlement …. Then, the victims and TEPCO [should] make efforts to settle through direct negotiation applying the standards adopted by the Center."[83]

With respect to this basic philosophy of seeking to promote direct negotiation through the establishment and dissemination of clear and uniform standards, one can point to a prominent model within Japan: the scheme for resolving traffic accident disputes.[84] The parallels between the two situations are striking.

In the early 1960s, the trend toward motorization led to a rash of accidents, and the rising numbers of traffic accident cases threatened to overwhelm the courts. The judiciary led the efforts to head off the looming crisis. After initially accumulating judicial precedents, judges in a special traffic accident division of the Tokyo District Court took the lead in developing heavily standardized procedures for handling cases, including the creation of clear and detailed substantive standards for calculating comparative fault and damages. In doing so, their immediate objective was to streamline the handling of traffic accident cases by the courts. Their ultimate objective, however, was to keep most of those cases from ever reaching the courts, by facilitating out-of-court resolution of disputes, ideally through direct negotiations by the parties. To achieve that result, the judges recognized the importance of disseminating the standards broadly and gaining widespread acceptance for them. The judges themselves played a central role in early efforts to that end, efforts that included assuming full editorial responsibility for special issues of law journals devoted to publicizing the fault and compensation standards. In later years, the Nichibenren Traffic Accident Consultation Center (Nichibenren Center)

82) *See* ADR Center, Report on Circumstances of Operations in Initial Period, *supra* note 43, at 17.

83) Idei, *supra* note 23, at 4.

84) For more detailed discussions of the traffic accident dispute resolution process and its historical background, see Foote, *supra* note 3; Tanase, *supra* note 3; and Ramseyer & Nakazato, *supra* note 3.

took on the tasks of maintaining and updating the standards and publicizing them; and that Center (which depends heavily on support from the government and JFBA) and The Japan Center for Settlement of Traffic Accident Disputes (Japan Traffic Accident Center) (which depends heavily on support from the insurance industry) provide free consultations and, when needed, mediation services.

The traffic accident standards have been criticized on various grounds, including charges that the compensation standards are too low and that, by utilizing actuarial statistics, those standards treat female victims worse than male victims.[85] There is broad agreement, however, that the scheme has proven highly effective for resolving traffic accident cases without necessitating heavy use of the courts or lawyers.

Two other features of the traffic accident dispute resolution system bear note. The first is the heavy emphasis on uniformity. The second relates to the role played by the organized bar. While the judiciary took the lead in creating and disseminating the standards, the Japanese bar cooperated heavily in the process. Indeed, the Nichibenren Traffic Accident Consultation Center, which took over the maintenance and publication of the standards, was created under the auspices of the JFBA (known as Nichibenren in Japanese). It is tempting to say that the willingness of the bar to cooperate in the establishment and maintenance of a system that reduces the need for lawyers and litigation reflects the relatively non-adversarial nature of Japanese society. A more nuanced explanation might be that, as of the 1960s, when there were fewer than 8,000 lawyers in all of Japan, traffic accident litigation did not represent a major bread-and-butter issue, at least for the established members of the bar who cooperated in setting up the system.[86]

As this description reflects, the ADR Center bears many similarities to the traffic accident context. In both cases, Japan faced a huge influx of disputes, which threatened to overwhelm the capacity of the judicial system. In both, the applicable legal standards are relatively clear (although, at least until TEPCO's admission of fault in October 2012,[87] issues relating to the impact of the natural disaster and *force majeure* complicated the Fukushima situation). In contrast, in both situations the specific fact patterns of individual cases vary widely. (That said, as compared to the extremely wide range of traffic accident scenarios, the fact patterns for victims of the nuclear disaster are likely to fall into a somewhat narrower typology.)

In another parallel, while the individual

85) *See, e.g.*, Nozaki Ayako, *Nihongata "shihō sekkyokushugi" to genjō chūritsusei – isshitsu rieki no danjokan kakusa no mondai wo sozai to shite* [Japanese-Style "Judicial Activism" and Status Quo Neutrality – As Seen in the Issue of Gender Disparity in Lost Earnings], *in* HŌ NO RINKAI [I], HŌTEKI SHIKŌ NO SAITEII [The Borders of Law [1], A Reorientation of Legal Thinking] (Inoue Tatsuo, Shimazu Itaru & Matsuura Yoshiharu eds., University of Tokyo Press, 1999), at 75.

86) Recent events lend an ironic touch to this discussion. Over the past fifteen years, the number of lawyers in Japan has doubled. Perhaps not so coincidentally, in recent years some lawyers have begun to focus on traffic accidents as a potential business opportunity. This development has not gone unnoticed by the judiciary. Judges charged with helping to promote prompt resolution of litigation have expressed concern over a perceived rise in the desire for court judgments in traffic accident cases and in cases that cannot easily be resolved by reference to the compensation standards. *See* Saibansho [Courts in Japan], Saiban no jinsokuka ni kakawaru kenshō ni kansuru hōkokusho (Dai6kai) (Heisei 27nen 7gatsu 10nichi kōhyō) [Report regarding investigation of efforts to speed up trials (No. 6) (announced on July 10, 2015)], Gaiyō [Overview] 22, *available at* http://www.courts.go.jp/vcms_lf/hokoku_06_gaiyou.pdf, visited September 8, 2017.

87) *See, e.g.*, *TEPCO admits fault in Fukushima nuclear disaster*, THE MAINICHI (Internet edition), Oct. 13, 2012: http://mainichi.jp/english/english/newsselect/news/20121013p2a00m0na007000c.html, visited Nov. 26, 2012.

tortfeasors in the traffic accident context – the drivers – are extremely numerous, in most cases the real parties in interest are the insurance companies, which are relatively few in number. Provided the insurance companies accept the standards that have been set, resolution of claims rests primarily on attaining agreement by the victim; and, to the extent the victim is convinced the standards are definite and he/she is being treated in the same way as other similarly situated victims (and to the extent the victim's representative conveys that same message), obtaining the victim's consent is likely to be relatively easy in the Japanese context. In the Fukushima case, TEPCO is the only respondent. Thus, provided TEPCO accepts the standards that have been set, resolution of disputes rests primarily on obtaining agreement by the claimants; and similar dynamics presumably would apply.

To my mind the most important similarity between the nuclear disaster and traffic accident context lies in the basic philosophy of the two schemes. By developing detailed and uniform standards through the accumulation of precedents and creation of written standards, and by achieving broad public dissemination of those standards, both schemes ultimately seek to channel the vast majority of cases out of the courts and even out of extrajudicial ADR processes, by providing a clear framework for settlement by direct negotiation. These similarities, together with the steady progress in the pace of settling claims, suggest reason for optimism regarding the potential of the ADR Center to foster resolution of disputes arising out of the nuclear disaster through direct negotiation, with no need for involvement even by the Center.

There are caution flags, however. One caveat is simply that it took the judiciary several years to develop concrete standards and typologies to cover the vast array of diverse fact situations in the traffic accident context. Similarly, in the nuclear disaster context, it has taken the ADR Center a considerable period of time to hone the relevant standards.

A significant difference between the two situations relates to fact finding. In the traffic accident context, after several requests by the judiciary, the Japanese police agreed to disclose the accident reports they prepare; and in most cases those accident reports have come to be accepted as a definitive determination of the facts. While tax assessment records, wage statements, balance sheets and other documentation may facilitate the fact finding process in the Fukushima context, no single widely accepted statement of facts exists, akin to the police report for traffic accidents. Even if the standards are clear, if there is no definitive statement of the facts on which the parties can agree, settling the claims through direct negotiation, without any third party involvement, is likely to be more difficult. This has made the role of the Center's investigative staff especially important.

This ties to another potentially grave concern: the attitude of TEPCO. In the traffic accident context, the insurance companies (which had a voice in discussions at the time the compensation standards were set initially, and which presumably can adjust insurance premiums to reflect changes in those standards) have been cooperative in abiding by the standards. In contrast, TEPCO has been highly adversarial. Even if the public shaming by the ADR Center and the modest financial sanctions for obstructionist tactics have had an impact on TEPCO's behavior in proceedings conducted by the Center, if TEPCO continues to utilize such tactics in direct negotiations with claimants, the Center's ultimate goal of fostering direct settlement may be impaired.

B. Dominance by the Bar

A second broad reflection regarding the ADR Center relates to the dominance by the bar. In the traffic accident context, the judiciary took the lead. For the ADR Center, in contrast, it is the bar that has taken the lead. Leading lawyers have been at the center in both system design and management. All the mediators are lawyers; and all the investigative staff members are either licensed lawyers or qualified to be licensed. At TEPCO, over 2,500 employees reportedly are involved in handling claims (including direct negotiations and litigation, as well as proceedings before the ADR Center). Those employees are not lawyers, but TEPCO reportedly also has utilized over two hundred lawyers, from a wide range of law firms, in handling the claims. Virtually all the victim representatives also are lawyers. Going beyond the ADR Center itself, following the disaster the bar rapidly mobilized, and over the intervening period the bar has made a great commitment to a wide range of activities, including providing free consultations for disaster victims and pursuing important legal reforms. Many lawyers have undertaken such activities at great personal expense and sacrifice.

The bar deserves to be commended for all of these efforts and for its deep commitment. That said, the bar domination of the ADR Center has led to a highly exclusionary attitude. In the debate over the ADR Promotion Act, the bar's stance was that all mediators must be lawyers. Although the ADR Promotion Act did not go that far,[88] in connection with bodies certified under that Act, the bar has continued to take the position that each mediation panel must include at least one lawyer.

The bar's dominance has gone even further in connection with the ADR Center. Not only has that Center adopted the policy that all mediators must be lawyers, it has insisted that all investigators must be qualified as lawyers, as well.

With the Steering Committee, panels of mediators, a supporting secretariat, publication of standards and precedents, and other features, the ADR Center bears many similarities to the United Nations Compensation Commission on which it was based. The dominance by the bar lies in sharp contrast to the U.N. Compensation Commission, however. For that Commission, the Commissioners (the equivalent to mediators at the ADR Center) "were drawn from a wide range of … professional backgrounds including law, finance, and damage evaluation."[89] Among its roles, the Secretariat for that Commission undertook investigative activities, similar to the function performed by the investigative staff members for the ADR Center. Here, too, however, the Compensation Commission's Secretariat included experts from a wide range of fields.

The ADR Center's steadfast resistance to involving non-lawyers in the mediation and investigation process deprives it of expertise in fields that would be valuable in performing its roles, including finance, accounting, engineering and damage evaluation. Naturally, limiting the hiring to lawyers also makes it more difficult to attract sufficient numbers of mediators and investigators. The bar dominance of the ADR Center process, when coupled with the heavy litigation orientation of the bar (which is likely to be even more pronounced for those serving as mediators), inevitably brings with it a legalistic mindset,

88) *See* text at note 11 *supra*.

89) Francis E. McGovern, *Dispute System Design: The United Nations Compensation Commission*, 14 HARV. NEGOT. L. REV. 171, 181 (2009).

deeply influenced by traditional judicial practice. Indeed, the Center's push to get mediators to simplify hearings "without getting caught up trying to find out details that aren't needed for the rough estimate"[90] reflects the struggle to break through the traditional litigation-centered mindset.

C. Implications for the Future of ADR in Japan

Finally, what are the implications of the ADR Center for the future of ADR in Japan? While it took some time to hit its stride, by mid-2012 the Center was achieving successful resolution of 65% of cases filed, with that rate rising to over 80% by 2013 and thereafter. As of the end of 2016, the Center had achieved full resolution of nearly 16,000 cases. That record alone may be seen as a demonstration of the potential for ADR.

The experiences of the Center have provided many lessons for how to organize and manage an ADR body. By providing large numbers of lawyers the opportunity to serve as mediators and investigators, the Center has given many people experience in conducting ADR. And, to the extent the Center has succeeded in instilling in the mediators a willingness to dispense with detailed inquiry into the facts, in favor of a more streamlined approach, it may point the way to a new conception of ADR.

That said, the context in which the Center arose is unique; and one would hope and pray Japan never has to face a similar set of circumstances again. While many of the concrete lessons are likely to be of value for future efforts at ADR, and while the experiences of the mediators and investigators are likely to impart or enhance skills relevant to many other settings, it is difficult to imagine other contexts in which this specific ADR model would be utilized.

To the extent the experiences with the ADR Center do shape future ADR efforts in Japan, the model it represents is highly legalistic and bar-dominated. To repeat then-Deputy Secretariat Chief Idei's quote, "the mediation proceedings tend to be more like a mini-arbitration aimed at giving the mediator's non-binding ruling, rather than mediation seeking compromise and agreement among the parties."[91] Despite the efforts to streamline the hearings and the fact finding process, at its core the ADR Center approach remains heavily shaped by a litigation mindset, with a set of standards issued in a top-down fashion, implemented by "proposals" made in quasi-adjudicatory proceedings. It is a model that places a premium on legal expertise, not other fields or perspectives. How applicable that approach is to other contexts is open to question. The difficulties other extrajudicial ADR bodies have experienced in seeking to attract cases suggest that the struggle to establish a robust ADR tradition in Japan has some ways to go.

(Daniel H. FOOTE)

90) *See* text at note 62 *supra*.
91) Idei, *supra* note 23, at 2.