

**NUCLEAR ENERGY AGENCY
STEERING COMMITTEE FOR NUCLEAR ENERGY**

Recommendation Concerning the Definition of “Radioisotopes Which Have Reached the Final Stage of Fabrication” in the Convention on Third Party Liability in the Field of Nuclear Energy of 29 July 1960 as Amended

This Recommendation was adopted at the 136th Session of the Steering Committee for Nuclear Energy held on 19-20 April 2018.

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*RECOMMENDATION OF THE STEERING COMMITTEE
CONCERNING THE DEFINITION OF “RADIOISOTOPES
WHICH HAVE REACHED THE FINAL STAGE OF
FABRICATION” IN THE CONVENTION ON THIRD PARTY
LIABILITY IN THE FIELD OF NUCLEAR ENERGY
OF 29 JULY 1960 AS AMENDED*

THE STEERING COMMITTEE,

HAVING REGARD to the Convention on Third Party Liability in the Field of Nuclear Energy of 29 July 1960, as amended by the Additional Protocol of 28 January 1964, by the Protocol of 16 November 1982 and by the Protocol of 12 February 2004 (hereafter “the Paris Convention”) and, in particular, to Article 1(a)(iv) of that Convention;

CONSIDERING that pursuant to Article 1(a)(iv) of the Paris Convention, radioisotopes outside a nuclear installation which have reached the final stage of fabrication so as to be usable for any industrial, commercial, agricultural, medical, scientific or educational purpose, are excluded from the scope of application of the Paris Convention;

CONSIDERING that according to the Exposé des Motifs of the Paris Convention, risks arising from such radioisotopes which have reached the final stage of fabrication are not of an exceptional nature and are covered by the insurance industry in the ordinary course of business; that there is little possibility of a catastrophe and that no special third party liability problems arise, hence justifying the application of ordinary legal régimes;

CONSIDERING that it is desirable to strengthen common understanding with regard to the definition of the term “final stage of fabrication” in Article 1(a)(iv) of the Paris Convention and with regard to the temporal effect of the exclusion of radioisotopes which have reached the final stage of fabrication;

RECOMMENDS the following interpretation:

The radioisotopes reach the final stage of fabrication, under Article 1(a)(iv) of the Paris Convention, when they may be used for any industrial, commercial, agricultural, medical, scientific or educational purpose. The radioisotopes which have reached the final stage of fabrication are excluded from the scope of application of the Paris Convention and shall not be made subject to it at a later stage.

NOTE BY THE SECRETARIAT

The Convention on Third Party Liability in the Field of Nuclear Energy of 29 July 1960, as amended by the Additional Protocol of 28 January 1964, by the Protocol of 16 November 1982 and by the Protocol of 12 February 2004 (the “Paris Convention”), is intended to govern liability for damage caused to third parties by a nuclear incident at a nuclear installation or involving nuclear substances coming from such an installation. A common understanding of what types of substances are covered by the term “nuclear substances” is important to determine whether the specific nuclear liability regime or general tort law would apply in case of damage caused by an accident. This is particularly relevant in case of transport of nuclear substances as one of the mandatory conditions for insuring carriage is to clearly identify which legal regime applies.

According to Article 1(a)(v) of the Paris Convention, “‘nuclear substances’ means nuclear fuel (other than natural uranium and other than depleted uranium) and radioactive products or waste.”¹ Article 1(a)(iv) of the Paris Convention defines “radioactive products or waste” as “any radioactive material produced in or made radioactive by exposure to the radiation incidental to the process of producing or utilizing nuclear fuel, but does not include (1) nuclear fuel, or (2) radioisotopes outside a nuclear installation which have reached the final stage of fabrication so as to be usable for any industrial, commercial, agricultural, medical, scientific or educational purpose”. Therefore, Article 1(a)(iv) of the Paris Convention expressly excludes from the scope of application of the Convention radioisotopes outside a nuclear installation which have reached the final stage of fabrication so as to be usable for any industrial, commercial, agricultural, medical, scientific or educational purpose.²

Since the adoption of the Paris Convention, the Nuclear Law Committee (NLC) of the OECD Nuclear Energy Agency (NEA) has been regularly discussing certain difficulties related to the interpretation of the term “radioisotopes which have reached the final stage of fabrication” and the effects of the exclusion of such radioisotopes from the scope of the Convention, and among them:

- the definition of the term “radioisotopes which have reached the final stage of fabrication”. Two different interpretations of Article 1(a)(iv) of the

¹ In accordance with Article 1(b) of the Paris Convention, the Steering Committee may, if in its view the small extent of the risks involved so warrants, exclude any nuclear installation, nuclear fuel, or nuclear substances from the application of the Convention. For more information on the exclusions of certain kinds of nuclear substances and small quantities of nuclear substances outside a nuclear installation see the Steering Committee decisions [NE/M(77)2] and [NEA/NE(2016)8/FINAL].

² In this regard, paragraph 20 of the Exposé des Motifs of the revised Paris Convention [NEA/NLC/DOC(2020)1] further specifies: “Risks which arise in respect of radioisotopes usable for any industrial, commercial, agricultural, medical, scientific or educational purposes are excluded from the scope of the Convention, provided the radioisotopes have reached their final stage of manufacture and are outside a nuclear installation. Such risks are not of an exceptional nature and, indeed, are covered by the insurance industry in the ordinary course of business. Despite the widespread use of radioisotopes in many fields, which requires continual and careful observance of health protection precautions, there is little possibility of catastrophe. Hence no special third party liability problems are posed and the matter is left to be determined by ordinary legal regimes.”

Paris Convention may be considered: (i) the radioisotopes have reached their final stage of fabrication as soon as they are “usable for any industrial, commercial, agricultural, medical, scientific or educational purpose”; or (ii) the classification of the final stage of fabrication is independent of the potential use of the radioisotopes and therefore needs to be specified;

- the temporal effects of the exclusion of radioisotopes which have reached the final stage of fabrication from the scope of the Paris Convention. The main concern is to determine whether the exclusion of such radioisotopes is final provided that radioisotopes generally undertake several successive carriage operations throughout their life cycle. Two different interpretations of Article 1(a)(iv) of the Paris Convention may be considered in this respect: (i) the exclusion from the scope of the Paris Convention of the radioisotope which has reached the final stage of fabrication is final as soon as it leaves its “nuclear installation of origin”; or (ii) prior to proceeding to any carriage operation, the operator must verify that all the exclusion requirements are met, considering that the radioisotope which has reached the final stage of fabrication may not be excluded from the scope of application of the Paris Convention should it not be “usable for any industrial, commercial, agricultural, medical, scientific or educational purpose” anymore.

These difficulties in the interpretation lead in practice to insurance coverage problems in certain Contracting Parties to the Paris Convention due to uncertainty as to whether the carriage of radioisotopes should be governed by the nuclear liability regime provided in the Paris Convention or by general tort law.

This Recommendation aims at strengthening the common understanding with regard to the definition of the term “final stage of fabrication” in Article 1(a)(iv) of the Paris Convention and with regard to the temporal effect of the exclusion of radioisotopes which have reached the final stage of fabrication. The principle is that once the radioisotopes have reached the final stage of fabrication and have left the nuclear installation where they reached that stage (i.e. the “nuclear installation of origin”), they will no longer be covered by the Paris Convention.