

**The NEA Nuclear Law Committee – from the viewpoint
of a Committee Member**

**Presentation on the Occasion of the 50th Anniversary of the Nuclear Law
Committee
at the Colloquium on the Past, Present and Future of the Nuclear Law
Committee, Paris, OECD Headquarters, Château de la Muette**

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by
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I.

When Julia Schwartz invited me to talk today about the history and the development of the Nuclear Law Committee I felt, of course, honoured and flattered. But immediately I became also aware that the invitation obviously was connected with the fact that I am sitting on this Committee for 30 or even more years and that I grew older together with the Committee. Is that a reason for feeling honoured and flattered? Certainly not. Actually, I cannot deny that I saw uncountable numbers of delegates joining and leaving the Committee. Today I am surrounded by young faces, which pleases me and which at the same time is a challenge, probably for both the younger people and me. My only comrade left over from the old times is my friend and colleague Yrjö Sahrakorpi from Finland. I wonder whether he has similar feelings about being a kind of dinosaur in a young environment.

Please allow me to continue dealing with personal impressions for another little while. When I around the second half of the 1970s first attended meetings of the Committee the head of my delegation advised me not to take the floor but to leave speaking to him. As a matter of fact, there was no risk that I would dare to make an intervention. I was gone all shy when I entered the conference room and, in particular, I did not at all have trust in my command of the English language, not to mention French. It turned out, however, that there was no need to worry about me possibly taking the floor: The chairman himself did almost all of the talking, and he did not leave much room for others to speak. I concluded that he did that because he felt being in harmony with the Group members and he anyway knew what they would say. His method created a pleasant atmosphere which I found most attracting.

The main subject matter of the Committee at the end of the 1970s and the beginning of the 1980s was the revision of the Paris and Brussels Conventions which resulted in the 1982 Protocols. Already in 1973, I had published an article in the Nuclear Law Bulletin on the modernisation of the Paris Convention and the views expressed in this article were shared by the German government. Consequently, the Germans planned to convince the other Contracting Parties of their ideas on the modernisation of the Paris Convention. We, together with some other delegations, especially wanted to achieve an increase of the liability amount. There were other delegations who were opposed to the revision in general and to any increase of the liability amount in particular. They argued there was no increase of the risk since the date of the original Paris Convention and it followed that an amendment was not warranted. They prevailed over our proposal. In the 1982 Protocol to the Paris Convention there is no higher liability amount, in a spirit of

compromise, however, higher public money tiers in the 1982 Protocol to the Brussels Convention were agreed upon. This result was not the outcome of a long controversial discussion but it was achieved by an extraordinary tactical manoeuvre of one delegation. The spokesman of that delegation started to filibuster. He did that most eloquently, most elegantly and in a highly educated way. All of us were deeply impressed, and at the end of the day, increasing the liability amount was not any longer an issue. For me, this was an unforgettable lesson, namely that successful negotiations require more than just an idea of what is desirable. You also have to know the techniques to accomplish your goals. I tell you, if this would happen today, I would know how to stop evasive filibustering and how to return to the subject.

II.

That is more than enough about my early experiences in the Committee, which at that time was not yet named “Nuclear Law Committee”.²³ The establishment of the Committee goes back to a proposal made by the Netherlands delegation at a Steering Committee meeting in January 1957. The proposal was aimed at setting up “a Working Party on the Harmonisation of Legislation”.²⁴ The Steering Committee followed the Dutch proposal and on 24th January 1957 established a Group which provisionally was called as suggested by the Netherlands delegation.²⁵ It assigned the following tasks to the new Working Party:

- “(a) the examination of and the formulation of proposals on the question of harmonisation of legislation concerning third-party liability in case of damage caused by the peaceful use of nuclear energy;
- (b) any further studies of a legislative nature that might be referred to it by the Steering Committee for Nuclear Energy.”

The Working Party had not yet a proper name, and it is difficult to find an official date at which the formal naming took place. The Steering Committee in July 1957 referred to the Working Party as “Group of Experts consisting of lawyers, insurers and technicians”.²⁶ In its convocation for the first meeting of the Group scheduled for 22nd January 1958, the Steering Committee called the Group “Group of Experts on Third Party Liability”, expressly referring to the July 1957 meeting of the Steering Committee.²⁷ The final name of the Group was apparently not decided by the Steering Committee but probably was fixed by the Group itself. It read: “Group of Governmental Experts on Third Party Liability in the Field of Nuclear Energy”. This is a longish and somewhat bureaucratic name but it reflected exactly what the Group was going to deal with and, in fact, has been dealing with during its lifetime.

At its first meeting in January 1958, the Group was composed of 8 lawyers, 5 specialists in insurance problems, 2 technicians, 3 members of the OEEC Insurance Sub-Committee Bureau, and 1 representative of the European Insurance Committee. Nine OEEC Member States were represented.²⁸ Please take note of the high proportion of insurance related persons in the Group: they were 9 of 19 in

²³ The author expresses his gratitude to NEA Legal Affairs and in particular to Mrs. Christelle Drillat, a former member of Legal Affairs, who kindly scanned the OECD/NEA archives and provided relevant documents and other material.

²⁴ OEEC Doc. NE(57)7, 23rd January 1957.

²⁵ OEEC Doc. NE/M(57)1, January 1957.

²⁶ OEEC Doc. NE/M(57)4, 2-3 July 1957.

²⁷ OEEC Doc. SEN(58)6, 11 January 1958.

²⁸ OEEC Doc. SEN(58)6 Annex (Revised). The States represented were: Denmark, France, Germany, Italy, Netherlands, Sweden, Switzerland, United Kingdom, United States.

total, which corresponds to more than 43 percent of the entire Group. This composition clearly shows that at that time nuclear liability was interpreted as being mainly a question of making insurance available rather than of providing adequate compensation. Here we may see the origin of some concepts of the nuclear liability conventions which today are sometimes difficult to warrant and to explain to the public. This applies particularly to the equivocal principle of congruence between liability and coverage which quite reasonably stipulates that liability needs to be covered but, as a consequence, also perversely turns things upside down: where there is no coverage there cannot be legal liability.

The Group of Governmental Experts was renamed as “Nuclear Law Committee” by a Steering Committee Decision at its 101st Session on 12-13 October 2000.²⁹ The new name mirrors the revised mandate of the Group, which now encompasses not only nuclear liability questions but also issues falling within the field of nuclear law generally and all other legal matters entrusted to it by the Steering Committee as appropriate.³⁰ The NLC today has 29 member states entitled to send representatives³¹ and in addition 7 state observers.³² I note the enlargement of the Committee with satisfaction: New members mean fresh ideas. That provides assurance that quantity will not harm quality.

The Committee, in the 50 years of its existence, had 8 chairmen. The first one, serving from 1957 to 1962, was Mr. A. D. Belinfante who despite his Italian name was Dutch. The chairmen serving for the longest periods of time, namely each of them 11 years, were Mr. Maurice Lagorce from France (1971 – 1982) and Mr. Håkan Rustand from Sweden (1992 – 2003). It certainly had some attraction to deal in some detail with the characteristics and with the individual style of the chairs I experienced. But this would take too much time. However I would like to confirm that all of them were persons who were most competent to guide the Group, and all of them had a good sense of humour, to a graded extent and with differences, though. As a consequence, laughing has always been a constituent element of implementing the Committee’s serious mandate. Sometimes, funny cartoons were produced meant to clarify complex issues, and the respective Committee member who made them immediately qualified for being elected chairman. Roland Dussart Desart certainly will confirm this observation.

To finalize my little statistics: Over the years, member states were represented by 203 delegates who at least twice attended Committee meetings, and there were 52 observers from Governmental and Non-Governmental Organizations. As of 1992, there were also observers from states but I do not have respective figures. The Secretariat deployed 14 persons to attend meetings on a regular basis but I am aware that many more were busy for the Committee. I would, with greatest pleasure, like to use this opportunity to express my respect and my gratitude to the Secretariat. The Committee would never have accomplished what I shall at once describe in some more detail without the permanent support by the Secretariat and in particular its Legal Affairs. The meetings have always been well prepared and unexpected problems are quickly solved. If delegates are confused, which happens more often than it should, the Secretariat steps in and clarifies matters. Julia Schwartz is today representing the presence and the past of the Secretariat’s Legal Affairs, please allow me to thank her and her predecessors on behalf of all delegates. I would also like to address the Director General of NEA Mr. Luis Echávarri. He and, as far as I can see, all of his predecessors always showed great interest in the work of our Group which has been encouraging and has provided momentum. We are looking forward to further cooperating with the Director General. I would like to ask him to continue treating Legal Affairs people well. The NLC needs them and strongly relies on them. Since I am dealing with persons supporting the Committee’s work, I will not forget

²⁹ OECD Doc. NEA/SUM/DEC(2000)2, 30/31 October 2000 No. 5 (iv).

³⁰ OECD Doc. NEA/NE(2000)11/REV1 Review of the NEA Committee Structure pp. 11 – 12.

³¹ List of member states see www.nea.fr under “About us”.

³² Bulgaria, Hong Kong (Special Administrative Region of China), Lithuania, Romania, Russian Federation, Slovenia, Ukraine.

the basic importance of the various teams of interpreters who made possible that we understood each other. Nothing is more difficult to translate than poetry and legal language, and our interpreters always mastered this particular challenge.

III.

I would like now to walk you through some of those issues of the Committee's working programmes which have major importance for both the development of nuclear law and the characteristics of the Committee.

When the Group of Governmental Experts convened its first meeting in January 1958 there did not exist much of a nuclear liability legislation in the world. The United States had issued the 1957 Price-Anderson-Amendment to its 1954 Atomic Energy Act.³³ In Germany, Switzerland and in the United Kingdom nuclear liability legislations were under preparation and were enacted in 1959.³⁴ In all of the other states respective legislations were only issued in the 1960s and 1970s or even later. It was the Group's mandate to examine and make proposals on the harmonization of nuclear liability legislation. However, there was nothing which could be harmonized, and the Group could not build on existing legislations. It follows that the 19 experts of the Group, which later were complemented by additional experts, had to break new ground and start developing a new draft international nuclear liability regime to be presented to the OEEC member states. The final outcome is well known: It is the 1960 Paris Convention.³⁵ This Convention is the "mother" of all nuclear liability conventions and, moreover, of most of the national nuclear liability legislations. Its basic concepts have been confirmed by states in the light of the Chernobyl nuclear accident and are valid still today.

If I had to appraise the overall results of the Committee's work I would without hesitation nominate the preparatory work of the Paris Convention as the most important achievement. The Convention's concepts were innovative. They enjoyed and enjoy broad international approval and acceptance and at the same time, at least some of them, triggered serious objections and controversial discussions. In any case, the Paris Convention is a thought provoking instrument. It was the example or even the blue print for the Vienna Convention,³⁶ and to a decisive extent, it is also mirrored in the 1997 Revision Protocol to the Vienna Convention,³⁷ the 1997 Convention on Supplementary Compensation³⁸ and in the 2004 Revision Protocol to the Paris Convention.³⁹ At the time of the drafting of the Paris Convention, I was a young assistant to Professor Georg Erler at Göttingen University. My Professor – who later became a judge at the European Nuclear Energy Tribunal – followed the work of the Group closely and stayed in touch with some of its members. They were invited to speak at our seminar, and I remember very well how impressed I was by their reports on the problems connected with establishing a

³³ Public Law 85-256 dated 6 September 1957.

³⁴ Germany: Gesetz über die friedliche Verwendung der Kernenergie und den Schutz gegen ihre Gefahren (Atomgesetz) of 23 December 1959 (Bundesgesetzblatt 1959 I p.814); Switzerland: Bundesgesetz über die friedliche Verwendung der Atomenergie und den Strahlenschutz of 23 December 1959 (Amtliche Sammlung 1959 p. 519); United Kingdom: Nuclear Installations (Licensing and Insurance) Act, 1959 (7 & 8 Eliz.2 ch. 46).

³⁵ UNTS vol. 956 p. 251 (in the version of the 1964 Additional Protocol).

³⁶ IAEA Doc. INFCIRC/500.

³⁷ IAEA Doc. INFCIRC/566.

³⁸ IAEA Doc. INFCIRC/567.

³⁹ Text reproduced in: Supplement to Nuclear Law Bulletin No. 75 (2005/1) p. 3.

multilaterally harmonized nuclear third party liability regime. I did not yet know that I also would devote a great part of my professional life to the same objective, an objective which is still not achieved.

Which were the highlights of the Committee's agenda after the finalisation of the Paris Convention in 1960? You probably expect me to talk about the 1963 Brussels Supplementary Convention, which also broke new ground.⁴⁰ I shall, however, at this stage leave out this Convention because it is not an original child of the OEEC/OECD but was initiated within EURATOM. Of course, the Brussels Convention later very often was subject of discussions in the Committee, and I shall come back to it as appropriate. I shall neither speak about the 1964 Additional Protocol⁴¹ which did not add new substance to the Convention but merely made the Paris and the Vienna Conventions matching.

Already at an early stage of the Committee's history, we find the agenda point "Exclusion of Small Quantities". We will find it later again, and the NLC is right now dealing also with this issue. This teaches us that small quantities may cause big work. There were discussions on the Exposé des Motifs to the Paris Convention which always were of substantial importance and promoted a better understanding of the provisions of the Convention. Soon again, the Committee will have to deal with this document to bring it in line with the 2004 Protocol to the Paris Convention. In addition, there is a draft Exposé des Motifs to the revised Brussels Convention which will need consideration.

Because of time constraints, it is impossible to run through all of the issues dealt with by the Committee within fifty years. The respective agenda points would perfectly cover the list of contents of a comprehensive handbook on civil nuclear liability law. The Committee discussed the Paris Convention and the Brussels Convention up and down, down and up, article by article. It identified and addressed a vast number of special fields of interest, such as, e. g., maritime carriage of nuclear material, damage to property on the site, definitions, simultaneous application of the Paris and Vienna Conventions, liability for nuclear damage caused by long-term management of radioactive waste, liability and decommissioning of nuclear installations, relationship to environmental liability instruments, insurance coverage for nuclear incidents caused by terrorist acts, and many other issues.

As a result of those in-depth studies of particular nuclear liability questions, the Committee prepared numerous recommendations and decisions of the OECD Council or the Steering Committee for Nuclear Energy which assisted Contracting Parties to the Paris and Brussels Conventions in implementing and interpreting these instruments properly.⁴² These auxiliary means and instruments also helped keeping the Paris and the Brussels Conventions *à jour* without a formal treaty revision. As for examples, I would like to refer to the 1990 NEA Steering Committee Recommendation on raising the liability amount of the operator of a nuclear installation from 15 million to not less than 150 million Special Drawing Rights⁴³ and to the 1992 OECD Council Recommendation on the so-called deferment solution, which recommended a procedure to mobilize the third tier under the Brussels Convention in cases where national legislations provided higher amounts of the operator's liability and coverage than foreseen in Article 3 of the Convention.⁴⁴

Irrespective of those interesting and important agenda points of the Committee meetings, sometimes the regular meetings of the Group, normally twice a year, seemed to develop to bureaucratic

⁴⁰ Text in its 1963/1964/1982 version reproduced under: www.nea.fr/html/law/nlbrussels.html .

⁴¹ See footnote 13.

⁴² See OECD/NEA (ed.), Paris Convention. Decisions, Recommendations, Interpretations, Paris 1990.

⁴³ OECD/NEA Doc. NE/M(90)1.

⁴⁴ OECD Doc. C(92)166/Final.

routine. But such view would be short-sighted. As a side effect, the substantial discussions at the meetings contributed to educating a staff of national experts in nuclear liability law which was to the benefit of member states at both national and international level. This, *inter alia*, paid off when the negotiations on the Joint Protocol⁴⁵ and on the revision of the Vienna Convention at the end of the 1980s commenced. Paris states were among the leading participants in these negotiations although they were not party to the Vienna Convention. If I may make a guess: When the Director General of the IAEA in 2003 established the INLEX Group on nuclear liability he probably had also in mind to make available to the IAEA an expert group comparable to the NLC.⁴⁶

I would not like to end my brief overview of issues discussed at NLC meetings without presenting to you what I felt were the most exciting exercises in recent times and which role the NLC played in this context. Of course, this will once more be a most subjective selection.

Firstly, I have to mention the revision exercises. At the beginning of this talk, I already commented on the negotiations of the 1982 Protocol to the Paris and Brussels Conventions. There is no need to add further details. What I would like to highlight is the period from 1987 to 2005. During these 18 years, the Joint Protocol, the revision of the Vienna Convention, the Convention on Supplementary Compensation and the revision of the Paris and the Brussels Conventions were negotiated. In parallel, there were also negotiations on the 1994 Nuclear Safety Convention,⁴⁷ the 1997 Joint Convention⁴⁸ and the 2005 Amendment to the Physical Protection Convention.⁴⁹ That was indeed a rich and most exciting schedule, and I am happy that I had a chance to take part in the respective exercises. Of course, the negotiations took place outside the NLC, most of them were conducted under the aegis of the IAEA. But they nevertheless had an impact of the group's programme. Issues and open questions of the negotiations were re-discussed at the Committee, in a circle of more or less like-minded states. For the negotiators, it was like coming home and reporting to the family what had happened outside. The NLC was a rest area where one could develop second thoughts about the issues under discussion.

The years from 1984 to 1988 were the other most exciting period of time at the Group which I keep in my memory. In 1985, Germany, a Contracting Party to the Paris Convention, had introduced unlimited liability of the operator with limited coverage, and we had to justify this concept *vis-à-vis* the Group, because the text of the Paris Convention stipulated a limitation of liability in amount. Germany immediately was isolated among its partners. Discussions of high quality took place, and blunt statements were made. At the end of the day, our partners accepted our approach, not because we could convince them but they tolerated it as a *fait accompli* which anyway could not be changed. The Group with this politically wise decision weakened the up till then uncontested dogma of limited nuclear liability and, probably unknowingly, slightly opened the door for a new development. The door was finally opened nearly two decades later: Under the revised Paris Convention the German approach is now without any doubt legitimate, and I personally feel confirmed in my view that unlimited liability with limited coverage will be the only generally accepted nuclear liability concept of the future.

⁴⁵ IAEA Doc. INFCIRC/402.

⁴⁶ IAEA Doc. GOV/INF/2004/9-GC(48)/INF/5; GC/47/RES/7.C.

⁴⁷ IAEA Doc. INFCIRC/449.

⁴⁸ IAEA Doc. INFCIRC/546.

⁴⁹ IAEA Doc. GOV/INF/2005/10 – GC(49)INF/6.

IV.

My birthday talk in honour of the NLC can be summarized by the sentence: If NEA's Nuclear Law Committee did not exist we should establish it right now. Since it fortunately has been in existence for 50 years we will have to use all our efforts to ensure that it will enjoy a future as successful as its past. This Committee has considerably contributed to the development of nuclear liability law both at international and national level. It does not only provide a forum for the exchange of views and experience among governmental experts but also for the preparation of ways and means to improve existing legal instruments.

The regular meetings helped building confidence among delegates of different states and promoted friendship among them. According to my view, the friendly atmosphere among the Committee members is perhaps the most important characteristics of the NLC. At international level, such atmosphere is not a natural thing. The OECD, as an international organisation of States sharing a commitment to democracy and market economy, certainly is supportive to creating a friendly environment without political tensions. But that is not enough. Actually, the way the Committee fulfils its mandate has built a kind of "*esprit de corps*" among members. This to a large extent is the merit of all of the eight chairmen and of the way in which the Secretariat has been looking after the Committee and its members. It is also a consequence of the fact that the meetings took place rather frequently and that a number of delegates stayed for longer periods on the Committee. We always have had frank and often controversial discussions on matters of substance but that has never harmed mutual trust among delegates, and there never has emerged a cold and hostile climate, which I sometimes experienced in other international fora. For me, an invitation to a NLC meeting has always been welcome and I looked forward to it. This makes the NLC a unique asset in the realm of international cooperation.

When I started considering what I should present today I came to the conclusion that it would be prudent to avoid emphasizing the importance of defined persons. Of course, I am aware that history is made by persons. This applies to the history of the NLC, too. There are many personalities who influenced and formed the NLC during 50 years, in particular the eight chairmen. Every selection of an individual person therefore necessarily would be arbitrary and most subjective and might discriminate against others of equal importance. At this stage, however, I feel entitled and obliged to break my own rule, and you probably will agree with me. It is my pleasure to explicitly stress the outstanding role which Patrick Reyners played in the history of the Group. He was NEA's Head of Legal Affairs from 1978 to 2004. During this good quarter of a century, he was not only the head and the heart of Legal Affairs but also, in support of the respective chairmen, the *rocher de bronze* of the Group. He was a reliable and knowledgeable legal adviser, an experienced diplomat, a loyal assistant to the Group's chair, who never tried to push to the front, and he was a good colleague and friend. The NLC and all of us owe him gratitude. This anniversary ceremony is the right place to pay tribute to Patrick Reyners' extraordinary merits.

Since the year 2000 the NLC has a broadened mandate. It is not any longer restricted to nuclear liability but now covers the entire field of nuclear law. There is not yet much experience how to deal with this enlargement of responsibility. It is a task for the future to develop work procedures to cover the new scope. Liability experts do not necessarily have expertise in other fields of nuclear law. This could possibly require a reorganisation of the Committee to avoid floating members. Moreover, membership of NEA today includes states from various regions of the world. This might change NEA to an agency which is much more governed by political considerations than in the past. A possible impact of this development on the Committee's subject matter oriented work can not be excluded. It will perhaps be more difficult to agree on unanimous decisions and compromises. As, however, Marc Léger will be dealing with the future of the Committee I shall refrain from further elaborating on this subject.

I ask for your indulgence for a final remark. In the past, Committee members often used to gather after the meetings for joint dining and wining. I made it a self imposed duty and enjoyed organizing such meetings. In recent times, this did not any longer happen. The reason is that I find it most difficult to organize such parties for the enlarged group at short notice. I regret the development, which deprives us from the possibility of getting more familiar among each other in an informal way. We should try and revitalize the old use, and I am looking at the Secretariat for support in organisation.

I shall present my concluding toast on the Committee in Latin to make it more solemn and longer lasting:

Vivat, crescat, floreat consilium iuris ad usum nuclei fissionis virium pertinentis!
Ad multos annos!