

How should nuclear be governed?

The Aarhus Convention's participatory system: strengths and weaknesses relevant to nuclear governance

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Introduction

1. Nuclear exploitation was introduced in an era of “enlightened” confidence in technology and industry¹, by elite circles. Lack of societal justification of nuclear, as well as secrecy surrounding nuclear, have caused fear, mistrust, and anger of the population – all of which is drastically intensified in case of a nuclear accident.

2. Transcending the elitism and confidentiality characterising nuclear, a participatory model would allow for nuclear to become an environmentally sustainable societal project, by involving the population in nuclear governance, both:

- At nuclear decision-making – where the public would participate in decisions regarding the installation or dismantling of a nuclear power plant, and
- During the operation of a nuclear power plant – where the public would be informed of continual and accidental impact of the nuclear exploitation on the environment, and have access to judicial procedures to challenge the way in which public or private entities carry out the nuclear societal project.

Hence, according to the participatory model, sustainable nuclear governance should comprise three facets: public participation in nuclear decision-making, access to nuclear information and access to justice in nuclear matters.

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¹ Cf. Gaston Merkens, “The trouble with justification – A reflection on public participation in radiological risk governance”, *ULB/SCK•CEN symposium Aarhus and Nuclear*, Brussels, 11 April 2011 (available at [http://www.sckcen.be/en/Events/AARHUS/\(page\)/37232](http://www.sckcen.be/en/Events/AARHUS/(page)/37232)).

3. The 1998 UNECE Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters organises those three facets of sustainable nuclear governance.

For the partisans of the participatory model, the Aarhus Convention would therefore seem to provide the ideal answer to the question of how nuclear should be governed.

4. However, symbolising a glide from the participatory model to a “participatory discourse”, the Aarhus Convention contains a number of weaknesses, of particular concern to sustainable nuclear governance. Pinpointing those weaknesses, this paper explores how nuclear should be governed if we want nuclear exploitation to be a truly environmentally sustainable societal project.

My purpose is in no way to discard the Aarhus Convention. As a genuine environmentalist and fierce partisan of the participatory model, I find the Aarhus Convention an interesting initiative, an important step in the right direction for sustainable nuclear governance. The existence of the Convention represents, in itself, a strength for nuclear governance. That being said, as my critical analysis will demonstrate, the Convention does hardly, in its present form, provide a satisfactory answer to the question of how nuclear should be governed.

5. The elements of the Aarhus Convention particularly relevant to nuclear governance (hereinafter “Aarhusian nuclear governance”) will be tested against the pivotal notion of “access” – considered not only as a nodal point of the analytical problems of Earth System Governance (ESG), but also as specially apropos for the themes of *Complex Architectures and Multiple Agents*.

This critical analysis of Aarhusian nuclear governance will allow me to suggest strategies for a durable strengthening of nuclear governance, and thus, in accordance with the aim of this Conference, to identify and develop new strategies for steering societies towards a more sustainable relationship with the natural world.

6. The paper is composed of three Sections:

- In Section 1., I present the Aarhus Convention’s participatory system and Aarhusian nuclear governance, and elaborate upon the participatory model versus the “participatory discourse”,
- In Section 2., I examine which public has access to Aarhusian nuclear governance, and
- In Section 3., I suggest strategies for a durable strengthening of nuclear governance.

1. The Aarhus Convention’s participatory system and Aarhusian nuclear governance, the participatory model versus the “participatory discourse”

7. The Aarhus Convention was signed by 35 member states of the UNECE, and by the European Community, at the 4th “Environment for Europe”² Ministerial Conference in Aarhus (Denmark) on 25 June 1998. The Convention entered into force on 30 October 2001, and currently has 46 Contracting Parties.³

1.1. The Aarhus Convention’s participatory system and Aarhusian nuclear governance

1.1.1. Architecture

8. In order to contribute to the protection of the “right of every person of present and future generations to live in an environment adequate to his or her health and well-being” (hereinafter the “right to a healthy and sustainable environment”), Article 1 of the Convention requires its Parties to guarantee three procedural rights, in accordance with the provisions of the Convention: the rights of access to information, public participation in decision-making, and access to justice in environmental matters. By meticulously organising those three rights, the Aarhus Convention establishes a veritable participatory system.

9. The following elements of the Aarhus Convention’s participatory system form the core of Aarhusian nuclear governance.

² On the “Environment for Europe” process, see <http://www.unece.org/env/efe/welcome.html>.

³ Most information and documents directly related to the Aarhus Convention explored in this contribution are available at the Convention’s website: <http://www.unece.org/env/pp/welcome.html>. For the information or documents no longer available on this website, and that cannot be obtained from elsewhere, the reader is welcome to contact the author (clarssen@ulb.ac.be).

Regarding nuclear decision-making, Article 6 of the Convention requires the Parties to organise a public participation procedure in accordance with the provisions of Article 6 for decisions regarding “[nuclear] power stations and other nuclear reactors including the dismantling or decommissioning of such power stations or reactors”.⁴

During the operation of a nuclear power plant:

- Access to nuclear information⁵ is foreseen both at the initiative of a member of the public⁶ and, in situations of emergency, at the initiative of public authorities⁷, and
- Access to justice gives members of the public the opportunity to challenge the way a request for access to nuclear information has been dealt with⁸, and to challenge acts and omissions by private persons and public authorities, which contravene provisions of national law relating to the environment.⁹

10. Since the adoption of the Aarhus Convention, a process has been established in the frame of the UNECE to ensure correct, full and effective implementation of the Aarhus Convention. Over the years, this “post-Aarhus process” has developed into a heavy and complex machinery. I will come back to the post-Aarhus process when examining the complex Aarhusian Architecture.¹⁰

⁴ Annex I to the Convention (to which Art. 6, §1, (a) refers), par. 1., 5th hyphen. The cited provision excludes “research installations for the production and conversion of fissionable and fertile materials whose maximum power does not exceed 1 kW continuous thermal load”. For other provisions of Annex I relevant to nuclear decision-making, see par. 1, 6th and 7th hyphen of the Annex.

Art. 7 of the Convention, organising public participation concerning plans, programmes and policies relating to the environment, is also relevant to public participation in nuclear decision-making (cf. strategic decisions regarding nuclear). However, Art. 7 is less prescriptive and much less detailed than Art. 6 and thus hardly allows for a genuine critical analysis.

Finally, I should also mention that Art. 9, §2 of the Convention organises access to justice to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of Art. 6.

⁵ The Aarhus Convention’s definition of “environmental information” (Art. 2, §3) explicitly includes nuclear information.

⁶ Art. 4 of the Convention.

⁷ Art. 5 of the Convention.

⁸ Art. 9, §1 of the Convention.

⁹ Art. 9, §3 of the Convention.

¹⁰ Cf. No. 2.3.1. *infra*.

1.1.2. Actors and agents

11. The Aarhus Convention’s participatory system contains two categories of protagonists, which could be considered as corresponding to the ESG distinction between actors and agents.

1.1.2.1. Actors

12. According to the ESG Science and Implementation Plan, “*actors* refer to the individuals, organizations, and networks that participate in decision-making related to the earth system.”¹¹

13. The “public” and the “public concerned” – the only actors defined by the Aarhus Convention¹² – are (potential¹³) actors of nuclear decision-making.

¹¹ Biermann, Frank, Michele M. Betsill, Joyeeta Gupta, Norichika Kanie, Louis Lebel, Diana Liverman, Heike Schroeder, and Bernd Siebenhüner, with contributions from Ken Conca, Leila da Costa Ferreira, Bharat Desai, Simon Tay, and Ruben Zondervan, *Earth System Governance: People, Places and the Planet. Science and Implementation Plan of the Earth System Governance Project*, Earth System Governance Report 1, IHDP Report 20. Bonn, IHDP: The Earth System Governance Project, 2009, p. 38 (original emphasis).

¹² The Aarhus Convention mentions various actors susceptible of participating in its system, including:

- Every person, both individually and in association with others
- Citizens
- Public
- Individual citizens
- NGOs
- Organisations
- Consumers
- Natural person
- Legal person
- Associations, organisations or groups of natural or legal persons
- Public concerned
- NGOs promoting environmental protection
- Persons
- Applicant
- The public which may participate
- Representative consultative bodies
- Any person

The “public” encompasses “one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups”.¹⁴ The definition is thus broad, and includes, in addition to natural or legal persons, groupings without legal personality, as well as groupings (with or without legal personality) that do not necessarily promote environmental protection.

According to the Convention, the “public concerned” means “the public affected or likely to be affected by, or having an interest in, the environmental decision-making”.¹⁵ The cited provision further specifies that non-governmental organisations (NGOs) promoting environmental protection, and meeting any requirements under national law, shall be deemed to have an interest. Such NGOs are thus *ipso facto* members of the “public concerned”.

14. As we will see, this distinction between the “public” and the “public concerned” causes numerous problems, of particular concern to sustainable nuclear governance.

1.1.2.2. Agents

15. In the ESG Science and Implementation Plan, an “*agent* of earth system governance is an actor who possesses the ability to prescribe behaviour and to obtain the consent of the governed. Hence, an agent is an *authoritative actor*.”¹⁶

16. The Convention’s public authority could¹⁷ be considered as corresponding to the ESG definition of agent. Under the Convention¹⁸, “public authority”, at the national level¹⁹, means:

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- Members of the public concerned having a sufficient interest, or, where the administrative procedural law of a Party so requires, members of the public concerned maintaining impairment of a right
 - Members of the public meeting the criteria, if any, laid down in the national law of a Party.

Since the ESG Science and Implementation Plan defines actors by referring to decision-making, I will concentrate on the actors of Aarhusian nuclear decision-making: the “public” and the “public concerned”.

¹³ Cf. No. 2.2.1. *infra*.

¹⁴ Art. 2, §4 of the Convention.

¹⁵ Art. 2, §5 of the Convention.

¹⁶ ESG Science and Implementation Plan, p. 38 (original emphasis).

¹⁷ I will examine the role of the public authorities, classical agents, in the Aarhus Convention’s participatory system *infra* (No. 2.3.2.2.).

- Governmental bodies from all sectors and at all levels (national, regional and local),
- Natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment, and
- Privatised bodies having public responsibilities or functions, or providing public services, in relation to the environment, under the control of the aforementioned types of public authorities.

By including both *de jure* and *de facto* public and privatised bodies providing public services in relation to the environment, the Aarhus Convention aims to cover as many existing and future entities as possible – and thus to avoid a slip of responsibilities.

1.2. *The participatory model versus the “participatory discourse”*

17. The Aarhus Convention’s participatory system was developed on the basis of Principle 10 of the Rio Declaration on environment and development.²⁰ Proclaiming that “[environmental] issues are best handled with the participation of all concerned citizens” and spelling out a triad for such participation – access to environmental information, public participation in environmental decision-making, and access to justice in environmental matters – Principle 10 launched a participatory model at the planetary level.²¹

¹⁸ Art. 2, §2 of the Convention.

¹⁹ Art. 2, §2 of the Convention also includes “the institutions of any regional economic integration organisation referred to in Article 17 of the Convention which is a Party to the Convention”. This provision chiefly concerns the European Union – which is a Party to the Convention – and emphasises that the provisions of the Convention apply to the EU institutions. For more information on the application of the Aarhus Convention by the European Union, see <http://ec.europa.eu/environment/aarhus>.

²⁰ See Christine Larssen, “La Convention d’Århus: ‘avancée majeure du droit international?’”, James Crawford and Sarah Nouwen (eds.), *Select Proceedings of the European Society of International Law*, Vol. 3, 2010, (pp. 339-352), p. 341.

²¹ At the time of the adoption of the Rio Declaration, the participatory model had already been explored at regional levels – in particular at the Pan-European level – for some time, cf. Christine Larssen, “La Convention d’Århus: ‘avancée majeure du droit international?’”, *op. cit.*, pp. 340 et seq.

This participatory model was recently reiterated at Rio + 20, where the Declaration on Justice, Governance and Law for Environmental Sustainability proclaims that “[environmental] sustainability can only be achieved [*via*] public participation in decision-making, and access to justice and information”.²²

The participatory model would contribute to environmental sustainability, for two main, interrelated, reasons.

On the one hand, by participating in environmental decision-making, the public would have the opportunity to ensure that its concerns are integrated into decisions regarding activities having, or which may have, a significant effect on the environment. Thereby, the public would feel less alienated from public policies relating to the environment, and the gap between the governing – an elite – and the governed – the public at large – would be reduced or closed. Reflecting the concerns of the public at large, decisions relating to the environment would be truly democratic, *i.e.* expressing “the rule of the people”.²³ Such strengthening of democracy would contribute to the quality and effectiveness – and thus sustainability – of environmental decisions.

On the other hand, thanks to access to environmental information and access to justice in environmental matters, the environmentally sensitised public would be able to hold public and private entities accountable for their action in the area of the environment, and thus contribute to environmental sustainability.

As we can see, the participatory model is based on an essential idea: the participation of the public at large in environmental governance contributes to environmental sustainability.

18. Applied to nuclear, the participatory model would contribute to sustainable nuclear governance as follows.

²² II., (b) of the Declaration, adopted at the World Congress on Justice, Governance and Law for Environmental Sustainability, Rio de Janeiro (Brazil), 20 June 2012.

²³ Cf. the Greek *demos* and *kratia*.

Regarding nuclear decision-making, public participation in nuclear decision-making would give the public the opportunity to express its concerns regarding nuclear before a nuclear project – *i.e.* (re-)installation or dismantling of a nuclear power plant – is implemented. Addressing the concerns of the public as a whole, fears and uncertainties of the wider public regarding nuclear would be dealt with upstream, nuclear would exit elite circles and nuclear decisions would represent a societal project.

During the operation of a nuclear power plant, members of the public would, thanks to access to nuclear information and access to justice in nuclear matters, be able to hold public authorities and private entities accountable for the way in which they carry out the nuclear societal project.

In this line, the Aarhus Convention organises public participation in nuclear decision-making, access to nuclear information and access to justice in nuclear matters.²⁴

19. However, the Aarhus Convention symbolises a slide from the participatory model – in which public participation means participation of the public at large – to a “participatory discourse”, where the circle of participants fluctuates, from “all concerned citizens”, to “all concerned parties”, to “all stakeholders”, to “the public concerned” (only).

This fluctuation of the circle of participants has caused a confusion regarding who actually the “public” is in public participation.

The confusion is strikingly illustrated by the Guidelines promoting the effective implementation of Principle 10²⁵, (hereinafter the “Principle 10 Guidelines”), which state, regarding public participation in decision-making, that “members of the public concerned should be informed of their opportunities to participate at an early stage in the decision-making process”²⁶, that States should make efforts to “ensure that members of the public

²⁴ Par. 9 *supra*.

²⁵ “Guidelines for the development of national legislation on access to information, public participation and access to justice in environmental matters”, proceedings of the Governing Council/Global Ministerial Environment Forum at its eleventh special session (UNEP/GCSS.XI/11, 3 March 2010), SS.XI/5, A, pp. 11 et seq.

²⁶ Guideline 8.

concerned are given an adequate opportunity to express their views”²⁷, while States should ensure “that due account is taken of the comments of the public in the decision-making process”.²⁸

We see that the confusion regarding the participants – particularly manifest in the Principle 10 Guidelines, but to be found in numerous “participatory” documents²⁹ – (sometimes) leads to a restriction of the participants to the “public concerned”.

20. What to retain from this brief survey?

According to the participatory model, involvement of the public in matters relating to the environment contributes to environmental sustainability, thanks to the closure or reduction of a double gap: the gap between the public at large and the environment, on the one hand, and the gap between the public at large and an elite, on the other hand. The involvement of the public at large is at the very heart of the participatory model. Otherwise formulated, in order for the participatory model to truly contribute to environmental sustainability, the public at large needs to have access to environmental governance.

The participatory model has glided into a “participatory discourse” in which the participants fluctuate. This fluctuation gives rise to two fundamental questions:

- Which public actually has access to environmental governance?
- Why does it matter?

21. The remainder of this paper addresses these two questions with regard to nuclear governance.

²⁷ Guideline 9.

²⁸ Guideline 10. “Public” and “public concerned” are defined as in the Aarhus Convention (cf., respectively, footnotes No. 10 and 11 of the Principle 10 guidelines).

²⁹ See Christine Larssen, “Les modalités et le déroulement des procédures d’enquête publique en matière d’environnement et d’urbanisme”, Benoît Jadot (dir.), *La participation du public au processus de décision en matière d’environnement et d’urbanisme. Actes du colloque organisé le 27 mai 2004 par le Centre d’étude du droit de l’environnement (CEDRE) des Facultés universitaires Saint-Louis, Bruxelles, Bruylant, 2005, par. 19.*

In the following Section, I closely examine which public has access to Aarhusian nuclear governance. Further to this analysis, in Section 3., I emphasise why it is important to be particularly attentive to who has access to nuclear governance, and offer strategies for a durable strengthening of nuclear governance.

2. Who has access to Aarhusian nuclear governance?

2.1. *The pivotal notion of “access”*

22. This paper apprehends the ESG analytical problems in a transversal perspective, through the pivotal notion of “access”. “Access” is thus here considered as a nodal point of the ESG analytical problems, rather than an analytical problem in itself.³⁰

“Access” as approached in this paper relates to *Architecture* in that Aarhusian nuclear governance will only be effective if the design of the Aarhus Convention enables the public to actually have access to the participatory system. This presupposes that the Aarhusian architecture – both the Convention itself and the post-Aarhus process – is accessible to the public.

Identification of the *Agents* in the Aarhus Convention’s participatory system, and the relationship between actors and agents in the system, requires special attention in order to be able to assess who has – directly or indirectly – access to Aarhusian nuclear governance. This, in turn, triggers questions of accountability and legitimacy, as well as equity, fairness, and equal opportunities for all.³¹ We will therefore pay special attention to agents and actors of Aarhusian nuclear governance.

23. The examination of access to Aarhusian nuclear governance will be twofold: first, I will examine the theoretical access of the public to Aarhusian nuclear governance, analysing the relevant provisions of the Convention; then, I will focus on the practical access of the public,

³⁰ The considerations below concerning the relationship between “access” as apprehended in this paper and the ESG analytical problems of Architecture, Agents, Accountability and Legitimacy, and Allocation and Access, are applicable, *mutatis mutandis*, to the ESG analytical problem of Adaptiveness.

³¹ Cf. the ESG analytical problems of Accountability and Legitimacy, and Allocation and Access.

examining which measures are foreseen by the Aarhus Convention, considered as a whole, to ensure that the public is in a condition (intellectually, physically, materially) to participate in nuclear governance.

24. Testing the Aarhus Convention against “access” as thus understood, will allow me to determine who effectively has access to Aarhusian nuclear governance, to respond to the question of this Section, and to offer strategies for a durable strengthening of nuclear governance in the following Section.

2.2. *Theoretical access to Aarhusian nuclear governance*

25. As mentioned earlier, sustainable nuclear governance comprises three facets: public participation in nuclear decision-making, access to nuclear information and access to justice in nuclear matters – all organised by the Aarhus Convention.

Consequently, I will analyse the relevant provisions of the Convention in order to determine who, theoretically, has access to nuclear decision-making (2.2.1.) on the one hand, and who, theoretically, has access to nuclear information and access to justice in nuclear matters (2.2.2.), on the other hand.

2.2.1. Theoretical access to nuclear decision-making

26. As pointed out *supra*³², Article 6 of the Convention constitutes the main reference for public participation in nuclear decision-making.

According to several provisions of Article 6, any member of the public is entitled to participate in the “Article 6 procedures”: the procedural information to be provided to the public concerned³³ must specify the opportunities for the public to participate³⁴, the participatory procedures shall include reasonable timeframes for the different phases, allowing sufficient time for the public to prepare and participate effectively during the

³² Par. 9.

³³ Cf. Art. 6, §2 of the Convention (*infra*, par. 27).

³⁴ Art. 6, §2, d), ii) of the Convention.

environmental decision-making³⁵, and the procedures shall allow the public to submit any comments, information, analyses or opinions that it considers relevant to the proposed activity.³⁶

The principle is thus clear³⁷: theoretically, any member of the public has access to nuclear decision-making.

But how does Article 6 apply this principle? Who has access to nuclear decision-making in light of the design of Article 6?

27. Since “[access] to all relevant information is a prerequisite for effective public participation”³⁸, I will here focus on the provisions of Article 6 regulating information of the potential participants.³⁹

In order for the public to be able to participate effectively, the potential participants need to be duly informed, both regarding the participatory procedure itself (the commencement of the procedure, the time and venue of any public hearing, etc.), and regarding the proposed activity and its estimated effects on the environment. In short, due information of the public within the context of a specific participatory procedure implies that the public disposes of the adequate procedural and substantial information.

³⁵ Art. 6, §3 of the Convention.

³⁶ Art. 6, §7 of the Convention.

³⁷ Despite this clarity, the distinction between the “public” and the “public concerned” in the Aarhus Convention has caused confusion with respect to the circle of participants (cf. *supra*, par. 19). The Draft Recommendations on Public Participation in Decision-Making in Environmental Matters (second draft for consultation, October 2012. The Draft Recommendations, prepared under the auspices of the Task Force on Public Participation in Decision-Making, open for consultation and thus subject to change, are available here: <http://www.unece.org/env/pp/ppdm.html>), while insisting on the principle that the public in its entirety is entitled to participate in a procedure organised under Art. 6 (cf. p. 24, par. 91. See also p. 26, par. 102), amply confuse the respective roles of the public and the “public concerned”.

³⁸ Draft Recommendations on Public Participation in Decision-Making in Environmental Matters, cited above, p. 20, par. 71. See also the 2nd par. of the preamble to the Principle 10 Guidelines.

³⁹ Regarding the provisions of Art. 6 regulating time in the participatory procedures, see Christine Larssen, “Vers une gestion démocratique du risque environnemental. Le système participatif de la convention d’Århus: faiblesses et potentialités”, *Lex Electronica*, vol. 17.1 (Été/Summer 2012), available online: http://lex-electronica.org/docs/articles_308.pdf, pp. 13 et seq.

Paragraphs 2 and 6 of Article 6, respectively, organise such procedural and substantial information – but only to the benefit of the “public concerned”.⁴⁰

Certainly, paragraph 6 specifies that it applies “without prejudice to Article 4”⁴¹, provision which organises access to information at the request of any member of the public.⁴² However,

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According to par. 2 of Art. 6, “[the] public concerned shall be informed, either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and effective manner, inter alia, of:

- (a) The proposed activity and the application on which a decision will be taken;
- (b) The nature of possible decisions or the draft decision;
- (c) The public authority responsible for making the decision;
- (d) The envisaged procedure, including, as and when this information can be provided:
 - (i) The commencement of the procedure;
 - (ii) The opportunities for the public to participate;
 - (iii) The time and venue of any envisaged public hearing;
 - (iv) An indication of the public authority from which relevant information can be obtained and where the relevant information has been deposited for examination by the public;
 - (v) An indication of the relevant public authority or any other official body to which comments or questions can be submitted and of the time schedule for transmittal of comments or questions; and
 - (vi) An indication of what environmental information relevant to the proposed activity is available; and
- (e) The fact that the activity is subject to a national or transboundary environmental impact assessment procedure.” (original emphasis).

Par. 6 of Art. 6 provides that “[each] Party shall require the competent public authorities to give the public concerned access for examination, upon request where so required under national law, free of charge and as soon as it becomes available, to all information relevant to the decision-making referred to in this article that is available at the time of the public participation procedure, without prejudice to the right of Parties to refuse to disclose certain information in accordance with article 4, paragraphs 3 and 4. The relevant information shall include at least, and without prejudice to the provisions of article 4:

- (a) A description of the site and the physical and technical characteristics of the proposed activity, including an estimate of the expected residues and emissions;
- (b) A description of the significant effects of the proposed activity on the environment;
- (c) A description of the measures envisaged to prevent and/or reduce the effects, including emissions;
- (d) A non-technical summary of the above;
- (e) An outline of the main alternatives studied by the applicant; and
- (f) In accordance with national legislation, the main reports and advice issued to the public authority at the time when the public concerned shall be informed in accordance with paragraph 2 above.”

it is unlikely that a member of the public, who is not considered part of the “public concerned” – and who therefore does not dispose of the procedural information detailed in paragraph 2 – knows that a participatory procedure is envisaged⁴³, what relevant substantial information is available⁴⁴, and where to obtain it.⁴⁵

2.2.2. Theoretical access to nuclear information and to justice in nuclear matters

28. Regarding access to nuclear information, any member of the public is entitled to introduce a request for nuclear information⁴⁶, “without an interest having to be stated”⁴⁷, whereas dissemination of nuclear information by the public authorities, in situations of emergency, is organised for members of the public who may be affected.⁴⁸

29. As concerns access to justice in nuclear matters, “any person” is entitled to challenge the way in which a request for access to nuclear information has been dealt with⁴⁹, while access to judicial procedures to challenge breaches of national law by public or private entities is foreseen for “members of the public meeting the criteria, if any” laid down in the national law of a Party.⁵⁰

2.2.3. Summing up theoretical access to Aarhusian nuclear governance

30. Echoing the fluctuations of participants in the “participatory discourse”⁵¹, different members of the public have theoretical access to Aarhusian nuclear governance:

⁴¹ See also Art. 6, §2, (d), (iv) of the Convention.

⁴² Cf. below, par. 28.

⁴³ Cf. Art. 6, §2, (d) of the Convention.

⁴⁴ Cf. Art. 6, §2, (d), (vi) of the Convention.

⁴⁵ Cf. Art. 6, §2, (d), (iv) of the Convention.

⁴⁶ Art. 4, §1 of the Convention.

⁴⁷ Art. 4, §1, (a) of the Convention.

⁴⁸ Art. 5, §1, (c) of the Convention.

⁴⁹ Art. 9, §1 of the Convention.

⁵⁰ Art. 9, §3 of the Convention.

⁵¹ Cf. *supra*, par. 19.

- Regarding nuclear decision-making, any member of the public is entitled to participate in “Article 6 procedures”, while information is only organised to the benefit of the “public concerned”;
- Regarding the operation of a nuclear power plant, any member of the public may introduce a request for nuclear information and a related review procedure; information of the public at the initiative of the public authorities, in situations of emergency, is organised for members of the public who may be affected; judicial procedures to challenge breaches of national law by public or private entities is foreseen for “members of the public meeting the criteria, if any” laid down in the national law of a Party.

In sum, except for requests for nuclear information, the public at large does not have theoretical access to Aarhusian nuclear governance.

31. After this theoretical analysis, let us now examine the practical access of the public to Aarhusian nuclear governance, and consider the Aarhus Convention as a whole: which measures are foreseen by the Aarhus Convention to ensure that the public has intellectual, physical and material access to Aarhusian nuclear governance?

2.3. Practical access to Aarhusian nuclear governance

32. In accordance with the Conference themes, I will examine the practical access of the public to Aarhusian nuclear governance addressing the complex Aarhusian architecture (2.3.1.), and the (supposedly) multiple agents of the Aarhus Convention’s participatory system (2.3.2.).⁵²

2.3.1. Complex architecture

33. The Aarhusian architecture is remarkably complex, both the Aarhus Convention itself – some 20 pages of intricate procedures –, and the post-Aarhus process, with its plethora of task forces, expert groups, working groups, etc., established to support the implementation of various elements of the Convention’s participatory system.

⁵² Cf. *supra*, par. 22, the relationship between the Conference themes and “access” as apprehended in this paper.

Certainly, much Aarhus-related guiding material has been produced. On the Aarhus Convention's website only⁵³, the "guiding material" page⁵⁴ contains 30 Aarhus-related documents. However, the documents appearing on the "guiding material" webpage – simply listed, without any conceptual treatment – are:

- Of different origins: non-governmental and governmental (national and international), without their respective statuses being clarified⁵⁵,
- In different stages of finalisation: draft and final. When a draft version appears on the webpage, it is not specified whether or where a final version exists,
- With different target-groups: government officials or civil society, and
- Of different nature: some effectively representing guiding material, some being the document itself. For instance, the Aarhus Convention appears as "guiding material" to itself!

With such mismatch of "guiding material", one needs to know what one is looking for in order to be able to locate it, and to understand the different statuses of the various documents. It is highly unlikely that an uninitiated member of the public is actually thus "guided" through the complex Aarhusian architecture.

34. Aarhusian nuclear governance will only be effective if the Aarhusian architecture is accessible to the public at large. However, in its current form and presentation, the Aarhusian architecture is merely practically accessible to a small portion of the public.⁵⁶

⁵³ Aarhus-related guiding material has been produced by various organisms, such as – just to name a few – the Regional Environmental Center (www.rec.org), Participate (www.participate.org), the European Environmental Bureau (www.eeb.org), and The Access Initiative (<http://www.accessinitiative.org>).

⁵⁴ <http://www.unece.org/environmental-policy/treaties/public-participation/publications/public-participation.html>.

⁵⁵ A disclaimer – reading as follows: "The above-listed publications are not official documents of the United Nations Economic Commission for Europe (UNECE). They have not been endorsed by UNECE, the Meeting of the Parties to the UNECE Aarhus Convention, or any of its subsidiary bodies. UNECE assumes no responsibility for the absolute accuracy of the information presented in these publications; nor for errors, typographical or otherwise; omissions; losses, damages, incorrect citations, non-cited sources, etc. resulting from the use of the data or information presented therein" – only appears with two documents, both of governmental origin.

⁵⁶ I will come back to this when examining the "intellectual access" of the public at large to the Aarhus Convention's participatory system later in this Section (No. 2.3.2.1.1.1.).

2.3.2. Multiple agents?

35. Just as the Aarhusian architecture corresponds to the Conference theme of Complex Architecture, the Aarhus Convention’s participatory system – and thus Aarhusian nuclear governance – seemingly encompasses Multiple Agents.

In order to verify whether the parallel between the Aarhus Convention’s system and the Conference themes is complete, I will identify the Aarhusian agents, distinguishing unofficial “agents” (2.3.2.1.) and official agents (2.3.2.2.).

2.3.2.1. Unofficial “agents”

36. As expressed by the ESG Science and Implementation Plan: “the norms of participation, participatory processes in decision-making, and stakeholder participation practices that are prevalent in a specific context will, as the ‘structure’, frame the ability of the various actors to exercise agency”.⁵⁷

This statement is particularly relevant to the Aarhus Convention’s participatory system. However, in this context, the statement calls for the following rephrasing: the norms of participation established by the Aarhus Convention – including, thus, in the area of nuclear governance – frame the ability of some actors to exercise power. Let us take a closer look at “some” actors (2.3.2.1.1.) exercising “power” (2.3.2.1.2.).

2.3.2.1.1. “Some” actors

37. Our analysis of the relevant provisions led us to conclude that, except for requests for nuclear information, the public at large does not have theoretical access to Aarhusian nuclear governance. Hence, already from a theoretical point of view, only “some” actors have access to Aarhusian nuclear governance.

38. Other features of the Convention, considered as a whole, entail that only “some” actors will have access to its participatory system, including, thus, to Aarhusian nuclear governance.

⁵⁷ ESG Science and Implementation Plan, p. 39.

We will now explore the practical access of the public and examine whether and how the Aarhus Convention ensures that the public has intellectual (2.3.2.1.1.1.), physical and material (2.3.2.1.1.2.) access to Aarhusian nuclear governance.

2.3.2.1.1.1. Intellectual access to Aarhusian nuclear governance

39. The adjective “intellectual” is here apprehended in its etymological sense, cf. the latin *intellectus*, which means to perceive, to understand.

In order to determine the intellectual access of the public to Aarhusian nuclear governance, we need to ask ourselves two questions:

- In general, what is done to ensure that the public at large understands the Aarhus Convention’s participatory system?
- Regarding nuclear governance specifically, what is done to ensure that the public understands nuclear information?

40. To respond to the first question, regarding intellectual access to the Aarhus Convention’s participatory system, I pointed out above⁵⁸ that both the Convention and the post-Aarhus process are extremely difficult to understand by an uninitiated member of the public: in its current form and presentation, the complex Aarhusian architecture is merely intellectually accessible to a small portion of the public.

However, intellectual access to the Aarhusian architecture is a prerequisite for access to Aarhusian nuclear governance.

41. To respond to the second question, regarding intellectual access to nuclear governance, nuclear information is particularly complex. For instance, how will all members of the public be capable of assessing the way in which a nuclear power plant addresses the “impacts of higher burnup UOX on the LWRs and HWRs with zirconium alloy-clad UOX fuels”⁵⁹?

⁵⁸ No. 2.3.1.

⁵⁹ Example inspired by *Impact of high burnup uranium oxide and mixed uranium-plutonium oxide water reactor fuel on spent fuel management*, IAEA Nuclear Energy Series, No. NF-T-3.8, International Atomic Energy Agency, Vienna (Austria) 2011.

Indeed, concerning nuclear decision-making, even if all the members of the public were informed within the context of a participatory procedure, it is unlikely that everyone would be capable of understanding the substantial information and thus of participating effectively. As concerns the operation of a nuclear power plant, it is only if the public understands the nuclear information that it receives that it will be able to hold public authorities and private entities accountable for the way in which they carry out the nuclear societal project.

In order to ensure intellectual access to nuclear governance, environmental education is paramount. The Aarhus Convention does contain a general provision requiring Parties to promote environmental education and environmental awareness among the public.⁶⁰ However, this general provision has, so far, barely received any attention in the post-Aarhus process.⁶¹

⁶⁰ Art. 3, §3 of the Convention.

⁶¹ Certainly, much attention is allocated to capacity building in the post-Aarhus process (see “Capacity-building activities supporting the implementation of the Convention”, Report prepared by the secretariat of the Aarhus Convention and presented to the Second Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, held in Almaty (Kazakhstan), 25-27 May 2005, ECE/MP.PP/2005/16 18, May 2005 – hereinafter “Aarhus Convention capacity-building report” –, as well as the other documents available at the webpage dedicated to capacity building on the Aarhus Convention’s website: <http://www.unece.org/env/pp/oa.html>).

However, it is important to recall that capacity building differs from education in several respects. I will here outline some of the main differences between capacity building and education directly relevant to this contribution:

- Capacity building is chiefly directed at public authorities (e.g. the judiciary regarding access to justice) and civil society organisations – not the general public. Regarding capacity building activities carried out for “civil society”, if the general public is, in theory, not excluded from such activities, it does not mean that the general public practically has access to them: the considerations in this paper regarding practical access of the general public to Aarhusian nuclear governance are applicable, *mutatis mutandis*, to capacity building activities,
- The “experts” carrying out the capacity building activities are not (or rarely) trained as teachers. However, in order to be able to increase the intellectual access of the public, one has to learn how to teach,
- Capacity building activities carried out within the post-Aarhus framework focus on the implementation of the Aarhus Convention, and precisely not on how to ensure intellectual access to the Convention’s participatory system, cf., e.g.: “[many] national projects aimed at the active provision of information, in particular through websites, have been implemented in many of the EECCA and South-East European

2.3.2.1.1.2. Physical and material access to Aarhusian nuclear governance

42. Even if all the members of the public were informed and understood the information, everyone would not have the physical or material capacities to participate in Aarhusian nuclear governance. Indeed, and for instance⁶², what about the sick or those suffering from ill-health? What about the members of the public who need to hold several jobs? Will they have physical or material access to Aarhusian nuclear governance?

The Aarhus Convention comprises no elements aiming to include the marginalised in its participatory system. Certainly, the Convention contains a series of general provisions destined to ensure a broad participation of the public. However, those provisions focus on how to support the members of the public who are already in the participatory system – for instance, the Convention asks the Parties to endeavour to ensure that officials and authorities assist and provide guidance to the members of the public (already) exercising their participatory rights⁶³ – but not on how to help marginalised members of the public accede to the system.

43. We must thus conclude that only “some” actors are able to exercise agency (“power”, cf. the next point) in Aarhusian nuclear governance: those who are informed, and understand the information, and have the necessary physical and material capacities.

2.3.2.1.2. Exercising “power”

countries. However, the speed of Internet access and access to technical equipment remain major obstacles, in particular in the Caucasus and Central Asia. It is therefore of the utmost importance that environmental information in these regions should be made accessible also through more traditional means, such as libraries and the media.” (Aarhus Convention capacity-building report, par. 35).

⁶² More generally, let us keep in mind that vulnerable groups are manifold and include, among others, “refugees, the aged, ethnic and racial minorities, people with disabilities, people released from institutions or prison, the sick or those suffering from ill-health, the homeless and people in poor housing, asylum seekers, lone-parent families, other women with family and caring responsibilities, the long-term unemployed, older workers, economically vulnerable women, young people and children.” (*Access to Social Rights in Europe*, Council of Europe Publishing, 2001, p. 51).

⁶³ Art. 3, §2 of the Convention.

44. According to the ESG Science and Implementation Plan, an agent is an authoritative actor. Authority is understood as the legitimacy and capacity to exercise power, and legitimacy is conferred through social consent, given formally or informally.⁶⁴

Hence, in order for the “some” actors that do participate in Aarhusian nuclear governance to exercise agency, they need to dispose of the formal or informal consent of the non-participants.

45. In my view, it is difficult to consider that the “some” actors that do participate in Aarhusian nuclear governance automatically have the (tacit) consent of those who do not – and, thus, that the “some” actors exercise agency.

Regarding nuclear decision-making, for instance, some members of the public may wish to participate, but do not have the intellectual, physical or material means to do so. It can be truly humiliating for those members of the public, not only to be factually excluded from the participatory procedures – and thus excluded from participating in determining the “if” and the “how” of nuclear –, but also to learn that their, involuntary, absence is considered as a tacit consent with what “some” actors have advocated. In addition to eroding the dignity of the excluded, such assumption of tacit consent is hardly in conformity with Article 21, §1 of the UDHR, since the “some” actors are not “freely chosen representatives”.

46. This leads to the tricky question of the relationship between the “some” actors that do participate in Aarhusian nuclear governance and the non-participants – and, thus, to questions of legitimacy, accountability and fairness.

The Aarhus Convention’s participatory system aims to protect the right – of every person of present and future generations – to a healthy and sustainable environment.⁶⁵

Since only “some” actors participate in Aarhusian nuclear governance, what is the relationship between those “some” actors and every person of present and future generations?

⁶⁴ ESG Science and Implementation Plan, p. 38.

⁶⁵ Cf. *supra*, par. 8.

Are the “some” actors accountable to every person of present and future generations? Is it legitimate and fair that only “some” participate in determining the content of what is supposed to be a societal project?

In our representative system, only official representatives are commissioned to act on behalf of every person of present and future generations.⁶⁶

Let us then see what role the Aarhus Convention reserves to those classical agents.

2.3.2.2. Official agents

47. The expression “official agents” designates the public authorities, which, in a representative democracy, dispose of the legitimacy and capacity to exercise power. Social consent is given formally, *via* free, fair, periodic and genuine elections.⁶⁷

Official agents would therefore seem as particularly appropriate to exercise authority within the Aarhus Convention’s participatory system.

However, the Aarhusian public authority capability to exercise agency is only incidentally mentioned, for instance when the Convention provides that “each Party shall ensure that, when the decision has been taken by the public authority, the public is promptly informed of the decision in accordance with the appropriate procedures”.⁶⁸

More importantly, the Convention does not, explicitly⁶⁹, foresee any role of classical agents within the participatory system: nowhere does the Convention mention that the public authorities could exercise the rights of access to information, participation in decision-making or access to justice.

⁶⁶ Cf. Stéphane Rials, “Représentations de la représentation”, *Droits*, n° 6, 1987, (pp. 3-9), p. 4.

⁶⁷ For a detailed analysis of those international requirements, see *Human Rights and Elections. A Handbook on the Legal, Technical and Human Rights Aspects of Elections*, Professional Training Series No. 2, Centre for Human Rights, United Nations, New York and Geneva, 1994.

⁶⁸ Art. 6, §9 of the Convention (emphasis added). See also Art. 6, §2, (c).

⁶⁹ Cf. *infra*, par. 63.

Hence, in the Convention's participatory system, the public authorities – classical agents – have essentially lost their role as agents.

48. To conclude this analysis, the agents in the Aarhus Convention's participatory system, and thus in Aarhusian nuclear governance, are hardly “multiple”. The classical agents are quasi-absent and unofficial “agents” are a handful of privileged actors – members of the “Aarhus family”.⁷⁰



49. We can now answer the question of this Section: which public has access to Aarhusian nuclear governance?

Those who are informed (in nuclear decision-making, only the “public concerned”), and understand the information and have the necessary physical and material capacities⁷¹ – otherwise said, an elite.

Access of the general public to Aarhusian nuclear governance is not ensured, neither theoretically nor practically.

50. I will now emphasise why it especially matters for sustainable nuclear governance, and explore strategies to enhance access of the general public – for a durable strengthening of nuclear governance.

⁷⁰ Cf. par. 2, 13 and 15 of the Chisinau Declaration, adopted by the Meeting of Parties to Aarhus Convention at its fourth session, held in Chisinau (Moldova), 29 June – 1 July 2011 (ECE/MP.PP/2011/2/Add.1, 19 August 2011).

⁷¹ And the will... Examining the will of the public in public participation would require a paper in itself.

3. Strategies for a durable strengthening of nuclear governance

51. Why is it important to be particularly attentive to who has access to nuclear governance?

52. In order to answer that question, I will need to insist on how the participatory model would allow for sustainable nuclear governance.

Regarding nuclear decision-making: public participation in nuclear decision-making would give the public the opportunity to express its concerns regarding nuclear before a nuclear project is implemented. Addressing the concerns of the public as a whole, fears and uncertainties of the wider public regarding nuclear would be dealt with upstream, nuclear would exit elite circles and nuclear decisions would represent a societal project.

During the operation of a nuclear power plant: members of the public would, thanks to access to nuclear information and access to nuclear justice, be able to hold public authorities and private entities accountable for the way in which those entities carry out the nuclear societal project.

53. Since access of the public at large to Aarhusian nuclear governance is not ensured:

- Regarding nuclear decision-making: nuclear decisions adopted further to Article 6 of the Convention will not address the concerns of the public as a whole, fears and uncertainties of the wider public regarding nuclear will not be dealt with upstream, nuclear exploitation will not exit elite circles, and decisions regarding nuclear exploitation will not represent a societal project, and
- Regarding the operation of a nuclear power plant, the public at large will not be able to hold public authorities and private entities accountable.

54. Again, I insist: I have no wish to discard the Aarhus Convention, a good starting point for involving the public in nuclear governance. However, as I have duly demonstrated, the Convention symbolises a “participatory discourse”, where public participation does in fact not mean participation of the public at large.

Taking the participatory model seriously, I will suggest strategies, within the frame of the Aarhus Convention, in view of strengthening access of the general public to nuclear

governance, exploring how to strengthen the intellectual access of the general public to the Aarhusian architecture (3.1.), and how to strengthen access of the public at large to Aarhusian nuclear governance – directly as actors and indirectly *via* agents (3.2.).

3.1. Strategies for strengthening access of the general public to the Aarhusian architecture

55. Before anything, in order to strengthen access of the public at large to Aarhusian nuclear governance, the Aarhusian architecture needs to become much more understandable.

If it will be difficult to rewrite the – prolix and complex – Convention, the numerous guides to the Convention and its protocols⁷² could fittingly be better articulated, perhaps into one single document. Such unique and comprehensive guide could be developed by (or under the auspices of) the Aarhus Convention Secretariat and, in order to clarify its status, be approved by the Meeting of the Parties.

Post-Aarhus work could be presented in a conceptual, structured, manner on the Aarhus Convention’s website, so that one does not have to know what information one is looking for in order to be able to locate it.

3.2. Strategies for strengthening access of the public at large to Aarhusian nuclear governance – directly as actors and indirectly via agents

56. The general public’s access to Aarhusian nuclear governance could be strengthened in two, complementary, manners: measures could be taken to include members of the public at large directly, where they would participate as actors (3.2.1.) and indirectly, where they would participate *via* agents (3.2.2.).

3.2.1. Strategies to include the general public directly in Aarhusian nuclear governance (as actors)

⁷² Cf. *supra*, No. 2.3.1.

57. Members of the public at large will only be able to fulfil their role as actors of nuclear governance if they understand nuclear information.

To that effect, far more attention should be allocated to environmental education. The Meeting of the Parties to the Aarhus Convention could instil an educative momentum in the post-Aarhus process by creating a subsidiary body specifically dedicated to environmental education. Such subsidiary body would make sure to integrate in its work existing initiatives relative, not only to environmental education, but also to education for sustainable development. Regarding the latter, the subsidiary body could suitably explore the will expressed in the UNECE Strategy for Education for Sustainable Development to support the implementation of the Aarhus Convention “by promoting transparent, inclusive and accountable decision-making as well as people’s empowerment”.⁷³

58. Members of the public at large need to be physically and materially capable of fulfilling their role as actors of nuclear governance.

The Aarhus Convention could remedy its failure to foresee support to the marginalised by including a general provision requiring Parties to take the necessary measures to include vulnerable members of the public. The authors of such provision could draw inspiration from post-Aarhus work itself, by referring to the Almaty Guidelines⁷⁴, which state that “where members of the public have differentiated capacity, resources, socio-cultural circumstances or economic or political influence, special measures should be taken to ensure a balanced and equitable process.”⁷⁵

59. Regarding nuclear decision-making specifically, the distinction between the public and the “public concerned” in Article 6 of the Convention could, as a minimum, be clarified. Hence, the unique guide suggested above could stress that all the members of the public are

⁷³ UNECE Strategy for Education for Sustainable Development, adopted at the High-level meeting of Environment and Education Ministries, held in Vilnius (Lithuania), 17-18 March 2005, CEP/AC.13/2005/3/Rev.1, 23 March 2005, par. 12 (emphasis added).

⁷⁴ Decision II/4, “Promoting the application of the principles of the Aarhus Convention in international forums”, adopted at the second meeting of the Parties [to the Aarhus Convention], held in Almaty, Kazakhstan, on 25-27 May 2005 (ECE/MP.PP/2005/2/Add.5, 20 June 2005). The Almaty Guidelines are annexed to the cited Decision.

⁷⁵ Par. 15 of the Almaty Guidelines.

entitled to participate in the “Article 6” procedures, and that the notion of “public concerned” only applies to the provisions of Article 6 organising information of the participants.

But such clarification would hardly suffice to include the public at large directly in nuclear decision-making. Indeed – it seems obvious, but it was apparently not obvious to the authors of the Convention – how can the public at large participate in nuclear decision-making if it does not dispose of the relevant procedural and substantial information? Also, since only the “public concerned” is informed of an envisaged procedure, on what basis can or will the public authority identify, *ex ante*, “the public affected or likely to be affected by, or having an interest in”⁷⁶ nuclear decision-making, while public participation in nuclear decision-making is precisely organised in order for the participants to express their opinions and concerns regarding nuclear?

In order to strengthen access of the members of the public who do have an interest in a given nuclear decision-making, the distinction between the public and the “public concerned” in Article 6 should rather be abandoned altogether. Hence, all the members of the public should be informed of an envisaged procedure (as is the case in several existing national public participation regimes⁷⁷). Each member of the public would then have the opportunity to assess⁷⁸ whether he or she “is affected or likely to be affected by, or has an interest in” the procedure in question, and thus have the opportunity⁷⁹ to fulfil their role as actors.

Otherwise said, in a truly participatory spirit, it should be up to the public itself to decide, when a participatory procedure is announced, whether or not it is concerned by the decision in question.

60. Those strategies would strengthen direct access of the public at large to nuclear governance, in that:

- Everyone would be informed,

⁷⁶ Cf. the definition of “public concerned” (*supra*, par. 13).

⁷⁷ Cf. Christine Larssen, “Vers une gestion démocratique du risque environnemental. Le système participatif de la convention d’Århus: faiblesses et potentialités”, *op. cit.*, p. 22.

⁷⁸ Provided that they understand the information.

⁷⁹ Provided that they have the material and physical capacities.

- Everyone – or, at least, a greater part of the public – would be able to understand the information, and
- The members of the public who wish to participate in nuclear governance further to the two preceding measures would be able to do so thanks to support.

61. Members of the public who would not be able (or willing) to fulfil their role as actors despite the above, could participate indirectly *via* agents.

Indeed, even if the participatory system were designed as to enable any member of the public to participate, there would inevitably be a selection of participants. Since there will be a selection of participants, it is crucial to ensure that those who participate legitimately do so on behalf of those who do not.

3.2.2. Strategies to include the general public indirectly in Aarhusian nuclear governance (*via* agents)

62. Classical agents, public authorities, are commissioned to exercise authority on behalf of the public as a whole, including “those who are absent” – of both present and future generations.

63. If the public authorities were included in the Aarhus Convention’s participatory system as beneficiaries of the system they could legitimately represent “those who are absent”.

The Aarhus Convention would not need to be amended to include the public authorities as beneficiaries of its participatory system.

Indeed, let us remember that the Convention’s public includes legal persons.⁸⁰ Since public authorities are legal persons⁸¹, they could, literally, benefit from the Aarhus Convention’s participatory system, including, thus, Aarhusian nuclear governance.

⁸⁰ Cf. *supra*, par. 13.

⁸¹ Likewise, public authorities, such as local and regional authorities, are frequently grouped into advisory bodies – cf., for instance, at the international level, the Committee of the Regions of the European Union. If one considers that the “legal persons” mentioned in Art. 2, §4 covers public authorities, these advisory bodies correspond to the “associations, organisations or groups” of legal persons, also mentioned in Art. 2, §4.

Such literal reading of Article 2, §4 of the Convention may however not convince everyone. In order to indirectly include “those who are absent” in the Convention’s participatory system, it would therefore be appropriate for the Meeting of the Parties to authentically interpret Article 2, §4, to clarify that the “legal persons” mentioned in this provision covers both private and public legal persons.

64. Regarding nuclear decision-making, other participatory systems applicable to nuclear decision-making organise the participation of public authorities. This is the case of the Espoo Convention⁸² – which strongly influenced the Aarhus Convention⁸³, except on this point, thus. It would therefore not be difficult to envisage or organise the participation of public authorities in Aarhusian nuclear decision-making.

As concerns access to nuclear information, since public authorities would be considered as members of the public – and if they are not sufficiently informed about the operation of a nuclear power plant⁸⁴ – they would be entitled to introduce requests for access to nuclear information and the related review procedures.⁸⁵

Finally, as regards access to justice in nuclear matters, and if their own administrative powers do not suffice, public authorities could be presumed to meeting the (potential) requirements for challenging acts and omissions by public or private entities, which contravene national law relating to the environment.⁸⁶

⁸² Convention on Environmental Impact Assessment in a Transboundary Context, done at Espoo (Finland), on 25 January 1991. For the inclusion of public authorities in the participatory procedures organised by the Espoo Convention, see esp. Art. 5 of the Convention. For the applicability of the Espoo Convention to nuclear decision-making, see its Appendix I, par. 2.

⁸³ Cf. Christine Larssen, “La Convention d’Århus: ‘avancée majeure du droit international’?”, *op. cit.*, p. 342.

⁸⁴ Further to Art. 5, §1, b) of the Convention, according to which each Party shall ensure that “[mandatory] systems are established so that there is an adequate flow of information to public authorities about proposed and existing activities which may significantly affect the environment”.

⁸⁵ Cf. *supra*, par. 28.

⁸⁶ Cf. Art. 9, §3 of the Convention, *supra*, par. 29. Such procedure is organised in Belgian law (see Benoît Jadot and Christine Larssen, “Le contentieux: quelques questions-clés relatives à l’accès à la justice pour assurer la protection de l’environnement”, contribution au Complément X, v^o “urbanisme et environnement”, *Répertoire Pratique du Droit Belge*, 2007, pp.1382-1401).

Conclusion

65. By organising public participation in nuclear decision-making, access to nuclear information and access to justice in nuclear matters, the Aarhus Convention represents a step in the right direction for sustainable nuclear governance.

But Aarhusian nuclear governance should not be considered as the destination: the Convention's elitist participatory system does not ensure effective involvement of the public at large in nuclear governance. Only those who are informed (in nuclear decision-making, only the "public concerned"), and understand the information and have the necessary physical and material capacities will effectively have access to Aarhusian nuclear governance.

66. The participatory model will only allow for sustainable nuclear governance if the public at large actually has access to the three facets of nuclear governance: nuclear decision-making, nuclear information and justice regarding nuclear matters.

Indeed, it is only if the public in its entirety participates in nuclear governance – participates in determining the "if" and the "how" and participates in ensuring that the "how" is respected by public and private entities – that nuclear exploitation can become a truly environmentally sustainable societal project.