Disposal of Radioactive Waste: The Question of the Involvement of the Public under International Law

by Pierre Strohl*

Introduction

The public's request to be informed, consulted and finally to participate in the decision-making process is one of the most significant features of modern times. Although this demand can only really be satisfied in democratic countries where appropriate procedures exist, it has been extended to even more numerous and varied fields, whether at local, national or international level: the principle is gaining ground.

It would not be justified to regard this as simply a political reaction ensuing from a lack of confidence in representative democracy. The phenomenon is, in reality, a product of the "information and communication era": the member of the public is informed, practically immediately, of all that takes place, well beyond national boundaries. He is therefore inclined to react instantly, and the media and opinion polls encourage him to voice his opinion. When an event or decision concerns him, and even more so when he finds himself threatened, the desire to be "involved", directly or through community action, aside from the traditional legal rights to public representation which he may exercise periodically through elections, becomes natural.

We are aware to what degree the development of nuclear programmes in OECD countries is influenced by this new request by the public to play an active role: the debates which have arisen from plans concerning the permanent disposal of radioactive waste provide a perfect example of this influence. It is therefore worthwhile to examine in this context how, and to what extent, international law has been receptive to the social phenomenon that we have just described, following which we can draw certain conclusions, albeit of a necessarily provisional nature.

The evolution of mentalities and of the law

An international analysis of the provisions on the right to information and the consultation and participation of the public in the decision-making process relating to the management of radioactive waste raises sensitive questions since provisions of this nature are firmly rooted in the state order, especially when they concern nuclear energy. Indeed, international law in general bases itself on the political and economical sovereignty of states. To illustrate this situation we can, for example, refer to one of the basic texts which is the Charter of Economic Rights and Duties of States (Resolution of the General Assembly of the United Nations of 12 December 1974) which declares that:

> "Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities." [Article 2(1)];

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> "The protection, preservation and enhancement of the environment for the present and future generations is the responsibility of all States. All States shall endeavour to establish their own environmental and developmental policies in conformity with such responsibility. [...] All States have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." (Article 30).

Nevertheless, since the beginning of the 1970's, the environmental movement has imposed the idea that man himself is at the centre of environmental concerns and has a role to play independently of the powers reserved to states. A new philosophy in international environmental law has gradually been evolving in this sense by helping to introduce a subject other than the State, namely "the citizen" who is no longer simply a passive subject whose right to enjoy an environment of sufficient quality must be protected, but rather is an "active subject" involved in the conservation and improvement of his environment, who has the right to participate in decisions on this topic and therefore to have complete access to the relevant information. The international legal instruments which reflect this philosophy are not legally binding on states but do provide a doctrinal basis from which the law is inspired. In this manner, the international substantive law, whether already in force or in the process of being formed, has followed this development through organisations of intergovernmental co-operation in the context of regional conventions.

The nuclear industry, subject from the outset to a special legal regime which remained independent to a certain extent from environmental law (which only came into existence at a later stage), now tends to be governed, through these conventions, by the same provisions concerning the rights of the public as those which apply in relation to other activities representing a risk for the environment. It should be pointed out, however, that the Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management of 5 September 1997 (hereinafter referred to as "the Joint Convention") which has a universal vocation, continues to adopt in this respect a much more restrictive attitude.

We will see that European community environmental law has followed its own course concerning the rights of the public.

Finally, the existence of transboundary risks leads to the adoption of other regional conventions which, without directly creating international standards governing the rights of the public, require countries from which such a risk originates to grant the same rights of information and participation to the public in countries which could be exposed to this danger as those which are enjoyed by their own citizens.

The philosophy of international environmental law

The Declaration of the Conference of the United Nations on the Environment adopted on 16 June 1972 in Stockholm (hereinafter referred to as "the 1972 Declaration"), while recalling the rights and obligations of sovereign states (Principle 21), asserts the rights and responsibilities of man in the field of the protection of the environment. However, the request made of governments, as far as the subject we are interested in is concerned, limits itself to "education in environmental matters" in order to explain to citizens how they should exercise their responsibilities in protecting and improving his environment (Principle 19). In the same vein, The Final Act of the Helsinki Conference of 1975 on Security and Co-operation in Europe, confirms this responsibility of society.

However, the specific obligation to inform the public on, or to involve them in activities concerning the environment, seems to appear for the first time in The Declaration of the OECD of Anticipatory Environmental Policies, adopted at ministerial level on 8 May 1979, in which governments agree to "encourage public participation, where possible, in the preparation of decisions with significant environmental consequences, inter alia, by providing, as appropriate, information on the risks, costs and benefits associated with the decisions". Using this idea, and limiting such participation to the public exposed, the Council of the OECD recommends to governments to "introduce, where appropriate, practical measures for informing the public and for participation by those who may be directly and indirectly affected, at suitable stages in the process of arriving at decisions on projects" which have a significant impact on the environment; it has entrusted the Committee for the environment to report on actions undertaken (Recommendation on Assessment of Projects with Significant Impact on the Environment, of 8 May 1979, Paragraph I-5).

In a wider context, the World Charter for Nature (Resolution of the General Assembly of the United Nations of 28 October 1988) declares that "all persons, in accordance with their national legislation, shall have the opportunity to participate, individually or with others, in the formulation of decisions of direct concern to their environment" (Paragraph 23), which implies the right to obtain the information necessary for this participation.

A few years later, with a more specific object, the Decision–Recommendation of the Council of the OECD of 8 July 1998 related to accidents involving hazardous substances makes a clear distinction between the *decision* to make it compulsory for governments to communicate information on the type of risk and the safety measures to be taken, and the *recommendation* to "take action to facilitate, as appropriate, opportunities for the public to comment prior to decisions being made by public authorities concerning siting and licensing of hazardous installations". Typically, however, nuclear installations are excluded from the scope of this text.

Finally, the developments which we have just described are to be found in the most general form on a universal level in the Declaration of the Rio Conference on Environment and Development of 13 June 1992, of which Principle 10 states that the best protection of the environment is ensured by public participation. As a result: "at the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in the decision-making process. States shall facilitate and encourage public awareness and participation by making information widely available".

The impact of this philosophy

The political intentions expressed by governments are therefore very clear, if not extending to details of implementation, at least with respect to fixed objectives; with the exception of our example mentioned, they all apply to nuclear energy and in particular to the management of radioactive waste. These declarations, recommendations and resolutions, which are not legally binding but which do to a certain extent set an example, are often referred to as "soft law" or considered to be creating customary law. We think this to be unfounded. It is also not possible to consider them as "general principles of international law" of which the definition and the scope, if not the very existence, are controversial. In any event, the latter concern the international order and imply the acceptance of their legally-binding character between states, criteria which can often not be applied to the rights and the role of the public in national environmental law, even though their integration in this

context is seen as being widely accepted.[1] In fact, the provisions to which we have referred take their legal basis from the results of international co-operation through which states confirm in an informal manner (even if such confirmation may appear formal) certain principles or rules which they deem appropriate. However, each state reserves its right to apply these principles to the extent possible according to the desired mode of implementation and timing, while also taking into account the attitude taken by others in relation to such measures. Given the permanent and institutionalised character of this co-operation, it is to be expected that the measures taken will be reported.

International environmental substantive law[2]

The difference between the declared intentions and the content of international substantive law remains clearly significant. It should be noted that we will not examine treaties and conventions which provide for exchanges of information and consultation between states, without creating rights for citizens or associations. Thus, it will become evident that texts of international substantive law which create direct rights for the public are few and far between.

The Convention on Long Range Transboundary Air Pollution adopted on 13 November 1979 in Geneva (and which came into effect on 16 March 1983 between more than 40 states and the EEC within the framework of the Economic Commission for Europe of the United Nations), essentially creates obligations for states to protect the environment and to facilitate exchanges of information. The public is only concerned by the states' commitment to develop education and training programmes concerning the pollution of the environment (similar to Principle 9 of the 1972 Declaration).

Over a decade passed before a regional convention was to define, in general but clear terms, the rights and guarantees of private persons. This instrument was the North American Agreement on Environmental Co-operation of 14 September 1993 (which came into force on 1 January 1994 between the three states party to the North American Free Trade Agreement) which aims *inter alia* to "promote transparency and public participation in the development of environmental laws, regulations and policies" [Article 1(h)]. The Contracting States shall "ensure that persons with a legally recognised interest under its law [...] have appropriate access to administrative, quasi-judicial or judicial proceedings for the enforcement of [...] environmental laws and regulations to support or defend their respective provisions to present information or evidence;" such proceedings shall be "open to the public, except where the administration of justice otherwise requires". A right of appeal of the parties to the proceedings aiming to "seek review and correction of final decisions" is foreseen in accordance with national law. These procedures must be fair and equitable and not lead to unjustified delays (Articles 6 and 7). A commission for co-operation is responsible for making recommendations regarding "public access to information concerning the environment [...] including information on hazardous materials and activities [...] and opportunity to participate in decision-making processes related to such public access" (Article 10).

It is interesting to note that the Convention of the Council of Europe on Civil Liability for Damage resulting from Activities Dangerous to the Environment, adopted on 21 June 1993 in Lugano, includes a Chapter III on access to information, which also establishes the role of associations for the

1. We may, however, consider that the right to information has become, in its widest sense, an integral part of human rights recognised as part of the general principles of international law.

2. The current situation brings us to refer to conventions being signed or ratified which are not yet in force. On the other hand, we will not include texts which have no bearing on the final disposal of radioactive waste.

protection of the environment (requests for the banning of dangerous and illegal activities, injunctions against operators concerning preventive measures), subject to the provisions of national law. However, this convention has not yet entered into force and it excludes nuclear installations[3] from its scope.

A new stage has just been reached by the adoption of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters on 25 June 1998 in Aarhus (Denmark) (hereinafter referred to as "the Aarhus Convention") within the framework of the Economic Commission for Europe of the United Nations (not yet in force). It is the first convention to describe in explicit and exhaustive terms the role of the public and to establish rather formal procedures to allow the public to exercise the wide-ranging rights which it has been granted in "a clear, transparent and consistent framework" [Article 3(1)]. Within the limits of the scope of application of the Convention, (*i.e.* between the Contracting States), no discrimination based on nationality or place of residence is allowed regarding the rights of the public [Article 3(9)], and associations (or other non-governmental organisations) for the protection of the environment must be recognised and receive the necessary support [Article 3(4)]. We can only summarise here the long and dense text of this instrument.

The right of access to any information concerning the environment is open to all physical or moral persons who make such a request, without an interest having to be stated; any refusal to communicate the requested information must state the grounds for refusal (manifestly unreasonable requests or relating to documents in a preliminary form, general confidentiality clauses on national defence or public security, commercial and industrial information, intellectual property etc.) which should be interpreted in a restrictive manner; the time limits and manner in which positive or negative replies are to be communicated by the public authority are defined (Article 4).

In addition, the public authorities are obliged to collect, publish, make available and disseminate information on a regular basis, according to procedures set out in detail, and, of course, to notify all members of the public who may be affected by imminent threats to the environment (Article 5).

The participation of the public in the decision-making process on projects for particular activities is organised under Article 6 of the Convention. The impressive list of activities concerned, across very different sectors, is set out in Annex I and covers almost all nuclear installations, including those for processing, temporary storage or final disposal of irradiated fuel and radioactive waste. This list can be complemented by national law for other activities which may have a significant effect on the environment. When the decision-making process has commenced, members of the "public concerned", *i.e.* the public likely to be affected by, or having an interest in, the decision-making, as well as associations for the protection of the environment which are automatically deemed to have an interest in the matter [Article 2(5)], enjoy the advantages of a procedure which ensures that:

- from the very beginning of the process, they will receive all information concerning the decision to be taken, the envisaged procedure and the possibility of participation;

- they will have access to all information relevant to the decision-making (description of the site; the nature, technical characteristics, effects on the environment, waste, safety, etc. of the proposed activity);

3. The reason for this exclusion is that this instrument is a convention on liability whereas an international regime specifically governing nuclear third party liability already exists.

- they may effectively participate in discussions for the duration of the decision-making process, from the outset of the procedure "when all options are open";

- "an effective public participation can take place" by submitting "in writing or, as appropriate, at a public hearing or inquiry […] any comments, information, analyses or opinions that it considers relevant […]";

- "in the decision due account is taken of the outcome of public participation"; when the decision has been taken by the competent authority, the text must be made accessible to the public "along with the reasons and considerations" on which the decision is based.

The participation of the public in the preparation of plans and programmes for the environment should take place "within a transparent and fair framework" and the Contracting Parties must also endeavour to provide such opportunities when drawing up environmental policies (Article 7).

The active involvement of the public during the preparation of regulations and other binding rules having significant consequences on the environment must also be ensured and their remarks must be taken into account as far as possible (Article 8).

Finally, review procedures before a court of law or "another independent and impartial body established by law" in cases where a request for information pursuant to Article 4 has been rejected, must be provided for, without prejudice to an expeditious administrative procedure that is free of charge or inexpensive (where a review is before the court). The final decision shall be binding on the public authority [Article 9(1)]. The same type of appeal is provided for members of the public concerned having a sufficient interest or maintaining impairment of a right, in order to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of Article 6 (participation in the decision-making process). The interest of environmental associations is deemed to be sufficient [Article 9(2)]. These appeals must be fair, equitable and timely, and decisions taken must be made available to the public [Article 9(4)]. Finally, the public is informed on the possibility of introducing review procedures, and shall be provided with the necessary assistance mechanisms to do so [Article 9(5)].

This summary does not reflect the level of detail of these provisions but it gives a strong indication of its extremely procedural character and its objective to comprehensively regulate public rights in the Contracting States. The Parties to the negotiations officially recognise with satisfaction the contribution of environmentalist non-governmental organisations.

The management of radioactive waste

The instruments described in the previous section concern the obligations incumbent on their respective Contracting Parties on the protection of the environment in general. Even when they do not exclude nuclear energy, we should ask ourselves to what extent they will be relevant to the management of radioactive waste, after the entry into force of the 1997 Convention which is specifically dedicated to this subject and whose contents are much more restrictive with respect to the rights of the public. This instrument is the Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management, adopted on 5 September 1997 in Vienna under the aegis of the IAEA. Although governments recognise, in the Preamble, the importance of informing the public on questions relating to the subject of the Convention, the text limits itself to providing that, with respect to the siting of proposed facilities for the management of spent fuel or radioactive waste,

each Contracting Party shall "take the appropriate steps to ensure that procedures are established and […]: iii) to make information on the safety of such a facility available to members of the public" (Articles 6 and 13).

No further details are provided. Proposals for final disposal are treated in the same manner as those for other installations for the management of radioactive waste and irradiated fuel. The modesty of the authors' objectives in this respect is significant, raising the question as to whether the obligation to take relevant measures to give "information" on safety fully satisfies the right of the public to have access to all relevant information. This is compounded by the absence of any reference in the 1997 Joint Convention to public participation. It is, however, an improvement compared with the Convention on Nuclear Safety which was adopted in Vienna on 17 June 1994 and was used as a role model: the latter does not even contain provisions on information of the public.

It is true that the overriding objective of the 1994 Convention was to encourage Eastern European countries to adopt the Western safety model as a basis for their nuclear power plants. Although the management of radioactive waste is no more dangerous than the operation of nuclear power plants, public awareness of the problems caused by this type of waste and, in particular, their long-term effects, is the only rational explanation for this evolution of treaty law.

It should also be recalled that the 1997 Joint Convention provides that each Contracting Party must consult other Contracting Parties in the vicinity of a facility which is likely to affect them and to "provide them, upon their request, with general data relating to the facility to enable them to evaluate the likely safety impact of the facility upon their territory" (Articles 6 and 13). We are still a long way from public consultation and even from the opportunity for a government to express its opinion on a transboundary risk, since no reference is made to such an option and therefore there is no obligation in this respect.

Transboundary risk

International law also deals with the information and participation of the public in another form, in a secondary rather than a direct manner, in the recommendations and bilateral and multilateral agreements on transboundary pollution. In this case, the standards governing the rights and the active role of the public are established under national law, but the benefits of such procedures in force in a given country are extended to the citizens of neighbouring countries which may be exposed to a transboundary risk.

This mechanism is included, for example, in several recommendations of the Council of the OECD[4] which have defined its principles in successive phases: equal access for persons from other countries (especially neighbouring States) to rights governing information and participation, and to the consultation procedures of the country hosting a new project or activity which could represent a major risk of transboundary pollution. The approach followed by these recommendations aims to harmonise policies and emphasises the importance of co-operation between national and local authorities of the countries concerned. It is necessary in this context for the right of access to be specified and defined by the legislation of the country of origin. The conclusion or the strengthening of bilateral or multilateral agreements is, nevertheless, encouraged. In the same vein, the Convention of Espoo of 25 February 1991 on Environmental Impact Assessment in a Transboundary Context, drawn up under

4. Recommendations of 14 November 1974, 11 May 1976 and 17 May 1977, completed for the "Frontier Regions" by the Recommendation of 21 September 1978.

the aegis of the Economic Commission for Europe of the United Nations and which entered into force on 10 September 1997 between approximately twenty countries (hereinafter referred to as "the Espoo Convention"), introduces the rights of the public in this field into substantive international law. It states that "the Contracting Party of origin shall provide, in accordance with the provisions of this Convention, an opportunity to the public in the areas likely to be affected to participate in relevant environmental impact assessment procedures regarding proposed activities and shall ensure that the opportunity provided to the public of the affected Party is equivalent to that provided to the public of the Party of origin" [Article 2(6)] and, as a result, the Contracting Parties "shall ensure that the public of the affected Party in the areas likely to be affected be informed of, and be provided with possibilities for making comments or objections on, the proposed activity, and for the transmittal of these comments and objections to the competent authority of the Party of origin [...]" [Article 3(8)]. Once again, it is the national law of a country which evaluates the impact on the environment which applies in particular for the protection of "information the supply of which would be prejudicial to industrial and commercial secrecy or national security" [Article 2(8)].

Appendix I, which lists the activities covered by the Espoo Convention, refers expressly to nuclear plants and other nuclear installations, including those for storage, disposal and processing of radioactive waste. The Espoo Convention also provides that the Contracting Parties may enter into bilateral and multilateral agreements with a view to adopting more stringent provisions in this field.

Also under the aegis of the Economic Commission for Europe of the United Nations, the Convention of Helsinki on the Transboundary Effects of Industrial Accidents of 17 March 1992, which has not yet entered into force, recalls, on the one hand, the 1988 OECD text on accidents due to dangerous substances by its object and its confirmation of the right of the exposed public to receive the relevant information and, on the other hand, that of Espoo through "an opportunity to participate in relevant procedures with the aim of making known its views and concerns on prevention and preparedness measures" which is "equivalent" to that given to the public of the country of origin of the risk. This Convention excludes, however, nuclear accidents and radiological emergency situations.

This leads us to comment that the weak point of texts such as those of the OECD and the Economic Commission for Europe of the United Nations is to subordinate the rights of access of the public exposed to transboundary effects to the limits and modifications to the legislation and procedures of the country that guarantees these rights. In any event, this country will not fail to take into account, especially in the nuclear field, the possible consequences of granting such access by persons and associations of third countries to information and decision-making procedures, when deciding on the provisions which should be established for its own citizens.

Bilateral or multilateral agreements between a small number of countries can, in fact, define more specific procedures concerning the information and consultation of the public, to which these countries commit themselves, and ensure the complementary nature of such procedures with obligations under an international convention.

However, the agreements of this type in the nuclear field present for the most part an informal character, and do not contain provisions on the information and participation of the public. They generally consist of agreements in simplified form or administrative arrangements (exchange of letters or notes, memoranda of understanding) concerning the transmission of information and consultation between authorities with a view to improving site assessment and safety, mostly in relation to installations situated 20 or 30 km from the border, as well as the organisation of the notification of radiological emergencies and mutual assistance. The Directives of 15 October 1976 on Nordic Co-operation (Denmark, Finland, Norway and Sweden), the agreements between France and Belgium (1966) as well as with Luxembourg (1962 amended in 1983 and 1988), those concluded by

Germany with Denmark (1977), the Netherlands (1977) and Switzerland (1982), the agreement between France, Germany, and Switzerland relating to a tripartite commission for neighbourhood problems in border areas (1975), etc., do not cover public participation.

Community law and the European Union

The binding nature of Community law is offset by the greater caution which is exercised in relation to the rights of the public, more specifically when they touch on nuclear energy matters. However, several directives of the Council have gradually extended the right to information.

The Directive on the Major-accident Hazards of Certain Industrial Activities (Seveso Directive of 24 June 1982) is principally aimed at harmonising the regulations governing chemical installations using dangerous substances, but it also requires each Member State to inform "persons liable to be affected by a major accident" on the safety measures which should be applied in the event of an accident and to make such information available at the same time to the other Member States (Article 8). The amendment of 24 November 1988 to this Directive specifies that this information should be provided without a request having to be made, and it should be kept up to date and made publicly available. These provisions constitute a first step, but they do not cover the nuclear industry and in any event do not touch upon decisions concerning the construction of installations, which is the subject of our paper.[5] It is noteworthy that the Seveso II Directive of 9 December 1996, although excluding dangers linked to ionising radiation, could be interpreted as being applicable to the other effects of a nuclear accident.

The right of the public to information has developed in two successive phases under Community law:

- in the Directive of 27 June 1985, the requirement to provide information extends to "the Assessment of the Effects of certain Public and Private Projects on the Environment", in other words, to preliminary information including projects for certain nuclear installations. The manner in which such information should be made available to the public is determined by each Member State [Article 6(3)].

- "the Freedom of Access to Information on the Environment" is established in the Directive of that name adopted on 7 June 1990 in favour of all physical and moral persons within the Community concerning the state and the protection of the environment and on activities related to it, thus clearly covering the effects of nuclear energy. It is not necessary to prove an interest in order to obtain such information; however all requests are subject to the confidentiality provisions listed. A refusal to communicate the information requested must provide the reasons for such refusal and is subject to review (Articles 3 to 5).

On the other hand, the right of the public to participate in decision-making procedures is limited at present under Community law. The Directive of 1985 mentioned above, is the only one to oblige states to ensure that "the public concerned is given the opportunity to express an opinion" during the licensing procedure according to the arrangements provided, for example, by written submissions or a public inquiry [Article 6(2) and 6(3)]. The amendments introduced by the new Directive of 3 March 1997 are not much more far-reaching. The list of nuclear installations to which it

5. The Directive of 27 November 1989 on the information of the population in the event of a radiological emergency does not cover the rights of the public when a project is being authorised.

applies has been extended and now expressly mentions the temporary storage and the final disposal of spent fuel and radioactive waste as well as drilling for the storage of this waste. The public must receive information on possible projects at a sufficiently early stage in the procedure so there is "a reasonable time [...] to express an opinion before the development consent is granted". The manner in which such consultation should be carried out is determined by the states (Article 6 amended). The scope and the criteria for implementation have been extended and strengthened in comparison with the 1985 Directive, thereby placing further constraints on states. These provisions can be interpreted in an extensive manner as far as the participation of the public is concerned, but leave a large margin of discretion to governments in relation to the procedures to be used, which is probably a wise attitude.

The Treaty of Maastricht which complements the Treaty of Rome in the environmental field, does not add any provisions on the rights of the public in this respect (Article 130 R to T).

The integration of international law into domestic law

1. What conclusions can be derived from an analysis of international law?

In terms of doctrine and commitments made by governments, international law has contributed to the emergence of an "environmental conscience" to which public opinion is in general favourable and which has led individuals and their associations, especially in industrialised countries, to become more directly involved in policies and projects which concern them, beyond the means which are offered to them through "representative democracy". This approach is all the more attractive when those who adopt it are not themselves involved in or beneficiaries of the polluting activities (cars, intensive agriculture and fishing, domestic rural or urban waste, concrete expansion of tourist sites, etc.).

In terms of international substantive law, the situation is complex, fragmented and constantly in evolution. The legal problem of conflicting conventions – primacy of the universal or specialised or subsequent treaties over regional or general or previous treaties – does not seem to arise in practice, even in the case of states which are party to two or more regional conventions of which certain provisions are contradictory, since the subject dealt with relates to domestic law rather than relations between states.

In our specific field, once it has entered into force, there will be the 1997 Joint Convention, which is of universal scope but whose Preamble is so modest that it seems to avoid any possibility of conflict:

> "(ix) affirming the importance of international co-operation […] through bilateral and multilateral mechanisms, and through this incentive Convention; [...]"
>
> (xiii) keeping in mind the Convention on Nuclear Safety [...] and other relevant international instruments".

The perspective of the emergence of a universal convention dealing specifically with rights of participation of the public in relation to the management of radioactive waste, seems unlikely for reasons we will identify later.

Finally, those conventions or agreements which focus on transboundary risk and aim to ensure equal rights of access to national procedures, tend to be of a mainly regional nature, even when they extend to relatively vast regions, because they imply a certain political proximity.

2. Comparison of current examples of legal instruments in terms of their potential integration into the domestic legal regime

Conventions which simply provide for the right of nationals from foreign countries to benefit from information and consultation procedures in order to take account of the cross-border risk, only affect national law to the extent that provision is made to effectively accommodate the rights of these nationals in a just and non-discriminatory manner (example Espoo Convention). Their implementation for the benefit of anti-nuclear activists can, however, raise political problems in certain neighbouring countries.

International legal instruments which define the rights of the public in rather general and flexible terms, leaving a margin of discretion sufficient to take account of national legislative and regulatory procedures, will be easier to implement, even for the nuclear industry (examples 1997 Joint Convention, OECD Recommendations, European Union Directives, Agreement NAFTA of 1993).

On the other hand, prospective conventions of a more ambitious nature which define exhaustively the rights of the public in a detailed and comprehensive manner, and set out details concerning the implementation (conditions of exercise, powers and obligations of the legal, administrative and judicial authorities, time limits, the form of acts etc.) of the information, participation and review procedures (example 1998 Aarhus Convention), are likely to lead to serious conflicts or duplication with national law, especially in the sensitive field of nuclear energy. They do not seem to us to have a great future except perhaps in the countries where the environmental movement which inspired them exerts a strong influence.

3. This analysis of the integration into domestic law would be incomplete without examining real situations

It must be recognised that the right and capacity of the public to intervene in the decision-making process is first and foremost a matter for the national authorities, and the conditions governing such participation of the public largely depends on the institutional system, political practices and sociological and cultural climate etc., of each country. Experience shows that even in the liberal states of the OECD, the modes of involvement of the public in nuclear projects are very varied, ranging from active information methods to original forms of “participation democracy”. It is clear that in other geopolitical areas, the types of relations which exist between the authorities and the population are even more mixed. We can cite for example developing countries where Western models are not suitable for obvious reasons, and countries which do not have the benefit of democratic institutions. It is, of course, an area where national situations and social surroundings remain the deciding factors.

It is true that the current political tendency has been to encourage numerous laws which have entered into force or are being drafted, to provide for extensive information and participation of the public, irrespective of any international convention. Nuclear energy also involves a wide range of involvement of the citizen (referenda, public and contradictory inquiries and hearings, commissions comprising elected representatives and associations etc.). Despite the prejudices of their opponents,

the nuclear establishment, accused of having maintained a policy of secrecy, is now increasingly supportive of the transparency of information and consultation.[6]

The importance of the role of the public

Irrespective of the opinion we may hold on the information and the participation of the public, it is realistic to try to appreciate its results.

The freedom of expression of an informed opinion, as well as the modern types of direct and reasonable involvement of citizens in the implementation of technologies involving risk, such as the use of nuclear energy, is certainly a factor which may promote a high degree of safety. The comparison between the quality of nuclear safety in the OECD area and the deficiencies in this respect in the countries of the former Soviet Union, are an example of this.

On the other hand, it has been shown that "emotional" public reactions and systematically biased activists can delay, increase the financial costs and finally put a stop to nuclear and other programmes and projects which are in the interest of the general public, including from a point of view of environmental protection. Apart from national or international legal norms and procedures, the transparency of the information policy and constructive participation procedures imply mutual trust and honest dialogue between, on the one hand, qualified authorities and experts, and on the other, the members of the public.

This is especially important for the management of radioactive waste, the solutions for which are vital for the future of nuclear programmes. Finally, it should be noted that the decisions relating to the final disposal of radioactive waste raise not only scientific and technical problems, but also questions of an ethical nature concerning the responsibility we bear for future generations. From a legal point of view, this ambiguous form of "responsibility" can, in fact, only be translated as a legal obligation to act at the present time so as not to impose on future generations risks and burdens which the present generations do not find socially acceptable. Any discussion on the choice between reversible or irreversible solutions for example must take this one legal obligation as its starting point.

This "ethical innovation" is most strongly affirmed in international studies of those responsible for the management of high-level and long-lived radioactive waste.[7] It is the responsibility of legal experts – because law is a branch of ethics – just as much as that of scientists, engineers and politicians, to identify appropriate measures and appropriate mechanisms of institutional control in order to responds to new needs in the distant future, before the public will be able to play a useful role in the decisions to be taken.

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6. See *Public Participation in Nuclear Decision-Making* (NEA/OECD 1993), and *Information Policies of Nuclear Regulatory Organisations* (OECD/NEA 1994).

7. See for example *Long-term Management of Radioactive Waste – Legal, Administrative and Financial Aspects* (NEA/OECD 1984), Pierre Strohl "Radioactive Waste Management: Ethics, Law and Policy" (*Nuclear Law Bulletin* No. 46, December 1990) and "Prévention et responsabilité pour le risque technologique: émotions, concepts et réalité" (*La Vie des Sciences* 1996 n°4 – Académie des Sciences); see also *Environmental and Ethical Aspects of Long-Lived Waste Disposal* (NEA/OECD 1995).

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