

Normative Rule Making at the IAEA: Codes of Conduct

by Anthony Wetherall*

*“The broadening subject matter of international regulation...[...].
requires diversified forms and levels of law-making”¹*

I. Introduction

One of the most serious challenges facing any international legal institution in the present era of globalisation is the adoption of adequate written laws that address the issues faced by the international community. The International Atomic Energy Agency (IAEA)² is the principal forum to develop international legal norms to regulate the worldwide peaceful and safe use of nuclear energy – as well as to ensure the uniformity of standards and compliance with such norms. This study is an attempt to look, in particular, at one aspect of this diversified normative spectrum, created to shape an adequate legal and regulatory framework for peaceful nuclear activities.

At the outset, it should be noted that whatever the process, a fundamental objective of any instrument of a normative nature is to bring about action of particular actors, in accordance with rules and standards, over a specified range of activity. The normative activity of the IAEA is enshrined in its Statute.³ In order to establish an efficient and effective global framework for the peaceful and safe use

* Legal Officer, Office of Legal Affairs, International Atomic Energy Agency. The author prepared this paper in his personal capacity. The opinions expressed herein do not necessarily represent the views of the International Atomic Energy Agency. This paper was originally submitted as the dissertation requirement of the University Diploma in International Nuclear Law, following the 2003 Session of the International School of Nuclear Law. The paper has been updated to reflect developments to March 2005.

1. Chinkin, C., “Normative Development in the International Legal System” in Shelton, D., *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (2000), p. 22.
2. Established in 1957 as an autonomous organisation as part of the UN system, the IAEA is the principal intergovernmental forum for scientific and technical co-operation in the peaceful use of nuclear technology.
3. The Statute of the IAEA sets the framework for co-operative efforts to build and strengthen an international safety and security regime. This framework includes a number of normative instruments advisory international standards, codes, and guides; binding international conventions (but it should be noted that the Statute does not mention the creation of such instruments as one of the functions of the Agency, nor does it establish any mechanisms by which the Agency might carry out such activities); international peer reviews to evaluate national operations, capabilities, and infrastructures; and an international system of emergency preparedness and response. Article III A. 6. provides that the Agency is authorised “To establish or adopt, in consultation and, where appropriate, in collaboration with the competent organs of the United Nations and with the specialized agencies concerned, standards of safety for protection of health and minimization of danger to life and property (including such standards for

of nuclear energy, the IAEA has, over the course of the last four decades, developed a vast mix of international legally binding rules and non-legally binding advisory standards and regulations of a variable nature, on a wide range of subjects related to nuclear safety. While international instruments not covered by the Vienna Convention of the Law of Treaties⁴ play an important role in international relations, this use in the nuclear context of non-binding instruments and their impact may well at first glance reflect a respect for the law and a desire to avoid entering into legal obligations when the ability to comply is uncertain.⁵

The concept of “soft law”⁶ has generated controversy in discussions concerning the sources of international law. However, it is not the purpose of this paper to discuss the actual status of soft law in international law. The thesis proposed here centres, from entirely a legal viewpoint, around one of those non-binding normative instruments – a Code of Conduct (or a Code of Practice), as prepared by working groups of experts from IAEA Member States, approved by the IAEA Board of Governors and endorsed by the IAEA General Conference⁷ – the two policy-making organs of the IAEA. By its very nature, a code is an instrument of soft law – and thus is not legally binding *per se*. Yet, such a code does represent efforts by governments to formulate certain expectations and induce certain behaviour.

This paper discusses the question of the legal effects of a code, which are in fact closely interrelated to the problems of its implementation and its overall effectiveness. In this context, the

labour conditions), and to provide for the application of these standards to its own operation as well as to the operations making use of materials, services, equipment, facilities, and information made available by the Agency or at its request or under its control or supervision; and to provide for the application of these standards, at the request of the parties, to operations under any bilateral or multilateral arrangements, or, at the request of a state, to any of that state’s activities in the field of atomic energy.”

4. The Convention was adopted on 22 May 1969 and opened for signature on 23 May 1969 by the United Nations Conference on the Law of Treaties. It entered into force on 27 January 1980, in accordance with its Article 84(1).
5. David Victor suggests that non-binding norms may be better in regulating complex environmental problems because their actual influence in changing behaviour may be better than that of treaties. Generally compliance is high with treaties because states negotiate treaties with which they can comply. The process of earning consent to binding commitments leads to commitments that are excessively modest or ambiguous and thus less effective than they could be. This is particularly the case where there is a high degree of uncertainty in goals, means or capacity or where exogenous factors may impact. States seem more willing to adopt clear and ambitious commitments when they are in non-binding form. Being clear, they are more effective. See Victor, D., *et al.* (eds), *The Implementation and Effectiveness of International Environmental Commitments* (1998).
6. The concept of “soft law”, a term whose origin is attributed to Lord McNair – who used the term for international law “formulated in terms of principles”. See comments of Georges Abi-Saab in Cassese and Wieler (eds), *Change and Stability in International Law-Making* (1988), p. 76. See also Tammes, A., ‘Soft Law’ in *Essays on International and Comparative Law in Honor of Judge Erades* (1983), 187. For the theoretical debate on the existence of soft law, compare *e.g.* Chodosh, H., “Neither Treaty nor Custom: The Emergence of Declarative International Law” (1991), 26, *Texas International Law Journal*, p. 88 with Weil, P., “Towards Relative Normativity in International Law?” (1983) 77, *American Journal of International Law*, p. 413, and Klabbers, J., “The Redundancy of Soft Law,” (1996), 65, *Nordic Journal of International Law* p. 167.
7. Such codes are different from the codes that were issued as Safety Standards under the NUSS programme, which were completed in 1986, because they receive General Conference endorsement and political commitments from states. Under the NUSS programme (the Agency’s programme on nuclear safety standards for nuclear power plants), which began in 1974, the IAEA prepared five codes.

paper analyses the elements of an effective code in relation to its form, formulation of provisions and its implementation. The paper also presents possible structural options for a Code of Conduct.

II. Normative Development

It is without question that the international legal order for nuclear energy has recently undergone remarkable changes, with international nuclear law-making developing new procedures and rules – indeed an “infinite variety”.⁸ The relative simplicity of traditional international law has, in the nuclear field, given way to intricate forms, processes, instruments, and norms.⁹

As a consequence of the ever-evolving fields of regulation, the international order has become increasingly bureaucratized and there is thus a need to utilise various methods to express expectations of behaviour. Generally, the complexity of the system is apparent from the multiple number of actors involved in the making of, and ensuring compliance with, international norms. From a community of predominately western states, the global arena now contains more than four times the number of states that existed at the foundation of the United Nations.¹⁰ In addition, globalisation has led other communities to play vital international roles: intergovernmental organisations, non-governmental organisations, professional associations, transnational corporations, and mixed entities comprised of members of different communities. These various groups now contribute to the formation of international norms and are increasingly bound by them.

It has been commented that the IAEA’s contribution to global nuclear safety is constrained by a lack of political will on the part of its Member States to allow more meaningful and binding international interventions for nuclear safety.¹¹ Yet, in the current international system, law may well no longer be perceived as the necessary or best instrument in all cases. The traditional sources of international law, treaties, custom and general principles¹² are often criticised as being incapable of coping with the modern problem of international relations, especially in the field of nuclear regulation. Today, international legal governance is generally accomplished through complex multilateral regimes with supervisory organs established to keep an eye on implementation and compliance. As a consequence, there is an increasing recourse by states to non-legal but politically-binding normative instruments, such as Codes of Conduct.

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8. R.R. Baxter, “International Law in ‘Her Infinite Variety’”, *The International and Comparative Law Quarterly*, Vol. 29, October 1980, p. 549-566.
 9. The Impact of Globalisation on the International Legal System, Globalisation and its Challenges, University of Sydney Conference, 12-14 December 2001, Dinah Shelton, Notre Dame Law School.
 10. At the time of writing, the IAEA has 137 Member States.
 11. The Chernobyl [Chernobyl] Accident and the Future of Nuclear Energy: The Path Towards Safety and Sustainability, Harvard Ukrainian Research Institute of Harvard University, Serguei Milenin, Sergei Skokov, Elizabeth Supeno.
 12. Article 38 of the Statute of the International Court of Justice provides that “(1) The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognised by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.” (26 June 1945, chap. II, art. 38, 59 Stat. 1031, 33 U.N.T.S. 993).

Yet, the international community's paramount focus and concern must be ensuring the peaceful and safe use of nuclear energy, in this context, a complex network of national and international measures define the approach. Thus the regulation of nuclear energy, like other activities that could have potential transboundary impact, necessitates the endowment of the international community with residual responsibility – or in certain instances co-responsibility – to ensure among other things, uniformity of standards, coordination, pooling of resources and services, as well as compliance.¹³ This responsibility has resulted in variations in forms of instruments, means and standards of measurement that interact intensely and frequently, with the common purpose of regulating behaviour within a rule of law framework.¹⁴

States today, not only in the field of nuclear regulation, enter into a variety of international commitments amongst themselves but also with intergovernmental organisations such as the IAEA but also the FAO, WHO, OECD/NEA etc, some of which they have chosen to label law and others of which are frequently described as soft law, to resolve a given problem.¹⁵ International organisations¹⁶ thus have become the fora for addressing new issues and for the evolution of international law. There is, then, a close link between the growth of non-binding normative instruments and the growth of international institutions, many of which lack the power to engage in legislation or other forms of law-making – but normally adopt such norms by consensus under their auspices.

The increasing usage of such non-binding normative texts is considered, for the most part, to be a welcome creation of international negotiations and the deliberations of international collective bodies.¹⁷ In fact, almost every area of international concern has given rise to such instruments – their growth being a response to a need for standards in the increasing field of international activities.

A. *Why Non-Binding Norms?*

These non-binding normative instruments, declarations, recommendations, guidelines, resolutions, standards, memoranda[s] of understanding or in the context of this paper codes of conduct, as a category have been given various appellations, for example, soft law, quasi-law, *les*

13. Elbaradei, M., Nwogugu, E., Rame, J., "International Law and Nuclear Energy", *IAEA Bulletin*, Vol. 37, No. 3, 1995.

14. The development of complex regimes is particularly evident in international management of commons areas, such as the high seas, and in ongoing intergovernmental co-operative arrangements. For the latter, memorandums of understanding have developed into a common form of undertaking.

15. The effective regime of the Organisation for Security and Co-operation in Europe is a case in point. The Organisation is entirely based on non-binding instruments, beginning with the Helsinki Final Act, but it has been instrumental in improving human rights throughout Central and Eastern Europe.

16. Until recently, the system of norm-making at WIPO had been the traditional treaty method. However, in order to remain a viable and credible institution, tasked with the promotion and protection of intellectual property, WIPO has had to devise new and innovative forms of norm-creation that are effective, rapid, and generally accepted by the Member States. The formal rigidities and problems associated with the treaty-making process in the field of intellectual property would seem to dictate the need for a more transparent, informal, and consensual method of norm creation. In the last few years, the Secretariat of WIPO has therefore explored other means for advancing the development of international intellectual property law that could supplement the current treaty procedures. For a further discussion, see Some Comments on Rulemaking at the World Intellectual Property Organization, RD Kwakwa, *12 Duke J. of Comp. & Int'l L.* p. 179.

17. See Baxter, "International Law in Her Infinite Variety", *29 INT'L & COMP.L.Q.* 549 (1980).

normes sauvages or *para droit*. Generally, a norm may be termed soft when it either does not constitute part of a binding regime, whether of conventional or customary law or because even though it is contained in a binding instrument, it is not expressed in obligatory language.¹⁸

There are a number of reasons which determine the choice of soft law over hard law.¹⁹ It is a generally accepted theory that states adopt, accept and comply with international norms when it is in their self-interest to do so. A state's self-interest can encompass its own survival, values, economic position and domestic politics.²⁰ States often choose cautiously those obligations that they desire to make legally binding. They will often make use of a non-binding code for a variety of reasons, such as when legally-binding commitments are unwanted or unavailable – more often than not due to their simplicity and flexibility, which will govern their relations. Due to its non-binding nature, a code can be adopted more rapidly and where it fails to meet the current challenges, it can be quickly amended or replaced. Thus, a non-binding code can be said to respond to the needs of the new international system when the issue is not clearly identified but there is an urgent need to take some action.

It is generally accepted that it is easier to create normative instruments through quasi-parliamentary procedures and majority voting.²¹ Yet, it has also been commented that pragmatism and politics rather than principle usually govern the type of instrument that will be selected and the type of incentives or disincentives that may be incorporated into such an instrument, so as to encourage compliance.

Whilst compliance with a non-binding norm may not result from fear of sanction, if the instrument provides a mechanism for such action, compliance may result from the need to ensure the sustainability of the common good; failure to comply may well result in the interests of others to take responsive actions. Thus, the greater the consensus in the international community for the creation of such norms, the greater the possibility that a state will comply. With the accelerating trend towards increased openness and public engagement in deliberations on the protection of human health and the environment, the application by states of a safety regime governing the peaceful and safe use of nuclear energy demonstrates to a questioning public that the state's efforts are in line with best international safety policies and practices.

When discussing the legal nature of rules of conduct contained in a code, we find ourselves in a grey area.²² On the one hand, it is true that a code is not technically legally binding and the rules are

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18. See Paul C. Szasz in *Environmental Change and International Law: New Challenges and Dimensions*, Edith (Ed) Brown Weiss, United Nations University Press, 1992.
 19. Lipson suggests four reasons why states may opt for choosing informal agreements: (1) to avoid formal and visible pledges; (2) to avoid ratification; (3) to be able to renegotiate or modify as circumstances change; and (4) to achieve a result. As part of such informal agreements, Lipton identifies speed, simplicity, flexibility and privacy as being components. Lipson, C., "Why are Some Agreements Informal?" (1991) 45 *Int. Org.* 495.
 20. It should be noted that it has been recognised that a state's economic capacity to comply with the positive obligations contained in a non-binding instrument is crucial to it achieving compliance with such obligations.
 21. See *Perspectives on International Law*, Nandasiri Jasentuliyana, p. 134-135 (1995), Kluwer Law International.
 22. The distinction between "hard law" and "soft law" may appear blurred – treaty mechanisms are including more soft obligations, such as undertakings to endeavour to cooperate. Whereas non-binding instruments are in turn incorporating supervisory mechanisms normally found in "hard law" instruments. Both instruments may combine compliance procedures that range from soft to hard.

not rules of law; but on the other hand, it cannot be denied that such rules have practical or legal effect – a code can still have a significant impact on state action. Although the norms are not adopted as law, and are of a non-binding form, they frequently are intended to alter the behaviour of their targets – usually by containing standard minimum rules and so forth. They thus create expectations of potential behaviour and sway the attitudes of the international actors. In this context, it should be noted that regardless of the non-binding form of such instruments, all international relations are governed by the fundamental principle of good faith.²³

A code will often encompass strong political commitments or moral obligations, indeed commitments and obligations that may well be stronger than many legal obligations.²⁴ In practice, such non-obligatory and merely recommendatory texts may have as much effect as formal rules and obligations, in so far as channelling state conduct. A code enables all those to which it may be addressed to be associated with it on the basis of shared responsibility. It could thus be argued that states are more willing to adopt clear and ambitious commitments when they are in a non-binding code. This is quite simply due to the fact that where norms, which have been negotiated within an intergovernmental organisation and then included in a non-obligatory form in a treaty or in a non-binding declaratory form (such as the norms contained in a code), states are generally desirous or content to observe them – otherwise they would never have negotiated and adopted them in the first place.

It is apparent then, that a legally non-binding code can respond to the need for standards resulting from the enormous increase of activities that transcend national borders. Such standards of conduct will be resorted to whenever there is a pressing economic need for legal regulation and the efficient promulgation of norms could not be achieved, for one reason or another, via the traditional treaty-making method. They operate well because states have recourse to them and bind themselves voluntarily, thus producing factual compliance even in the absence of strict legal obligations.²⁵

A non-binding code can act as a substitute for hard law where no agreement on hard law can be achieved or when recourse to the hard law form would be ineffective (unlikely that the norms will be accepted). Being non-binding, a code is easy to revise or abandon if it proves unsuitable. It may even become a “springboard”²⁶ for legally creative action by national courts and other authorities, or by the subjects to whom it is addressed. More often than not, a non-binding instrument, such as a code, does

23. According to Kelsen, the rule of good faith is the cardinal principle of international law, placed at the top of his pyramid representing the hierarchy of norms: Hans Kelsen, *Théorie pure du droit*, Éditions de la Braconnière, Neuchâtel, Switzerland, 2nd Edition 1988, p. 177; see also the ICJ decision concerning French nuclear tests. The ICJ referred to good faith in connection with the obligation for a state to abide by a unilateral undertaking given in the form of a declaration by a high ranking political official: *Australia v. France & New Zealand v. France*, ICJ, 20 December 1974, vol. 1974, pp. 253-457.

24. Indeed, it should be noted that an unratified convention is also technically not legally binding.

25. An Action Plan can assist a code’s implementation: The Agency’s revised Action Plan for Safety and Security of Radioactive Sources [GOV/2003/47-GC (47)7] contains a number of actions on the Secretariat relevant to the implementation of the code – in particular to develop guidance in support of the code. In September 2001, the Board requested [which the General Conference subsequently endorsed – see GC (45)/RES/10.A)] the Secretariat to develop and implement, in conjunction with IAEA Member States, an international research reactor safety enhancement plan, which included the preparation of a Code of Conduct on the Safety of Research Reactors.

26. See Baade, H.W (1980) “Legal Effects of Codes of Conduct”, In Horn (ed.), *Legal Problems of Codes of Conduct for Multi-national Enterprises*, Kluwer-Deventer, 1980, p. 9.

not stand alone – it can be linked to a treaty or other such binding instrument in some manner,²⁷ either as a precursor (it may be *pré-droit* – although this is, however, generally far from being its purpose)²⁸ or as a subsequent elaboration of technical terms or expected performance. It creates a dynamic interplay between various types of commitments. These non-binding instruments often serve to enable treaty parties to authoritatively resolve ambiguities in the text, fill in the gaps or supplement a hard law instrument with new norms.²⁹

The use of a code as a precursor to a hard law instrument is apparent with the incorporation of some of the provisions dealing with the transboundary movement of spent fuel and radioactive waste in the IAEA's Code on Transboundary Movement³⁰ into Article 27 of the IAEA's Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management.³¹

In evaluating the importance of a non-binding code, account must also be taken of the various ways in which it may often quite rapidly be hardened. One route is the incorporation of an initially non-binding norm into a binding treaty which, for example, is the normal and expected course when a general framework convention is supplemented by binding protocols. Another is the creation of customary law when states, acting out of a combination of a sense of legal obligation and in response

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27. See the Regulations for the Safe Transport of Radioactive Material [1996 Edition (Revised), Safety Standards Series No. TS-R-1 (ST-1, Rev.), IAEA, Vienna (2000)]. The requirements of the regulations are incorporated into UN regulations, as well as the requirements of other international transport organisations. They are widely implemented by the IAEA Member States either by reference, direct adoption in national legislation or through compliance with modal regulations. The regulations were approved by the IAEA Board of Governors and were adopted at the Fourth General Conference in 1960, by a unanimous resolution urging that they be taken as a basis for national regulations and should be applied to international transport [GC(IV)/RES/74].
 28. In some instances, like the prior informed consent procedure, “soft law” commitments precede the conclusion of a binding treaty, but it has been commented that this seems less a deliberate policy than it does in the field.
 29. See the Convention on International Civil Aviation of 1944 (the Chicago Convention), which regulates international air transport and which is administered by the International Civil Aviation Organization (ICAO). The Convention provides, *inter alia*, for the adoption by the ICAO Council of international standards and recommended practices concerning the regulation of air navigation, which are incorporated as Annexes, into the Convention. See, Status, Prospects and Possibilities of International Harmonization of Nuclear-Law Perception from the standpoint of a worldwide international organization, Andronico A. Adede and Ha-Vinh Phuong in International Harmonization in the Field of Nuclear Law, Proceedings of Nuclear Inter Jura, 1985, Norbert Pelzer (ed.), 1985
 30. International concern about the possible international unauthorised movement and disposal (dumping) of radioactive waste on the territory of the IAEA's developing Member States resulted, in 1990, in the Board of Governors approving and requesting the Director General to transmit a non-binding Code of Practice to the General Conference, with the recommendation that the General Conference “adopt the Code, ensure its wide dissemination and monitor its implementation”.
 31. Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management [INFCIRC/546, IAEA, Vienna (1997)]. Article 27, sets out the international norms regarding the transboundary movement of spent fuel. Adopted on 5 September 1997 by a Diplomatic Conference convened by the IAEA.

to some pressure, adopt as their practice rules that originally were merely expressed in solemn (but nevertheless non-binding) declarations.³²

In the field of human rights, soft law usually preceded hard law in the past, helping to build consensus on the norms. Thus, the Universal Declaration of Human Rights³³ led to the two Covenants on Civil and Political and on Economic, Social, and Cultural Rights.³⁴ In the environmental field, statements of principles coming from global conferences have stimulated the conclusion of both legally binding and non-binding instruments, with peaks of regulation following the Stockholm and the Rio Conferences.³⁵ In the context of attempts to build up a New International Economic Order,³⁶ a number of codes of Conduct have been prepared by UN and non-UN organs.³⁷ They are not

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32. This discussion is beyond the context of this paper, see Paul C. Szasz in *Environmental change and international law: New challenges and dimensions*, Edith (Ed) Brown Weiss, United Nations University Press, 1992.
 33. Universal Declaration of Human Rights, 10 Dec. 1948, G.A. Res. 217A (III), U.N. Doc. A/810, at 71.
 34. The Conventions on race, women, children, and torture all were preceded by declarations. The situation has changed now that the “easy” topics on which there was widespread consensus have been completed and there are fewer treaties being concluded on the global level. Instead, the United Nations increasingly adopts declarations without subsequent treaties. At the same time, regional institutions continue to formulate legal obligations, with concomitant efforts to secure compliance, perhaps because it is easier to achieve consensus in the shared culture of regional systems and also to agree upon stronger institutions; human rights courts exist only on the regional level. Regional adoption of soft norms also has an important role. More than in the human rights field, arms control is characterised by an intertwining of hard and “soft law”, with non-binding commitments foreseen by hard law instruments, thus conferring upon the “soft law” a stronger legal nature. In some instances, “soft law” acts as a substitute for or preemptive of, hard law, as with private codes of conduct, for example, the Sullivan principles that were adopted for companies doing business in South Africa during the apartheid regime.
 35. An ecosystem approach has stimulated a strong move towards regional efforts, with the conclusion of numerous regional seas agreements, a series of agreements on the Alps, comprehensive regulation by the European Union, and major agreements elaborated within the context of the UNECE, the OAU, ASEAN, and other regional institutions. Soft law also often follows these agreements, as with the Convention on Migratory Species, acting to fill in gaps, bring in non-state actors, or allowing provisional solutions where there is scientific uncertainty about the proper course of action.
 36. See Kimminich, *Das Völkerrecht und die neue Weltwirtschaftsordnung*, 20 AVR (1982) 2 et seq.
 37. A large area of activity of intergovernmental organisations – particularly in the specialised agencies and technical fields of the United Nations – has given rise to a variety of standards of conduct, regulations, guidelines and accepted practice that do not have the formal character of binding law. They are generally adopted by international bodies under their recommendatory authority. Such texts are recommended to states or other agencies for observance in their common interest. UN Codes, such as the Restrictive Business Practices Code (1980), the International Code of Marketing of Breast-milk Substitutes (Infant Formula Code) (1981); the Transfer of Technology Code (TOT Code); and the Code of Conduct Concerning Transnational Corporations (TNC Code), to name but a few; non-UN Codes, such as the OECD Guidelines for transnational enterprises (See, OECD Declaration on International Investment and Multinational Enterprises, Guidelines for Multinational Enterprises, OECD Doc. C (76), 99; see also OECD Doc. C (76), 117 and C (79), 143; National Treatment: C (79), 118 and C (79), 144; International Investment Incentives and Disincentives: OECD Doc. C (79), 119 and 145; and Consultation Procedures, 1976, as well as the Revised Recommendation of the OECD Council concerning cooperation between Member countries on Restrictive Business Practices affecting International Trade, 1978; all published in Horn, *supra* note 5, at 451 et seq.; see also Bryde, *supra* note 5, at 77 et seq.; see also Vogelaar, *The OECD Guidelines: Their Philosophy, History, Negotiation, Form, Legal Nature, Follow-Up Procedures and Review*, in Horn, *supra* note 5, at 127 et seq.; R. Blanpain, *The OECD Guidelines and Labour Relations: Badger and Beyond*, *ibid.*, 145 et seq.). Whilst model laws and guidelines do not purport to

formulated as fully obligatory norms, nor do they postulate effective modalities of implementation; instead they aim at being applied on a voluntary basis.

It is apparent, therefore, that a non-binding code can be the first step towards the negotiation and conclusion of legally binding obligations, thus providing a basis for a treaty regime. Where non-binding norms precede a legally binding agreement, it can be said that the former helps shape the consensus that leads to a legally binding agreement. In contrast, where a prior treaty explicitly refers to subsequent elaborative instruments, the latter may acquire a legal basis.

III. Norm-making at the IAEA

As previously mentioned, the worldwide harmonisation of nuclear energy legislation is achieved through the development of various binding and non-binding international instruments i.e. bilateral and multilateral agreements, conventions, guidelines, standards, and codes of conduct or practice. The programme of the IAEA in the area of nuclear safety involves work in three basic directions: the first direction is to develop international conventions,³⁸ which contain legally binding obligations to be followed in different areas concerning the peaceful use of nuclear energy; the second direction is the development of International Safety Standards, which mean norms, regulations or recommendations established to protect health, ensure nuclear safety, and minimise danger to life and the environment. The third direction is the application of the international mechanisms, which provide for the application of such standards.

A. IAEA Conventions

The IAEA has in the past used the multilateral treaty process to create rules under its auspices.³⁹ However, for all its virtues this process has had its drawbacks. Binding international instruments

codify international law, they nonetheless, as mentioned above, are complied with by states and other entities for a range of motives. Such as the 1985 UNCITRAL Model Law on International Commercial Arbitration [U.N. Comm'n on Int'l Trade Law UNCITRAL Model Law on International Commercial Arbitration, U.N., Doc. A/40/17, Annex I, U.N. Sales No. E.95.V.18 (1995)]; and the 1985 FAO Guidelines for the Packaging and Storage of Pesticides [Food and Agriculture Org. of the U.N., Guidelines for the Packaging and Storage of Pesticides (1985)]. Accordingly, each Member State of the IAEA may determine the extent to which it will implement the provisions of a code.

38. Two of the most important conventions developed are the Convention on Nuclear Safety, which applies to power reactors, and the Joint Convention on the Safety of Spent Fuel Management and the Safety of Radioactive Waste Management (the Joint Convention). These are in addition, of course, to the post-Chernobyl Conventions on assistance and notification in the event of a nuclear accident or radiological emergency. It should be noted, that the Convention on Nuclear Safety, while only being an "incentive" convention like the and the Joint Convention [see, respectively Preamble para. (vii) and Preamble para. (x)], is the first international instrument that legally binds its parties to ensure the safety of land based civilian nuclear power reactors.
39. e.g. Convention on Nuclear Safety; Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management; Convention on the Physical Protection of Nuclear Material; Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency; Convention on Early Notification of a Nuclear Accident; Vienna Convention on Civil Liability for Nuclear Damage; Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage; Optional Protocol Concerning the Compulsory Settlement of Disputes; Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention; Convention on Supplementary Compensation for Nuclear Damage.

generally require hard and fast commitment that many states are not prepared to undertake. There are indeed many reasons why states do not wish a restraint of their sovereignty⁴⁰ – some states are just simply reluctant to impede their lawmaking supremacy.

The formulation of a binding international instrument in the nuclear context can be a slow and costly process, involving lengthy negotiations between parties,⁴¹ and resulting more often than not in a text that is the product of compromise. Such a text also does not enter into force until the requisite number of states have adhered to it.⁴² When it does enter into force, it can then be difficult to amend or further develop in response to evolving or emerging needs. Additionally, only those states that expressly ratified or adhered to the instrument are bound by it and thus states are divided between parties and non-parties. Additionally, the process may be further delayed by the fact that both international and national domestic requirements need to be fulfilled.

In contrast, however, it should also be noted that a binding international instrument does not necessarily restrict freedom of action with regard to a particular nuclear activity, or force a change of approach or method. Rather, it goes some way to ensuring that there exists a uniform standard applicable with regard to a particular nuclear activity.

B. IAEA Safety Standards

A large part of the IAEA's statutory mandate⁴³ (in collaboration with the competent organs of the United Nations and with the specialised agencies concerned), is the establishment and the promotion of advisory international standards and guides, issued as series publications, recommended

40. Sometimes because of internal legal reasons, such as in the case of the United States of America and the need to avoid parliamentary ratification procedures. See, "The Twilight Existence of Nonbinding International Agreements," Oscar Schachter, (1977), Vol 761, *American Journal of International Law*, p. 302. The criteria employed by the State Department in deciding what constitutes an international agreement for the purpose of submission to Congress include as a primary requirement that the parties intend their undertaking to be legally binding and not for merely political or personal effect.

41. Such as the lengthy meetings of the Standing Committee on Liability for Nuclear Damage. The mandate of the Standing Committee was to: "(i) consider international liability for nuclear damage, including international civil liability, international state liability, and the relationship between international civil and state liability; (ii) keep under review problems relating to the Vienna Convention on Civil Liability for Nuclear Damage and advise States Party to that Convention on any such problems; and (iii) make the necessary substantive preparations and administrative arrangements for a revision conference to be convened in accordance with Article XXVI of the Convention on Civil Liability for Nuclear Damage"(see paragraph 6.3.A of document GOV/2427).

In contrast, it should be noted the speedy negotiation of two IAEA Conventions: the Convention on Early Notification of a Nuclear Accident [(NFCIRC/335 (1986)]; and the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency [INFCIRC/336/Add.1 (1986)]. These two Conventions were opened for signature within four months of the establishment of an open-ended intergovernmental working group, following the Chernobyl accident on 26 April 1986.

42. The Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage was opened for signature at Vienna on 29 September 1997 but only entered into force on 4 October 2003, three months after the date of deposit of the fifth instrument of ratification, acceptance or approval, pursuant to Article 21.1.

43. Article III.A.6 of the Statute.

by panels of experts selected in their individual capacity to advise the IAEA Secretariat.⁴⁴ The IAEA Board of Governors approves the Safety Standards (they are not endorsed by the IAEA General Conference, unlike a code).⁴⁵ they are published with the Board's authorisation and constitute international standards for national legislation and regulations. The binding nature of the safety regulations reflected in the current international legal instruments varies. Thus, the Safety Standards are mandatory with regard to nuclear activities undertaken with IAEA assistance, but where such assistance is not provided and the state implements these standards by choice, their legal status is merely recommendatory. It has been commented that the rigour of Safety Standards and their universal implementation should be based on the principle of voluntary implementation and their status as recommendations. Nevertheless, it is recognised, that such standards, while being recommendatory in nature, have become a principal means of harmonising safety approaches.⁴⁶

C. IAEA Codes

Within the IAEA, three codes⁴⁷ have been developed: a Code of Practice on the International Transboundary Movement of Radioactive Waste; a Draft revised Code of Conduct on the Safety and Security of Radioactive Sources; and a Code of Conduct on the Safety of Research Reactors.⁴⁸

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44. The IAEA Safety Standards Series comprises of publications of a regulatory nature covering nuclear safety, radiation protection, radioactive waste management, the transport of radioactive materials, the safety of nuclear fuel cycle facilities and quality assurance. As previously mentioned, these publications are issued under the terms of the Agency's Statute, which authorises the Agency to establish standards of safety for protection against ionising radiation. The Safety Standards Series supersedes the Safety Series, in which over 200 publications were issued. Safety Standards Series publications are categorised into: (1) Safety Fundamentals (F; blue lettering), stating basic objectives, concepts and principles of safety and protection – they are the “policy” documents of the Series; (2) Safety Requirements (R; red lettering), establishing the basic requirements that must be fulfilled to ensure safety for particular activities or applications; and (3) Safety Guides (G; green lettering), *recommending actions, conditions or procedures* for complying with these safety requirements.
 45. It should be noted that only the Safety Fundamentals and Safety Requirements require the approval of the IAEA Board of Governors before publication. Safety Guides are issued under the authority of the IAEA Director General.
 46. For further comment, see Elbaradei, M., Nwogugu, E., Rame, J., “International Law and Nuclear Energy,” *IAEA Bulletin*, Vol. 37, No. 3, 1995; and *History of the International Atomic Energy Agency, The First Forty Years*, David Fischer, 1997.
 47. (1) Code of Practice on the International Transboundary Movement of Radioactive Waste. Adopted by the General Conference GC (XXXIV)/RRES/530 of 21 September 1990. Contained in Annex 1, GOV/2445, 9 May 1990. As previously mentioned, the provisions of the Code of Practice are now by and large embodied in Article 27 of the Joint Convention; (2) Draft revised Code of Conduct on the Safety and Security of Radioactive Sources GOV/2003/49-GC(47)/9, 29 July 2003; and (3) Code of Conduct on the Safety of Research Reactors, GOV/2004/4, 2 February 2004 or GC(48)/7, 19 July 2004.
 48. In March 2003, a draft Code of Conduct on the Safety of Research Reactors [GOV/2003/7] was considered by the Board, which decided that it should be circulated to all Member States for comment and that, on the basis of the responses received, the Secretariat should produce a revised version. In October 2003, a revised draft of the Code of Conduct was prepared by the Secretariat with the advice of an expert Working Group of 15 members from 11 Member States. In preparing this revised draft, the Secretariat and the expert Working Group considered the comments submitted by Member States and also statements made at the March 2003 Board. The revised draft was circulated to all Member States for comment. This revised code [GOV/2004/4, 2 February 2004] was adopted by the Board of Governors at

As mentioned above, a code by its very nature is an instrument of soft law, unlike legally binding international instruments and thus it is not legally binding *per se*. Yet, once approved by the IAEA Board of Governors and endorsed by the IAEA General Conference,⁴⁹ a code is a legal instrument of a non-binding nature, prepared at the international level, to offer guidance to states for the development and harmonisation of policies, laws and regulations.⁵⁰

One may question the need for such a code, given that there may already be norms, albeit of a soft law nature, already in existence, for example, under the IAEA Safety Standards: yet such a code stands alone and apart from other documents, such as those standards. However in this context, it should also be noted that it may well represent one of the ways in which the IAEA Safety Standards⁵¹ are encouraged to be applied by a state, nevertheless, the action required to apply the guidance in a code is still a matter for the state.⁵²

its March 2004 meeting and was endorsed by the 48th Regular Session of the General Conference held in September 2004.

49. In the context of the Code of Conduct on the Safety and Security of Radioactive Sources, the Board of Governors at its June 2003 meeting, in approving and transmitting the code to the General Conference, recommended that the “Conference adopt it and encourage its wide implementation” [GOV/2003/49-GC(47)/9, 29 July 2003]. In endorsing the objectives and principles set out in the code, the General Conference at its September 2003 session, recognised that the code was not a legally binding instrument [GC(47)/RES/7, Date: September 2003]. With regard to the Code of Conduct on the Safety of Research Reactors, adopted by the Board of Governors at its March 2004 session, the Board requested the Director General to circulate the approved Code of Conduct to all Member States and relevant international organisations and transmit it to the General Conference with a recommendation that the Conference endorse it and call for its wide application. In endorsing the guidance for the safe management of research reactors set out in the code, the General Conference in Resolution 10 [GC(48)RES/10, September 2004] welcomed the adoption by the Board and encouraged Member States to apply the guidance in the code to the management of research reactors; and requested the Secretariat to continue to assist Member States in the implementation of the code and associated safety guidance within available resources.
50. This is how the IAEA Office of Legal Affairs views a Code of Conduct. See Paragraph 6 of the Report of the Chairman (dated 16 October 2003), of the Working Group Meeting on Revision of the Draft Code of Conduct on the Safety of Research Reactors, held in Vienna, from 13 to 17 October 2003.
51. The Code of Conduct on Research Reactors [GOV/2003/7, 6 February 2003] stated that “Effective implementation of this code relies on the application through national regulations at all stages in the life of research reactors of IAEA safety standards relevant to research reactors and those relating to the legal and governmental infrastructure for nuclear, radiation, radioactive waste and transport safety.” The code, as revised [see GOV/2004/4, 2 February 2004], refers to “effective application”. The principal source documents for the code, which basically summarizes principal requirements of the Safety Standard Series, are: IAEA Safety Fundamentals: The Safety of Nuclear Installations, SS No. 110, 1993. IAEA Safety Requirements; Legal and Gov’t Infrastructure for Nuclear, Radiation, Radioactive Waste and Transport Safety, GS-R-2, 2000; Safety Requirements for Research Reactors, DS 272, (in preparation to replace 35-S1 and 35-S2); Code on the Safety of Nuclear Research Reactors: Design, SS No. 35-S1, 1992; Code on the Safety of Nuclear Research Reactors: Operation, SS No. 35-S2, 1992; and, Predisposal Management of Radioactive Waste, Including Decommissioning, WS-R-2, 2000.
52. The Code of Conduct on the Safety and Security of Radioactive Sources relies on and is intended to complement existing “international standards”, in its area of concern. Such standards would embody the IAEA Safety Standards.

IV. Effectiveness of a Code

It is of fundamental importance that a code is effective. Practice speaks well for the effectiveness of a code: its effectiveness is more linked to factors other than its formal legal nature, for example, its widest possible adoption, the support by all parties concerned, and the evolution of the instrument in the future.⁵³ Thus, if the effectiveness of a code is the primary objective and its legal nature is of lesser relevance, then the support of all parties concerned both with regard to its content as well as for the machinery of its implementation is required. It is safe to say, therefore, that an effective instrument will have significant impact, in the direction so desired, on the behaviour of those it concerns.⁵⁴ For the sake of effectiveness and compliance, it is more crucial that the standards therein suit the interests and concerns of the parties involved, than they be technically or legally binding. Its effectiveness therefore depends on satisfying the needs of the parties involved, either because compliance is beneficial or because non-compliance is damaging.

The drafters of a code must calculate the outcome of measures, so as to decide whether the objectives of the code will be met, i.e. that the code will be effective. In this context, the following three elements have been identified as determining the effectiveness of a Code of Conduct: (A) the formal legal character of the instrument in which it is embodied – its adoption; (B) the precise language of its provisions in identifying the behavioural results it seeks to accomplish; and (C) the machinery for its implementation and the subsequent follow-up arrangements.⁵⁵

A. *Legal form*

There are many different types of instruments that are used in international practice, but for the purpose of this paper three may be distinguished: an international multilateral convention, formally binding under international law on the sovereign states which have adopted it; a formal resolution of a policymaking organ of an international organisation (which may combine the characteristics of a declaration or recommendation);⁵⁶ and a solemn declaration, not in the form of a binding treaty, adopted by sovereign states (i.e. at an international conference). The principal difference between a convention and the other instruments, which do not possess formal binding force, is that the former imposes on states which have adopted it, a legal obligation to comply with its provisions. How far such an obligation actually limits the subsequent freedom of state action largely depends on the language of the convention, the type of obligation imposed and the relevant provisions on implementation.

53. See also Report of the Secretariat on “Transnational Corporations: Certain Modalities for Implementation of a Code of Conduct in relation to its Possible Legal Nature”, Commission on Transnational Corporations, Intergovernmental Working Group on a Code of Conduct, E/C.10/AC.2/9, 22 December 1978.

54. “...the status of a generally accepted code is such that governments may feel it appropriate to transform code provisions into national law.” p.244, “Implementing Codes of Conduct for Multinational Enterprises”, Pieter Sanders, p. 241-248, *American Journal of Comparative Law*, Vol. 30 (1982).

55. See, Report of the Secretariat on “Transnational Corporations: Certain Modalities for Implementation of a Code of Conduct in relation to its Possible Legal Nature”, Commission on Transnational Corporations, Intergovernmental Working Group on a Code of Conduct, E/C.10/AC.2/9, 22 December 1978.

56. In the words of Professor Dupuy, resolutions, even recommendatory resolutions, are in the process of becoming something more, they may affirm “a legitimacy which anticipates the legality of tomorrow”.

It should be borne in mind that the legal form of an instrument is only one of several factors that determine the extent of its real (effective) binding force. A text in the form of an international convention may in fact bind the parties to nothing significant if its provisions are couched in optional terms, using vague and general wording or providing unlimited state discretion. On the other hand, a formally non-binding instrument may have real practical importance.⁵⁷ States usually feel compelled not to act inconsistently with instruments which they have formally accepted, even if those instruments are not technically legally binding. Thus the circumstances of a code's acceptance or adoption are also of primary importance, as they can largely determine the degree of effective respect it will receive.

There are various options available to reinforce the commitment of states to a non-binding code – these options differ significantly. In simplified terms, at one end of the spectrum, states may opt for a 'traditional' form of binding international agreement on the subject, for example in the form of a convention. At the other end of the spectrum, states may decide to opt for what is traditionally perceived as a non-binding international instrument, namely an IAEA General Conference resolution to cover the subject matter. A supporting statement by a representative of the state concerned, by way of a unilateral declaration or a political commitment, is also relevant in determining a code's impact on international law.

i. IAEA General Conference resolutions

In the UN, codes can be adopted by a resolution of the General Assembly; in the IAEA adoption can be by way of a resolution of the General Conference. Yet the question arises as to whether such a resolution has binding force (especially where there are no reservations to it), as a reflection of customary law.⁵⁸

It is not significant, as a matter of international law, though it may be important psychologically or relevant as a result of national law or some international undertaking, whether a recommendation of a policymaking organ of the IAEA, is issued. Whilst a code may not be legally binding, its adoption

57. See A.A Fatouros "The UN Code of Conduct on Transnational Corporations: A Critical Discussion of the First Drafting Phase", p. 103-105, In Horn (ed.), *Legal Problems of Codes of Conduct for Multi-national Enterprises*, Kluwer-Deventer, 1980.

58. It is noted in this context, however, that, strictly speaking, the question of the normative value of resolutions adopted by international organisations is still subject to debate. While some authors consider that such resolutions could, in certain circumstances, create rights and obligations for Member States of the organisation and could even, if adopted unanimously, be regarded as equivalent to treaties concluded in simplified form (see Oppenheim's *International Law*, Ninth Edition, Vol. 1, p. 48), others consider that "the unanimous acceptance of a resolution is [...] still not proof but merely an indication of the existence of consent. Real consent only arises when states recognise the content of a resolution as international law before, during or after voting on it by unilateral declarations, implicit acts, or by unopposed acceptance of the respective legal statements" (see "The Charter of the United Nations", a commentary, B. Simma, Second Edition, Volume 1 p. 272). According to the International Court of Justice (see *Legality of Nuclear Weapons*, Advisory Opinion, ICJ Reports (1996), paras. 70-71), "General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character". Further, for the views of states, see "Unilateral Acts of States, Replies from Governments to the Questionnaire", General Assembly, International Law Commission, 52nd Session, Report of the Secretary-General, A/CN.4/5.11, 6 July 2000.

by consensus underscores a political commitment to its principles. Such a commitment may be further enhanced by an individual commitment by a state. The IAEA Board of Governors has, in the past, recommended to its Member States that certain IAEA Safety Standards (e.g. those relating to transportation) “should serve as the basis for relevant national regulations” or that certain codes “be taken into account in the formulation of national regulations or recommendations”. The Director General has also made similar recommendations in the publications setting forth the texts of certain Safety Standards, and even in Manuals promulgated on his own authority. However, it should be borne in mind as a matter of international law, these recommendations generally have no force of law. The Agency’s Statute does not place on IAEA Member States any obligation to conform to recommendations made in this regard by any Agency organ, or even to report to the Agency on the degree of such conformity or the fact of or the reason for rejection.⁵⁹

ii. *Unilateral declaration*

The term “declaration” is used for various international legal instruments. Such instruments are frequently used by states to convey a commitment on their part. Declarations are not always legally binding. “Some unilateral declarations may create rights and duties for the states, while others just explain or justify conduct, views or intentions on various matters and are more of political than legal significance.”⁶⁰ Declarations, however, can also be treaties in the generic sense with the intention to be binding under international law. It is therefore necessary to establish in each individual case whether the parties intended to create binding obligations and the circumstances of any reliance placed on a declaration by other states. Under international law, these are the key elements which need to be taken into consideration when determining whether a state is bound by a unilateral declaration.

On several occasions the International Court of Justice (ICJ) had to determine whether a specific unilateral declaration had created legal obligations for the state that submitted it. The legal position on this matter is set out by the ICJ in general terms in the 1974 Nuclear Tests Case (Australia v. France). The ICJ held:

“It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the state making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the state being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding.”⁶¹ (emphasis added)

The ICJ on this basis concluded that various communiqués, messages and press interviews by persons speaking on behalf of the French government constituted binding legal commitments for France.

On the other hand, in the case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) the Court “[was] unable to find anything in these

59. Compare the Constitution of the WHO (14 UNTS 185), Article 22, and the Convention on International Civil Aviation (15 UNTS 295), Article 38.

60. Oppenheim’s *International Law*, Ninth Edition, Vol. 1, Parts 2 to 4, p. 1190.

61. ICJ Rep (1974), p 253 (Australia v. France).

documents [namely, a resolution of the XVIIth Meeting of Consultation of Ministers for Foreign Affairs of the Organization of American States and a communication from the Junta of the government of Nicaragua to the Secretary-General of the Organization accompanied by a “Plan to secure peace”] from which it can be inferred that any legal undertaking was intended to exist”⁶². The communication from the Junta of the government mentioned, *inter alia*, its “firm intention to establish full observance of human rights in [the] country” and “to call the first free elections [the] country has known in this century”. In the ICJ’s view, this communication was essentially a “political pledge”.

However, in the case concerning the Frontier Dispute (Burkina Faso v. Mali), the ICJ did not find any binding character to a verbal declaration made by Mali’s head of state who stated that: “Mali extends over 1 240 000 square kilometres, and we cannot justify fighting for a scrap of territory 150 kilometres long. Even if the African Unity Mediation Commission decides objectively that the frontier line passes through Bamako, my government will comply with the decision.”⁶³

In the ICJ’s view, “there was nothing to hinder parties from manifesting an intention to accept the binding character of the conclusions of the Organization of African Unity Mediation Commission by the normal method: a formal agreement on the basis of reciprocity. Since no agreement of this kind was concluded between the parties, the Chamber finds that there are no grounds to interpret the declaration made by Mali’s head of state [...] as a unilateral act with legal implications in regard to the present case.”⁶⁴

From the above, it appears that according to the ICJ, unilateral declarations by states may have different legal implications depending on a number of factors. Decisive in this context are the originator of the unilateral declaration, the content of the unilateral declaration and, most importantly the intention by the originator of the unilateral declaration to be bound by it and the corresponding legitimate expectation of the addressee. A definitive answer under which circumstances a unilateral declaration is and which elements of a unilateral declaration make it legally binding however still cannot be found.⁶⁵

Finally, it is recalled that the form of the declaration is not decisive. In the abovementioned 1974 Nuclear Tests Case, the Court recalled that:

“With regard to the question of form, it should be observed that this is not a domain in which international law imposes any special or strict requirements. Whether a statement is made orally or in writing makes no essential difference, for such statements made in particular circumstances may create commitments in international law, which does not require that they should be couched in written form. Thus, the question of form is not decisive.”⁶⁶ (emphasis added)

62. ICJ Rep (1986), para. 261 (Nicaragua v. United States of America).

63. ICJ Rep (1986), para. 36 (Burkina Faso v. Republic of Mali).

64. ICJ Rep (1986), para. 40 (Burkina Faso v. Republic of Mali).

65. See also in this context the still ongoing work of the International Law Commission at its fifty-fourth session in 2002, as set out in its Report. [Official Records of the General Assembly, Fifty-fourth session, Supplement No. 10 (A/57/10)].

66. ICJ Rep (1974), p 253 (Australia v. France).

iii. *Political commitments*

What is meant by a political or moral commitment is rarely spelt out, beyond the implication that it does not entail legal effect or sanctions. The question of whether such commitments are generally observed is one of empirical research and not for normative analysis.⁶⁷ It has been suggested that a breach of law gives rise to legal consequences while a breach of a political norm gives rise to political consequences. However, this is a fine distinction to make, as breaches of law may give rise to consequences that may be politically motivated.

It should be noted that a political commitment of a state implies, and should give rise to, an internal legislative or administrative response. It should also be noted that a state that has made a political commitment has entered into an international pact with other states who have made the same commitment. Thus, a state may be presumed to have agreed that the matters covered are no longer exclusively within its concern. This does not, however, mean that any violation of the requirements contained within the instrument would give rise to legal consequences.⁶⁸

B. Formulation

There are a number of ways in which legal obligations may be expressed, here I cite just a few:
(a) an important element in the formulation of the text of a code, is the degree of specificity of its

67. See, "The Twilight Existence of Non-binding International Agreements", Oscar Schachter, (1977), Vol. 761, *American Journal of International Law*, p.303.

68. Further to an endorsement of a code by the IAEA General Conference, states could be encouraged to make individual political commitments concerning their implementation of the code. With regard to the Code of Conduct on Sources, the General Conference recognised that the code was not a legally binding instrument, yet it also urged each Member State to write to the Director General that it fully supported and endorsed the IAEA's efforts in this field, that it is working toward following the guidance contained in the code, and that it encouraged other countries to do the same. The Director General was requested, subject to the availability of resources, to compile, maintain and publish a list of states that have made such "political commitment[s]". Yet it also recognised that the abovementioned procedures were exceptional, having no legal force, were only intended for information and therefore did not constitute a precedent applicable to other Codes of Conduct of the Agency or of other bodies belonging to the United Nations system [see GC(47)/RES/7, September 2003]. Examples of such political commitments proposed during the drafting of the Code of Conduct on Sources include: (a) "[State] declares that it will fully implement the terms of the Code of Conduct on the Safety and Security of Radioactive Sources. Consistent with the non-legally binding status of the code, this declaration does not create any legal obligations."; (b) "[State] fully supports and endorses the IAEA's efforts to create international standards for the safety and security of radioactive sources. [State] is working toward full implementation of the IAEA Code of Conduct on the Safety and Security of Radioactive Sources and encourages other countries to do the same."; (c) "[State] affirms its determination to uphold the principles of safe and secure management of radioactive sources, as are stated in the Code of Conduct on the Safety and Security of Radioactive Sources. Consistent with the non-legally binding status of the code, this declaration does not create any legal obligations or any specific reporting system."; (d) "[State] affirms its support for the IAEA's work on the safety and security of radioactive sources, including the completion of the recently revised IAEA Code of Conduct on the Safety and Security of Radioactive Sources, which is non-legally binding in nature. [State] will implement the IAEA Code of Conduct on the Safety and Security of Radioactive Sources and urges other countries to do the same. This declaration does not create any legal obligations or any specific reporting systems.". See The Report of the Chairman of the Open-ended Meeting of Technical and Legal Experts to Review a Draft Revised Code of Conduct on the Safety and Security of Radioactive Sources, held in Vienna, from 14 to 18 July 2003 [GOV/2003/49-GC(47)/9, Annex 2].

language. The more specific the language, the more restricted is the freedom of the parties to it. The more general the language, the greater the freedom;⁶⁹ (b) a provision may be directed at a desirable outcome or result, permitting conduct that brings about such a result. A provision may direct obligations or recommendations on the substance of the conduct of a particular actor. A combination of these two approaches may be found in a set of provisions – desirable, recommendatory or obligatory, combined with a provision(s) on the particular types of conduct required leading to that result; and (c) a provision may include terms which expressly (i.e. national interest exceptions) or by implication (i.e. the mention of broad standards of conduct, any application of which involves decisions by the concerned party or by an appropriate authority), refer to decisions by the party affected or by other parties, concerning the elements of conduct required or prohibited.

The drafters of a code must establish from the outset whether the code will be binding or not. Where it is agreed that a code should be non-binding, then there should be no reason not to prepare an instrument containing highly specific text: the options of states would not be formally restricted thereby and there would be no breach of a legal obligation if in a specific instance an inappropriate rule were not complied with. Where a code is being drafted without due regard as to its legal form, then it may well end up having the worst of both worlds: a non-binding instrument with vague and general language. As mentioned above, a code can be effective only to the extent that it is widely accepted and all states adopting it are committed to it. On the other hand, the opposite danger is also present: that a code may be accepted by all, or most countries concerned, but it is a code with a vague and general text which changes little in the existing situation, where in relation to important matters, the parties concerned have reached linguistic compromises, which deprive the code of any real effect, and which lacks any provisions regarding its implementation.⁷⁰

C. *Implementation*

On the domestic level, non-binding international instruments often become a source of law⁷¹ even before they are compulsory internationally, by being adopted into legislation or regulations. Yet, strictly speaking many soft law instruments do not need to be implemented via domestic legislation, making them easier to adopt than conventions and be applied without delay by states.

69. Consistent with the accepted practice for codes and guides, “shall” and “should” are used to distinguish between strict requirements and desirable options respectively. While there is little legal distinction between them, the use of “should” is more in keeping with the voluntary and advisory nature of the code. However, it should be noted that if a state is to implement the provisions of a code then effectively it would be bound to ensure that its provisions were followed.

70. See A.A. Fatouros, “The UN Code of Conduct on Transnational Corporations: A Critical Discussion of the First Drafting Phase”, p. 123, In Horn (ed.), *Legal Problems of Codes of Conduct for Multi-national Enterprises*, Kluwer-Deventer, 1980.

71. For example, Codex Alimentarius – jointly produced by the Food and Agriculture Organisation (FAO) and the World Health Organisation (WHO), prescribes standards “for all principal foods” and is widely used in the international food industry. It is a noteworthy illustration of a formally binding instrument that has become effective law for numerous states worldwide on a subject of practical significance to many people. Where a state has been unable to incorporate such a code into its domestic law, it is still nevertheless influenced by its requirements. For further discussion, see “Codex standards and other Codex measures are widely used by governments and by the international food trade”, Frederic Kirgis, “Specialized Law-Making Processes”, in *The United Nations and International Law*, at 86.

The adoption⁷² of a code by states, whether as an international convention or as a General Conference resolution, will undoubtedly have an impact on the national law of adopting states. The impact of the adoption of a code by means of a convention may be stronger and more immediate, but such impact could still exist in the case of a non-binding instrument. A code's provisions may deal in various ways with the matter of its implementation and application at the national level or it may contain no provisions on the matter. Alternatively, it may include provisions which refer to the code in its entirety and which express a broad undertaking of the states adopting it, to give effect to the principles it embodies. It may also contain specific provisions, which require effect to be given in the national law and practice, or requiring that the very language of the code be enacted into national law. The code may also contain provisions which require regular or ad hoc reporting by each state concerning the application of the code.⁷³

V. Structural Options

The following part of this paper provides a non-exhaustive list of possible structural options for an IAEA Code of Conduct. These options are presented for illustrative purposes only, without any preference whatsoever, and should be read in light of the preceding parts of the paper. The options reflect both the various types of machinery for a code's implementation and the legal form (binding or non-binding) of the instrument(s) embodying it.

In considering options, there is a clear relationship between form and content. In other words, the appropriateness of a legally or non-legally binding approach will depend on the content, which in turn derives from the objectives. It could be argued that the issue of content must be discussed before the issue of form, and whilst this would make sense, the issue of form will also have implications for the more specific content. For the purpose of this part of the paper, the issue of form is discussed. The code under consideration is fully non-binding and voluntary and is issued in the form of a declaration in a resolution of the IAEA General Conference.

72. In the context of revisions to the draft Code of Conduct on the Safety of Research Reactors, due to the non-binding nature of the code, it was suggested that the term "application of the guidance in the code" should be used in place of the term "implementation of the code". See Working Group Meeting on Revision of the Draft Code of Conduct on the Safety of Research Reactors, Vienna, 13-17 October 2003, Report of the Chairman, 16 October 2003.

73. In this context, the draft Code of Conduct on the Safety of Research Reactors submitted to the Board of Governors in March 2003, contained provisions (in particular the two linked Paragraphs 8 and 42) that would require a state to prepare and submit national reports on the status of implementation of the code to the Agency for review. The Agency would then take this into account when planning its technical co-operation programmes. However, although this provision sought to encourage the code's implementation, Member States' comments at the Board indicated that many would not wish application of the code to be taken into account by the Secretariat when it was planning Agency technical co-operation programmes. "...A non-binding code should not impose restrictions on access to material, equipment and technology for peaceful purposes..." (see paragraphs 121-161, GOV/OR.1063, dated April 2003). It follows that the Conclusions from the Meeting of the Stakeholders' Group records that the provision on implementation of the code should be removed and taken up in a General Conference resolution, as was done for the Code of Conduct on the Safety and Security Sources. (see Conclusions from the Meeting of the Stakeholders' Group for the Code of Conduct on the Safety of Research Reactors, 2003-10-07). Consequently, the code as revised and submitted to the March 2004 Board and September 2004 General Conference (GC(48)), merely states that "if the state faces difficulties in application of this code, it should communicate the difficulties and any assistance it may require to the Agency." (paragraph 7, GOV/2004/4, 2 February 2004).

The code may include provisions which, *inter alia*:

- provide that the adopting states undertake to give effect to it in their national law and administrative practice, and to report regularly and on request to its application;
- entrust the Secretariat with responsibilities concerning the collection and study of state reports on the code's application, and the preparation of studies based on such state reports and from sources other than such reports;
- provide an international committee with responsibility for preparing and adopting revisions of the code;
- establish an international panel of experts charged with the elucidation of the code's provisions on the basis of their language and context, the interpretation of the code on the basis of its structure and purpose, other kinds of action in consultation with the parties concerned; to act on a non-adversary consultative basis, with respect to all general and specific issues brought before it by a concerned party;
- provide procedures for non-compulsory settlement of disputes between states (conciliation, arbitration and adjudication) concerning the application and interpretation of the code.

In favour of such an arrangement it may be argued that, for instance:

- that it will be easier to reach agreement among states with respect to a non-binding code and therefore it will be easier for it to be speedily adopted and put it in effect within a short time;
- that it will have considerable effect because its moral force will make it a guideline for state behaviour and a source of law for national courts and administrative authorities;
- that the provisions entrusting the Secretariat with administrative tasks will make compliance more likely;
- that the explicit requirement of national implementation will enhance the code's role as a source of law within states;
- that the provision on national implementation and on administrative and monitoring services, as well as the creation of the panel, will make compliance more likely;
- that provisions dealing with the code's revision makes possible future improvement. That the work of the panel will enhance the chances for significant future improvements through revision;
- that those provisions on compulsory settlement of disputes and the threat of sanctions are necessary to induce state compliance.

It may be argued against such a type of arrangement:

- that states will not accept provisions against which they have serious objections to, and even a code which is not legally binding may still not be speedily adopted;
- that states will not respect a text in which those who prepared it have signaled its limited significance, by neither giving it binding force nor any specific implementation machinery;

- that as long as the code is non-binding there is no certainty that states will institute sufficient changes in their relevant national laws and practices and provide reports, so as to allow an effective review;
- that national action alone is not sufficient for monitoring and control. That, even if states act in a manner indicated, there may be too many basic divergences in national laws and practice;
- that administrative and technical review of state action is too limited to induce adequate compliance with the code;
- that the implementation machinery is inadequate; states may have little help as to the meaning and operation of the code and that the relevant experience is studied at a level too abstract to permit effective future revision;
- that the panel's responsibilities are too limited to make it an important factor in increasing the effectiveness of the code; That the creation of a panel introduces an element of judgment about specific cases which is inappropriate in an essentially voluntary instrument and that if the code does not contain specific enough language the panel cannot function on a proper and predictable basis;
- that the non-binding character of the entire instrument undermines the effectiveness of the enhanced implementation machinery, since states remain free to avoid using the code.

The code may include legally binding provisions on implementation in a Protocol, whilst the other provisions are issued in the form of a declaration in a resolution of the IAEA General Conference. Where a code has a number of addressees, such as the Code on Research Reactors (three addressees: the state; the regulatory body; and the operating organisation) it would also be possible to separate the provisions concerning each party, in order to make them binding or not. Thus certain provisions concerning one party may be legally binding, whilst the other provisions concerning another can be issued in the form of a declaration in a resolution of the IAEA General Conference.

In favour of such an arrangement it may be argued, for instance:

- that giving binding force to the implementation provisions ensures that those provisions will be sufficiently effective and that states will give effect to the code in their national laws and practice and will otherwise comply with it;
- that the binding force of the implementation provisions will foster utilisation of the available implementation machinery by states and other parties concerned;
- that the uniform language ensures uniform application of those provisions in all countries;
- that the binding provisions addressed to a particular party will increase the code's effectiveness. If such provisions are broadly phrased, they will allow flexibility in their operation.

It may be argued against such a type of arrangement:

- that a code is a non-binding international legal instrument. Its provisions are recommendations intending to provide guidance to Member States;
- that the uniformity sought by such an agreement is too rigid and stifling for states in widely different situations. In particular, that the uniformity of national laws and practices would be neither desirable, in view of profound differences between states, nor feasible, in view of the role of national authorities in their application of the code. Instead it is

recommended that the state should implement, within the framework of its national law, those legislative, regulatory, administrative, and other measures that are appropriate for the state;

- there would inevitably be problems in attempting to give legally binding status to a text which has been negotiated precisely on the understanding that the provisions would be non-binding;
- that it would take a long time to elaborate such a text.

VI. Conclusion

The variety of soft law developments in the IAEA reveals that there are effective ways of enacting international law other than through the conventional treaty process. It has been demonstrated that the content of the norm, the legitimacy of the process by which it is adopted, the international context, and especially the institutional follow-up, seem to impact on state decisions to comply or not to comply with specific norms. However, the considerable recourse to and compliance with non-binding norms appears to represent a maturing of the international system for nuclear energy.

In theory soft law can be as effective as hard law. Whilst some scholars have formulated that the practice of international organisations, and of states within international organisations, is not the full equivalent of hard customary international law directly based on state practice – the adoption of a Code of Conduct expressly declared to be unenforceable internationally is not without substantial legal consequences.⁷⁴ Whilst they are not law, non-binding norms are effective and offer a flexible and efficient way to order responses to common problems. Thus, a non-legally mandatory code may still lay down standards and prescribe particular action required by a state. This paper has gone some way to demonstrating that such codes have been used by the IAEA as an effective norm-creating technique. They thus have an indispensable place in a modern international system.

The international system for the peaceful and safe use of nuclear energy is characterised by a mix of legally binding rules, agreements and regulations and, non-binding advisory standards and codes. This mix is constantly changing. Very important steps forward have already been made and the development of this system is a continuous process. Non-binding advisory codes and standards are gradually becoming binding commitments. Indeed, many countries are voluntarily accepting, step by step, recommendatory international regulations as a basis for their national legislation. Yet in order to assist and support this development, it is imperative that the concerned parties are actively involved in the progressive development of the system.⁷⁵

It is without question that the international instruments adopted under IAEA auspices play an important role in the adoption of norms and rules on nuclear energy. The IAEA is working to establish an efficient and effective global framework for the peaceful and safe use of nuclear energy. The enhancement of this framework can be made more effective depending on the options pursued. Yet the choice of the various options is controlled by states, who may or may not want to commit themselves to a binding instrument. Where a non-binding option is chosen, such as a code, this choice can be

74. Horn (ed.), *Legal Problems of Codes of Conduct for Multi-national Enterprises*, Kluwer-Deventer, 1980, p. 413.

75. *The Chernobyl [Chernobyl] Accident and the Future of Nuclear Energy: The Path Towards Safety and Sustainability*, Harvard Ukrainian Research Institute of Harvard University, Serguei Milenin, Sergei Skokov, Elizabeth Supeno.

reinforced, but again it depends on the options chosen regarding the instruments legal form, formulation and mechanisms for implementation. However, in practice, states having opted for a non-binding instrument have consistently sought to reinforce the instruments purely non-binding nature.

If states are ready to voluntarily undertake to comply with international norms that they formally view as recommendations, they should be afforded every opportunity to do so. It is important to facilitate the expansion by states of their norm acceptance. In the field of international co-operation, the emphasis need not be on the formal character of the commitment but rather on the degree of compliance with that commitment. Paradoxically, while legal commitments may not always be fulfilled, it is not infrequent that non-binding commitments are faithfully complied with. Experience has shown that when states explore new areas of international co-operation which have previously been regarded as within the sphere of domestic jurisdiction, a trial period is often required for states to satisfy themselves that undertaking a legal commitment is appropriate. Such trial period commitments indicate that the international community is feeling its way through an area of international co-operation.

The challenge for the IAEA is how best to make a normative framework more effective and applicable in an effort to enlarge widespread observance of the basic norms governing the safe and peaceful uses of nuclear energy, while safeguarding selectivity in the creation of new principles, standards and rules.