ARTICLES

The IAEA Code of Conduct on the Safety of Radiation Sources and the Security of Radioactive Materials

A Step Forwards or Backwards?

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When considering all the work and discussions involved in progressing from the Conference of Dijon, held in September 1998, to finalisation of the Code of Conduct on the Safety and Security of Radioactive Sources** in July 2000, followed by its presentation to the IAEA Board of Governors and then to its General Conference in September of the same year, one cannot help being perplexed at the striking difference between the initial enthusiasm and subsequent reservations.

With a broad audience of 232 participants from 60 countries – including a significant number of senior managers from the private sector – and 20 participants representing international organisations, the Dijon Conference covered a vast range of topics related to concerns about the use of radiation sources and radioactive materials.[1]

Thus, its conclusions[2] expressed a convergence of views on the current state of affairs in this field and on the specific means of resolving the problems, highlighted in particular as a result of different accidents the analysis of which made it possible to identify shortcomings of various origins;

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** The text of the Code of Conduct is reproduced in the chapter "Texts" of this *Bulletin.*

1. See the publication of the Proceedings of the Conference entitled: *Safety of Radiation Sources and the Security of Radioactive Materials, Proceedings of a Conference*, Dijon, France, 14-18 September 1998, IAEA, Proceedings Series, Vienna 1999, hereinafter referred to as *Proceedings of a Conference*. The Dijon Conference was held from 14 to 18 September 1998, and organised jointly by the European Commission, the International Atomic Energy Agency, the International Criminal Police Organization – INTERPOL and the World Customs Organization.

2. G.A.M. Webb, "Major Findings of the Conference", in *Proceedings of a Conference*, op. cit., p. 364.

to the extent that the said conclusions, exactly as set out, were submitted in the form of a report, several days later, to the IAEA General Conference.[3]

In the Resolution adopted by the Agency's General Conference in the light of this document, the Secretariat was asked to prepare for the consideration of the Board of Governors a report on how national systems for ensuring the safety of radiation sources and the security of radioactive materials could be operated at a high level of effectiveness and – adopting the exact words of the last sentence of the remarks closing the Dijon Conference –

> "ii) whether international undertakings concerned with the effective operation of such systems and attracting broad adherence could be formulated".[4]

This idea of international undertakings, to which the Code of Conduct owes its origin,[5] seems to have dissolved in the course of the exercise. Moreover, the scope of application of the Code turned out to be significantly restricted and, consequently, its operative provisions also.

We shall endeavour to identify the main elements of such an outcome which, in the final analysis, is highly disappointing having regard to the importance of the issues involved.

I. A Code with Restricted Content

Already when issuing invitations to the Dijon Conference, its organisers had identified two "distinct but interrelated" subject areas:[6] the prevention of accidents involving radiation sources and the prevention of theft or any other unauthorised use of radioactive materials – including measures for responding adequately to the illicit trafficking of these materials which was on the increase as a result of the upheavals in the last decade of the 20th century in Central and Eastern Europe and in the former USSR.

This dual methodological approach naturally led to the association, at a practical level and in the framework of the organisation and holding of the Conference, of representatives from different types of national (public and private) and international institutions, most of which were routinely involved either with safety or with security, but aware of the need to understand and manage in an appropriate fashion the complementarity which may exist between these two concerns.

In this respect, it is noteworthy that the Dijon Conference was the first to undertake a joint consideration of all of the aspects relating to the safety of radiation sources and the security of radioactive materials.[7] As pointed out in the conclusions, the attention of the community of radiation

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3. GC(42)INF/15, 21 September 1998.

4. GC(42)RES/12, paragraph 3.

5. For the background to the process leading to the drafting of the Code of Conduct, see the author's previous paper: Katia Boustany, "A Code of Conduct on the Safety of Radiation Sources and the Security of Radioactive Materials: A New Approach to the Normative Control of a Nuclear Risk?", *Nuclear Law Bulletin*, No. 65, June 2000, p. 7.

6. See: *International Conference on the Safety of Radiation Sources and the Security of Radioactive Materials*, Dijon, France, 14-18 September 1998, First Announcement and Programme, http://www.iaea.org/worldatom/thisweek/preview/1998meet/cn-70.html.

7. G.A.M. Webb, "Major Findings of the Conference", in *Proceedings of a Conference*, op. cit., p. 363. Note also, in the same publication (pp. 6-7), the inaugural remarks by the Director of the Division of

protection experts had, in the past, been focused on preventing accidents involving such sources; but the increase in incidents of illegal trafficking in the early 1990s led to a growing awareness of the problem of sources which, for various reasons, were outside the control systems.[8]

These two aspects, finally addressed from the same perspective of protecting against the harmful effects of radiation sources and radioactive materials, together presided over preparation of the main final recommendations of the Dijon Conference. On closer analysis, these can be seen to cover three series of substantive proposals which, in reality, are intended for three major categories of addressee: states, manufacturers and suppliers, and users.

For the attention specifically of source manufacturers, the text – without, however, referring to them expressly – emphasises that the risk of accidental exposure to radiation must be anticipated in such a way that "safety devices" and procedures are incorporated and that weaknesses in the design and construction of sources are corrected.[9] These clear instructions are not included in the Code of Conduct itself which says simply that when implementing the Code, states should emphasise and reinforce to manufacturers their responsibilities for the safety and security of radioactive sources.[10] Moreover, worded in a typically general fashion, this provision also applies to suppliers, users and those managing disused sources[11] – an amalgam which, since the respective responsibilities of these different types of operator are not specifically identified, is highly likely to end up being simply meaningless.

In a wider context, including manufacturers as well as the suppliers and users of sources – who are not expressly targeted either – the concluding remarks of the Dijon Conference essentially state that a sound safety culture must be promoted in such a way as to minimise human error by means of proper training. This safety culture concept was not included in the Code of Conduct in which only a provision as to appropriate levels of training for manufacturers, suppliers and users of radioactive sources survives, in the form of a requirement that regulatory bodies should impose.[12] According to

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Radiation and Waste Safety of the IAEA, Mr. Abel J. Gonzalez: "It is surprising that after three quarters of a century of radiation protection, we are meeting together for the first time at an international level to foster the sharing of information on these two important topics. In its seventy years of existence, the International Commission of Radiological Protection (ICRP) has produced more than seventy publications with recommendations for protection against ionising radiation that have been followed by national and international organisations. However, only two – very recent – ICRP publications deal with the problem of the safety of radiation sources, and none has ever dealt with the issue of the security of radioactive materials. For the IAEA, the balance is similar. […] It seems, I would like to suggest, that we were convinced that minimum requirements for safety and security were somehow automatically established and implemented. We all assumed, for instance, that all governments had radiation safety infrastructures in place which at least included a system of notification, registration, licensing and inspection of radiation sources."

8. G.A.M. Webb, "Major Findings of the Conference", in *Proceedings of a Conference*, op. cit., p. 363.

9. G.A.M. Webb, "Major Findings of the Conference", in *Proceedings of a Conference*, op. cit., p. 363, paragraphs (2) and (2)(a).

10. *Code of Conduct on the Safety and Security of Radioactive Sources*, hereinafter referred to as the "Code of Conduct", GOV/2000/34-GC(44)/7, Attachment 7, Article 6.

11. Article 6 reads as follows: "In implementing this Code, states should emphasise and reinforce to manufacturers, suppliers, users and those managing disused sources their responsibilities for the safety and security of radioactive sources".

12. Code of Conduct, op. cit., Article 17(k). Article I.4 of Appendix I of the BSS provides: "Employers, registrants and licensees shall ensure, for all workers engaged in activities that involve or could involve

the definition in the BSS publication,[13] however, the safety culture is much more than appropriate training which is only one component of

> "The assembly of characteristics and attitudes in organizations and individuals which establishes that, as an overriding priority, protection and safety issues receive the attention warranted by their significance".[14]

While it is true that the Code does not fail to make the ritual reference to the BSS,[15] this does not seem to us to compensate for the omission relating to the safety culture which probably has to be attributed to the fact that this new normative tool deliberately targeted a single addressee: the state. Indeed, in his report on the second meeting[16] of the Group of technical and legal experts responsible for drafting the Code of Conduct, the Chairman of the Group noted that it had discussed whether the Code should be addressed to states only or also to manufacturers, suppliers and users of radioactive sources. But the Group felt that, while certain provisions in the Code did in fact apply to manufacturers, suppliers and users, regulatory activities fell within the domain of states, and that therefore the addressees of the Code should be states.[17]

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occupational exposure, that: […] (h) suitable and adequate human resources and appropriate training in protection and safety be provided, as well as periodic retraining and updating as required in order to ensure the necessary level of competence; […] (k) necessary conditions to promote a safety culture be provided". This shows clearly that appropriate training is not the same thing as a safety culture, the objectives and procedures for which are laid down in the section of the BSS dealing with "Principal Requirements", in Article 2.28, which provides: "A safety culture shall be fostered and maintained to encourage a questioning and learning attitude to protection and safety and to discourage complacency, which shall ensure that: (a) policies and procedures be established that identify the protection and safety of the public and workers as being of the highest priority; (b) problems affecting protection and safety be promptly identified and corrected in manner commensurate with their importance; (c) the responsibilities of each individual, including those at senior management levels, for protection and safety be clearly identified and each individual be suitably trained and qualified; (d) clear lines of authority for decisions on protection and safety be defined; and (e) organisational arrangements and lines of communications be effected that result in an appropriate flow of information on protection and safety at and between the various levels in the organisation of the registrant or licensee". As can be seen, this provision asserts unambiguously that training is only one aspect among others of the safety culture.

13. BSS refers to the *International Basic Safety Standards for Protection against Ionizing Radiation and for the Safety of Radiation Sources*, Safety Series No. 115, IAEA, Vienna, 1997.

14. Ibid., Glossary, "Safety culture", p. 354.

15. Paragraph 12 of the Preamble: "Noting that the International Basic Safety Standards for Protection against Ionizing Radiation and for the Safety of Radiation Sources contain recommendations for protection against exposure to ionising radiation and for the safety and security of radioactive sources".

16. This meeting was held at the headquarters of the IAEA from 10 to 14 July 2000.

17. Report by the Chairman of the second meeting of the Group of technical and legal experts, Mr. S. McIntosh (Australia), set out in GOV/2000/34-GC(44)/7, Attachment 7, paragraph 4.

However, nothing obliged the Group of experts to deal with regulatory activities only. In reality, in the practice of international organisations – whether they are part of the United Nations family or not – the purpose of codes of conduct is usually to make up in part for the unwillingness of states to subject certain economic operators to legally binding rules, preferring to prepare a compendium of standards intended to incite conformity on a voluntary basis. In this perspective, a code of conduct has been defined as

> "a set of principles and rules relating to the behaviour of certain international agents and incorporated into a single act or legal instrument adopted by states".[18]

It has also been clearly stated that

> "International agents whose behaviour has to be regulated may be states – traditional subjects of public international law – but also companies and private associations. Such as transnational enterprises or even natural persons".[19]

And having regard to the examples of the most important codes of conduct[20] adopted during the last quarter of the 20th century, we are obliged to observe that

> "Formally, a special feature of all codes is that they lay down rules applying both to states and to transnational companies. […] The proportion of the rules applying to either states or transnational companies varies, sometimes substantially, from one code to another".[21]

This all goes to show that there was a real opportunity to address the question of the safety of radiation sources and the security of radioactive materials in a global approach which would have concerned each of the parties sharing responsibility for the effective attainment of the objective in question: namely, on the one hand, states as regards their regulatory functions and, on the other, manufacturers, suppliers and users in their capacity as economic operators whose diligence in complying with the standards is vital for their effectiveness in relation to transactions, applications and management involving the sources and materials concerned.

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18. A.-A. Fatouros, "*Le projet de Code international de conduite sur les entreprises transnationales : essai préliminaire d'évaluation*", *Journal du Droit International* – JDI, No. 1-4, January-December 1980, 5-47, p. 6. The author notes (ibid): "They may be adopted in the form of an international convention, creating more or less detailed legal obligations for participating states. However, in most cases, more flexible forms are used (or are likely to be used), expressing a *general approval of standards which, although not strictly speaking binding, do have legal scope and effects*" (italics added; unofficial translation).

19. Ibid, p. 7.

20. On a world-wide basis: Code on Restrictive Business Practices, adopted in 1980 by Resolution 35/63 of the General Assembly of the UN; Guidelines or Code for Consumer Protection, adopted in 1986 by Resolution 39/248 of the General Assembly of the UN; International Code of Marketing of Breast-Milk Substitutes, adopted in 1981 by Resolution WHA 34-22 of the Assembly of the WHO; International Code of Conduct on the Distribution and Use of Pesticides, adopted by Resolution 10/85 of the General Conference of the FAO; on a non-world-wide basis: Declaration on International Investment and Multinational Enterprises of the Member countries of the OECD, adopted in 1976, including an annex containing Guidelines for Multinational Enterprises.

21. Nguyen Huu Tru, "*Les codes de conduite : un bilan*", *R.G.D.I.P.*, T. XCVI, 1982, 45-60, p. 49.

Such an approach would not have been in contradiction – far from it – with the terms in which the Board of Governors requested

> "the Director General to initiate exploratory discussions relating to an international undertaking in the area of the safety and security of radiation sources, it being understood that the international undertaking – which might take the form of a convention or some other type of instrument – should provide for a clear commitment by and attract the broad adherence of states".[22]

For, in the case of codes of conduct, the determination of states and their adherence are expressed through the conditions under which the normative instrument is adopted within the competent bodies of the organisation, in this case the Agency, which is responsible for drafting it. It is therefore highly regrettable that the Group of experts convened by the Secretariat of the IAEA chose to ignore the benefits of a wider normative dynamic and to concentrate solely on the regulatory activities of states.

Naturally, as appears from the conclusions of the Dijon Conference, setting up a regulatory authority with appropriate powers and resources for continuous control and monitoring of radiation sources and radioactive materials is indispensable if a sufficient level of safety and security, having regard to the risks involved, is to be ensured. Recent history provides examples enough of the dramatic consequences of the loss or absence of control over such sources and materials.

However, sticking in the rut of state regulation, as if this were the universal cure for all ills, is a sterile exercise: in a world in which the real capability of the apparatus of the state varies considerably from one country to another, where state structures sometimes collapse completely in a context of political destabilisation and armed conflict, the only possible back-up to failure by the state, should this arise, remains responsible action by the operators concerned, in this case the manufacturers, suppliers and users of radiation sources and radioactive materials. That is why it seemed to us important, from the outset, to include such actors in the normative prism of the code of conduct discussed here.[23]

In particular, in the context of export and import of radiation sources, it is not difficult to anticipate the reluctance of the states of origin of the sources exported to assume any obligation when, clearly, the importing states should establish systems for licensing and control to ensure on their own territory the safety and security of the applications used there. In this respect, moreover, the report by the Chairman of the Group of experts indicates, not surprisingly, that the Group did not reach any agreement concerning any obligations of "exporting states" in this regard:[24] according to the Group, the main responsibility for the safe management of radioactive sources rested with the importing state,

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22. GOV/1999/16, paragraph 6(d).

23. We take the liberty of referring readers once more to the author's previous article, in this same *Bulletin*, already mentioned in note 5.

24. GOV/2000/34-GC(44)/7, Attachment 7, paragraph 6. The Group of technical and legal experts was composed of "representatives" – according to the term used by the Secretariat in this same document – of 16 Member States: Argentina, Australia, Austria, Canada, Cuba, Egypt, Finland, France, Germany, Greece, India, Republic of Korea, Russian Federation, Slovakia, Sweden, United States of America. Obviously, producer states were well represented.

which should consent to such an import only if it had the technical and administrative capability needed to manage the source in a safe manner.[25]

In addition, the Group of experts considered that the proposal that states should create comprehensive national registries for radioactive sources under their jurisdiction was not practicable at this time and, consequently, the proposal that the Agency provide the platform for an international registry was also felt to be premature.[26] Thus, the Code of Conduct simply provides that each state should ensure that its regulatory body maintains appropriate records of holders of authorisations in respect of radioactive sources, with a clear indication of the type(s) of the radioactive sources that they are authorised to use, and appropriate records of the transfer and disposal of the radioactive sources on termination of the authorisation.[27]

Lastly, on the ground that most accidents with serious consequences were caused by radioactive sources,[28] the Group of experts agreed that the Code should focus on radioactive sources defined as being

> "radioactive material that is permanently sealed in a capsule or closely bonded and in a solid form, excluding material within the nuclear fuel cycles of research and power reactors".[29]

In the Code of Conduct itself, this exclusion is reflected in the definitions given in Article 7 to the expressions "radiation source" and "radioactive source".[30] Nuclear materials as defined in the Convention on the Physical Protection of Nuclear Materials are also excluded from the application of the Code[31] as are radioactive sources within military or defence programmes, which should, however, be managed in accordance with the principles of the Code.[32]

Leaving aside the military and defence exception, we feel there is a sort of fragmentation of the regime of the safety of radiation sources and the security of radioactive materials which, almost inevitably and notwithstanding any measures taken elsewhere, could result in the creation of loop-holes. Yet the drafting of the Code could have been an opportunity for a systematic and coherent clarification of the standards and behaviour required, in different situations and hypotheses, in order to achieve the aims initially set. But, for all practical purposes, the option chosen leaves the most

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25. Ibid.

26. GOV/2000/34-GC(44)7, Attachment 7, paragraph 5. As regards the proposal for national registries, it should be noted that the report by the Chairman of the Group simply referred to "various reasons" for its not being included in the Code of Conduct.

27. GOV/2000/34-GC(44)/7. Attachment 7, Article 17(c).

28. GOV/2000/34-GC(44)/7, Attachment 7, paragraph 3.

29. GOV/2000/34-GC(44)/7, Attachment 7, paragraph 3.

30. GOV/2000/34-GC(44)/7, Article 7: "For the purposes of this Code: […] 'radiation source' means a radiation generator, or a radioactive source or other radioactive material outside the nuclear fuel cycles of research and power reactors; 'radioactive source' means radioactive material that is permanently sealed in a capsule or closely bonded and in a solid form, excluding material within the nuclear fuel cycles of research and power reactors. It also includes any radioactive material released if the source is leaking or broken".

31. GOV/2000/34-GC(44)/7, Attachment 7, Article 2.

32. GOV/2000/34-GC(44)/7, Attachment 7, Article 3.

important aspects of security outside the scope of the Code, in spite of the ambitions expressed in its title.

In any event, there is every reason to fear that this restrictive and state-oriented approach – not properly thought through, moreover – will compromise the hoped-for effects of such a normative tool.

II. A Code of Uncertain Scope

Conceived as a guide to states for the development and harmonisation of policies, laws and regulations on the safety and security of radioactive sources,[33] the Code of Conduct was to be submitted to the Agency's Board of Governors in terms significantly different from those in which the Board requested the Director General to initiate exploratory discussions relating to an "international undertaking".[34]

In the Secretariat document proposing the action to be taken by the Board of Governors, this last expression was replaced by "exploratory discussions on a possible Code of Conduct on the Safety of Radiation Sources and the Security of Radioactive Materials".[35] This change was certainly not made in order to imply that the Code of Conduct could stand for an international undertaking, but simply to invite the Council to take note of the Code, to ask the Director General to circulate it to all states and relevant international organisations and to request the Director General to organise consultations on decisions which the Agency's policy-making organs may wish to take, in the light of the report of the Chairman of the Group of technical and legal experts, regarding the application and implementation of the Code of Conduct and to make recommendations thereon to the Board.

This extreme caution is probably the result of a debate within the Group of experts on the question of whether states should be recommended to submit to the Director General of the Agency unilateral declarations committing themselves to take the measures required to implement the Code's provisions.[36] According to the Group of experts, the actual Code should be an "incentive" document[37] which might or might not be complemented by binding legal undertakings; and since the mandate of the Group did not refer to the legal form of the international undertaking on which it was to conduct exploratory discussions, it was not for it to recommend any policy action to the states, this type of decision falling within the jurisdiction of the policy-making bodies of the Agency.

It has to be said that the position of the Group of experts on this issue is irreproachable and altogether in line with the order of respective competencies in the international organisational system. The problem seems to proceed from a confusion in certain minds between the expression "international undertakings" and international obligations. Thus, inasmuch as the states chose not to opt for

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33. GOV/2000/34-GC(44)/7, Attachment 7, last paragraph of the Preamble.

34. GOV/1999/16, paragraph 6(d).

35. GOV/2000/34-GC(44)7, paragraph 14(g).

36. GOV/2000/34-GC(44)7, Attachment 7, paragraph 9.

37. It should be noted that this is precisely the term used in the Nuclear Safety Convention (1994) and by the Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management (1997). It might be thought that there is a pathological tendency to describe all instruments relating to safety in the nuclear field as being incentives – which would be serious – but it has to be admitted that the peculiarity of a code of conduct in international law is not to create legally binding obligations.

an international convention in the field of the safety of radiation sources and the security of radioactive materials, preferring a code of conduct – in other words a *soft law* normative instrument – the idea of finding a way in which the Code would nevertheless become binding upon them shows both great ingenuity and, above all, a profound disregard for international law and "her infinite variety".[38]

First of all, for a unilateral declaration by a state to produce any legally binding effect on it, such declaration must be made in circumstances indicating the state's intention for this to happen. In this respect, the International Court of Justice clearly stated that

> "not all unilateral acts imply obligation, but a state may choose to take up a certain position in relation to a particular matter with the *intention of being bound*".[39]

It is therefore difficult to understand how a series of unilateral declarations to be deposited by the states with the Director General of the Agency could have been envisaged given that the states, by deciding not to have recourse to a convention had precisely indicated their intention not to be bound, their wish not to undertake any legally binding obligations.

But above all, with respect to international law, the adoption of a code of conduct in itself constitutes an international undertaking, the nature and scope of which vary in accordance with the modalities of the act by which the states – acting as such or as members of an international organisation through its competent policy-making bodies – confer upon it normative status within the international legal order. Thus,

> "The instruments concerned, although not legally binding, are not all of the same legal nature. Some are the resolutions of international organisations but the differences noted in the respective status of the bodies in question together with the negotiation procedures and adoption arrangements of the texts reveal that they do not all involve the same degree of political commitment by the states concerned".[40]

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38. R.R. Baxter, "International Law and 'Her Infinite Variety'", The *International and Comparative Law Quarterly*, Vol. 29, October 1980, 549-566.

39. *Nuclear Tests Case (Australia v. France*), 20 December 1974, ICJ, Rec. 1974, paragraph 44; italics added. One of the circumstances in question is the status and level of responsibility within the state of the person making the unilateral declaration. On this point, the case law of the International Court of Justice in the French Nuclear Tests case (paragraph 49) follows the precedent set by its predecessor, the Permanent Court of International Justice in the Eastern Greenland case: *Legal Status of Eastern Greenland*, 5 April 1933, PCIJ, Rec. 1933, p. 71. Other relevant circumstances include measures designed to make public the content of such a unilateral declaration, or to notify it to interested states, which was what happened in the French Nuclear Tests case (paragraphs 43, 50 and 51).

40. Nguyen Huu Tru, op. cit., p. 47. The author illustrates his remarks (p. 48) by analysing various examples: "The text of the Code of Restrictive Business Practices was adopted by the Conference concerned and the very title of the Code seems to indicate an international agreement (principles and rules *agreed* at multilateral level); however, to denote the non-binding nature of the instrument, the Code was formally incorporated into a resolution of the General Assembly of the UN. The WHO Breast-Milk Substitutes Code reflects the firm support of Member States since although it was adopted by the Assembly in the form of a resolution, it is expressed in terms similar to those of a treaty ("The Member States hereby agree the following articles…"). The OECD Declaration is not legally an act of the Organisation since it expressly states that it is a Declaration by the Member countries. […] It is not an act issued by an international entity without official power but a multilateral act resulting from the concording wills of states with everything that that entails in terms of political and economic powers of

This does not at all mean that such undertakings have no effect in law or are not intended to have such effect. Indeed,

> "It is hard to imagine that the representatives of states would devote so much energy and time to drafting these instruments if they were to remain mere scraps of paper. In truth, they do, as they are intended, produce effects in law".[41]

How does this work? It is here that the extent of this "infinite variety" of international law can come into play, as analysed by Judge Baxter, whose penetrating observation of the diversification of the normative phenomenon in international relations led him to say:

> "it is excessively simplistic to divide written norms into those that are binding and those that are not. Provisions of a treaty may create little or no obligation, although inserted in a form of instrument which presumptively creates rights and duties, while on the other hand, instruments of lesser dignity may influence or control the conduct of states and individuals to a certain degree even though their norms are not technically binding"[42]

A similar opinion was expressed at almost the same time with regard precisely to a code of conduct:

> "the problem of legal form becomes a false problem. The important thing to know and to ensure is the actual definitive effect of the code, to what extent it will affect, in the way intended, the behaviour of the agents to whom it applies. The legal form of an instrument is only one of the factors determining its repercussions on the real world. A text which takes the form of an international convention may not impose any real obligations on the parties if its provisions are couched in optional terms, using vague and general wording, or in such a way as to allow unlimited discretion to the states concerned […]. On the other hand, even an instrument which is not binding in law may exercise real influence on the behaviour of the agents concerned, either because procedures have been envisaged to control the application thereof or because its provisions are precise enough to enable a judgment to be made as to whether any given behaviour complies with them".[43]

The conclusion to be drawn from this series of remarks, which we felt it was important to copy in full, is first of all that legal formalism is not necessarily relevant in the field discussed here when it comes to assessing the effectiveness of a normative tool or of a norm vis-à-vis the behaviour that it is supposed to be triggering. Three elements may be pointed out here: the effectiveness of a non-binding instrument depends on the adoption process, the existence of follow-up arrangements as regards its implementation, and the clarity of its provisions in identifying the behavioural results it is trying to achieve.

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constraint. As a whole, the Declaration could be described as an agreement between Member countries, an agreement to which it was decided to give a purely political nature" (unofficial translation).

41. Alain Pellet, *"Le 'bon droit' et l'ivraie – Plaidoyer pour l'ivraie"*, in *Mélanges offerts à Charles Chaumont, Le droit des peuples à disposer d'eux-mêmes*, Paris, Ed. Pedone, 1984, 465-493, p. 490.

42. R.R. Baxter, "International Law and 'Her Infinite Variety'", op. cit., pp. 564-565. Let us not forget that the author was a professor of international law at Harvard University, and had been appointed a judge of the International Court of Justice in 1978.

43. A.-A. Fatouros, *"Le projet de Code international de conduite sur les entreprises transnationales: essai préliminaire d'évaluation"*, op. cit., pp. 33-34.

It is in this context that the question of the possible scope of the IAEA Code of Conduct on the Safety and Security of Radioactive Sources arises.

The first observation to make is that the Code has in no way been submitted to a process for its adoption by the states within the policy-making bodies of the Agency. Indeed, both the Board of Governors[44] and the General Conference[45] do no more than, respectively, "take note" of the Code, invite Member States to do so and consider, as appropriate, means of ensuring its wide application.

As for the suggestion made to the Board of Governors to request the Director General of the Agency to organise consultations on decisions which might be taken by the policy-making bodies of the Institution concerning the application and implementation of the said Code, the least that can be said is that the opinions of the Member States on this point varied widely. Countries such as Japan,[46] the United Kingdom[47] and Finland,[48] saw no advantage in holding consultations on the Code, while Australia[49] and the United States[50] were in favour of so doing.

In addition, some states such as the Russian Federation,[51] China and Sweden[52] wished to emphasise the non-binding nature of the Code, and even to describe any contrary approach as premature.

This being said, the Board of Governors nevertheless adopted the suggestion relating to consultations, the conduct of which was entrusted to the Director General of the Agency. However, this cannot be compared to a follow-up mechanism which still seems beyond reach at the present time.

And although the provisions of the Code addressed to the states may be considered clear enough to obtain appropriate adjustments on their part with regard to the standards contained therein, the fact remains that important normative aspects concerning other addressees whose action has an impact on the effectiveness of such an instrument have been omitted, to say nothing of the various aspects of the field in question which have been excluded from its scope of application.

Moreover, it is noteworthy that at the same September 2000 meeting during which it took note of the Code of Conduct, the Board of Governors not only also took note of the Categorisation of

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44. GOV/2000/34-GC(44)/7, paragraph 14(g).

45. GC(44)/RES/11, September 2000, paragraph 4.

46. GOV/OR/1011, October 2000, Record of the One Thousand and Eleventh Meeting, Held at Headquarters, Vienna, on Monday, 11 September 2000, paragraph 58.

47. GOV/OR/1011, October 2000, Record of the One Thousand and Eleventh Meeting, Held at Headquarters, Vienna, on Monday, 11 September 2000, paragraph 99.

48. GOV/OR/1012, October 2000, Record of the One Thousand and Twelfth Meeting, Held at Headquarters, Vienna, on Monday, 11 September 2000, paragraph 16.

49. GOV/OR/1011, October 2000, Record of the One Thousand and Eleventh Meeting, Held at Headquarters, Vienna, on Monday, 11 September 2000, paragraph 54.

50. GOV/OR/1011, October 2000, Record of the One Thousand and Eleventh Meeting, Held at Headquarters, Vienna, on Monday, 11 September 2000, paragraph 61.

51. GOV/OR/1011, October 2000, Record of the One Thousand and Eleventh Meeting, Held at Headquarters, Vienna, on Monday, 11 September 2000, paragraph 66.

52. GOV/OR/1012, October 2000, Record of the One Thousand and Twelfth Meeting, Held at Headquarters, Vienna, on Monday, 11 September 2000, paragraph 9.

Radiation Sources document but, in addition authorised the Director General of the Agency to issue it and the Secretariat to use it in discharging the Agency's statutory responsibilities with regard to the safety of the radiation sources under its control or supervision, particularly those used in Agency projects.[53] This means that the document in question takes on a value equivalent to that of the other normative safety instruments prepared by the Agency and approved by the Board of Governors, while no such thing was even envisaged or discussed in relation to the Code.

In fact, it is not possible at present to attribute any status whatsoever to the Code since the intention of the states, the Agency and its policy-making bodies remains extremely unclear. And, in the final analysis, saying that the Code is not legally binding is meaningless. So what now?

Conclusion

For the moment, this "what now" remains difficult to predict. It is tempting to agree with the question raised by some states: consultations, what for? – and, we are driven to add, to do what? Nevertheless, one would like to hope that such consultations could shed light on the intention of the different parties concerned in this respect and on the procedures for implementing the Code of Conduct.

In these circumstances, it is not easy to give an opinion as to whether the Code of Conduct constitutes progress in the field of the safety of radiation sources and the security of radioactive materials. What analysis reveals is rather that there are gaps in both the content of the Code and the processes relating to it. Nevertheless, new standards have been introduced as a result of this exercise and have thus, as an enactment of what constitutes appropriate behaviour in the field of the safety and security of radioactive sources, emerged into the arena of international relations. It has to be said that this is better than nothing. But it is not nearly enough.

However since we are dealing with contingencies, there is nothing to prevent us from hoping that future results will sweep away the inevitable scepticism born of the uncertainties of the present.

53. GOV/2000/34-GC(44)/7, paragraph 14(c).