

The IAEA's Legal Framework for Public and Private Partnerships

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Introduction

The Agency's Medium Term Strategy for 2006–2011 envisions that the Agency “will have extended the impact of its work by increasing synergies with UN and other international organizations and partners” by 2011 and defined the “enhancement of cooperative interaction with partners and the public to achieve the Agency's goals”. In addition to fostering cooperation with and among Member States, the Medium Term Strategy also calls for increased efforts to develop new partnerships with the public and private sectors.

In its current efforts to formalize a new partnership policy, the Agency also takes into account the UN-wide partnership initiative being carried out in pursuit of the eighth UN Millennium Development Goal, which stresses the importance of partnerships at the highest strategic levels of the UN System.

IAEA Legal Framework for Public and Private Partnerships

In accordance with the Agency's established practice, partnerships have been concluded through public law agreements, private law agreements or practical arrangements depending on the parties thereto and the substance thereof.

Public law agreements, such as treaties, agreements and exchanges of letters, can only be concluded by two or more international juridical persons including States and/or intergovernmental organizations with treaty-making capacity. In accordance with the Statute of the Agency, as confirmed in its Administrative Manual (AM.I/17), all agreements with States or intergovernmental organizations governed by public international law require the authorization of the Agency's policy making organs(s) for their conclusion and are signed by the Director General or by a Deputy Director General in the name of the Director General.

Private law agreements and contracts can be concluded with either public or private sector entities. Public sector entities include States and their instrumentalities as well as international organizations whether intergovernmental or non-governmental. Private sector entities include companies, banks, academic or research institutions. Such agreements and contracts usually involve commercial transactions or the procurement or provision of goods and services. They do not require the authorization of the Board of Governors and can be signed by the Contracting Officer or Director concerned. For signing authority on specific kinds of contracts, reference should be made to the Financial Regulations and Rules as well as to the relevant sections of the Administrative Manual.

Practical arrangements are less formal legal instruments which contain agreed supplementary arrangements or modalities of cooperation at the technical, operational or practical level. The parties can be either public or private entities. Such arrangements do not give rise to legal or financial rights and obligations. Such arrangements can be concluded at the working level by the Deputy Director General or Director concerned.

A joint communiqué is usually issued by two or more parties to announce an initiative, meeting or relationship or to declare a joint position or statement. Where the objective is purely political, a joint statement or communiqué is the Agency's preferred format.

Until recently, the Agency has had a mixed practice with respect to the use of Memoranda of Understanding (MOUs). For most of its history, the Agency used MOUs interchangeably as public law instruments, private law instruments as well as practical arrangements. As a matter of law, the status of the MOU under international law is determined with reference to the parties thereto, the subject matter thereof and the nature of the provisions thereof. In general treaty practice, however, an MOU is most often used to set out the operational or practical arrangements under a framework international agreement or to regulate the technical or detailed matters of a relationship.

Concerned about the proliferation of, and lack of consistency in, the use of MOUs, the Director General announced a new policy in 2008 wherein the Agency now limits its use of MOUs exclusively as practical arrangements; MOUs can therefore no longer be used to establish legal or financial obligations.

By way of summary, the Agency has established a coherent and consistent framework for the conclusion of partnerships with public and private entities. Treaties, agreements or exchanges of letters to establish legal rights and obligations under public international law; agreements or contracts to establish legal rights and obligations under private international law; MOUs and other practical arrangements to set out purely technical or operational details or modalities of cooperation; and Joint Communiqués for initiatives of a purely political nature.

Ensuring transparency and accountability

Following an OIOS evaluation of Agency partnerships in 2006, the Secretariat implemented a number of measures recommended in the OIOS report. The recommended measures which are currently being applied and incorporated into the new draft policy on partnerships, *inter alia*, include:

- documentation by means of a written agreement or arrangement using the appropriate legal instrument;
- the establishment of a reporting mechanism on the progress made in meeting targets and commitments of the Agency's partnership agreements as an integral part of the Agency performance assessment reporting system;
- the inclusion of new standard provisions requiring each party to designate a partnership manager (or focal point) with clear and agreed definition of the responsibilities thereof; the nature and frequency of their consultations; and the necessary hand-over modalities in the event of a change of personnel;
- the clear delineation of signing authority wherein public law agreements and exchanges of letters may be signed by the Director General (DG) or Deputy Directors General (DDsG) or by persons with full powers from the DG. Private law agreements may be signed by the DG, DDsG or Director concerned. Practical arrangements (including MOUs) may be signed by the DDG or Director concerned. In accordance with proper management principles, DDsG should be kept informed of all agreements and arrangements to be signed at the Director level;

- central registration of all partnership agreements or arrangements in the Office of Legal Affairs;
- the specification of specific, measurable, achievable, realistic and timely (SMART) objectives as well as measurable performance indicators;
- the periodic review of activities to ensure that all partners are held accountable for the efficient and effective achievement of the partnership's objectives;
- the transmittal of information on the establishment and achievements of partnerships to the Member States of the Agency.

Challenges in establishing relationships between public and private actors

Among the significant challenges in this regard is the question of added value. Often times, it seems that the party or parties concerned are seeking publicity or other political or promotional objective for activities that can be conducted through the normal work of the Agency without the need for partnership agreements or arrangements. For example, some States and regional or international organizations have sought to conclude such agreements or arrangements for activities that fall comfortably within the Agency's technical assistance or technical cooperation programmes. Similarly, private sector entities have proposed framework or partnership agreements for the provision of goods and services that would normally be treated under the contract and procurement procedures of the Agency.

Moreover, when dealing with States or intergovernmental organizations, it is important to ensure the Agency's integrity, independence and impartiality. To that end, partnership agreements should not imply any prerogatives in the decision-making process of the Agency nor the ability to exercise influence thereon.

Similarly, when dealing with commercial entities, the question of fairness arises with a view to ensuring the integrity of the Agency's bidding and procurement practices. Vigilance is required to uphold the principle of fair competition in such transactions and to ensure that partnerships do not result in any direct or indirect advantage of any partner. It is also imperative that partnerships are not deemed or construed to be an endorsement of any product or service of a partner.

The use of the Agency's name and emblem by its partners is subject to specific and explicit authorization for specific and stated purposes. The co-mingling of public acts and commercial activities is potentially grounds for calling into question the privileges and immunities of the Agency and to avoid that eventuality, the Agency has jealously guarded its status and mandate as an intergovernmental organization. The latter is not only relevant in connection with partnerships with private entities but also in its partnerships with States where increasingly there is potential to regard the Agency as a "contractor".

While there is a need to support the widest possible dissemination of unclassified information amongst its Member States, there is a parallel need to equally protect confidential, restricted or other classified or proprietary information. There is also a need to protect the intellectual property and rights thereto, including all copyrights and patents, in and to any material or invention arising from the partnership.

Nature of Public and Private Partnerships

One of the most longstanding partnerships in the Agency's history is with the Food and Agriculture Organization (FAO). Pursuant to an arrangement between the Directors General of the IAEA and the FAO, the Joint FAO/IAEA Division of Atomic Energy in Agriculture was established effective 1 October 1964. The Joint FAO/IAEA Programme assists Member States to use nuclear techniques and related biotechnologies for developing improved strategies for sustainable food security. The Joint FAO/IAEA Programme is financed by the IAEA's Technical Cooperation Fund and FAO's Technical Co-operation Programme and through trust funds provided by donor countries and international funding agencies. It is currently providing scientific and technical support for over 200 national and regional TC

projects, as well as for interregional and regional training courses channeled to recipient countries for the purpose of providing equipment, expert advice and training. The Joint FAO/IAEA Programme also provides mechanisms for coordinating and supporting research; providing laboratory support and training (the FAO/IAEA Agriculture and Biotechnology Laboratory), collecting, analyzing and disseminating information through conferences, symposia, seminars and advisory group panels, and the publication of technical and public information documents that arise from these meetings.

From 1995-2005, the Agency concluded approximately 150 agreements or arrangements out of which 60% were public international law agreements, 20% were private international law agreements and 20% were practical arrangements. Of these, 25% were concluded with States or their instrumentalities, 50% with organizations of the UN system and other intergovernmental organizations and 25% with private sector entities. While, during this twenty-year period, the concept of “partnerships” had not yet crystallized in the policy and practice of the Agency, many of these agreements and arrangements would embody partnerships within the meaning of its prevailing definition today. In relevant part, the Agency’s draft partnership policy defines “partnerships” as collaborative relationships between the Agency and one or more partners from different sectors of society, in which all partners agree to work together to pursue a common objective or to undertake a specific task or tasks in furtherance of the overall objective of the partnership.

The Agency seeks partnerships that add value either by increasing the efficiency or effectiveness of its work either by:

- Expanding the base for policy dialogue and advocacy;
- Sharing of information, knowledge and experience;
- Increasing participation in efforts to develop norms and standards;
- Better coordinating project and programme delivery and management; and/or
- Mobilizing, and maximizing the benefits of, resources in support of the Agency's mandate to achieve programmatic objectives.

In the recent past, the PACT for Global Cancer Partnership has emerged as the most comprehensive and visible example of Agency partnerships. The Programme of Action for Cancer Therapy (PACT) was launched as an IAEA initiative in 2004. From its inception, PACT has endeavoured to facilitate communication among the various organizations so that they may, each with their own area of expertise, work closely together to provide support for integrated and sustainable cancer control programmes to developing countries. Through a global public-private partnership the organizations involved work together to assess cancer needs in developing countries, help them to define national plans for cancer prevention and control and raise funding to improve conditions and outcomes for cancer patients by focusing on timely, planned and balanced investments to maximize the beneficial impact of radiotherapy and all other interventions. In this way, limited resources will be used in the most cost-effective way and millions of unnecessary deaths could be prevented. The PACT for Global Cancer Partnership now includes more than twenty national and international, intergovernmental and non-governmental, public and private partners including, inter alia, the World Health Organization, the American Cancer Society, the Open Society Institute, Best Medical International Inc. and the University of Oxford's Department of Clinical Pharmacology.

Another area where the Agency is seeking new partnerships is nuclear security. Especially in the last two years, the Agency has entered into negotiations or concluded a series of Practical Arrangements to enhance the contribution of States and their instrumentalities as well as of intergovernmental organizations to the implementation of the IAEA's Nuclear Security Plan and its activities in the areas of nuclear security and protection against nuclear terrorism. The modalities of cooperation provided for in these practical arrangements include, but are not limited to, exchange and dissemination of information, including joint publications; assistance in training and capacity building in relevant nuclear security topics, including development of joint educational and training courses; conduct of joint expert missions, as appropriate, to assess country needs or requests for support.

Pursuant to Article II of its Statute, the Agency seeks to accelerate and enlarge the contribution of atomic energy to peace, health and prosperity throughout the world. This Article lays the foundation of the Agency's work in the fields of technical cooperation and

socio-economic development and constitutes yet another area where the Agency has pursued major partnerships in support of national and regional development goals. With particular reference to NEPAD, the Agency has developed strong collaboration with AU-PATTEC, UNDP/GEF, the United Nations Human Security Trust Fund (UNHSTF), and the African Development Bank (AfDB). Steps were also initiated to develop partnerships with the European Union to support key areas of socio-economic significance relevant to nuclear science and technology applications, such as energy, health and environment. The Agency has a strong partnership with the Global Environmental Facility (GEF) in Africa with UNDP often serving as a third partner. The IAEA/GEF/UNDP tripartite partnership is expected to expand to a number of other areas as well. The Agency has also forged important partnerships with the UN Trust Fund for Human Security (UNTFHS), the USA, OPEC Fund and China in connection with the Tsetse and Trypanosomosis Eradication Project promoting the development and use of improved and integrated technologies of soil, water and nutrient management in cropping systems through the use of nuclear and related techniques.

In the Latin America region, building partnerships between scientific and developmental authorities and exploring new means of cooperation between Member States remains a major management objective. To this end, the Agency has maintained an excellent partnership with the Global Environmental Fund (GEF), the World Bank and the Organization of American States (OAS) in connection with ground water and aquifer projects as well as with the Pan American Health Organization (PAHO) in connection with cancer prevention and care projects. In the area of human health, the Agency has begun collaboration with the UNDP-Spanish MDG Achievement Fund, Thematic Window for Children, Food Security and Nutrition.

The European Union (EU) is one of the most important TC partners in Europe and beyond. The European Commission (EC) has provided extra-budgetary contributions on behalf of the EU in the past for several Europe region projects, financed by the former TACIS (Technical Assistance to the Commonwealth of Independent States), programme and more recently by the Instrument of Pre-Accession Assistance (IPA). Recent negotiations with the EC seek to expand this partnership into other areas including a number of safety-related projects in Europe and other regions.

Problematic or Controversial Partnerships

On the public sector side, and with regard to the FAO/IAEA Joint Division mentioned above, in late 2007, the FAO Director General served notice of the FAO's intention to terminate the Joint Division. The FAO's decision emanated from its external auditor's recommendation in the context of a broader set of recommendations to reform and streamline the work of the FAO. Several Member States emphasized that the FAO/IAEA Joint Division had been providing Member States with concrete and positive results in the fields of crop enhancement, pest control and food and environmental protection. They urged the retention and strengthening of the current partnership and cooperation agreement between the IAEA and FAO. Following extensive consultations by the IAEA Secretariat with the FAO Secretariat as well as with the Member States of both organizations, the IAEA is confident that the work undertaken by the Joint Division will continue as an excellent and early example of "Delivering as One" within the UN System.

On the private sector side, the Nuclear Threat Initiative (NTI) had offered the IAEA \$50 million for a low enriched uranium reserve, contingent on contributions of an additional \$100 million by others by the end of September 2009. To date, with the contributions and pledges made by Norway (\$5 million), the USA (\$50 million), the United Arab Emirates (\$10 million) and the European Union (€25 million) and Kuwait (\$10 million), the international community has met the target of matching contributions specified by the NTI. The Director General intends to develop and submit, for the consideration of the Board of Governors, a possible framework for the establishment of such a fuel reserve of last resort under IAEA auspices. Such a partnership would be unprecedented in scale and scope and would pose a unique set of challenges on the legal, constitutional and financial fronts.