

[TRANSLATION]

NOTES

LEGAL RULES APPLYING TO OBSERVATORIES INSTALLED OR TO BE INSTALLED IN CHILE

1- **Who may install and operate observatories in Chile.**

The installation of astronomical or any other observatories in Chile may be performed by different entities, including the following worthy of mention:

- (a) The Chilean Government, through a public entity or institution;
- (b) Non-profit organizations;
- (c) Scientific or academic universities or institutes empowered by their articles of incorporation to engage in such practice;
- (d) Private, profitable enterprises such as corporations;
- (f) Foreign governments;
- (g) International governmental associations, such as ESO;
- (h) Foreign universities or university associations such as Associated Universities, Inc.
- (i) Foreign academic or scientific institutions;
- (j) Foreign, private, non-profit corporate entities;
- (k) Foreign, private, profitable corporate entities.

**2- Special benefits.**

The legal regulations that apply to each of the entities listed in the previous numeral is that which corresponds to the particular circumstances of the entity to install and operate the observatory. Thus, in the case of the Chilean Government or its institutions or corporations, a special law shall apply. In the case of private individuals or corporations or foundations, it will suffice for them to apply according the standards that apply to each. This applies wherever special franchises or benefits are waived by prevalent legal standards.

**3- Foreign entities.**

Foreign governments and foreign government associations shall normally resort to treaties with the Chilean Government, both for regulating their Chilean activities beyond their public rights and for obtaining any franchise or special treatment.

Other foreign entities or corporations may, in principle, install observatories in Chile under general laws of the nation. However, it is reasonable that since this is a high priority activity of national interest normally performed by non-profit, academic or scientific corporations, like governments, they apply for preferential treatment that would assure their stability through tax exemptions or other benefits.

Thus it was that in the ESO case a special agreement was made with the Chilean Government which covers it and extends to its officers. The agreement ranks as a treaty, whereas the rest of the foreign observatories installed in Chile have achieved similar treatment through special legislation.

Furthermore, at present there is a bill that underwent its first constitutional step in the Chamber of Deputies, and has now been in its second stage in the Senate for two years. This bill covers the subject and establishes a generic legal framework for observatories with special treatment, whether Chilean or foreign,

Within the generic framework described above, it can be seen that the installation of new observatories in the country by foreign entities allows for an initial distinction. If the interested party is a Government or an International Association like ESO, it is probable that based on its status as a subject of international public law, it would seek to carry out its project by means of an agreement with the Chilean Government. On the other hand, if it is a private entity it would have to go through general standards of private law applicable to the legal vehicle chosen, without giving up tax exemptions or other benefits as established for that purpose in the special laws currently in effect.

In the first case it is understood that the legal guidelines that apply to private entities would not be available, and the only choice for a Government or an Association of Governments as in the case of ESO is by treaty. We believe that this uncertainty merits more study, which would be beyond the scope of these notes. Meanwhile, we shall discuss the interpretation in question, with the caveat that this uncertainty does not appear to be resolved in the above-mentioned bill.

4- **Joint project between ESO and other non-governmental foreign entities.**

Based on the above considerations, rather than trying to guess whether ESO can choose between a treaty and a legal approach to the new project covered in these notes, it would seem more appropriate to outline the characteristics of each, so that ESO may determine which legal vehicle is preferable. It should be pointed out, however, that since this project is a joint effort with other private, foreign entities, as each one is carried out in Chile by all of them, only the existing legal framework would be available rather than the treaty, since this is feasible only when the Chilean Government's counterpart is one or more foreign governments.

5- **Treatment applicable to ESO by virtue of the treaty signed with the Chilean Government.**

This arrangement came into being with the Agreement of October 5, 1962 signed by Germany, France, Belgium, the Netherlands and Sweden, which were subsequently joined by Denmark, Italy and Switzerland.

As seen in an internal document of the Ministry of Foreign Relations<sup>1</sup>, ESO is recognized in Chile as an association of governments with its own corporate structure, for performing the functions and objectives issued by its corporate charter. By virtue of the International Court of Justice doctrine issued in a 1949 opinion, it enjoys international legal status as opposed to any Government, even without special recognition.

The same document adds that irrespective of its recognition as an international juridical entity, as a practical matter it requires express recognition. This was provided in Chile through the November 6, 1963 agreement which, following ratification by the National Congress, was implemented as a law of the Republic by means of Supreme Decree No. 18 of the Ministry of Foreign Relations, as published in the Official Gazette of April 4, 1964. This agreement was modified by the Complementary Agreement of March 30, 1966, implemented as a law of the Republic by means of Supreme Decree No. 584 of the Ministry of Foreign Relations, as published in the Official Gazette of October 18, 1967. It was further amended by an Interpretative, Supplementary and Modifying Agreement dated April 18, 1995, implemented as a law of the Republic by means of Supreme Decree No. 1766 of the Ministry of Foreign Relations, as published in the Official Gazette of May 17, 1997.

ESO has installed its observatories in La Silla and Paranal, based on the above-mentioned agreement and modifications (the Agreement).

The benefits recognized or granted to ESO by virtue of the Agreement are basically as follows:

1) Information and facilities.

The right to obtain information and the facilities needed for installing the above-mentioned observatories and those that may be regarded as complementary works (Article II);

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<sup>1</sup>Memorandum, Res. No. 164 of February 20, 1995, from the Director of Legal Affairs to the Director of Administrative Affairs of the Ministry of Foreign Relations.

2) Corporations.

Recognition by the Chilean Government of ESO's international legal status for contracting, acquiring and disposing of personal property or real estate, and standing trial (Article III);

3) Immunity and other considerations.

Recognition of the same immunities, prerogatives, privileges and facilities enjoyed by ECLA (Article IV). By virtue of this adherence to the Agreement between the Chilean Government and ECLA, ESO enjoys the following prerogatives and benefits:

- (a) Inviolability of the properties where it carries out its astronomic activities, notwithstanding that ESO must feel obliged, as well as ECLA, to prohibit the use of its headquarters or locations for use by persons who try to be arrested by Chilean law or who are wanted by the government on a legal summons, or by the courts in legal action.
- (b) Immunity from jurisdiction and judgment, except to the extent that in certain cases ESO may have waived that immunity.

The above-mentioned report by the Ministry of Foreign Relations comments as follows regarding ESO's immunity from jurisdiction and judgment:

"The analysis of the reference standards reveals that immunity from jurisdiction and judgment as enjoyed by ECLA, to whose standards ESO subscribes, is absolute. This agrees with the standards of International Law that regulate this subject, and which determine that the immunities granted to International Organizations do not allow for the trend to restricted interpretation, i.e., the distinction between acts of law and administrative acts, which should be observed in regard to governmental immunities. In this regard, it should be pointed out that on the other hand, international organizations are obliged to operate within the territory of one government, their own protection being precisely the immunities they have been granted."

The same report points out that this premise has been officially communicated to the Most Excellent Supreme Court.

(c) Tax exemptions. As with ECLA, ESO is exempt from:

- (i) all direct taxes;
- (ii) customs duties, and prohibitions and restrictions on imported or exported articles for official use, save for restrictions on subsequent sales thereof.
- (iii) customs duties, and prohibitions and restrictions on the importation or exportation of its publications.

These exemptions have been defined by the Chilean Government through various Supreme Decrees, to wit:

- D.S. 2940, D.Of. of 12/2/65 grants exemption of income and real estate taxes, as well as sales taxes, business turnover, document stamps and municipal duties and taxes;
- D.S. 56 of 1/2/1970 (we have not yet ascertained the date of publication and thus have not been able to check the text);
- D.S. 455, D.Of. of 9/8/84 which amends D.S. 2940 to adopt exemption to the Value Added Tax that may be levied;
- D.S. 25, D.Of. of 3/13/85 complementing the previous one above;
- D.S. 560, D.Of. of September 1985 (we have not yet ascertained the date of publication) amends D.S. 2940;
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- D.S. 351, D.Of. 6/24/89 amends D.S. 2940;

We are not aware of specific guidelines that may have been issued as to the amount of customs exemptions applicable to ESO, or whether they have been exercised by directly invoking the ESO Agreement together with the ECLA Agreement.

- (d) Financial and currency exchange facilities. As in the case of ECLA, ESO is not subject to currency regulations or controls.
  - (e) Inviolability of ESO's communications, as well as ECLA's;
  - (f) Others.
- 4) Treatment of representatives of the member nations and international chiefs and officials. Article V of the Agreement equates them to those of ECLA. Consequently, these entities enjoy the prerogatives and immunities in Art. 7 of the Agreement and the Complementary and Explanatory Agreement with ECLA of February 16, 1953 that included, among others, immunity from arrest or detention, immunity from confiscation of baggage, immunity from legal action for acts of compliance with official missions, tax exemption on remuneration, other tax exemptions for each and for their relatives, the right to hold accounts in foreign funds and remove funds from the country without exchange restrictions, equal rights to those of members of diplomatic missions at times of international tension, and customs exemptions on certain imports including an automobile. Obviously, these persons are not subject to Chilean tax or labor laws.
- 5) Treatment of certain foreigners who furnish services in construction, installation, maintenance and operations.

As provided in Article VI of the Agreement, scientists, professors, engineers, technicians and foreign ESO personnel employed in construction, installation, maintenance and operations will enjoy the following rights:

- exemption from customs duties and restrictions on the importation of possessions, including the right to bring an automobile for themselves and for their families.
- the same treatment as enjoyed by ECLA officials, which in effect means that this personnel is also excluded from Chilean labor laws, the same as foreign embassy officials. However, no explicit standards are contemplated for this area.

6) Treatment of local employees.

Although the Agreement does not provide for explicit norms on this, it can certainly be gathered that they do not enjoy the prerogatives and immunities outlined in the above numeral 4), on the other hand they would also be unaffected by Chilean labor laws, as is the case of foreign embassy personnel, owing to the fact that their employer is a foreign government operating under the guise of working on foreign soil. In ESO's case this conclusion appears to come under the Supplementary Agreement of April 18, 1995, Article 6 of which discusses this basis by providing that the regulations for such local personnel shall adhere to the essential principles and objectives of Chilean law.

Tax treatment of this personnel is different. As we understand it, they are considered subject to income tax, both under ESO as foreign embassies, as Chileans residing in Chile.

7) International Arbitration.

Article X of the ESO Agreement provides that any controversy between the Government and ESO as to its interpretation or application, as well as any supplementary agreement or questions regarding venue, or relations between the Government and ESO that is not resolved by direct dialog, may be submitted by either party to a "tribunal of three members to be established as soon as this Agreement is in force." This same provision states that each party shall appoint a member of the Tribunal, its President being appointed by mutual agreement of both parties or by the International Court of Justice, if necessary. This clause pertains to the status of sovereignty of the member nations of ESO.

6- **Legal framework available to private foreign interests that have installed or may install observatories in the country.**

The sole article of Law 15,172 of March 7, 1963 granted exemption from customs and other taxes for apparatuses, instruments, working tools, accessories, office equipment, vehicles and, in general, the necessary



materials or implements needed for construction, installation, operation, functioning and "ahlajamiento" [sic] of the Astrophysical Observatory and housing for astronomers and employees, to be built as provided in a certain agreement between the University of Chile and the Association of Universities for Research in Astronomy Inc. (AURA).

Law 17,182 of September 9, 1969 introduced a new, paragraph three of the sole article of law 15,172 providing that AURA and its scientists, professors, engineers, technicians and employees entering the country for the construction, installation, maintenance and operation of the Observatory referred to above in the Agreement with the University of Chile, **"would be subject to the same regime and enjoy the same prerogatives and facilities established in the current Agreement dated November 6, 1963 between the Chilean Government and the European Organization for Astronomic Research in the Southern Hemisphere (ESO)."**

Finally, Law 17,318 of August 1, 1970 replaced the third paragraph of the sole article in Law 15,172, extending its application to **"other foreign organizations, entities or corporations"** established in Chile **"in accordance with extant or future agreements with the University of Chile."**

From the above it follows that the benefits enjoyed by ESO are open to any other foreign entity that wishes to install an observatory in Chile, **as long as an agreement therefor is made with the University of Chile.**

The first doubt that arises with respect to the above cited legal principles is the scope of ESO's legal statute.

Without going into a detailed analysis of the subject at this time, we can affirm that there is a consensus among those who have studied this in connection with specific matters that have been submitted, to the effect that this statute is totally and absolutely legal and specifically includes the jurisdictional immunity enjoyed by ESO.

In line with this conclusion, D.S. 354 of the Ministry of Foreign Relations, published in the Official Gazette on June 30, 1998, extends the same treatment and the same prerogatives and facilities granted in the Agreement of November 6, 1963, to Associated Universities, Inc., and its scientists, professors, engineers, technicians and employees entering

the country for the construction, installation, maintenance and operation of the Millimeter Array Astronomic Observatory in Chile.

This decree is based on Law 15,172 and amendments, relying on the existence of the above-mentioned agreement with the University of Chile.

An unresolved doubt observed upon reading it is whether adherence to the 1963 Agreement also includes adherence to its amendments. **We believe, upon initially viewing this subject, that adherence only applies to the original Agreement.**

As to the international arbitration contemplated in Clause X of the Agreement, discussed in Numeral 7) of Paragraph 5 above, we believe that this clause is not covered in the application of Law 15,172 despite the broad terms in which it is written; i.e., Law 15,172 refers on the one hand to the "same regime," meaning the objective norms that apply to ESO, and further, to the "same prerogatives and facilities" (those privileges and opportunities granted to ESO to make things easier), all of which transcends ESO's "sovereign" status. To suggest the opposite goes beyond the clear meaning of the law and the intention of its legislators, who should not be expected to deal with a private organization or entity as if it were a State unless such were expressly stipulated. Nevertheless, we understand that there are no administrative or judicial pronouncements that back up our interpretation. Thus, it must be admitted, at least in theory, that a deeper study of the subject could yield a different interpretation.

It should also be noted that there is some ambiguity as to tax and labor treatment for personnel claiming protection under Law 15,172 as to exemption from income tax and labor laws to apply. At first blush it appears that upper echelon and technical personnel should enjoy the same allowances as ESO and ECLA personnel. However, as to local personnel, it would seem to be directly subjected to Chilean tax and labor laws.

A definite opinion on this subject would require a more thorough analysis, as well as a look into existent criteria and precedents, including any statements that may have been made by the Ministry of Foreign Relations on the matter.

Finally, the requirement of the Agreement with the University of Chile raises the question whether the special regime granted to the entity covered by Law 15,172 should be subordinate to the signing of an agreement with the University of Chile, whether this regime would be dissolved, annulled, rescinded or terminated for legal cause, or revoked by mutual accord. We understand that it suffices for the agreement with the University of Chile to be in force at the time when the Supreme Decree recognizing the special treatment is issued. It should be noted, however, that this is an arguable point, especially under the prevailing circumstances leading to termination of the agreement with the University of Chile. We feel that it would be quite different if termination were due to expiration of a term freely agreed upon by both parties, known by the government upon application for benefits under Law 15,172, or upon non-compliance of the obligations undertaken by the entity under agreement or upon learning of a mutual revocation that reveals that the only purpose of the agreement was to take advantage of the [special treatment] regime.

**7- Regime established in the bill pending Senate's ratification.**

Obviously, until this bill is written into law of the Republic, it cannot be applied to any observatory.

Similarly, it should be taken into account that the bill's present text may be modified as to form and basis before it is approved.

In any case, it is wise to point out the following basics of the bill:

- (a) Its main objective is to establish a protection regime for the heavens worthy of astronomic research, as well as for the surrounding grounds, proclaiming it as a natural sanctuary with protection as such under the Law of National Monuments.

- (b) It authorizes the expropriation of adjacent lands for sky protection suitable for astronomic research.
- (c) It provides that the construction, installation, expansion, operation and maintenance of observatories and centers for astronomic observation shall be governed by its provisions, with the specific exception of "those centers established by virtue of an international treaty or those that require specific approval by law." This would seem, then, to exclude observatories belonging to foreign governments, as well as those that require legislative approval, as in the case of an observatory belonging to the State or to one of its corporations or organizations.
- (d) In general, foreign organizations and entities may seek approval under its provisions, as well as domestic projects and entities that sign an agreement with the Government for this purpose, which could be extended for up to 25 years.
- (e) It provides for benefits and prerogatives in favor of those who adhere to its provisions as in the case of ESO and other entities that have merged with it, excluding any reference to jurisdictional immunity. This gives rise to the presumption that there is no intention to grant this treatment to new projects.
- (f) It provides that agreements for these effects shall include a plan for handling the respective observatory, guaranteeing the hiring of Chilean researchers and engineers, as well as reserving 10% of observation time in favor of domestic science and the observance of Chilean labor laws, among other requirements.

**8- A problem shared by ESO and entities covered under Law 15,172.**

Due to the jurisdictional immunity granted to ESO and to those who apply for protection under Law 15,172, it would be inconvenient for any of these entities to acknowledge, whether implicitly or explicitly, jurisdiction of Chilean courts. The inclusion of domestic arbitration clauses in agreements made with third parties can be interpreted as an acknowledgment of the jurisdiction of the Chilean courts,

since domestic arbiters are part of Chile's judicial structure and are subject to the Supreme Court's jurisdictional discipline. If no arbitration is arranged, or if international arbitration is arranged, such acknowledgment would not ensue and the entity could invoke immunity if sued, resorting to the Government for protection. In this respect there is no difference between ESO and the entities covered under current law. As to ESO, it should be recalled that Article XXIII of the Multilateral Protocol on Privileges and Immunity for ESO signed by the members of this organization on August 13, 1974 provides that all written agreements in which it may participate except as concerns their personnel, should include an arbitration clause. The General Contract Terms established by ESO by its top management include an international arbitration clause which, in our concept, precisely due to its international nature, does not constitute a tacit submission to Chilean jurisdiction as would be the case if the arbitration agreed to did not hold to this requirement. (The standards implemented in Santiago in this regard nevertheless establish domestic arbitration which, in effect, could be interpreted as a possible waiver of jurisdictional immunity, as stated above.)

- 9- Main differences between the regimes outlined in Items 5- and 6-.
- (a) The Agreement with ESO amounts to a treaty, and thus cannot be abrogated either by the Chilean Government or without ESO's consent. The regime granted to ESO through Law 15,172 and amendments could eventually be abrogated by law or by administrative action. Such action, however, could compromise the rights acquired by the respective beneficiary, who could then resort to the courts for those rights to be respected. The difference in this regard would be subtle. An indirect demonstration of this is the fact that the bill discussed in Item 7 respects regimes established before it went into effect.

- (b) The regime in Law 15,172 does not include an international arbitration clause. Thus, in the event of a discrepancy with the Government, the entity covered by the cited law may not impose the establishment of an arbitration court for resolving the controversy. The solution for a case of this type will depend on recourse of a private nature that would invoke existing laws on the subject. This will generally result in the intervention of courts of justice, whether by virtue of special procedures established for the purpose at hand or by filing for protection. In dealing with administrative edict, the only recourse is the right to petition for arbitration.
- (c) Jurisdictional immunity enjoyed by ESO is based on its status as an international association of foreign governments, and as such may not be ignored by the Government. In the case of beneficiaries of the aforementioned legal regime, jurisdictional immunity granted to them arises from interpretations and doctrine that could eventually be disallowed. At present the specific case of Carnegie Institution of Washington is under discussion, having been sued by the firm of Agricola Las Casas del Recuerdo Ltda. in the First Court of "Letras de La Serena," in which the Government has invoked the defendant's jurisdictional immunity through Official Edict No. 13,365 of July 20, 1998.
- (d) ESO's regime, established through a treaty, is not restricted by any prior requisite. On the other hand, the legal regime discussed is limited exclusively to those who sign agreements with the University of Chile.
- (e) As a public State enterprise, ESO is not obliged to comply with labor laws, even concerning its local personnel, save for the obligation it assumed in the latest amendment to the Agreement, in 1963, to harmonize its labor policy with Chilean law and to submit conflicts described in Article 7 of this amendment to international labor arbitration. Local personnel of private enterprises under this legal regime are understood to be subject to local labor laws.

- (f) We have no basis for opining on possible, different treatment for ESO from others as regards the value added tax. This would have to be examined.
- (g) The regime of international treaties involves lengthy negotiation, both at the Foreign Relations Ministry level and later in Congress for ratification; whereas an application under existing law only requires administrative approval by the President of the Republic through a Supreme Decree. Perhaps this latter procedure is shorter and simpler.

## 9- **Conclusion.**

The preceding numeral compares the advantages and disadvantages involved in both regimes, concerning the results desired and the legal vehicle for achieving them.

If emphasis is on the safety of jurisdictional immunity, the treaty approach appears to be more convenient, considering, of course, that to accomplish this the new project would have to be carried out by ESO and/or foreign States.

Conversely, if speed is desired, it might be preferable to structure the project in the form of some legal entity that could operate under existing laws, provided it also jibes with the requisite agreement with the University of Chile.

In the absence of any urgency, it could await the dictates of the new legislation.

As we know, a decision is pending from the Ministry of Foreign Relations as to the possibility of adding the installation of ESO's first radio astronomic observatory to the Agreement without having to resort to a new treaty, on the premise that it be considered as complementary to the existing activity.

We estimate that the joint project discussed in these Notes could not be regarded as analogous to the above cited situation; thus, even though it were decided to use ESO as a vehicle to carry it out, it would still be subject to congressional approval as indicated in the juridical edict contained in Verbal Note No. 9251 of May 22, 1998 issued by the Special Policy Directorate of the Ministry of Foreign Relations.

I feel that the above covers the issues pointed out in your Note of October 29 and attachments, in an effort to furnish a general overview of the subject.

I am at your disposal for clarifying or complementing these notes, and particularly for delving further into the judicial aspects dealt with herein that might be of interest to you.

Sincerely,

Laura Novoa V.

November 24, 1998.