

Coudert Brothers

ATTORNEYS AT LAW

MEMORANDUM

1627 I STREET, N.W.
WASHINGTON, D.C. 20006-4007
TEL: (202) 775-5100
FAX: (202) 775-1168
URL: <http://www.coudert.com>

March 8, 2000

To: Pat Donahue, Vice President
Associated Universities, Inc.

From: Roger Stark
Katherine Culliton

Re: International Legal Considerations in Structuring the ALMA Project

We have reviewed information provided by or on behalf of Associated Universities, Inc. ("AUI") and by Rick Cys of Davis, Wright, Tremaine (U.S. counsel for AUI). We also have reviewed documents provided by AUI and its Chilean counsel, Martín Gubbins of the Barros, Court & Correa firm. Based on our review of the referenced materials, we have completed a preliminary analysis of the current status of AUI's proposed participation in the Atacama Large Millimeter Array Observatory Project ("ALMA" or the "ALMA Project").¹ This memorandum summarizes our initial conclusions and recommendations regarding the matters set forth below. Part I discusses five key legal issues concerning the development and success of the ALMA Project. Part II sets out our conclusions and identifies some alternatives for proceeding with development of the ALMA Project.

PART I. RELATIVE STATUS OF ESO/AUI UNDER CHILEAN AND INTERNATIONAL LAW

AUI is a New York non-profit corporation previously funded to undertake the Millimeter Array ("MMA") and other large radio-astronomical observatory projects through a cooperative agreement with the U.S. National Science Foundation. The European Organization for Astronomical Research in the Southern Hemisphere, also known as the European Southern Observatory ("ESO") is an international organization that currently operates two observatories in Chile, under a 1963 treaty and its 1997 amendments. AUI and ESO wish to jointly develop, own, construct and operate the ALMA Project, which would be the largest ground-based astronomy project in the world and detect the most distance galaxies in order to study star and planet formation. In July 1999, AUI concluded an agreement with CONICYT, the Chilean Government's scientific agency that has a concession over the ALMA Project site, to conduct

¹ Please note that we are not admitted to practice in Chile and our analysis and conclusions regarding the interpretation and effect of Chilean law are based in their entirety on our discussions with Chilean counsel.

initial studies on the site.² We understand that ESO has concluded a similar agreement with CONICYT. Both AUI and ESO are currently negotiating a draft agreement with CONICYT to begin prototype and antenna installations.³

AUI and ESO wish to arrive at an arrangement that will serve their mutual objectives in jointly developing and operating the Project. A successful joint arrangement will be structured with appropriate regard for the relative status of AUI and ESO under applicable principles of Chilean and international law. The discussion below summarizes our assessment of the current legal framework applicable to AUI and ESO in connection with the ALMA Project.

1. ESO Would Have to Amend its Treaty with Chile in Order to Lead the Project.

The November 6, 1963 Agreement for the Establishment of an Astronomical Observatory in Chile (“ESO Treaty” or “Treaty”) between the Government of Chile (“Chile”) and ESO authorized ESO to build its first observatory. The ESO Treaty does not authorize ESO to build additional observatories, such as the ALMA Project. Therefore, ESO may not participate in the ALMA Project unless it amends the Treaty or finds another legal basis for proceeding without specific authorization.

Amendment of the ESO Treaty would be difficult. Full Congressional debate is required for treaty amendment.⁴ Moreover, the newly-elected Chilean President would have to sign such a treaty amendment.⁵

We understand that the Chilean Congress likely would welcome the opportunity to renegotiate all of the treaty benefits ESO received in the past. ESO also would have to procure the votes necessary for treaty amendment within its own international organization members. We also understand that ESO wishes to incorporate several additional organizations, including the scientific agency of the United Kingdom, into the ALMA Project.⁶ If so, negotiation and ratification of treaty amendments would likely become all the more complex and difficult to expedite.

Because of the risk of potential delays and loss of immunities (*e.g.* taxation) inherent in any approach that requires amendment of the ESO Treaty, AUI should seek a joint structure with ESO that (to the extent possible) minimizes reliance on the ESO Treaty regime.

2. The ESO Treaty Does Not Provide Complete Immunity from Chilean Jurisdiction.

Even if relying on the ESO Treaty did not implicate the potential disadvantages discussed above, it bears emphasis that the 1963 ESO Treaty did not provide complete immunity from Chilean law and jurisdiction.⁷

² *Convenio entre la Comisión Nacional de Investigación Científica y Tecnológica (“CONICYT”) y Associated Universities, Inc. de 7 de julio de 1999.*

³ December 1999 Draft Agreement on the Installation of the Site Infrastructure and Antenna Prototypes for the ALMA Radio Astronomy Observatory by and between CONICYT and AUI and ESO Acting Jointly on Behalf of the ALMA Coordinating Committee.

⁴ *Constitución Política de la República de Chile de 1980 con reformas de 1997* (“Const. Chile”) at Art. 50(1).

⁵ *Id.* at Art. 32(17).

⁶ See “Organizations supporting the ALMA Project,” at www.eso.org/projects/alma/institutions.html.

⁷ See *e.g.*, ESO Treaty Art. VII (individual immunity shall be lifted if such immunity “would impede the good administration of justice”; ESO promises to cooperate with Chilean authorities to ensure good administration of justice, observe police regulations, and avoid abuse in the exercise of privileges and immunities) and Art. VIII (if the

In 1997, ESO relinquished significant aspects of its immunity rights when it negotiated Treaty amendments necessary for authorization of its Paraná observatory. For example, ESO promised to cooperate with the Chilean authorities “to assure observation of the regulations of the police, of the public health and of labor and other analogous norms...”⁸ ESO also agreed to enact internal labor regulations conforming to Chilean labor law,⁹ and to take into account governmental recommendations about Chilean environmental law, which incorporates international environmental norms.¹⁰

The 1997 ESO Treaty Amendments also resulted in ESO submitting virtually all labor matters to Chilean jurisdiction. Only a labor dispute “that cannot be resolved by an internal [Chilean] appellate proceeding and is not within the competence of the Administrative Tribunal of the International Labor Organization,” will be submitted to international arbitration.¹¹ The result is that any further ESO observatory projects in Chile authorized under an amendment to the ESO Treaty regime (including the ALMA Project) will be subject to the limitations on immunities set forth in the 1997 Amendments to the ESO Treaty.

3. AUI Has Authority Comparable to ESO to Proceed with the ALMA Project.

According to Chilean Laws 15.172 and 17.182 and executive branch decrees regarding AUI thereunder, AUI is subject to the “same legal regime, prerogatives and benefits established in the ESO Treaty in force,” and AUI is empowered to build and operate the Millimeter Array (“MMA”) project in Chile.¹² AUI negotiated an agreement to conduct preliminary studies for ALMA with the Chilean government agency, CONICYT, based on the foregoing AUI authority.

CONICYT has agreed that it considers Laws 15.172 and 17.182, along with the executive branch decrees regarding AUI and the MMA project, to be suitable authorization for AUI to conduct preliminary studies for ALMA.¹³ According to the Barros firm, Chilean law provides an adequate foundation of legal authority for AUI to undertake the ALMA Project.¹⁴

Government considers that an abuse occurred, the ESO Director must cooperate with the Chilean authorities to determine whether an abuse occurred; if either ESO or the Government is unsatisfied, then the international arbitration mechanism applies). (See ¶ 5 of this memorandum, on international arbitration.)

In addition, the law of immunities of international organizations is not without limits in any part of the world. See Convention on the Privileges and Immunities of the United Nations, 1 U.N.T.S. 15 (1970) at §8; International Organizations Immunities Act, 22 U.S.C.A. §288 (1976). In Chile, the 1989 Plebiscite ensured that any Person within the territory of Chile may not violate the international human rights treaties Chile signs, and that body of law is supra-constitutional. See Art. 5, 1980 Const. Chile as amended; See also Chilean Law No. 18.825 (1989). International human rights law, including labor rights, is the law with which international treaty rights, including immunities, are interpreted in Chile.

⁸ Art. III, Interpretive, Supplementary and Modifying Agreement regarding the ESO Treaty DTO-1766 (May 17, 1997)(“1997 ESO Treaty Amendments” or “1997 Amendments”).

⁹ Art. VI

¹⁰ Art. VIII.

¹¹ *Id.* at Art. VII.

¹² Law 15.172 (1963); Law 17.182 (1969) at Art. 48; Ministry of Foreign Relations Decree No. 354 (1998); and Ministry of Finance Decree No. 1749 (1999).

¹³ *Convenio entre la Comisión Nacional de Investigación Científica y Tecnológica (‘CONICYT’) y Associated Universities, Inc. de 7 de julio de 1999.*

¹⁴ Phone conference with Martín Gubbins (March 2, 2000).

However, concession agreements would need to be negotiated with CONICYT for the next phases of the Project.

Based on our discussions with local counsel and our experience with other large infrastructure projects, it appears unlikely that the current laws and decrees applicable to AUI constitute a comprehensive legal framework and/or satisfactory governmental approval to proceed with the long-term development and operation of the ALMA Project. While it appears that AUI authority is comparable to the authority granted pursuant to the ESO Treaty, resolution of the issue discussed below will be central to structuring a successful AUI/ESO arrangement for the ALMA Project.

4. At Present, Neither AUI Nor ESO Can Be Certain of the Chilean Legal Rules That Would Govern the Project. Chilean laws do not clearly articulate precise legal requirements applicable to AUI, ESO and the ALMA Project.

Laws 15.172 and 17.182 appear to provide AUI with exemptions from import duties and taxation. They also subject AUI to the “same legal regime, prerogatives and benefits established in the ESO Treaty *in force*.”

The words “in force” present a risk for AUI. They could be interpreted to include a long list of benefits from the 1963 ESO Treaty, as previously detailed for AUI in the Barros firm memoranda.¹⁵ However, the 1997 ESO Treaty Amendments significantly reduced benefits available under the original ESO Treaty. Therefore, the ESO legal regime *in force* (*i.e.*, applicable to AUI) could be viewed as referring to only the post-1997 Amendments reduced benefits, which might include further reductions pursuant to any additional amendments.¹⁶

The ambiguity regarding which ESO Treaty provisions would apply to AUI does not appear to have been addressed by any of the Chilean authorities.¹⁷ The ambiguity regarding interpretation of the ESO Treaty provisions applicable to AUI creates significant uncertainty regarding the legal framework applicable to AUI’s development of the ALMA Project. Moreover, because structuring of joint arrangements between AUI and ESO likely will require a greater degree of certainty regarding applicable rules of local jurisdiction, import duties, taxation, property rights, labor, environmental and other matters, it is in both parties’ interest to pursue available alternatives for clarifying the applicable legal framework.

5. The ESO Treaty Does Not Offer An Adequate Dispute Resolution Mechanism Because the Forum Designated Therein Lacks Jurisdiction Over AUI.¹⁸ The ESO Treaty requires Chile to indemnify ESO in the case of termination under the 1997 ESO Treaty Amendments, but such indemnification is limited to the Paraná Project and not applicable to

¹⁵ *Minuta con fecha 3 de julio de 1998, en relación al Régimen legal de la AUI en Chile; Minuta con fecha 16 de diciembre de 1998 con relación al Régimen Tributario de las Organizaciones Astronómicas Extranjeras en Chile.*

¹⁶ See Sources of Chilean law cited at note 12, *supra*. (AUI subject to the “same legal regime...in the ESO Treaty *in force*.”) Chilean counsel agreed that Chile could potentially adopt this interpretation. Phone conference with Martín Gubbins (March 2, 2000).

¹⁷ *Id.*

¹⁸ Art. X ESO Treaty; Arts. VII & XI 1997 ESO Treaty Amendments. (We note that there is no international legal forum with jurisdiction over a State (Chile), an international organization (ESO) and a non-governmental juridical person (AUI), unless the three entities expressly consented to such jurisdiction.)

ALMA.¹⁹ Equally important, the dispute resolution procedure utilized to resolve indemnification matters, like other procedures under the ESO Treaty, is inadequate for the ALMA Project because the ESO Treaty forum does not have jurisdiction over AUI.²⁰

Each of AUI and ESO must have the right to participate in proceedings about any disputes with Chile. This is a generally-accepted international legal rule of international commerce or “*Lex Mercatoria*.”²¹ International arbitration may be barred if the forum does not have jurisdiction over one of the parties.²² Even if an ESO-Chile arbitration went forward, an extra phase of litigation would be required to resolve the jurisdictional problems.²³ Under the dispute resolution procedures of the ESO Treaty regime, each of AUI, ESO and the Government of Chile would be at risk for duplicative litigation costs.

II. CONCLUSIONS/RECOMMENDATIONS

1. Further Development of the ALMA Project Will Require Elaboration of a Sound, Common Legal Framework Within Which AUI and ESO Can Structure Their Proposed Joint Efforts. At present, the Chilean legal framework (including the international treaty rules incorporated into Chilean law) is not sufficiently clear or detailed to reliably support a thirty year joint investment in the ALMA Project. AUI and ESO should initiate a cooperative effort to develop a definitive framework with the Chilean government, including the steps set forth below.

Further due diligence will be required to identify the optimal legal basis for implementing the Project under Chilean law. ESO should assist with such legal due diligence and cooperate in clarifying the limitations on immunities and risks inherent in the ESO Treaty regime in the context of Chilean law. The parties should consider whether or not to pursue a legal regime that will avoid amending the ESO Treaty (which, in our view, would be the most desirable approach).

A comprehensive agreement describing the legal framework applicable to the ALMA Project in reasonable detail should be negotiated with the new Chilean Government, but only after both parties have completed legal due diligence and agreed on how to structure their co-participation. It may be necessary or desirable to request that the Government assist in proposing new or amended implementing legislation for the ALMA Project, but this determination should be made jointly by the parties after completion of legal due diligence.

Because current Chilean law is insufficiently precise to provide an optimal foundation for the ALMA Project, AUI and ESO should work together towards the goal of negotiating a

¹⁹ *Id.* at Art. X.

²⁰ Art. X ESO Treaty; Arts. VII & XI 1997 ESO Treaty Amendments.

²¹ See e.g. *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt* (“SPP v. Egypt” or “Pyramids case”) (ICSID Case No. ARB/84/3), Decision on Jurisdiction of November 27, 1985, published in 3 ICSID Rep. 112 (1995) (citing cases and practice).

²² *Id.*

²³ See *SPP v. Egypt*, Decision on Jurisdiction and Dissenting Opinion of April 14, 1988, published in 3 ICSID Rep. 131 (1995). (Three years later, after another international tribunal and the French courts renounced jurisdiction, this international tribunal resolved that it had jurisdiction in the Pyramids case. A final award was issued four years thereafter. Award and Dissenting Opinion of May 20, 1992, 8 ICSID Rev. 328 (1993).)

comprehensive Implementation Agreement with the Government. If possible, this should be done through the Executive Branch and not the Congress in order to expedite the process. A comprehensive ALMA Project Implementation Agreement would cover the entire range of legal requirements applicable to the Project—from permits to environmental matters to leasing to labor laws to dispute resolution over all parties for all aspects of the Project—defined precisely and agreed to by the Government of Chile, in one document.²⁴ This approach should reduce the risks associated with vagueness and ambiguities, thereby lessening the risk of later disputes, stoppages, and litigation.

2. Implementation of the ALMA Project Also Will Require Negotiation of a Co-Participation Structure Between AUI and ESO. The parties should begin to identify and evaluate various alternatives for structuring AUI/ESO co-participation in a manner that addresses the material legal issues that have been identified in this memorandum (together with any other issues that arise during the due diligence phase discussed above). Recommendations regarding the process for structuring the ALMA Project in a manner that minimizes the associated risks are outlined below.

AUI and ESO should jointly consider how to address the problems with the ESO Treaty noted above and agree upon a structure that will, to the extent possible, mitigate reliance on those aspects of the ESO Treaty that create the most legal uncertainty. Chilean counsel has advised that co-participation may be restructured under the auspices of present AUI authority. The parties should evaluate whether co-participation under AUI authority or otherwise apart from the ESO Treaty regime is feasible, and begin to discuss the alternative structures and associated risks.

Because ESO will determine the extent (if any) to which the ESO Treaty may be amended, the risks associated with the ALMA Project may be more unforeseeable for AUI than for ESO. One way to address this risk would be for ESO to covenant with AUI that it will not amend its Treaty to the detriment of AUI or the ALMA Project and agree to indemnify AUI for any damages resulting from failure to honor the guarantee.²⁵

AUI, ESO and Chile should negotiate a three-way dispute resolution provision. The ESO Treaty forum does not have jurisdiction over AUI and would therefore create a risk of protracted litigation and potentially duplicative litigation costs. AUI and ESO should approach Chile together to resolve this issue, which could be resolved by mutual agreement to submit disputes to one of several available fora that would have jurisdiction over the three parties for disputes concerning the ALMA Project.

We recommend that AUI approach the upcoming series of meetings with ESO with the goal of discerning whether ESO will cooperate in identifying and mitigating the risks by means of a joint legal diligence project. The upcoming meetings also should explore available alternative structures for implementing joint development and ownership of the Project.

²⁴ Sample Provisions for an Implementation Agreement are attached for your reference as Annex A.

²⁵ We note that ESO is not an entity anticipated to have extensive financial resources to support its guarantee commitments. For this reason, we should explore alternative commitments to provide appropriate AUI rights and/or ESO incentives to act consistent with the spirit of the proposed covenant.

Please do not hesitate to contact us if you have any questions regarding this memorandum, or if we may otherwise be of assistance.