

# ISSUES AFFECTING AN ALMA ORGANIZATION IN CHILE AND OPTIONS TO EXPLORE

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The U.S. National Science Foundation (NSF) and the European Coordinating Committee (ECC) seek agreement to install and operate, in Chile, the Atacama Large Millimeter Array (ALMA), a joint initiative of the NSF and the ECC. These two entities have identified Associated Universities, Inc. (AUI) and the European Southern Observatory (ESO) as their respective management and operating agencies in Chile.

## **I. Issues to be Resolved**

### **A. Common Issues**

1. The relative status of AUI and ESO in Chile is different under international law. How can the two organizations participate jointly in a common organizational structure in Chile?
2. What is the role, if any, of the non-ESO, non-NSF, ALMA Project participants (e.g. the UK, Spain and Canada)?
3. The Chilean legal structure (“regime”) that will govern the project is unclear both for AUI and for ESO<sup>1</sup>.
4. There exists no dispute resolution of common applicability to AUI and ESO<sup>2</sup>.
5. By what mechanism is the investment in ALMA to be protected, e.g. for long term site use and possible indemnification?

### **B. Issues Affecting ESO Leadership of the Project**

1. ESO must negotiate an independent, new, treaty with the Republic of Chile specifically for ALMA.
  - The enabling ESO treaty of 1963 as amended in 1995 is not an applicable instrument for ALMA in the eyes of the Chilean Ministry of Foreign Affairs<sup>3</sup>.
  - A new treaty for ALMA must be approved by the Chilean Congress and signed by the President.
  - UK, Spain and other non-ESO participation in ALMA complicates the treaty negotiation<sup>4</sup>
2. A new ESO treaty threatens to split the status of ESO employees in Chile—the rights enjoyed by ESO/ALMA employees may differ from those enjoyed by other ESO employees.
3. A new ESO treaty specific to ALMA potentially endangers the status of AURA, Gemini, CARSO and AUI employees in Chile whose status through Public Law

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<sup>1</sup> Courdert Brothers Report, Art. 4.

<sup>2</sup> Courdert Brothers Report, Art 5.

<sup>3</sup> Verbal Note 2742 18 February 2000.

<sup>4</sup> L. Novoa 31 March 2000, Art. 3.

- 15172 (and 17318) is established by the “ESO treaty in force”<sup>5</sup>. Is there a mechanism by which these institutions can be protected against such a loss?
4. The 1995 amendment to the ESO treaty status removed provision for complete immunity from Chilean jurisdiction. The new treaty needed for ALMA is likely to erode these provisions further<sup>6</sup>.
  5. The ESO indemnification provision with the Republic of Chile applies only to the facilities at Paranal. Such provision would have to be negotiated anew as part of the new treaty for ALMA.
  6. What would be the status in Chile of employees from AUI and non-ESO European ALMA participants?

### C. Issues Affecting AUI Leadership of the Project

1. AUI is empowered to build and operate the MMA in Chile “subject to the same legal regime, prerogatives and benefits established in the ESO treaty in force”. Hence the same limitations on immunities in the present ESO treaty, as amended, apply equally to AUI<sup>7</sup>.
2. 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 of the ALMA project<sup>8</sup>. A thorough negotiation, and agreement, with the government is required that includes rights, immunities, and dispute resolution process. Any indemnification provision would have to be part of that negotiation.
3. What would be the status in Chile of employees from ESO and non-ESO European participants in ALMA?

## **II. Negotiation with the Republic of Chile for the ALMA Legal Regime is Necessary**

1. In the case of an ESO-led ALMA Project a new, independent, treaty is needed for ALMA. This requires approval by the Congress of the Republic of Chile and the President’s signature.
2. In the case of an AUI-led ALMA Project the negotiation would take the form of legislation proposed by the Executive branch and requiring Congressional approval (much like the “Gemini Law”).
3. For an ALMA Project jointly managed by AUI and ESO the form of the negotiation would depend on the acceptance by the Chilean Government of whether or not to regard the joint management as an international organization. The discretion in this matter rests with the government<sup>9</sup>.

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<sup>5</sup> Coudert Brothers, Art. 4.

<sup>6</sup> L. Novoa 13 January 2000, Art 9ii.

<sup>7</sup> Coudert Brothers, Art. 4.

<sup>8</sup> Coudert Brothers, Art. 3.

<sup>9</sup> Kunz-Hallstein, Art. 3.

### III. Joint ESO-AUI Management of ALMA

#### A. Motivation for a Joint Project Organization

1. Transparency: The Project in Chile is what it appears to be, a joint project of the U.S. and Europe.
2. Extensibility: Provision can be made to include the Japanese as a third major partner in a straightforward way.
3. Stability: Since the joint Project is an entity unto itself, the regime negotiated for ALMA does not threaten, or impinge upon, the regime in place for existing ESO operations.

#### B. ALMA Organized Abroad and Recognized in Chile as an International Organization

1. Both Kunz-Hallstein<sup>10</sup> and L. Novoa<sup>11</sup> emphasize the opportunity to organize ALMA abroad and seek recognition by the Chilean government of the legal personality of that organization as an international entity.
2. There is no doubt that the European side of the joint organization, ESO, is an international organization. The other participating European organizations would have to agree that ESO represents their side of the partnership.
3. On the U.S. side the case for international status is eased if NSF is the ESO partner in ALMA. NSF is then acting for and in behalf of the U.S. government, either by declaration, *or by the Chilean government accepting that NSF, as an agency of the U.S. government, is prima face, acting in behalf of the U.S. government.* Further agreement with the Chilean government would be necessary for the NSF to assign that responsibility to AUI; such agreement could be motivated in ways that would make the arrangement very attractive to the Chileans.
4. The joint ALMA organization, while not an international organization *per se*, would seek to be granted international status by Chile precisely as Dr. Kunz-Hallstein suggests.
5. The counterpart to the Chilean government in negotiations is the single entity, the ALMA partnership (or what Novoa and Kunz-Hallstein refer to as the Management Organization, the M.O.).
6. The ALMA partnership and the Chilean government would negotiate the legal regime that applied to ALMA, including the rights, immunities and forum for dispute resolution.
7. That agreement would need approval by the Chilean Congress as a treaty instrument.

#### C. An Alternative: ALMA Organized Around a Chilean Management Corporation with Responsibility to Coordinate the Merger of the ESO LSA Project and the AUI MMA Project

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<sup>10</sup> Article 3

<sup>11</sup> 13 January 2000, Article 1.

1. A legal corporation would be established in Chile by AUI and ESO to install the MMA and LSA respectively and operate the two instruments together as a single telescope, ALMA.
2. AUI and ESO would separately negotiate with the Republic of Chile the legal regime under which permission was obtained to install their instruments. The negotiations would include all rights, privileges, immunities and dispute resolution provisions. The intent would be to make the pertaining legal regimes identical.
  - In the case of ESO this would be a new treaty for ALMA;
  - In the case of AUI this would be legislation drafted by the Executive and subject to the approval of Congress.
3. The Chilean ALMA corporation provides the single interface for the government to AUI (MMA) and ESO (LSA).
4. The Chilean ALMA corporation has no permanent assets.
5. The Chilean ALMA corporation employs the Chilean labor force needed for ALMA operations.
6. The Chilean ALMA corporation manages ALMA operations, work done by ESO staff under the regime negotiated by ESO for LSA, by AUI staff under the regime negotiated by AUI for MMA, and by local staff hired by the corporation under Chilean labor laws.
7. Materials for ALMA are imported by ESO and AUI under their respective permissions and remain the property of these two organizations.
8. Imports for operations, contracts, facilities rent and so forth would be done in the name of AUI or ESO under the provisions of the negotiated tax and jurisdictional immunities.