



XXXI SCAR Delegates Meeting

Buenos Aires, Argentina, 9-11 August 2010

Agenda Item: 9.4

Person Responsible: A. Meloni,
SCAR Vice
President for
Administration

Report on SCAR Legal Status

Executive Summary

Title: Report on SCAR Legal Status

Author: C. Summerhayes

Relevant URLs or references to other reports: <http://www.scar.org/about/constitution/>

Introduction/ Background: ICSU requires all its subsidiary bodies to have independent legal status. SCAR achieved this in 2008, by becoming incorporated as a UK Company Limited by Guarantee, and by becoming registered as a UK Charity. Delegates approved the change in principal in Hobart in 2006, appointing an ad hoc working group to address outstanding questions for the final approval of EXCOM. EXCOM approved in 2007 the changes recommended by the ad hoc group. The former Constitution was translated into the Articles of Association, and the former Rules of Procedure remained substantially unchanged, save that some of the wording of the former Rules was incorporated into the Articles and some of the wording of the former Constitution was incorporated into the Rules, so that the final documents are consistent with UK law. Additional legal language was added to the Articles to ensure that SCAR operates efficiently and effectively as a Company and Charity under UK law, but with no prejudice to the spirit or intent of the former Constitution and Rules of Procedure.

Important Issues or Factors: Although finalization of the change was welcomed by Delegates at St Petersburg in 2008, a group of delegations requested further clarification of several points. It was agreed that their concerns would be addressed intersessionally, which led to correspondence between the President and the Delegations that raised concerns, and to the publication of Notes from the President No 2 (19 August, 2008). These discussion concluded that at present there are no outstanding issues regarding the Memorandum and Articles of Association and the Rules of Procedure. Delegates should note that with the agreement of the meeting of Delegates, Articles can be modified by means of a Special Resolution. At that time the President pledged to address any and all remaining issues and corresponded directly with parties involved.

Recommendations/Actions and Justification: It is recommended that no further modification of the Articles of Association or Rules of Procedure be made at this time. Changes should take place when the issue is substantive rather than minor, and materially affects the way in which SCAR conducts its business. If such changes are to be made it is further recommended that unless they represent a matter of some urgency, changes be accumulated such that a number of changes (if required) can be made together at some regular interval to be determined by the Delegates. Delegates are asked to note the completion of the Rules of Procedure for Subsidiary Bodies (IP 13)

Expected Benefits/Outcomes: The Secretariat's limited resources and time will be spent on matters of primary and pressing importance to the functioning of the organization.

Partners: (will this involve others both within and outside of SCAR?) Not applicable

Budget Implications: (are funds requested or other commitments by SCAR?) None

Report on SCAR Legal Status

1. SCAR's parent body, ICSU, required that from 2000 onwards all subsidiary bodies, like SCAR as an Interdisciplinary Body of ICSU, should become independent legal entities as a means of protecting ICSU from unwarranted legal action stemming from the actions of one or other of its subsidiary bodies.
2. At about the same time the SCAR Constitution and Rules of Procedure were suspended so that they could be revised by EXCOM to reflect the changes called for in the SCAR review of 2000. These changes were sweeping and could best be accomplished by this approach. Suspension of the Constitution for a limited period of time during this transformation was agreed by the Delegates and ICSU.
3. The SCAR Executive Committee meetings in Bremen on January 21, 2004, and again on July 25 and 30, discussed SCAR's legal status in the light of a verbal report from the Executive Secretary, Peter Clarkson, who had begun discussions with a firm of legal advisers. EXCOM recognized that SCAR must have legal status in the country in which it was domiciled, the UK, and that the most appropriate procedure would be for it to be designated a Company Limited by Guarantee followed by an application for charitable status. Establishing a Company Limited by Guarantee required drawing up Memorandum and Articles of Association, documents that would be based largely on the wording of the original Constitution and consistent with UK Charity laws. It was concluded that the revised Rules of Procedure would remain mostly unchanged when SCAR became a Company. The Company documents would have to be drawn up so that they were acceptable to the Charity Commissioners.
4. At the XXVIII SCAR Delegates meeting in Bremerhaven, on October 4-8, 2004, Delegates adopted the revised Constitution and Rules of Procedure but made no decisions regarding the impending change in legal status. Instead the matter was taken up by the incoming EXCOM, which met on October 8 and tasked Peter Clarkson with finalizing arrangements regarding legal status and liability, if possible by the end of November 2004.
5. A Report on the current legal status and liability of SCAR was intended (but not written) as Paper 34 for the EXCOM meeting in Sofia on 11-13 July 2005. The Executive Director reported verbally on progress, and EXCOM requested the Secretariat "To work with lawyers to finalize the legal arrangements for SCAR".
6. Delegates at the XXIX SCAR meeting, in Hobart on 17-19 July 2006, considered in Working Papers 22, 23, and 24, the draft Memorandum of Association, Articles of Association and Rules of Procedure required for SCAR to become a UK Company and Charity. An accompanying explanatory paper (WP 25) noted that these papers were derived directly from the original Constitution and Rules of Procedure.
7. As noted in the report of the Delegates meeting, "*Delegates did not have a problem in principle with the proposed change, but identified some specific points that need to be examined in relation to the status and powers of the Directors of the Limited Company. It was agreed that a small intersessional ad hoc working group should be formed to work with the Executive Director to examine the proposed Memorandum and Articles of Association and Rules of Procedure in relation to the present Constitution and Rules of Procedure, so as to identify topics for further discussion with SCAR's legal advisers. The ad hoc group should be provided with other examples of organizations (including those parented by ICSU, as well as an IUCN example) that had undergone similar transformations under UK law, to see what could be learned from them. The findings of the ad hoc group would be communicated initially to the Executive Committee meeting in July 2007 for consideration*". The ad hoc group comprised F. Davey (NZ), A. Rocha-Campos (Brazil), A. Samah (Malaysia), J. Dowdeswell (UK), a Vice President (A. Meloni), and the Executive Director.
8. The ad hoc working group compared the new documents against the original Constitution and Rules of Procedure in side-by-side format so as to establish where or if there had been changes and to

review the ramifications of the changes made. Several suggestions were made to improve the documents to the satisfaction of the working group.

9. The revised Memorandum and Articles of Association and Rules of Procedure were presented to EXCOM at its meeting in Washington DC on 9-11 July 2007, as working papers 21a (Rules), 22 (Memorandum), and 23 (Articles) and in side-by-side format to allow comparison with the original Constitution and Rules of Procedure. Noting that the Delegates at XXIX SCAR had approved the changes in principle, that the ad hoc working group had concluded its business, and that equivalent bodies (like ICSU's SCOR in the USA and INASP in the UK) had made similar changes, and having considered the side-by-side presentations, EXCOM approved the changes and requested the Executive Director to continue the process of SCAR becoming a Company and Charity.
10. SCAR was duly incorporated as a Company on 14 April 2008, and became a Charity on 4 July 2008.
11. Delegates at XXX SCAR in St Petersburg on 14-16 July were provided with a report on these developments (WP 25), the Revised Rules of Procedure (WP26), which required a change to the procedure for elections, and the web address for the new Memorandum and Articles of Association (www.scar.org/about/constitution/). The changes made the officers of SCAR the Directors of the Company and Trustees of the Charity, and they were to carry out their duties in accordance with the required procedures for those positions as stipulated by UK law. Although the Delegates noted and approved, some Delegates raised in writing concerns about the Articles. It was agreed that these concerns could be dealt with intersessionally by EXCOM and the Secretariat. Delegates adopted the new Rules of Procedure.
12. The questions raised by Delegates were addressed in "Notes from the President No. 2" on 19 August 2008, with the aim of reassuring all Delegations – "that the translation of the SCAR *Constitution* into the *Memorandum and Articles of Association* remains true to the intent and spirit of the founders of SCAR 50 years ago". The President's note went on to explain to Delegates that:
 - i) "The issue of membership in the charity was determined by XXX SCAR by adopting "Special Resolution XXX-SCAR-1, on Membership". The adoption of the resolution requires no additional action by the members of SCAR to continue their current status in SCAR."
 - ii) "The Memorandum and Articles of Association only apply as long as the Secretariat is in the UK. If a change in the location of the Secretariat occurs, a new company must be established under the laws of the host country. It remains a policy of SCAR that any member country may offer to host the Secretariat and proposals to do so are evaluated on their merits and what is in the best interests of SCAR by the Delegates."
 - iii) "Further questions were raised about the balance of power (decision-making authority), the supremacy of the members (Delegates Meeting) in decision making (by consensus), preservation of the original spirit and intent of the SCAR Constitution, and the equality of members. After careful consideration, it is my [SCAR President Kennicutt's] opinion that the SCAR Constitution is faithfully reproduced in the *Memorandum and Articles of Association* and the revised *Rules of Procedure*. I also conclude that the "spirit" of the [original] SCAR Constitution is preserved, authority and decision making power is conserved, and that the status of all member categories remains unchanged."

Regarding the balance of powers, the former Constitution was clear:

that the President is the legal representative of SCAR and that if he were unavailable a member of the EXCOM would be the temporary legal representative of the organization (Constitution item 11.1);

that the elected officers of SCAR form the Executive Committee (Constitution item 7.1), and that the EXCOM directs the affairs of SCAR and attends to matters requiring consideration by SCAR (Constitution item 7.2), reporting its decisions to the biennial SCAR Meeting of Delegates (Constitution item 7.4).

Thus it has been accepted practice that in order to manage the affairs of SCAR between biennial meetings the EXCOM is delegated the authority to operate on behalf of the Delegates. This same balance of powers is preserved in the new Articles of Association. There was no requirement under the original Constitution, nor is there any under the new Articles, that decisions of EXCOM are

subject to prior approval by the Delegates. Nevertheless, it is the explicit intention of EXCOM to be transparent about its activities and to consult with Delegates as appropriate on matters sufficiently important to require such consultation. The series of monthly “Notes from the President” was instituted as one means of accomplishing such consultation. Decisions by the EXCOM intersessionally, on most occasions when substantive issues are involved, are subject to final Delegate approval at the next regularly scheduled Delegates Meeting. This procedure, in spirit and action, is rigorously followed and enforced. It should also be noted that when, or if, there is Delegate disagreement with EXCOM decisions, such decisions can be reversed by a vote of the Delegates providing checks and balances on organizational decision making. The outcome is that ultimate authority for decision-making rests with the Delegates while allowing the organization to effectively and efficiently operate year-round.

Similarly, regarding disbursement of funds, original Rule of Procedure 6.9 states “The President of SCAR, in consultation with EXCOM, may authorize unforeseen expenditure”. This Rule facilitates the efficient and effective management of SCAR business between biennial meetings. The Delegates retain final approval of biennial budgets at regularly scheduled Delegates meetings.

While keeping to the spirit of making as few changes as possible between the original Constitution and Articles, SCAR’s legal advisors nevertheless recommended changing the word consensus (used in the Constitution), to unanimity (used in the Articles), because the term ‘consensus’ has a variety of meanings including ‘the majority view’, whereas unanimity means ‘the view of all’, and therefore avoids the possibility of disputes arising. This is in concert with the intent of the original SCAR Constitution.

13. If Delegates wish to modify the Articles, they need to debate what change(s) need to be made, and why, avoiding alterations that are 'minor' and do not represent a significant change in the way in which SCAR does its business. Once the Delegates have agreed a change at their meeting, then a Special Resolution must be drawn up and agreed, following which the Secretariat sends agreed changes to Companies House in London. In general changes should be accumulated to avoid continual changes to the Articles and the Rules of Procedure (which do not have to go to Companies House). Changes can be enacted on a timeframe selected by the Delegates as warranted.
14. It is recommended that Delegates agree that at present no changes to the Articles of Association or the Rules of Procedure are needed.
15. During 2009 the Secretariat transferred the assets of SCAR to the Company, and arranged for an audit of the SCAR accounts, which was carried out and reported to Companies House and the Charity Commission by independent auditors at the beginning of 2010. SCAR also supplied a report on its activities for 2009 to these entities. Dependent on annual income thresholds, yearly audits may be required by law to maintain Charity status. Delegates should note that Charity status affords SCAR advantages when raising external funds and by exemption from certain tax statutes and by other means enabling charities to operate at low cost.
16. Draft Rules of Procedure for Subsidiary Groups were tabled at XXVIII SCAR in 2004, where Delegates agreed that they should be stream-lined for final approval by EXCOM. At XXX SCAR Delegates agreed that these rules should be finalized for approval by EXCOM in 2009. These rules were reviewed at the EXCOM meeting in Punta Arenas on 3-5 August 2009, with special reference to JCADM and SCAGI having become Standing Committees, and to the changing the modus operandi of SCATS. The revised and approved version of these rules is presented to Delegates at XXXI SCAR for information as IP13. These Rules are considered to be a supplement to the core Rules of Procedure published on the SCAR web site. Delegates are asked to note them.