

Minutes, ICoC Working Group #3 Meeting: 25 July 2011 via teleconference

Attending

- James Cockayne, Center on Global Counterterrorism Cooperation (USA) – co-chair
- Melike Yetkin, US Department of State (USA) – co-chair

- Jenny Stein, US Department of State (USA)
- Margaret Belof, UK Foreign & Commonwealth Office (UK)
- Doug Cahn, The Cahn Group (USA)
- Glynne Evans, ADS Security in Complex Environments Group (UK)
- Sylvia White, Aegis (UK)
- Will Imbrie, Dyncorp International (USA)
- Ian Ralby, ADS Security in Complex Environments Group (UK)
- Corrina Morrissey, Swiss Foreign Affairs (Switzerland)
- Doug Brooks, ISOA (USA)
- Jessica Vogel, ISOA (USA)

- André du Plessis, DCAF (Switzerland)
- Thomas Haueter, DCAF (Switzerland)

BEGIN 11:00 DC / 16:00 UK / 17:00 GENEVA

The Chair explained that the purpose of the meeting was to consider various legal regimes for incorporating the eventual international governance and oversight mechanism.

There then followed a short presentation of an Excel spreadsheet (appended) comparing different legal entities possibilities in the US, UK and Switzerland.



ICOC WG3 - Legal
Entity Chart_sw1107.

Highlights included the following:

UK:

- The charitable requirements for tax-exempt status would not easily be met.
- The “limited by guarantee” solution might be better since members would only have a nominal liability compared to a company “limited by shares”.
- The costs of registering a company would be minimal, legal costs are not significant and there would be some auditing costs in the UK

US:

- Some elements would vary from State to State within the US, as companies are incorporated at the State level with no unifying corporate law
- It might be possible to be considered as a non-profit organization under 501(c)(3) of the IRS code if the focus on human rights is clearly stated; however it is not guaranteed. It could take up to 6 months until non-profit status is accepted.
- The second option of business association might not meet the independence requirements of the Code

Switzerland:

- The association form is the most preferable within Switzerland since it is extremely flexible, exempted from taxes, and members are not individually liable

Other issues mentioned:

- There were questions regarding data protection issues in the various jurisdictions, including whether there would be restrictions on an organization holding/sharing “black lists” of personnel. Some participants noted that there were ways to be exempt from data protection rules, for example through authorizations given by governments.
- It was asked if there is a possibility of some kind of liability protection/shield offered by the Swiss models. The structure of GAVI was mentioned as a possible model. It was agreed that this question should be followed up on.
- Participants noted that other countries might be an option for location too: factors such as the international image of that country, liability and geographical access should be taken into consideration.
- Other forms of incorporation, such as being linked to a University, were considered, noting that universities are independent, credible and have already certain infrastructure, research materials and funding options. It was noted, however, that there were complicating factors – such as the image of a particular university.
- There was mention as to whether certain parts of the institution could be in different countries.

It was agreed that the following questions would be followed-up on:

- Liability issues/protection in the different jurisdictions – in particular in Switzerland
- Data protection issues in the different jurisdictions
- Whether different elements could be hosted in different countries
- To what extent potential host governments were supportive of the establishment of the mechanism in their jurisdiction
- Checking if a Swiss association can be formed by non-Swiss nationals

Next meeting would be on Tuesday August 2nd at 11:00 DC / 16:00 UK / 17:00 GENEVA

END 11:40 DC / 16:40 UK / 17:40 GENEVA

Entity	Ownership	Governance	Management Structure	Liability	Taxation	Filings/Disclosure Requirements	Costs	Locality Requirements	Other Concerns
Australia	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	Australia has declined the idea of hosting the IGOM.
Switzerland - Association	Members	<p>Association statute provides for governance:</p> <p>A) Determines name off assoc.; B) Determines will of members to organize; C) Defines purpose of the association (common practice to define the purpose and means to achieve desired result); D) Defines association's constituent bodies and competencies; E) Lists association's members and determines conditions and procedures for admitting new members; F) Defines the association's resources (i.e., financing); i) No need for initial financing contribution; ii) Funding can be contributions form members or can come from third parties; G) Terms of dissolution.</p> <p>*Note Swiss law demands for written statutes (bylaws); minimal content in statutes referencing a governance document complies with Swiss law.</p>	<p>A) Flexible. B) Normally, will have a general meeting (its supreme body), a management committee and an auditing body. C) Other bodies may be established (e.g., committee appointed to perform specific tasks).</p>	<p>Generally members have no liability. Entity itself carries the liability. A) Unless otherwise provided in statutes, entity is liable for its debts, which are guaranteed by its corporate assets. B) Assoc. statute may provide for specific member liabilities (e.g., in the context of procedures for dissolution); members may be liable for negligent acts. C) Staff must be protected by compulsory insurance under Swiss law (health insurance etc.)</p>	<p>A) Tax-exempt if pursuing public-service or state-approved goals at the federal and cantonal levels. Exemption does not extend to staff members.</p>	<p>A) No need to be registered or listed with Swiss authorities, as it acquires legal personality upon adoption of statutes. B) Must register in the commercial register if performing commercial activities; C) May choose to enter the commercial register (publicly accessible) on a voluntary basis to make the association more visible, protect its name, inform third parties of the powers of its directors (rights of signature in particular). D) Audits: management committee is responsible for accounting and reporting to general meeting; stricter accounting and reporting applies if registered in the commercial register. Stricter auditing rules apply in 2 cases: i) Full external audit if two of the following figures are exceeded in two successive business years: total assets of CHF 10 million, turnover of CHF 20 million, avg. annual total of 50 full-time staff ii) Limited external audit if the statutes provide for personal liability or obligation to provide additional funds (in case of assoc.'s underfunding) of one/several member(s) and one of these members requests the audit.</p> <p>*No legal obligation to make information public.</p>	<p>A) Hiring Swiss legal counsel to assist in drafting association's statutes. B) Administrative charges if association decides to be entered in the commercial register (basic fee for registration is 400 Swiss francs). C) Audits: an association should submit accounts for audit.</p>	<p>A) No requirement to hire local staff. Hiring local staff must be in accordance with employment law. B) Must have address in Switzerland; no req. to have an "office" in Switzerland. C) Do not need to have meetings / physical presence in Switzerland.</p>	<p>Transfer of foreign currency: No concerns. Foreign NGO registration requirements: No concerns. IP Protection: Registering with the commercial register protects the name of the association; as a legal entity it is entitled to the same IP rights as other entities.</p>

Entity	Ownership	Governance	Management Structure	Liability	Taxation	Filings/Disclosure Requirements	Costs	Locality Requirements	Other Concerns
Switzerland - Foundation	Founder	<p>Foundation charter provides for governance:</p> <p>A) Determines name of foundation.; B) Basis for entry in commercial registry C) Indicates the organs of the foundation. Foundation Council with at least 3 natural persons is common practice D) Defines foundation's constituent bodies and competencies apart from Foundation council E) Funding is determined by public deed or testamentary disposition F) May contain provisions for change of purpose which needs at any rate agreement by the supervisory body. Much less flexible than association</p>	<p>A) Flexible. B) Foundation Council is mandatory C) Other bodies may be established according to needs.</p>	Foundation itself carries the liability.	<p>A) Tax-exempt if pursuing public-service or state-approved goals at the federal and cantonal levels. Exemption does not extend to staff members. B) Funds must be exclusively applied for public purpose C) Purpose must be irrevocable, ie Charter must exclude possibility of redirecting funds to founders</p>	<p>A) Needs to be registered in the commercial register B) Audits: Foundation nominates auditors. Required to keep adequate accounting records C) Reporting: File annual report, annual financial statements with balance sheet, profit and loss statement and attachment, auditors' report, approval of reporting by the Foundation Council as and list of current members of the Foundation Council</p>	<p>A) Hiring Swiss legal counsel to assist in drafting Foundation Charter. B) Administrative charges for registration and supervision C) Audits</p>	<p>A) No requirement to hire local staff. Hiring local staff must be in accordance with employment law. B) At least one member of the foundation council with sole signature rights must be citizen of Switzerland or any EU member state with residence in Switzerland</p>	<p>Change or adaptation of purpose is only possible under specific circumstances and requires approval by authorities.</p> <p>There are no members to a foundation.</p>
United Kingdom	Members are guarantors.	"Memorandum & Articles of Association must state that any surplus is put towards the company's social purpose and usually defines the company as democratic and accountable to the community through its membership." (Resource Centre, "Not-for-profit Organisations"). In general, this is a flexible entity.	Managed by directors as set forth in Articles of Association.	"The directors are agents of the company and are not personally liable for its debts." (Resource Centre, "Not-for-profit Organisations"). But since the entity has legal personality, the entity can be sued.	Tax exempt if registered with the Charity Commission for England and Wales.	Companies House requires substantial documentation and reporting.	There are costs for registering, and legal costs for preparing reports and accounts to Companies House.	N/A	

Entity	Ownership	Governance	Management Structure	Liability	Taxation	Filings/Disclosure Requirements	Costs	Locality Requirements	Other Concerns
	(i) shareholders (ii) Members are guarantors.	Both types are governed by the Companies Act and the Memorandum & Articles of the Company. (ii) The Co ltd by guarantee / CIC "Memorandum & Articles of Association must state that any surplus is put towards the company's social purpose and usually defines the company as democratic and accountable to the community through its membership." (Resource Centre, "Not-for-profit Organisations"). The difference from a charitable company, is that it merely has to benefit the community, is subject to lesser regulation, and sets up an asset lock to ensure that all assets go to the community.	(i) Managed by directors as set forth in Articles of Association. (ii) managed by members as directors	(i) personal liability of shareholders limited to the nominal value of shares in the Company. (ii) "The directors are agents of the company and are not personally liable for its debts." (Resource Centre, "Not-for-profit Organisations"). But since the entity has legal personality, the entity can be sued. Each member's liability is limited to the guaranteed sum - can be as little as £1 - which he or she guarantees to pay if the company has debts on winding up	Company tax rates.	Companies house filings - annual report (includes audited accounts) and CIC filings: annual community interest company report for public record, to show what has been done during the year to pursue its pre-specified community interest and to involve the individuals or groups with a particular interest in the CIC.	Registering and reporting costs.	N/A	
	Set by Royal Charter.	Set by Royal Charter.	Set by Royal Charter.	Set by Royal Charter.	Set by Royal Charter.	Set by Royal Charter.	Set by Royal Charter.	Set by Royal Charter.	Unlikely to happen.

Entity	Ownership	Governance	Management Structure	Liability	Taxation	Filings/Disclosure Requirements	Costs	Locality Requirements	Other Concerns
United States	This would depend on how the underlying structure is set up. Since the non-profit first has to be established as a legal entity under the laws of one of the 50 States, there is some flexibility here. But there must be a showing that this is not a private business and that the funding comes from diverse sources, including the public.	The non-profit must be governed by a board of directors. While there is some flexibility and variety from state to state, this requirement is non-negotiable. In general, articles of incorporation are filed with the state corporation commission (Secretary of State) indicating inter alia the name of the company, its purpose, its structure, the names of its officers, the address of its principle place of business and an address for service of process. To then become a non-profit, bylaws must be drafted and application must be made to the IRS for charitable status. Once that status is granted, application is then made to the state to register the non-profit, obtain a solicitation license to seek funds, and obtain sales tax exemption. Then the entity can apply for a non-profit bulk mail permit. Finally, the entity must obtain liability insurance including director and officer liability insurance.	Again, some requirements will vary from state to state, but the non-negotiable is that a board of directors is responsible for the general management of the entity.	This depends entirely on the type of underlying entity. Corporations, LLCs, LLP, and other business entities will each have a different liability structure. For the purposes of the IGOM, it would seem a corporation with institutional liability would be most logical. Here, the insurance becomes extremely important.	Once the underlying entity is set up, it would then apply, pursuant to the IRS Code for federal tax exempt status. It takes 2-6 months to go through this process at this time. Once complete, the non-profit can apply for state sales tax exemption.	This varies state to state.	In general, there will be a small fee for setting up the business entity (e.g. \$30), a fee for registering as a charitable organization, other state-specific fees, the cost of insurance and the cost of a lawyer.	The main locality issue is the service of process (i.e. where the entity will accept a lawsuit).	Many foreign non-profits set up US non-profit chapters in order to make it easier to accept money from within the US. This is a possibility.
	As above.	As above.	As above.	As above.	As above.	As above.	As above.	As above.	A business association likely wouldn't fulfill the independence requirements of the Code.
	Set by Congress.	Set by Congress.	Set by Congress.	Set by Congress.	Exempt.	Set by Congress.	Set by Congress.	Set by Congress.	Unlikely to happen.