

SOPAC

GOVERNING COUNCIL 37th SESSION

Funafuti, Tuvalu
22-30 October 2008

AGENDA ITEM	TITLE
10	ESTABLISHMENT AND ADMINISTRATION
10.1	Paragraphs 251 and 252 – Proceedings of AS36 (RIF)
10.1 Supplementary 2	Abridged Summary of Legal and Contractual Issues Pertaining to SOPAC Should it Decide to Dissolve or Suspend its Operations

Background and Purpose of this Abbreviated Summary

As part of the work of the Committee of the Whole to examine the implications of the RIF process on SOPAC, a consultant was engaged during the year to carry out a legal assessment of the issues involved. The Terms of Reference have been circulated and are contained in the Committee's Progress Report.

The draft consultant's report is available for consideration by Council at its 38th Meeting in Funafuti, and has been circulated. The report and its executive summary are lengthy, and the Secretariat has prepared this Abbreviated Summary in an attempt to facilitate briefing Members on the outcomes of the legal assessment.

Every attempt has been made to reflect the Consultant's opinions without prejudice.

Abbreviated Summary

TOR (i): Examine the legal obligations, if any, that the SOPAC Council has to the Pacific Islands Leaders Forum, and thereby any requirements for a response from SOPAC Council to a Pacific Islands Forum Leaders Communiqué.

This TOR sets out to examine the SOPAC Agreement as against the Agreement Establishing the Forum Secretariat, the basis for which the Forum Leader's decision comes from. It looks at whether the Forum Leaders decision made under its own Agreement is legally binding on the SOPAC Council.

In summary, the report makes eleven (11) conclusions; the key ones appear to be as follows:

- No legal relationship exists between the SOPAC Agreement and the Forum Agreements 2000/2005
- SOPAC is an observer organisation at the Forum, and decisions of the Forum Leaders are not binding on observer organisations.
- There are no clear decision making provisions for the Forum having overall binding effect on other organisations
- Not all members of SOPAC are members of the Forum hence decisions of Forum cannot bind third parties
- The obligation of SOPAC Governing Council to implement the Forum decision is really a moral one based on long standing practice of accepting Forum decisions and not a legal one.

TOR (ii): In regard to dissolution and suspension (Article 16).

This TOR set out to clarify the legal processes and their implications that differentiate between dissolution and suspension of the Commission; and in regard to a resolution to suspend the Commission, describe possible options for suspension being terminated and the organisation revived.

The report provides some general conclusions as follows:

- Grounds for dissolution or suspension do not exist to warrant termination/suspension of the activities in the SOPAC Agreement.
- Rationalisation of activities may not be justifiable grounds for suspension or dissolution.
- The Vienna Convention on Law of Treaties does provide steps in implementing suspension/dissolution if Governing Council does not provide the procedures.

In regard to the **implications of dissolution**, in summary, the report makes thirteen (13) conclusions summarised as follows:

- Dissolution will affect the whole/entire Agreement, it would definitely affect Council, TAG and Secretariat to continue to exist as no separation of provision within the Agreement in case of dissolution is said to apply to the other provisions.
- The issue of how to deal with the liquidation, or distribution of assets and obligations of the Commission appears to be priority and needs to be considered before the final decision is taken to dissolve the Commission itself.
- The issue of staff redundancy arrangements should be looked at also in accordance with the SOPAC Constitution regarding staff matters. A proper evaluation should be undertaken to ascertain implications on staff in view of the merge of activities.
- There is an obvious budgetary implication for contract obligations of staff contracts- any payouts would involve budgetary implications that need to be considered as a liability issue for SOPAC.
- Implications on existing donor-funding arrangements SOPAC has with Donors needs to be evaluated and the time frames for the operation of these funds considered.
- A decision to dissolve must be by way of a resolution of the Council and such resolution will take effect following conclusion of next session of the Governing Council provided 2/3 of members have ratified the resolution to dissolve.
- The members must ratify the resolution in accordance with their internal ratification procedures of their national laws. Procedures for ratification varies and in some countries lengthy than others depending on their consultation procedures etc for wider national support. Some countries obviously would require enactment of national laws to implement the resolution for it to be in force legally aside from notifying the Depository of the Treaty of the same.
- The practical difficulties of reaching the desired outcome of bringing 2/3 of members' ratification at the next annual session would obviously create a problem with Forum Leaders decision to bring everything to completion by 2009/2010 is perhaps an ambitious one.
- The evaluation of assets and obligations of SOPAC including donor funding implications may go well into 2009/2010 and beyond perhaps impossible to achieve within this timeframe.

In regard to the **implications of suspension**, in summary, the report makes thirteen (13) conclusions, many of which are similar to those above for dissolution, key however appear to be as follows:

- SOPAC Agreement provides that in the case of a resolution of suspension the Commission shall in its declaration prescribe the procedure whereby the suspension may be terminated and the organisation revived. It does not offer much guidance and leaves it to the discretion of the Governing Council.
- Suspended activities may be applied elsewhere as merged activities with SPREP/SPC but that intention must be clearly reflected in the instrument providing for suspension.
- Revival of the suspended activities need to be clearly expressed on the same instrument and under what circumstances the revival of activities can be effected also need to be made clear.
- Revival of suspended activities would be subject to the same ratification procedures and can be a delayed awaiting ratification by 2/3 of members.
- In the case of suspension, guidance may be made to the SOPAC Constitution or to the Rules of Procedure on how assets or the other obligations in terms of liability of SOPAC is to be determined as regards liquidation, or distribution of assets or to the staff redundancy arrangements or to the donor funding arrangements.

Options and Implications if desired outcomes are not achieved by 2009/2010 deadline

SOPAC will continue to exist as an organisation if no decision is taken at the next annual session due to the slowness of the ratifications by members. In this case there are some options:

Option 1: A progress Report should be made to the Forum Leaders by Chair of the SOPAC Governing Council outlining slow progress and unrealistic timeframe to achieve the desired outcome of the Forum Leader's decision. Underlying reasons for this approach are likely due to the following:

- SOPAC has not completed or undertaken assessments of its assets and obligations in the event suspension/dissolution takes place. This must be done prior to the dissolution or suspension.
- Staff redundancy and redeployment arrangements have not been undertaken and should be considered together with the assessments of the assets.
- Assessments of possible merge of SOPAC activities with SPC and SPREP have not been completed.
- Assessments of possible amendments to respective Constitutions and Strategic Work Plans of the three organisations in relation to the mergers have not been completed.

Option 2: SOPAC proceed with the outstanding work above pending the outcomes of the Forum Leader's advice to show SOPAC Secretariat is implementing the Forum Leader's decision in terms of administrative preparations well underway.

Option 3: Make a case for SOPAC to continue to exist especially with the new emerging direction of cooperation in the exploitation of non living resources and related seafloor issues becoming prominent in the immediate future. Assuming extended continental shelf work for SOPAC countries has been successful; member States would need advice from a technical organisation on future cooperative contractual arrangements for the extended areas for seafloor mining and other explorations to be undertaken. This is to encourage economic growth for Island States and an emerging issue SOPAC is best mandated to deal with.

Other contractual and property issues

If decision is taken to dissolve or suspend, the assessments should be conducted immediately:

- Undertake a full analysis of the implications of the decision to dissolve or suspend SOPAC and its impact on the assets of the Commission, the issue of liquidation or distribution of assets or property would be part of that assessment This is priority and according to SOPAC Agreement must be undertaken prior to the dissolution or suspension of the Commission.
- Provide an analysis of all the contractual obligations of SOPAC with service providers regarding existing procurements and including overseas donor funding which are subject of separate agreements and determine time frames or possible lapse of each arrangement.
- Address the redundancy arrangements for staff and possible redeployment in light of mergers with the work programmes of SPC, SOPAC & SPREP and how this would affect the assets or property of the Commission if to be merged. This would be further dependent on an analysis of the synergies of the activities of the three organizations and which organisation will deal with what activities.
- Address the budget and liability issues of the Commission arising from the above assessments.

TOR (iii): Comment on the possible legal implications for SPC and SPREP of absorbing any, or all, of SOPAC'S work program functions.

In summary, and in general the report makes no mention of any specific legal implications for SPC or SPREP absorbing some or all of SOPAC's work programmes, however it does make reference to issues related to budget, work programme synergies, office space, and service delivery.

TOR (iv): Provide comments on any other legal issues the Consultant may consider relevant.

Issues arising from certain treaty obligations, such as UN Law of the Sea Convention

There are potential economic development issues arising from certain treaty obligations such as UN Law of the Sea Convention which should not be missed, therefore a strong case could be made for SOPAC to continue to exist based *inter alia* upon the following considerations:

- Mineral exploitation of the seafloor of Member States is becoming important and gaining momentum in the region, and negotiations in mining agreements in both continental and extended continental shelf areas will be needed. That opportunity should not pass or be loosely dealt with as a merged activity with some other organization.
- Countries need to prepare for joint cooperation of the non living resources of the sea floor and with the development of proper legal and policy frameworks including negotiations for contracts in seabed mining with large mining companies.
- Extended Continental Shelf work currently overseen by SOPAC in providing assistance to its members would obviously need to continue and be assured. Associated with that is the whole issue of negotiation of maritime boundaries of member States. This is all about exercise of jurisdiction and sovereignty of member States.

Possible Review of Forum Decision

Forum leaders have an implied power to alter their earlier decision if legal and practical issues make it difficult to achieve its desired outcomes within the given timeframe.

It is arguable SOPAC still has a role to play assuming the two third of (2/3) of membership do not ratify the resolution to dissolve or suspend. Perhaps an opportunity for review could arise if Governing Council is informed of the shortcomings in the whole exercise of meeting Forum Leaders decision and that certain disputes could arise which should not be discounted if members are reluctant to implement the Forum decision.

A dispute resolution mechanism should be in place for those members aggrieved by the decision of the Forum Leaders.