



GOVERNING COUNCIL 38th SESSION

Port Vila, Vanuatu
21-29 October 2009

AGENDA ITEM	TITLE
10	REGIONAL INSTITUTIONAL FRAMEWORK
10.1 Revised	Legal Implications

Purpose of Paper

To present to Council some of the legal implications for the rationalization of SOPAC functions into SPC and SPREP, as well as the process required of SOPAC full members to dissolve or suspend the Pacific Islands Applied Geoscience Commission (SOPAC), should the members wish to do so.

Background and Comments

The joint meeting of governing bodies of SOPAC, SPREP and SPC held in July 2009 decided on new regional institutional arrangements (refer Annex 1), calling for the following transition of SOPAC components:

With SPREP - Pacific Islands Global Ocean Observing System (PI-GOOS); Island Climate Update; Climate and Meteorological Database; the component of the energy sector relating to monitoring and evaluation of greenhouse gases and the clean development mechanism (CDM).

With SPC - the core SOPAC work programme as a new applied Geoscience Division of the SPC; and the Energy Programme and ICT functions to be integrated into a proposed, new Division of Economic Development¹.

Papers under Agenda Item 10 (10.3.1 through 10.3.3s) address potential implementation components and plans for the transfer of those mentioned functions for SPC, with AS38/10.3.4 outlining the functions and the necessary steps to transfer those identified for SPREP. As well AS38/10.2 outlines specific administrative and financial issues that need to be considered.

Due to the number and nature of functions to be transferred to SPREP, that portion of the transaction is considered to be more simple and straightforward than the SPC transaction. Therefore, preparation of joint legal agreement outlining the transaction, should be well underway prior to 2010 for inclusion in a proposed final comprehensive plan

In respect of those functions to be integrated into the SPC, it is considered that transfer of the core SOPAC work programme will require more time due to the complexity of the transaction, with full integration possible from October 2010. Planning for integration of the energy programme and ICT functions appears the simpler subset of the SPC transaction, and implementation planning for this phase could be complete subject to an earlier milestone.

¹ Division of Economic Development, Energy, Transport, Infrastructure and Communications – It is understood that this Division would be formally incorporated following the meeting of the CRGA in early October 2009.

Dissolve or Suspend SOPAC

There are specific articles within the *Letter of Agreement Establishing SOPAC (Constitution)* that allows for the dissolution or suspension of the Pacific Islands Applied Geoscience Commission (SOPAC) (Article 16) and for amendment of the Constitution (Article 14), and these clearly outline the legal requirements for these to come into effect.

An independent legal memorandum provided through the PMEG/STAR mechanism addresses the legal procedure required to dissolve or suspend SOPAC (refer Annex 2), and also states that such actions may not be required. It also covers various other legal issues that would need to be addressed in addition to either suspension or dissolution coming into effect.

Passage of a resolution for suspension or dissolution requires at least twelve of the seventeen full members to vote in favour of either of these, with an amendment of the Constitution needing a consensus of those members present. In addition amendments need to be proposed three months in advance of the Council meeting.

Therefore the minimum amount of time before a resolution to suspend or dissolve SOPAC could take effect would be one year from the initial vote. If this vote occurred at the 38th Annual Session in October 2009, it could conceivably take effect in **October 2010** at the next meeting of Council, although this timetable carries with it additional legal risk and may not be necessary to implement the goals of RIF. Moreover, assets and Liabilities of the Commission may only be formally transferred after such a resolution has been adopted, been ratified, and taken effect.

It is worth noting that notwithstanding the minimum time for a suspension or dissolution resolution to take effect, neither suspension nor dissolution may be implemented until at least two thirds of the full members of the Commission have ratified the resolution in advance of the implementation date.

These conditionalities therefore put a minimum time for effective transfer of SOPAC core functions into SPC as following the October 2010 session of SOPAC's Governing Council

Implications of Dissolution/Suspension

The passage of a resolution for dissolution or suspension of SOPAC may immediately and effectively alter SOPAC's legal standing as an entity and would, as a consequence, have potentially immediate impacts on contracts that it has entered into with other parties (donors, staff), as well as fiscal accountabilities (liabilities and assets), together with any other legal and contractual obligations and agreements.

An assessment of such impacts should be undertaken **prior** to passage of such a suspension or dissolution resolution. The intervening months between October 2009 and October 2010 would be required to hold discussions and effectively manage the variations that would need to happen ahead of suspension or dissolution being resolved.

Transitional and alternative arrangements

As SOPAC functions are aligned with either SPC or SPREP from January 2010 regardless of whether suspension, dissolution, or an alternative option is ultimately employed, it is important that there be formal legal agreements between SOPAC and SPC and, SOPAC and SPREP governing the applicable terms and conditions (that is all elements of the transaction of the functions that have been identified by the joint meeting of the governing bodies of SOPAC, SPREP and SPC). Such integration or transfer agreements are considered essential and would ensure that there is mutual understanding of the conditions of each transfer and provide comfort to employees, donor partners and member countries interested to see no diminution in delivery

of services related to those specific functions. Such agreements should be prepared and presented to Council before Council acts upon a decision to suspend or dissolve.

Recommendations

With regard to the Regional Institutional Framework in respect of the transfer of SOPAC functions into SPC and SPREP, Council is requested to:

- a) Consider the legal implications of the decision of the joint meeting of governing bodies of SOPAC, SPREP and SPC in July 2009 especially with regard to the implications for dissolution or suspension of the Commission, and consider the timing and/or need to suspend or dissolve SOPAC, noting the requirement for a two thirds majority of full members; acknowledge the need for instruments to ratify any decision to suspend or dissolve SOPAC from two thirds of full members of SOPAC before it comes into full effect; note that at a minimum the effective date of full effect of dissolution or suspension which is required for legal transfer of assets, liabilities could be October 2010, subject to other legal requirements.
- b) Consider entering into a formal legal transitional agreement with SPREP that outlines the transaction of SOPAC functions that are to transfer to SPREP; to ensure that these are transferred in an effective and timely manner.
- c) Consider entering into one/two formal legal transitional agreement(s) with SPC that outlines the transaction(s) of the core SOPAC Work Programme as a SOPAC (science and technology) Division of the SPC, and the transfer of the SOPAC Energy Programme and ICT functions as components of the proposed, new Division of Economic Development. The(se) agreement(s) will work toward ensuring full and effective integration of SOPAC functions, it's assets and liabilities into SPC upon approval of the agreements by Council and , if necessary, approval of amendments to the SOPAC Constitution or resolutions to suspend or dissolve.

ANNEX 1

SPC-SOPAC-SPREP/RIF (01)

Summary of decisions
ORIGINAL: ENGLISH**JOINT MEETING OF SOPAC, SPC AND SPREP GOVERNING BODIES
ON THE REGIONAL INSTITUTIONAL FRAMEWORK (RIF)**
(Tradewinds Convention Centre, Suva, Fiji, 7-8 July 2009)**SUMMARY OF DECISIONS**

1. The governing bodies of the Pacific Islands Applied Geoscience Commission (SOPAC), the Pacific Community (SPC), and the Pacific Regional Environment Programme (SPREP) met together under the chairmanship of the Secretary General of the Pacific Islands Forum Secretariat to consider options for new institutional arrangements for their organisations. The meeting was an historic occasion, being the first time that such a joint meeting has been held. Work on the reform of the current Regional Institutional Framework (RIF) has been carried out in response to the decision of Pacific Islands Forum Leaders and the previous decisions of the three governing bodies that SOPAC programmes and services should be rationalised into SPC and SPREP. As a result, the CEOs of SOPAC, SPC and SPREP, with the support of their staff, have undertaken extensive consultation to develop options for such a rationalisation and have commissioned reports from independent consultants on the financial, legal and operational implications of various options. An overriding consideration of these consultations has been the need to avoid fragmentation or diminution of SOPAC's core services, which are highly valued by its members, and to ensure that the region benefits from enhanced synergies and efficiencies as a result of the rationalisation, in accordance with the objectives of the RIF process and the wishes of Forum leaders. After extensive deliberation of the options *and associated implementation plans* presented, the joint meeting of the governing bodies of SOPAC, SPC and SPREP agreed on the following decisions. These decisions will be provided to Forum Leaders through the Pacific Plan Action Committee.

DECISIONS**a) *With respect to the ICT Outreach Programme of SOPAC, the joint meeting of the governing bodies:***

- (i) endorsed the integration of the ICT Outreach Programme of SOPAC into the Digital Strategy component of the proposed, new division of Economic Development, Energy, Transport, Infrastructure and Communication of SPC from January 2010;
- (ii) noted that the final implementation plan will be presented to the meetings of the respective governing bodies of SPC and SOPAC in October 2009; and
- (iii) noted further that the GIS and remote sensing functions constitute an integral part of the core scientific work of SOPAC and will transfer to SPC from January 2010.

b) With respect to the Energy Programme of SOPAC, the joint meeting of the governing bodies:

- (i) endorsed the decision taken by Pacific Energy Ministers in Tonga in April 2009 in which *Energy Ministers*:
- a. agreed that regional and donor coordination and delivery of energy services to Pacific Island countries be strengthened and delivered through one energy agency and through one programme contributing to the development of a stronger energy sector and improved service to member countries; and
 - b. in this context, noted that there was a need to ensure that energy policy and climate change policy remained separate, where environmental aspects are managed by SPREP and energy sector activities by SPC so as to ensure that the socio-economic aspects of energy were adequately addressed;
- (ii) recognised the interrelationship and links between energy and climate change and the need to address energy policy in relation to climate change as an integral part of the final implementation plan for rationalisation of the energy programme of SOPAC;
- (iii) noted that this plan will be presented for consideration to the meetings of the governing body of SPREP in September and of SOPAC and SPC in October 2009 to enable implementation from January 2010.

c) With respect to the balance of the SOPAC core work programme, the joint meeting of the governing bodies:

- (i) welcomed the commitment by members to strengthen SPREP as the region's lead environmental agency, including through support for the implementation of the approved decisions relating to the independent corporate review of SPREP;
- (ii) agreed that the following specific SOPAC functions be transferred to SPREP *from January 2010*: the Pacific Islands Global Ocean Observing System, the Islands Climate Update, the Climate and Meteorological Database, and the component of the energy sector relating to monitoring and evaluation of greenhouse gases and the clean development mechanism (CDM);
- (iii) agreed that the remaining functions of SOPAC be transferred to SPC as a new geoscience division from January 2010 based on the final implementation plan to be presented to and considered by the governing bodies of SOPAC and SPC in October 2009;
- (iv) encouraged SPREP and SPC to optimise linkages between their work programmes and activities in the area of environment to strengthen service delivery and coordination; and
- (v) agreed that progress with the transfer of SOPAC functions be reported to the annual meetings of the governing bodies and Pacific Plan Action Committee.

TO: Honorable Members of the SOPAC Governing Council
FROM: K&L Gates LLP
DATE: 30 September 2009
RE: Legal Comment on Suspension or Dissolution under RIF
CONFIDENTIAL – RESTRICTED TO COUNCIL MEMBERS

We thank the Governing Council once again for the opportunity to be of assistance in the RIF process, and for the opportunity to appear before the Council at its upcoming meeting.

I. INTRODUCTION

In July 2009, the SOPAC, SPC, and SPREP governing bodies met jointly “to finalise decisions on new institutional arrangements and rationalisation of programmes and services of their respective organisations, effective from 1 January 2010.”¹ At the July Meeting, the SOPAC Council approved the following actions to implement the goals of RIF:

1. Integrate into SPREP: SOPAC’s (1) Pacific Islands Global Ocean Observing System, (2) Islands Climate Update, (3) Climate and Meteorological Database, and (4) the component of the energy sector relating to monitoring and evaluation of greenhouse gases and the clean development mechanism (CDM); and
2. Integrate into SPC: SOPAC’s (1) ICT Outreach Programme; (2) SOPAC’s Energy Programme (non-climate change projects); and (3) SOPAC’s core Geoscience functions.²

An overriding goal and policy behind this proposed framework is “the need to avoid fragmentation or diminution of SOPAC’s core services, which are highly valued by its members, and to ensure that the region benefits from enhanced synergies and efficiencies as a result of the rationalisation, in accordance with the objectives of the RIF process and the wishes of Forum leaders.”³

¹ Fortieth Pacific Islands Forum, Forum Communiqué, ¶ 39.

² See, Joint Meeting of SOPAC, SPC and SPREP Governing Bodies on the Regional Institutional Framework (RIF), Summary of Decisions.

³ Joint Meeting of SOPAC, SPC and SPREP Governing Bodies on the Regional Institutional Framework (RIF), Summary of Decisions; see also Thirty-Ninth Pacific Islands Forum, Forum

We have been requested by the SOPAC Secretariat, for the benefit of this Council, to comment upon the potential use of suspension or dissolution under the SOPAC Constitution as a part of implementing the Council's July 2009 decisions. Based upon our review of those materials provided to us, we summarize as follows with respect to potential suspension or dissolution of SOPAC:

1. The SOPAC Constitution, Article 16, provides specific procedures governing suspension or dissolution. The SOPAC Constitution, Article 14, provides specific procedures governing amendment of the treaty.
2. Passage of a resolution for suspension or dissolution requires, at minimum, a two-thirds vote of the full membership of the Council. SOPAC has seventeen full members, meaning an affirmative vote of at least twelve members would be required to pass a resolution to suspend or dissolve the Commission. Amendment requires consensus of those members present, and all amendments must be proposed at least three months before the meeting of the Council. No amendments may be voted on at the present Council meeting because none were proposed in advance of the meeting.
3. The minimum amount of time before a resolution to suspend or dissolve could take effect would be one year from the initial vote. Since the earliest the initial vote on this resolution could occur would be at the October 2009 Council meeting, the earliest date a resolution to suspend or dissolve could take effect would be October 2010. The resolution taking effect does not complete the formal process. Only after the resolution takes effect may a plan be adopted to dispose of the assets and liabilities of the Commission. Amendments could also be voted on in October 2010 if proposed at least three months in advance of that meeting.
4. Notwithstanding the minimum amount of time for a suspension or dissolution resolution to take effect, neither suspension nor dissolution may be implemented until at least two thirds of the members of the Commission have ratified the resolution. In other words, if a dissolution or suspension resolution were passed in October 2009, at least twelve members of the Commission would then be required to ratify the resolution prior to the October 2010 annual Council meeting, or else the resolution would not take effect. Ratification would be governed by the domestic laws of each member.
5. A change in the corporate form of SOPAC will directly impact the viability of its legal relationships with third parties. Most notably this includes potential termination as a legal matter of funding contracts and employment relationships. Maintaining the corporate form of SOPAC may afford the Commission greater flexibility in addressing these important issues and assuring

Communiqué, ¶ 20(a) (recalling decision that implementation occur “without any substantive diminution in SOPAC functions....”).

that funding contracts are not terminated and employees' vested rights respected. These legal issues (e.g., negotiation with third parties regarding perpetuation of funding agreements) should be addressed before any final decision to suspend or dissolve.

6. Regardless of whether suspension, dissolution, or an alternative option is employed, SOPAC functions, assets and liabilities should not be transferred to SPC or SPREP without a specific agreement between SOPAC and each entity governing the terms and conditions of transfer. This agreement should be prepared and proposed to the Council for final consideration before any final (i.e., irrevocable) decision to suspend, dissolve or transfer.

7. SOPAC need neither suspend nor dissolve at this time. There is no requirement or directive that the Council approve either action at the present meeting. It is not essential that the Council resolve to suspend or dissolve at this time to complete transition agreements and implementation of its July decisions. The option to suspend or dissolve after implementation remains. The option also exists to amend the SOPAC Constitution to craft a new procedure specific to RIF, which could preserve the benefits of SOPAC's corporate form in a more limited capacity, while still obtaining the benefit of RIF through integration of operations and eventual consolidation of funding.

II. SUMMARY OF SOPAC CONSTITUTIONAL PROVISIONS: DISSOLUTION, SUSPENSION, AND AMENDMENT

A decision to suspend or dissolve SOPAC, either now or at a future date, would be governed by specific requirements of the SOPAC Constitution. Those requirements are as follows:

Dissolution. Article 16 of the SOPAC Constitution establishes the following procedure:

1. The Governing Council may adopt a resolution to dissolve.
2. The dissolution only becomes effective at the next Annual Session of the Governing Council if two-thirds of the members of SOPAC have ratified the resolution (consistent with their own domestic law) in the intervening period.
3. If two-thirds of the members of SOPAC have ratified the resolution by the next Annual Session, the Governing Council will determine "the manner in which the assets and obligations of [SOPAC] should be liquidated, distributed or borne, prior to the dissolution [] of the [SOPAC]." Art. 16, § 2.
4. If two-thirds of the members of SOPAC have ratified the resolution by the next Annual Session, the Governing Council also adopts a declaration "prescribing the date on which [SOPAC] shall be deemed dissolved []." Art. 16, § 3.

Suspension. The same treaty provision governing dissolution, Article 16, governs suspension:

1. The Governing Council may adopt a resolution to suspend.

2. The suspension only becomes effective at the next Annual Session of the Governing Council if two-thirds of the members of SOPAC have ratified the resolution (consistent with their own domestic law) in the intervening period.
3. If two-thirds of the members of SOPAC have ratified the resolution by the next Annual Session, the Governing Council will determine “the manner in which the assets and obligations of [SOPAC] should be liquidated, distributed or borne, prior to the [] suspension of [SOPAC].” Art. 16, § 2.
4. If two-thirds of the members of SOPAC have ratified the resolution by the next Annual Session, the Governing Council also adopts a declaration “prescribing the date on which [SOPAC] shall be deemed [] suspended.” Art. 16, § 3.
5. In the case of suspension, the declaration that must be adopted pursuant to Art. 16, § 3, also must include “the procedure whereby the suspension may be terminated and the organisation revived.” Art. 16, § 4.

Depending on the integration process and structure chosen by the Council, amendment of the SOPAC Constitution may be useful or required, and could potentially modify a future process for dissolution or suspension; amendments could also be used to craft an alternative procedure to dissolution or suspension (e.g., the preservation of SOPAC’s corporate form in a more limited capacity).

Amendment: Article 14 governs amendment procedure:

1. Amendments must be circulated three months in advance of any session of the Governing Council.
2. Amendments must be adopted by consensus of the Commission members present at the Governing Council session.
3. Amendments will enter into force 30 days after the receipt of acceptance or ratification by the Depositary of all members of the Commission.

For a detailed example of how these timelines might be applied to RIF, please see the “Sample Timeline” submitted as Appendix A.

III. IMPLICATIONS OF DISSOLUTION OR SUSPENSION

Given these procedural requirements, must SOPAC vote to dissolve or suspend now, in order to implement its July decisions and the objectives of RIF? The answer is no. A decision regarding suspension or dissolution should, at minimum, be deferred until after implementation, and not taken beforehand.

By way of analogy, suppose two existing medical facilities wish to merge so as to create a new, centralized and more efficient medical center. The medical facilities would not tear down the existing medical buildings, terminate funding for existing medical grants, or dismiss doctors and nurses currently tending to patients, until the new medical center was operational, and it was

evident it could continue to provide necessary medical services to the community. And perhaps the old building could still be of service to the new medical center in some way, although the way may not be known until new operations commence. Similarly, here, the goal is for an integrated, more efficient regional framework, without diminution in services. There is no requirement that the existing structure be dissolved before the new structure is in place, and before it can be determined that services continue to be provided to the region. And perhaps the existing structure, which has inherent value built through four decades of service, may also continue to be of service in some manner.

The dissolution or suspension of SOPAC would alter the organisation's "structure" in the legal (and perhaps irrevocable) sense, with corresponding legal implications. Absent the completion of specific due diligence with respect to SOPAC's assets, liabilities, personnel, and other legal obligations and agreements (which we have not been requested to conduct at this time), it is not possible to identify all of the possible effects or impacts of dissolution or suspension. Since this information is not yet before the Council, the Council cannot determine at this time what all the effects or impacts of dissolution or suspension might be.

Moreover, an international organisation such as SOPAC may effectively "transfer" many of its operations (as contemplated by the Council's July decision) without suspending or dissolving.⁴ A prime example is the Western European Union ("WEU"). The WEU was originally formed when the Treaty of Brussels was modified in 1954.⁵ Its purpose was to facilitate common defense, social and cultural goals among its member states.⁶ In 1960, the WEU transferred its social and cultural committees to the Council of Europe.⁷ Over the past two decades, the WEU has transferred most of its remaining core capabilities and functions to the European Union.⁸ The WEU's ministerial Council has not convened since November 2000.⁹ While WEU's core

⁴ See PATRICK R. MYERS, SUCCESSION BETWEEN INTERNATIONAL ORGANIZATIONS 34-36 (1993).

⁵ See PHILLIPE SANDS & PIERRE KLEIN, BOWETT'S LAW OF INTERNATIONAL INSTITUTIONS 196 (5th ed. 2001).

⁶ See SANDS & KLEIN, *supra* n. 5, at 196.

⁷ See MYERS, *supra* n. 4, at 35.

⁸ See James G. McLaren, *Europe's Efforts to Develop an Autonomous Defense Capability, A Constitution for Europe, and the Implications for NATO*, 11 COLUM. J. EUR. L. 523, 535-36 (2005) (noting the European Union's "assumption of the duties of the WEU").

⁹ Western European Union, *What is WEU Today?*, available at <http://www.weu.int/index.html> (last visited Sep. 28, 2009).

functions were transferred, the organisation still exists to administer residual functions and in case it is needed in the future to carry out the common defense goals of the Brussels Treaty.¹⁰

In the same fashion, SOPAC's main operations could be transferred to other entities, while the organisation itself could remain in some form. This necessary form could be more specifically established, for example, by amendments to the SOPAC Constitution. Common appointments could be made to the Secretariats of SOPAC and SPC, with members of both organisations contributing to transition and oversight.¹¹

Dissolution, in contrast, is final. It would terminate all relations under the existing SOPAC Constitution.¹² In the event of dissolution, SOPAC could neither resume nor perpetuate selected operations (such as STAR, TAG or PMEG), pursue new operations within its mandate (for example, advice and support with respect to the region's deep sea minerals), retain or administer any of its contractual relationships, administer any vested rights or benefits of its employees, serve as an archive or data resource for the region, license or sell any of its intellectual property, or retain any benefit from its name or established goodwill. As noted in our previous submission to the Council, suspension is "less radical" in that it is not irrevocable.¹³ But it is an extraordinary step nonetheless, employed, for example, when countries in an existing diplomatic relationship enter into hostilities.¹⁴ Suspension would also turn SOPAC into a dormant shell, with all assets liquidated, thereby substantially inhibiting its ability to take actions such as any of those described in this paragraph.

Either suspension or dissolution would also result in substantial "ripple" effects that SOPAC could not control. These include "the transfer of functions, treaties, transfer of assets and liabilities, transfer of subsidiary institutions, and employees."¹⁵ A prime example here that has

¹⁰ See McLaren, *supra* n. 8, at 536; Western European Union, *supra* n. 9.

¹¹ Again by comparison to the WEU, Javier Solana, who is the High Representative for the Common Foreign and Security Policy of the EU and Secretary-General for the Council of the European Union, was also appointed Secretary-General of the WEU. See Western European Union, *supra* n. 9.

¹² See, e.g., MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 865 (2009) (Article 70).

¹³ See VILLIGER, *supra* n. 12, at 711 (Article 57).

¹⁴ See e.g., MYERS, *supra* n. 4, at 16 (describing the suspension of the League of Nations during World War II).

¹⁵ C.F. AMERASINGHE, PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS 477 (1996) (noting that succession between organisations effects each of these areas).

been raised previously is that SOPAC's contracts could "perish with the organization."¹⁶ And while some contracts may potentially be assumed by the successor organisations, legal assignment often requires approval by the other parties (i.e., parties other than the members of SOPAC, SPREP and SPC).¹⁷

This is hardly a theoretical issue when it comes to SOPAC. Based on the information we have been provided to date, it appears that SOPAC has funding commitments extending in some cases through 2014. Total donor funding under contract for 2010 is estimated at \$30,222,838 FJD; for 2011 at \$25,937,654 FJD, and for 2012 at \$20,882,172 FJD. In other words, in uncertain economic times, SOPAC has under contract more than **\$77M** FJD in funding for the next three calendar years, and some funding beyond that date. This is more than a substantial percentage of SOPAC's overall budget, and so would appear important to assuring there is no diminution of those services SOPAC presently provides.

A more specific example of the legal issue is evidenced from the terms of agreements between SOPAC and the European Community, highlighted in our previous submission to the Council. Through its "European Community Contribution Agreement with an International Organisation," the EU preserves the right to terminate such funding arrangements in the event of specified "organizational change":

12.2 Where the Organisation: . . .

-- undergoes legal, financial, technical or organisational change that is liable to affect this Agreement substantially or to call the award decision into question; the Contracting Authority [EU] will enter into discussions with the Organisation [SOPAC] and, failing a proper solution within one month, may terminate this Agreement, without prior notice and without paying compensation of any kind. In that event the Contracting Authority may demand full or partial repayment of any amounts unduly paid, after allowing the Organisation to submit its observations.

12.3 Prior to or instead of terminating the Agreement as provided for in Article 12.2, the Contracting Authority may suspend payments or (exceptionally) the

¹⁶ See HENRY G. SCHERMERS & NIELS M. BLOKKER, INTERNATIONAL INSTITUTIONAL LAW 1059 (4th rev. ed. 2003).

¹⁷ Ramses A. Wessel, *Dissolution and Succession: The Transmigration of the Soul of International Organizations* 13, available at <http://www.mb.utwente.nl/legs/research/wessel/wessel45.pdf> (last visited Sep. 28, 2009).

eligibility of expenses as a precautionary measure, informing the Organisation immediately.¹⁸

Dissolution or suspension will most squarely raise the question of whether any “organisational changes” are “liable to affect this Agreement substantially or to call the Award decision into question.” The relevant provisions of clause 12.2 require that the Contracting Authority (EU) enter into discussions with the Organisation (SOPAC) and, failing a proper solution within one month, allow it to terminate the Agreement without prior notice and without paying compensation of any kind. It would, therefore, be critical for SOPAC to engage in these discussions in order to gain the agreement of the Contracting Authority that the organisational changes proposed do not affect this Agreement substantially or call the Award decision into question, thereby not entitling the Contracting Authority to terminate. Moreover, should the EU wish to see certain considerations contained in implementation agreements in order to consent to continuation of funding, this would still be possible.

To date we have not been presented with copies or examples of other funding agreements or contracts, but this same legal issue potentially arises with each of them, and should be addressed as part of the integration process and prior to any material change in SOPAC’s legal status.

A similar process would be necessary for other assets, liabilities, and personnel. For example, the general rule is that personnel of a dissolved organisation lose their jobs, and the successor organisation has no obligation to re-employ them.¹⁹ This also directly impacts issues such as benefits and pension funds.²⁰ Again, these types of issues may be addressed through specific implementation agreements between organisations and with employees. But these actions should be agreed upon before dissolution or suspension.

IV. IMPLEMENTATION AGREEMENTS SHOULD PRECEDE DISSOLUTION OR SUSPENSION

There appears to be substantial agreement that integration should occur pursuant to a detailed implementation plan.²¹ For the reasons outlined above, we strongly recommend that the

¹⁸ See European Community Contribution Agreement, General and Administrative Provisions, Articles 12.2 & 12.3.

¹⁹ See SCHERMERS & BLOKKER, *supra* n. 16, at 1059-60.

²⁰ See SCHERMERS & BLOKKER, *supra* n. 16, at 1059-62; MYERS, *supra* n. 4, at 89-90, 94.

²¹ See Joint Meeting of SOPAC, SPC and SPREP Governing Bodies on the Regional Institutional Framework (RIF), Summary of Decisions; Brenda Heather-Latu, Report on Legal Implications of Certain Options Relating to the Rationalisation of SOPAC’s Work Programmes (June 2009), at 33 (“The outstanding legal issues which must be accommodated in the

proposed transactions between SOPAC and each of SPREP and SPC, be documented in detailed integration/transition agreements finalized in advance of any decision on suspension or dissolution, and contingent on the completion of certain events.

This sequence of integration enjoys precedent in international law. For example, in April 2001, the member states of the International Vine and Wine Office (“IVWO”) agreed at a high level to terminate their prior treaty and create a new International Organisation of Vine and Wine (“OIV”) to directly replace the IVWO in its entirety. Both organisations focused on the technical and scientific aspects of grape production and winemaking. In 2004, the organisations appointed a temporary administrator charged with winding-up IVWO’s affairs, and passed a series of subsequent resolutions dealing with specific transfers of assets, liabilities, treatment of technical committees, and the like.²² The proposed transfer of duties from SOPAC to multiple entities is a more complex proposition. SOPAC exists to further a broader and more diverse mandate than the IVWO. It would be expected that the Council’s high level decisions on implementation would be followed by the requisite specific resolutions and agreements, and that dissolution or suspension if employed would succeed these activities.

Effecting the proposed transactions through the use of integration agreements will provide additional benefits to SOPAC including the following: (i) ensure that all parties understand and are in agreement as to the key terms of the transactions by providing a “road map” for orderly implementation, including transfers of assets and liabilities; (ii) provide employees and third parties that may be affected by the transactions (such as donors or vendors) with certainty regarding the structure of the transactions and the composition of the resulting entities; (iii) provide an efficient method of dispute resolution in the event a disagreement arises with respect to the implementation of the proposed transactions; and (iv) potentially provide a mechanism to maintain SOPAC as a separate organisation.

Failing to employ detailed integration agreements may, in turn, slow the implementation of the transactions and may increase the risk that the parties, or SOPAC and a third party, have a fundamental disagreement during the implementation process, which may be difficult to resolve

implementation of the [SPC] option would benefit from a transition plan which lists all [of] SOPAC’s legal commitments, assets, obligations and undertakings in order for specific decisions to be made.”).

²² OIV passed numerous resolutions to implement the transfer of functions, including resolutions titled: *Transfer of the Assets and Liabilities of the Office to the Organisation and the Appointment of a Temporary Administrator, Maintaining the Scientific Structures of the Office, and Elections of the President of the O.I.V., the Chairpersons of the Committees and Sub-committees of the O.I.V., and the Director General of the O.I.V.* See International Organisation of Vine and Wine, Resolutions – General Assembly, available at http://news.reseau-concept.net/pls/news/p_entree?i_sid=29906438766496767265780&i_type_edition_id=20435&i_section_id=20470&i_lang=33 (last visited Sep. 28, 2009).

absent pre-existing arrangements regarding dispute resolution. Furthermore, third parties such as donors may be more likely to discontinue funding under existing legal arrangements if they do not understand the structure of the proposed transactions or are not satisfied that the transactions are proceeding in an orderly manner.

The Council could issue a resolution at the present meeting directing the preparation and negotiation of these agreements for final approval in October 2010, and could also direct that specified key terms and conditions be included. See Appendix B for a list of sample terms and conditions that could be included in a resolution of the Council directing the preparation of implementation agreements.

V. CONCLUSION

Dissolution and suspension are extraordinary legal remedies. The Council is not required to vote to suspend or dissolve at this time. The Council could direct the preparation and negotiation of implementation agreements for final approval in October 2010, and proceed with a transfer of functions that does not require suspension or dissolution. It could amend the SOPAC Constitution to preserve SOPAC's legal personality in a fashion most useful and efficient to implementation of RIF, with a reduction in legal risk as well as procedure and expense. It may take these acts without prejudice to a future decision to dissolve or suspend. Regardless of whether it suspends or dissolves and on what timeline, the Council should not finalize implementation in the absence of specific implementation agreements that address outstanding legal issues potentially critical to the continued provision of services to the region.

APPENDIX A: SAMPLE TIMELINE

In light of the preceding discussion, the following reflects a potential timeline under which dissolution, suspension, amendments, and integration plans could be implemented; reference to prior milestones identified in the CEO's report of 1 July 2009 is also included. Note again that it is legally possible to implement the milestones for Integration Terms and Conditions and the CEOs' Report, without presently implementing dissolution or suspension milestones.

Date	Dissolution Milestones	Suspension Milestones	Integration Terms and Conditions Milestones	CEO's Report Milestones
October 2009 Annual Governing Council Session	Pass resolution[s], pursuant to July 2009 Council decision, to dissolve the Commission. Approval required by at least the votes of twelve full members.	Pass resolution[s], pursuant to July 2009 Council decision, to dissolve the Commission. Approval required by at least the votes of twelve full members.	Pass resolution[s], pursuant to July 2009 Council decision, directing negotiation and preparation of transition terms and conditions; specify key terms and conditions to be included. Approval required by at least the votes of twelve full members	
November 2009 – June 2010	(1) Ratification Period: Dissolution resolution open for ratification by Commission membership; (2) pursuant to Art.	(1) Ratification Period: Suspension resolution open for ratification by Commission membership; (2) pursuant to Art.	(1) Analyze assets, liabilities, funding contracts/agreements, etc., that will be	

	<p>16, § 2, develop draft declarations for consideration at the October 2010 SOPAC Governing Council Annual Session that address “the manner in which the assets and obligations of [SOPAC] should be liquidated, distributed or borne” if SOPAC is dissolved;</p> <p>(3) pursuant to Art. 16, § 3, develop draft declarations for consideration at the October 2010 SOPAC Governing Council Annual Session prescribing the date on which SOPAC will be deemed dissolved.</p>	<p>16, § 2, develop draft declarations for consideration at the October 2010 SOPAC Governing Council Annual Session that address “the manner in which the assets and obligations of [SOPAC] should be liquidated, distributed or borne” if SOPAC is suspended;</p> <p>(3) pursuant to Art. 16, § 3, develop draft declarations for consideration at the October 2010 SOPAC Governing Council Annual Session prescribing the date on which SOPAC will be deemed suspended;</p> <p>(4) pursuant to Art. 16, § 4, develop draft declarations for consideration at the October 2010 SOPAC Governing Council Annual Session establishing the procedure whereby any suspension of SOPAC would be terminated and SOPAC revived.</p>	<p>impacted by integration;</p> <p>(2) negotiate integration/transfer agreements with counterparts at SPC and SPREP;</p> <p>(3) negotiate accommodations of legal agreements with third parties including funding contracts and employment relationships;</p> <p>(4) determine future role of TAG, STAR, PMEG.</p>	
<p>May 2010</p>			<p>Prepare any required amendments</p>	<p>New SOPAC Director in place</p>

			to SOPAC Constitution	(position could be shared with SPC appointee)
July 2010	Proposed Article 16 resolutions submitted to Council accompanied by integration plan	Proposed Article 16 resolutions submitted to Council accompanied by integration plan	(1) Proposed integration plan submitted to Council (2) Proposed Amendments to SOPAC Constitution circulated with integration plan	
August 2010				Presentation of new Strategic Plan, 2011 budget and work plan
October 2010 Annual Governing Council Session	If <u>dissolution</u> of SOPAC was resolved, and ratification of dissolution resolution has been received from two-thirds of SOPAC members in advance of this meeting: approve a declaration setting the dissolution date and prescribing the manner in which the assets and obligations of SOPAC should be liquidated, distributed or borne.	If <u>suspension</u> of SOPAC was resolved, and ratification of suspension resolution has been received from two-thirds of SOPAC members in advance of this meeting: (1) approve a declaration setting the suspension date and prescribing the manner in which the assets and obligations of SOPAC should be liquidated, distributed or borne;	Approve by resolution the integration/transfer agreements negotiated by SOPAC Secretariat and counterparts at SPC and SPREP; Approve applicable amendments to Constitution (consensus required)	

		(2) approve a declaration establishing under what conditions the suspension of SOPAC would be terminated and SOPAC revived.		
December 2010				Harmonize systems of SOPAC, SPREP and SPC as appropriate
January 2011				Formal integration of SOPAC programs with SPC and SPREP begins pursuant to approved implementation plan
TBD	Dissolution Effective	Suspension Effective	Expiration of contingencies in terms and conditions	

APPENDIX B – SAMPLE INTEGRATION AGREEMENT TERMS

Following are general listings of sample terms that could appear in an integration agreement (specific terms would be subject to specific drafting pursuant to negotiation of the parties. Because we have not been provided with specific due diligence materials these terms are samples only and not intended as an exhaustive list of terms that should be included in a final agreement:

- transfer and ownership of SOPAC's real property or leases;
- transfer and ownership of SOPAC's personal property (such as equipment and vehicles);
- transfer and ownership of SOPAC's intellectual property (such as patents, trademarks, and copyrights) and any licensing arrangements with respect to the intellectual property;
- assumption of SOPAC's liabilities by SPREP and SPC;
- employment of SOPAC's employees (as appropriate) by SPREP and SPC;
- benefits to be provided to former SOPAC employees, how they will be administered, and by whom;
- legal consents that must be obtained from donors under existing SOPAC funding agreements and other material agreements prior to consummation of the transactions;
- required approvals of the governing bodies of SOPAC, SPREP and SPC for consummation of the proposed transactions; including any amendments to the respective treaties
- dispute resolution procedures (such as arbitration);
- reporting obligations of SPREP and SPC to SOPAC for a period of time following consummation of the transactions;
- events that may trigger the unwinding of the transactions and revival of SOPAC;
- contingencies in the event a substantial portion of funding is terminated as a result of implementation, or a substantial diminution of services occurs within a specified period;
- the future of TAG, STAR and PMEG;
- procedures to be followed for further SOPAC Council meetings
- constitution of Secretariats
- integration and harmonization of systems