



**3<sup>rd</sup> Meeting of the SOPAC Council Committee of the Whole (SCW)  
on the Regional Institutional Framework**

Banyan Room, Holiday Inn, Suva, Fiji

Wednesday, 16<sup>th</sup> July 2008

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AGENDA ITEM	TITLE
5	UPDATE SINCE SCW02
5.1	Assessment of Legal Issues

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**Assessment of the Legal Issues Pertaining to the SOPAC Commission should it  
Dissolve or Suspend its Operations**

Attached is the draft legal opinion commissioned by the Secretariat in April, which the Director of SOPAC referred to in her progress report to the Committee at its Second meeting.

**DRAFT REPORT**

**Pacific Islands Applied Geoscience Commission  
(SOPAC)**

**Assessment of the Legal Issues Pertaining to the  
SOPAC Commission should it Dissolve or  
Suspend its Operations**

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**Masio Nidung (LLB, LLM)  
130 Johnson Rd  
Mapleton Queensland 4560  
AUSTRALIA**

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## LEGAL OPINION ON THE STUDY OF THE LEGAL ISSUES PERTAINING TO THE SOPAC COMMISSION SHOULD IT DISSOLVE OR SUSPEND ITS OPERATIONS

### **TERMS OF REFERENCE: (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.**

### **The Agreement Establishing the Pacific Islands Applied Geoscience Commission**

SOPAC is created by the Agreement Establishing the Pacific Islands Applied Geoscience Commission as an intergovernmental organisation. The Agreement is governed by international law arising from the fact that Pacific States are parties to this Agreement, with the exception of the Territory of Guam.

This Agreement establishing SOPAC is multilateral in nature with more than two parties to the Agreement. Essentially the Governments of the South Pacific Region identified in the Schedule to the Agreement including Associate members, their membership subject to the conditions set down by the Governing Council. See Article 3.

The main objective of SOPAC is in the promotion and exploitation of non living resources in the offshore, coastal and onshore areas.

The decision making of SOPAC is vested in the Governing Council. See Article 6, paragraph 10. Decision making is subject to consensus. This means all parties must agree for a decision to be a consensus. If some members disagree then that will not be consensus. Where consensus is not reached then vote taking may be applied.

The Agreement is subject to ratification process. This means member States need to subject the Agreement to internal ratification procedures in accordance with their respective constitutional laws. See Article 13.

Any amendments are also subject to ratification process. Thus amendments must be adopted by a consensus decision of all members. See Article 14.

A Party may withdraw from the Treaty by following the procedure in Article 15 of the Agreement. Withdrawal takes effect one year after receipt of such notice by the Depositary.

Nonetheless the Treaty in Article 16 goes further to provide the dissolution of SOPAC or for its activities to be suspended. The Agreement does not provide the

circumstances under which this provision may be invoked or applied. Perhaps that is a matter for the Governing Council to decide in accordance with its Constitution or its Rules of Procedure.

On analysis there are two scenarios presented. In the case of **dissolution** of SOPAC the organisation is dissolved. In case of **suspension** only the activities of the SOPAC are suspended but the organisation would appear to remain intact.

In both scenarios two thirds (2/3) of members must have ratified the resolution to dissolve or suspend. Such a resolution must be based on consensus and shall take effect following conclusion of the next session of Governing Council provided 2/3 of Parties have ratified the resolution to dissolve or suspend.

**Paragraph 19(b) of the Forum Communiqué reads:**

*“ The need to rationalise the functions of SOPAC with the work programmes of the Secretariat of the Pacific Community (SPC) and the Secretariat of Pacific Regional Environment Programme (SPREP), with the view to absorbing those functions of SOPAC into SPC and SPREP”.*

This paragraph is not clear as to what and how to rationalize the functions of SOPAC. The term “functions” of SOPAC would impliedly refer to the activities and work programmes of SOPAC. If that view is acceptable to the Governing Council then a consensus has to be reached or 2/3 of its members must vote to dissolve or suspend the activities of SOPAC to be merged with SPC and SPREP accordingly. What goes to SPC or to SPREP is a matter for a separate study/analysis to be undertaken of the three organisations.

The issue of SOPAC’s mandate in the non living resources is also critical. How can a mandate of an organisation be amended? Is it simply through re-organisation of the functions and responsibilities of the three organisations in accordance with its strategic work plans or should that require amendments to the Agreement of the respective organisation? These are issues to consider when a separate study is undertaken.

**Gaps identified in the SOPAC agreement**

- The Agreement does not provide the circumstances in which SOPAC may be dissolved or its activities suspended under Article 16. Whether this is provided in the SOPAC Constitution or its Rules of Procedure needs to be ascertained. Further guidance could be drawn from Vienna Convention on Law of Treaties.
- There is no legal provision in the Agreement for the SOPAC Governing Council decision to subject itself to the Forum Leaders decision. In the absence of this legal relationship whether the Governing Council of SOPAC is obliged legally to implement Forum Leaders decision is a matter of course based on a moral duty and accepted standing practice than a legal one.

- SOPAC is a separate organisation and under no legal obligation to the Forum Secretariat. The agreement does not show Forum Secretariat as the focal regional organisation for collaboration and reporting purposes by other regional organisations. That is not reflected in the Agreement.
- Constitution of SOPAC and other rules of Procedure of SOPAC may need to be looked at to ascertain the relationship of SOPAC Governing Council decisions with the decisions of the Forum Leaders.
- The whole decision making structure of the regional organisations need to be reviewed because of the gaps and uncertainties created between SOPAC and the Forum Agreements.

### **Obligations of SOPAC to respond to Forum Leaders' Communiqué**

Under the SOPAC Agreement, there is no link with SOPAC Governing Council decision with the Forum Leaders decision. As noted the SOPAC Agreement does not define the extent of SOPAC's relationship with the Forum Leaders. In the absence of that further reference could be made to the Agreement establishing the Forum.

### **Agreement Establishing the Pacific Islands Forum 2000**

This Agreement Establishing the Pacific Islands Forum Secretariat 2000 is currently the Agreement in force to govern the operations of the Secretariat.

The main focus of the Forum Secretariat is to develop trade, promote economic development, tourism, energy, telecommunications, legal, political, and security as the Forum directs. The Agreement is subject to ratification.

Although the Agreement establishes the Forum, it has no provisions on the role and functions of the Forum Leaders to make decisions binding on all regional organisations in the region.

The Agreement is silent on the Forum as the key focal organ/body and does not show its interrelationship with other regional organisations. In fact the Agreement does not give recognition to other regional organisations in the region.

The focus of the Agreement appears to be on the role of the Secretariat. Among other things the role and function of the Secretariat is to cooperate and coordinate work with other international and regional organisations. Again the provision is restrictive and does not make the Secretariat the overall decision making focal point for all forum related issues.

The present move to integrate or reform the region as part of the Pacific Plan may be outside of the scope of the present Agreement. It follows therefore that any decision

made by the Forum on any aspects of the integration of the region is questionable, mindful also of the fact that other regional organisations have distinct mandates given by their own Agreements.

### **Obvious Gaps with Agreement Establishing the Pacific Islands Forum 2000**

- The current Agreement shows obvious gaps and does not show the role of the Forum to integrate all regional institutions to implement the Pacific Plan as part of its powers.
- There is no recognition given to other regional organisations within the legal framework of the Forum Agreement and their relationship with the Forum or with the Forum Secretariat.
- It is not clear where the other regional organisations fit into the membership of the Forum. There is no provision on observers but it is understood that many of the regional organisations act as observers to the Forum meetings.
- Naturally Forum decisions may not be binding on the observers to which SOPAC and others fall within.
- There is no decision making provision of the Forum to bind other regional organisations nor does it show how other regional Agreements of other bodies fit into the desired integration as anticipated by the Pacific Plan.
- There is no provision providing the Forum explicit powers and functions to guide them to make decisions concerning its members except what the Forum Secretariat recommends to the Forum.
- It follows therefore that the decisions of the Forum directing other regional organisations to rationalise their activities is strictly outside of its own powers in the Agreement. Thus one can only direct what it is legally empowered to do or given clear powers to direct others but only if those regional organisations are recognised by the Forum Agreement.

### **Review of Forum Agreement 2000**

It is understood that due to the deficiencies of the current Act a review of the current Agreement was undertaken resulting in a new Agreement which was opened for signature in 2005 and signed by all members of the Forum. However the Agreement has not been brought into operation as yet because all 16 members of the Forum must ratify the Agreement.

The new Forum Agreement 2005 is anticipated to bring about integration and implementation of the Pacific Plan.

## **The Forum Agreement Establishing the Pacific Islands Forum 2005**

**This Agreement is not yet in force** but for this purpose discussed to ascertain the role and powers of the Forum with decision making on issues affecting the region because the current agreement is not clear. Whether the Forum has the legal power to bind other regional organisations is the focus and to ascertain the Forum's inter-relationships with other regional organisations, it helps to see what is in the new Agreement.

The recent Agreement establishing the Pacific Islands Forum is established as an international organisation. Membership of the Forum is open to all Pacific Island States. Thus other States may be admitted subject to approval of the Forum Leaders from time to time.

Territories may be admitted to the Forum as associate members again subject to the approval of the Forum Leaders.

Furthermore intergovernmental organisations whose membership includes a significant number of Forum members may be invited as Forum Observers. See Article 1. In this connection regional organisations such as SOPAC would be observers at the invitation of the Forum.

The Agreement is subject to ratification and includes amendments also subject to ratification. Articles XI and XII.

The purpose of the Forum is to strengthen regional cooperation and integration, including through the pooling of regional resources of governance and the alignment of policies, in order to further Forum member's shared goals of economic growth, sustainable development, good governance and security. See Article 2.

The decision making of the Forum is vested in the Forum Leaders Meeting. See Article 3. There is no reference to the decision of the Forum binding on other regional organisations or intergovernmental organisations whose membership includes a significant number of Forum members.

It is also worth noting that inter governmental organisations would be observers hence decisions of the Forum impliedly would not be binding on observers.

The Pacific Islands Forum Officials Committee is the executive committee which comprises of representatives from member States, whose function is to provide general policy directions to the Secretariat and make reports and recommendations to the Forum Leaders. See Article V



The Forum Secretariat is established by Article IV and its functions are provided in Article VIII and its primary role is to provide policy advice, coordination and assistance in implementing the decisions of the Forum Leaders.

Among other things, the Forum Secretariat's functions include working in partnerships between the Forum and its stakeholders within and beyond the Pacific region; including working in cooperation and coordination with other intergovernmental organisations in the Pacific region, with the aim of ensuring the most effective use of the regional resources. See Article VIII 3(c) & 4

As noted one of the functions of the Forum is to work in partnerships and in coordination and cooperation with other regional or intergovernmental organisations. The agreement is silent on the Forum to be the focal point for coordination or receiving of annual reports from other regional organisations.

The Agreement allows the Forum to work in partnership with others but its overall role being the primary focal point in terms of its relationship with other regional organisations is not clearly defined.

### **Gaps in the Forum Agreement 2005**

- The Forum Agreement 2005 does not clearly portray the Forum to be the central or principal decision making body for the Region nor does it legally recognize the other existing intergovernmental organisations in the Agreement.
- The only reference to other regional or intergovernmental organisations is in the membership provision. The Forum may invite membership of regional or intergovernmental organisations whose membership includes a significant number of forum members, to be observers.
- Legally, decisions of the Forum or the Forum Leaders would not be binding on observer organisations.
- The membership of regional or inter-governmental organisations are also members of the Forum and it would be in their best interest that clear legal provisions were put to show legal relationship of these organisations and what these organisations are to achieve bearing in mind the integration and alignment of regional resources as captured in the purpose of the Forum Agreement.
- The Agreement does not specify how decisions of the Forum Leaders are to be implemented. Whether decisions are implemented in accordance with the Forum Rules of Procedure or in accordance with the Forum Constitution or through Communiqués.

- Precedents elsewhere show in certain regional organisations that Rules of Procedure or Guidelines on procedure explicitly set down adoption of decision making. In some multilateral organisations, reference to national legislation or policies are usually referred to enabling the State Party to implement decisions.
- No dispute resolution mechanism exists if an issue for interpretation between the Forum Agreement and another regional organisation over an interpretation of the Agreement.

### **Membership and Third Party Obligations**

The membership of SOPAC is mostly State Parties in the Pacific Region with the exception of Guam which is a Territory of the United States.

The SOPAC Agreement is a multilateral agreement and governed by international law on the basis that States (with the exception of Guam) are parties to this Agreement. Treaty making between States as well as States and international organisations is regulated by the Vienna Convention on Law of Treaties 1969.

The Vienna Convention is explicit that those only parties to an international Agreement or Treaty would be bound by the Treaty/Agreement. Likewise any amendment to a Treaty or an international Agreement would bind the members.

Any amendment to a Treaty/ international Agreement must not create obligations on third parties without their consent or knowledge. And if consent is obtained from the non party, it must be in writing.

Thus application of Treaties or Agreements to non Parties is very limited in instances where a customary rule of international law applies or now an emergence of certain treaties or agreements could apply to non parties, such as the UN Fish Stocks Agreement on the High Seas out of global concerns for the depletion of tuna stocks world wide.

All members of SOPAC with the exception of Guam are members of the Pacific Islands Forum. It follows that Guam is a third party to the Forum Agreement.

The Forum Leader's decision to rationalise functions of SOPAC and absorb these into the work programmes of SPC or SPREP would not be binding on Guam.

Nevertheless SOPAC is an observer to the Forum hence Forum Leaders decisions would not to apply to an organisation with an observer status. However, SOPAC per se is an organisation which comprises of member States. The legal issue raised earlier about observer status would mean decision by the Forum Leaders would not be binding on observers appearing as members of SOPAC.

In practical terms what that may mean is that where members, who are both members of SOPAC and the Forum, the Forum decisions would apply to those members appearing as Forum members wearing the hat of the Forum.

The members by virtue of SOPAC being an observer cannot commit to the Forum Leader's decision in another sense wearing the hat of SOPAC because of the observer status of SOPAC to the Forum. There is lack of clarity with both the Forum and SOPAC Agreements governing the relationships of all the regional institutions in spite of the fact that a CROP exists. CROP is a high level advisory body comprising the heads of eleven regional organisations in the Pacific. It is not a legal entity or a separate organisation, and does not set policy for national governments. However, it can and does provide policy advice and may facilitate policy formulation at national, regional and international levels. It provides a mechanism for cooperation, coordination, and collaboration among the various intergovernmental regional organisations to work toward achieving the vision of the Pacific Plan.

That being said the last phrase of Article I (4) of the Forum Agreement may be referred to. The entitlements of observers shall be determined by the Forum Leaders from time to time. In this respect this may refer to observer's criteria for admission to meetings; make opening statements or comments at the Forum meetings.

In any case the usual standard practice is that observers may have the right to participate in meetings but they do not have the right to vote. Hence voting comes with accepting the decision. Ordinarily whether accepting decisions of the Forum as binding on observers is not clearly defined but the usual practice would suggest that decisions of the Forum would only apply to its State party members.

### **Comparative analysis of Caricom, and Organisation of Eastern Caribbean States**

It seems the overall decision making structure within the Forum or the other regional institutions do not have a clear layout of interrelationships of all regional institutions. This is important for purposes of reforms that need to take place in the interest of rationalisation and cost effectiveness of service delivery to its members arising from Agreements which set up many of these institutions in the Pacific region.

Whilst there are precedents elsewhere, in other regional organisations such as the CARICOM or Organisation for Eastern Caribbean States may be compared and in this regard two are selected for purposes of discussion. These arrangements are chosen for easy reference due to its size and similarity with the Pacific Islands Forum and compared for analysis sake, although noting the administrative set up for CARICOM or the Organisation for Eastern Caribbean States and the Pacific Forum are quite distinct.

But certainly a number of references from CARICOM and Organisation for Caribbean States perhaps can be highlighted to show the intent of clarity in decision making and implementation between different institutions within CARICOM and Organisation for

Eastern Caribbean States. Other regional organisations such as the Central European Initiative are more detailed and have clear defined decision making structures within the different organs established within the respective Agreements which create the regional institutions.

### **Organisation for Eastern Caribbean States**

A new Treaty had been developed for the Organisation for the Eastern Caribbean States. The essence of the Treaty was to complete the process for integration and harmonize policies for economic growth within that region by improving on the institutional, legislative and executive procedures which were lacking in the old Treaty.

Among other things the Treaty provides the various organs of the organisation. This is part of the governance regime to facilitate the achievement of its purposes. In terms of decision making depends on the powers of the respective organs. For instance the decision of the OECS Authority is binding on member States and organs of the Organisations and implemented within the competence of the members States.

In terms of decision making procedural and substantive matters are also distinguished in the various decision making process of the various organs. This is relevant especially when dealing with issues of specific powers or mandates of the organs concerned and show how these issues can be dealt with.

In the Treaty a number of regional institutions are specifically mentioned and given recognition. The essence of this is to show that this is lacking in the Forum Agreement when the Pacific Islands region actually has a number of regional organisations similarly existing, as in the Caribbean region.

### **CARICOM**

In the Caricom arrangements a similar approach was taken with the administrative structure of the Community. The Treaty establishing the Caribbean Community also provides for the various organs of the Community and recognizes the different institutions of the Community including any other which may be designated by the Conference of the Parties. There are also Associate institutions recognised as part of the Community.

In terms of dispute settlement within the Community is dealt with in accordance with an Annex to the Treaty. Within the Annex there is reference to the dispute procedures for a common market. It also makes reference to and spells out Tribunal.

The foregoing basically highlights the need for clarity in some of the decision making processes and the role of the different institutions at play in a regional organisation.

**In summary**, it would be recommendable that the legal frameworks for the various Agreements in the Pacific region creating the regional organisations be reviewed for

clarity and explicit coverage of the provisions dealing with the interrelationships of the various regional organisations with the Forum, its decisions and the links between it and other regional institutions. This will enable achievement of the purpose of the Forum to strengthen regional cooperation and integration through pooling of regional resources of governance and the alignment of policies. That is not clearly defined hence leading to issues of possible conflict.

### **Accepted Practice**

The SOPAC Governing Council is not legally obliged to implement the Forum Leaders Decision. Whether the SOPAC Governing Council implements this decision is one based on moral duty arising from standard practice rather than from a strictly legal interpretation.

Nonetheless there may be a counter and possible legal argument that could be presented to show that Forum Leader's decisions have always been implemented by regional organisations and member States alike within their competence on the basis of accepted consistent practice or behavior over a long period of time raising a legitimate expectation among its members that this will always be the practice.

Again this is a matter for the SOPAC Governing Council to decide based on all considered circumstances. The aim of this research and assessment is to point out the legal issues and possible gaps in accordance with the Terms of Reference given.

### **TERMS OF REFERENCE: (ii)**

#### **In regard to dissolution and suspension (Article 16):**

- **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.**
- **A decision to dissolve or suspend requires ratification by two thirds of the Members. Examine the process (es) that will be required at the national level to enable countries to ratify such a decision.**
- **Consider options for the eventuality that two thirds of the Members are not in a position to ratify by the time of the next annual session, and thereby not able to make a decision on the date of dissolution or suspension of the Commission.**

- **Provide options for the Commission to consider in order to decide on the manner in which the assets and obligations of the Commission should be liquidated, distributed or borne.**

### **Implications on Dissolution under Article 16 of SOPAC Agreement**

Ordinarily many Treaties or Agreements as a standard practice provide provisions on termination, denunciation or withdrawal from the Treaties or Agreements. In the SOPAC Agreement, there is no provision on termination or denunciation as in the Forum Agreement. Instead the SOPAC Agreement has provisions on withdrawal, dissolution and suspension.

Under Article 16 the Governing Council of SOPAC may resolve that the Commission be dissolved or its activities be suspended by resolution of the Council.

Such a resolution takes effect immediately following the conclusion of the next Annual Session of the Governing Council provided 2/3 of its members at the time of the next annual session have ratified the resolution. The Governing Council shall at the next Annual Session decide the manner in which the assets and obligations of the Commission should be liquidated, distributed or borne prior to the dissolution or suspension of the Commission.

Also at the next annual session the Governing Council shall adopt a declaration prescribing the date on which the Commission shall be deemed to be dissolved or suspended. The declaration shall be communicated to the Chairman of the Commission to the Members and Associate Members of the Commission.

In the case of a resolution of a suspension the Commission shall in its declaration prescribe the procedure whereby the suspension may be terminated and the organisation revived.

These two aspects will be considered as follows.

In the case of **dissolution** the Commission is dissolved and the whole Treaty would come to an end. Article 44 of the **Vienna Convention on Law of Treaties** makes the point that where a Treaty is denounced, terminated, withdrawn or suspended; **such action affects the whole Treaty unless the contracting parties have otherwise agreed.** (My emphasis)

Where dissolution is effected, several issues may arise within the context of the SOPAC agreement.

As noted from the Agreement itself, the Commission is created by Article 1 and its membership is reflected in Article 3.

It is further noted that the Commission has legal status as a legal entity and has such privileges and immunities defined in specific agreements entered into between the Commission and its members in respect of its activities in each Member State as would be normally required by national laws of some of its members.

The composition of the Commission as per Article 5 comprises Governing Council, Secretariat and Technical Advisory Group. Whether the composition of the Commission is affected by the dissolution is critical due to concerns members have raised about the continuation of the TAG and the Secretariat to be assumed into SPC or SPREP.

Going by interpretation of the Vienna Convention rules the whole agreement would be dissolved hence the existence of TAG and Secretariat would be affected. Article 16 does not provide the alternative option to separate the provisions of the Agreement in case of dissolution.

The powers and functions of the Governing Council are set out in Article 6(2). The decision to dissolve may naturally affect adoption of work programmes and budget matters depending on when the ratification notices received by the Depositary and notifications to contracting parties are completed by the Depositary.

**Further implications on dissolution arise:**

- Dissolution 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 appear 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 to keep and merge with SPC/SPREP and those to place on the redundancy arrangements be undertaken.
- There is an obvious budgetary implication for Contract Obligations of staff contracts- any payouts would involve budgetary implications that needs 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.

- 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 2010 is perhaps an ambitious one.
- The evaluation of assets and obligations of SOPAC including donor funding implications may go well into 2010 and beyond perhaps impossible to achieve within this timeframe.

### **Implications on Suspension under Article 16**

Under Article 16, in the case of suspension the activities of the Commission are suspended. This may imply that the Commission itself remains in existence but the Vienna Convention on Law of treaties must be referred to for guidance.

Again as noted above the resolution to suspend the activities must be ratified by 2/3 of the members and that such suspension can affect the whole treaty unless otherwise agreed by members.

Whether the SOPAC as an organisation would remain intact would be considered from the guidance of the Vienna Convention. The suspension of activities is one of the key issues for consideration and how can the suspended activities be assumed by another regional organisation to be discussed further.

By Article 7(1) of the Agreement Secretariat is created and its responsibilities are spelt out in Article 7(2). The matters set out in this Article would be suspended including the work programs identified in the SOPAC Strategic Plan would also be affected.



In practical terms the effect of the overall suspension on the whole Agreement is the issue. Alternatively whether the members have otherwise stated another alternative in the SOPAC Agreement would be considered.

### **Implications of suspension under Vienna Convention Law of Treaties**

The Vienna Convention on Law of Treaties has certain rules in place governing the operation of Treaties and further regulates the conduct of contracting States to a Treaty.

As a general rule every Treaty in force is binding upon the parties that are parties to it and must be performed in good faith.

Consent of State to be bound by a Treaty is expressed through the ratification process. Such a consent is a free consent of the contracting State and not be influenced by anyone.

According to the Vienna Convention a suspension of a Treaty can take place if allowed by the Treaty itself as in the case of the SOPAC Agreement.

***Such suspension will affect the whole treaty unless provided otherwise. Only in certain specified circumstances separation of provisions is allowed. More so separation is not permitted in certain types of instances. See Articles 42, 43, & 44***

In this sense the SOPAC Agreement makes it clear in Article 16 that only the activities will be suspended releases the contracting parties from performing their obligations in the performance of the activities during the suspension. (Article 72). It follows therefore that the whole SOPAC Agreement would not be suspended but only the provisions governing the application of activities during the period of suspension.

### **Grounds for suspension/dissolution**

Consent of all parties must be obtained to suspend a Treaty. A suspension ordinarily cannot be invoked unless there is a material breach of the Treaty (Article 60) or if the Treaty is impossible to be performed or some fundamental change of circumstances has occurred.

In the SOPAC Agreement this aspect is silent and there are no specified grounds in the Agreement itself to invoke suspension of the Agreement. This is a fundamental legal gap and one where a Forum Leader's decision under a separate Agreement seems to play the pivotal focus and outside of the Vienna Convention standards.

Again the decision of the Governing Council has to be based on sound judgment of all the circumstances and assuming the Leader's decision is supported would be based again on a moral duty and not in the strict legal sense.

### **Gaps in the SOPAC Agreement raised by Suspension/Dissolution**

- Suspension too will affect whole Agreement unless the parties have agreed otherwise. In this case suspension will only affect the activities of the SOPAC as opposed to rest of the provisions.
- There are no grounds for suspension in the Agreement or for dissolution of the organisation for that matter. The decision of the Forum Leaders does not come within the provisions of the SOPAC Agreement because it is made by another body outside of the SOPAC Agreement. The Leaders decision does not constitute material breach, or impossibility to perform obligations or change in circumstances of the SOPAC Agreement, to warrant suspension or dissolution.
- In the Practical sense, there is no clear provision on how the rest of the provisions would operate without the exercise of or performance of the powers by SOPAC to undertake activities.
- There is no guidance on how the suspension is to be carried out in the practical sense and for this guidance may be made to the SOPAC Constitution or the Rules of Procedure.
- Article 16 (4) of 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.
- Likewise in the case of dissolution, 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.
- The SOPAC Agreement, the Constitution and the Rules of Procedure have been looked at to address both the suspension or dissolution issue but there are no clear defined procedures.

### **Options for Suspension of the SOPAC**

Having identified the implications and the gaps that currently exist what may be the practical option to implement suspension as the course of action to implement the Forum Leaders' decision has to be considered within the parameters of the Vienna Convention standards.

As noted the SOPAC Agreement does not explicitly cover the issue of suspension in terms of the manner of its implementation. In such absence Vienna Convention on Law of Treaties again would be used as a guide.

The option suggested by Vienna Convention on Law of Treaties is appropriate under the circumstances considering the multilateral nature of the SOPAC Agreement which is subject to ratification by the contracting Pacific States and governs their relations as State Parties between themselves and with SOPAC as a regional organisation.

Articles 65 and 67 of the Vienna Convention are most appropriate. In the former Article it sets down the procedure to be followed with respect to invalidity, termination, withdrawal or suspension of the operation of a Treaty. In the latter Article this provides for the necessary instrument to implement the suspension, termination or withdrawal of a Treaty.

**The steps are as follows in Article 65:**

1. A party must invoke a ground for suspension of its operation of the Treaty.
2. The party must be notify the other contracting parties of its claim
3. Such notification must be in writing and shall indicate the measure proposed to be taken with respect to the Treaty and the reasons thereof such as separation of relevant provisions of the Agreement on activities are not affected by the suspension and will continue to exist.
4. After a reasonable period (3 months is mentioned in the Vienna Convention) and no party has raised objection, the party making the notification shall proceed in accordance with the manner in Article 67 the measure it has proposed If objection has been raised then the parties shall seek solution through means indicated by Article 33 of the Charter of the United Nations or in accordance with dispute settlement stipulated in its own Treaty governing its operations.
5. The ratification process should commence after all the steps have been complied with as above.

**The steps in Article 67 are as follows to suspend the operations of the Treaty:**

1. An instrument (ratification) must be communicated to the other parties
2. Instrument must be signed by the Head of State, the Head of Government, or a Minister for Foreign Affairs

3. If the instrument is not signed by any of the above, the representative communicating it may be called upon to produce full powers.
4. The above instrument (of ratification) should be communicated as part of the ratification process

**NOTE:** In terms of the requirement of Article 16(4) of the SOPAC Agreement the foregoing identified steps may be used in the declaration to dissolve. In the case of suspension, there would be a further procedure on how to revive the organisation which is to be expressed on the same instrument of suspension.

### **Procedural gaps in the SOPAC Agreement, the SOPAC Constitution and SOPAC Rules of Procedure for implementation of Suspension of Activities**

The procedural gaps to implement suspension are noted. It follows that there are number of procedural difficulties in implementing the Forum Leaders' decision is now more apparent legally as the SOPAC Agreement, the Constitution or its Rules of Procedure do not provide any grounds for suspension or dissolution of the Agreement or provide appropriate options to facilitate such suspension or dissolution.

The first difficulty is whether the rationalization of activities as noted in the Forum Communiqué is enough to warrant suspension within the meaning of Articles 60 (material breach), 61(impossibility to perform obligations in a Treaty), and 62 (Fundamental Change in circumstances) of the Vienna Convention on Law of Treaties, is really a matter for the Governing Council to decide to follow the above steps as outlined.

The second difficulty is that the Forum Leaders Decision is made under another regional Agreement, the Forum Agreement and is not made within the SOPAC Agreement itself to warrant addressing the suspension. This is a legal issue and one which questions the application of the Leaders decision on SOPAC.

As previously noted SOPAC is an observer to the Forum meeting and therefore the Forum Leaders' decision is not binding on it as an organisation to implement suspension of its activities. It is further noted that certain members of SOPAC are not members of the Forum and therefore the Leader's Decision would not bind third parties.

This is further complicated by the lack of defined decision making provisions in both the Forum Agreement and the SOPAC Agreement to ascertain the clear legal link to bring the Forum Leaders decision binding on other regional organisations.

The third difficulty is the dispute settlement mechanism assuming member countries object to these changes. The SOPAC Agreement does not provide any provisions on dispute resolution and therefore Vienna Convention standards may be applied.

In the final analysis the most notable difficulty would be the practical aspects of completing all the processes before the by 2010 deadline and may be an issue. It seems SOPAC has not undertaken appropriate assessments of the effects of suspension/dissolution on its existing work programmes, its assets and contractual obligations on its procurements, staff redundancy arrangements or donor funding arrangements, some are contractual in nature.

This assessment exercise is important and a prerequisite within Article 16 to be undertaken before the decision is taken by the Governing Council to implement suspension/dissolution within the deadline aside from each national government to take steps to implement the same. Thus national action would add further delays due to the ratification process which experience has shown in many Pacific Islands Countries a slow process.

### **Options to revive the SOPAC Organisation**

As highlighted above, Article 16(4) of the SOPAC Agreement is relevant. That provides 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. The Agreement leaves it to the discretion of the Council to prescribe the procedure.

The SOPAC Constitution and the Rules of Procedure do not offer much assistance in terms of procedures to revive the organisation because there are no such procedures in place. In the absence of all this, again the Vienna Convention on Law of Treaties should be used as a guide.

A number of Articles of the Vienna Convention appear to be relevant. As noted the general rule would be that a suspension would affect the whole Treaty unless provided otherwise by the Parties. (See Article 44) Separation of some of the provisions of the Treaty therefore is possible and must be explicit in the Treaty itself.

In this case the suspension of the activities has been agreed to by the SOPAC members reflected in Article 16 of its Agreement. In terms of revival of the Agreement it means the suspension of the activities needs to be uplifted again. This must be reflected in the procedure to revive in the declaration.

The provisions dealing with activities of SOPAC may need to be isolated or separated from the rest of the Agreement. In this instance, relevant Articles of the SOPAC Agreement would be:

- 2 (Purpose)
- 6(2) (Powers and Functions of Governing Council)
- 7(1)&(2) (Secretariat itself and its Responsibilities)
- any other article which bears on activities approved by Governing Council

In essence the above identified Articles relate to performance of activities and would be suspended whilst the rest of the Agreement remains unaffected.

However, in line with the Forum Leader's decision a better approach perhaps is to clearly state in the declaration that the above named articles of the SOPAC Agreement would be suspended in terms of performance of the activities within the SOPAC Agreement consistent with Article 16 but reorganisation of those activities would be implemented elsewhere outside of the SOPAC Agreement in consultation with other regional organisations.

The legal issue is whether once activities are suspended, could the activities be continued elsewhere? Is it possible within the existing provisions which continue to apply? It all depends perhaps on the resolution covering suspension to clearly indicate the intention of the Parties that the suspended activities would apply elsewhere as merged activities with SPC and SPREP activities.

In terms of revival the parties would then need to indicate these Articles in the declaration to revive as the rest of the provisions remain unaffected. In fact the continued application of the rest of the SOPAC Agreement would not be unjust for the parties. Again that needs to be ascertained from further analysis of possible implications.

The parties also need to indicate on what basis or under what circumstances the provisions on suspension of the activities of the Treaty would be uplifted or terminated in due course. In this regard, in practice, individual consent of the parties needs to be obtained again by way of ratification to revive the organisation.

By Article 72 of the Vienna Convention, the declaration should also indicate that during the period of suspension, the parties should refrain from acts tending to obstruct the resumption of the operation on the suspended provisions of the Treaty.

Nevertheless the other option is to negotiate a new Agreement on the same subject matter to replace the Agreement with suspended provisions as indicated by Article 59 of the Vienna Convention.

The later Agreement would replace the Agreement with suspended provisions with clear provisions in the new Agreement stating this intention. However negotiation of a new Agreement could be time consuming and may be seen as tending to obstruct the resumption of the Agreement with suspended provisions as noted above.

### **Implications on revival of SOPAC**

- It would be time consuming for revival of SOPAC applying the same process in terms of the ratification process.
- SOPAC Agreement remains with suspended provisions on performance of activities.
- Revival of SOPAC by declaration would mean member States undertake internal ratification process under their laws and again the timing for revival of the organisation would be delayed until all ratification processes are fully completed by 2/3 of the contracting parties.
- Revival would have further implications on programme delivery, budget and continued existence of the organisation and reorganisation of the suspended activities, again in consultation with SPC/SPREP.
- What role should SOPAC play if the suspended activities are revived? Should the original mandate be maintained? Again this is a practical issue for consideration because the rest of the Agreement would appear to exist.
- Host agreement implications for privileges and immunities and other benefits for SOPAC and its staff would be varied in light of the revival of the suspended activities.

In all fairness the consideration of whether SOPAC should be dissolved or only its activities be suspended is a matter for the Governing Council to decide in consideration of all the implications associated with such a decision.

**A decision to dissolve or suspend requires ratification by two thirds of the Members. Examine the process (es) that will be required at the national level to enable countries to ratify such a decision.**

The SOPAC Agreement makes it explicit that the Governing Council's Resolution to dissolve or suspend must be ratified by 2/3 of the members. Ordinarily national governments would have to subject such resolution to ratification in accordance with their respective constitutional laws.

Many of the judicial systems of the Pacific Islands are influenced by the British, French, and American type of legal systems. What happens at the national level is dependent on what each national law provides.

For many of the countries consent to be bound by the resolution to dissolve or suspend must be given by the respective State and thereafter such notification is referred to the Depositary. This is then followed by enactment of national legislation to give it force of law for those which follow the British type of judicial system.

For others the ratification of the resolution becomes binding on the date depositary receives the instrument of ratification and does not require subsequent national law to give it force of law. This is followed in respect of countries which follow the American type of legal system.

Some of the members which are territories would rely on the States which are responsible for them in international/foreign relations.

I refer to **Appendix B of a “Previous Report on the Legal Framework supporting Regional Organisations in the Pacific and the Legal Basis for Reform” by Brenda Heather-Latu** and acknowledge her work. The Appendix B summons up well which organs of Government are responsible for ratification in each Pacific Island Country.

From that Appendix B, it is implicit that there would be a process involved in each country in respect of ratification. Many Countries have ratification process inbuilt into relevant Government Handbooks for Departments to follow. Again this is dependent on each country procedures.

For many countries, consultations would have to be conducted amongst different government agencies or consultations at State (provincial) or National levels for submissions which either needs to go to Cabinet/Executive or Parliament/Congress or to the President or a Prime Minister depending on who/which body needs to approve the ratification.

Whatever the requirement, however so done and in what form, at the end of the day consultations must be conducted and briefings organized etc for every stakeholder to be consulted. Normally we can expect delays.

From experience, the process of getting submissions through to Cabinets involves going through different Departments or Committees or before designated Ministers before Cabinet gets to consider the same. Again the different countries have their own requirements. Delays would be experienced as is quite common.

Submissions for ratification normally would be referred to certain government Departments to clear. For instance legal aspects or legal clearances would normally come from Justice Ministries/Departments. Other Departments such as of Foreign Affairs would be consulted where it involves regional organisations for appropriate advice. It depends on the subject matter and consultation with relevant Department is dependent on this. For instance for SOPAC matters some countries require Mining and Geological Survey Departments to be consulted before further referrals to the next designated authority.

A critical factor is the issue of national approvals to dissolve or suspend SOPAC. In this regard whether approval would be easily obtained remains to be seen. Non action by non members of the Forum such as Guam is another factor and whether their non action would make any difference is a practical issue.

Some countries have required numbers needed to approve resolutions of this nature at Parliament level. For instance 2/3 majority or absolute majority may be required and again depends on what the legal requirements for approvals are in each country.



Thus, at the Parliament level normal debates would be required and this may take time depending on when Parliaments meet and what is on their Agenda. Normally Parliament/Congress does not meet everyday so that's a practical difficulty to bear in mind.

It follows that for ratification at the national level depends very much on the laws and the processes involved in each country. There is no standard process. Many countries insist on transparency therefore consultations are required in many countries.

In the final analysis the process for ratification would definitely experience delays at the national level and this is obviously not uncommon for the Pacific Island countries. A good precedent is the ratification required for the new Agreement for the Establishment of the Pacific island Forum signed by all 16 members in 2005. Up to now only three countries have ratified it.

**In summary:**

- Realistically the deadline of by 2010 is an ambitious one to complete all the processes to suspend or dissolve SOPAC.
- Delays will definitely be experienced due to different timings of ratifications by member governments and the different processes involved at member (country) level in terms of consultation, coordination and action on ratification.

**Consider options for the eventuality that two thirds of the Members are not in a position to ratify by the time of the next annual session, and thereby not able to make a decision on the date of dissolution or suspension of the Commission.**

Assuming two thirds (2/3) of members are not in a position to ratify by the time of the next annual session then the following options could be considered:

**Option one:** A progress Report should be made to the Forum Leaders by the Chair of the SOPAC Governing Council to be made aware of the slow progress and the unrealistic timeframe to achieve the desired outcome of the Forum Leader's decision.

Underlying reasons for this approach is because of the following:

- 1. 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.
- 2. SOPAC has not completed or undertaken assessments of its assets and obligations in the event suspension/dissolution takes place. In the context of Article 16 this must be done prior to the dissolution or suspension.
- 3. Staff redundancy and redeployment arrangements have not been undertaken and should be considered together with the assessments of the assets.

- 4. Assessments of possible merge of SOPAC activities with SPC and SPREP have not been completed.
- 5. 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 two:** It is recommendable for SOPAC to proceed with the outstanding points from 2-5 as indicated 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 Three:** Make a possible 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 programme has been successful; member States would need advice from a technical organisation on future cooperative contractual arrangements for the extended areas for seafloor mining; legal and policy issues and other possible explorations to be undertaken. This is to encourage economic growth for Island States and an emerging issue SOPAC is best mandated to deal with.

**Provide options for the Commission to consider in order to decide on the manner in which the assets and obligations of the Commission should be liquidated, distributed or borne.**

**Option one** is to 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 Article 16 must be undertaken prior to the dissolution or suspension of the Commission.

**Option two** is to provide an analysis of all the contractual obligations of SOPAC with service providers regarding existing procurements and including overseas donor funding which are the subject of separate agreements and determine time frames or possible lapse of each arrangement.

**Option three** is to address two matters:

- The redundancy arrangements for staff and possible redeployment in light of mergers of the work programmes of SOPAC into SPC and,or 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 providing synergies of the activities of the three organisations and which organisation will deal with what activities.

**Option Four** is to address the Budget and Liability issues of the Commission arising from the above assessments.

### **TERMS OF REFERENCE (iii)**

#### **Comment on the possible legal implications for SPC and SPREP of absorbing any, or all, of SOPAC's work programme functions**

##### **The Pacific Community Agreement**

The Agreement establishing the South Pacific Commission (with the most recent name change to the Pacific Community in 1997) goes back to 1947, making SPC the oldest intergovernmental organisation with a reasonable size membership.

The focus and mandate of the organisation seems to be wide and includes cultural, economic, social and other development issues.

Over the years and due to changes in work programmes and direction of the organisation has led to assuming other responsibilities such as taking on the Regional Maritime Programme within its corporate plans and operational policies as opposed to strictly bringing it within the legal mandate of the Agreement, understandably to avoid amendments to the Agreement and lengthy ratification process in member countries.

The three organisations need to work on the analysis of work programme and activities of SOPAC to see where the synergies are before agreement is reached for the merge in accordance with the decision of the Forum Leaders to split some of the activities of SOPAC between SPC and SREP. This would depend on the outcomes of the assessments done.

It is not definite at this stage whether the analysis of the synergies of work programmes of the three organisations is being undertaken and much of their recommendations should guide where the merge of activities would be implemented.

##### **Capacity to absorb**

The capacity of SPC to absorb some of the activities of SOPAC is perhaps the critical factor and that decision would be based on existing strength of staff, office space and delivery of service to member States. In whatever form this may take, issues for budget increase in staff and office space would naturally be addressed.

It seems the merge of SOPAC activities into SPC would still increase the budget of SPC so whether this rationalization is to cut back on budget is an important consideration.

In which SPC Divisions some of these programmes will be merged again depends on work programmes and the strength of their technical staff. SOPAC functions are highly technical and specialized and, whether current capacity of SPC can accommodate these are matters for consideration. At the end of the day service delivery to members must be encouraged and improvements seen to happen.

### **Changes required implementing rationalization**

There will be change in programme delivery and improved service delivery alike and much depends of what are left out or included after the synergies of activities have been analysed.

In essence amendments will be required not to the Agreement but more in the SPC Constitution, and Strategic Plans of the various Divisions of the SPC. This is a matter for the decision making process of the SPC Governing Body to approve before the appropriate amendments are made to the **SPC Constitution, Corporate Plan or Strategic Plans.**

One of the practical issues is the likelihood of the service delivery of programmes to be affected when Divisions are either downsized or increased.

A comparison can be made with reference to the SPC Regional Maritime Program which initially was with the Forum Secretariat. Due to reorganisation of the Maritime Programme years later saw it merged with SPC activities.

Thus the legal work programme has been difficult in some sense with increase in security and other aspects of maritime terrorism for example with only one legal advisor servicing a reasonable sized membership of countries can be daunting. The creation of PIMLA has helped with addressing some of the shortcomings of the legal division.

Over the years it has been difficult to sustain the traditional IMO obligations arising from maritime shipping in the region with increase in new issues. This is cited as an example of the workload within the staff and budget constraints.

**In summary** the analysis of synergies of activities should be undertaken now to identify which areas of activities will be merged with SPC and its impact on budget and related office space and staff to be identified. Realistically service delivery to member States at the end of the day should be the main concern.

### **The Pacific Regional Environment Programme (SPREP)**

The SPREP Agreement essentially establishes the SPREP and gives it the status of a body/organisation and accords it privileges and immunities as an organisation.

Whilst the functions are not stipulated in the Agreement itself, SPREP has played a predominant role and has mandate in implementing all environmental obligations in the region and further plays the liaison role for United Nations Environment Programme in the region.

One of the interesting aspects about SPREP is the administration of a number of Regional Multilateral Environment Agreements. It is observed that the mandates of these Agreements are oriented or focused on protection and conservation of the marine environment which may appear to conflict with the role of some of the activities of SOPAC which are predominantly development in nature. This could be a fundamental issue to consider which of the activities are to be assumed by SPREP.

### **Rationalization**

As noted earlier, any efforts to rationalise must draw away from affecting the service delivery of the service to the members, that is the result must be improved service delivery. More-so the budget aspects of rationalisation are important and whether an increase or decrease in the budget is also important to identify earlier before definite steps are taken to the merge of the work activities.

The service delivery of the activities to the members should be the key issue and avoid any possible potential conflicts which could arise when addressing the mandates of the two organisations dealing with conservation versus development work programmes. This could lead to practical problems in implementing if one organisation assumes both mandates.

As indicated above, any change in the programme delivery or service delivery is always a concern and therefore synergies of activities to be undertaken with these potential conflicts in mind.

### **Capacity to absorb**

The decision to merge activities raises the issue of the capacity to absorb. In the analysis of the synergies of activities to be undertaken it should point out any expansion or shortcomings of the proposal. Whether current capacity of SPREP can absorb the increase of activities is a matter for the analysis to determine.

### **Changes required implementing the rationalisation**

Like changes to SPC, the changes to SPREP will be made to the relevant **SPREP Constitution, and the SPREP Corporate Plan or SPREP Strategic Plan** to accommodate the merge of activities following the analysis done on the synergies of the various activities of both SPREP and SOPAC.

**In summary**, the budget implications would arise depending on whether rationalisation would increase/decrease budget. More so whether the merged activities would affect service delivery remains to be seen but in all fairness would depend on the current capacity of SPREP to absorb the new functions.

The issue of conservation versus development mandates of the respective organisations should be a deciding factor and probably one that realistically could create problems for implementation. Again this aspect is considered when synergies of activities are being considered.

**TERMS OF REFERENCE: (iv)**

**Provide comments on any other legal issues the Consultant may consider relevant.**

One of the important aspects of the RIF Review is in the minds of many to integrate, streamline and improve service delivery of work programmes of the various regional organisations. In all service delivery to member States must not be affected to fall out of the aims of the Pacific Plan, one of which is to improve the economies of the small island States to be sustainably managed.

It seems some of the regional organisations are too important to rationalize their functions. The Forum Fisheries Agency is one such Agency and case on point due to the international and regional treaty obligations of its member States and this helps to provide guidance on ways in which to sustain SOPAC as an organisation without affecting its activities. To rationalize FFA functions would be difficult due to the treaty obligations of its members.

The SPREP as an organisation also has important responsibilities in environmental protection and sustainable management of the resources of the region and avoidance of pollution of the marine environment of the region. Much of this is also drawn from treaty obligations of its members.

To rationalize activities of SOPAC with SPREP is fundamentally a cause for concern. The latter simply has a conservation/protection role and merging it with development activities of the former could lead to potential conflicts.

The SPC as an organisation with the most varied functions could be the only organisation probably able to take on the additional activities of SOPAC. It has certain responsibilities able to synergise with activities of SOPAC but an analysis would be recommendable.

In fairness, SOPAC as an organisation has an independent role to play in the exploitation of the non living resources of the oceans. One of the fundamental directions now is the whole issue of mineral exploitation of the sea, a whole new

frontier in potential economic development and this comes out of the 1982 UN Convention of the Law of the Sea.

It follows that the Law of the Sea and Climate Change issues needs to be addressed appropriately. These factors play a role; hence affect delivery of vital services to member countries. These are matters arising from Treaty obligations.

The whole issue of oceans being the sinks affecting climatic conditions hence affecting the atmosphere and the whole hazards phenomena is important and cannot be downplayed. The magnitude of possible loss of life of vulnerable members of SOPAC from natural disasters should be avoided. This is a priority for the survival of vulnerable communities in the region. Thus any reform should not undermine the interest of the members.

In terms of potential economic development the Law of the Sea opportunities should not be missed. The following points should be considered by SOPAC:

- Development issues for mineral exploitation of the seafloor of member States is becoming important and gaining momentum in the region with increased numbers of offshore mineral exploration licenses being granted. Offshore negotiations in mining agreements in both continental and extended continental shelf areas should be seriously considered as a potential for economic development within the aims of the Pacific Plan.
- Exploitation of the non living resources is a big area of development and will bring potential economic benefits to the region as a whole. That opportunity should not pass or be loosely dealt with as a merged activity with some other organisation.
- Countries need to prepare for cooperation of the non living resources of the sea floor and assisted with development of proper legal and policy frameworks in place including negotiations for contracts into seabed mining, a new area of prospects with large mining companies in the immediate future.
- Extended continental shelf work currently overseen by SOPAC in providing assistance to its members would obviously be jeopardized. 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. This is so fundamental in the existence of a State per se. This re-emphasizes the role of SOPAC in addressing these issues.
- There is no adequate treaty impact assessment of the regional organisations and the various treaty obligations of its member States. There should be a system in place to coordinate this role so that proper advice is given to the regional organisations and ultimately to its members as well.

This has not been adequately provided or undertaken over the years. This type of assessment also bears on work programmes for implementation both at regional and national levels.

**In summary** it would be fair to say 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.

### **Conclusion**

In the strict legal sense the Forum Leader's decision is not binding on observer organisations such as SOPAC. The decision making provisions do not show any legal relationship between the Forum Leaders and the other regional organisations. The former's decision is not binding on the latter but perhaps for SOPAC it is a moral duty to comply with the Forum decision, not a legal one.

In any case the legal issues must be raised and that possible reviews could be undertaken at some point to strengthen the existing gaps as highlighted above to avoid possible conflicts in interpretation of the Agreements or decision making.

Forum Leaders have made a decision which some may argue is legitimately expected of its members to implement due to the consistent practice of its decisions on its members and other regional organisations.

Having said that however realistically the time frames for full implementation of this decision may not be achieved within the next annual session of the council therefore consideration perhaps be made for the SOPAC Governing Council to provide a progress report to the Forum Leaders.

In this regard it may be appropriate to consider the opportunity of a review perhaps of the Forum decision but based on a strong and sound case (such as sea floor non-living resources development and adaptation to climate change issues) based on the role of SOPAC if the outcomes are slow in being achieved.

As a matter of statutory interpretation common in many jurisdictions, the Forum Leaders have an implied power to alter their previous decision assuming procedural and legal issues complicate the situation. This may be a safer way of approaching the whole issue because it appears the by 2010 deadline may not be achieved on time.

The foregoing discussions raise many legal and practical issues which need to be considered in full before SOPAC decides on the approach to take. In the final analysis the decision to dissolve will dismantle the organisation. It may be in the best interest of the members to suspend the activities of SOPAC instead.



Whatever the decision it still raises many issues as highlighted above and whether the desired outcomes will be achieved within the target date due to the practical difficulties anticipated.

The option to allow some form of review of the Forum decision maybe possible if it is impossible to bring everything to a completion by 2010. That should be based on a good strong case for SOPAC based on full assessments of the new developments in the areas of seafloor exploration and potential mining and the need for assistance to members in developing cooperative legal frameworks for the continental shelf areas of its members.

## ANNEX 1

### Pacific Islands Applied Geo-science Commission (SOPAC)

#### Terms of Reference

For a Study of the Legal and Contractual Issues pertaining to the SOPAC Commission should it decide to Dissolve or Suspend its Operations

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#### Background

The Pacific Island Forum Leaders Communiqué, October 2007, paragraph 19 refers to the Regional Institutional Framework Review and in particular 19b to SOPAC, which states *“the need to rationalize the functions of the Pacific Islands Applied Geo-science Commission (SOPAC) with the work programs of the Secretariat of the Pacific Community (SPC) and the Secretariat of the Pacific Regional Environment Program (SPREP) with the view to absorbing those functions of SOPAC into SPC and SPREP”*.

In determining a response to the Leaders decision, SOPAC Council in November 2007, recognized the critical need to adhere to a set of principles of:

- transparency;
- timeliness;
- cost effectiveness;
- focus on the RIF objective of creating an institutional framework that further improves service delivery to PICTS and assists with effective implementation of the Pacific Plan;
- consideration of staff welfare; and
- the need to address the full range of legal, organisational, administrative, governance, membership and financial implications.

The Agreement Establishing SOPAC (1990), in Article 4 establishes the legal status, privileges and immunities of the Commission. Article 16 addresses the issues of dissolution and suspension, other relevant documents include the Staff and Finance Regulations.

The objective of this study is to address the full range of legal issues that the Commission Members must consider should the eventual outcome be dissolution or suspension.

## **Terms of Reference**

The Consultant is required to carry out the following tasks and report to the SOPAC Director.

- (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.
- (ii) In regard to dissolution and suspension (Article 16):
  - 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.
  - A decision to dissolve or suspend requires ratification by two thirds of the Members. Examine the process (es) that will be required at the national level to enable countries to ratify such a decision.
  - Consider options for the eventuality that two thirds of the Members are not in a position to ratify by the time of the next annual session, and thereby not able to make a decision on the date of dissolution or suspension of the Commission.
  - Provide options for the Commission to consider in order to decide on the manner in which the assets and obligations of the Commission should be liquidated, distributed or borne.
- (iii) Comment on the possible legal implications for SPC and SPREP of absorbing any, or all, of SOPAC's work program functions.
- (iv) Provide comments on any other legal issues the Consultant may consider relevant.

The Consultancy is for a period of 10 working days, for which the Consultant will be paid a lump sum payment of FJD\$10,000.

A draft report, submitted electronically, and in Microsoft Word format by 3<sup>rd</sup> June 2008. Following comments from the Director, the final report is to be submitted by 15<sup>th</sup> June 2008.

**SOPAC Secretariat, 30<sup>th</sup> April 2008**