

**REPORT
ON
LEGAL IMPLICATIONS
OF CERTAIN OPTIONS
RELATING TO THE RATIONALISATION
OF SOPAC'S WORK PROGRAMMES**

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1. **BACKGROUND**

1-1 In **2005** the Pacific Islands Forum adopted the ‘Pacific Plan’ as a framework to facilitate the strengthening of regional cooperation and integration amongst member countries which was also to be reflected amongst its organizations. As part of its implementation plans a regional integration framework “RIF” was developed in order to rationalize the resources used by, and available to the region, eventually resulting in certain decisions by the Forum Leaders in 2007 and 2008.

1-2 In **January 2009** the CEO’s of SOPAC, SPC and SPREP “the three CEO’s” jointly commissioned an independent consultancy to:

‘... analyse, assess and validate the most appropriate regional institutional arrangements based on a range of options provided by the CEO’s of SOPAC, SPC and SPREP’.

1-3 On **6 April 2009** the consultants presented a draft of their Final Report: Part 1 which had 3 recommendations which were:

1. The ICT-Outreach component be coordinated and absorbed by SPC.
2. The CROP lead organization coordination role for the pacific energy sector and petroleum advisory services be transferred to SPC. The components of renewable energy, energy efficiency and energy conservation¹ should be integrated into a new environment and resource management organization.
3. **A re-branded regional environment and resource management organization (potentially called the “Pacific Environment Resources Commission”) be established by integration of the ‘core’ functions and programmes of SPREP and SOPAC, while taking into account the recommendations of the SPREP Independent Corporate Review (ICR) ‘Recommendation 3’.**

1-4 On **12 May 2009** after further consultations with the CEO’s the Consultants presented a further draft Part Two of their report, recommending an additional option to Recommendation 3 in the earlier draft report which was:

‘That the SOPAC ‘core’ work programme be established as a division of SPC’

Included in the draft were implementation plans for both options.

1-5 In mid **May 2009** the CEO’s decided to jointly commission a detailed legal analysis of the recommended options as well as to make recommendations for their effective implementation in light of the existing favouring legal instruments of SOPAC, SPREP and SPC implementation plan.

1-6 On **Wednesday 3 June 2009** the three CEO’s further defined the second option to emphasise the establishment of the SOPAC core work programme (excluding IT and Energy which are already destined to be folded into existing SPC programmes) as a division of SPC. Three components of the SOPAC work programme would be transferred to SPREP. Further details would be discussed in a meeting in the week commencing 8 June 2009.

1-7 The following report begins with a review of the institutional back drop against which the totality of the current work is being taken, followed by a critical legal analysis of the particular options considered by the CEO’S of the three organizations, and then seeks to identify and assess the practical requirements for implementation, as well as any collateral matters which affect due implementation.

¹ Noting the role of other CROP Organisations who have mandated responsibilities within the pacific energy sector

2. EXECUTIVE SUMMARY

In 2007 and 2008 the Leaders of the Pacific Forum countries agreed to rationalize the functions of SOPAC with the work programs of SPC and SPREP and directed the heads of the three regional organizations to present the new institutional arrangements and implementation plans to the 2009 annual Forum meeting.

At the beginning of 2009 in the course of progressing the Leaders directives, the three CEO's commissioned a Consultancy to 'analyse, asses and validate' their proposed arrangements to rationalize the SOPAC work programme'.

As an outcome of the resulting Consultancy report (submitted in draft form and in then in separate Parts in April and May 2009), the three CEO's have agreed to progress and develop implementation plans in respect of two options presented by the Consultants which are:

1. **The establishment of a rebranded regional environment and resource management organisation;** and
2. The establishment of SOPAC as a division of SPC.

In the first week of June 2009, the CEO's confirmed the second option to involve the incorporation of most of the SOPAC work programmes with SPC (with three components being transferred to SPREP) and for these functions and work programmes to be established as a specific division of SPC.

So Option 2. as proposed is:

2. The establishment of the SOPAC work programmes as a division of SPC.

In assessing the two options according to legal principles, it is clear that:

- Both options are capable of implementation under the SOPAC, SPREP and SPC governing agreements themselves or in accordance with the Law of Treaties;
- Either option will require the approval of the member countries who are parties to the respective SOPAC, SPREP and SPC agreements 'the Agreements';
- Such approval must be sought through the prescribed process which is particular to each body. This will require the passage of resolutions which are agreed to by the governing bodies and where necessary a treaty change which will require formal ratification by all parties to such treaty;
- The transfer of work programmes to either SPREP or SPC which are identified as being within the particular organizations existing mandate can be made effective through the passage of an ordinary resolution by the governing council of the respective organization, without the need for a formal amendment to the respective treaty documents.
- The transfer of all SOPAC work programmes away from the SOPAC organization will however require the termination of the SOPAC Agreement insofar as the principal effect of the transfer of all activities renders the treaty body (which is the Commission) with no practical and the treaty without any purpose.the suspension of the Commission may also be possible;
- Implementation of either option will also require the approval by the governing bodies of detailed and comprehensive implementation plans and transitional arrangements;

In assessing the risks associated with the two options, the following are identified:

- The support of member countries on the governing bodies is critical to the success of a particular option and the opposition of one party to any of the resolutions which give effect to either option will prevent the progress of such option to implementation (although SPC does not require unanimous support as is required by SOPAC and SPREP);
- The support of the Forum Leaders is critical to the success of any proposed options given the number of Forum Island countries who are members of the governing bodies;

- Option 1 (as presented by the Consultants) is not in strict accordance with the Forum Leaders decisions in 2007 and 2008 requiring the rationalization of SOPAC functions into SPREP and requires further approval by the Forum Leaders. A further decision will be required which supersedes and replaces the earlier directives from the Leaders in terms of the rationalization of SOPAC and its functions;
- A slight alteration to the details of Option 1 could however result in a more practical approach to implementation which focuses on the existing mandate of SPREP

In respect of **Option 1:**

- Both SOPAC and SPREP governing council's will be required to pass resolutions in order to implement the recommendation;
- The preferred and most effective path for implementation is to facilitate the transfer of SOPAC work programmes into SPREP using the organisation's current mandate, resolve to change the name of the organization and schedule a process for review whilst or after the work programmes have been transferred.
- The recommendation requires an initial merger of the existing work programmes of both organizations and the conduct of a complex reform process to guide the reformation of a new body;
- The option in the form proposed by the Consultants does not itself lead to the rationalization of SOPAC functions but submits both organizations to a further process of review and reform aimed to be effective by the end of 2011;
- The change of name and incorporation of SOPAC work programmes into SPREP is capable of implementation without the need for an amendment to the SPREP treaty.

In respect of **Option 2:**

- The transfer of work programmes and the establishment of a new division can be implemented by a decision of the Conference of SPC and would not ordinarily require any amendment to the Canberra Agreement;
- This recommendation proposes the rationalization of SOPAC functions and work programmes through their transfer to SPC (in large part) with three components of the work programme transferred to SPREP;
- This option satisfies the part of the Leaders decision which requires that there not be a substantive diminution in SOPAC functions as a result of rationalization.

Conclusions

The two options which have proposed are capable of implementation through the operational and administrative transfer of actual work programmes from SOPAC to either SPC or SPREP or both.

The broad mandates of both organizations are cast in suitably broad terms (in the case of SPC) and ranges over a widely defined category of responsibility (as in the case of SPREP) so as to provide a basis to support the use of either option to fulfill the objectives of the RIF Process and the Leaders intentions in making their 2007 and 2008 decisions, subject to final determination by the respective governing councils.

3. TERMS OF REFERENCE

PURPOSE OF THE CONSULTANCY

- 3-1 The principle purpose for the legal Consultancy is to assist the CEO's of SOPAC, SPREP and SPC to identify the legal aspects of any proposed institutional arrangements (or any of its aspects) and provide a critical and assessment of the available legal options of any proposed institutional arrangements (or any aspects of those arrangements) which will achieve the most optimum rationalization of SOPAC programmes.

SCOPE OF THE CONSULTANCY

- 3-2 The consultant must undertake analysis and provide responses in the following areas:

a) Re-branded Organisation

- (i) Given that recommendation 3 called for the integration of the core functions and programmes of SOPAC and SPREP under a reformed, re-branded organization, does this imply a merger of the two organizations?
- (ii) Would the current SPREP Treaty and mandate allow for what is intended in the recommendation – “a re-branded regional environment and resource management organisation (potentially called the “Pacific Environment Resources Commission”) be established by integration of the ‘core’ functions and programmes of SPREP and SOPAC”?
- (iii) Would the current SPREP Treaty and mandate allow for the SOPAC core work programme to be rationalised into SPREP?
- (iv) What specific amendments are required to the SPREP Treaty and how can these be accomplished (including legal and governance processes) in order to achieve implementation of the recommendation 3
- (v) What implications does this have for the Letter of Agreement Establishing SOPAC? If so, what legal impediments arise, such as `contract agreements, transfer of assets and liabilities, location and host agreements. How best could these be addressed to achieve timely, effective implementation of recommendation 3? Consideration should be given to issues such as timeframes to achieve key legal milestones and processes.

b) SOPAC as a Division of SPC

- (i) Does the Canberra Agreement and mandate allow for the establishment of the SOPAC core work programme as a Division of SPC.?
- (ii) If so, what specific amendments are required to the Canberra Agreement and how can these be accomplished (including legal and governance processes) in order to achieve implementation of this option.
- (iii) What implications does this have for the Letter of Agreement Establishing SOPAC? If any, what legal impediments arise, such as contract agreements, transfer of assets and liabilities, and how best could these be addressed to achieve implementation of this option?

c) Other General Assessments for both Options

- (i) Provide a critical analysis of the risks associated with all legal, fiscal and contractual (including bilateral and multilateral obligations) and provide suggestions to remove reduce the impact of or minimize such risks.

4. HISTORICAL BACKDROP TO CURRENT ACTIVITIES

4-1 The examination and assessment of the Pacific region's shared resources have been a feature of its activities since the early **1970's**, and have ranged from the 'single regional organization 'SRO' movement, to the formation of SPOCC (the meeting of the region's ten independent service agencies), followed by the **1995** Siwatibau review of the Forum Secretariat; the transformation of SPOCC to CROP, the Siwatibau/ Muller SOPAC – SPC Integration Study Report in **2000**; the Eminent Persons Review in **2004**, followed by the adoption by Forum member countries of the Pacific Plan in **2005**.

4-2 The Eminent Persons Review's recommendations, particularly in respect of the provision of regional services, focused upon the impact and delivery of services by CROP agencies to the region. These recommendations were, in large part, further developed in the Pacific Plan and made effective as part of the broad mandate for the Pacific Plan Action Committee 'PPAC' (chaired by the Secretary General) which was required to examine the region's institutional framework "RIF":

'... looking for areas of significant improvement that would enhance the capacity of CROP agencies in providing top quality technical services of critical value in attaining planned objectives in development'

4-3 The PPAC commissioned the 'Strengthening Regional Management' Report in **2005** (commonly referred to as the Hughes report) which was in turn interpreted by the Tavola Project Report – **RIF1** in **2006**, which made revisions to the Hughes Recommendations and was followed by the Pangelinan Team Report 'The Pathway Towards Quality of Service from Pacific Regionalism' – **RIF2** in **2007**.

4-4 In **2007**, the Forum Leaders, having regard to the **RIF1** and **RIF2** reports and their respective recommendations, made certain decisions at their annual meeting reflected in a Forum Communiqué in which the Leaders agreed to:

"(b) the need to rationalize the functions of the Pacific Islands Applied Geoscience Commission (SOPAC) with the work programmes of the Secretariat of the Pacific community (SPC) and the secretariat of the Pacific Regional Environment Programme (SPREP) with a view to absorbing those functions into SPC and SPREP"

4-5 Of note, the Forum Leaders decision did not accept the RIF 2 Team's recommendations which proposed utilizing the three pillars of the regional institutional framework (comprising of education, of political and technical services), and that all technical agencies be folded into an expanded Pacific Community with four (4) sectoral directorates consisting of:

Marine Resources based in Honiara

Land Resources based in Suva

Social Resources based in Noumea

Transport, Communication & Infrastructure based in the Northern Pacific

together with one (1) cross sectoral directorate for **Environmental Protection** based in Apia.

4-6 The RIF2 recommendations, in general, proposed a significantly expanded SPC which would incorporate the functions of existing regional organizations (such as FFA, SPREP, SPBEA, SPTO) which would then be reorganized and combined with the existing functions and work programmes of SPC under four sectorial directorates within SPC.

4-7 However, the Leaders decided in response to the RIF2 Report to instead rationalize the functions of SOPAC into SPC and SPREP, which it was anticipated would necessitate the transfer of all existing SOPAC work programmes into either SPC and SPREP, and thus the expansion of those two organizations either with additional functions, or expanded legal mandates. The collateral result of the decision would be the continuation of SPREP, the expansion of the work of both SPREP and SPC and the eventual dismantling of SOPAC as a separate entity.

4-8 In **2008**, the Forum Leaders:

- (a) recalled their 2007 decision on the rationalization of SOPAC functions into SPC and SPREP, without any substantive diminution in SOPAC functions, and the merger of South Pacific Board for Educational Assessment (SPBEA) with SPC;
- (b) expected that all work to define the new institutional arrangements, as well as plans for implementing those arrangements, will be finalized and jointly agreed by the CEOs of the relevant agencies for presentation to Leaders at the 2009 Leaders' meeting;

and directed their representatives on the Governing Councils of the SPC, SOPAC, SPREP and SPBEA in 2009 (and prior to the Leaders' meeting) to take all the final decisions on the new institutional arrangements and implementation plans, with implementation to commence immediately after the Governing Council meetings and no later than **1 January 2010**.

4-9 Accordingly in terms of political direction, the **2008** Forum Leaders decision remains the most authoritative and current policy mandate for the conduct of activities which have arisen out of and have developed from the extensive and evolving RIF process overseen by the Forum Secretariat.

4-10 However in terms of constitutional direction, the resulting plans or recommendations proposed by the three CEO's (and the respective Secretariats of the three organizations) must be approved by each individual governing body of each organization which remains the sovereign authority of every such organization.

4-11 The review of the identified options has been undertaken in the light of, and guided, by the following assumptions:

4-11-1 The governing bodies of SOPAC, SPC, and SPREP are comprised of representatives from the member countries who have signed the treaty or agreement which forms the particular body and agree to be bound by its terms;

4-11-2 The governing bodies of each organization is the sovereign authority for such treaty body and is empowered to determine the direction and conduct of its functions as well as that of its Secretariat.

4-11-3 Each member country of each regional organization is entitled to participate in the decisions made by the governing body of such organizations according to the procedure in their requisite agreement or otherwise according to international practice reflected in the articles of the Vienna Convention on the Law of Treaties "VCLT".

4-11-4 Each member country is subject to its own internal processes and protocols as to how it forms and ultimately conveys its views in regard to any matter or resolution before the governing councils of which it is a member;

4-11-5 Each Forum member country is represented at its highest level by its head of government or designated Minister at the annual Forum Leaders meetings.

4-11-6 The Forum Leaders decisions:

- (i) Are intended to commit each member country to the decisions made and expressed by its respective leader;
- (ii) Are intended to guide the work of the Forum Secretariat, as the administrative organ of the collective of sovereign nations known as the Pacific Forum;
- (iii) Are intended to bind each Forum member country's representative on the governing bodies of the CROP agencies, subject however to its domestic agenda;

4-11-7 The representatives of Forum countries which are members of the various regional organizations will act consistently with the instructions of their respective national authority and in accordance with their leaders commitments reflected in any determinations made by consensus at each annual Forum meeting.

4-11-8 The representatives of non-Forum countries which are members of the governing bodies of the three organizations are not subject to the directives or decisions of Forum leaders or the administrative arrangements or policy initiatives proposed by the Forum Secretariat.

5. A LEGAL ASSESSMENT OF THE OPTIONS UNDER CONSIDERATION

5.1 An assessment of the two (2) options identified in the 2009 consultancy report and further defined in early June 2009 would not be complete without the restatement of ‘first’ principles applicable to treaty relations between sovereign countries (and for the purposes of this report self governing, but not independent territories) drawn from the Vienna Convention on the Law of Treaties 1969 “VCLT” and customary international law which are:

- Treaties are binding and enforceable agreements between states which are entered into freely and with the necessary domestic authority;
- Treaties are to be interpreted in good faith and in accordance with the ordinary meaning of its terms and in the context and light of its object and purpose;
- The obligations which arise under a treaty are binding upon its members and must be respected;
- Each party to a treaty has authority to participate fully in the conduct of treaty affairs including their right to:
 - seek to amend, withdraw, suspend or terminate the treaty;
 - participate in the deliberations of the governing body of the treaty;
 - undertake any process available to a member to propose a resolution, seek to table a resolution or seek to support or oppose a resolution relating to the affairs of the treaty;
- The articles of a treaty and the resulting obligations upon any party to the treaty continue until the formal ratification and coming into effect of any subsequent amendment of any provision, suspension or termination of such articles or the treaty itself.
- It is preferable to amend rather than terminate a treaty.

5.2 The governing body of a treaty organization is entitled to, and duly empowered by its treaty to:

- Make such decisions which are necessary in order to give effect to the purpose of the treaty;
- Make such administrative, policy and practical decisions which seek to achieve or satisfy the organisation’s mandated functions;
- Make such decisions which authorize individuals or bodies (i.e. CEO, Secretariat) to carry out certain activities and functions which are consistent with the organisation’s mandate.

I. The establishment of a new organization arising from the integration of SOPAC and SPREP

5-3 As a result of the 2009 Consultancy report, a recommendation “Recommendation 3” has been proposed for the establishment of a new regional environment and resource management body named ‘Pacific Islands Environment and Resources Management Commission’ “PIERMC”.

5-4 The broad objective of the ‘PIERMC’ is stated in Part 2 of the 2009 Consultants report as being an option which:

‘..., presents the region with an opportunity for substantial reform of regional services in the environment and resource management sectors.’

‘...In essence it is generating a new rebranded, reformed organization.’

- 5-5 The new regional body is proposed to be formed from the amalgamation of the work programmes of SOPAC and SPREP with the aim of providing an opportunity for substantial reform in the environment and resource management sectors for the region. The proposed new body will thus combine the existing environmental mandate of SPREP, (i.e. to manage and conserve natural resources) to specifically incorporate the ‘use of non-natural resources to contribute to economic development’ mandate of SOPAC, in what is considered will be a more holistic approach to the region’s sustainable use of all resources.
- 5-6 The option clearly envisages that:
- a) an existing organization (SPREP) will continue in existence;
 - b) the existing organization will expand its responsibilities to integrate the work programmes of SOPAC as well as the expanded mandate of SOPAC within its operations;
 - c) the existing organization will be renamed as PIERMC.
 - d) SOPAC as an organization will eventually cease to exist once its work programmes and functions are duly incorporated into the rebranded organisation
- 5-7 The ‘rebranded’ option must proceed upon the basis that either SPREP can currently incorporate the existing work programmes of SOPAC within its existing legal mandate, or the requisite amendments to the SPREP treaty will be necessary in order to implement the proposal to incorporate the mandate, objectives and work programmes of SOPAC. The option also envisages the merger of two existing treaty bodies through amendment of the SPREP Agreement and then (presumably) the eventual dissolution or suspension of SOPAC.

LEGAL IMPLICATIONS

5-8 In order to implement Option 1 (as it has been presented), the following measures are required:

1. The formal amendment of the SPREP Agreement to expand its mandate and functions:
2. The eventual dissolution of SOPAC and the termination of the SOPAC Agreement

1. Amendment of SPREP Agreement

1. This option requires the amendment of the existing treaty (in this case the SPREP Agreement) to incorporate all the functions of SOPAC (as set out in the SOPAC Agreement), and all other consequential changes required to implement the expansion of the organizations functions. The parties must follow the amendment procedure provided in the Agreement at Article 11.
2. Article 11 provides a process for the amendment of or withdrawal from, the Agreement which may be applied in the following way:
 - 2-1. A party may propose amendments to the Agreement for consideration by all other parties during the meeting of the governing body of SPREP which is: the SPREP Meeting, which is scheduled annually or is called according to the organizations usual procedure;
 - 2-2. A proposed amendment is required to be tabled no less than six (6) months before the conduct of the SPREP meeting at which the resolution containing the amendment is to be considered;
 - 2-3. However, the amendment can only be adopted by the SPREP Meeting with the consensus of **all** the parties actually attending the meeting;
 - 2-4. The amendment only enters into force thirty (**30**) days after the receipt of instruments of ratification acceptance or approval of that amendment are lodged with the depository of the agreement by all parties to the agreement.

3. In particular this option will require amendments to the SPREP Agreement which:

- to expand its existing mandate;
(preamble/ Articles 1,2,3 – 7)
- to change the organizations name;
(preamble/ Article 1)
- to change governance arrangements;
(Article 1,3,6,7 and 11)
- to change its membership
(Article 10)

In this regard any proposed amendment to the SPREP Agreement necessarily requires the parties to the Agreement to undergo a further ratification process in order to bring an amendment into effect, and in this respect the amendment **or** termination of a treaty follows a similar process.

2. *Termination of SOPAC Agreement*

Article 14 of the SOPAC Agreement provides for the Amendment of the agreement.

Article 16 provides for the dissolution or suspension of the Commission.

The suspension of the Commission however, is not the same as terminating the SOPAC Agreement itself, which is a matter which is not specifically dealt with in the agreement and accordingly is subject to the norms of international law which are contained in VCLT.

The procedure prescribed for termination in VCLT requires:

- in **Article 54**, that the termination of a treaty may take place at any time by consent of all the parties after Consultation with the other contracting states. [Contracting states are those states who have signed the treaty but have not ratified, so are not yet 'parties' to the treaty].
- in **Article 65** that the procedure to be followed requires written notice of the proposed termination, an opportunity for the parties to object and in the absence of any objection may be confirmed by an instrument signed to that effect.

Articles 10 and 16 of the SOPAC Agreement requires any resolution for dissolution of the Commission to be passed if not by consensus then by 2/3rds of the members present and voting at the Governing Council Meeting and such resolution will not come into effect until its ratification by 2/3rds of the members of the Commission.

Accordingly the process of termination and dissolution in this case should be as follows:

1. A party to the Treaty to prepare and lodge with the depositary (being the Government of Fiji), written notification of that member state's intention to:
 - a) dissolve the Commission; and
 - b) terminate the SOPAC Agreement
2. If, after a specific period (of not less than 3 months) no party raises any objection to the notification then the notification can be the subject of a formal resolution at the next or special session of the SOPAC governing council;
3. At the governing council meeting, the resolution for **dissolution** can be voted upon by the Council members and requires a 2/3 vote of the members of the Commission present and voting at such meeting in order to be passed. The resolutions may only come into effect after 2/3rds of all members of the agreement have formally ratified such resolution for dissolution;

4. At the same time a resolution by a member state seeking the **termination** of the SOPAC Agreement itself, is required to be tabled at the same Annual or Special session of the Governing Council and must be passed by consensus and may only come into effect after ratification by **all** members of the Agreement;
5. Further resolutions should also be sought which allow:
 - the orderly transfer of functions from one organization to the other;
 - the need to dispose of, and transfer all assets and liabilities;
 - the need to determine the transition or termination of any existing legal, financial or treaty obligations.
6. The suspension of the Commission is also available and follows the process which is required for termination in Article 16. As the process is similar to termination there is little practical benefit for this approach other than to allow the organization to be revived at a later time.
7. A transition plan should include a list of all legal, contractual, financial or other obligations to which SOPAC is subject to, which will need to be considered individually to determine how they will be dealt with.

In summary, the amendment of the SPREP Agreement is legally possible. So too, is the dissolution, termination or suspension of the SOPAC Agreement.

The risks which are inherent in this approach however include:

A. Challenge to Amendment of SPREP Agreement on technical grounds.

Whilst there is a legal basis to amend the SPREP Agreement, there exists however a valid basis for a member country to argue that amendments whilst technically possible, are not appropriate in these circumstances where the changes being sought fundamentally change the original purpose and mandate of the SPREP Treaty. This argument focuses upon the extensive nature of the required amendments which include amendments to the preamble as well as to most, if not all of the Articles of the Agreement. Also required is the need to amend the functions, governance and membership of the original agreement which is far beyond the type of routine and practical changes which form routine amendments sought to improve the operation of a treaty.

Any one member of the Agreement which adopts this approach to the amendments will preclude its successful passage given the need for the support of all members for amendments to succeed.

B. Failure to obtain the approval of all members and ratification by all members.

The amendment of the SPREP Agreement requires the agreement of all the parties to the agreement and may only come into force after the receipt of ratifications from all parties. So too does the termination of the SOPAC Agreement.

There is possible risk that one member state will not agree to the resolution for Amendment or dissolution/termination at the governing bodies meeting which effectively stops the amendment in its tracks. If, however, the proposal gains approval during the requisite SPREP or SOPAC meeting, then the resolution will not come into force until all parties have formally ratified their earlier decision, which has occurred in other instances in the region, but where the parties have nonetheless continued as if the formal agreement has been ratified.

Whilst the SOPAC resolution for dissolution can be passed by 2/3rds of the members, during the governing council meeting the resolution for termination requires the ratification of **all** members.

C. Delay

Approval by the governing bodies of the resolution for amendment and termination can be facilitated by the convening of special meetings and sessions of the governing bodies of SOPAC and SPREP. The ratification process however presents a direct challenge to any indicative timeframe or identified 'effective date' given the particular domestic requirements of member states. Whilst a definitive leaders decision and timeframe would assist, ultimately there are limited non-political means to minimize this particular risk.

D. Rationalisation

This option would not of itself appear to immediately achieve the objectives of the RIF strategy but requires the conduct of a comprehensive reform and review process which takes place prior to final amalgamation which is identified as coming into effect on 1 January 2012. The current timeframe proposed by the Consultants presents a risk to the acceptance of this approach.

Alternative approach to Recommendation 3.

The Consultant, after having regard to the further and very recent development of the 'SPC option' and in particular the proper emphasis upon the transfer of work programmes from SOPAC to SPC, considers that the same approach could be adopted as a practical means of implementing a recast and revised Recommendation 3 (as it was originally proposed by the Consultants). This could be achieved by focusing upon the existing mandate and purposes of SPREP in order to determine whether most SOPAC functions (and therefore work programmes) which relate to 'resources' are in fact validly part of the wider definition of 'natural resources' for which SPREP is currently responsible.

SPREP Mandate

The stated purposes of SPREP (as drawn from Article 1 of the SPREP Agreement) are:

'...to promote cooperation in the South Pacific region and to provide assistance in order to protect and improve its environment and to ensure sustainable development for present and future generations.

The preamble of the Agreement also includes the following:

'Recognising the importance of protecting the environment and conserving the natural resources of the South Pacific...'

'Recognising the need for cooperation within the region and with competent international regional and sub-regional organizations in order to ensure coordination and cooperation in efforts to protect the environment and use the natural resources of the region on a sustainable basis...'

SOPAC Mandate

The stated objectives of SOPAC according to Article 2 of the SOPAC Agreement are:

- 'a) to promote, facilitate, undertake, co-ordinate, advise on and cooperate in, the prospecting of and research into, the non-living resources in the offshore, coastal and onshore areas of those countries whose Governments are Members of the Commission as well as in the other oceanic areas of the South Pacific region;
- b) the otherwise assist in the development of such resources; and
- c) to undertake such other activities related in prospecting, research and development of these resources as the Governing Council shall determine.

The term "non-living resource" in this Agreement shall include corals and such other resources having potential for minerals or energy exploitation as the Governing Council may determine.'

This provision has been interpreted by the SOPAC Council in the following manner:

‘SOPAC is mandated to contribute to sustainable development, reduce poverty and enhance resilience for the peoples of the Pacific by supporting the development of natural resources, in particular non-living resources, investigating natural systems and the management of vulnerability.’

It is possible, based upon the existing and specific mandates of SPREP and SOPAC, to mount a credible case that a more practical approach to implementing Recommendation 3. does not require the formal passage of amendments to the SPREP Agreement, but can in fact be implemented through the transfer of the work programmes (and thus the functions) of SOPAC to SPREP which can be undertaken according to a fairly short timeframe.

Accordingly it is considered view of the Consultant that the change in approach from ‘institutional change’ initially dictated by the incorporation of the SOPAC organization and functions into SPC; to ‘operational change’ (facilitated through the transfer of work programmes and functions) can render Option 1. a more viable option than it is currently presented and allows the prospect that implementation can commence in the short term and thus meet the timeframe decided upon the Leaders.

By the same token this approach also lends itself to the ‘rebranded, reformed organisation’ if the details of the original recommendation are changed to reflect the approach now adopted under the SPC option. Such changes would involve the transfer of work programmes at the outset followed by the conduct of a detailed reform process whilst the programmes are being carried out in their existing form by an expanded SPREP organization.

This operational option is available because both SPC and SPREP have broad mandates which can be considered wide enough to include the current functions and work programmes of SOPAC.

It is available to SPREP members to consider that the existing SOPAC functions which relate to non-living resources can be interpreted as coming within SPREP’s broad mandate over all natural resources and consider the incorporation of SOPAC’s work programmes under its existing mandate.

Accordingly, the incorporation of certain work programmes could be achieved by the passage of a primary resolution to that effect supported by all member countries at the next SPREP meeting, leaving the details to the passage of specific implementation and transition resolutions which support the original resolution) can more easily be achieved through the approval of the governing councils without the need for a change to the governing treaty documents.

COMMENT

There are clear and practical benefits to this approach both in its ease of passage and also the ability to quickly implement the resulting resolution.

The sovereignty of the SPREP Meeting over all matters relating to the conduct of the Secretariat’s work plan and the carrying out of SPREP functions, provides it with both the authority and the capacity to expand and determine its activities subject only to consistency with its fundamental mandate.

It is the Consultant’s view that the organisation’s responsibility for natural resources provides a sufficient basis for SPREP to incorporate the work programmes of SOPAC to the extent that such programmes relate to any activity involving ‘non- living resources’. Non-living resources are defined as an aspect of, or coming within the broad definition of ‘natural resources’ for which SPREP is currently responsible.

Potential Risks

1. Challenge to the liberal interpretation of SPREP's Mandate

This approach to the implementation of Option 1 requires the support and acquiescence of the members of both SOPAC and SPREP. There are clear grounds to oppose the interpretation proposed and require the passage of formal amendments to the SPREP Agreement.

The response to such opposition which is based upon a strict interpretation of the Agreement and the insistence upon formalities is the capacity which the expansion of SPREP will have to better protect and secure the sustainability of all resources within one body and the benefits which that will have upon the successful achievement of significant parts of the SPREP mandate as well as its ability to expand its impact for the benefit of the region.

Any failure to secure support for this approach to Option 1. will result in a return to the need for treaty procedures in order to change the SPREP Agreement.

2. Lack of Support by Non Forum Member Countries

Both SOPAC and SPREP have member countries who are not members of the Forum which represents a risk that the proposed option will not suit their domestic or regional agenda. This risk cannot be fully assessed without engagement with those member countries, however it still represents a credible risk given competing considerations and national approaches to the conduct of treaty relations.

II. SOPAC programmes to be established as a division of SPC

This option consists of the transfer of SOPAC work programmes to SPC in their entirety and to be formally established as a division of that organization.

This option requires:

1. The transfer of SOPAC work programmes and functions to SPC as a result of decisions by the Conference and the SOPAC Council and will not need formal amendment to the SPC Agreement
2. The eventual termination of the SOPAC Agreement or the indefinite suspension of SOPAC as an organisation.

SPC's Mandate

The Secretariat of the Pacific Community "SPC" was formed as a result of the coming into force Canberra Agreement 1947. Such Agreement established SPC

'...as a consultative, advisory and operational body which has technical, research and advisory roles which seeks to contribute to the economic and social development of its constituent countries.'

This mandate was further defined in the Tahiti Mandate as part of the organizations vision:

'Our vision for the region is a secure and prosperous Pacific community whose people are healthy and manage their resources in an economically, environmentally and socially sustainable way '

The provisions of the Agreement are stated as capable of being amended.

No process is prescribed in the Agreement although until the coming into force of the VCLT in 1980 customary international law principles were applied which have now been codified in the convention and require parties to undergo a further ratification process for any amendments or for termination.

The general wording however of the amendment provision in Article XVIII which states:

'Alteration of Agreement'

'60. The provisions of this Agreement may be amended by consensus of all the participating Governments'

This Article has been interpreted liberally by the governing body of SPC which is the: The Conference, and has led to the adoption of a less cumbersome process of obtaining the approval of the member countries for operational matters which is best illustrated by the adoption of the Declaration de Tahiti Nui or 'the Tahiti Mandate' in 1999 which is described as a companion to the Canberra Agreement and contains all the operational policies of the organization, which are able to be periodically altered and modified by the Conference of member countries.

By virtue of a Memorandum of Understanding signed in Rarotonga on 2 October 1974 the rules of procedure of the Conference require all matters of procedure to be decided by a simple majority of votes cast and substantive matters to be decided by a simple majority provided the number of affirmative votes equals at least half the total number of member countries represented by the Conference.

The mandate of SPC drawn from the Canberra Agreement and restated in the Tahiti Mandate is:

'...to undertake research, technical assistance and training in support of the economic and social development of the region's 22 Pacific Island countries and territories'

and is described as being unlimited in terms of sectoral content. A reflection of this mandate can also be drawn from part of SPC's vision (part of the 1999 Mandate) which states:

'Our vision for the region is a secure and prosperous Pacific Community, whose people are healthy and manage their resources in an economically, environmentally and socially sustainable way'

Accordingly a draft resolution could be circulated amongst member countries in accordance with the usual procedures of the Conference which:

- a) approves the incorporation of the SOPAC work programmes within SPC;
- b) approves any transitional arrangements required;
- c) approves any change of institutional arrangements which arise from the absorption of SOPAC into the organization i.e. creation of a new division or expansion of existing Directorates; creation of a new Director position; the expansion of the current status and privileges of SPC to the SOPAC Office in Suva; the formal acceptance of SOPAC's bilateral and multilateral commitments and obligations

without the need for formal amendment of the Canberra Agreement.

Comment

The broad mandate of SPC effectively means that the mandate and functions of SOPAC can easily be incorporated into that organization without any significant change required to the organization's treaty document. The use of the decision making processes currently used by SPC for all operational matters, allows for the integration of SOPAC functions in a fairly straightforward manner.

In this regard the transfer of functions could be relatively straightforward subject to the approval of both SOPAC and SPC member countries.

TERMINATION OF SOPAC AGREEMENT

Once the SPC Conference has approved the inclusion of SOPAC work programmes into SPC, then steps will need to be taken to terminate the SOPAC agreement or alternatively suspend the work of the Commission until some future time or event as decided by the SOPAC Council..

Potential Risks

1. Challenge to the interpretation of SPC's Mandate

The ability of the Conference to pass resolutions by simple majority provides an in built buffer which allows a resolution to pass without the need to secure unanimous approval by all member countries. Accordingly whilst there may well be a difference in interpretation in respect of the breadth or otherwise of SPC's mandate it is unlikely that such a factor will prevent the passage of this option. It is more likely that any potential opposition will focus upon the financial benefits which the option brings to SPC and whether these are clear and in SPC's favour. The improved capacity which the option will bring to further satisfy the organisation's broad mandate will be evident. This is considered to be a low risk in the circumstances.

2. A re-run of RIF2

The outcome of Option 2 if implemented may be considered an attempt to revive the recommendations of RIF 2 with the movement of technical agencies towards SPC.

Given the opposition to those recommendations there may still be resistance amongst certain member countries based not on the actual details of the current option but related to the previous recommendations. This risk is considered to be credible and can be addressed by highlighting the benefits of the Option and perhaps the possibility that SOPAC can be revived if the Commission is merely suspended and not terminated.

6. ISSUES REQUIRING SPECIFIC RESPONSES

The following section of the report records specific responses to the issues identified in Part 2.2 of the Consultancy Agreement, firstly in respect of the Rebranded Reformed Organisation option, followed by the SPC option.

Rebranded Reformed organization:

a) Re-branded Organisation

- i) Given that recommendation 3 called for the integration of the core functions and programmes of SOPAC and SPREP under a reformed, re-branded organization, does this imply a merger of the two organizations?**

Yes. Recommendation 3, in the manner in which it has been presented by the Consultants, represents an amalgamation of the functions and work programmes of two independent legal entities which is illustrated by the timeframe included in the report and the continued existence of both organizations until late 2011 when the preparatory work for merger has been completed and the new body is set to commence its operations in January 2012.

It is this Consultant's view, however, that by adopting a broad definition of SPREP's current mandate, rather than focusing upon institutional changes, that such a merger can take place through the transfer of such SOPAC work programmes which relate to resources to SPREP and that the reform and review process can be undertaken under the auspices of the renamed SPREP organization.

Once all SOPAC work programmes are transferred to SPREP and SPC, some consideration will need to be given by the SOPAC Council as to whether it should suspend the operations of SOPAC or terminate the SOPAC Agreements.

- ii) **Would the current SPREP Treaty and mandate allow for what is intended in the recommendation – “a re-branded regional environment and resource management organisation (potentially called the “Pacific Environment Resources Commission”) be established by integration of the ‘core’ functions and programmes of SPREP and SOPAC”?**

Yes. If one adopts a broad definition of the current SPREP mandate, then this allows the incorporation of SOPAC functions and work programmes which deals with the maintenance or protection of ‘natural resources’

- iii) **Would the current SPREP Treaty and mandate allow for the SOPAC core work programme to be rationalised into SPREP?**

Yes. If the core work programmes are consistent with the current overall SPREP mandate then they may so be rationalized.

- iv) **What specific amendments are required to the SPREP Treaty and how can these be accomplished (including legal and governance processes) in order to achieve implementation of the recommendation 3**

These matters are dealt with in Section 5 of this paper however the Consultant has proposed an alternative approach to implementation which follows the approach adopted in the SPC option and consists of transferring the work programmes of SOPAC to SPREP as are consistent with that organisation's overall mandate

- v) **What implications does this have for the Letter of Agreement Establishing SOPAC? If so, what legal impediments arise, such as contract agreements, transfer of assets and liabilities, location and host agreements. How best could these be addressed to achieve timely, effective implementation of recommendation 3? Consideration should be given to issues such as timeframes to achieve key legal milestones and processes.**

The transfer of all SOPAC functions and work programmes either as a result of a decision made by the SPREP and SOPAC councils or through a formal amendment of the SPREP Agreement must result in either the eventual termination of the SOPAC Agreement and the dissolution of the Commission or a suspension of the work of the Commission until a particular time or the occurrence of a particular event.

In terms of the transition from SOPAC to SPREP of the legal authority to undertake SOPAC functions, the change requires a detailed implementation plan which also requires the approval of the two governing bodies who must set a timeframe for the:

- practical transfer of administrative tasks and functions; and
- preparations for the legal transfer of authority from one body to another which should take place on a particular date which is dependent upon the timetable required for the:
 - o tabling of the necessary resolutions for amendment and termination or implementation (under the proposed approach)
 - o calling of a governing council meeting to deal with the resolution

An indicative date would allow a degree of certainty in terms of:

- the transfer of assets and obligations;
- the clarification of employment arrangements including notice of the termination of employment contracts which go beyond the handover date or extension of such contracts under the auspices of SPC with arrangements made to review the current job description with the new arrangements, salary scales and conditions offered under SPC;
- the extension of the SPC diplomatic and immunities in Fiji to privileges SOPAC staff and assets;
- the location of SOPAC staff and assets whether they remain in Fiji or are relocated to Noumea or elsewhere;
- the commencement of consultations with SOPAC's bilateral, or multilateral partners in respect of the proposed transfer of programmes and commitments from SOPAC to the jurisdiction of SPC.

The original Forum Leaders decision was made in late 2007 and recalled in 2008 when it was envisaged that the requisite governance decisions would have been taken by the governing bodies sometime in 2009 in order for the commencement of the implementation of the new institutional arrangements in 2010. The 'transfer of work programmes' approach would provide the certainty needed to facilitate an orderly transfer between the two organisations

b) SOPAC as a Division of SPC

i) Does the Canberra Agreement and mandate allow for the establishment of the SOPAC core work programme as a Division of SPC.?

Yes. The Canberra Agreement (and all its parts) has an extremely broad mandate which would allow for the integration of the SOPAC functions and work programmes with SPC.

Indeed, the SOPAC – SPC Integration Study authored by the late Savenaca Siwatibau and Phillip Muller in August 2000 undertook a detailed and critical assessment of the benefits of a 'merger' and cited the transfer of the Forum's maritime and energy programmes as precedents for ease of the transfer of programmes from the Forum to SPC. This would be a similar situation, although on a much more extensive basis.

ii) If so, what specific amendments are required to the Canberra Agreement and how can these be accomplished (including legal and governance processes) in order to achieve implementation of this option.

Given the current broad mandate of SPC, the integration of SOPAC could possibly be considered operational in nature and as such the integration of SOPAC functions and work programmes may only require the passage of resolutions by the Conference which will allow the implementation of the overall option.

In particular certain resolutions will be required:

- To formalize the establishment of a new division within SPC
- To incorporate any functions which are not already part of SPC's operations
- To approve the employment of a new Director and staff according to the current SPC policies and after negotiation with SOPAC staff
- To approve a budget for the operation of the new division
- To identify and address any transitional matters which require approval or funding
- To approve the existing work programmes undertaken by SOPAC and incorporate them into the SPC
- To approve the conduct of negotiations with any parties which have legal, financial, bilateral or multilateral relationship with SOPAC

The risk of this strategy is the possibility that a member country will insist that the integration of SOPAC warrants a formal amendment to the Canberra Agreement which will have the resulting disadvantages.

iii) What implications does this have for the Letter of Agreement Establishing SOPAC? If any, what legal impediments arise, such as contract agreements, transfer of assets and liabilities, and how best could these be addressed to achieve implementation of this option?

The incorporation of SOPAC work programmes into the SPC organization requires:

- a) the authority by the Conference of SPC to accept such an option and authorize any change of structure, administration, budget or governance which will result from the change and be reflected in draft resolutions placed before the member countries prior to the conduct of such meeting;
- b) the termination of the SOPAC Agreement and the dissolution of the Commission or the suspension of the Commission.

The outstanding legal issues which must be accommodated in the implementation of the option would benefit from a transition plan which lists all SOPAC's legal commitments, assets, obligations and undertakings in order for specific decisions to be made.

By way of illustration there are certain issues which will require action:

Diplomatic Rights and Immunities

SOPAC's existing diplomatic rights and privileges will need to be continued without interruption and brought under those offered by the Governments of Fiji and France to SPC.

Formal notification to the Government of Fiji of SOPAC's change of name but not status will be required as will notification from SPC to extend its privileges to SOPAC staff from a particular date.

Agreements

If SOPAC is a party to any agreements which require them to supply scientific, advisory or any other services, then an assessment must be made as to whether they will continue with such agreements after the amalgamation with SPC and should:

- notify the other party in advance of the possible changes in the organizations name and status;
- advise of SOPAC's intention to continue with, terminate or renegotiate the agreement with the approval of SPC;
- enter into negotiations with the other party as to any practical ramifications arising from the change

Leases

SOPAC will generally be required to advise the Lessor of a change in status and consider whether to terminate the lease, renegotiate its terms or advise that it is intended to transfer the lease to SPC. A transfer will generally be acceptable with most standard leases containing provisions that the lessor's consent to transfer a lease will not be unreasonably withheld.

Contracts

Each contract which SOPAC is a party will have to be assessed accordingly to its particular terms, with the need for SOPAC/ SPC to decide whether to terminate the contract or transfer the contract to SPC. The success or otherwise of this process is wholly dependent upon the existence of early termination and penalty clauses and the attitude of the other party to the contract.

c) Other General Assessments for both Options

- i) Provide a critical analysis of the risks associated with all legal, fiscal and contractual (including bilateral and multilateral obligations) and provide suggestions to remove reduce the impact of or minimize such risks.**

Political Mandate

The Forum Leaders decisions in 2007 and 2008 represent the current and most authoritative directives on RIF from the heads of government of the member states of the Pacific Forum who share common membership of the three organizations in question.

The Consultant's have however (under the guidance of the three CEO's as reflected in a Memorandum of Understanding to that effect dated 7 May 2009), recommended two options which will either:

- create a new regional organization retaining the structure functions and operations of SOPAC;or
- establish SOPAC as a division of SPC

In many respects, the original recommendations were clearly outside the stated terms of reference of the 2009 Consultancy (which is acknowledged in the report), however, the three CEO's have continued to revise and further develop the options in order to meet the overall goals of rationalization defined by the RIF process and to seek pragmatic ways to satisfy the overall policy mandate of the Leader's decisions whilst still ensuring that existing work will continue.

The change of detail from the institutional incorporation of SOPAC into SPC to the transfer of SOPAC's work programmes is a shift which allows a more pragmatic approach to implementation which can also be adopted in order to provide a more viable means of achieving the overall purpose of Option 1 albeit with certain modifications to the original recommendation 3.

The current focus upon the operational transfer of functions and work programmes is, in the Consultant's view, a far more pragmatic approach to the current endeavor insofar as the broad mandates of SPREP and SPC are both, arguably, capable of enfolding SOPAC functions without the need for cumbersome and lengthy treaty procedures to be undertaken, concluded and ratified.

The risks associated with either option (if this approach is followed) is the opposition of a member state to the legal capacity of the organization (be it SPC or SPREP) to accept the new work programmes and functions as proposed, which will force a return to the cumbersome process of amendment earlier described in this report. This will also have the practical effect of significantly delaying any change in the use of the regions resources to and will seriously undermine the prospect of short term benefits from rationalization. Obviously this risk is greater in respect of SPREP and where SPC has been the subject of detailed and positive assessments as to its capacity to enfold other programmes and even other organizations.

Bilateral and Multilateral Obligations

SOPAC has a number of international obligations which include the provision of scientific and technical support and monitoring to the provision of more direct advisory and technical services. In order for these obligations to continue there will be a need for these to be specifically addressed in any plan for integration.

SPREP's treaty obligations in respect of three other agreements are even more defined and require close and careful scrutiny to ensure that they are not placed at peril through the change of arrangements.

Once a decision has been taken at a policy level, the other parties to all arrangements be they legal, bilateral or multilateral will need to be informed of the proposed changes to the work and status of the organization which they have relationships with and each arrangement will need to be dealt with on a case-by-case basis.

7. CONCLUSION

The previous legal report which was prepared as part of RIF 2 by the Consultant, focused at an institutional level, on the legal capacity of treaty bodies to make changes to their treaties in order to facilitate the changes to institutional arrangements of the type which were being proposed in the 2007 'Pathway Towards Quality of Service from Pacific Regionalism' report.

In that legal report, the sovereignty of each governing body was paramount to the prospect of success of each proposed treaty change, and the legal capacity to determine an organization's future activities was firmly vested in the member countries which collectively determined the direction in which their organization would go.

This report has sought to identify the formal requirements which are undertaken in order to change the terms of a treaty document and thus the role and operations of a treaty based organization. Without exception the formal treaty requirements are cumbersome, lengthy and slow.

In preparing this report however, the Consultant's attention has been drawn to the existing mandates of both SPC and SPREP, which has in turn resulted in the analysis of options for implementation of the two identified options which do not require amendments to existing Treaties and can be implemented administratively and operationally by the organizations once the proposed arrangements have been approved by the governing councils.

Option 1 (of the rebranded and reformed organization) in the way in which it has been presented, is subject to a process of reform which will lead to a new organization commencing operation in January 2012 with SOPAC and SPREP continuing in existence until at least September 2011. Whilst this is possibly consistent with the length of time required to formally amend the SPREP and SOPAC treaties and undertake a considered approach to the establishment of a new regional organization, there is an alternative approach which might achieve a more timely outcome and still result in the opportunity to reform the stewardship of resources by, and for the region.

Option 2 involves the incorporation of work programmes from SOPAC to SPC and is clearly an available option due to the breadth of SPC's mandate.

By the same token, it is at least possible to adopt the same approach with regard to Option 1 and to propose an alternative approach to the implementation of the general concept of a new organization (which is at the heart of such option), which is created from the essence of SPREP but will be subject to a process of reform and improvement whilst it is carrying out expanded work programmes (which are systematically transferred from SOPAC) rather than having to await the passage of a two to three year preparatory period.

In conclusion, there are identifiable legal means to implement both options which have been identified by the CEO's of SOPAC, SPC and SPREP and have been referred for legal analysis. In the course however of assessing those means the Consultant has been drawn to the pragmatism of using the existing authority of two bodies, namely SPC and SPREP, to incorporate the work and functions of SOPAC such as are consistent with their current functions and work in order to rationalize the functions of SOPAC. This would then be consistent with the outcome of the Forum Leaders deliberations in 2007 and 2008 and has a real prospect of meeting the 1 January 2010 date for the commencement of implementation of such rationalization.

The Consultant is grateful for the significant input of the Chief Executive Officers of SOPAC, SPC and SPREP to the draft report and trusts that this final report will be of some assistance to their joint endeavor.
