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**Plenary meeting to determine modalities and institutional arrangements for an intergovernmental science-policy platform on biodiversity and ecosystem services
First session**

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Item 4 (a) of the provisional agenda*

Consideration of the modalities and institutional arrangements for an intergovernmental science-policy platform on biodiversity and ecosystem services: legal issues relating to the establishment and operationalization of the platform

Legal opinion of the secretariat concerning certain legal issues relating to the establishment and operationalization of the platform

Note by the secretariat¹

1. The present note sets out legal opinion of the secretariat of the United Nations Environment Programme (UNEP) concerning certain legal issues relating to the establishment and operationalization of the platform as highlighted in the note by the secretariat on the subject (UNEP/IPBES.MI/1/2). This legal opinion has been prepared on the basis of the legal advice of the Office of Legal Affairs of the United Nations (OLA) on those issues as provided to the UNEP secretariat, in particular OLA's legal advice and related comments dated 30 September 2011 addressed to the Executive Director of UNEP.

I. A question as to whether the General Assembly established the platform

2. A question has been raised as to whether the General Assembly, in paragraph 17 of its resolution 65/162 of 20 December 2010, established the platform. That paragraph reads as follows:

[The General Assembly]

Takes note of United Nations Environment Programme Governing Council decision SS.XI/4 of 26 February 2010 entitled "Intergovernmental science-policy platform on biodiversity and ecosystem services", the Busan outcome of the third ad hoc intergovernmental and multi stakeholder meeting on an intergovernmental science-policy platform on biodiversity and ecosystem services, held in Busan, Republic of Korea, from 7 to 11 June 2010, the decision entitled "Science-policy interface on biodiversity, ecosystem services and human well-being and consideration of the outcome of the

* UNEP/ IPBES.MI/1/1.

1 The present note has not been formally edited.

intergovernmental meetings” adopted by the Conference of the Parties to the Convention on Biological Diversity at its tenth meeting, held in Nagoya, Japan, from 18 to 29 October 2010, and the decision on the United Nations Educational, Scientific and Cultural Organization and the intergovernmental science-policy platform on biodiversity and ecosystem services adopted by the Executive Board of that Organization at its one hundred and eighty-fifth session, and requests the United Nations Environment Programme, without prejudice to the final institutional arrangements for the intergovernmental science-policy platform on biodiversity and ecosystem services and in consultation with all relevant organizations and bodies, in order to fully operationalize the platform, to convene a plenary meeting providing for the full and effective participation of all Member States, in particular representatives from developing countries, to determine modalities and institutional arrangements for the platform at the earliest opportunity.

3. In this connection, the use of the word "takes note of" by the General Assembly should be understood in the light of General Assembly decision 55/488 of 7 December 2001. By that decision the General Assembly "reiterate[d]" that "the terms 'takes note of' and 'notes' are neutral terms that constitute neither approval nor disapproval."

4. Thus, the General Assembly, by merely taking note of the relevant decisions in paragraph 17 of resolution 65/162 of 20 December 2010, did not express approval or disapproval of the arrangement outlined therein, and accordingly did not establish the platform as a United Nations body.

II. A question as to whether it would be possible to operationalize the platform without the formal act of its establishment

5. With the above background, the present plenary meeting, which has been called for by General Assembly resolution 65/162 of 20 December 2010 and subsequently convened in accordance with decision 26/4 of 24 February 2011 of the UNEP Governing Council, is independent from the platform, and has a specific mandate to “determine the modalities and institutional arrangements for the platform”. It appears that there is no express mandate for the present plenary meeting to constitute the first meeting of the platform. Bearing in mind the fact that the General Assembly did not establish the platform in its resolution 65/162, and given the above background, it does not seem legally viable to operationalize the platform without the formal act of establishing it, for instance by merely declaring at the present plenary meeting that the platform has been established by the General Assembly as described in option 1 contained in paragraphs 12 and 13 of document UNEP/IPBES.MI/1/2. It would seem that the final decision concerning the modalities and institutional arrangements that would lead to the operationalization of the platform might be best left for the formal intergovernmental process, such as the General Assembly, the UNEP Governing Council and/or the governing body of a specialized agency.

III. Possible options for the establishment and operationalization of the platform

6. Document UNEP/IPBES.MI/1/2 sets out three options 2 (a), (b) and (c) in paragraphs 14-22 that are built upon the assertion that the General Assembly did not establish the platform in its resolution 65/162. On the other hand, option 1, which calls for “agreement that the platform has already been established”, does not appear to be a viable option as stated above.

A. Option 2(a): Establishment of the platform by the current plenary meeting

7. With regard to option 2(a), it provides that the current plenary meeting consisting of the representatives of Governments may decide by resolution to establish the platform. Furthermore, it provides that modalities and institutional arrangements of the platform might be specified in such a resolution, and in this way, the current plenary meeting could be transformed into the first plenary of the platform, if it is so declared.

8. In this respect, the specific mandate given to the current plenary meeting in paragraph 17 of General Assembly resolution 65/162 may be recalled. The mandate is to “determine the modalities and institutional arrangements for the platform” in order to “fully operationalize the platform”. Subject to the possible option stated below, that General Assembly resolution does not explicitly provide a mandate for the current plenary meeting to establish the platform or to transform itself into the first plenary of the

platform. In particular, if the platform is to be established as a UN body, it seems necessary to specify such action in a decision of the relevant intergovernmental body of the UN and/or specialized agencies.

9. It may be noted, however, that the Busan Outcome states that “the new platform should be established as an independent intergovernmental body” that is to be “administered by one or more existing United Nations organizations, agencies, funds or programmes”. Given this context, it seems possible that the platform could be either a UN body or non-UN body. If the platform is to be established as an intergovernmental body independent from the UN bodies or agencies, which might be similar to international treaties or other intergovernmental arrangements established outside of the UN system, with institutional arrangements with the existing UN bodies or agencies for its administration, it would not exclude the possibility for the representatives of Governments at the current plenary meeting to consider the establishment of the platform as part of the mandate of the plenary meeting to “determine the modalities and institutional arrangements for the platform” in order to “fully operationalize the platform”, and subsequently take action for its establishment. Should such an option be chosen, it might require firstly a resolution to define the purpose of the current plenary meeting to include the establishment of the platform, which could be followed by a resolution for the establishment of the platform.

10. It should be noted that if the platform is to be administered by two or more UN bodies or agencies, it would seem desirable that the process for the establishment of the platform substantively involves all relevant UN bodies or agencies. Consideration could be given to making such joint arrangements among all the organizations concerned, subject to the agreement of each of these organizations, for instance for part of the second session of the current plenary meeting scheduled for early 2012 to serve as a distinctive segment of the meeting for the establishment of the platform. It is noted that the case of the establishment of the Intergovernmental Forum on Chemical Safety by the International Conference on Chemical Safety convened jointly by UNEP, ILO and WHO is an example of such joint arrangement for the establishment of an intergovernmental arrangement as well as an example of transforming an intergovernmental meeting into an agreed intergovernmental arrangement, although it might be viewed as being distinguishable from the present case from the perspective of the mandate given to those organizations for convening the intergovernmental meeting which could constitute the first meeting of the intergovernmental forum as specified in paragraph 19.76 of chapter 19 of Agenda 21 and the subsequent General Assembly resolution 47/190 of 22 December 1992 calling upon all concerned to implement all commitments, agreements and recommendations reached at the United Nations Conference on Environment and Development which included Agenda 21.²

B. Option 2(b): Executive heads of selected organizations to establish the platform

11. Option 2(b) provides that the representatives of Governments at the current plenary meeting would call on the executive heads of selected organizations to establish the platform and it would become an intergovernmental body constituted upon the institutional framework of those organizations. It is noted that a similar arrangements was adopted for the Intergovernmental Panel on Climate Change (IPCC) and that to the extent the executive heads have received authorization from the governing bodies of the respective organizations, they could make arrangements to establish the platform.

12. In relation to IPCC, the following are recalled:

(a) The tenth Congress of the World Meteorological Organization (WMO) held in 1988 urged WMO, UNEP and the International Council of Scientific Unions (ICSU) to increase understanding of climate change;

(b) Following this, the UNEP Governing Council, in decision 14/20 of 18 June 1987 adopted at its fourteenth session, urged the Executive Director of UNEP to respond positively to the decision by the tenth Congress of WMO “requesting its Secretary-General, in cooperation with the Executive Director [of UNEP] to explore, and after appropriate consultations with Governments, to establish an ad hoc intergovernmental mechanism to carry out internationally coordinated scientific assessment of the magnitude, timing, and potential impact of climate change”.

(c) Subsequently, the Executive Council of WMO and the UNEP Governing Council agreed to the establishment of IPCC that report on its activities to both governing bodies, which was subsequently endorsed by the General Assembly in resolution 43/54 of 6 December 1988.

² This part concerning option 2 (a) is mainly based on the opinion of the UNEP legal office.

13. In a similar manner, the UNEP Governing Council could take a decision to establish IPBES alone or together with another specialized agency/UN body. Such a decision should also detail the reporting lines of IPBES, which organization would provide the secretariat, funding, etc., and the respective roles of each organization. The UNEP Governing Council would include such a decision in its reports to the General Assembly through the Economic and Social Council.

C. Option 2 (c): Intergovernmental organs of the United Nations, its programmes and funds, and/or specialized agencies, to establish the platform

14. Option 2(c) provides that the representatives of Governments at the current plenary meeting may make recommendations to the intergovernmental organs of the United Nations, its programmes and funds, and/or specialized agencies, to establish the platform, and those governing bodies might adopt concurrent decisions to jointly establish the platform. In paragraph 22, it also provides that the governing body of the organizations establishing the platform would be required to request the executive heads of the relevant organizations to take the necessary action and that the institutional arrangements under this option would be similar to option 2 (b).

D. Possible involvement of the General Assembly

15. With regard to the possible involvement of the General Assembly (paragraphs 23-24 of document UNEP/IPBES.MI/1/2), it provides that the General Assembly could endorse actions taken under options 2 (a) to 2 (c), or request the relevant intergovernmental organs of the United Nations, its programmes and funds and/or specialized agencies, or the executive heads of those organizations to establish the platform, or the General Assembly could independently or jointly with other relevant organs, take action to establish the platform. It should be noted that if the platform is going to be jointly established with a specialized agency, the governing body of the respective specialized agency would be required to take a separate decision establishing the platform. It should be noted also that the formal intergovernmental process to take final decisions concerning the modalities and institutional arrangements that would lead to the operationalization of the platform would include the General Assembly, the UNEP Governing Council and/or the governing body of a specialized agency, and the General Assembly should be viewed as one of such bodies and not the sole body which might be able to take such decisions.
