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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
Nairobi, 3–7 October 2011
Agenda item 4 (a)

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 advice of the Office of Legal Affairs of the United Nations concerning certain legal issues pertaining to an intergovernmental science-policy platform on biodiversity and ecosystem services: note by the Assistant Secretary-General for Legal Affairs to the Chair of the plenary meeting

Note by the secretariat

The annex to the present note sets out legal advice provided by the Office of Legal Affairs of the United Nations concerning certain legal issues pertaining to an intergovernmental science-policy platform on biodiversity and ecosystem services. The information is presented in the form of a note by the Assistant Secretary-General for Legal Affairs to the Chair of the plenary meeting. It has been reproduced as received, without formal editing.

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Annex

Note to Mr. Robert Watson

Inter-governmental science-policy platform on biodiversity and ecosystem services ("IPBES")

1. I wish to refer to Ms. Nagai's e-mail to me of 3 October 2011 in which she indicates that the plenary meeting convened pursuant to General Assembly resolution 65/162 of 20 December 2010 and which is currently meeting in Nairobi has requested OLA's advice on the following questions:

I. Whether the General Assembly established IPBES by resolution 65/162 of 20 December 2010;
II. Whether there are any legal impediments to any of the options for the establishment of IPBES as set out in UNEP working document UNEP/IPBES/M/1/2; and
III. Whether it is legally possible to operationalize IPBES, without it having been established.

I. Whether the General Assembly established IPBES by resolution 65/162 of 20 December 2010

2. By resolution 65/162 of 20 December 2010, the General Assembly took note of the UNEP Governing Council decision SS.XI/4 of 26 February 2010 entitled 'Intergovernmental science-policy platform on biodiversity and ecosystem services' and took note 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 ("Busan Outcome Document").

3. By paragraph 17 of that resolution the General Assembly requested UNEP, "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."

4. Subsequently, the UNEP Governing Council by decision 26/4 of 24 February 2011 decided, inter alia, to convene the plenary meeting requested above in order to determine the modalities and institutional arrangements for IPBES.

5. We would like to recall that the use of the words "notes" or "takes note of" by the Assembly should be understood in the light of the 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". 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 did not take a decision to establish IPBES as a UN body.

6. In addition, the Busan Outcome document in the chapeau of paragraph 6 provides "that an intergovernmental science-policy platform for biodiversity and ecosystem services should be established to strengthen the science-policy interface for biodiversity and ecosystem services for the conservation and sustainable use of biodiversity, long-term human well-being and sustainable development." Thus "the new platform should be established as an independent intergovernmental body administered by one or more existing United Nations organizations, agencies, funds or programmes" (paragraph 6 (f)). In paragraph 9, the Meeting "[r]ecommend[ed] that the General Assembly at its sixty-fifth session should be invited to consider the conclusions set out in the present outcome document and take appropriate action to establish the platform". Accordingly, the Busan Outcome document formulated its statements on the platform/IPBES in the form of recommendations and did not take a decision to establish IPBES.

II. Options for the establishment of IPBES as set out in UNEP working document UNEP/IPBES/M/1/2 ("the Document").

Establishment by the present plenary meeting

7. This option provides that the plenary meeting consisting of representatives of Member States 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. In this way, the present plenary meeting could be transformed into the first plenary of the platform, if it is so declared".

8. We would like to recall the mandate of the current plenary is to "determine the modalities and institutional arrangements" for the platform in order to "fully operationalize the platform." Neither General Assembly resolution 65/162 of 20 December 2010 nor a decision of any other UN inter-governmental body expressly mandates the current plenary to establish the platform or to transform itself into the first plenary meeting of the platform.

9. The establishment of the Intergovernmental Forum on Chemical Safety ("IFCS") by a resolution of the International Conference on Chemical Safety is used in the Document as a precedent for this option. However, IFCS was established by the International Conference on Chemical Safety convened jointly by UNEP, ILO and WHO which adopted a resolution establishing the IFCS, adopted its terms of reference and declared that "for the purpose of commencement of the work of the [IFCS], the Conference shall, at its completion, be considered as though it were the first session of the [IFCS]". In taking these decisions, the Conference was acting pursuant to a specific mandate set out in paragraph 19.76 of Chapter 19 of Agenda 21 which had been endorsed General Assembly resolution 47/190 of 22 December 1992. This resolution called upon all concerned to implement all commitments, agreements and recommendations reached at the UN Conference on Environment and Development, which included Agenda 21.

Executive heads of selected organizations to establish the platform

10. This option provides that Member States would call on the executive heads of selected organizations to establish the platform and it would become an

intergovernmental body constituted upon the institutional frameworks of those organizations. The Document provides that a similar arrangement was adopted for the Intergovernmental Panel on Climate Change (IPCC) and that "to the extent that executive heads have received authorization from the governing bodies of the respective organizations, they could make arrangements to establish the platform".

11. In relation to the IPCC, we wish to recall the following:

- 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.
- Following this, the Governing Council of UNEP, at its fourteenth Session, urged its Executive Director to respond positively to the decision by the WMO Congress "requesting its Secretary-General, in co-operation 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 assessments of the magnitude, timing, and potential impact of climate change".
- Subsequently, the Executive Council of WMO and the Governing Body of UNEP agreed to the establishment of IPCC that would report on its activities to both governing bodies, which was subsequently endorsed by General Assembly resolution 43/54 of 6 December 1988.

12. In a similar manner, UNEP's Governing Body 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. UNEP would include such a decision in its reports to the General Assembly through ECOSOC.

Intergovernmental organs of the United Nations, its programmes and funds and/or specialized agencies to establish the platform

13. This option provides that the plenary may make a recommendation "to the intergovernmental organs of the United Nations, its programmes and funds, and/or specialized agencies, to establish the platform. [...] Those governing bodies might adopt concurrent decisions to jointly establish the platform." The Document 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 the second option listed above.

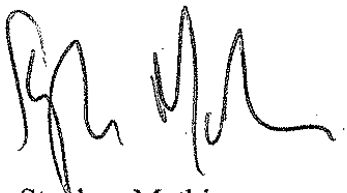
Possible involvement of the General Assembly

14. This option provides that the General Assembly could endorse actions taken under options 1 to 3 listed above, 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". We note that if IPBES is going to be jointly established with

a Specialized Agency, the governing body of the respective Agency would be required to take a separate decision establishing IPBES.

III. Operationalization of IPBES

15. As to the question whether it would be legally possible to operationalize IPBES, without formally establishing IPBES, we note that the plenary meeting which has been called for by General Assembly resolution 65/162 of 20 December 2010 has a very specific mandate. Its mandate is to "determine the modalities and institutional arrangements for the platform" and is also "without prejudice to the final institutional arrangements" for IPBES. In particular, there is no express mandate for the upcoming plenary to constitute the first meeting of the IPBES. We would thus advise that final decisions concerning the modalities and institutional arrangements that would lead to the operationalization of the IPBES be left for the formal inter-governmental process, i.e. the General Assembly, the UNEP Governing Council and/or a Specialized Agency in line with the options discussed above.



Stephen Mathias
4 October 2011