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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

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 issues relating to the establishment and operationalization of the platform

### Note by the secretariat

### Introduction

1. In the Busan outcome, the representatives of Governments at 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, concluded, “having now reached agreement, as requested by the Governing Council of the United Nations Environment Programme (UNEP) through its decision SS.XI/4 [of 26 February 2010], 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”. The representatives went on to state in the Busan Outcome that “the new platform should be established as an independent intergovernmental body administered by one or more existing United Nations organizations, agencies, funds or programmes, and that “the plenary, which shall be the platform’s decision-making body, should be open to participation by all States Members of the United Nations and by regional economic integration organizations”.

2. While the Busan outcome did not specify a manner in which the platform should be established and operationalized, it recommended that the General Assembly at its sixty-fifth session should be invited to consider the conclusions set out therein and take appropriate action to establish the platform. It also recommended that the Governing Council of UNEP should invite the Executive Director of UNEP, in cooperation with the United Nations Educational, Scientific and Cultural Organization (UNESCO), the Food and Agriculture Organization of the United Nations (FAO) and the United Nations Development Programme (UNDP), to continue to facilitate any ensuing process to implement the platform until such time as a secretariat was established.

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\* UNEP/IPBES.MI/1/1.

3. In accordance with decision SS.XI/4, the Executive Director, on behalf of the Governing Council, submitted to the Secretary-General the report of the third meeting on the platform, including in its annex the Busan outcome, for transmission to the General Assembly at its sixty-fifth session for consideration during the high-level segment on biological diversity on 22 September 2010 and thereafter. The report was made available to the General Assembly in document A/65/383. In addition, the Government of the Republic of Korea, in its capacity as the host country of the third meeting on the platform, submitted a proposal to the General Assembly to consider the matter during its sixty-fifth session.

4. Subsequently, the General Assembly considered the Busan outcome during the high-level segment on biological diversity and thereafter. The outcome of its deliberations was reflected in paragraph 17 of its resolution 65/162 of 20 December 2010, which reads as follows:

*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 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.*

5. The Governing Council of UNEP, in its decision 26/4 of 24 February 2011, endorsed the outcomes of the third meeting on the platform and decided:

Based on the request by the General Assembly in its resolution 65/162 of 20 December 2010, 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 fully to 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.

## **I. Background**

6. There is currently a range of views among Governments on the legal status of the platform. Some Governments consider that the platform was established by United Nations General Assembly resolution 65/162, while others consider that the platform must still be established before its full operationalization. This range of views has been apparent during discussions by, among others, the Governing Council at its twenty-sixth session and the Committee of Permanent Representatives to UNEP at its meetings convened thereafter.

7. In response to requests from some Governments at the twenty-sixth session of the Governing Council for legal advice as to whether the General Assembly had established the platform by its resolution 65/162, the secretariat requested the Office of Legal Affairs of the United Nations to provide a legal opinion on that question. The legal opinion received in response to that request<sup>1</sup> stated that paragraph 17 of General Assembly resolution 65/162 should be understood in the light of the annex to General Assembly decision 55/488 of 7 September 2001, in which the General Assembly reiterated that the terms “takes note of” and “notes” were neutral terms that constituted neither approval nor disapproval. Thus, the advice from the Office of Legal Affairs is that the General

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<sup>1</sup> The Executive Director of UNEP has subsequently requested additional advice from the Office of Legal Affairs on the further process concerning the platform’s establishment and operationalization. The additional legal advice from the Office of Legal Affairs, once received, will be made available for the current meeting.

Assembly, by taking note of the decisions stating that the platform should be established, neither expressed approval or disapproval of such an arrangement nor established the platform. Furthermore, it was pointed out that the General Assembly did not consider how the platform would be funded.<sup>2</sup>

8. As indicated in the quoted language above, the General Assembly in resolution 65/162 requested UNEP, “in order to fully operationalize the platform, to convene a plenary meeting ... to determine modalities and institutional arrangements for the platform at the earliest opportunity”. It might be understood from this wording that the plenary meeting was intended to be distinct from the platform and an independent event convened with a view to recommending modalities and institutional arrangements for the platform rather than to be an organ of the platform itself. It might also be understood from this wording that the plenary meeting would be expected to take all necessary measures to fully operationalize the platform.

9. With regard to Governing Council decision 26/4, the Governing Council, by endorsing the outcomes of the third meeting on the platform, endorsed the conclusion of that meeting that the platform should be established but did not actually establish the platform. Instead, the Governing Council, in response to the request of the General Assembly, decided to convene a plenary meeting in order fully to operationalize the platform.

## II. Establishment and operationalization of the platform

10. While consideration will be given at the current plenary meeting to issues regarding modalities and institutional arrangements for the platform in preparation for its operationalization, the platform must have been established and its modalities and institutional arrangements must be decided by its governing body for the platform to be fully operational.

11. Paragraph 6 (f) of the Busan outcome states that the platform should be established as an independent intergovernmental body administered by one or more existing United Nations organizations, agencies, funds or programmes. Bearing in mind the background described above, options for the establishment of the platform might include those set out below.

### A. Option 1: Agreement that the platform has already been established

12. Under this option, representatives of Governments at the current plenary meeting might decide that the platform has been established by the General Assembly resolution 65/162 and that the current plenary meeting is therefore the first meeting of the platform’s plenary. The representatives at this meeting, during its two sessions, would thus be in a position to fully operationalize the platform.

13. Should the current plenary meeting, convened by the Executive Director of UNEP, be considered to be the platform’s plenary, consideration will need to be given to the subsequent involvement of other United Nations organizations in the final institutional arrangements for the platform’s plenary.<sup>3</sup>

### B. Option 2: Agreement that the platform must still be established

14. Under this option, further action would be required to establish the platform. Options for such action for the establishment of the platform might include those set out below. The options are not exclusive, and others could be proposed.

### C. Option 2 (a): Establishment at the current plenary meeting

15. Under this option, representatives of Governments at the current plenary might decide that the platform has not been established by the General Assembly resolution 65/162. They might then further decide to establish the platform as part of their response to the request from the General Assembly in resolution 65/162 to fully operationalize the platform. The legal basis for this action is the authority

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2 Although it was agreed in Busan that the platform would be funded through voluntary contributions to a core trust fund to be allocated by the plenary, there was neither a report of the Secretary-General on an estimate of expenditures associated with the platform nor an opportunity for the Administrative and Budgetary Committee (Fifth Committee) to state the effect of the proposal upon the budget estimate of the United Nations as required by rule 153 of the Assembly’s rules of procedure.

3 Subject to clarification of the legal basis of the platform, if the platform is considered already established by the General Assembly and the current plenary meeting is considered to be the plenary of the platform, then the platform’s first plenary would be convened by the Executive Director of UNEP under the auspices of the Governing Council of UNEP as per the request of the General Assembly, with the mandate to determine the modalities and institutional arrangements for the platform, in order to fully operationalize the platform, as specified in General Assembly resolution 65/162 and Governing Council decision 26/4.

vested in those representatives through their credentials issued by their heads of State or government or ministers for foreign affairs to act on behalf of their States and their collective decision to adopt an intergovernmental agreement regarding the establishment of the platform.

16. The Intergovernmental Forum on Chemical Safety was established in this manner by resolution IPCS/IFCS/94.8Res.1 of the International Conference on Chemical Safety. The Conference was convened jointly by UNEP, the International Labour Organization and the World Health Organization in Stockholm in April 1994, in response to a call for an intergovernmental meeting in chapter 19 of Agenda 21.<sup>4</sup> In that resolution, the Conference decided to establish the Forum and adopted its terms of reference, declaring that, “for the purpose of commencing the work of the Forum, this Conference shall, at its completion, be considered as though it were the first session of the Forum”.

17. If this option is chosen, the representatives of Governments at the current plenary meeting, after considering relevant issues, might adopt a resolution by which they establish the platform. The platform’s modalities and institutional arrangements, as identified at the current plenary meeting, might be specified in such a resolution. In this way, the current plenary meeting could then be transformed into the first plenary meeting of the platform. The resolution could also specify when and how the platform would begin its work. For instance, if the example of the Forum were followed, the resolution could include a declaration stating that, “for the purpose of commencing the work of the platform, the current plenary meeting shall, at its completion, be considered as though it were the first plenary meeting of the platform”. Alternatively, the current plenary meeting could conclude its work and be immediately reconvened as the first plenary meeting of the platform (in a similar way as the arrangements for the adoption of the Convention on Biological Diversity during the seventh negotiating session/fifth session of the Intergovernmental Negotiating Committee for a Convention on Biological Diversity, in Nairobi in May 1992), or to set specific arrangements for convening the first plenary meeting of the platform as a separate meeting.

18. In the event that the representatives of Governments agree that the platform should be administered by two or more United Nations bodies or agencies, consideration might be given to whether those bodies or agencies should jointly convene a meeting to establish the platform or whether the representatives of Governments at the current meeting could instead do so representing the interests of those bodies or agencies.

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

19. Under this option, the representatives of Governments at the current plenary meeting might decide that the platform has not been established by General Assembly resolution 65/162 and, after considering the modalities and institutional arrangements for the platform, could resolve to call upon the executive heads of selected organizations, such as the Executive Director of UNEP, the directors-general of FAO and UNESCO and the Administrator of UNDP to establish the platform. Under this arrangement, while the platform might be functionally autonomous and independent from the decision-making processes of those selected organizations, the platform would become an intergovernmental body established to utilize the institutional frameworks of those organizations. This is similar to the arrangements for the Intergovernmental Panel on Climate Change, which was jointly established by the Executive Director of UNEP and the Secretary-General of the World Meteorological Organization (WMO) with the subsequent endorsement of the General Assembly in its resolution 43/53 of 6 December 1988. In the present case, the executive heads of the organizations involved could make arrangements to establish the platform to the extent that they have received authorization from their governing bodies to do so.

20. It may be noted that the Executive Board of UNESCO, at its 185th session, held in October 2010, took note in its decision 43 of the intention of UNESCO to seek institutional association with the platform, if established, and expressed satisfaction at the excellent cooperation between UNESCO and UNEP, UNDP and FAO in relation to the platform and its expectation that such cooperation would continue until the platform was formally established and thereafter. The Governing Council of UNEP, in its decision 26/4 of 24 February 2011, requested the Executive Director, in cooperation with UNESCO, FAO and UNDP, to convene the current meeting and to continue to facilitate any ensuing process for implementing the platform until such time as a secretariat was established, and invited the

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<sup>4</sup> *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992* (United Nations publication, Sales No. E.93.I.8 and corrigenda), vol. I: Resolutions adopted by the Conference, resolution 1, annex II.

Executive Director to submit an offer of interest to host or otherwise support the secretariat of the platform, to be considered along with other offers subject to the procedures agreed by the plenary. The FAO Conference at its thirty-seventh session adopted resolution 14/2011 on 2 July 2011, by which it welcomed the decision of Governments to establish the platform, requested the Director-General of FAO to work closely with UNEP and other relevant international organizations and bodies in the preparation of the forthcoming meetings for the operationalization of the platform and authorized the Director-General to offer to establish and (co-)host or otherwise support the platform with other relevant international organizations.

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

21. Under this option, the representatives of Governments at the current plenary meeting might decide that the platform was not established by the General Assembly resolution 65/162 and might recommend to the intergovernmental organs of the United Nations, its programmes and funds, and/or specialized agencies, that they establish the platform. Examples of such organs include the Governing Council of UNEP and the governing bodies of FAO, UNESCO and UNDP.

22. In the event of joint arrangements, those governing bodies might adopt concurrent decisions jointly to establish the platform. In this process, the legal basis for the establishment of the platform would be the authority of the respective governing bodies. Since each governing body must request the executive head of the organization that it governs to undertake necessary action, the eventual institutional arrangements might be similar to those under option 2 (b) above.

**F. Possible involvement of the General Assembly**

23. Possible action by the General Assembly could include endorsement, as appropriate, of the actions taken under any of the above options, a request to 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 its own action, independently or jointly with other relevant organs, to establish the platform.

24. If Governments expect the General Assembly to decide on the establishment of the platform, the issue needs to be considered under the agenda item already identified by the General Assembly or an additional or supplementary item or sub-item proposed by Member States in accordance with its rules of procedure. The General Assembly at its sixty-sixth session might provide an early opportunity to reflect on the follow-up to its resolution 65/162, under the sub-item of the proposed provisional agenda on the report of the Governing Council of UNEP.

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