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

Panama City, 16–21 April 2012

Item 4 (g) 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**

1. At the first session of the plenary meeting to determine modalities and institutional arrangements for an intergovernmental science-policy platform on biodiversity and ecosystem services, the representatives considered legal issues pertaining to the establishment of the platform. To assist their deliberations, they had before them a note by the secretariat on the subject (UNEP/IPBES.MI/1/2), legal advice from the Office of Legal Affairs (UNEP/IPBES.MI/1/INF/14) and a supplementary legal opinion of the United Nations Environment Programme (UNEP) secretariat (UNEP/IPBES.MI/1/INF/9).
2. During the discussions on this matter, the importance of urgently operationalizing the platform was repeatedly emphasized by all the representatives who took the floor. With regard to the question of whether the platform had been established, there were divergent views. Several representatives said that it had already been established by a resolution of the General Assembly and that no further action was necessary. A number of representatives, however, argued that the platform had not yet been established. While many representatives said that all that was needed to establish the platform was a resolution by those present, in which case the current meeting could become the first meeting of the governing body of the platform (the plenary), there was no consensus as to the way forward for taking such action at the second session of the current meeting.
3. The representatives may wish further to consider the relevant legal issues and identify a way forward for the full operationalization of the platform through appropriate institutional arrangements, including by resolving the question as to whether to take action to establish the platform.
4. For ease of reference, the legal advice from the United Nations Office of Legal Affairs and the supplementary legal opinion of the UNEP secretariat made available at the first session have been reproduced in annexes I and II to the present note.

\* UNEP/IPBES.MI/2/1.

## **Annex I**

### **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**

(issued as UNEP/IPBES.MI/1/INF/14 dated 5 October 2011)

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.

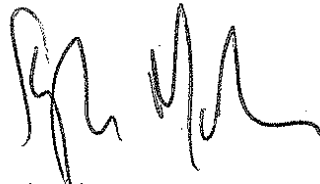
Possible involvement of the General Assembly

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

## Annex II

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

(previously issued as UNEP/IPBES.MI/1/INF/9 dated 3 October 2011)

#### **Note by the secretariat<sup>1</sup>**

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 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.

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<sup>1</sup> The present note has not been formally edited.

## **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.<sup>2</sup>

## **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.

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

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

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.

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