

November 2017

**Subject: BBNJ Process – Governance of scientific assessment methodology and quality of technical reports**

Dear Director General of Fisheries from the European Commission, Mr. Aguiar Machado

In the framework of preparatory (“PrepCom”) meetings for the possible future negotiation of a new UNCLOS instrument applicable to biodiversity, the question of the quality standards to be observed for scientific appraisals for submission (by whoever is concerned) to be admissible among decision-makers (whoever these may be) in order to clarify the choices they have to make has not been dealt with.

This aspect is technical, yet nonetheless essential for the proper implementation of any applicable future UNCLOS instrument to be negotiated.

For instance, the PrepCom Chair proposal dated May 2017 on the economy of an applicable future agreement<sup>1</sup> only underscores the need to establish proceedings for expertise and MPA project evaluation, but does not suggest any standard requirement for such proceedings to observe in order to yield solid, legitimate appraisals (Cf. § 3.22).

This question likewise concerns the environmental assessments referred to in Chapter E of the PrepCom Chair document if it is deemed necessary to independently evaluate the pertinence of these assessments.

The expertise proceedings established by the ICES<sup>2</sup> would seem one source of inspiration for proposing expertise proceedings that guarantee the rationality and objectivity of the expert advices required.

Transparency, collective responsibility and independence are three principles of good governance in ICES expertise proceedings that would be able to guarantee the rationality and objectivity sought after, overcoming the polemics – including scientific controversies – that arise from the simple promotion of scientific publications defending different approaches. For the record, RFMO scientific committees – which also deal with the impact of fishing on biodiversity, even though this is not always stated – are progressively adopting modes of operation and governance similar to those implemented at the ICES (even if this is still partial, particularly in the absence of means).

Along the lines applied by the ICES, it might be suggested that any appraisal intervening in the implementation of the possible future UNCLOS instrument applicable to biodiversity, in order for its conclusions to be admissible, should be prepared in accordance with the above-mentioned governance principles (transparency, collective responsibility and independence), and, in addition, should attest to certain qualities of common sense appropriate to guaranteeing an intrinsic rationality of advice (explicit reference to the principles on which advices are founded, the existence of supporting verification measurements).

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<sup>1</sup> Cf. “Chair’s indicative suggestions to assist the Preparatory Committee established by resolution 69/292 ../..” dated 31/05/17

<sup>2</sup> For the record, the proceedings in place at the ICES as well as their implementation – the sequence of which is important – is described in summary in the document attached. Cf., “Introduction to advice”, point 1.2.2, or at the ICES website: cf. <http://www.ices.dk/community/advisory-process/Pages/default.aspx>

As regards governance of the proceedings, certain requirements regarding implementation are in themselves necessary to establish respect for the principles mentioned (transparency, collective responsibility and independence):

- The assessment must be submitted following request from the decision-makers in order, as far as possible, to avoid confusing the mission assigned to the experts (delivering the objective elements to assist decision-making) with the role that the decision-makers/managers must assume (deciding with full knowledge of the risks entailed by their decision, but nevertheless deciding);

From striving too hard for the decisions taken to be those recommended by the experts, all too often have assessment proceedings become pre-decision proceedings in which the decision-makers have ended up involved in one way or another;

- A sequence of the stages of assessment guaranteeing disconnection between technical verifications/analyses and the advice issued as such: this raises the likelihood of counteracting coercion to a maximum and ensuring the best possible consensus;

By way of illustration, the ICES adopts the following sequence:

- 1/ establishment of a technical report by a technical working group (in response to a request);
- 2/ based on this report (and on its review, cf. below), the preparation of a project for advice by a drafting team composed of the working group Chair and experts who have not participated in the group; and
- 3/ discussion of the advice project and adoption of the advice by an assessment committee composed of scientific representatives from all ICES member countries.

This sequence lays the foundations for an authentic consensus of assessments given, legitimising the assessment procedure to scientific community and stakeholders alike.

- A review of the technical analyses made above by independent/external experts, giving rise to an observation report, required to ensure the objectivity of the assessment procedure;
- Free access to all the reports prepared throughout the assessment proceedings, to the data supporting them and/or backing the quantitative results, and contained but effective meetings with the expert authorities (the different groups, working groups, advice project drafting groups and the final advice group) open to the participation of outside observers (stakeholders), which is necessary for process transparency.

Knowledge of the context to which the advices refer and the use of accurate measurements and methods are necessary prerequisites for rational advices:

- The framework of explicit premises based on which the advices are issued must be documented.  
By way of illustration, the advices of the ICES cite:
  - ✓ With regard to advices concerning the exploitation of living resources, all of the following: UNCLOS (studies on MSY/Maximum Sustainable Yield), UNCED (precautionary principle), UNSFA (ecosystem approach) CBD (ecosystem approach for biodiversity conservation), WSSD (fisheries restoration for MSY);
  - ✓ With regard to advices on matters not concerning direct restriction measures/fishing quotas (of the type leading to numerous questions raised by OSPAR relating to inventories or indicator formulation, etc), advices are based on the targets and criteria that requesting parties themselves assign (sometimes leading ICES to underscore their inconsistencies or insufficiencies).
- The definition of accurate metrics and methods for quantification makes it possible to ensure the rationality of the advices given, particularly in matters regarding the impact of activities. The idea

should be that expert advices are not merely “expert opinions”. Adoption of these standards must follow the same rules of governance and observe the same principles as those leading to the adoption of advices on specific matters.

These general principles of governance seem to us to be the only criteria able to guarantee the rationality and objectivity of expertise conclusions, even where the price of such guarantee is evidently that of mobilising a sizable part of the scientific community (ICES has to mobilise around 1,500 scientists in the course of its various meetings) and the requirement for the existence of proprietary means on which the procedure of assessment can fall back in order to coordinate collaborating experts.

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By way of illustration – to finish more controversially – I will cite an example of the safeguards that observance of the principles raised can leverage (this refers to a request addressed to ICES by OSPAR on an issue concerning MPAs, namely that of EBSAs), and an example of the insufficiencies observed when these principles are not implemented (this relates to the CBD).

(1) Following the OSPAR request to the ICES regarding 10 EBSA projects relating to the North-east Atlantic arising from the meetings of CBD/OSPAR experts, only four were acknowledged by ICES as fulfilling the criteria that the CBD itself set for the establishment of EBSAs (and this after substantial modifications to three of them), none of which relate to the water column. OSPAR and the CBD, which were associated in the work, have not responded to these verifications a priori.

(2) Current practice in the UNEP legal system, or, more generally, its environmental system (CBD, CITES, etc) with regard to expertise rests largely on periodic meetings of COPs receiving the advices of a scientific committee that itself meets periodically. The governance observed by such assessment procedures leaves much to be desired.

For instance, the operation and governance of the body serving as the CBD scientific committee (SBSTTA) would seem very far from the standards proposed above. The SBSTTA seems to be, above all, a non-permanent venue for sharing regional seminar outcomes or diverse programme results, which themselves are based on unspecified (not to say improbable) modes of operation and governance. The SBSTTA likewise seems to be a body lacking independent capacity for expertise beyond its annual meetings, with no capacity for mobilising collective, transparent and independent expertise. It follows from this that the CBD produces reports or advices in which rationality and objectivity do not appear certain.

By way of example, the CBD report on the progress achieved towards the Aichi targets (CBD Technical series no 78), which purports to be an assessment of the evolution of biodiversity, was not written by the SBSTTA (although it might have been taken as the body fully appointed to produce this).

This report was indeed subcontracted from service providers, as indicated in its preamble: *“This report was prepared in response to a call from the Convention on Biological Diversity (CBD) Secretariat and under contracts to UNEP-WCMC and DIVERSITAS, as well as subcontracts to The University of British Columbia (UBC), PBL and University of Lisbon”*. In the case of Aichi Target 6 on sustainable fishing, only the University of British Columbia seems to have contributed. Despite an impressive list of contributors, this technical report offers no assurance of objectivity and independence (it is essentially a bibliographic review which certain parties – ourselves among them – find eminently biased and one-sided, with no affirmed methodology, no a priori peer review, etc..).

We hope you find these reflections helpful to inform the EU position during this process.  
Yours faithfully,

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