

IN THIS ISSUE!

One and a half own goals: Addressing some Eastern and Southern Africa Fisheries Industry Concerns Pages 1-4

Elijah Munyuki

SEATINI analysis of the European Commission's response to ESA fisheries industry demands Pages 4-7

Editorial: Bad advice breeds bad product Pages 7-9
Rangarirai Machemedze

One and Half Own-goals: Addressing some Eastern & Southern Africa Fisheries Industry Concerns

By Elijah Munyuki

Introduction

Delegates at the recent meeting (Harare, January 30, 2006) of the East & Southern Africa (ESA) countries technical group on fisheries expressed a number of important concerns. The ESA group indicated its desire to conclude a fisheries agreement with the European Union (EU) and this agreement, which will be based on the draft proposal produced by ESA countries, would include modalities for both inland and marine fisheries. However the ESA group faced a setback after the European Commission (EC) failed to make a meaningful response to the ESA group's proposals. In the discussions

over the future of the fisheries sector in the region two important issues kept on being mentioned. First, the delegates emphasized the need for an agreement with the EU, but this agreement should have a clear special and differential treatment of the ESA fisheries industry. Secondly, realising that the EU will not be the perpetually better trading partner, the ESA group seeks flexibility in the fisheries agreement to take account of the possibility of better terms from third party states. Are these issues achievable?

Suspending the principle of non-discrimination

The suspension of the principle of non-discrimination obviously reflects the ESA belief that their fisheries sector will not be able to survive if placed on equal terms with the more established industries from the EU. A liberalised fisheries regime which does not take into account the differences between

ESA and EU fisheries industries will spell the end of the numerous small enterprises, co-operatives and a few established companies which ply their trade on ESA waters. This is not exactly the development co-operation through trade with the EU which the ESA countries have in mind. The point applies to both marine and inland fisheries. A more favourable regime for ESA industry would allow it to grow and also to take a direct part in the exploitation of its own resources. Properly monitored, the local fisheries industry has the capacity to make serious contributions to the region's economic development.

However better treatment for ESA fisheries industry has to be negotiated within the context of the agreement between the Africa-Caribbean-Pacific (ACP) and EU states, the ACP-EU Economic Partnership Agreement (EPA) or the Cotonou Agreement. Article 53 of this agreement sets the terms for the negotiation of future fisheries agreements. With respect to non-discrimination the important clause is art.53.2 which reads:

“In the conclusion or implementation of such agreements, the ACP States shall not discriminate against the Community or among the Member States, without prejudice to special arrangements between developing States within the same geographical area, including reciprocal fishing arrangements, nor shall the Community discriminate against ACP States.”

The position therefore is that the non-discrimination principle is applicable to ESA-EU fisheries agreements. The ESA states may not favour their local industries at the expense of the EU industries. However this requirement is not absolute. Since ESA countries are

developing countries within the same geographical area they may have special arrangements amongst themselves. Such arrangements may have the effect of more favourable treatment for ESA fisheries industries over those from non-ESA countries, including the EU. In the absence of such special arrangements the principle of non-discrimination will have to apply, and ESA countries will have to give EU fisheries industry the same treatment as their own industries.

Effect on Current Negotiations

The above conclusion has a direct and very practical effect on the current ESA-EU negotiations for a fisheries agreement. As noted above the ESA group has gone a step ahead and drafted a fisheries framework agreement. Progress has been stalled because the EU through the European Commission (EC) has not made any commitment on the issue. ESA countries are on the hand very anxious to conclude an agreement. Given the current state of ESA fisheries an early agreement with the EU would be a disaster. This is primarily because the principle of non-discrimination will apply. ESA countries have not made special fisheries arrangements for the benefit of their own industries. Such special arrangements can serve as the basis for better treatment for ESA industries at the expense of those from the EU, and therefore suspend the principle of non-discrimination in compliance with the Cotonou Agreement. In making haste to conclude an agreement with the EU, ESA countries are dribbling themselves to an own goal.

To take advantage of article 53.2., ESA countries must first conclude a series of bilateral arrangements on fisheries. These are long overdue. The fisheries

industry in the ESA region has been operating without basic regulatory modalities and this is particularly true for inland fisheries. There has not been any cohesion in regional policies, when ironically most of the inland fisheries operate on internationally shared water bodies. More organisation and clear rules of operation and co-operation should result in a better ESA fisheries regime. For example it does not make much sense that different rules apply over the same fish species in the same waters between Zambia and Zimbabwe (Lake Kariba). A regional focus will make it easier for the industry especially in setting up costly infrastructure such as testing laboratories; resources can be shared to benefit from the resulting economies of scale. Regional arrangements are essential on their own, and not necessarily as a basis for the conclusion of an agreement with the EU. In any case we argue that concluding fisheries agreements with the EU is a bad idea given that article 53.1. of the Cotonou Agreement is against the long-term interests of ESA countries.

Better terms for fisheries trade from a third party

Assuming that ESA-EU countries have concluded an agreement on fisheries can ESA countries shift position to take advantage of better terms of trade from a third party to ESA-EU arrangements? Common sense dictates that such a possibility should be taken advantage of. The EU is not the only market or trade partner. For better or for worse other countries have an interest in African resources. Recently China has been making noises about a Sino-Africa free trade area. ESA countries must structure any fisheries deals with the future in mind instead of being locked into bad arrangements.

Since their minds are focused on a deal with the EU, ESA countries should note that room for manoeuvre in the EPA context is limited. There are two reasons for this point. The first is of ESA and other ACP states' own making. The second, ESA is already in the process of making.

ACP states agreed to article 91 of the Cotonou Agreement. This article limits the scope of future arrangements during the subsistence of the Cotonou Agreement. It reads:

“No treaty, convention, agreement or arrangement of any kind between one or more Member States of the Community and one or more ACP States may impede the implementation of this Agreement.”

Whilst this clause does not necessarily address future arrangements with third parties to the Cotonou Agreement it limits room for bilaterals. For example ESA states cannot benefit from better terms of trade in fisheries which are at the prompting of one EU member if the result would be to create impediments to the ESA-EU arrangement. In general the Cotonou Agreement does not prevent ESA states from creating third party arrangements, but it is difficult to justify such arrangements when ESA states are asking the EU to invest in the development of fisheries. Such investments will obviously lock in ESA fisheries to the EU's interests.

The second point is a curious clause in the Draft ESA-EU EPA Agreement. This is a draft which COMESA produced on behalf of ESA countries. This draft includes modalities for fisheries. Article 4 thereof reads:

“This Agreement shall not preclude the maintenance or establishment of

custom unions, free trade area or other arrangements between either of the Parties and third countries, insofar as they do not alter the rights and obligations provided for in this Agreement.”

ESA countries must know that they have restricted themselves as far as the conclusion of other FTAs is concerned. All other FTAs are not supposed to alter the rights and obligations provided for in the EU-ESA EPA, including modalities on fisheries.

This is the second own goal in the making.

Conclusion

ESA countries should slow down. Questions on the viability of a fisheries agreement with the EU given the current imbalances should be seriously considered. An EPA or no EPA, ESA states should immediately start on modalities for regional arrangements for a sustainable fisheries regime. Regional bodies such as COMESA, SADC, ECA, EAC, IGAD and IOC etc, should take the lead in the creation of better operational conditions for the fisheries sector. Further reliance on donors is a problem in that long-term lock-in conditions will be applied.

A final point relates to the inadequate human resources capacity for ESA to conclude a beneficial agreement with the EU. It is apparent that crucial legal issues are not being given attention in the rush for the EPA with the EU. There is no evidence that the bulk of the ESA group consults its principal stakeholders before and after taking important positions. And it is certainly clear that no real legal consultation was done with respect to the two concerns addressed in this paper. National legal advisers should be a presence in all

these issues. Indeed the COMESA draft referred to above was not properly discussed because most delegations had no capacity to deal with it.

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SEATINI analysis of the European Commission's response to ESA fisheries industry demands

Introduction

In many parts of East and Southern Africa (ESA) fish provide a cheap and efficient form of protein. The fisheries industry in its various sizes across the region accounts for a significant number of jobs and livelihoods. This is true for both marine and inland fisheries. Marine fisheries suffer from the competing demands of the coastal states and those of foreign states (mostly industrialized countries) whose huge trawlers outperform local operators. The latter are often ill-equipped to compete with the hi-tech machinery of the international sea harvesters.

In one estimate, of the **2-3 billion euro** of tuna harvests **117 million euro** accrues to the ESA region. The competition for fisheries is intensifying given that the industrialized countries have practically emptied out their seas, this is true with respect to the European Union. Given the rate of the unsustainable fishing activities on the open seas, the future lies in controlled inland fisheries, where aquaculture is steadily gaining popularity. The ESA countries of the Great Lakes region, and farther south, those along the Congo and Zambezi rivers have excellent climate and other conditions (minus the money) for a booming inland fisheries industry. It is no

surprise that in negotiating future trading relations (so-called Economic Partnership Agreements, EPA) with the EU, the ESA grouping has developed specific demands and priorities to safeguard the exploitation of what is left on the seas, and what it has on the inland waters. ESA countries view the fisheries negotiations as an intrinsic part of the EPA process which is to come into effect by 2008.

ESA Demands

Effectively the ESA group wants to conclude a fisheries agreement which expands local benefits and ensures local development, and further creates more favourable treatment to ESA operators. In this regard ESA countries want an agreement which can give preferential treatment to local operators. Further, ESA requested the following commitments from the EU:

- that the Fisheries Framework Agreement (FFA) be the basis for bilateral fisheries agreements;
- that due emphasis be given to development issues in order to enhance supply capacity and value addition;
- that provision be made for additional resources for the implementation of the developmental components;
- that preference margins should be protected as an important tool for fisheries development;
- that support be provided for inland fisheries development, including aquaculture; and
- that support be provided to combat illegal, unregulated and unreported fishing (the EU fleet is more of a culprit than the local fleet)

The list of demands shows that this wish list is not based on a “trade as usual” mentality. The core emphasis is sustainability, development, and better benefits for the ESA citizens. ESA requested specific comments from the EU.

The EU Response

The ESA group expected to discuss a full EU response at its Regional Negotiating Forum (RNF) meeting in Harare, Zimbabwe (February 1-2, 2006).

Although not in full agreement with some of the demands, the EU indicated that it agreed that the FFA be the basis for fisheries negotiations. The EU responded by issuing a *non-paper*. The EU did not make a single reference to the major objectives of the FFA. ESA countries have complained that the EU does not want a regional supra-national agreement on fisheries. They find this unacceptable as it limits ESA efforts at regional integration, especially in view of the fact that fisheries require closer regional co-operation. Further the EU did not respond (despite having made a commitment to do so) to ESA demands on areas of cooperation, support to conservation measures, and investment support and private sector development. There were no commitments from the EU on, illegal, unreported and unregulated activities, preservation of preferences, and control of transshipment. Effectively the EU did not address the specific issues in the FFA which had been expected of them from an earlier undertaking. The COMESA secretariat (acting as ESA secretariat for this purpose) said

“the EC non-paper represented a step backwards compared to earlier [the]

position of the EU that the FFA would be the basis of the negotiations.”

Non-papers at large

It is instructive that the EC “responded” to ESA positions through a non-paper. In actual fact we can say the EC did not respond to the ESA positions. The use of non-papers is normal in international relations. Non-papers are simply off record, or unofficial presentations of government policy. A non-paper is not a record of a commitment. By issuing the non-paper the EC was indicating that it wished not to be held as having committed itself to the contents of the paper. The content of the non-paper bolstered the EU’s tactics further; it was largely irrelevant to ESA’s expectations. In fact no real policy was articulated in the non-paper. Effectively the non-paper was a no paper. The EU basically ignored ESA countries. From this it is easy to understand the frustrations of the ESA group.

The Strategy Game

The reason why ESA is in a haste to conclude a fisheries agreement is because they are not happy with the status quo. The reason why the EU is not in a haste to conclude a fisheries agreement is because they are happy with the status quo. So when the ESA countries complain that the EC response is a step backwards, one must ask in whose direction is that step backwards; certainly not in the EU’s. This process is not a charity ball. There are deep commercial interests involved in this process, and notions about livelihoods and development are generally irrelevant. Of course it makes perfect sense for commerce to think and plan around issues of sustainability; but that is hardly the immediate concern in a profit motive.

ESA countries know too well that in fisheries they hold the leverage of resources, they have the fish, Europe needs them. But the party who needs the fish is not necessarily the same party that needs a fisheries agreement. The EU can get the fish without an agreement along the ESA style FFA. And evidently the EU is exercising this option. If the ESA sponsored FFA was not an impediment to EU interests then the EU would have reacted otherwise.

Is the EU obliged to commit itself to ESA demands?

One would ask, why given the friendly language of the EPAs discourse would the EU practically flaunt the cold shoulder to ESA countries? Is the EU not obliged to respond to ESA demands in the context of the post-Cotonou negotiations? Unfortunately recourse to legal documentation of this EU-ESA relationship is unavoidable. Answers are to be found in tedious legal analysis.

Articles 36 and 37 (Chapter 2) of the Cotonou Agreement (which creates the stage for these EPA negotiations), uncompromisingly commits both the EU and ESA countries to reciprocal trade arrangements by January 2008. These articles speak of what **must be done by January 2008**. What must be done is that ESA countries must liberalise their economies, slash duties and ease other import restrictions to match the EU actions on these issues. This language changes in the subsequent chapters, to “co-operation in other areas”. This is the context in which fisheries agreements are slotted. Fisheries agreements are catered for under article 53. Article 53.1. reads:

*“The Parties declare their **willingness to negotiate** fishery agreements aimed at guaranteeing sustainable and*

mutually satisfactory conditions for fishing activities in ACP States”

This little sentence is crucial. In it lies the rights and obligations of the EU and ESA countries. By declaring a willingness to negotiate fishery agreements (as the other Party) the EU never committed itself to negotiating one or many with ESA countries in February 2006, or at any other time thereafter! With respect to obligations, article 53.1. is a meaningless little sentence. Unlike the time bound specifics of articles 36 and 37, and whose obligations must be performed by ESA states, article 53.1. creates no such obligations. The loose language of “co-operation in other areas” commits parties to declaring a “willingness to negotiate”. There is no clause to enforce this willingness into practical negotiations through time stipulations. Strictly speaking the EU is not obliged to negotiate an FFA with the ESA countries. One can also say ESA countries are negotiating “co-operation in other areas” of competition policy, investment and intellectual property rights when they are under no obligation to do so. Such negotiations may happen when the EU feels like it; hopefully by then there will be something left in the seas to negotiate about! And a revision of the second sentence in this paragraph is necessary, the obligations in article 53.1. are only for ESA countries.

Having said this, it is also important to note the location where these illusive fisheries agreements are supposed to apply (when they do get to be negotiated, signed, implemented and enforced!). The Cotonou agreement on which fisheries agreements are to be based does not talk of fishery resources in the EU and the ACP states. Rather it talks of **guaranteeing sustainable and mutually satisfactory conditions for**

fishing activities in ACP States. ESA countries are part of ACP states. What they signed up to is an agreement guaranteeing that the EU will be happy with the conditions under which they can exploit ESA fisheries. In simple terms the EU is merely saying to ESA countries **“let’s share what you have”**. Never mind the fact that the larger part of the current ESA fish cake is already in the EU hands anyway.

Editorial: Bad advice breeds bad product

Rangarirai Machedzwe

In our last Bulletin (Bulletin 9.02 on Economic Partnership Agreements) we promised to carry out further analysis of the RNF meeting of the ESA countries as well as the technical meetings between officials of ESA countries and the European Commission. This bulletin carries articles and concerns of the fisheries negotiations.

The 15 ESA countries (news is DRC is out of ESA) is home to vast water bodies with fish and other edible products that have the potential to reduce malnutrition to manageable levels had our governments been more prudent in their different trade arrangements with their developed countries counterparts. To mention a few we are home to Lake Victoria (which covers three countries), Lake Tanganyika, Lake Kariba and a host of others which can supply not only fish but water and electricity as well.

Unfortunately, our waters have been invaded mainly by foreigners who use the power of the dollar or is it the Euro at the expense of the health and nutrition needs of the poor people. Even our governments and local

authorities have been hard on indigenous people who fish ‘without licenses’ as they are labelled poachers. Instead, those who have the money have been given some “fishing quotas” and have been exporting these to the rich consumers outside the territories of ESA countries. The local populations, who are fortunate enough to be on a fish diet can only access this at a cost which an ordinary citizen cannot afford to have.

From the article in this bulletin by Elijah Muniyuki and our analysis of the EU’s response to the ESA demands it is clear that our countries cannot afford the current situation to continue. Instead they want a new fisheries agreement which does not only address the trade concerns of ESA countries but also the food security issues.

However, such a fisheries agreement cannot be developed and agreed to overnight. It is a delicate and complicated situation that requires careful analysis and which needs to take into consideration a number of issues.

The COMESA secretariat which practically speaking is the ESA secretariat needs to be guided by the needs of the member countries. It should be made clear that the issues which are at hand are not secretariat issues but are people issues because they touch on their health, they touch on their nutrition, they touch on their employment and basically they touch on their livelihood. It only takes good advice, adequate consultations and full representation for a good agreement to come out of the fisheries negotiations.

Reports that the Fisheries framework Agreement (FFA) of the ESA countries was done without adequate input by member countries does not only

jeopardize effective output but also questions the seriousness of the member states of ESA in their engagement with the EU.

Surely bad advice or lack of it will breed a bad agreement at the end.

In our analysis we have raised serious concerns about the obligations of ESA countries and the EU in negotiating a fisheries agreement (article 53). More can be written about article 53, and it will be. The EU knows it clearly that a quick settlement on the subject will scupper their chances of continued exploitation of the water resources of ESA countries.

Whereto ESA countries?

For now ESA countries must reflect on the technicalities. The first point is that the legal basis for the EU’s attitude is clear. The EU is quite right to drag its feet. The second point is that the legal basis for fisheries agreements is disastrously skewed against the interests of ESA countries. ESA countries should take the EU’s attitude as a blessing in disguise and they must never negotiate agreements which effectively promise to exploit ESA resources by Europe or anyone else for that matter. If it is ESA’s point that at present the EU is fleecing ESA fisheries, a way can be found to control this beyond the mischievous confines of article 53.1. of the Cotonou Agreement. How such a clause found its way into the so-called Partnership Agreement can only prove how ESA countries and the rest of the ACP brethren were ill-prepared for this so-called new trade arrangements with the EU. The ESA group’s haste for fisheries agreements is not good hence the EU’s attitude actually helps ESA to focus on the deceptions inherent in the framework for the EPAs and to

appreciate what “co-operation in other areas” really means. These are the sort of things which ACP states should have squirmed at before signing this agreement. A review (even a repudiation) of the Cotonou agreement has never been more necessary.

It is important to end on a mischievous note. Let us go back to article 53.1. above, substitute the words “fishery” and “fishing” with “farming” and substitute “ACP” with “EU”.

It will thus read “*The Parties declare their **willingness to negotiate farming agreements aimed at guaranteeing sustainable and mutually satisfactory conditions for farming activities in EU States***”

Let ESA countries try to negotiate for the result.

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