

➤ Trade and competitiveness in African fish exports: Impacts of WTO and EU negotiations and regulation

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tralac Trade Brief
No 5
September 2005

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Introduction

Exports of inland and marine capture fish and fishery products (thereafter 'fish') are of integral importance to government revenues and income and employment generation in Sub-Saharan Africa (thereafter 'Africa'). African countries face complex negotiations at the WTO-level on tariffs and fishery subsidies, and bilateral and regional negotiations with the EU in the formulation of Economic Partnership Agreements (EPAs) and Fisheries Partnership Agreements (FPAs). In addition, they need to comply with increased food safety standards. The outcomes of WTO negotiations under the Doha 'Development Round' and changing EU regulations are likely to place new hurdles on African fish exporting countries. In this briefing, we analyse how these countries can respond to these challenges.

Fish trade between Africa and the rest of the world is regulated via a complex overlap of multilateral and bilateral trade agreements. We focus here on aspects that affect market access and competitiveness of African fisheries exports to the EU, their main end-market. During the Uruguay Round, fisheries were left out of the Agreement on Agriculture at the insistence of some EU countries that benefited from the EU fisheries subsidy regime. As a result, fisheries-related issues are covered by various other agreements. Most notably, fisheries subsidies fall under the discipline of the Agreement on Subsidies and Countervailing Measures (ASCM). The main areas up for negotiation in the Doha Round are tariff and non-tariff barrier reductions under the negotiating group on 'Non-Agricultural Market Access' (NAMA) and specific mention of a reduction of fisheries subsidies under the WTO negotiating 'Group on Rules'. However, many other WTO-related issues have real or potential impact on market access opportunities for fisheries products from African countries, such as: (1) outcomes from the Dispute Settlement Mechanism; (2) the current process of clarification on the impact of eco-labels on trade; (3) the relation between trade rules and Multilateral Environmental Agreements (MEAs); (4) Technical Assistance and Capacity Building (TA & CB); and (5) provisions for Special and Differential Treatment (SDT).

As for the EU, the Cotonou Agreement applies to all African members that are part of the ACP group of countries. This agreement provides tariff-free access to the EU provided that fish exports comply with specific Rules of Origin (ROO). If ROO fail, then a country has to export to the EU under the higher Most-Favoured-Nation (MFN) tariff rates. ACP countries

claim that these rules are promoting rather than decreasing dependence on the EU. The EU modified its ROO in 2005. The new ROO for fisheries products, however, are not substantially different than the older ones and they do not address ACP countries' demands for more liberal rules. For the time being, African ACP exports to the EU that qualify under Cotonou still have some degree of tariff preference over exports taking place under MFN rates. They also have (less marked) tariff preference over exports that qualify under the Generalised System of Preferences.

The EU is seeking to replace the Cotonou Agreement with a series of WTO-compatible Economic Partnership Agreements (EPAs). However, the negotiation process in this realm has been very slow and the EU 'vision' of how EPAs might function remains opaque except for a fairly narrow emphasis on 'the progressive removal of barriers to trade between the Parties' (EC, 2000: Article 37.7). The ACP position on the Cotonou Agreement is more concerned with its potential developmental implications. In short, while Cotonou offers elements of the continuation of the preferential trade agreements embodied in the Lomé Conventions (although within a more limited and/or tenuous timeframe), in practice, by sub-dividing the ACP grouping into five new EPA sub-regional groupings, Cotonou substantially reduces the collective bargaining power of these 79 countries. The replacement of bilateral fisheries agreements with Fisheries Partnership Agreements (FPAs) is linked to EPA negotiations. However, there is significant confusion in ACP negotiating forums over the distinctions between EPAs and FPAs. For example, EPAs are (on paper) 'developmental' arrangements, but FPAs are perceived by the EC Directorate of Fisheries as a *commercial* mechanism.

The outcome of EPA and FPA negotiations is particularly important for non-LDC ACP countries because if they fail to reach such agreements from 2008 their preferences will fall under the GSP of the EU. Relying on GSP preferences is a volatile option, as it is gradually being phased out. While it seems likely that the full implementation of EPAs might extend beyond the 1 January 2008 deadline for non-LDC ACP countries, this will only entail a maximum of two additional years.

The Everything-but-Arms (EBA) scheme is a unilateral offer of the EU to LDCs that is valid for an unspecified period of time. This also means that it can be withdrawn at any time. It allows tariff-free access to the EU, provided that they fulfil the appropriate ROO. Finally, the Trade, Development and Cooperation Agreement (TDCA) is a bilateral agreement between the EU and South Africa, which was signed in 1999. A bilateral fisheries

agreement was supposed to follow the TDCA, but negotiations have stalled, given South Africa's refusal to allow EU vessels to fish in its territorial waters.

Fisheries-relevant negotiations at the WTO

WTO negotiations impacting fisheries sectors in Africa have taken place under various headings. The two main ones are: (1) tariff negotiations under NAMA (as noted above, fish are not covered by the Agreement on Agriculture); and (2) subsidy negotiations under the 'Negotiating Group on Rules'. The goal of the Doha Round in relation to tariffs is their negotiated reduction on a number of categories of goods, including fish and fishery products. In general terms, one of the central issues for African fish exporting countries is not to obtain lower tariffs in their principal export markets, but to avoid tariff preference erosion. A successful round of WTO negotiations on reducing or abolishing fishery tariffs under NAMA would therefore be highly problematic. An exception is South Africa, which currently faces MFN tariff rates in the EU and would thus benefit from fishery tariff reductions. Conversely, a status quo situation at the WTO level would conserve tariff preferences to the benefit of African LDCs, whereas the impact on non-LDC ACP fish exporters depends on the outcome of EPA negotiations with the EU – and even then their margin of tariff preference may still be eroded.

As the fish sector is not subject to the Agreement on Agriculture, negotiations on subsidies are framed within the more rigorous disciplines of the WTO Agreement on Subsidies and Countervailing Measures (ASCM). Although ACSM made it possible to challenge (some) fisheries subsidies, no major reduction has taken place to date. Few WTO members have complied with their obligation to report subsidies to the ACSM. The ACSM also allows litigation through the WTO Dispute Settlement Body (DSB). A positive outcome of a case brought to the DSB could have allowed the imposition of countervailing duties in other sectors. Yet, the DSB has not yet been used to challenge fisheries subsidies.

Given the failure of member countries in using ASCM and the DSB to force reductions in fisheries subsidies, the focus has now moved towards a negotiated process. Fisheries subsidies were explicitly slated for reduction or elimination in the Trade and Environment section of the Doha Declaration (paragraph 31). The limited status of knowledge on fisheries subsidies and their impacts implies that WTO negotiations are taking place with at best a fragmented and contradictory knowledge on the issue. These negotiations have been taking place within the 'Negotiating Group on Rules' since 2002. Before the start of

the Doha Round (November 2001), fishery subsidies had been discussed for about five years in the Committee on Trade and Environment, which is not a negotiating forum.

A number of submissions have been made to the 'Negotiating Group on Rules'. In simplified terms, these fall along two main positions. The first is held by a group known as 'Friends of Fish' -- arguing that the existing provisions of the ACSM are not enough to regulate fisheries subsidies. Therefore, this group calls for a specific (and improved) discipline for fisheries subsidies within the WTO. An opposite position has been developed chiefly by Japan, Korea and Taiwan, arguing that there is no need for special treatment for fisheries subsidies within the WTO. Their initial refusal to negotiate on subsidies was later mitigated. In the early days of negotiation, the EU took a passive stance in the debate in view of the ongoing internal discussion on the reform of its Common Fisheries Policy (CFP). In its submission of May 2003, however, it finally presented a proposal that was roughly in between the two other positions, but somewhat closer to the proposal of 'Friends of Fish'.

By late 2004, the debate in the negotiations started focusing on a 'traffic light' system of subsidy classification and on clarifying what would go into various boxes – a debate that is still ongoing. Until very recently, the issue of Special and Differential Treatment (SDT) for developing countries had not arisen in the negotiations. A detailed submission by Brazil (April 2005) opened up the debate in this regard. African countries have remained generally passive in these debates and negotiations, despite the clear impact that they may have on some coastal states that have bilateral access agreements with the EU (particularly in West Africa and the African island states of the Western Indian Ocean).

Reform of the EU Common Fisheries Policy (CFP): Implications for Africa

The EU Common Fisheries Policy (CFP) was agreed by member states in January 1983 with the intention of ensuring sustainability of fish stocks within EU waters. After more than 20 years of operation, it can be safely concluded that it has failed to do so, primarily due to over-capacity in the EU fishing fleet (fuelled substantially through subsidies) and ineffective regulatory and enforcement mechanisms. As fish stocks are at critically low levels in EU waters, resulting in decreasing levels of landings, the EU is facing a growing supply deficit to meet its demand for fish. The supply deficit has been solved through the increased purchase of fish caught by non-EU vessels outside EU waters and by the rise in effort of EU fleets in distant water fisheries (particularly along the African coast).

The EU revised the CFP in 2002. Although most of the revisions can be related to internal fisheries policy issues for EU waters, some changes may have an important impact on African countries. The CFP is composed of four policy areas. The following discussion highlights, for each policy area, the changes and specific content that impact on African countries.

- *Conservation policy* – The changes in the CFP under this area were primarily directed to cope with the problems affecting EU waters. However, the policy has now broadened from focusing only on EU waters to also cover waters outside the EU in which EU vessels operate. An important principle here is to ensure that all conservation measures are respected, both within and outside EU waters. Yet, it should be noted that this principle might not always be respected in practice.
- *Structural policy* - The changes in this area were also related mainly to the European fishing industry, but have an indirect impact on African countries. The most important element is the Financial Instrument for Fisheries Guidance (FIFG), which is a subsidy scheme. The new CFP tightened (and by the end of 2004 formally terminated) the mechanism relating to the setting up of joint enterprises between EU companies and companies in third countries. From 2002, it has no longer been possible to establish *temporary* joint ventures, and the support from FIFG generally declined in later years. The financial support to the EU fish processing industry has also been revised. It is less favourable and has moved the focus from increased efficiency to the promotion of, and search for, new markets and uses for fisheries products.
- *Market policy* – The aims of the new market policy are to balance supply and demand, improve the competitiveness of the processing industry and ensure the availability of quality fish products at affordable prices for European consumers. From an African perspective, the common marketing standards and regimes for trade with non-member countries are the most important elements here. Almost two thirds of EU imports are covered by special rules as a result of bilateral agreements or special provisions (e.g. Cotonou, GSP).
- *International policy* – in the revised CFP, the international policy dimension has become more prominent. The intention is to move from ‘access agreements’ to Fisheries Partnership Agreements (FPAs) with third countries, particularly with developing coastal states. The FPAs are supposed, on the one hand, to protect the interests of the EU

distant-water fleet and, on the other hand, to promote sustainable fisheries in the waters of the partner concerned.

Bilateral fisheries relations are the backbone of EU fisheries collaboration with ACP countries. As of mid-2005, the EU was part of 22 bilateral fisheries agreements of which 16 were with African countries. In 2005, approximately 20% the EU fleet (in GRT terms) was fishing under bilateral fisheries agreements with ACP countries. The cost for the EU to enter these agreements was €145 million per annum in the late 1990s, which is paid to ACP countries as rent for obtaining fisheries access. This rent is supplemented by European fishing companies which paid an additional €30 million in access fees. The bulk of the fish caught under ACP-EU fishery agreements is shipped to the EU, where processing and marketing takes place. Furthermore, catches by the EU distant-water fleet are most likely to be grossly underestimated, as ACP countries have limited possibilities to control their activities.

Despite the EU's apparently sympathetic intentions, in reality it needs: (1) continued access to African waters to employ large, predominantly Spanish and French industrial fleets; and (2) a reliable supply for the EU fish processing industry in the form of raw material, as landings from EU waters are continuously shrinking. At the same time, African fish processors have a genuine interest in obtaining access to the large and potentially lucrative EU fish market – particularly in increasing their share of processed products rather than being a raw material provider to the EU processing industry.

The challenge of establishing FPAs is thus to find means that can ensure a balanced solution to the potentially conflicting interests of EU and African countries. It should be kept in mind that the development of FPAs needs to be seen in the context of the negotiation of Economic Partnership Agreements (EPAs), which will to a large degree set the framework for how FPAs can be elaborated. At the same time, there may initially be important contradictions between them – contradictions that might stem from the EU's lack of transparency and openness in its negotiation platform.

Non-tariff barriers, market access and competitiveness

Apart from the unevenness of fisheries access agreements in particular, the new international trade regime in general, and the barriers to entry embodied in OECD country fisheries subsidies, African exporters *also* have to face tough food safety and traceability standards imposed by developed countries. This issue is particularly tricky in relation to

fisheries exports given their susceptibility to spoilage, heavy metals in the food chain (such as mercury and cadmium) and the need for a cold-chain for many types of products.

The main legal framework regulating food safety measures at the multilateral level is the WTO SPS Agreement, which aims at ensuring that SPS measures do not place 'unnecessary barriers to trade'. In essence, the agreement recognizes the right for countries to protect human, animal and plant life/health through the application of standards, provided that they are based on sound science, that they are appropriate to the levels of risk incurred, and that they do not unjustifiably discriminate among different importing countries. Complaints against a country's perceived discriminatory SPS measures can be brought to the DSB of the WTO. A formal application for the establishment of a dispute panel is not the only option, however. Complaints and requests for clarification can also be brought to the SPS Committee for discussion and possible informal bilateral settlement. However, African countries have rarely used these mechanisms.

The Agreement on Technical Barriers to Trade (TBT) is also relevant to fisheries. It aims at ensuring that standards, regulations and analytical procedures for assessing conformity do not create unnecessary barriers to trade. The main case that has been brought to the DSB to date was the 'sardine case' – where Peru complained against EU labelling regulations on canned sardines requiring the indication of geographic origin to qualify the term 'sardine' when it was not of the species *Sardinella pilchardus*. The Dispute Settlement Body ruling was in favour of Peru.

In the present conjuncture, African countries do not seem to be inclined (or able) to use the WTO to address perceived discriminatory standards applied by developed countries. Even when these measures may not be considered discriminatory or excessive, African fisheries still face the problematic task of compliance. The problems faced are not only the level of expenditure, paperwork and skills necessary for exporters to assure compliance, but also the legal, personnel and financial requirements placed on African governments to establish regulatory frameworks at the domestic level to support compliance.

The EU has institutionalised particularly challenging regulations in this respect. The basic framework for fisheries products was laid out in the EC Directive 91/493 of 1991. This directive deals with 'the production and placing on the market of fishery products for human consumption'. It requires member states and third countries to put in place systems of inspection and control to ensure the safety of fisheries products, including the

implementation of Good Hygiene Practices (GHPs) and Hazard Analysis and Critical Control Point (HACCP) systems. Other important regulations affecting African exports of fisheries products are EU Regulation 466/2001 setting the maximum limits for heavy metals in a number of species of fish and shellfish, and EU Regulation 2065/2001 on labelling information for fishery and aquaculture products. The EU is also developing a legal framework to regulate the development of ecolabels and voluntary certifications, and laying down guidelines for the monitoring of claims.

Many EU fisheries-specific regulations have now been integrated within what is known as the new EU 'hygiene package' of regulations (see details in Appendix 1). These contain a bewildering array of rules and demands on the regulatory agencies and exporters in African countries, even without considering private standards on quality, packaging, processing, and the impact of eco-labelling on market access. Given the highly technical nature of compliance and the costs related to it, this is probably the area that will pose the most serious challenges for African exporters of fisheries products and their industries and governments.

Conclusions and policy implications

African fish exporting countries are facing challenging negotiations and new developments in many different guises. These range from WTO-level negotiations on tariffs and subsidies, to bilateral and regional negotiations with the EU in the formulation of Economic Partnership Agreements (EPAs) and Fisheries Partnership Agreements (FPAs), to increased food safety standards imposed on their exports both by government regulation and by private buyers. The limited capabilities of these countries, especially LDCs, to follow (let alone shape) the outcome of these processes requires external support, regional coordination, and prioritisation of effort.

In general, African countries, both LDCs and non-LDCs, have very little direct interest in seeing NAMA tariff negotiations succeed. They already enjoy preferential market access to the EU and will see this preference eroded in the case of successful negotiations. Thus, if anything, they should use the possibility of NAMA success as a bargaining chip for concessions in other areas of negotiation.

Despite the high level attention that Northern subsidies have attracted in development circles, especially in agriculture, we argue that this is not the area where the most dangerous challenges arise for African fisheries. The latest developments in fisheries

subsidy negotiations suggest that access fees for distant water fishing are likely to be considered 'acceptable' forms of subsidization, provided that certain rules are followed. Even if they are not followed, 'back door' WTO-compatible arrangements can be easily administered, such as Japan's practice of providing aid that, on paper, is totally unrelated to fisheries access. At the same time, there are broader impacts of Northern subsidies that have repercussions in African countries: overfishing, overcapacity and oversupply, threats to artisanal/small-scale fishing, insufficient local landings for processing, and a dearth of fish in local markets. Yet, if well-managed, local landings from distant water fleets can progressively stimulate local processing industries and create employment, and by-catch can be used as a source of supply for local markets.

In our view, the main area where African negotiating teams should focus for the time being is on EPA/FPA negotiations with the EU, and within these on instruments that would facilitate the matching of official and private food safety (and in the future, environmental) standards. The situation is particularly delicate for non-LDCs in relation to EPA/FPA negotiations as they will lose preferential access to the EU in 2008 under the terms of the Cotonou agreement. Still, even LDCs will be under a lot of pressure from the EU, as the EBA is a unilateral offer and can be withdrawn at will at any time. Also, cross-conditionality between EPA/FPA negotiations and bilateral aid is likely to continue, albeit in more hidden forms than previously. On the other hand, the EU is deeply concerned about finding sources of supply for its distant water fleets, its processing industry and its domestic markets more generally. This should give African countries more weight in EPA/FPA negotiations than ever before with the EU, especially if these agreements (or at least some of the basic principles underpinning them) are carried out in practice at the regional or sub-regional levels.

APPENDIX 1: EU FOOD SAFETY REGULATION

The new EU food safety and hygiene framework ('hygiene package') to be in force from 2006 covers all foodstuff from farm-gate to retail (but some requirements are not applied to farms – e.g. HACCP). Special provisions/chapters/annexes apply to fisheries products, by and large coming from older fishery-specific regulations.

The main features of the 'hygiene package' are:

- Third countries need to have health and sanitary regulations that are at least equivalent to the ones required within the EU;
- They need to have competent authorities that can guarantee effective implementation of the relevant regulations through inspection, monitoring and sanctioning systems;
- Business operators need to apply specific sanitary and health practices in catching, handling, processing and packaging fish and fishery products, and a system of risk management based on HACCP.

In the following paragraphs, the main features of individual regulations that make up the 'hygiene package' are laid out.

Regulation 178/2002

- Framework regulation forming the basis of new legislation on food safety – establishing basic principles, setting up the European Food Safety Authority (EFSA)
- Sets guidelines for the establishment of a comprehensive system of **traceability** and recall/withdrawal (art. 18)
 - All food businesses need to maintain documentation of suppliers and buyers ('one-step-back, one-step-forward' system) for food and feed
 - Need to know the identity of suppliers/buyers (except for final consumers) and what item/batch has been bought/sold;
 - Need to have appropriate system and procedures in place
 - Risk management tool, does not make food any safer by itself
 - Regulation establishes principles and goals, not how to achieve them; leaves some degree of flexibility to food industry; but measures need to be designed to follow physical movement of product, not only commercial movement
 - Applies to 'any substance intended to be, or expected to be, incorporated into food or feed'; does not apply to veterinary medicine, plant protection products, fertilizers, packaging (covered by other regulations)
 - Internal traceability needed to facilitate targeted and accurate withdrawals
 - Applies to all food business operators at all stages of the value chain, including primary producers and transporters
 - Applies from importer to retail levels in case of products coming from third countries (Art. 11)
 - Exporters are not legally required to fulfil traceability requirements, except in case of special bilateral agreements for sensitive sectors, or where there is a specific EC legal requirement
 - In practice, food businesses may require trading partners to provide traceability information all the way up the value chain in third countries – but this is a matter of contractual obligations, not EC regulation.

Regulation EC 852/2004

- Sets **general principles of food hygiene practices to be followed by all food businesses** (except for primary producers) and places specific responsibility on them
- Demands the application of HACCP
- Demands registration and/or approval of food businesses with competent authorities
- Does have an extra-territorial dimension (all imported foodstuffs have to comply with EC hygiene standards in their production, processing and handling)

Regulation EC 853/2004

- Sets specific **hygiene rules for food of animal origin to be carried out by food businesses**
- In general, does not apply to primary producers; however, it does apply in the case of fisheries products
- Implications for third countries:
 - Establishes a list system of third countries from which imports of products of animal origin are permitted (already in place for fisheries since 1998)
 - General guidelines for approval of third country
 - Legislation, quality of organization of competent authority, inspection
 - General animal health situation
 - Experience in exporting
 - Rules on inspection and audits to be done in a third country by the EU
- Special provisions for fisheries products (Section VIII)
 - Equipment and hygiene conditions on vessels
 - Hygiene during and after landing
 - Hygiene rules for fresh, frozen, processed fisheries products
 - Health standards to be monitored and matched by fishery businesses
 - Rules on wrapping, packaging, storage and transport.

Regulation EC 854/2004

- Sets rules for **official control of products of animal origin to be carried out by competent authorities** (including in third countries)
- Sets rules for approval of establishments by competent authorities
- General provisions: audits of good hygiene practices (GHPs) and HACCP
- Special provisions for fishery products (Annex III)
 - checks on hygiene conditions at landing and first point of sale
 - inspections of vessels, land-based establishments, storage and transport conditions
 - official controls for fishery products:
 - organoleptic examinations
 - freshness indicators
 - histamine
 - residues and contaminants
 - microbiological checks ('where necessary')
 - parasites.

Regulation EC 882/2004

- Lays out **EU's duties in the organization of official food and feed controls**, including rules to be applied by competent authorities
- Provisions for the creation of third country lists
 - These countries have to undergo a compulsory EU audit and obtain a veterinary certificate
 - EU inspections can be carried out in non-member countries
 - Frequency of controls appropriate to the level of risk
- Lays out rules to be followed by competent authorities
 - Operational criteria
 - Adequate staffing and equipment
 - Auditing of GHP, GMP and HACCP
 - Effectiveness
 - Impartiality
 - Contingency plans
 - Delegation to non-governmental bodies
 - Transparency
 - Sampling and analysis
 - Pre-export checks from non-member countries
 - Financing of official controls
 - Official and reference laboratories
 - Criteria for certification

Other specific EU food safety regulations that affect fish and fishery products are:

- EC Regulation **91/493** (and amendments) 'Production and placing on the market of fishery products for human consumption' – most provisions are now incorporated in 'general hygiene package'
- EU Regulation **466/2001** – sets the maximum limits for heavy metals in a number of species of fish and shellfish
- EU Regulation **2065/2001** on labelling information of fishery and aquaculture products – requires the label to provide information on the trade name of the species, production methods (capture or aquaculture) and country of origin
- EC Directive **96/23** – sets rules for controlling the residue levels of veterinary medicines (relevant for aquaculture).

Finally, the EU is also developing a legal framework to regulate the development of ecolabels and voluntary certifications, and laying down guidelines for the monitoring of claims.



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