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on the external dimension of the Common Fisheries Policy

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The External Policy - Not Only Fisheries Agreements and RFMOs

The Communication by the Commission on the external dimension of the Common Fisheries Policy (CFP) touches upon many aspects of the EU's external fisheries activities, but largely concentrates on the two formal themes of Regional Fisheries Management Organisations (RFMOs) and bilateral Fisheries Partnership Agreements (FPAs, which the Commission wishes to call "sustainable fisheries agreements"). This is the traditional view of what the EU's external fisheries policy includes, and the proposal for the Basic Regulation also reflects that.

Nonetheless, the involvement of EU interests in fisheries outside EU waters ranges far beyond these two quite distinct themes. The EU is (for the moment) the world's largest fish market, with *per capita* fish consumption continuing to increase[1]. EU interests go to extraordinary efforts to satisfy that demand. These other efforts are the subject of the present working document, for if the reform is to shape the EU's fisheries policy for the decade to come, such aspects must be considered as well.

If FPAs are to be limited in the future to the surplus that is not able to be caught by the coastal State, as has been a provision of international law since 1994[2], then the current over-fished status of so many fish stocks worldwide, mentioned in the Communication, means that it will become more difficult for EU ship-owners to operate under the protective and supportive umbrella of FPAs. They will, with little doubt, seek other ways of operating in the waters of third countries, including:

- private agreements between EU companies and third countries,
- joint ventures with local partners in third countries,
- reflagging,
- illegal fishing without authorisation by the third country.

Depending on the details of each situation, it can be expected that these activities by EU interests will increase. In all cases involving non-EU flags, the EU loses control over the activities of the EU interests and, frequently, the Commission will not even know that they are occurring. The Member States (MS) will, in theory, be able to follow activities of vessels still flying their flag, though not necessarily to exert significant control. Given that many MS have difficulties in controlling their vessels in EU waters, many of them appear only too happy to ignore activities further afield.

The EU and the MS must find mechanisms to maintain their authority and control over the activities of EU companies and vessels to reinforce their responsibilities as flag and market States. They must also enhance their responsibilities with respect to their nationals when acting outside the EU.

EU legislation has a few tentative provisions in this direction, such as the Fishing Authorisation Regulation that requires MS to “endeavour” to obtain information on private agreements between their nationals and a third country concerning fishing rights[3]. EU vessels

[1] See FAO Fisheries Circular No 972/4, Part 1: ftp://ftp.fao.org/docrep/fao/010/ah947e/ah947e00.pdf
[2] See Article 62 of the United Nations Convention on the Law of the Sea.
[3] See Regulation No 1006/2008, Article 11.2.

are required to report their catches in waters outside EU jurisdiction that are not taken under the provisions of a fisheries agreement[1]. EU nationals are prohibited from exporting vessels to operators of vessels on the EU IUU vessel list[2]. However, simple collection of catch data gives no indication of the terms of any private agreements or whether the fisheries are sustainable and/or legal.

In order to enhance its oversight over the activities of EU vessels and companies, the Commission would thus need many types of information which, currently, it does not have - frequently because the MS have failed to give it to them. These include the number of EU-flagged vessels operating in the waters of third countries under private agreements and joint ventures. Also useful would be information on ownership by EU interests in vessels, companies, quota, etc. in third countries. Third countries should be encouraged to provide information to the EU on who is fishing in their waters, at the least as a condition for bilateral fisheries agreements and, possibly, as a requirement under the IUU Regulation.

When vessels leave the EU registers, not all are scrapped. Many are reflagged, often to flags of countries which cannot or do not want to control their activities. Serious consideration must be given to legal mechanisms that limit the ability of a Member State to de-list a vessel. The IUU Regulation[3] prohibits several actions in respect of States on the list of non-cooperating third countries, including re-flagging, chartering, private trade arrangements and others. To date, no such list has been adopted by the EU and the Commission and Council should do so as soon as possible.

One practice that has developed is for EU ship-owners to operate under an FPA or RFMO until it has exhausted its fishing possibilities and then to flag out, to avail itself of other possibilities. It subsequently returns to the EU register. Such flag-hopping, as mentioned in the Communication, should be prevented as it is in contravention of the spirit of the "exclusivity clause" and encourages overfishing. In addition to that, the EU loses, once again, all control over the vessel's actions when it flies other flags. Why should such vessels be allowed to return and so benefit from FPAs funded by the EU tax-payer, or even to gain access to quotas for EU stocks? Such behaviour is not in the interests of the crew either, as labour standards can vary.

EU ship-owners, and the MS, have consistently maintained that they wish to continue to operate under the EU flags, since that affords significant benefits, mostly concerning legal and fiscal security. However, if certain operators feel that the requirements of meeting EU regulations become too burdensome, they may be tempted to re-flag or set up shell companies in tax havens, which leads to the concept of beneficial ownership. There is no formal definition of beneficial owner, though both the UN and the OECD are attempting definitions, mostly for the purposes of taxation and prevention of terrorism. It can be considered as a person or company that enjoys the benefits of ownership of a property even though its ownership is in the hands of another.[4] It should be the clear ambition of the EU to define the legal responsibility of MS not only as flag States but also as States where the beneficial owner

[1] See Regulation No 1006/2008, Article 13 and Regulation No 1224/2009, Article 14.1.
[2] See Regulation No 1005/2008 (IUU Regulation), Article 40.
[3] Article 38.
[4] See http://www.oecd.org/dataoecd/49/35/47643872.pdf.

of a vessel is based, regardless of whether a vessel is operating in third country or international waters. This is a problem that ranges far beyond fisheries but must be tackled urgently.

Certain MS have expressed an interest in creating "second registers" for the distant water parts of their fishing fleets, similar to what exists for merchant ships. Such a register would offer benefits such as reduced fiscal and tax burdens, the logic being that this would help create a more level playing field with other flags. This would be a retrograde development, a true "race to the bottom" logic which the EU is bound to lose. Further, second registers could also result in reduced labour, social and environmental standards which must be opposed.

Far preferable, and more consistent with the objectives outlined in the Communication, would be the encouragement of a "race to the top" whereby fishing operations that are more sustainable are rewarded with incentives such as market access (through the EU's market regulation, adaptation of the WTO rules, etc.) and enhanced allocation of fishing opportunities in RFMOs. This latter point is the opposite of the proposal in the Communication to introduce market-driven rights-based management in RFMOs.

The IUU Regulation is designed to prevent the arrival on the EU market of fish that has been caught illegally. It has led to shipments of fish being refused entry but, so far, has not led to any third country being identified as "non-cooperating" nor to any EU vessels being listed as IUU - the only vessels listed as IUU are those coming from lists established by RFMOs. Fish that has been caught legally, though, has not necessarily been caught sustainably. Once the EU has achieved sustainability of its own fisheries, it can begin discussions with other major market States, as well as exporting States, to improve controls and conditionalities to ensure that fish traded internationally is caught from well-managed and sustainable fisheries. While bilateral and multilateral cooperation is essential as a first step, the global nature of fish trade means that discussions with other countries will need to be conducted at a global level, under the aegis of the WTO.

There is already a wide web of private investments by EU interests in third countries, including joint ventures and private agreements between an EU company and a third country government for access to fishing quotas. Consideration must be given to how to prevent these private investments from undermining the EU's global objectives of sustainability and transparency. Avenues to explore could include the proposed amendment of the Transparency Directive (Directive 2004/109/EC)[1]. If fishing were to be included as an "extractive industry" in the directive, it could help to detect when undue pressure or payments were made by European interests to third country governments or companies in exchange for fishing rights. The Dodd-Frank Act in the US is an attempt to bring transparency to the origin of goods that are imported into the US and the Commission should reflect on how to accomplish similar transparency in the EU. The terms of such private agreements, and the catches made under them, should be publicly available.

The EU has signed a number of Free Trade Agreements (FTAs) and Economic Partnership Agreements (EPAs) (including trade in fish products with countries which are known to be involved in IUU fishing such as South Korea) and more are being negotiated. These should

[1] COM(2011) 683.

include conditions on the establishment of joint ventures and other types of investment in third countries by EU companies, with the objective of requiring transparency in the activities of EU interests as well as minimum standards for their behaviour in terms of environmental sustainability. The negotiation of such agreements should also be preceded by social and environmental impact assessments so that their consequences are known to people in both the EU and the third country prior to their entry into force. The controversial Pacific EPA is a good example of why such prior assessments are necessary.

New provisions of the Lisbon Treaty[1] make the protection of EU private investments in third countries a competence of the EU, whereas previously it had been a Member State responsibility. If the EU is to assume such a responsibility, it should be able to impose conditions for protecting investments. It should not be in a situation where it is obliged to protect, for instance, investments in a developing country that result in the over-exploitation of fish stocks and problems of food security in the region. Operating under EU protection offers significant advantages for EU companies, particularly in developing countries with poor legal, judicial and financial systems, but this protection should not be unconditional. Once again, this approach would lead to a "race to the top" in EU investments which should make them more welcome in third countries.

Fishing costs money and fishing companies need easy access to capital. Banks should be encouraged to include ecological sustainability among the criteria they evaluate prior to granting credit to fishing companies. At least one bank already has a list of such criteria, including the legality of operations, the status of the stocks being fished (including as bycatch), the environmental impact of the fishing methods and others. Financial institutions and lenders need to pay more attention to such aspects of fishing, for it is difficult to re-pay a loan if the fish stock is depleted and the fishery closed.

In a wider context, fishing forms but one part of our impact on the oceans. For some time, the EU has been attempting to develop and implement an "ecosystem approach to fisheries management". The upcoming United Nations Conference on Sustainable Development - Rio+20 - in Brazil this year provides a good opportunity to explore these concepts, including the challenges of areas beyond national jurisdiction, in an international arena.

At the end of the day, the EU's external fisheries policy must abide by the provisions of the Treaties – good governance, coherence with other policies, especially development and environment. The EU has taken some major steps internationally in its fisheries policy, most strikingly the IUU Regulation. If the EU is to maintain its credibility in the international arena, and convince other States to follow our initiatives, the entire external dimension of the CFP must aim at a level playing field by fostering a "race to the top" in terms of sustainability and international cooperation, rather than a "race to the bottom" which, given the competition, we could never win.

Conclusions:

Dwindling fish stocks and the rarity of "surplus" fish to be sold will lead to an increase in EU nationals operating outside of EU fisheries agreements, threatening the sustainable use of

[1] See TFEU, Articles 3.1e, 206, 207.

global fish stocks. Mechanisms must be developed for the EU and MS to maintain authority and control over all EU operators - vessels, nationals, companies - including:

- collection and publication of data on catches and activities of all EU-flagged vessels regardless of where and how they operate;
- creation of the list of Non-Cooperating Countries under the IUU Regulation;
- refusal to allow vessels to return to an EU flag once they leave;
- MS must develop ways to exert responsibility over vessels flying other flags that have an EU national as beneficial owner;
- prohibition of "second registers" of fishing vessels in MS;
- inclusion of fisheries as an "extractive industry" in the Transparency Directive.

Additionally, the EU should negotiate, both bilaterally and at the WTO, to ensure that fish traded internationally comes from well-managed and sustainable fisheries. Both FTAs and EPAs should contain conditions on the transparency and sustainability of investments in fisheries. Any EU obligation regarding private investments in third countries concerning fisheries should be conditional upon their social and environmental sustainability.

Finally, the EU must work for ocean sustainability globally, not least addressing the need for ecosystem approach in areas beyond national jurisdiction. Since fish is one of the most traded commodities in the world, and fishing is an extremely mobile and in legal terms volatile activity, the EU external fisheries policy must include a truly global and holistic approach to deal with this, in order not to simply clean up its own house while moving the problems elsewhere.