ENHANCING KENYA'S MARKET ACCESS: A FOCUS ON SANITARY AND PHYTOSANITARY (SPS) STANDARDS FOR AGRICULTURAL PRODUCTS

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RESEARCH PROJECT SUBMITTED IN PARTIAL FULFILMENT OF THE DEGREE OF MASTER OF LAWS OF THE UNIVERSITY OF NAIROBI

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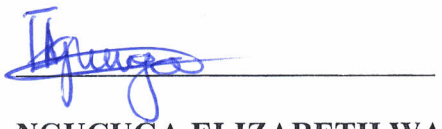
DECLARATION

I, NGUCUGA ELIZABETH WANJIKU, do hereby declare that this project is my original work and has not been submitted and is not currently being submitted for a degree in any other University.



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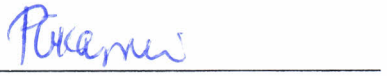

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My dear parents, Mr and Mrs Nguchuga whose love and support have made my education possible.

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TABLE OF ABBREVIATIONS

1. ABA-	Anything But Arms
2. ACP-	African Caribbean Pacific
3. AFC-	Agricultural Finance Corporation
4. ASARECA-	Association of Agricultural Research for Central and Eastern African
5. CAC-	Codex Alementarius Commission
6. CBD-	Convention on Biological Diversity
7. COMESA-	Common Market for Eastern and Southern Africa
8. CPCC-	Control Point and Compliance Criteria
9. DSU-	Dispute Settlement Understanding
10. DVS-	Department of Veterinary Services
11. EAC-	East African Community
12. EMCA-	Environmental Management and Coordination Act
13. ESA-	Eastern and Southern Africa
14. ESA- EPA-	Eastern and Southern Africa- Economic Partnership Agreement
15. EU-	European Union
16. EUREPGAP-	Euro-Retailer Produce Working Group Good Agricultural Practices
17. EWS-	Early Warning Systems
18. FAO-	Food and Agricultural Organization
19. FPEAK	Fresh Produce Exporters Association of Kenya
20. GATT-	General Agreement for Trade and Tariff

21. GDP- Gross Domestic Product

22. GMO- Genetically Modified Organisms

23. HCDA- Horticultural Crops Development Authority

24. ICIPE- International Centre for Insect Physiological and Ecology

25. ICPM- Interim Commission on Phytosanitary Measures

26. IDF- International Dairy Federation

27. IPM- Integrated Pest Management

28. IPPC- International Plant Protection Convention

29. ISO- International Standards Organization

30. ISPM- International Standards for Phytosanitary Measures

31. JICA- Japan International Cooperation Agency

32. KARI- Kenya Agricultural Research Institute

33. KEBS- Kenya Bureau of Standards

34. KEPHIS- Kenya Plant Health Inspectorate Services

35. KFC- Kenya Flower Council

36. KIPPRA The Kenya Institute for Public Policy Research and Analysis

37. KRDS- Kenya Rural Development Strategy

38. MFN- Most Favoured Nation

39. MoA- Ministry of Agriculture

40. MoH- Ministry of Health

41. MRL- Maximum Residential Level

42. MTI- Ministry of Trade and Industry

43. NAMA- Non-Agricultural Market Access

44. NCTWO-	National Committee on WTO
45. NEMA-	National Environmental Management Authority
46. OIE-	Office International Des Epizooties
47. SPS-	Sanitary and Phytosanitary
48. TBT-	Technical Barriers to Trade
49. UNEP-	United Nations Environmental Programme
50. USA-	United States of America
51. WHO-	World Health Organization
52. WTO-	World Trade Organization

TABLE OF DOMESTIC STATUTES

1. The Agricultural Act, Chapter 318, Laws of Kenya (Revised edn., 1986)
2. The Agricultural Produce (Exports), Chapter 319, Laws of Kenya (Revised edn., 1979)
3. The Animal Diseases Act, Chapter 364, Laws of Kenya (Revised edn., 1989)
4. The Environmental Management and Coordination Act, 1999 (Act No. 8 of 1999)
5. The Fisheries Act, Chapter 378, Laws of Kenya (Revised edn., 1991)
6. The Food, Drugs and Chemical Substances Act, Chapter 254, Laws of Kenya (Revised edn., 1992)
7. The Local Government Act, Chapter 265, Laws of Kenya (Revised edn., 1978)
8. The Penal Code, Chapter 63, Laws of Kenya (Revised edn., 1985)
9. The Pest Control Products Act, Chapter 346, Laws of Kenya (Revised edn., 1985)
10. The Plant Protection Act, Chapter 324, Laws of Kenya (Revised edn., 1979)
11. The Public Health Act, Chapter 242, Laws of Kenya (Revised edn., 1986)
12. The Seeds and Plant Varieties Act, Chapter 326, Laws of Kenya (Revised edn., 1991)
13. The Standards Act, Chapter 496, Laws of Kenya (Revised edn., 1981)
14. The Use of Poisonous Substances Act, Chapter 247, Laws of Kenya (Revised edn., 1983)
15. The Water Act, 2002 (Act No. 8 of 2002)

TABLE OF INTERNATIONAL LEGAL INSTRUMENTS

1. EUREPGAP, "Control Points and Compliance Criteria: Fruits and Vegetables-Version" 2.0-Jan 04, Cologne, Germany.
2. International Standards for Phytosanitary Measures, Guidelines for Pest Risk Analysis (1996) Publication No 2. Secretariat of the IPPC, FAO, Rome 1996.
3. International Standards for Phytosanitary Measures, Principles of Plant Quarantine as related to International Trade, Publication No 1. (1995) Secretariat of the IPPC, FAO, Rome.
4. Regulation 178/2002/ EC of the European Parliament and of the Council of 28 January 2002, laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, OJ L 31, 1/2/2002..
5. Secretariat of the Convention on Biological Diversity (2000) Cartagena Protocol on Biosafety to the Convention on Biological Diversity: Text and Annexes. Montreal: Secretariat of the Convention on Biological Diversity.
6. The Agreement on the Application of Sanitary and Phytosanitary Measures (The SPS Agreement), entered into force with the establishment of the World Trade Organisation on 1st January 1995. It appears in the Final Act of the Uruguay Round of Multilateral Trade Negotiations signed in Marrakesh on 15th April 1994. This Agreement and others contained in the Final Act along with the General Agreement on Trade and Tariff as amended (GATT1994) are part of the Treaty that established the WTO.

7. The Codex Alimentarius, passed in 1962 when the Joint FAO/WHO Food Standards Conference requested the Codex Alimentarius Commission to implement a joint FAO/WHO food standards programme and create the Codex Alimentarius.
8. The Convention on Biological Diversity, adopted at the 1992 Earth Summit in Rio de Janeiro. Reprinted in International Legal Materials 818.
9. The Group of Eight, " G8 Africa Action Plan" July 27,2002, Kananaskis, Canada.
10. The International Agreement for the Creation of an Office International des Epizooties, passed in Paris, France on 25th January 1924.
11. The International Plant Protection Convention, deposited with the Director-General of the Food and Agriculture Organisation (FAO) of the United Nations since its adoption by the Conference of the FAO at its Sixth Session in 1951. The Convention came into force on 3rd April 1952 and was registered with the United Nations Secretariat on 29th November 1952. The FAO Legal Office/Treaties Archive. The New Revised Text of the IPPC was approved by the FAO Conference at its 29th Session on November 1997.

ABSTRACT

In recent times, Kenyans have awoken to newspaper headlines of the following nature:

"*New Horticultural rules hurting smallholders.*"

"EU's rules slow growth in horticultural exports"

"EU rules could destroy horticulture"

"Kenya has until January to comply with new rules"

By merely glancing at the above newspaper headlines, one realizes that an important sector of the Kenyan economy, the horticultural sector is in a crisis. A crisis that no doubt needs to be urgently resolved if the sector is to survive. It is the message that these newspaper articles carry that has invoked in me a desire to delve deeper and inquire as to the history behind the crisis. This study is therefore an inquiry touching on access to markets of Kenya's agricultural products, with a case study on the horticultural sector. Though the sector is beset with a myriad of challenges, the study focuses on the challenges arising as a result of quality requirements for the protection of human, animal and plant health, commonly known as Sanitary and Phytosanitary (SPS) measures.

Chapter one is concerned with an analysis of the problem statement. Chapter two defines market access and sanitary and phytosanitary standards. On the other hand, chapter three concerns itself with an analysis of international and domestic legal instruments that have been enacted to regulate issues touching on SPS measures. In Chapter four, the horticultural sector has been critically analysed with the key highlight being the challenges farmers face in their bid to comply with SPS standards.

Chapter five is an inquiry as to whether there is any link between the standards laws discussed in chapter three and market access of horticultural products. We conclude in this Chapter that indeed such a link does exist. We also find that various shortcomings in Kenya's standards laws impede their efficacy in enhancing market access of agricultural products. The concluding remarks are made in Chapter six where we conclude that indeed law can act as a tool to enhance market access of Kenya's agricultural products. However, for Kenya's standards laws to so act, there is need for policy, legal and institutional reforms followed by strict enforcement of the enacted laws.

CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND TO THE PROBLEM

Within the realm of international trade, there have been concerted efforts for countries to open up their markets to products from other countries. These efforts have seen countries gradually reduce their tariffs and quota restrictions. The tariff reduction is an ongoing process with the ultimate goal being the establishment of a global free trade area. For those countries that are members of the World Trade Organization (WTO), their efforts to reduce tariffs on specific products is legally binding on them as they must deposit their tariff binding with the WTO.

As the tariffs reduce, the spotlight has now turned on SPS measures and their ability to act as trade barriers. Tariff bindings may force countries to look for other policy instruments through which they can restrict imports especially where they envisage that such imports will hurt their domestic industries. One instrument that is mostly adopted is the invocation of SPS measures ostensibly to prevent risks to human, animal and plant health. Such measures may include banning imports of certain products from a country, imposition of stringent certification and quality control procedures. The effect of these procedures is to increase the cost of production for the exporting countries making their products uncompetitive.

The WTO while acknowledging the importance of countries to monitor the quality of products sold to their citizens also recognize that such requirements may end up impeding international trade especially where sanitary measures are established without any justification. In this respect the WTO during its Uruguay Round enacted the Agreement on Sanitary and Phytosanitary measures. These are a set of rules that lays down the procedures to be followed when a country imposes SPS measures on products of another country.

For the developing countries in general and Kenya in particular, the SPS Agreement provides little respite as time and again their products are constantly rejected in western markets. The importers justify such measures inter alia on the need to safeguard the health of their citizens. Developing countries on the other hand see such measures as a move to keep them out of their markets. They are of the view that various constraints hinder their utilization of the SPS Agreement to their benefit.

Sanitary and phytosanitary standards therefore can play two roles. On the one hand they may be used to overcome market failures by concentrating on objectives that are ignored by the profit driven private sector such as protection of public health or the environment. On the other hand, SPS standards may be used for purposes other than social protection. For example, they may be used to gain strategic trade advantages for domestic firms over foreign competitors. SPS measures are often non-transparent and in some cases force firms to duplicate testing and certification costs.

Added to these stringent requirements by Governments, consumers in the developed countries have been demanding quality products especially in the wake of health scares such as the 'mad cow disease'. They also insist on products produced in an environmental friendly atmosphere where there is adherence to labour requirements.

This advent of an enlightened consumer with ever increasing quality demands has shifted the paradigm. Exporting countries can no longer complain that the importing country is using SPS measures to lock out their goods. This is because, it is the consumer rather than the government imposing the standards. These consumers are not subject to international agreements on SPS standards such as the WTO Agreement on SPS measures and more often than not demand standards with far reaching consequences on the producers in the exporting countries. Furthermore, the consumer quality demands do not necessarily lead to imports ban or quarantine measures as is the case with the government's measures, rather the consumers simply will not buy those products that they perceive to be of low quality.

This study seeks to examine the SPS Measures that can be invoked by importing countries and the roles such measures play. This examination is then followed by an analysis of the various international instruments that regulate SPS measures with particular emphasis on the SPS Agreement. Domestic laws on SPS measures have then been analysed with the sole aim of inquiring as to Kenya's compliance ability with international standards requirements. The impact that both compliance and non-compliance with the standards can have on international trade has been examined by use of Kenya's horticultural sector as a case study. In this respect, the European Union's

Traceability Rules and the Protocol on Good Agricultural Practices and their impact on Kenya's horticultural sector have been analysed.

While most studies on SPS measures concentrate on the trade impacts of such measures, this study seeks to go further than that. Rather than bemoan the fact that quality standards are used to lock out Kenya's agricultural products, the study seeks to find out what the public and private sector is doing to enhance the quality of the agricultural products to a level acceptable in foreign markets. This is because given the nexus between quality products and demand for such products, Kenya has no choice but to put in place mechanisms that ensure quality of her products, especially those targeting the export market.

In this respect, shortcomings of the current legal regime in addressing challenges raised by international market requirements have been brought to the fore. Having analysed these shortcomings, current national and regional initiatives to address the shortcomings have been reviewed. Based on the findings the study then seeks to map the way forward so that Kenya's agricultural products are not denied access to external markets on the basis of quality either justifiably or as an import restricting strategy.

1.2 STATEMENT OF THE PROBLEM

Kenya's agricultural sector faces critical challenges in improving domestic capacity to meet production and quality standards that are required in foreign markets. A major reason for the existence of these challenges is that Kenya's existing laws on standards have failed to play their role as a facilitator in ensuring that standards are developed and if so developed, that they are strictly enforced and conform to international standards.

1.3 THEORETICAL/CONCEPTUAL FRAMEWORK AND LITERATURE REVIEW

1.3.1 THEORETICAL/CONCEPTUAL FRAMEWORK

This research concerns itself with the exports of agricultural products. Agricultural products do not exist in vacuum, rather they are produced by farmers, be they small-scale or large-scale farmers. These farmers, given their common goals and interests may very well be defined as a sub-sector of the larger Kenyan society. Going by this definition of farmers as members of a society, their challenges represent societal challenges that can be addressed from various perspectives. This research is an inquiry as to how the Government can address the problems of the agricultural exporters, especially that of enhancement of their external markets. One of the instruments that the Government can use to address societal needs and wants is the enactment of laws that direct action towards the stated goals and objectives.

From a broad perspective, this research is based on the sociological jurisprudence. **Roscoe-Pound,**[1] a leading sociological jurist, in his '*Programme of the Sociological School*', lays down similarities among sociological jurists to include; a study of the actual social effects of legal institutions, legal precepts and legal doctrines, a study of the means of making legal precepts effective in action and a sociological legal history.[2]

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[1]Pound R., "Outlines of Jurisprudence" (1943) 5th Edition, Reported in "Llyods' Introduction to Jurisprudence" (2001) Sweet and Maxwell. A Thonson Company.

[2] By this means he means the study of the social background and social effects of legal institutions, legal precepts and legal doctrines, and of how these effects have been brought about.

Proponents of this school of thought have an abiding concern with social justice. Pound was concerned with the effects of law upon society and he saw the task of a lawyer as a social engineer. Indeed in his work entitled '*The end or Purpose of Law*'[3] he talks of a paradigm shift in the thinking of jurists on the end of law. He postulates that jurists no longer consider the end of law as a maximum of self-assertion, but as a maximum satisfaction of wants. One of the key factors to this shift, according to Pound, is an attempt at economic interpretation of legal history, by showing the extent to which law had been shaped by the pressure of economic wants.

Jhering,[4] placed great emphasis on the function of law as an instrument for serving the needs of society. According to **Jhering**, everybody exists for the world and the world exists for everybody. For him the task of bringing the legal order into closer touch with actual human needs was a matter for the legislature rather than part of the judicial function.

This research follows the line of thought developed by proponents of the sociological jurisprudence, principally that the task of a lawyer is that of a social engineer. Narrowing down to the problem at hand, the agricultural sector in Kenya is faced with various challenges; the goal of this research is to inquire as to how law can act as an instrument to alleviate these challenges.

[3] Pound R., "An introduction to the Philosophy of Law" (1954) Revised Edition, New Haven, Yale U.P.
[4] Jhering V.R., "Law as a Means to an End" (1924) Trans I Husik, Published by Augustus M. Kelley.

More specifically, this research would not be exhaustive without engaging the literature on the regulation of international trade, especially on the "precaution versus trade facilitation" debate. The Precautionary principle takes on the view that society should seek to avoid environmental damage by careful forward planning, blocking the flow of potentially harmful activities. The principle is premised on the idea that all technologies and chemical substances are dangerous until proven safe.[5] It is used to eliminate or regulate specific technologies (for example cell phones, pesticides, genetically modified crops, chlorine, pharmaceuticals and medical devices). Proponents of the precautionary principle are dissatisfied with the current science based regulatory approach arguing that it does not exercise adequately precaution.

The precautionary principle is not without criticism. Opponents of the principle (also known as the permissive proponents) argue that though precaution is necessary, it is also subjective and susceptible to abuse. According to them, adopting the precautionary principle can increase risks to human health and environmental protection by focusing on the risks posed by the introduction of new technologies while ignoring the risks that new technologies can alleviate or prevent.[6]

For the developing countries, concern has been raised over the application of the precautionary principle. **Barney Dickson**[7] posites that where precautionary legislation is enacted in Europe and importers then expected to comply with this legislation, this might

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[5] Adler Jonathan. " The Precautionary Principle's Challenge to Progress" Published in "Global Warming and Other Eco-myths" Edited by Ronald Bailey (Prima,2002) at P.2

[6] *Ibid*

[7] Dickson Barney. presenting at the IUCN Conference on "Uncertainty, Conservation and Confusion: Clarifying the Role of the Precautionary Principle in Natural Resource Management" (2002) South Africa

result in trade barriers for developing countries with negative implications for equity. According to **John Mugabe**,[8] the precautionary principle may have implications for Africa's food security and should only be applied where there is a range of choices as far as food choices are concerned. Further, countries cannot effectively employ the precautionary principle without scientific capacity. This view is echoed **by Laurence Tabiana**[9] who observed that developing countries often have less capacity for applying the principle and are concerned about who will pay the cost of precautionary decision making.

In the case of Kenya's agricultural products, the external market, more so the European Union, has adopted a precautionary approach citing human health and environmental concerns. This is more pronounced with regard to the use of pesticides, traceability rules and environmental conservation. The positive aspect of this approach is that Kenya could use the inclusion of the principle in international trade law to compensate for failures in our domestic legal systems.

However, Kenya must also be alive to the potential for the precautionary principle to act as a trade barrier. This is especially so where the procedures that are required to eliminate or reduce the possibilities of risk so that the products may be accepted at international level are way beyond what the farmers can afford. In this regard, risk ought to be examined by evaluating environmental and health risks in the context of economic and social consequences.

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[8] Mugabe John. *Ibid*
[9] Tabiana Laurence. *Ibid*

1.3.2 LITERATURE REVIEW

Various studies have been conducted to investigate the relationship between standards and external market access. From these writings, briefly reviewed below, one can infer the following; Firstly, most of these studies relate to developing countries as a whole rather than providing country specific analysis. Secondly some of the writings do not specifically refer to sanitary and phytosanitary standards per se but rather combine in the same writings sanitary standards with other technical barriers to trade (TBT) such as packaging and labelling requirements. Thirdly, the writings, safe for a few, concentrate on the impact of sanitary and phytosanitary measures rather than on how the affected countries can enhance market access by improving the standards of their products. Fourthly, none of the literature reviewed have appreciated the role that the law can play in facilitating or impeding compliance of standards and by extension the enhancement or inhibition of market access.

This research while borrowing from the concepts developed by these researchers adopts an incisive analysis in that geographically, though reference is made to developing countries, the emphasis is on Kenya. Secondly, given that standards may be either sanitary and phytosanitary (SPS) or technical barriers to trade (TBT) the standards that are examined are those that are sanitary and phytosanitary in nature. Thirdly, rather than look at SPS standards from a negative point of view, this thesis emphasizes that Kenya's agricultural sector is better off complying with these standards sooner than later lest it finds itself locked out of the export market. Finally, this research inquires as to whether the law has assisted in enhancing the compliance capability of the farmers towards

meeting international standards requirements. The works of other researchers that have been reviewed are as follows:

1.3.2.1. Nyangito H.O., Olielo T., and Magwaro D., (2003) *"Improving Market Access through Standards Compliance. A diagnostic and Road Map for Kenya"* Reported in Wilson JS and Abiola V, "Standards and Global Trade: A Voice for Africa" (2003) World Bank, Washington, D.C.

This study focuses on the impact of international standards and technical regulations on the current and prospective trade in Kenya and documents the challenges and opportunities faced by the country in meeting international agreements' obligations. The study is most useful to this study since it concentrates on Kenya's constraints in standards compliance. However, gaps that need to be filled include analysing in more details the trade impact of SPS to Kenyan farmers, especially the small-scale farmers. Furthermore, the paper only casually mentions Kenya's standards law without critically analysing how the law can facilitate or impede standards compliance.

1.3.2.2. Henson S., Luader R., Swinbank A. and Bredahl M. (2000) *"The impact of Sanitary and Phytosanitary Measures on Developing Countries' exports of Agricultural and food products"* Paper presented at the World Bank Conference on Agriculture and the New Trade Agenda in the WTO 2000 Negotiations, Geneva, Switzerland.

This paper explores the impact of sanitary and phytosanitary measures applied in developed countries on developing countries' exports of agricultural and food products. It

identifies the problems that these countries face in meeting SPS requirements, the compliance resources available to the government and the extent to which SPS measures impede exports of agricultural products from developing countries. Though the paper does not specifically refer to Kenya, it nonetheless provides a useful insight into the challenges faced by developing countries, which invariably mirror those that Kenya faces.

1.3.2.3. Oyejide T., Ogunkola E., and Bankole A., (2000) *"Quantifying the Trade Impact of Sanitary and Phytosanitary Standards: What is Known and Issues of Importance for Sub-Saharan Africa,"* University of Ibadan, Nigeria.

This paper identifies and discusses what is known about the effects of SPS measures on trade in the products to which they apply, the extent to which these measures may influence the external market access of Africa's Agricultural and food products and whether these effects can be quantified. The paper makes use of economic models to assess the trade effects of SPS measures.

1.3.2.4. Iacovone Leonardo, (2003) *"Analysis and Impact of Sanitary and Phytosanitary Measures,"* Harvard University, Global Trade Negotiations, Center for International Development.

In addition to presenting an overview of the institutional framework set by the WTO's SPS Agreement, the paper also uses economic models to evaluate the impact of SPS measures. The paper however concentrates on the impact of the SPS measures and does not dwell on how compliance with the standards requirements would enhance market access.

1.3.2.5. **Nyangito H., (2002)** *"Post- Doha African Challenges in the Sanitary and Phytosanitary and Trade Related Intellectual Property Rights Agreements,* KIPPRA Occasional Paper No. 4, 2002, Nairobi.

The writer focuses on the challenges for Sub-Saharan Africa arising from Doha declarations on SPS and TRIPS Agreements. This is a short paper that is only concerned with the Doha Round of negotiations and no other aspect of the SPS measures.

1.3.2.6. **Simonetta Zamilli, (1999)** *"WTO Sanitary and Phytosanitary Agreement: Issues for Developing Countries"* Working Paper 3, South Centre, Geneva.

This working paper evaluates the WTO's Agreement on SPS measures and then describes issues for developing countries arising from the SPS Agreement. The working paper is useful in that it deals with the SPS Agreement while at the same time advising that developing countries must address the issue of standards compliance if their goods are to access external markets.

1.3.2.7. **Wilson J., (2002)** *"Standards, Regulations and Trade: WTO Rules and Developing Countries' Concerns"* Reported in Hoekman B., Mattoo A., and English P., "Development, Trade and the WTO-A Handbook" (2002) World Bank, Washington, D.C.

By using case studies of the Kenya fish exports case (Where importation of fish from Kenya was banned by the European Union in 1998) and standards related problems encountered by Indian exporters, the writers seek to quantify the effect of technical barriers and standards on trade. This book is however general in that it does not target

any specific country or productive sector. Furthermore, the book's approach to standards is general in that it is concerned with both SPS and TBTs.

1.3.2.8. World Bank's Report (2004) *"Global Economic Prospects: Trade, Regionalism and Development 2005,* World Bank, Washington, D.C.

Though this World Bank Report concentrates on regional integration, it nonetheless provides useful suggestions on enhancement of standards through cooperation between countries.

1.3.2.9. Otieno Odek (2003) *"East Africa's Agricultural Interests: A Defensive and Offensive Strategy with Regard to EU- CAP reforms"* Published by Friendrich Ebert Stiffung (FES), Nairobi.

This paper emphasizes the need for the East African countries to develop offensive and defensive strategy to counter European Union reforms of its agricultural policy. Although the paper focuses on the current European Union (EU)- African Caribbean and Pacific (ACP) countries' Economic Partnership Agreement (EPA) negotiations, it also provides a useful analysis of the different trade policy issues arising from SPS measures.

1.3.2.10. Wilson J., and Abiola V., (2003) *"Standards and Global Trade: A Voice for Africa"* World Bank, Washington, D.C.

This is a World Bank publication that uses case studies of five African countries, that is, Kenya, Uganda, Nigeria, South Africa and Mozambique to identify the specific capacity constraints, opportunities and institutional reforms needed for market access success. The

paper provides an insight into the best practices from other developing countries on standards compliance. These best practices have been used to inform the recommendations of this research.

1.4 OBJECTIVES OF THE RESEARCH

1.4.1. MAIN OBJECTIVE

The main objective of the research is to demonstrate the interconnection between enhancement of standards and external market access of Kenya's agricultural products.

1.4.2. SPECIFIC OBJECTIVES

Specific objectives of the research are to:

(a) Evaluate the link between standards requirements and external market access

(b) Analyze international rules regulating imposition of standards and their efficacy in addressing market access issues for developing countries

(c) Evaluate the impact of standards on Kenya's Agricultural sector with emphasis being the horticultural sector

(d) Investigate constraints that hinder Kenya's compliance with international standards

(e) Evaluate the success or failure of Kenya's standards regulatory regime in addressing compliance constraints

(f) Recommend appropriate policy, legal and institutional interventions.

1.5 BROAD ARGUMENT LAYOUT

Unless the Government plays a key role in facilitating the compliance of international standards, agricultural products, particularly horticultural products, may be rejected in foreign markets. The reason for this current scenario is threefold. Firstly, Kenya, as is the case with most developing countries, does not actively participate in international standard setting with the result that the standards developed do not reflect Kenya's unique situations. Secondly, lack of resources limit Kenya's compliance with international standards and standards set by Governments and consumers in foreign markets. Thirdly, the existing laws on standards have failed to act as a tool that facilitate standards compliance.

Therefore, there is need to develop a comprehensive framework of capacity building that addresses both the question of participation in international standard setting and compliance with standards requirements.

1.6 ASSUMPTIONS OR HYPOTHESIS

(a) Kenya's export market plays an important role in economic development and ought to be safeguarded.

(b) Non compliance with international norms deprives Kenyan farmers access to key international markets.

(c) There are gaps in standards formulation, compliance and enforcement capacity in Kenya as compared to international norms and requirements of importing countries.

(d) The law can play an important role in enhancing market access by ensuring that standards are developed and enforced.

(e) Developing countries including Kenya face tremendous challenges that impede their ability to use the SPS Agreement and benefit from it.

(f) Changing consumer preferences in developed countries is influencing national and international markets.

1.7 RESEARCH QUESTIONS SOUGHT TO BE ANSWERED

(a) What is the role of SPS measures in international trade?

(b) What constraints do Kenya's agricultural producers and exporters face in meeting international standards requirements?

(c) Is there a link between standards laws and market access of agricultural products

(d) Can Kenya's farmers rely on the standards regulatory regime to address standards requirements of international markets?

(e) What policy and legal interventions need to be put in place to enhance market access of Kenya's agricultural products?

1.8 METHODOLOGY

In collecting data for the study, the following methods were used:

Firstly, there was use of library research. This entailed the use of various books and reports that have been written on the subject of international trade and standards. Key libraries that were made use of include the High Court Library, Various University of Nairobi libraries, the National Archives, the Central Bureau of Statistics library and the WTO Reference Room at the Ministry of Trade and Industry.

Secondly numerous internet searches conducted revealed that there is a wide range of publications and reports on SPS measures in the internet. Key websites visited include that of the United Nations, the World Bank, the World Trade Organisation and that of international standard setting organisations such as Codex Alimentarius. Websites of local institutions that were visited include the Horticultural Crops Development Authority, the Fresh Produce Exporters Association of Kenya, the Kenya Plant Health and Inspectorate Services and the Ministry of Trade and Industry.

Thirdly, various interviews with key informants were conducted. These include interviews with officials from organisations such as the Ministry of Trade, Department of External Trade, the Kenya's Horticultural Crops Development Authority and the Kenya Plant Health Inspectorate Services.

CHAPTER TWO

MARKET ACCESS AND SANITARY AND PHYTOSANITARY (SPS) MEASURES DEFINED

2.1 MARKET ACCESS

2.1.1 DEFINITION OF MARKET ACCESS

Market access is a fundamental concept in International trade and a key issue in the General Agreement for Trade and Tariff/ World Trade Organisation (GATT/WTO). Due to the nature of international trade, countries must trade with one another. As they are involved in trade, the main issue concerning them is that of market access. This is because, foreigners require the permission of their host country in order to sell their goods there.

Market access describes the extent to which a good or service can compete with locally-made products in another market. In the WTO framework, the term stands for the totality of government imposed conditions under which a product may enter a country under non-discriminatory conditions.[10]

The WTO deals with market access in two categories:

(a) Market access for agricultural products

(b) Market access for industrial products. This is referred to as Non Agricultural Market Access (NAMA). Negotiation under this field is known as NAMA negotiations or industrial tariff negotiation.[11]

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[10] WTO Publications, "WTO Background materials", Chapter 3, Market Access (Goods) p. 3.2. Extracted from the "WTO- a Training Package. Geneva , Switzerland. Available at <www.wto.org> (accessed on 6th March 2005).

[11] *Ibid.*

2.1.2 POLICY INSTRUMENTS REGULATING MARKET ACCESS

To regulate access to their markets, countries use two policy instruments. These are:

(a) Tariffs; and

(b) Non tariff measures

A tariff is a duty or a levy levied at the border on goods going from one customs territory to another.[12] Non- tariff measures on the other hand, include all measures, other than tariffs, used to protect domestic industry. Two important non-tariff measures are:

(a) Quantitative restrictions or quotas; and

(b) Technical barriers to trade (TBTs) and Sanitary and phytosanitary standards (SPSs).

One of the main principles of GATT is that protection to domestic industries should be given through tariffs and not through imposition of quantitative restrictions and other non-tariff measures restricting imports. While reduction or elimination of tariff takes place through specific commitments, non- tariff measures are dealt with by developing rules and disciplines to limit their trade restrictive effect.

2.2 DEFINITION OF TECHNICAL BARRIERS TO TRADE (TBT)

Technical Barriers to Trade are technical regulations, national standards and conformity assessment procedures laid down to ensure product quality or to safeguard health, life or the environment. The technical regulations and standards set out specific characteristics

[12]WTO Background materials *supra* note note 10 at P.3.2

of a product- such as its size, shape, design, functions and performance, or the way it is labelled or packaged before it is put on sale.[13]

The WTO Agreement on Technical Barriers to Trade draws a distinction between technical regulations and standards. The difference relates to the obligation of conformity. While conformity with a standard is optional, compliance with a technical regulation is mandatory. Thus an imported product which does not comply with a standard will enter the market, while if it fails to comply with a technical regulation, it cannot enter that market.[14]As this thesis is concerned with SPS measures, the role of TBTs and their implications to international trade is outside the realm of this paper.

2.3 THE SANITARY AND PHYTOSANITARY STANDARDS/MEASURES

2.3.1 DEFINITION

Sanitary and phytosanitary (SPS) measures are border control measures necessary to protect human, health, animal or plant life or health.[15] They are also known as quarantine measures. Sanitary measures refer to those measures related to human or animal health while phytosanitary measures as those that deal with plant health.[16]

At the international level, the use of SPS measures is designed to protect food safety and animal and plant health protection. It is not the measure that is important, but the

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[13] WTO Publications, "WTO Background materials", Chapter 7, Technical Barriers to Trade p. 7.2. Extracted from the "WTO- a Training Package. Geneva , Switzerland. Available at <www.wto.org> (accessed on 6th March 2005).

[14] *Ibid*

[15] Dictionary of Trade Policy Terms, Walter Goode, Centre for International Economic Studies University of Adelaide, 1998 as reported in WTO Background materials, Chapter 5.

[16] WTO Background materials *supra* note 10 Chapter 5 at P. 5.2

objective or goal of the measure. If the goal is to protect man, animal or plant life, then the measure is an SPS measure. SPS measures apply to domestically produced food or to local animal and plant diseases, as well as to products coming from other countries. Any discrimination among foreign suppliers ought to be justified on the basis of their animal and plant health conditions.

2.3.2 TYPES OF MEASURES

The SPS measures can take many forms such as[17] imposing specific product or process criteria, requiring products to come from disease-free areas, quarantine regulations, certification or inspection procedures, sampling and testing requirements, health- related labeling measures, setting of permissible maximum levels of pesticide residues and permitted use of only certain additives in food

Some of the measures such as processing requirements or certification may take place in the exporting country and not upon arrival in the importing country. However, although the measure may be imposed outside the territory of the imposing country, its purpose must be to protect health within the territory of the importing country.[18]

2.3.3 THE ROLE OF SPS STANDARDS AND REGULATIONS

2.3.3.1 Positive aspects of SPS Standards and Regulations

While a regulation is a technical requirement that is mandatory and must be complied with, a standard is voluntary and set by the taste of the consumer. Standards and

[17] *Ibid.*
[18] *Ibid.*

regulations aim at complying with a variety of aims and tasks. A working paper prepared by the **South Centre** on the role of standards and regulations[19] lists these aims and tasks to include risks minimization, providing information to consumers about the characteristics of products, providing information to producers about market needs and expectations, facilitating market transactions, raising efficiency and contributing to economies of scale. Further, the paper notes that standards and regulations respond also to growing public demand to have in the market products which have minimum detrimental effect on the environment, display clear information regarding their possible impact on health and respond to high quality requirements.

The above tasks and aims of standards have been expanded further by **Wilson John,**[20] who while writing on the role of standards, noted that standards play the following roles; firstly, standards are designed to facilitate information exchange, ensure quality and achieve the provision of public goods. According to **Wilson**, standards can improve information flows between suppliers and consumers regarding the characteristics and quality of products, thereby facilitating market transactions. Secondly, the process of standardization may reduce the costs of uncertainty (as measured by time and effort devoted to search) that consumers face in assessing product quality. Thirdly, standards facilitate comparison by consumers across products with common essential characteristics. Fourthly, they provide guidelines or focal points around which firms can organize their own quality or performance standards.

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[19] Simoneta Zamilli, "WTO Sanitary and Phytosanitary Agreement: Issues for Developing Countries" (1999) Working Paper 3, South Centre, Geneva.

[20] Wilson J.S., " Standards, Regulation and Trade: WTO Rules and Developing Country Concerns", (2002) in Development, Trade and the WTO- A Handbook, Hoekman B, Mattoo A and English P, eds Washington DC: World Bank at P.429.

Wilson John and Abiola Victor[21] described standards and regulations as tools for improving quality of life, creating shared consumption benefits for the public and solving common product and quality problems. According to them, well-defined standards can facilitate trade by reducing transaction and other costs and improve linkages among firms across industries.

Clearly, as the above analysis portrays, standards have their role to play in the market place. In principle, they exist to achieve important objectives that would go under-served in the private market, such as protection of public health or the environment. Elimination of such regulations could produce social losses that outweigh any economic efficiency gains.

2.3.3.2 The Role of SPS Standards and Regulations in Restricting Market Access

While SPS standards and regulations, by satisfying the above-mentioned tasks, can promote economic development and trade, they may also be used as powerful tools to impede international trade and protect domestic producers. This is mainly through unjustified different requirements in different markets, unnecessary costly or time consuming tests or duplicative conformity assessment procedures.

As noted in the **South Centre**[22]working paper, the risk that countries resort to standards and regulations to maintain a degree of desired domestic protection is increasing, since more obvious trade barriers, such as tariffs, were reduced through several rounds of multilateral negotiations. This risk is particularly high in the agricultural sector where

[21] Wilson J.S. and Abiola V., "Standards and Global Trade: A Voice for Africa" (2003) Eds. Washington DC: World Bank at P.xxviii.
[22] Simoneta Zamilli *supra* note 19.

lowering the level of protection provided by tariffs and many non-tariff barriers would increase the importance of sanitary and phytosanitary measures as border protection instruments. The major difficulty in dealing with standards and regulations is to distinguish those measures that are justified by a legitimate goal from those which are applied for protectionist purposes.

Among technical regulations and standards, sanitary and phytosanitary regulations occupy a particularly relevant place in the regulator's agenda, because of their primary aim of protecting citizens from every day food hazards. However, it has been observed that this connection with food, human safety, animal and plant life has become a virtual minefield for trade policy makers as national differences in risk perceptions and tolerance can be manipulated to protect domestic industry from international competition.[23]

A paper presented to the Conference on Agriculture and the New Trade Agenda in the WTO 2000 negotiations,[24] categorised the trade impact of SPS measures into the following three categories:

(a) Prohibition of trade by imposing an import ban or by prohibitively increasing production and marketing costs.

(b) Diverting trade from one trading partner to another by laying down regulations that discriminate across potential suppliers; and

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[23] Leonardo Iacavone, "Analysis and Impact of Sanitary and Phytosanitary Measures" (2003) Harvard University, Global Trade Negotiations, Center for International Development.

[24] Henson S., Loader R., SwinBank A.,and Breday M., (2000) "The Impact of Sanitary and Phytosanitary Measures in Developing Countries' Exports of Agriculture and Food Products". Paper presented at the World Bank Conference on Agriculture and the New Trade Agenda in the WTO 2000 Negotiations, Geneva, Switzerland.

(c) Reducing overall trade flows by increasing costs or raising barriers for all potential suppliers.

The writers then noted that though high profile disputes between the European Union (EU) and the United States of America (USA), particularly on use of hormones in meat production, portray the SPS Measures as a developed country issue, it is actually in the developing countries where their impact to trade is mostly felt.

2.4 CONCLUSION

In conclusion, SPS standards and regulations can lead to both positive and negative effects. The positive effects are the enhancement of food safety, animal and plant health while the negative effects is the use of standards as non-tariff barriers to trade.

CHAPTER THREE

INTERNATIONAL AND DOMESTIC LAWS ON SANITARY AND PHYTOSANITARY (SPS) MEASURES

3.1. INTERNATIONAL LAWS AND STANDARDS ON SPS MEASURES

As can be observed from the preceding Chapter, standards are essential for the protection of human beings, animals and the environment. At the same time, these standards need not be imposed on exporting countries in a manner that results to unjustified barriers to trade. The need to ensure that standards in general and SPS measures in particular are justified have led to the development of numerous international legal instruments whose objective is to ensure harmonization of standards that provide for scientific risk assessment methods. Though these legal instruments are many, some regional specific and some dealing with either, food, animal or plant health, this thesis will only highlight the key instruments while examining in detail the Agreement on the application of Sanitary and Phytosanitary Measures (The SPS Agreement). These international instruments include the following:

3.1.1. THE CODEX ALIMENTARIUS[25]

3.1.1.1 Introduction

The Codex Alimentarius, also known as the food code, is the global reference point for consumers, food producers and processors, national food control agencies and the international food trade. It presents a unique opportunity for all countries to join the

[25] The Codex Alimentarius was passed in 1962 when the Joint FAO/WHO Food Standards Conference requested the Codex Alimentarius Commission to implement a joint FAO/WHO food standards programme and create the Codex Alimentarius.

international community in formulating and harmonizing food standards and ensuring their global implementation. Codex Alimentarius also facilitates the development of codes governing hygienic processing practices and recommendations relating to compliance with those standards.[26]

3.1.1.2 The Historical Background of Codex Alimentarius

The Codex Alimentarius has its historical roots in the evolution of food standards that have developed over the years. In ancient times, governing authorities were already concerned with codifying rules to protect consumers from dishonest practices in the sale of food.[27] The second half of the nineteenth century saw the first general food laws adopted and basic food control systems put in place to monitor compliance. During the same period, food chemistry came to be recognized as a reputable discipline and the determination of the purity of a food was primarily based on the chemical parameters of simple food chemical consumption.[28]

In the late 1800s, a new era of long- distance food transportation was ushered in by the first international shipment of frozen meat from Australia and New Zealand to the United Kingdom. Almost at the same time, in the Austro- Hungarian Empire, a collection of standards and products' descriptions for a wide variety of foods was developed as the *Codex Alimentarius Austriacus*. In early 1900s, food trade associations attempted to facilitate world trade through the use of harmonized standards. For example, the

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[26] <www.codexalimentarius.net Linked to www.fao.org:> Understanding the Codex Alimentarius- Preface at P.1 (Both websites accessed on 7th March 2005).

[27] For example, in Europe during the Middle Ages, individual countries passed laws concerning the quality and safety of eggs, sausages, cheese, beer, wine and bread.

[28] <www.fao.org:> Understanding the Codex Alimentarius- Origins of the Codex Alimentarius at P.2.

International Dairy Federation (IDF) developed international standards for milk and milk products in 1903.[29]

In 1945, the Food and Agricultural Organization (FAO) was established, followed by the World Health Organization (WHO) in 1948. These organizations had as their mandate, *inter alia*, the development of international food standards. Around 1960, there were calls, particularly from European countries on the need to develop an international agreement on minimum food standards. These calls culminated in the establishment by the FAO of the Codex Alimentarius Commission in 1961 and the Codex Alimentarius in 1962. In 1963, the joint FAO/WHO Programme on Food Standards was established and it adopted the Statutes of the Codex Alimentarius Commission. These statutes provide the legal basis for the Commission's work and formally reflect the concepts behind and reasons for its establishment.

3.1.1.3 The Codex Alimentarius, International Trade and Market Access

The Codex Alimentarius has relevance to the international food trade. Prior to its establishment, different sets of standards arising from the spontaneous and independent development of food laws and standards by different countries inevitably gave rise to trade barriers in the early twentieth Century. Indeed, in 1955, the joint FAO/WHO expert Committee on nutrition noted as follows:[30]

"...the existence of widely differing control measures may well form an undesirable deterrent to international trade."

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[29] *Ibid.*
[30] *Ibid.*

Thus, the Codex Alimentarius came into being in response to a widely recognized need; that of protecting the consumers' health, of ensuring quality and of reducing trade barriers. This role of facilitating international trade and therefore enhancing market access is aptly captured by Article 1(a) of the Statutes of the Codex Alimentarius Commission which provides as follows:[31]

The Codex Alimentarius Commission shall be responsible for making proposals to and shall be consulted by, the Directors- General of the Food and Agriculture Organization (FAO) on all matters pertaining to the implementation of the joint FAO/WHO Food Standards Programme, the purpose of which is:

(a) Protecting the health of consumers and ensuring fair practices in the food trade.

In tandem with the purpose or objective embraced in Article 1 above, Codex Alimentarius has developed both commodity and general standards. The Codex Commodity Standards include information on the[32] scope - including the name of the standards, description, essential composition and quality factors, food additives, hygiene and weights and measures, labelling and methods of analysis and sampling.

On the other hand, general standards have across- the- board application to all foods. The general standards or recommendations that have so far been developed include[33] food labelling, food additives, contaminants, food import and export inspection and certification systems, residues of veterinary drugs in foods and pesticide residues in foods.

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[31] *Ibid.*
[32] As reported in <www.fao.org:> The Codex system: FAO, WHO and the Codex Alimentarius Commission at P.5 (accessed on 7th March 2005).
[33] *Ibid.*

Codex standards have over the years gained international acceptance. Indeed, the World Trade Organization's (WTO) Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) cites Codex standards, guidelines and recommendations as the preferred international measures for facilitating international trade in food.

3.1.2. THE OFFICE INTERNATIONAL DES EPIZOOTIES (OIE)[34]

Based in Paris, France, the OIE is the world animal health organization.

3.1.2.1 The Historical Background of OIE

In 1924, a handful of inspired veterinarians decided to create an international organisation capable of informing Member Countries on epizootic outbreaks, in order to help them protect themselves and exchange scientific information essential to the fight against animal diseases. The idea driving the veterinarians was the realization that a true veterinary policy could not be implemented at the national level alone. On 25th January 1924, twenty-eight States ratified an Agreement creating the Office International des Epizootes (OIE).[35]

By 2004, the membership had grown from the original 28 to 166 members. At the 71st General Session of the International Committee held in 2003, the Delegates of the Member Countries adopted a resolution allowing the use, in all circumstances, of the name 'World Organization for Animal Health', while keeping for the time being, the historical acronym 'OIE'. The OIE has entered into official agreements with various organizations such as the Food and Agriculture Organization and the World Health

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[34] The International Agreement for the Creation of an Office International des Epizooties was passed in Paris, France on 25th January 1924.

[35] <www.oie.int: >Short history of the Office International des Epizooties.htm. (accessed on 7th March 2005).

Organization, both of the United Nations. In 1994, it was officially recognized by the World Trade Organization (WTO) as an international reference for safe trade in animals and animal products as regards risks due to animal diseases and zoonoses.

3.1.2.2 The OIE's International Health Standards, International Trade and Market Access

The OIE has as one of its objectives, to safeguard world trade by publishing health standards for international trade in animals and animal products.[36] This is in tandem with the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). The Agreement requires Member Countries, with a view to achieving the widest possible harmonization of the animal health measures they take to ensure the protection of human and animal life and health, to establish those measures on the basis of international standards, guidelines and recommendations. For animal health and Zoonoses, the SPS Agreement refers to the 'standards, guidelines and recommendations developed under the auspices of the OIE.

The Standards, guidelines and recommendations referred to by the SPS Agreement are contained in two Codes of the OIE. These are the OIE Terrestrial Animal Health Code and the OIE Aquatic Animal Health Code. These Codes contain standards, guidelines and recommendations designed to prevent the introduction of infectious agents and diseases pathogenic to animals and humans into the importing country during trade in animals, animal genetic material and animal products. They do this through detailed recommendations on sanitary measures to be used by OIE Member Countries in establishing the health regulations applying to the import of animals, animal genetic

[36] *Ibid.*

material and animal products. Part 1 of the Codes contain procedures for international reporting of diseases, ethical rules for international trade and certification, the principles of import risk analysis, and the organisation of import and export procedures.[37]

The Codes are a reference document for use by Veterinary Authorities, import/export services, epidemiologists and all those involved in international trade. These Codes are used together with their respective manuals, namely, The Manual of Diagnostic Tests and Vaccines for Terrestrial Animals and the Manual of Diagnostic Tests for Aquatic Animals. These manuals provide a uniform approach to the diagnosis of OIE-listed diseases and other diseases of importance to international trade, so that the requirements for health certification in connection with trade in animals and animal products can be met.

By describing internationally agreed laboratory methods for disease diagnosis and requirements for the production and control of biological products (mainly vaccines), their objective is to harmonize these important elements of animal disease prevention, surveillance and control. The manuals provide a wealth of internationally agreed essential scientific and technical information that complements the Code's trade provisions.

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[37] *Ibid.*

3.1.3. THE INTERNATIONAL PLANT PROTECTION CONVENTION (IPPC)[38]

3.1.3.1.Historical Background of the IPPC

The IPPC has its roots in various international agreements that have been developed over the years dealing with plant protection. The first of these International Agreements was the Phylloxera Vasatrix Convention of 1881. This was followed by the Berne Convention of 1889. In 1929, the International Convention for the protection of Plants was signed in Rome. In 1951, the FAO adopted the International Plant Protection Convention (IPPC). This Convention came into force in 1952, superseding all the existing international plant protection agreements.[39]

Since its coming into force, the IPPC has been amended twice, notably in 1979 and in 1997. The New Revised Text of 1997 was undertaken to incorporate contemporary phytosanitary concepts and also to take into consideration the role of IPPC in relation to the SPS Agreement. In particular, the SPS Agreement identifies the IPPC as the Organisation providing international standards for measures implemented by governments to protect their natural resources from harmful pests (phytosanitary measures) while ensuring that phytosanitary measures are technically justified and are not used as unjustified barriers to international trade.[40]

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[38] The IPPC is deposited with the Director-General of the Food and Agriculture Organisation (FAO) of the United Nations since its adoption by the Conference of the FAO at its Sixth Session in 1951. The Convention came into force on 3rd April 1952 and was registered with the United Nations Secretariat on 29th November 1952. The FAO Legal Office/Treaties Archive. The New Revised Text of the IPPC was approved by the FAO Conference at its 29th Session on November 1997.

[39] <www.ippc.int: Evolution of the IPPC>. (accessed on 7th March 2005).

[40] WTO OMC, Synopsis of WTO Agreements and Related Topics " Agreement on the Application of Sanitary and Phytosanitary Measure"(2000). Prepared for the meeting of African Trade Ministers in Libreville/ Gabon in November 2000.

3.1.3.2.Key Highlights of the New Revised Text of the IPPC and their relevance to external market access

The New Revised Text of the IPPC has as one of its objectives the facilitation of international trade. This is evidence in its preamble where it duly recognizes that:

"...phytosanitary measures should be technically justified, transparent and should not be applied in such a way as to constitute either a means of arbitrary or unjustified discrimination or a disguised restriction, particularly on international trade."[41]

Article IV of the Convention provides for an official national plant protection organization whose responsibilities shall include, inter alia, the issuance of certificates relating to the phytosanitary regulations of the importing contracting party for consignments of plants, plant products and other related articles.

Article V provides for phytosanitary certification and is to the effect that each contracting party shall make arrangements for phytosanitary certification with the objective of ensuring that exported plant, plant products and other regulated articles and consignments thereof are in conformity with the certifying statements to be made pursuant to paragraph 2(b) of Article V. Article VII (1) refers to requirements in relation to imports and acknowledges contracting parties' sovereign authority to regulate, in accordance with applicable international agreements, the entry of plants and plant products and other regulated articles.

[41] International Plant Protection Convention (New Revised Text approved by the FAO Conference at its 29th Session- November 1997).

Article VII (2) is concerned with facilitation of international trade.[42] In particular it lays down guidelines to be followed by the Contracting Parties in regulating entry of plants and plant products within their territories. For example, Parties are required to publish and transmit phytosanitary requirements, restrictions and prohibitions to any contracting party or parties that they believe may be directly affected by measures imposed by them.

Article XI provides for the establishment of a Commission on Phytosanitary Measures within the Framework of the Food and Agriculture Organization of the United Nations (FAO). Consequently, an Interim Commission on Phytosanitary Measures (ICPM) has been established. At the third ICPM in 2001, the ICPM established the Standards Committee (SC). The SC's mandate is to manage the standard setting process and assist in the development of International Standards for Phytosanitary Measures (ISPM) which have been identified by the ICPM as priority standards.

It is important to note that even before the establishment of the ICPM and the Standard Committee, the development of ISPM was already underway. Among the ISPM that have so far been developed is **Principles of Plant Quarantine Related to International Trade.**[43]These are principles that are divided into general and specific principles. The aim of formulating the principles is to facilitate the process of developing international standards for plant quarantine. It is envisaged that implementation of these principles by the relevant phytosanitary authorities will result in the reduction or elimination of the use of unjusitifiable phytosanitary measures as barriers to trade.

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[42] *Ibid.*

[43] International Standards for Phytosanitary Measures, Principles of Plant Quarantine as related to International Trade, Publication No 1. (1995) Secretariat of the IPPC, FAO, Rome.

The general principles deal with issues of sovereignty, transparency, harmonization, necessity, minimal impact, modification, equivalance and dispute settlement. They indicate the process of development of phytosanitary measures as applicable to international commerce.

The specific principles, on the other hand, either directly support the IPPC or are related to particular procedures within the plant quarantine system. These specific principles are concerned with issues of cooperation, technical authority, risk analysis, managed risk, pest free areas, emergency action, notification of non-compliance and non-discrimination. Another ISPM that has been developed is the Standard known as **Guidelines for Pest Risk Analysis.**[44]This Standard describes the process of pest risk analysis for plant pests for the purpose of preparing phytosanitary regulations by National Plant Protection Organizations. It describes the pest risk analysis as consisting of three stages, namely, initiating the process of analyzing risk, assessing pest risk and management of the pest risk.

3.1.4. THE CONVENTION ON BIOLOGICAL DIVERSITY (CBD)[45]

3.1.4.1.Historical Background to the CBD

The Convention on Biological Diversity (CBD) arose out of the realization by the international community that biological resources are vital to humanity's economic and social development. At the same time, it was recognized that human activities could be a threat to species and eco-systems. Consequently, the United Nations Environment

[44] International Standards for Phytosanitary Measures, Guidelines for Pest Risk Analysis (1996) Publication No 2. Secretariat of the IPPC, FAO, Rome 1996.
[45] The Convention on Biological Diversity, Adopted at the 1992 Earth Summit in Rio de Janeiro. Reprinted in International Legal Materials 818.

Programme (UNEP) convened the Ad Hoc Working Group of Experts on Biological Diversity to explore the need for an international legal instrument for the conservation and sustainable use of biological diversity.[46] The Working Group's work led to the conclusion of the CBD which was signed on 5th June 1992 and entered into force on 29th December 1993.

3.1.4.2.The Convention on Biological Diversity and External Market Access

Though the CBD does not expressly provide for international trade and market access, it is nevertheless a Convention that impacts heavily on international trade and by extension to external market access. This is because, the Convention concerns itself with the preservation and conservation of species and the eco-system. The link between this Convention therefore and international trade is the fact that in engaging in international trade, Contracting Parties must ensure that they do not in any way engage in activities that have adverse effects on the biodiversity of others Parties. Conservation of the environment and the safety and health of plant species is one of the reasons cited by importing countries when they impose phytosanitary measures on exports of other countries. For this reason, compliance with the provisions of the CBD by countries will in the long run limit the possibility of their products being rejected by other nations on the basis of protection of plant life from the introduction of pests, diseases or disease-causing organisms. Some of provisions that the Contracting Parties ought to consider as they engage in international trade include the following:

[46] *Ibid:* Text and Annexes- Introduction at P.1.

Firstly, Article 2 deals with the definition of terms. It defines Biological Diversity as the variability among living organisms from all sources including, inter alia, terrestrial marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems.

Secondly, Article 7 concerns itself with identification and monitoring of biological diversity. Of particular relevance to international trade is Article 7 (c) which obliges Contracting Parties to identify processes and categories of activities which have or are likely to have significant adverse impacts on the conservation and sustainable use of biological diversity, and monitor their effects through sampling and other techniques.

Thirdly, Article 8 deals with In-Situ Conservation. This refers to the conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings and, in the case of domesticated or cultivated species, in the surroundings where they have developed their distinctive properties.[47] Article 8 (g) requires Contracting Parties to establish means to regulate, manage or control the risks associated with the use and release of living modified organisms resulting from biotechnology which are likely to have adverse environmental impacts and create risks to human health. On its part, Article 8 (h) concerns itself with the prevention of the introduction of, control or eradication of those alien species which threaten ecosystems, habitats or species.

[47] *Ibid.* Article 2.

Fourthly, Article 19 provides for the handling of biotechnology and distribution of its benefits. More particularly, Article 19(3) obliges Parties to consider the need for and modalities of a protocol setting out appropriate procedures, including in particular advance informed agreement, in the field of the safe transfer, handling and use of any living modified organism resulting from biotechnology that may have adverse effect on the conservation and sustainable use of biological diversity.

3.1.5. THE CARTAGENA PROTOCOL ON BIOSAFETY TO THE CONVENTION ON BIOLOGICAL DIVERSITY[48]

3.1.5.1. Historical Background to the Cartagena Protocol

One of the issues addressed by the CBD was Bio-safety. This concept refers to the need to protect human health and the environment from the possible adverse effects of the products of modern biotechnology. At the same time, modern biotechnology is recognized as being a great potential for the promotion of human wellbeing particularly in meeting critical needs for food, agriculture and health care.[49]

The convention, in recognizing these twin aspects of modern biotechnology, has provided for the access to and transfer of technologies, including biotechnology and appropriate procedures to enhance the safety of biotechnology so as to reduce all potential threats to biological diversity, taking also into account the risks to human health. Article 8(g) deals with measures that Parties should take at national level, while Article 19(3) sets the stage

[48] Secretariat of the Convention on Biological Diversity (2000). Cartagena Protocol on Biosafety to the Convention on Biological Diversity: text and annexes. Montreal: Secretariat of the Convention on Biological Diversity.

[49] The Cartagena Protocol on Biosafety to the Convention on Biological Diversity *Ibid*: Introduction at P.1

for the development of an international legally binding instrument to address the issue of bio-safety.

During its second meeting, in November 1995, the Conference of the Parties to the Convention established an open-ended Ad Hoc Working Group on Biosafety. The Group's mandate was to develop a draft protocol on biosafety, focusing specifically on transboundary movement[50] of any living modified organism resulting from modern biotechnology that may have adverse effect on the conservation and sustainable use of biological diversity. The Protocol, known as the Cartagena Protocol on Biosafety to the Convention on Biological Diversity, was finalized and adopted in Montreal on 29th January 2000 at an extraordinary meeting of the Conference of the Parties.[51]

3.1.5.2.Key Highlights of The Cartagena Protocol

Articles 4 and 5 of the Protocol concern themselves with the scope of application of the Protocol. According to Article 4, the Protocol applies to all living modified organisms[52] that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health. Article 5, on the other hand excludes the application of the Protocol to pharmaceuticals for humans that are addressed by other relevant international agreements or organisations.

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[50] Transboundary Movement refers to the movement of a living modified organism from one Party to another Party. (Article 2)

[51] Secretariat of the Convention on Biological Diversity *supra* at *n*ote 48.

[52] Article 2 of the Protocol defines 'Living Modified Organism' to mean any living organism that possesses a novel combination of genetic material obtained through the use of modern biotechnology.

Articles 7-12 relates to advance informed agreement procedure. Articles 8-10 respectively deal with procedures for notification by the exporting Party, acknowledgement of receipt of notification and decision procedure by the Party of import. This is in relation to the first intentional transboundary movement of living modified organisms for intentional introduction into the environment of the Party of import.

Article 11 describes the procedure to be followed for living modified organisms intended for direct use as food or feed, or for processing. This Article requires, *inter alia,* for a Party that makes a final decision regarding domestic use, including placing on the market, of a living modified organism that may be subject to transboundary movement for direct use as food or feed for processing, to within fifteen days of making that decision, inform the Parties through the Biosafety Clearing House.[53]

Articles 15 and 16 deal with the need for risk assessment and risk management. Article 15 requires risk assessments to be carried out in a scientifically sound manner. On its part, Article 16, obliges Parties to establish and maintain appropriate mechanisms, measures and strategies to regulate, manage and control risks identified during the risk assessment process.

Article 18 concerns itself with the handling, transport, packaging and identification of living modified organisms. It provides that in order to avoid adverse effects to the environment and to reduce risks to human health, each Party should ensure that living

[53] Article 20 of the Protocol provides for the establishment of a Biosafety Clearing House to facilitate the exchange of scientific, technical, environmental and legal information, on and experience with living modified organisms.

modified organisms are handled, packaged and transported under conditions of safety, taking into consideration relevant international rules and standards.

The conclusion of the Biosafety Protocol is a significant step as it provides an international regulatory framework to reconcile the respective needs of trade and environmental protection with respect to a rapidly growing global industry, the biotechnology industry. The Protocol provides for the environmentally sound application of biotechnology, making it possible to derive maximum benefits from the potential that biotechnology has to offer, while minimizing the possible risks to the environment and to human health.

3.1.6. THE AGREEMENT ON THE APPLICATION OF THE SANITARY AND PHYTOSANITARY MEASURES (SPS AGREEEMENT)[54]

3.1.6.1.Historical Background of The SPS Agreement

Firstly, The SPS Agreement has its origin in the WTO Uruguay Round of negotiations that was concluded at Marakesh, Morocco in 1994. The agricultural negotiations within the Uruguay Round strove to lower barriers that countries used to protect their domestic markets. There were fears, however that these barriers in agriculture would be replaced by disguised protectionist measures in the form of sanitary and phytosanitary regulations. There were therefore calls for the creation of an Agreement to deal solely with the SPS measures.

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[54] The Agreement on the Application of Sanitary and Phytosanitary Measures (The SPS Agreement) entered into force with the establishment of the World Trade Organisation on 1st January 1995. It appears in the Final Act of the Uruguay Round of Multilateral Trade Negotiations signed in Marrakesh on 15th April 1994. This Agreement and others contained in the Final Act along with the General Agreement on Trade and Tariff as amended (GATT1994) are part of the Treaty that established the WTO.

Secondly, many food safety, animal and plant health regulations fell within the scope of the plurilateral 1979 Agreement on Technical Barriers to Trade (the TBT Agreement). This Agreement permitted its signatories to introduce potentially trade-restrictive technical or sanitary and phytosanitary regulations in the pursuit of a 'legitimate'objective. This objective could be defined widely to cover the protection of human, animal, or plant health, the protection of the environment, animal welfare, religious considerations, and national security motives. It was felt during the Uruguay Round that there was need to give more specific and in-depth coverage to the relationship between health protection and trade measures than the TBT Agreement was covering.

Thirdly, a potential loophole existed in the GATT 1947, under Article XX, General Exceptions, point (b) Under this clause, a measure could be exempt from other GATT provisions if it was 'necessary to protect human, animal or plant life or health' There were some concerns that in the absence of clearer and more detailed rules on the scope of measures permitted in this regard governments would be pressured to resort to sanitary barriers as a device to shield domestic industries from competition and to frustrate measures to liberalize trade in Agriculture. This concern added to the view that there was need to provide an expanded and clear set of rules and principles regulating the application of sanitary and phytosanitary measures.

It is these fears and concerns that led to the creation of an Agreement dealing solely with the Application of Sanitary and Phytosanitary Measures. This Agreement is a set of rules, principles and benchmarks for WTO members to ensure, among other things, that

sanitary and phytosanitary trade measures are justified and do not constitute disguised restrictions on international trade. The rules are legally binding on members.

3.1.6.2.Aims and Objectives of the SPS Agreement

3.1.6.2.1. Aims

The main goal of the SPS Agreement is to prevent domestic SPS measures from having unnecessary negative effects on international trade and their being misused for protectionist purposes.[55] More specifically, the Agreement aims to ensure food safety and prevent the spread of diseases among animals and plants,[56] encourage the adoption of measures of scientific principles in the application of standards, prevent discrimination between members when identical or similar conditions prevail, promote SPS Measures based on international guidelines and common risk assessment techniques and encourage standards based on broad-based participation and consensus.[57]

3.1.6.2.2. Objectives of the SPS Agreement

The SPS Agreement has narrowed down the definition of SPS measures to a limited range of situations that also reflect its objectives. These situations/objectives are the[58] protection of human or animal life or health from risks arising from additives, contaminants, toxins or disease-causing organisms in their food, protection of human life from plant or animal carried diseases, protection of animal or plant life from the

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[55] Simonetta Zamilli *supra* note 19.
[56] *Ibid.*
[57] Wilson.JS and Abiola V " Standards and Global Trade: A Voice for Africa" (2003) The World Bank,, Washington DC at P. xxx.
[58] WTO Background materials *supra* note 10 at Chapter 5.2.

introduction of pests, diseases or disease causing organisms and protection of a country from damage caused by the entry, establishment or spread of pests.

3.1.6.3.Key Provisions of the SPS Agreement

3.1.6.3.1. Disciplines prescribed for the establishment of sanitary and phytosanitary measures

(a) Basic rights and Obligations

These are provided under Article 2 of the SPS Agreement. The Agreement recognizes Members' sovereign rights to take measures that may restrict trade in order to implement national laws protecting human, animal or plant life or health. However, these measures must comply with the GATT principle of Most Favoured Nation (MFN). In this respect, such measures should apply to domestically produced food or to local animal and plant diseases requirements, as well as to products coming from other countries, without unjustified discrimination among foreign sources of supply.

(b) Risk Assessment

The Agreement also seeks to reduce arbitrariness in governments' decision making by stipulating that measures should be based on the analysis and assessment of objective and accurate scientific data. Article 5 of the Agreement provides that in the absence of international standards, guidelines or recommendations, sanitary or phytosanitary measures must be based on an assessment of risk. Annex A of the Agreement defines risk assessment as the evaluation of the likelihood of entry of a pest or disease within the territory of an importing Member and of the associated potential biological and economic

consequences. Alternatively, it is evaluation of the potential for adverse effects on human or animal health arising from the presence of additives.[59]

The Agreement provides that in determining the level of protection, account shall be taken of the objective of minimizing negative trade effects. In this respect, it encourages consistent and transparent decision-making in determining an appropriate level of health protection and requires that potentially trade restrictive measures be applied for no other purpose than that of ensuring food safety and animal and plant health so as not to result in unjustified barriers to trade.

SPS measures shall not be more trade restrictive than required to achieve the appropriate level of protection, taking into account technical and economic feasibility. When a Member considers that another Member's measure is constraining its exports and is not based on international standards, an explanation of the reasons for the measure may be requested and shall be provided by the Member maintaining the measure.

(c) Obligation of Transparency

This is provided for under Article 7 and Annex B of the Agreement as follows:

I. Publication of regulations

This rule requires Members to promptly publish their sanitary and phytosanitary measures. Further, except in urgent circumstances, members are required to allow a

[59] As reported in the WTO OMC Synopsis of WTO Agreements and Related Topics, Agreement on the Application of Sanitary and Phtyosanitary measures *supra* note 40 at P.3.

reasonable interval between the publication of a measure and its entry into force in order to allow time for producers in exporting Members, and particularly developing country Members, to adapt their products and methods of production to the requirements of the importing Member.

II. Enquiry points

Members shall establish enquiry points responsible for the provision of answers to all questions from interested Members as well as for the provision of relevant documents.

III. Notification procedure

Members must notify other Members whenever they have proposed regulations (or amendments to existing regulations), whenever an international standard, guideline or recommendation does not exist or the proposed measure differs from them, and if the regulation may have a significant effect on trade of other Members. Where urgent problems of health protection arise, Members shall immediately notify the regulation concerned to the WTO Secretariat. Members have an obligation to designate a single central government authority responsible for notifications.

3.1.6.3.2. Means prescribed to reduce the negative effects of SPS measures on trade

(a) Harmonization

This is provided for in Article 3 of the SPS Agreement. Under this Article, Members shall establish sanitary and phytosanitary measures based on international standards, guidelines and recommendations. This is referred to as Harmonization.[60] The SPS

[60] WTO Background Rules, Sanitary and Phytosanitary measures *supra* note 10 at Chapter 5.5

Agreement aims to overcome health-related impediments to market access by encouraging the establishment, recognition and application of common sanitary and phytosanitary measures by different Members. Through the use of common international norms, it is hoped that this will provide the necessary health protection based on scientific evidence and improve trade flows at the same time.

The SPS Agreement does not set the standards. Instead, it refers to three standard setting international organizations. These organizations are:

I. **The Food and Agricultural Organization (FAO)/World Health Organization (WHO) Codex Alimentarius Commission** – The SPS Agreement designates Codex as the authority for all matters relating to international food safety, evaluation and harmonization.

II. **The Office International des epizooties (OIE)**- The OIE is designated in the SPS Agreement as the authority on world animal health.

III. **The International Plant Protection Convention (IPPC)**- The IPPC has been designated as the authority on plant health and phytosanitary issues.

(b) Use of International Standards-Certification and Compliance

Before the entry into force of WTO, these international standards, guidelines and recommendation prepared by Codex, the OIE and IPPC could be adopted by governments on a voluntary basis. Currently, due to the SPS Agreement, Members adopting such measures are deemed to be in full compliance with the SPS Agreement.

(c) The Committee on Sanitary and Phytosanitary Measures

This Committee is provided for under Article 12 of the SPS Agreement with the mandate to carry out the functions necessary to implement the SPS Agreement. Its main functions are to encourage and facilitate ad hoc consultations or negotiations among Members, to encourage the use of international standards, guidelines or recommendations and to maintain close contacts with the relevant standard-setting international organizations. The Committee has established a provisional procedure to monitor the process of harmonization. This procedure consists of identifying cases where the non-use of international standards, guidelines and recommendations has an impact on trade and determining the reasons why the international standards, guidelines and recommendations are not used.

(d) Equivalence

This is provided for under Article 4 of the Agreement. The SPS Agreement recognizes that there may be varied ways of ensuring food safety or animal and plant health protection in different countries. In this respect, the Agreement provides that WTO Members should accept another's procedures as equivalent whenever the same level of human, animal or plant health protection is achieved. The concept of equivalence requires countries to develop confidence in their trading partners' health and safety standards without compromising their own health objectives. The Agreement thus recognizes the need for bilateral consultations and the sharing of information as essential to the successful negotiation of equivalence agreements.

In the negotiation of such equivalence agreements, the exporting country has the burden of demonstrating that its sanitary treatments are at least as good as those of the importing country in that they achieve the same level of health protection. If the exporter's measures are found to provide the same level of health protection, they ought to be accepted as equivalent by its trading partners.

(e) Pest or Disease Free Areas

This is provided for under Article 6 of the SPS Agreement. Under this Article, Governments are requested to recognize the possibility that a part or region of the exporting Member's territory may be pest or disease free. For example, animal diseases such as foot and mouth disease may be limited only to a geographical area in a country. Consequently, the SPS Agreement requires that products coming from disease free areas within a country should be considered on the basis of their disease status and not of the rest of the country.

However, the burden rests on the exporting Member to demonstrate that given areas within its country are free from a disease. In this respect, the exporting country must allow experts from the importing country to inspect the area concerned and the controls in place to check the disease from spreading.

(f) Emergency Situations

This is provided for under Article 5 of the Agreement. This is to the effect that whenever an emergency situation exists, an importing country can impose an SPS measure. Such measures are to be used whenever there is unexpected disease outbreaks. Article 5(7) permits emergency measures in cases where relevant scientific evidence is insufficient. In

such a case, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information including that from relevant international organisations. Notification must be made upon implementation of the provisional measures. An emergency measure must be supported by an appropriate risk assessment and the government must stand ready to provide a scientific justification for maintaining the measure.

(g) Dispute Settlement Under the SPS Agreement

An aggrieved Member may refer disputes resulting under the SPS Agreement to any of the following dispute settlement mechanisms: Firstly, to the unified WTO dispute settlement procedures, i.e. under the Dispute Settlement Understanding (DSU). Under the DSU, a specific food safety or animal or plant health requirement may be challenged if it restricts trade and if the scientific evidence does not support its implementation.

Secondly, Members may use bilateral consultations to solve their discussions and find a mutually acceptable solution. Thirdly, the SPS Agreement allows Members to use dispute settlement procedures of the standard setting organisations, ie Codex, the OIE and the IPPC. Fourthly, Members of a regional organization, such as The Common Market for Eastern and Southern Africa (COMESA) could choose to take SPS-related matters to that organization's dispute settlement mechanisms.

(h) Special and Differential Treatment for developing countries

Given the nexus of SPS measures to human, animal safety and plant life, it is difficult to have two standards, one for developing countries and the other for developed countries.

However, under the SPS Agreement, various measures have been undertaken in favour of developing countries: Firstly, least developed countries and developing countries have had the option to delay application of the provisions of the SPS Agreement for five years and two years respectively, from the date of entry into force of the WTO Agreements (Article 14). Though these periods have since expired, they were meant to give developing countries time to adopt international standards or otherwise develop their national SPS regulatory frameworks on the basis of scientific principles.

Secondly, Under Article 10.3, the Committee is enabled to grant developing countries, upon request, specified, time limited exceptions to obligations under the SPS Agreement. Thirdly, under Article 9, Members may provide technical assistance either bilaterally or through standard- setting organizations. This may take the form of advice, credits, donations, grants, training and equipment. Fourthly, where substantial investments would be required for a developing country to fulfill the sanitary or phytosanitary requirements of an importing Member, the latter shall consider providing technical assistance to the developing country. Fifthly, under Article 10, in the preparation and application of their sanitary and phytosanitary measures, Members shall take into account the special needs of developing countries and in particular of the least-developed countries. Finally, Members are requested to encourage and facilitate the participation of developing countries in the relevant international organizations.

3.1.6.4.Issues for Developing Countries in the SPS Agreement

3.1.6.4.1. Participation

This issue presents itself in the following manner:

(a) Membership to the WTO- A number of developing and least developed countries such as Ethiopia, Nepal and Sudan, are not members of the WTO. The implication of this is that they are not able to participate fully within the WTO system such as participating in the SPS Agreement.

(b) Low membership to international standard setting organisations- the implication is that since they are not members they cannot participate in standard setting. Consequently, standards will be set without taking into consideration the needs and circumstances of most developing countries.

(c) Many developing countries have so far not established an enquiry point or single national notification agency, crucial elements of the transparency requirement under the SPS Agreement. This limits their ability to communicate with other WTO Members on SPS measures.

(d) Attendance of meetings in Geneva relating to the SPS Agreement by the developing countries is poor. Related to this, developing countries complain that their ability to effectively participate in these meetings is hampered by their inability to understand and contribute to the discussions taking place owing to the limited technical and scientific know-how of their delegates.

According to **Henson,**[61] except for India, Phillipines, Egypt and Indonesia, developing countries have not actively participated in the SPS Agreement. This then raises concerns about the ability of developing countries to participate even in SPS Committee meetings suggesting that the workings of the Agreement will tend to be driven by the priorities of developed countries."

(e) Developing countries also complain that they are constrained in their ability to implement and or respond to key elements of the SPS Agreement such as notification of new SPS Measures, risk assessment, developing and implementation of international standards, demonstrating equivalence and dispute settlement. The most significant constraint however, is the insufficient ability to assess the implications of developed countries' SPS requirements following notification.

3.1.6.4.2. Concern about the operation of the SPS Agreement

Developing countries are unhappy with the way the SPS Agreement has been implemented; Firstly, they are critical of the implementation of the transparency mechanisms. According to them, they feel that the length of time given between the notification of new SPS measure and their application is inadequate for developing countries to respond in an effective and appropriate manner.

Secondly, developing countries complain that there is reluctance by developed countries to accept SPS measures in developing countries as equivalent. As a consequence, SPS

[61] Henson S., Loader R., Swinbank A and Breday M. "The Impact of Sanitary and Phytosanitary Measures in Developing Countries' Exports of Agriculture and Food Products" *supra* note 24.

requirements may be applied that are difficult to comply with given local circumstances such as climatic conditions and/or prevailing systems of marketing and production.

Thirdly, developing countries encounter problems when they attempt to conform and comply with the SPS standards. This is because, compliance requires conducting tests that ascertain that the project in question comply with the SPS standards. Furthermore, Member countries must put in place an institution that can issue certificates of compliance. The challenge that such countries face is lack of qualified personnel and the technology to conduct authentic tests.

For example, in Kenya, the two institutions responsible for implementing the SPS Agreements are The Kenya Bureau of Standards (KEBS) and The Kenya Plant Health Inspectorate Services (KEPHIS). Though these institutions issue certificates of compliance, they do not carry much weight in the international market, because of their perceived lack of qualified personnel and equipment. Kenyan exporters are forced to incur additional certification costs at the point of entry that adds on their costs making their products non-competitive.

Fourthly, developing countries complain that the level and types of technical assistance given to facilitate the implementation of the SPS Agreement and/or comply with the developed countries' SPS requirements fail to address the fundamental day to day problems faced by developing countries. These include the development of scientific and technical expertise and access to modern testing methods.[62]

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[62] *Ibid.*

3.1.6.4.3. Standards-takers

Developing countries are critical of the procedures by which international standards are negotiated and signed within Codex, the OIE and IPPC. Key issues include the nature of decision making processes within the international standards organisations and the ability of developing countries to represent themselves given their limited financial, scientific and technical resources.

Indeed as noted by **Wilson,**[63] lack of participation, coupled with limited capacity to provide credible information needed to articulate and defend their interests and/or complaints has transformed many developing countries (African firms and farmers in particular) into 'standards-takers'- reactive as opposed to proactive players in the international trade system. According to **Wilson,**[64] this position raises three main concerns especially for African firms and farmers. The first one is that as standards-takers, they are vulnerable to sudden or frequent changes in foreign standards, especially when such changes are orchestrated with protectionist intent.

Secondly, many times, their situation is exacerbated by simultaneous exposure to divergent, multiple standards imposed by various trading partners. Servicing several markets with varying standards increases production costs, complying testing and verification procedures and increases the burden of proof unnecessarily.

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[63] Wilson.JS " Standards and Global Trade" *supra* note 21 at P.xxxv.
[64] *Ibid.*

Thirdly, foreign standards (e.g packaging, testing or environmental requirements) may become moving targets. Local consumer and producer groups and their supporting agencies abroad can influence (if not mobilize) the development of standards and codes of practice and make them more stringent once their competitors achieve compliance.[65]

3.2. DOMESTIC LAWS AND STANDARDS ON SPS MEASURES

The law relating to standards generally and SPS Measures in particular in Kenya is to be found within numerous Acts of Parliament. These statutes empower various organizations to enforce the standards. For a detailed analysis of these standards laws, the laws shall be classified into three main group namely laws dealing with standards formulation, laws dealing with the quality of agricultural inputs and produce and the laws that safeguard human health, animal health, plant health and the environment. These laws are not mutually exclusive and as the analysis shall reveal, one statute may be concerned with product quality while at the same time guarding against human, animal or plant health.

3.2.1. LAWS RELATING TO STANDARDS FORMULATION AND IMPLEMENTATION

The main legislation responsible for standards formulation and implementation is the Standards Act, Chapter 496 of the Laws of Kenya. Section 3 of the Act establishes an Institution known as the Kenya Bureau of Standards (KEBS) whose function, *inter alia*,

[65] For example, processed foods from Del Monte, Kenya was in 2001 restricted from European markets because of worker safety and environmental standards. Del Monte was accused by human rights associations of not providing adequate safety standards to its workers and that environmental health standards were not adhered to. This led to a boycott of Del Monte's products in most EU supermarkets.

is to make arrangements or provide facilities for the examination and testing of commodities and any material or substance from or with which and the manner in which they may be manufactured, produced, processed or treated.[66]

Section 6 of the Act creates a Council of the Bureau known as the National Standards Council. As per Section 9, the Council may by notice in the Kenyan Gazette, declare any specification or code of practice framed or prepared by the Bureau to be a Kenyan Standard. Upon declaration of the standard, the Minister, on the advice of the Council, shall by order in the Gazette, prescribe a date after which no person shall manufacture or sell any commodity, method or procedure to which the relevant specification or code of practice relates unless it complies with that specification or code of practice.

The Kenya Bureau of Standards works closely with three main public organizations in the development and implementation of health standards on animal and animal products, plant and plant products, and food safety. These are the Kenya Plant Health Inspectorate Services (KEPHIS) for standards on health of plants and plant products, the Department of Veterinary Services (DVS) for standards of health of animal and animal products and the Fisheries Department which is responsible for fisheries. The Ministry of Health (MoH) is responsible for food safety standards.[67]

Regarding the participation of Kenya in international standards, KEBS is the contact point for the Codex Alimentarius Commission (CAC) and the International Standards Organisation (ISO)- related standards. It coordinates Kenya's viewpoints on international

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[66] The Standards Act, Chapter 496 Laws of Kenya , Section 4(c).

[67] Nyangito. H.O., Olielo. T., and Magwaro D. " Improving Market Access through Standards Compliance: A Diagnostic and Road Map for Kenya" Reported in Wilson. JS " Standards and Global Trade" *supra* note 21 at P.13.

standards developed by CAC and ISO for various products, particularly those that are important for local and export trade.[68] These are mainly agricultural products and include tea, horticulture, coffee, pyrethrum, sisal, hides and skins and fish.[69] KEPHIS is the contact point for the International Plant Protection Convention (IPPC) while the DVS is the contact point for Office International des Epizooties (OIE).[70]

Overall, the Ministry of Trade and Industry (MTI) is responsible for trade agreements and it coordinates with all public institutions involved in standards setting and implementation at a ministerial level and at the National Committee on WTO (NCTWO). The MTI is also the notifying authority for WTO issues.[71]

3.2.2. LAWS RELATING TO THE QUALITY OF AGRICULTURAL INPUTS AND PRODUCE

The principle law that is concerned with the quality of agricultural inputs and produce is the Agricultural Produce (Exports) Act, Chapter 319 of the Laws of Kenya. Section 4 of the Act stipulates that no person shall export, or cause to be exported, or attempt to export the produce of any animal intended for human consumption which is infected with any disease rendering such produce unfit for such consumption. Export of agricultural produce intended for human consumption which is infected with any disease rendering such produce unfit for such consumption is also prohibited. Further, Section 4 also

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[68] *Ibid.*

[69] KEBS has established about 1000 standards for processed and manufactured agricultural products. Most Kenyan standards are based on international standards, which are either adopted without change or adopted to allow for local conditions.

[70] Nyangito. HO, Olielo. T and Magwaro D. " Improving Market Access through Standards Compliance: A Diagnostic and Road Map for Kenya" Reported in Wilson. JS " Standards and Global Trade" *supra* note 21 at P.18.

[71] *Ibid.*

prohibits export of agricultural produce which owing to its condition or for any other reason is unlikely to be brought to its destination in a sound or good marketable state.

The Act provides for grading, inspection, preparation and manufacture of produce. It also allows for the certification of horticulture exports through the horticultural Inspection Services.[72] Under Section 10 of the Act, different rules may be made for different kinds of agricultural products intended for exports. Such rules have been made for wheat, chillies, castor seed, wattle products, beans, potatoes and horticultural produce.

3.2.3. LAWS RELATING TO PUBLIC HEALTH SAFEGUARDS, PROTECTION OF ANIMAL HEALTH, PROTECTION OF PLANTS AND THE ENVIRONMENT GENERALLY

The laws that have been enacted to safeguard public health, animal health, plant health and the environment are scattered over very many statutes. The main concern of these statutes is the prevention of diseases to human beings, animals or plants. In addition, there are laws are concerned with the conservation of the environment and more particularly the prevention of pollution in the environment. The main laws include the following:

(a) The Public Health Act (Cap 242)

The Public Health Act contains provisions dealing generally with the protection of human health. The Act makes it the duty of every local authority (in the capacity of "health" Authority) to take all lawful, necessary and reasonable practicable measures to safeguard

[72]Third Schedule, pursuant to Rule 14 of the Agricultural Produce (Export) (Horticultural Produce Inspection) Rules.

and promote public health.[73] Section 13 imposes a duty on local authorities "to take all lawful, necessary and, under its special circumstances, reasonably practicable measures for preventing the occurrence of any outbreak or prevalence of any infections, communicable or preventable disease, to safeguard and promote the public health and to exercise the powers and perform the duties in respect of the public health conferred on it by the Act or any other law."

Section 131 of the Act stipulates that no person shall sell or expose for sale or import or bring into any market or have in his possession without reasonable excuse any food for man in a tainted, adulterated, diseased or unwholesome state, or which is unfit for use, or any food for any animal which is in an unwholesome state or unfit for their use.

Part IX of the Act deals with sanitation and housing, and is of most significance for control of polluting discharges. Section 116 of the Act imposes a duty on every local authority to maintain its district in a clean and sanitary condition, to prevent nuisances and prosecute those responsible for nuisances. Nuisances include drains and sewers for the discharge of pollutants into watercourses and lakes.

(b) The Food, Drugs and Chemical Substances Act (Cap 254)

Section 3 of the Food, Drugs and Chemical Substances Act prohibits the sale of food that has in it any poisonous or harmful substance, is unwholesome, or unfit for human consumption. Section 24 of the Act makes it an offence to use or dispose of chemical

[73] Section 13.

substances in a manner likely to cause contamination of food or water for human consumption.

(c) The Use of Poisonous Substances Act (Cap 247)

Under section 3, the Use of Poisonous Substances Act empowers the Minister to make regulations providing for the use of poisonous substances, the employment of persons at premises where poisonous substances are used and the storage, transport, sale and disposal of poisonous substances.

(d) The Plant Protection Act (Cap 324)

Under the Plant Protection Act, the Minister may make rules for preventing and controlling attacks by or the spread of pests or diseases, including the disinfection, treatment, destruction and disposal of any unhealthy plant appearing to be infected with any pest or disease.[74] Section 8 of the Act empowers the Minister to control the importation of any plants, soil, packages and coverings that are likely to spread pests and diseases.

(e) The Seeds and Plants Varieties Act (Cap 326)

Section 3 of the Act empowers the Minister to make regulation, *inter alia*, for preventing the spread of plant disease by the sale of seeds, for requiring the treatment of seeds and to regulate the importation, quality, testing and sale of any material used in such treatment. Section 15 of the Act deals with the control of imports and the prevention of injurious cross pollination and empowers the Minister to prevent the importation into Kenya of

[74] Section 3

seeds which may cause deterioration of domestic types of varieties of plants by cross-pollination, physical mixture or other means.

(f) The Pest Control Products Act (Cap 346)

The Pest Control Products Act provides for the control of the import, export, manufacture, distribution and use of products for the control of pests and of the organic function of plants and animals. The Act imposes licensing requirements on premises, which manufacture, formulate, package, sell or store pest control products.[75] The design, layout and construction of the premises should be such as to avoid contamination of the environment. Additionally, pest control products must be registered. Registration may be refused if the use of the product would lead to unacceptable risk or harm to *inter alia,* public health, plants, animals or the environment.

The Act imposes classification, packaging and labeling requirements, which are designed to prevent, and/ or minimize hazards, to human health and/ or the environment arising from the storage, transport or use of the product. The detailed requirements are set out in the Pest Control Products (Labeling, Advertising and Packaging) Regulations. The regulations require that every person desiring to register a pest control product shall make an application to the Pest Control Products Board. The Board may refuse to register a pest control product if, in its opinion its use would lead to an unacceptable risk or harm to things on or in relation to which the pest control product is intended to be used or public health, plants, animals or the environment.

[75] The Pest Control Products (Licensing of Premises) Regulations.

The regulations also prohibit the sale of any pest control product without a label showing its name, information on the nature and degree of hazard inherent on it, a statement directing the user to read the label, the common name of the active ingredient, the contents of the active ingredient, its registration number, its contents, the name and postal address of the registrant, the directions for use of the pest control product and information on the hazards of handling, storage, display, distribution, and disposal of the product including instructions on procedures to alleviate the hazard, decontamination, and disposal of the product and empty package. The label should also contain information identifying any significant hazard to things on or in relation to which the pest control product is intended to be used; or public health, plants, animals on the environment including instructions on how to alleviate the hazard

The Regulations made under the Act establishes 3 types of classes for the pest control products. The first is the restricted class which represents significant environmental harm. Pest control products used in aquatic and forestry situations are classified as restricted. The second class is the commercial class. This is a class of products that present possible environmental risks within a limited region. The third class is the domestic class. In this class, no special precautions/ equipment are required for inhalation hazard. There are no irreversible effects from repeated exposures and the disposal of containers can be safely done by placing it in the garbage. The package sizes are limited to those that can be safely used and stored by consumers.

(g) The Animal Diseases Act (Cap 364)

Section 8 of the Act empowers the Director of Veterinary Services to prohibit or regulate the importation of all animals capable of spreading infection in animals. As per

Section 9 thereof, the Minister may make rules, which inter alia, prevent the introduction of and the prevention and control of, notifiable diseases, including the licensing of animal producers. Consequently, Rules known as The Animal Disease Rules have been made.

(h) The Water Act, 2002

The laws dealing with the conservation and management of water are scattered across a wide range of statutes but the principal Act is the Water Act, 2002. Under section 2(1) of the Water Act, 2002, "pollution" in relation to water resources means any direct or indirect alteration of the physical, thermal, chemical or biological properties of the water so as to make it less fit for any beneficial purpose for which it is or may reasonably be expected to be used. The alteration may also make it harmful or potentially harmful to the welfare, health or safety of human beings, any aquatic or non-aquatic life or property or the environment.

The Act establishes an Authority known as the Water Resources Authority.[76] One of the functions of the Authority as stipulated under section 8(1) (e) is to regulate and protect water resources' quality from adverse impacts. Under section 76, the Act stipulates that no person shall discharge any trade effluent from any trade premises into the sewers of a licensee without the consent of the licensee. In this section, " trade effluent," means any liquid, whether with or without suspended particles, produced as a by-product in the course of any trade or industry.

[76] Section 7(1)

Under the Act, it is an offence to throw or convey, or cause or permit to be thrown or conveyed, any rubbish, dirt, refuse, effluent, trade waste or other offensive or unwholesome matter or thing into or near to any water resource in such manner as to cause, or likely to cause, pollution of water resource.[77]

Following public participation, the Minister shall formulate, and publish in the Gazette, a national water resources management strategy in accordance with which the water resources of Kenya shall be managed, protected, used, developed, conserved and controlled.[78] The national resource management strategy sets out the principles, objectives, procedures and institutional arrangements for the management, protection, use, development, conservation and control of water resources.[79]

(i) The Environmental Management and Co-ordination Act, 1999

The Environmental Management and Co-ordination Act is the principle Act concerned with the conservation and management of the environment in Kenya. Regarding the conservation of water, the Act establishes a system for controlling industrial discharges into watercourses. Section 74 of the Act states that every owner or operator of a trade or industrial undertaking shall discharge any effluents or other pollutants originating from the trade or industrial undertaking only into existing sewerage system. The relevant local authority operating or supervising such sewerage systems, at a prescribed fee, may issue the necessary licence for the discharge. The proponent or owner of a trade or an industrial

[77] Section 94
[78] Section 11(1)
[79] *Ibid,* (3)

undertaking is required to install an appropriate plant for the treatment of such effluents prior to being granted a licence.

Under section 70 of the Act, a Standards and Enforcement Review Committee is established. One of the functions of the Committee is to recommend to the National Environmental Management Authority water quality standards of all waters of Kenya.[80] It is an offence under the Act, for any person to discharge or apply any poison, toxic, noxious or obstructing matter, radioactive waste, or other pollutants or to permit any person to dump or discharge such matter into the aquatic environment in contravention of water pollution control standards established by the Act.[81]

No local authority operating a sewerage system or owner of any trade or industrial undertaking shall discharge any effluents or other pollutants into the environment without an effluent discharge licence issued by the Authority.[82] Before the issuance of such a licence, the Authority is required to consider, *inter alia,* the possible effects of effluents or pollutants to be discharged on the quality of an affected water course or other source of water and the water requirements of riparian residents and ecosystems, human settlements, and agricultural schemes, which depend on the affected watercourse.

The Act also deals with hazardous wastes. Section 91 of the Act states that the Standards and Enforcement Review Committee shall, in consultation with the relevant lead agencies, recommend to the Authority standard for criteria for the classification of

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[80] Section 71
[81] Section 72
[82] Section 75

hazardous wastes with regard to determining hazardous wastes, corrosive waste, carcinogenic waste, flammable waste, persistent waste, toxic waste, explosive waste, radioactive waste and any other category of waste.

The Minister may, on the advise of the Authority, make regulations for toxic and hazardous waste materials.[83]No person shall discharge any hazardous substance, chemical, oil or mixture containing oil or mixture containing oil into any waters or other segments of the environment. A person convicted of this offence shall pay the costs of the removal of the substance and restore the environment that has been destroyed as a result of the discharge.[84]

The Standards and Enforcement Review Committee, in consultation with the relevant lead agencies is required to recommend to the Authority standards for pesticides and residues in raw agricultural commodities, processed foods and animal feed. Raw agricultural commodities include fresh or frozen fruits and vegetables in their raw state, grains, nuts, eggs, raw milk, meat and other agricultural produce. Raw agricultural commodities do not include any agricultural produce, which is processed, fabricated or manufactured by cooking, dehydrating, milling or by other similar means.[85]

The Act also deals with solid wastes. The Standards and Enforcement Review Committee is obligated to, in consultation with the relevant lead agencies, recommend to the

[83] Section 92
[84] Section 93
[85] Section 94

Authority standards for wastes.[86] The Act prohibits discharge or disposal of any wastes, whether generated by within or outside Kenya, in such a manner as to cause pollution to the environment or ill health to any person.[87] Any person transporting any waste must do it in accordance with a licence to transport waste issued by the Authority and the waste must be transported to a waste disposal site established with a licence issued by the Authority.[88]

(j) The Local Government Act (Cap 265)

The Local Government Act also contains provisions empowering local authorities to control discharges. Under section 163 of the Act, a local authority may control or prohibit activities, both industrial and domestic, which constitute " a source of danger, discomfort or annoyance to the neighbourhood", is an offensive trade or has been gazetted by the Minister. One further way of control is for the local authority to refuse to license the activity on the ground that the treatment method proposed is not adequate.[89] Generally, it is the local authority's duty to establish and maintain sewerage and drainage works within its area. It may charge for this service[90] and the charge is recoverable from the owner of any land or premises served.

(k) The Agriculture Act (Cap 118)

The Agriculture Act empowers the Minister to make rules prohibiting, regulating or controlling agricultural activities, which may lead to the siltation of watercourses. The

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[86] Section 86
[87] Section 87(1)
[88] *ibid,* (2)
[89] Section 165
[90] Section 176(2)

Rules may be made if necessary for the maintenance of water in a body of water.[91] The Agricultural (Basic Land Usage) Rules, which are made under the Act, deal with the carrying on of agricultural activities on slopping land where the risk of soil erosion is significant. There is power to prohibit such activity on such land. Additionally, permission is needed to carry out agricultural activity next to watercourses.

(l) The Fisheries Act (Cap 378)

The Fisheries Act makes it an offence to use explosives, poisonous or noxious substances or electric shock devices to catch fish.[92] The Fisheries (General Regulations) made under the Act declare the Kenya Fishery waters to be a "pollution protection zone". Within these waters, it is prohibited to discharge pollutants, which may, cause harm to fisheries resource, interfere with fishing or become a hazard to irrigation.[93]

(m) The Penal Code (Cap 63)

The Penal Code through section 191 makes it an offence to voluntarily corrupt or foul the water of any public spring or reservoir so as to render it less fit for the purposes for which it is ordinarily used.

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[91] Section 48
[92] Section 15
[93] Part X

3.3. CONCLUSION

This chapter has been an inquiry as to whether indeed there exists laws, both domestic and international, regulating SPS measures. Within the international arena, we have found out that indeed there are various legal instruments that have a bearing on SPS measures and international trade, the major instrument being the SPS Agreement. In regard to domestic laws, it is evident that attempts have been made to put in place measures to protect public health, animal life, plant life and the environment. The major concern, however, is whether these laws are enforced and whether they conform to international standards. These standards laws are revisited in Chapter five where the link between laws and market access of horticultural products is examined.

CHAPTER FOUR

THE EXTERNAL TRADE OF KENYA'S HORTICULTURAL PRODUCTS

4.1 AN OVERVIEW OF KENYA'S AGRICULTURAL SECTOR

4.1.1. INTRODUCTION

Agriculture is the second largest sector in Kenya, the largest being the service sector.[94] The sector plays a critical role in the national economic growth and development. Firstly, agriculture is a source of employment for about 80 percent of the Kenya's population.[95]Secondly, agriculture contributes about 60 percent of the earnings made from total merchandise exports.[96]Indeed, as table 4.1 below portrays, agricultural commodities such as tea, coffee, pyrethrum and horticultural products dominate Kenya's exports.

...e of Commodities	1994	1995	1996	1997	1998	1999	2000	2001
...od and beverages	51.50	51.10	52.90	53.90	57.40	55.9	56.3	49.2
...dustrial supplies	29.40	26.90	26.10	22.40	18.30	17.9	19.1	22.7
Fuel and lubricants	6.50	5.30	6.60	9.00	9.10	8.2	8.6	10.2
...chinery and capital equipment	0.90	1.40	0.90	0.60	0.90	1.3	0.5	0.6
...nsport equipment	1.10	0.50	0.50	0.40	0.60	0.9	0.5	0.4
Consumer goods	13.60	14.80	13.10	13.90	13.70	15.9	15.1	16.8

Table 4.1: Composition of Kenya's Exports in Broad Categories 1994-2001 (percent)

Source: Kenya Economic Surveys (various years)

Thirdly, the sector also provides raw materials to the manufacturing sector and therefore stimulates large indirect growth effects in non-farm incomes and employment.

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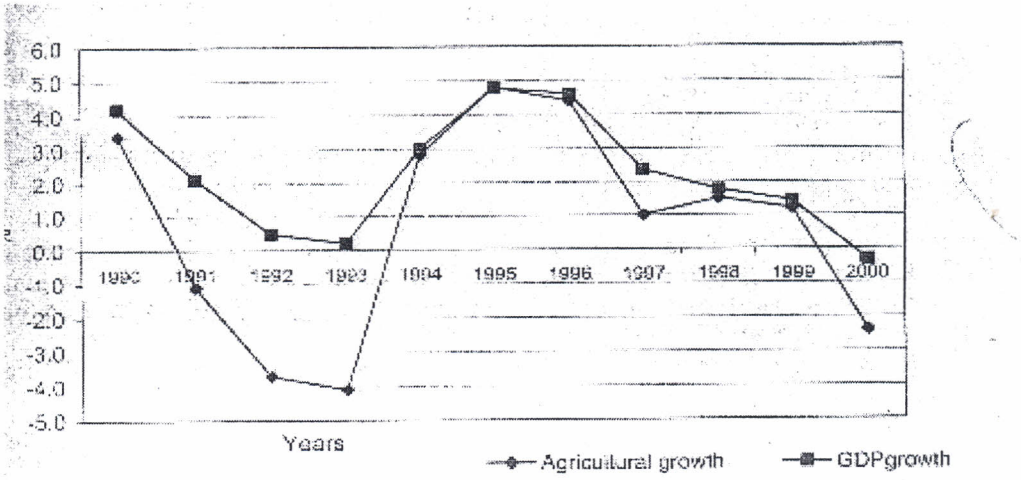
[94] Nyangito. HO, Olielo. T and Magwaro D. " Improving Market Access through Standards Compliance: A Diagnostic and Road Map for Kenya" Reported in Wilson. JS " Standards and Global Trade" *supra* note 21 at P.3.
[95] *Ibid.* at P.3.
[96] *Ibid.*

Furthermore, it is an entry point for the country's industrialisation by providing necessary food and social security and a relatively large market for processed products. Fourthly, agriculture accounts for about 25 percent of Kenya's Gross Domestic Product (GDP).[97] Growth in agriculture and improved rural incomes has a significant and direct impact in reducing overall poverty. However, this sector's contribution to the GDP has progressively declined from 37 percent of the GDP in the early 1970s to 25 percent at the end of 2000 as figure 4.1 below attests.

Figure 4.1: Trends in Agricultural and GDP Growth Rates



4.1.2. KEY AGRICULTURAL PRODUCTS IN KENYA[98]

The agricultural products produced in Kenya fall into two main categories, that is, crops and livestock. Under the crop category, this may further be divided into food crops, commercial crops and horticultural crops. Food crops include such crops as maize, wheat, rice, sorghum, millet, pulses, roots and tubers. Examples of commercial crops are tea,

[97] Republic of Kenya " National Development Plan 2002-2008: Effective Management for Sustainable Economic Growth and Poverty Reduction." Prepared by the Department of Rural Planning, Ministry of Planning and National Development (2002). Printed at the Government Printer, Nairobi.
[98] *Ibid* at P.25-35.

coffee, sugar, pyrethrum, cotton, bixa and oil crops. On their part, horticultural crops consist of fruits, vegetables, herbs, spices and cutflowers.

Regarding the livestock industry, this contributes approximately 10 percent of the GDP. However, the true proportion of this sub-sector is likely to be higher if consideration is taken of unrecorded slaughter and home consumption.[99] This sub-sector may be classified further into various sub-industries such as the dairy industry, the meat industry, beekeeping and other livestock. The meat industry consists of meat from cows, sheep, goat, pigs and poultry while other livestock refers to the keeping of camels, ostriches, guinea fowls, donkeys, buffaloes, crocodiles and snakes.

4.1.3. CHALLENGES FACING THE AGRICULTURAL SECTOR IN KENYA

Kenya's Agricultural full potential has been hampered by a number of factors. These factors are[100]decreasing farm sizes, inadequate use of appropriate technology, adverse weather conditions and poor marketing infrastructure (this has been aggravated further by the mismanagement of marketing boards).[101] Other factors include limited access to credit, high costs of farm inputs including agricultural machinery, poor market information and Early Warning Systems (EWS) and lack of a land use policy resulting in low productivity. In an attempt to address these challenges, the Government has developed the Kenya Rural Development Strategy (KRDS). This strategy aims at providing a common basis for all actors in the sector to steer development for the agricultural sector.[102]

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[99] *Ibid* at P.30.
[100] *Ibid* at P.23.
[101] Nyangito HO "Improving Market Access through Standards" *supra* note 94 at P.3.
[102] Republic of Kenya " National Development Plan 2002-2008" *supra* note 97 at P.23.

4.2 AN ANALYSIS OF THE HORTICULTURAL SUB-SECTOR IN KENYA

4.2.1. DEVELOPMENT OF HORTICULTURE IN KENYA

4.2.1.1 History

Horticultural farming in Kenya may be traced back to the early settlement of immigrant races under the British colonial rule. Both missionaries and the early settlers brought with them some fruits, trees and vegetable seeds for growing in their kitchen gardens.[103] Some of the fruits and vegetables introduced by these missionaries and settlers were cabbages, carrots, beetroots, plums, apples, pears, peaches, strawberries, citrus, avocadoes, potatoes, kales and essential oils.

The Asians who came to Kenya during the building of the Kenya-Uganda Railway 1893-1902 also brought with them the Asian vegetables and fruits such as karela, gourds, mooli, drumsticks and mangoes.[104] During this period, there was no commercial activity as all the products were consumed at family/group level. Indigenous Kenyans, however, did not participate in the introduction or growing of horticultural products. This is because, such crops were not part of their diets and could not be obtained from the European and Asian growers as no trade existed between them.[105]

As these crops were haphazardly introduced by individuals without any governmental control, they led to the introduction of new pests and diseases that continue to decimate the horticultural industry to-date. The earliest attempt to introduce some form of control and harmony in the horticultural sub-sector was immediately after the First World War

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[103] <www.hcda.or.ke /history> (accessed on 10th April 2005)
[104] *Ibid.*
[105] *Ibid.*

(1919-1922) when Kenya was used as a source of food for the armed forces. In order to acquire suitable seeds, the Department of Agriculture was created to handle seed imports and supervise production of the specific crops.[106]

The period 1922 to 1938 saw some limited growth in horticultural crops by the immigrant farmers and with no participation of indigenous Kenyans other than in the form of labour. The Second World War brought these developments to an abrupt halt until 1946 when activities resumed with the formulation of governmental programmes for development of agriculture in the country.[107]

Horticulture was not included in these developmental programmes and remained unrecognised by the government. However, limited activities within the sub-sector continued and survived the 1949- 1953 uprisings and clamour for independence. These activities formed the basis for the post independence growth of the sub sector when it gained recognition under the Swynerton Plan of October 1953.[108] In particular, paragraph 49 of the Plan recognized the importance of establishing sound cooperative marketing organizations and in remote areas, the establishment of processing plants to ensure good quality and to overcome perishability of horticultural products.

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[106] *Ibid.*

[107] *Ibid.* Such programmes included the African Development Plan (ALDEV) (1946-1950).

[108] Swynnerton R.J.M, " Swynnerton Plan of October 1953: A Plan to Intensify the Development of African Agriculture in Kenya". Office of the Member of Agriculture and Natural Resources (1953) Nairobi.

4.2.1.2 Early landmarks of Sub Sector Development [109]

The period 1952- 1966 saw a rapid involvement by both government and the private sector in the horticultural sub sector in various ways, the major ones being:-

(a) Government

Firstly, the government established a horticultural research station in Molo to provide a nursery for seed and seedling for sale to farmers coupled with extension advisory services. Secondly, the passion fruit processing factory was revived. This was relocated from Kitale to Sotik and later to Thika where it is currently located. Thirdly, the Pineapple Development Authority was set up specifically to assist small-scale farmers with technical services and financial loans from the Agricultural Finance Corporation.

(b) Private

Firstly, the Horticultural Cooperative Union (HCU) was established by fruits and vegetable farmers from the Rift Valley region for marketing surplus vegetables and fruits in Nairobi and later exporting to the United Kingdom. Secondly, a potato seed producers' association was formed in Molo for importation and multiplication of seed potatoes. Thirdly, there was introduction and acceptance of a wide variety of new fruits and vegetables by indigenous Kenyans. The demand enticed farmers, both in traditional holdings and settlement in former European highlands, to adopt them in their farming activities.[110]

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[109] Republic of Kenya " National Development Plan 2002-2008" *supra* note 97.
[110] *Ibid.*

As horticultural farming intensified, so did the need to develop effective marketing systems. However, due to other social and economic reforms that competed for attention from the young government, the sub-sector was ignored and left largely in the hands of the private sector. The initiatives taken by the colonial government were not sustained. Consequently, new farmers/settlers were unable to adjust to foreign technologies needed in horticultural farming and marketing. To add insult to injury, the Horticultural Cooperative Union collapsed and the vegetable dehydration project in Naivasha finally closed after revival efforts by the Ministry of Agriculture failed.[111]Consequently, all infrastructures for horticulture ceased to operate. As a result, the smallholders' pineapple programme failed in Thika and other horticultural production schemes fell by the wayside. There was therefore need to develop a new strategy to revamp the horticultural industry.

4.2.1.3 The Revival of the Horticultural Industry

During the first decade of independence, that is, 1963 to 1973, there were minimal efforts to rejuvenate the horticultural industry. This is because, priority was given to commodity crops, cereals and livestock. As a result, horticultural crops were relegated to private sector interventions. The Government however later reversed this trend and introduced various institutional changes.[112] These changes include the creation of the Interim Horticultural Development Council in 1966 (this converted to the Horticultural Crops Development Authority-HCDA in 1967), the establishment of the smallholder pineapple growing scheme at Thika funded by the Agricultural Finance Corporation (AFC), the

[111] *Ibid.*
[112] *Ibid.*

revival of the Horticultural Co-operative Union, the relocation of the horticultural research headquarters to Thika and retention of Molo and Matuga as substations and the substantial investment in potato research and seed storage/production infrastructures.

Formulation of policies for horticultural development was undertaken on several occasions detailing the crops to be grown, identifying major constraints and how to overcome them. An example of such policies is the Sessional Paper No. 1 of 1986- Economic Management for Renewed Growth.[113] According to this paper, some of the measures that were to be undertaken to promote growth of the horticultural industry were the expansion of domestic market potential, the provision of new varieties of vegetables and improvement of the infrastructure such as roads by the government.

The private sector initiatives were boosted by the HCDA following its identification of the export potential of specific fruits and vegetables into British and other European countries and the promotion of those crops by selected farmers. Small export companies were formed with the help of HCDA which assisted in packaging and transport by air of small quantities of produce to the Covent Garden Market Importers and later to other destinations in Germany and France.[114]

The HCDA was legally entrenched under the Agricultural Act, Chapter 318 of the Laws of Kenya in 1967 through a subsidiary legislation to promote and develop production and

[113] Republic of Kenya "Sessional Paper No. 1 of 1986: Economic Management for Renewed Growth (1986), Government Printer, Nairobi. Chapter 5 at P.77-79.
[114]< www.hcda.org> *supra* note 103 at P.5

marketing of horticultural produce.[115]Over the years, HCDA's role in the horticultural industry has narrowed down to regulating and facilitating, to ensure a smooth production and marketing environment and advocating for policies that favour and enhance performance of the sub sector.[116]

4.2.2. KEY HORTICULTURAL CROPS AND MARKETS

4.2.2.1 Horticultural Crops

Horticulture is a compound name for numerous fresh farm product broadly classified as fruits, vegetables and cut flowers. According to the Fresh Produce Exporters Association of Kenya,[117]the most important export fruits are mangoes, avocadoes and passion fruits. Others are melons, bananas, pineapples, cashew nuts, macadamia nuts, lime and apples.[118]

Under the vegetables category, french beans, snow and snap peas, Asian vegetables (such as Karella, chillies, aubergines and okra) dominate the export list.[119]Other vegetables are coriander, ginger, parseley, rosemary, brinjals, curry leaves and bobby beans. The main flowers exported from Kenya include roses, carnations, statice, alstroemreia and a variety of summer flowers. Other flowers exported include lilies, veronica, orchid and tuberose.[120]

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[115] The Horticultural Crops Development Authority Order, 1967, Legal Notice No. 229/1967.
[116] <www.hcda.org> *supra* note 103 at P.5
[117]< www.fpeak.org.ke /Industry info> at P.1 (accessed on 10th April 2005).
[118]< www.hcda.or.ke> *supra* note 103.
[119] <www.fpeak.org.ke> *supra* note 117.
[120] *Ibid.*

4.2.2.2 Key markets of Kenya's horticultural products

4.2.2.2.1 Marketing of Fresh vegetables and Fruits

The marketing of fruits and vegetables in Kenya falls under two categories; domestic marketing and export marketing. Regarding domestic marketing, vegetables such as kales, cabbages, tomatoes and carrots dominate the local market. The domestic consumption for horticultural products has never been accurately quantified or valued. However, it accounts for over 95% of the total production and is therefore a major source of domestic farm incomes and rural employment.[121]

The main export markets for fresh fruits and vegetables are Western Europe and the Middle East. The United Kingdom is the largest export market in Europe with France, Germany, the Netherlands and Belgium being the other significant markets.[122]The marketing system for fresh fruits and vegetables for export is dominated by licensed exporters. There are more than 200 licenced fresh produce exporters in Kenya. However, only 50 are consistently operational while the other 150 exporters exploit favourable short-term market conditions, entering and exiting the industry sporadically during the October-April peak season.[123]

4.2.2.2.2 Flower Marketing

The international market for cut flowers is concentrated in the high-income countries of Northern America, Europe and Asia. Europe is the largest market for Kenyan Flowers.[124]

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[121] <www.hcda.or.ke> *supra* note 103.
[122] Nyangito HO "Improving Market Access Through Standards Compliance" *supra* note 94 at P.36-37.
[123] *Ibid.*
[124] *Ibid*

More specifically, the Netherlands imports the bulk of flowers for sale through the auction system.[125]The Kenya flower trade operates on a counter- seasonal basis to the patterns of production in Western Europe. Kenya's exports are generally highest during the November to May period, with specific peaks in market demand associated with Valentine's Day (February), Easter (March and April), and Christmas (December). Kenya's exports are lowest between June and August because of the availability of low-cost supplies within Europe.[126]

4.2.3. THE ROLE OF THE HORTICULTURAL SUB SECTOR IN THE KENYAN ECONOMY

The horticultural sub sector has in post independent Kenya evolved into a vibrant industry within the larger agricultural sector. It is credited with playing the following roles in the economy:

Firstly, the horticultural industry is an important source of foreign exchange earnings. It is currently the third most important foreign exchange earner after tea and tourism. Small-holder production constitutes 80% of all growers and produces 60% of horticultural exports.[127] As is illustrated in Table 1.2 below, the volume of fresh horticultural exports has been on the increase. It increased by 10.0 percent from 121.1 thousand in 2002 to 133.2 thousand tonnes in 2003. Export earnings increased by 7.9 percent in 2003 to stand at Kshs. 28.8 billion from Kshs. 26.7 billion realized in 2002.

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[125]< www.fpeak.org.ke> (accessed on 10th April 2005).
[126] Nyangito HO " Improving Market Access Through Standards Compliance " *supra* note 94.
[127] Republic of Kenya " National Development Plan 2002-2008 *supra* note 97at P.29.

Cut flowers continued to take the largest share (45.8 percent) of the export volumes, followed by fruits (36.5 percent) and vegetables (17.7 percent) respectively.[128]

Table 4.2: Exports of Fresh Horticultural Produce (2000-2004)*

YEAR	VOLUME '000' TONNES	VALUE KSHS BILLIONS
2000	99.2	13.9
2001	98.9	20.2
2002	121.1	26.7
2003	133.2	28.8
2004**	166.1	32.6

*- Figures are exports by Horticultural Crops Development Authority (HCDA).

**- Provisional figures.

Source: Economic Survey 2005

Secondly, the horticultural industry is an important source of domestic food with exports accounting for only 4 percent of the total production.[129] It is recognized as a viable solution to Kenya's need for cash crop diversification and enhanced food nutrition.

Thirdly, it is a source of employment with the industry employing about 2 million people directly and another estimated 0.5 million indirectly.[130] Horticulture offers high returns for small-scale farmers with limited land resources. It enables the small-scale farmers to

[128] Republic of Kenya, Central Bureau of Statistics, Ministry of Planning and National Statistics " Economic Survey 2004" Printed by the Government Printer, Nairobi, 2004. Page 133.
[129] Nyangito HO "Improving Market Access Through Standards Compliance *supra* note 94 at P.35.
[130] *Ibid.*

utilize their own labour, as production is labour intensive. It also provides raw materials for the agro processing industries.[131]

4.2.4. SPS MEASURES IN THE HORTICULTURAL INDUSTRY

Due to changing global market conditions, players within the international market are required to meet more refined, diverse and sometimes unexpected and personalized customer tastes and societal preferences. These customer demands are represented by a mix of informal rules reflected in industry practices (voluntary standards), as well as formal rules crafted within the context of national regulatory frameworks (technical regulations). For voluntary standards, failure to comply with such standards may lead to their rejection by the consumer, but not necessarily block access to specific export markets. For standards that are mandatory in international or national law (mostly technical regulations), failure to comply prohibits a product or service from being sold in a given market.

Kenya in general has had its fair share of standards imposed by importers of her products. More particularly, the Kenya's horticultural sector has in the recent past had to grapple with stringent sanitary and phytosanitary standards that have been prescribed both by national laws and consumers within the importing countries. As the consumers' demands and national laws that mostly affect the Kenya's horticultural sector are to be found within the European Union we shall confine our discussion on SPS measures in the horticultural standards to those prescribed by the European Union. Consequently, in regard to national laws, resort will be had to the European Union Traceability Rules

[131] <www.hcda.or.ke> (accessed on 10th April 2005).

while as far as consumer demands are concerned, the Euro-Retailer Produce Working Group Good Agricultural Practices (EUREPGAP) will be examined.

4.2.4.1 The General EU Requirements on Traceability

The general principles and requirements for traceability are set out by Regulation 178/2002/EC of January 2002.[132] Though Regulation 178/2002/EC entered into force on 21st February 2002, Article 65 thereof is to the effect that a number of articles, including Article 18 setting out the requirements for traceability, applies only as of 1st January 2005.

Article 3(15) of Regulation 178/2002 defines Traceability as:

"the ability to trace and follow a food, feed, food-producing animal or substance intended to be, or expected to be incorporated into a food or feed, through all stages of producton, processing and distribution."[133]

Article 18 (1) of Regulation 178/2002 provides that the traceability of food, feed, food-producing animal, and any other substance intended to be, or expected to be, incorporated into a food or feed must be established at all stages of production, processing and distribution. Article 18 (2) thereof requires food and feed business operators to be able to identify any person from whom they have been supplied with a food, a feed, a food-producing animal, or any substance intended to be, or expected to be, incorporated into a food or feed.

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[132] Regulation 178/2002/ EC of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, OJ L 31, 1/2/2002 at P.1.

[133] Some WTO Members argue against the definition of traceability provided by the EC. However, since there is no internationally agreed definition for traceability, the EU is entitled to its own definition and conceptual scope.

To achieve this goal, food and feed operators must have in place systems and procedures that allow for this information to be made available to the competent authorities on demand. Food and feed business operators must also have in place systems and procedures to identify the other businesses to which their products have been supplied (forward traceability).

Article 18(4) provides that to facilitate the process of traceability, the food or feed which is placed on the market, or that is likely to be placed on the market in the EU, must be adequately labelled or identified through relevant documentation or information in accordance with the relevant requirements of more specific provisions. Article 18(5) concerns itself with the legislative procedure that is to be followed to adopt the necessary provisions needed to apply the European Union's traceability requirements in respect of specific sectors.

4.2.4.1.1 Justification of the European Union's Traceability Rules

The main reason behind the introduction by the European Union of a system of traceability is food safety. Recent outbreaks of diseases and health threats to consumers and animals have indicated the urgency for the establishment of a system that will allow swift reaction and effective countermeasures to limit the spread of diseases or dangerous food and safeguard consumers' health and confidence.[134]

According to the European Union, the functioning of the internal market can be jeorpadized where it is impossible to trace food or where different traceability systems

[134] O'Connor and Company, " The EC Traceability and Equivalence Rules in light of the SPS Agreement: A Review of the Main Legal Issues", (2003) Commissioned by the Technical Centre for Agricultural and Rural Cooperation (CTA), Wageningen, Netherlands at P. 17.

apply at Member States' level. The European Union considers it necessary to establish a system of traceability within food businesses so that targeted and accurate withdraws can be undertaken or information given to consumers or control officials, thereby avoiding the potential for unnecessary wider disruption in the event of food safety problems.[135]

All European Union food operators, including those importing food from other countries such as Kenya must comply with these requirements. As currently there is no proof that the EU's traceability rules infringe the European Union's commitments within the World Trade Organization, traders must adapt to them if they are to continue selling in the EU market.

4.2.4.1.2 Criticism of the EU"s Traceability Rules

Despite the noble objectives that the traceability rules set to achieve, these rules have not been without some criticisms. Critics of the rules point to the operational disadvantages associated with them. These disadvantages may be summarized as follows:

Firstly, the EU's rules do not deal with the issue of "*mixage*". This is where raw agricultural commodities are mixed shortly after harvest.[136] Mixing is a common feature in trade from developing countries. This is because, individual farms or producers often are not able to make exportable quantities. This necessitates mixing of the products either in markets, warehouse or cooperative societies.

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[135] *Ibid.*
[136] *Ibid* at P.21.

Where a mixage system is in place, it is very difficult to maintain the quality of traceability. The requirements to know the processes to which a raw material has been subjected to can limit the number of potential suppliers to those large enough to have traceability systems in place. In deed, traceability systems favour large scale producers and vertically integrated enterprises.

Secondly, traceability rules calls for the establishment of sound record-keeping systems by the food operators. This has been cited as a constraint by the small scale producers who often cannot guarantee the provision of traceability or the record keeping on the maintenance of standards which goes with it. The requirement of record keeping has been seen as additional costs to most market operators and prohibitive to most developing countries' exporters and producers.[137]

Thirdly, there has been debate as to whether the EU's traceability rules are compatible with the relevant WTO's rules and regulations. To the extent that a traceability system is designed to impose a health or safety standard, the standard (or even the traceability system itself) may be subject to the WTO's Agreement on the Application of Sanitary and Phytosanitary measures (SPS Agreement). The European Union's traceability rules has been criticized as being disproportionate to the aim that is being sought by the EU, that is, ensuring food safety. Indeed, countries such as Australia, Canada and the US have all argued that the EU's proposed system is more trade- restrictive than required to achieve the appropriate level of SPS protection.[138] In particular, these countries challenge the apparent failure by the EU to consider alternative measures that could meet the stated

[137] *Ibid* at P.21
[138] *Ibid* at P.20.

objectives in a less trade-restrictive fashion and through less trade-distortive options than the traceability rules.[139]

4.2.4.2 EUREPGAP

4.2.4.2.1 Meaning of EUREPGAP

EUREPGAP started in 1997 as an initiative of retailers belonging to the Euro-Retailer Produce Working Group (EUREP). It has since then evolved into a partnership of agricultural producers and their retail customers. EUREPGAP's mission is to develop widely accepted standards and procedures for the global certification of Good Agricultural Practices (GAP).[140]Technically speaking, EUREPGAP is a set of normative documents suitable to be accredited to internationally recognized certification criteria such as ISO Guide 65.[141]

4.2.4.2.2 Factors that led to the development of EUREPGAP

Following food safety scares such as mad cow disease, pesticide concerns and the rapid introduction of genetically modified foods, consumers throughout the world became more interested in the methods of producing the food that they ate. They started questioning the safety and sustainability of the food that they consumed.[142] In order to reassure customers, global players in the retail industry came together and developed a commonly recognized and applied reference standard of Good Agricultural Practice that

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[139] It is instructive to note that though traceability rules in the Kenyan context would revolve around products such as beef, fish and fresh horticultural products, the main issues of concern with regard to Australia, Canada and the United States of America is regarding Genetically Modified Organism (GMOs) which are also subject to the EU's Traceability Rules.

[140] <www.eurep.org/ About EUREPGAP> (accessed on 21st April 2005).

[141] *Ibid.*

[142] *Ibid.*

is focused on the consumer. At the core of Good Agricultural Practices are the promotion of food safety, the environment, workers' welfare and the welfare of animals.[143]EUREPGAP members hoped that by adhering to good agricultural practices, there would be reduced risk in agricultural production.

EUREPGAP promotes the incorporation of Integrated Pest Management (IPM)[144] practices within the framework of commercial production. The adoption of IPM is regarded by EUREPGAP members as essential for the long-term improvement and sustainability of agricultural production.[145]More particularly, EUREPGAP requires farmers to demonstrate their commitment to maintaining consumer confidence in food quality and safety, minimizing detrimental impact on the environment whilst conserving nature and wildlife, reducing the use of crop protection products, improving the efficiency of natural resource use and ensuring a responsible attitude towards worker health and safety.[146]

4.2.4.2.3 Distinction between the EU's Traceability Rules and EUREPGAP

Though both the EU's traceability rules and EUREPGAP are concerned with similar objectives such as promotion of food safety, the two are different market requirements. Firstly, EUREPGAP is a private standard code of good agricultural practices devised by some major EU supermarkets to ensure quality and safety of the produce on their

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[143] *Ibid.*
[144] IPM is discussed later in the Chapter.
[145] EUREPGAP, "Control Points and Compliance Criteria: Fruits and Vegetables-Version" 2.0-Jan 04, Cologne, Germany at P.3.
[146] *Ibid.*

shelves.[147] Secondly, not all retailers in Europe subscribe to EUREPGAP. It is only widely used in the United Kingdom and the Netherlands.[148] Thirdly, EUREPGAP, being an ongoing quality assurance requirement by retailers, has no deadline. Fourthly, EUREPGAP has no legal backing. However, though non-compliance with EUREPGAP will not lead to rejection of the goods at the EU borders, exporters could face difficulties getting their products into the supermarket shelves.

On the other hand, the European Union's Traceability Rules are part of the Union's laws. They are mandatory and must be complied with by all members of the European Union. Furthermore, they have a deadline in the sense that they were to enter into force on 1st January 2005.[149]

4.2.4.2.4 EUREPGAP and Market Access for Kenya's Horticultural Products

EUREPGAP being a market-based requirement has tremendous implications for Kenya's horticultural sector; Firstly, as discussed in the preceding pages, EUREPGAP is not a mandatory requirement for exporters. However, given that Kenya's horticultural exporters mainly export their goods to countries where EUREPGAP has been implemented, such as the United Kingdom and Netherlands, by failing to comply with EUREPGAP requirements, they run the risk of having their goods rejected by the major retailers.

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[147] Sunday Nation, 12th December 2004 at P.22. Reporting deliberations of a media seminar on horticulture and EU markets organized by the Business Services Market Development Project.
[148] These are key markets for Kenya's horticultural products making EUREPGAP almost compulsory to Kenya's horticultural exporters.
[149] Sunday Nation, 12th December 2004 at P.23.

Secondly, EUREPGAP as opposed to European Union's Traceability Rules is not a national legislation, but requirements imposed by retailers. The implication for this is that though most of the requirements may be interpreted to be SPS measures, especially requirements dealing with promotion of food safety and conservation of the environment, the affected exporters have no recourse to the WTO's SPS Agreement or its dispute settlement mechanism. This is because, the WTO's SPS Agreement main objective is to ensure that Member countries do not impose unjustified SPS measures to goods from other countries. While provisions on EU's Traceability Rules may be queried at the WTO level as restrictive trade barriers, exporters cannot take independent retailers before the WTO as they are not representatives of any government. They therefore have no choice but to comply with the retailers' requirements.

Thirdly, EUREPGAP is a sign of changing consumer tastes and needs. As lifestyles change, consumers, more so those in developed countries are no longer concerned with access of basic needs such as food, but rather the quality of that food. Consumers are also concerned with the processes within which that food has been produced. In this context, they would like to know whether such food has been produced in an environmentally sustainable manner and whether there was respect for workers' health and safety. Given that producers produce goods to be consumed, they have no choice but to listen to the demands of their consumers.

Given the above consideration, it is evident that Kenya's agricultural sector in general and the horticultural sub-sector in particular have no choice but to abide by the EUREPGAP requirements if they are to continue accessing the external markets they have enjoyed over the years.

4.2.4.2.5 EUREPGAP and the Compliance Constraints for Kenya's Horticultural Sector

Having concluded that Kenya's horticultural sector has no alternative but to comply with EUREPGAP and to a certain extent, European Union's Traceability Rules,[150] it is imperative that we highlight some of the challenges encountered by both the Kenyan Government and producers in their bid to comply with these requirements.

The EUREPGAP Control Points and Compliance Criteria (CPCC)[151] lists down numerous requirements that the farmer must comply with. These requirements include the implementation of documented traceability systems, record-keeping and internal self inspection, effective crop-husbandry such as high seed quality, use of pest and disease resistance varieties and compliance with the applicable national legislation on Genetically Modified Organisms (GMOs). Other requirements are risk assessment for new agricultural sites, soil management such as techniques to maintain the soil structure and prevent soil erosion, determination of optimum quantity and type of fertilizer, use of the most efficient irrigation system, treatment of sewage water that is to be used for irrigation and the use of a recognised Integrated Pest Management (IPM) techniques. The CPCC also demand performance of hygiene risk analysis on the harvest and the produce

[150] Though the EU insists that the Traceability Rules have no extra-territorial effect, eventually the Kenya exporter has to abide by these rules since the retailers have to, as it were, 'trace' the foods in their shelves back to the farm. The farms in this case, being in Kenya, have to put in place such systems as sound record keeping systems. Furthermore, traceability is both an EU requirement and also a component of EUREPGAP. In this context, compliance with EUREPGAP implies compliance with EU's Traceability Rules.

[151] EUREPGAP, "Control Points and Compliance Criteria: Fruits and Vegetables-Version" 2.0-Jan 04, Cologne, Germany at P.6-22

handling process, implementation of a waste management plan, promotion of a safe and healthy working conditions and the establishment of a conservation management plan.

It is clear that the requirements enumerated above are desirable means to attaining high quality produce that would be in demand both internally and in Kenya's export market. However, it has not been all smooth sailing for farmers desirous of complying with these requirements. Such farmers are faced with constraints that must be dealt with if they are to become fully EUREPGAP compliant. These constraints include the following:

(a) The cost of compliance

Compliance costs need to be examined from various perspectives;

Firstly, farmers must be certified by EUREPGAP accredited bodies. Certification denotes a process whereby production or processing systems are independently verified to prove that a supplier has complied with the requirements of the standard in question.[152] For a long time in Kenya, certification was only done by two accredited institutions. These are Bureau Veritas and SGS International. These institutions are foreign owned. It is only in December 2004 that a local company, Africert, was EUREPGAP accredited.[153] However, despite the addition of Africert, the certifying institutions are still few and given that sometimes they have to bring in experts from abroad, they end up charging very high certification fees to the farmers.

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[152] Daily Nation, Thursday 13th January 2005. The definition was part of the information released by Africert in their Supplement upon being internationally accredited to certify horticultural products for exports.

[153] Africert is an initiative of German Technical Cooperation (GTZ) under the management of the International Centre of Insect Physiology and Ecology (ICIPE). It was formally registered in Kenya as a limited company in 2003. In June 2004, it acquired official approval from FoodPlus, the owners of the EUREPGAP standard. It was only in December 2004 that the company was mandated to offer internationally accepted certificates to the EUREPGAP standards for fruits and vegetables.

Secondly, the problem of high certification fees is compounded by the fact that none of the public institutions, such as The Kenya Bureau of Standards (KEBS) and the Kenya Plant Health Inspectorate Services (KEPHIS) have so far had their laboratories accredited. These are the institutions that farmers look upon to provide cost-effective certification services. Attempts by KEPHIS to be accredited have so far not been successful.[154] Without low-cost certification services from the public institutions, the Kenyan farmers will continue suffering at the hands of commercially driven private institutions.

Thirdly a feature of these accrediting bodies is that their laboratories are mainly located in Nairobi. As most of the farmers are found in rural Kenya, they have to incur travelling expenses since they have to travel all the way to Nairobi to have their products, water or soil certified. These travelling costs add on to their compliance costs.

The collaboration between the Ministry of Agriculture, Horticultural Crops Development and JICA has prepared a manual[155] that acts as a guideline to inform farmers of possible costs that they will incur in their bid to be EUREPGAP certified. These costs may be summarized as follows:

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[154] Information obtained from officials of the joint collaboration between the Ministry of Agriculture, Horticultural Crops Development Authority (HCDA) and Japan International Cooperation Agency (JICA) on various dates in January and February 2005. The collaboration has its offices at HCDA Headquarters, Embakasi, Nairobi.

[155] The Ministry of Agriculture, Horticultural Crops Development Authority in Conjuction with JICA, "Cost of EUREPGAP Certification and Laboratory Tests for Fresh Horticultural Produce". October 2004. Published by the Ministry of Agriculture and Horticultural Crops Development Authority in conjunction with JICA.

Table 4.3: The Cost of EUREPGAP Certification

ITEM	Cost of certification per institution		
	Bureau Veritas	SGS	Africert
CERTIFICATION COSTS			
(a) Registration fee (payable to EUREPGAP)	US$700**		*
(b) Audit fee per man-day	US$400*		Ksh. 28, 000
(c.) Mileage (Ksh/km)	24.50		45.00
(d) Audit report	-		US$150
(e) Subsistence allowance per man-day (Ksh.)	2000		1500

Source: The Ministry of Agriculture, Horticultural Crops Development Authority in conjunction with JICA.

Note

- Certification costs for SGS were not available but may be obtained from their offices;
- The certification fees outlined above refer to only one certificate; and
- All charges are exclusive of the government taxes.

In addition to the certification costs enumerated above, there are other compliance costs that must be met by the farmers. These include costs for water potability analysis and costs for testing water suitability analysis.[156] Regarding water potability analysis, the costs for laboratory analysis per institution are Kshs 18,900, Kshs 9,193 and Kshs. 9,100

[156] EUREPGAP protocol requires that water used for final product washing be potable, that is, suitable for domestic use. The emphasis on irrigation water as far as EUREPGAP is concerned is to ensure that the water is not contaminated with human waste.

for Bureau Veritas, Kenya Bureau of Standards (KEBS) and Nairobi Water Company respectively. Costs for testing water suitability for irrigation are as follows:[157]

Table 4.4: Costs for testing water suitability

Institution	Cost (Kshs)
Bureau Veritas	14,700
KEBS	5,900
Nairobi Water Company	7,500
KEPHIS	4850
KARI	4,200

Source: Ministry of Agriculture, HCDA in Conjuction with JICA.

In addition to the above costs, the farmers must invest in highly trained experts (usually agronomists) who must advise and inspect on the level of use of pesticides, grading and pre-cooling facilities at the production sites, refrigerated transportation, and cold storage at the port of export.[158]According to Nyangito, one such expert may be paid up to US$6,000 per month.[159]

When all the costs are summed up, the initial capital investment costs for facilities required to achieve international standards for export of fruits and vegetables from the farm to the airport are estimated at about US$1.2 million for a daily capacity of 10 tonnes. The operation costs per month for a 10 tonne daily capacity to ensure that the

[157] The Ministry of Agriculture *supra* note 155 at P. 2-5.
[158] Nyangito HO, " Improving Market Access Through Standards" *supra* note 94 at P.39
[159] *Ibid* at P.44

product meets the required standards are estimated at about US$ 25,600. (For flowers the costs are much higher-US$38,000 for operating costs and US$1.2 million investment costs for a daily capacity of only 5 tonnes).[160] As a result of the high costs, small farmers are not able to do it alone and are forced to rely on contracts with large growers or exporters.

(b) Non-Financial Constraints

Apart from the huge financial outlay that a farmer must incur, there are other challenges that besiege farmers in their bid to be EUREPGAP compliant. More often than not, these challenges confound all farmers irrespective of the nature of the agricultural products. Unfortunately, no single one of the farmers can resolve such challenges and it falls on the government to institute corrective measures for the sake of the entire agricultural sector. Such constraints are;

Firstly, EUREPGAP requires that water used for washing the final product be potable, that is, suitable for domestic use. Such water should contain neither microbial nor chemicals. Regarding chemicals, there are allowable maximum residue levels (MRL) for each chemical that should be found in the final product. Unfortunately for the Kenyan farmers, industries dispose a lot of heavy metal such as lead in rivers. Downstream, such rivers are used by farmers for irrigation. Eventually, these heavy metals find their way into the irrigated crops which when sampled and analysed show a residual level that is

[160] *Ibid* at P.39 and 44

higher than the one recommended. This leads to unnecessary rejection of agricultural products by buyers in the international market.[161]

Secondly, EUREPGAP emphasizes that water used for irrigation should not be contaminated with human waste. Consequently water used for irrigation must be analysed to ensure that there is no presence of Ecoli- Bacterium. (Presence of Ecoli Bacterium in the water indicates use of sewage water for irrigation).[162] This is another challenge to Kenyan farmers as sewage system is not leakproof. This water eventually finds its way into rivers and is often used downstream for irrigation. As with the case with metals, farm products found to contain the Ecoli Bacterium will be rejected leading to losses to the concerned farmers.

Both the heavy metal and human waste problems are a result of laxity in enforcing the laws dealing with upstream water. These are problems that can only be solved through concerted efforts by various governmental departments such as the ministries of public health, agriculture and environment.

Thirdly, EUREPGAP discourages the use of chemicals as the sole means of controlling pests for agricultural products. Instead use of the Integrated Pest Management (IPM) system is encouraged. This denotes use of the following methods for pest control:[163]

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[161] Information obtained from an interview with the officials of the Ministry of Agriculture, Horticultural Crops and Development Authority and JICA *supra* note 154.
[162] *Ibid.*
[163] *Ibid.*

i. Cultural methods- these are pest control methods that have evolved over the years and passed on from one generation to the next. They include specific crop spacing, inter-cropping and mono-cropping.

ii. Biological methods- these include use of crop varieties that are pest resistant. Another biological method is use of one organism to control another (antagonism).

iii. Physical methods- this refers to methods of treating both the seeds and the soil to make them pest resistant. Such methods include heat treatment of seeds such as warming cabbage seeds. They also include use of floods to control pests known as nematodes.

iv. Use of chemicals

Integrated pest management refers to combination of all the four methods to control a specific pest (that is, integrated control). The rationale for this is that use of chemicals alone degrades the environment. Integrated pest management is therefore seen as an environmental friendly way of controlling pests. Furthermore use of IPM leads to less metal in the final crop and therefore crops are able to pass the MRL tests. It also leads to the production of safer food crops.

In developed countries, each pest has its own IPM to control it. However, in Kenya, as in many other developing countries, we have not yet been able to develop IPMs for all the pests. IPMs in Kenya are developed by the International Centre for Insect Physiology and Ecology (ICIPE). So far, ICIPE has developed IPMs for tomatoes, Okra, brasicus and

french beans. Development of IPMs takes time, is expensive and can only be done by trained personnel. Consequently, this is a challenge to Kenyan farmers in that they are not able to comply with this EUREPGAP requirement for reasons that are beyond their control. Again, this is a challenge that can only be resolved by the government, perhaps with collaboration with various international organizations such as ICIPE and other donors.

4.3 CONCLUSION

This chapter commenced with an analysis of the place of agriculture in the Kenyan economy. Given that agriculture encompasses many types of products, the analysis was narrowed down to the horticultural sub-sector. The sector was critically analysed, tracing its development in Kenya and its role within the Kenyan economy.

Challenges that beset the sub-sector were examined. Again, there are various challenges facing the horticultural sector. In this context, this chapter restricted itself to those challenges that arise from imposition of SPS measures especially by the international market. These SPS measures were examined. Finally, the challenges that the farmers are facing in their bid to comply with the SPS measures were analysed in great detail. Having identified these challenges, we shall in the next chapter conduct an inquiry as to the link between standards law and the external trade of horticultural products.

CHAPTER FIVE

AN ANALYSIS OF THE LINK BETWEEN LAWS AND MARKET ACCESS OF HORTICULTURAL PRODUCTS IN KENYA

5.1 INTRODUCTION

In the preceding chapters, we have reviewed the laws, both national and international, that have been enacted with the aim of safeguarding human health, animal health, plant life and the environment in general. We have also discussed Kenya's agricultural sector which we narrowed down to a critical review of the horticultural sub-sector. It is during this review that we outlined the various standards that have been set by the external markets and the challenges that the Kenyan producers face in their bid to comply with these standards.

This analysis of both the standards law and the horticultural sector then begs the question: *Is there a link between regulations on standards and the external marketing of horticultural products? As lawyers,* for this thesis to claim its place among purposeful writings, it must seek to explore and answer this question. If the answer is in the negative, then nothing more need be said and the matter ought to rest there. However, if the answer is in the affirmative, then this link need to investigated with the sole aim of establishing that it is used to achieve positive ends.

5.2 THE ROLE OF STANDARDS LAWS IN MARKET ACCESS OF HORTICULTURAL PRODUCTS

The laws relating to standards have a critical role to play in ensuring that products are of the desired quality and that they are produced in an environmentally sustainable manner. Ideally, such laws ought to firstly; ensure that agricultural inputs are safe to use. Secondly, the laws should create control mechanisms that ensure the quality of inputs and products. Thirdly, the laws ensure that food consumed is produced and handled in a hygienic manner. Fourthly the laws ensure that the standards are available while finally, the laws protect consumers from health hazards.[164]

With regard to the standards imposed on horticultural producers by the external markets, specifically through the European Traceability Rules and EUREPGAP it becomes obvious that what these importers are demanding is exactly what ideal standards law ought to ensure. For example, EUREPGAP insists on high seed quality, soil conservation, evaluation of water quality, prevention of environmental pollution and use of only recommended methods of pest control.

Since the introduction of EUREPGAP control points to Kenyan farmers, there has been a lot of hue and cry with complaints being raised from all quarters, be it the government and from the farmers themselves. Those complaining have tended to look at the stringent

[164] Nyangito. HO, Olielo. T and Magwaro D. " Improving Market Access through Standards Compliance: A Diagnostic and Road Map for Kenya" Reported in Wilson. JS " Standards and Global Trade" *supra* note 21 at P.21.

requirements as barriers to trade whose effect was to lock out horticultural products from the external market.[165] This line of thinking, it is humbly submitted, is defeatist since it assumes that the standards imposed are merely burdensome and ought to be done away with.

Ironically, as our laws have portrayed, EUREPGAP does not introduce a novel way of handling farm produce. Rather, the law of Kenya has always imposed certain standards that must be observed when handling food or agricultural products. For example, as we have already established, the Public Health Act is very clear on the manner of preventing diseases and food contamination. Similarly, The Environmental Management and Coordination Act (EMCA), though fairly new, was enacted way before EUREPGAP imposed the condition of conservation of the environment.

Given the existence of all these laws touching on the safety of human beings, animals, plant life and the environment, various questions beg to be answered; For example, could it be that the originators of EUREPGAP have identified shortcomings in our laws that make them wary of relying on them? If this is so, what are these shortcomings and how can they be addressed? On the part of the exporters and the government, if we maintain that our laws actually provide for most of the conditions imposed by EUREPGAP, then what could have gone wrong? At what point did we become standard-takers, rather than standard developers? Or is the problem one of standards enforcement rather than standard development? The answers for these questions can only be discerned after a review of the shortcomings of the law as an agent of market access.

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[165] These sentiments were frequently aired in the media especially towards the end of year 2004 when the European Union's Traceability Rules were anticipated to enter into force on January 2005.

5.3 CONSTRAINTS IN STANDARDS LEGISLATION THAT IMPEDE MARKET ACCESS OF HORTICULTURAL PRODUCTS

Though as we have already stated Kenya has its fair share of standards law, various factors have led to these laws not being as effective as they ought to be especially in regard to enhancement of external market access of horticultural products. These factors include the following:

(a) Numerous statutes regulating agricultural products

Currently, the agricultural sector as a whole is burdened with numerous statutes each dealing with a specific issue. These statutes range from the Agricultural Act (Cap 318), The Agricultural Produce (Exports) Act (Cap 319), The Plant Protection Act (Cap 324), The Pest Control Products Act, (Cap 346). There are also specific statutes dealing with specific marketing organizations. Added to these numerous agricultural statutes are various statutes that are general in nature but nevertheless affect the agricultural sector. These include the Environmental Management and Coordination Act, 1999, the Water Act, 2002, the Standards Act Cap 496 and the Local Government Act (Cap 265). The result is that it becomes very difficult for the farmers to comply with all the law. Consequently, there is need to consolidate all the laws dealing with agricultural products so that at any one time, players in the agricultural sector know where to find the law under which they operate.

(b) Numerous coordinating institutions

The numerous statutes create different agencies to coordinate the formulation and implementation of standards. For example the Kenya Plant Health Inspectorate Services

(KEPHIS) is a government Parastatal under the Ministry of Agriculture and Rural Development. It derives its powers from the Plant Protection Act (Cap 324), the Agricultural Produce (Exports) Act (Cap 319), the Seed and Plant Variety Act (Cap 326) and the Pest Control Products Act (Cap 346). Similarly, the Standards Act (Cap) 496 creates the Kenya Bureau of Standards (KEBS). Other institutions dealing with the formulation of standards are the National Environment Management Authority (NEMA) which is established by the Environmental Management and Coordination Act of 1999.

Another feature of standards development and implementation is that this is again scattered over various government ministries such as the Ministry of Agriculture, the Ministry of Health, the Ministry of Trade and Industry and the Ministry of Environment. Thus a feature of the implementation of standards in Kenya is the fragmentation of responsibilities. This fragmentation leads to overlaps and inefficiencies in implementation of the functions of the different bodies. For example, KEBS and the Port Health officials duplicate each other in the inspection of foods for quality.[166] There is therefore need for better co-ordination to avoid overlaps that affect the enforcement of the standards in the country.

(c) Institutional constraints

Institutions dealing with standards development and implementation face various challenges. Firstly, KEBS, KEPHIS and DVS represent Kenya in technical committees of

[166] Nyangito. HO, Olielo. T and Magwaro D. " Improving Market Access through Standards Compliance: A Diagnostic and Road Map for Kenya" Reported in Wilson. JS " Standards and Global Trade" *supra* note 21 at P.20

international standard setting organizations such as CAC, ISO, IPPC and OIE. These institutions ought to participate in all the technical committees. However, financial constraints limit them to a few select meetings each year.[167] Failure to participate in the international meetings inhibits institutional development and capacity building. It also inhibits sensitizing and educating the private sector on standards implementation and conformity assessment schemes such as quality schemes that guarantee acceptance of international standards.

Secondly, the paucity of expertise, resources and technical capacity constrains the ability of these institutions to play a significant role in the implementation of laws and regulations. For example, the SPS Agreement requires WTO Members to base their standards measures on a risk assessment appropriate to the circumstances. Kenya's ability to carry out such a risk analysis, which requires substantial empirical data and considerable professional expertise, is constrained.[168] This is an aspect that needs to be strengthened.

Thirdly, as has already been highlighted in the previous chapter, EUREPGAP requires farmers to be certified by bodies accredited to EUREPGAP. For a long time, accredited bodies were foreign companies. It is not until December 2004 that the first Kenyan firm, Africert, was accredited. However, Africert is a private company. Currently, certification costs charged by these bodies are high and a big expense to the farmers. The government laboratories at KEBS and KEPHIS have so far not been accredited to EUREPGAP. This

[167] *Ibid.*
[168] *Ibid.*

is due to limited laboratory capacities. There is therefore need for the government to adequately fund these laboratories so that they can be able to certify farmers and thereby reduce the cost of such certification.

(d) Non Development of Standards

In certain instances, the enabling statutes provide for the development of standards. However, such standards have so far not been developed. For example, Section 70 of EMCA provides for the establishment of a Standards and Enforcement Review Committee. One of the functions of the Committee is to recommend to the National Environmental Management Authority minimum water quality standards of all waters of Kenya and for different uses such as drinking water, water for industrial purposes, agricultural purposes, recreational purposes, for fisheries and wildlife.[169] As of now, no such standards have been developed. As a result, when it comes to the use of water for agricultural purposes, Kenyan farmers do not have local guidelines that can be used as benchmarks. Had such standards been developed and strictly enforced, farmers would have been well equipped to comply with EUREPGAP requirements on water potability.

(e) Non enforcement of Standards and laws

Even where the laws and standards have been developed, there is lethargy when it comes to enforcement of the standards. For example, Section 94 of the Water Act, 2002, makes it an offence to throw any rubbish, dirt, refuse, effluent, trade waste or other offensive or unwholesome matter into any water resource so as to cause pollution of water resource. Similarly, the Penal Code (Cap 63) through section 191 makes it an offence to voluntarily

[169] Section 71

corrupt or foul the water of any public spring or reservoir so as to render it less fit for the purposes for which it is ordinarily used. On its part, EMCA, vide Section 72 makes it an offence for any person to discharge or apply any poison, toxic, noxious or obstructing matter, radioactive waste, or other pollutants into the aquatic environment.

Given such legal provisions, one would think that Kenyan waters would be free from any pollutants, The reality, however, is quite different. Most of the rivers are polluted with both chemicals from factories, sewage water and all manner of rubbish (one only needs to visit Nairobi River to understand the gravity of the matter). Given this kind of scenario, it is no wonder then that EUREPGAP insists on testing of water to determine the presence of chemicals and microbiological contaminants.[170] In addition to this being a cost on the farmers, it also presents a burden to farmers in the sense that if the source of the water has been polluted upstream, testing of such water will reveal the presence of chemical and microbiological contaminants. The effect is the reduction of water sources for the farmer who has to comply with EUREPGAP. The alternative is for such farmer to invest in expensive water treatment equipment, no doubt an expensive undertaking even for the large-scale farmers. For the small-scale farmers, they may not be able to afford such treatment equipment hence they end up being locked out of the export market. Enforcement of pollution law would therefore go along way in alleviating the suffering of such farmers.

[170] EUREPGAP, "Control Points and Compliance Criteria: Fruits and Vegetables-Version" 2.0-Jan 04, Cologne, Germany at P.3

(f) Intra-regional Trade

Enforcement of standards within the country is also made difficult due to porous borders that support a significant volume of informal exchange of goods. While most firms seem to be indifferent about the extent of uncontrolled informal trade, this trend, if left unchecked, reduces the effectiveness of standards monitoring and traceability mechanisms (including quarantine and pest monitoring programs, surveillance and monitoring of data or disease spread). Accordingly, this increases the risk of the spread of product defects or diseases that can undermine industry reputation across countries.[171]

5.4 INTERVENTIONS TO ADDRESS THE CHALLENGES BROUGHT ABOUT BY IMPOSITION OF SPS MEASURES

Given the challenges that farmers face in their bid to comply with SPS measures, both within the horticultural sub-sector and the wider agricultural sector, stakeholders in the sector have adopted various intervention measures. These measures may be examined from the context of the government, the industry and regional intervention measures.

(a) Government

The Kenyan Government has acknowledged that indeed, the SPS measures is a matter of national concern which if left unresolved would lead to export bans. Such export bans would have disastrous consequences especially for small-scale farmers. It is for this reason that the government has combined various approaches in its bid to speed up compliance. These approaches are:

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[171] Wilson. JS " Standards and Global Trade" *supra* note 21 at P.xi

i. Policy, legal and institutional reforms

Firstly, the Government, through the Horticultural Crops Development Authority (HCDA) has developed a horticultural policy that is geared towards accelerating the rate of horticultural growth and production.[172]Among the broad objectives of the horticultural policy is facilitation of increased production of high quality horticultural produce in order to, *inter alia*, meet the increasing demand for top quality produce in the export market. One of the strategies of achieving the broad objectives is the enhancement of monitoring and protection of water supply against pollution and preservation of water catchment areas.[173]

Secondly, the government is also alive to the fact that the agricultural sector is burdened with numerous statutes which more often than not, confuse the farmer and thereby reduce compliance. To this end, the Government plans to consolidate, by the end of the year 2006, the over 60 statutes governing the agricultural sector into a single legislation. This plan is contained in the Kenya Economic Recovery Strategy for Wealth Creation.[174]It is hoped that such a single legislation will ensure safety and health, promote self-governance and encourage efficiency and competition.

Thirdly, there have been plans to enact a Horticultural Act to provide for the development, promotion and coordination of the industry and to legally entrench the HCDA. Consequently the Horticultural Bill, 2001 has been prepared. Among the

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[172] <www.hcda.or.ke/ Horticultural Policy> (accessed on 27th May 2005).
[173] *Ibid.*
[174] The Government of Kenya " Kenya Economic Recovery Strategy for Wealth and Employment Creation 2003-2007" (2003) Nairobi at P.30.

planned functions of the HCDA within the Bill is the collaboration with other players in the horticultural industry in issues such as Maximum Residue Level, the European Union Legislation and Sanitary and Phytosanitary requirements.[175]However, four years later, this Bill remains a draft that has not even been discussed in Parliament for discussion. Furthermore, given the Government's plan to consolidate all the agriculture-related statutes, it remains to be seen whether this draft will ever translate into an Act or it will be discarded with some of its provisions being incorporated into the proposed single legislation.

Fourthly, EUREPGAP Control Points and Compliance Criteria has provisions on Genetically Modified Organisms (GMO). EUREPGAP requires that if GMO products are used, there must be documentation of any planting, use or production of products derived from genetically modified organisms.[176]Similarly, the Cartagena Protocol on Biosafety to the Convention of Biological Diversity has laid down the procedure to be followed for living modified organisms intended for direct use as food or feed, or for processing.[177]Kenya, being a signatory of the Cartagena Protocol, and also in its bid to comply with EUREPGAP has prepared the Kenya Biosafety Bill, 2003 with the objective of regulating biotechnology and biosafety matters.

In general, the Bill does not in its present form represent an adequate robust and comprehensive biosafety regime designed to protect the environment, human health and

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[175] Section 12 of the Horticultural Bill, 2001. <www.hcda.or.ke> (website visited on 27th May 2005).
[176] EUREPGAP, "Control Points and Compliance Criteria: Fruits and Vegetables-Version" 2.0-Jan 04, Cologne, Germany at P.7
[177] Secretariat of the Convention on Biological Diversity (2000). Cartagena Protocol on Biosafety to the Convention on Biological Diversity: text and annexes. Montreal. Article 11.

biodiversity from the risks posed by GMOS. Rather, the underlying imperative of the Bill is the promotion of genetic engineering and not biodiversity. Further, the Bill omits critically important provisions of the Biosafety Protocol that form the cornerstone of biosafety regulations. These include the Precautionary Principle (Article 10(6) and 11(8) of the Protocol) and Public Participation (Article 23 of the Protocol). The Bill also does not deal with traceability and labelling and liability and redress. In this respect, the Bill needs to be amended to ensure compliance with the Biosafety Protocol. Compliance with the Biosafety protocol will also herald significant progress in complying with EUREPGAP's GMO requirements and therefore lead to enhanced market access of Kenya's agricultural products.

ii. Introduction of Training Programs

The Government has also responded to the requirements of EUREPGAP by establishing a training program. This training program is a joint collaboration between the Ministry of Agriculture (MOA), Horticultural Crops Development Authority (HCDA) and Japan International Cooperation Agency (JICA). The training program has set aside a training team made up of officials of the three organizations which is housed at Embakasi, Nairobi, within the Headquarters of the Horticultural Crops Development Authority. The mandate of the training team is the implementation of EUREPGAP requirements. More particularly, the team is charged with the responsibility of interpreting the EUREPGAP Control Points and Compliance Criteria and also to assist farmers in their bid to comply with EUREPGAP.[178]

[178] Information obtained from officials of the joint collaboration between the Ministry of Agriculture, Horticultural Crops Development Authority (HCDA) and Japan International Cooperation Agency (JICA) on various dates in January and February 2005 at their offices at HCDA Headquarters, Embakasi, Nairobi

In its efforts to disseminate information to the farmers, the team has organized seminars for farmers. It has also developed various manuals. These include a community empowerment manual on farmer organization and good agricultural practices.[179]The team has also developed a manual to act as a guideline that will inform farmers of estimated costs of EUREPGAP certification and laboratory tests.[180]One positive aspect of the training team is that it targets small-scale farmers who may not have the ability to interpret EUREPGAP requirements on their own.

(b) Private Sector initiatives in EUREPGAP Compliance

Private sector in this respect denotes producers' associations. Generally, codes of practice are the instruments private business use to achieve standards. These industry specific codes are derived from international standards or requirements of export markets for these products. Such codes include the Fresh Produce Association of Kenya's (FPEAK) Code of Practice. The two main associations whose members have to comply with EUREPGAP requirements are the FPEAK and the Kenya Flower Council (KFC). These associations have developed various strategies in their bid to comply with EUREPGAP requirements. For example, the FPEAK launched its Code of Practice in 1996 as a certification measure for producers and exporters to achieve. This has since changed to the Kenya Good Agricultural Practice (Kenya-GAP).[181]Kenya-GAP covers fruits, vegetables and flowers for export.

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[179] MOA, HCDA in conjunction with JICA " Community Empowerment Manual on Farmer Organization and Good Agricultural Practices" (2004) Nairobi.

[180] MOA, HCDA in conjunction with JICA " Cost of EUREPGAP Certification and Laboratory Tests for Fresh Horticultural Produce" (2004) Nairobi.

[181] <www.fpeak.org> (accessed on 30th April 2005).

The Association hopes that Food Plus (the EUREPGAP Administrators) will declare Kenya-GAP equivalent to EUREPGAP. Such a declaration would see local conditions particularly those unique to Kenyan producers incorporated in Kenya-GAP. Furthermore, such a declaration would enhance the Association's ability to negotiate as a block with EUREPGAP certification bodies for lower certification fees and rates thus drastically reducing Kenya's certification costs.[182]

In February 2005, the Chairman of EUREPGAP visited Kenya and agreed on a way forward between the FPEAK and EUREPGAP. This is to the effect that the FPEAK will continue the process of revising KENYA-GAP and benchmarking it with EUREPGAP. Secondly, a National Technical Working Committee has been established to work on the benchmarking.[183]

In addition to the development of KENYA-GAP, the producers' associations have also been involved in constant consultations with the Government in order to drum up support for the horticultural industry especially in setting up conducive interventions and policies.[184] The associations have also extended the services they offer their members so as to assist them comply with the EUREPGAP requirements. In this regard, they have incorporated into their service delivery portfolio such services as lobbying and advocacy programmes, information dissemination and technical support. Regarding information dissemination, the associations have launched a quarterly update through which they

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[182] *Ibid*
[183] *Ibid*
[184] Isaac Esipisu "New Code in the Offing for Horticultural Sector" Daily Nation, July 2004, Nairobi.

endeavor to keep their members fully informed of the goings on in the negotiation between EUREPGAP administrators and the associations.[185]

(c) Regional Interventions

An important area in which regional standards development have influenced standards setting in Kenya is on Sanitary and Phytosanitary measures. The East African Community's (EAC) Secretariat has developed a harmonized system of sanitary and phytosanitary measures to apply for the three countries. This work was spearheaded by the Association of Agricultural Research for Central and Eastern Africa (ASARECA). The harmonized measures focus on requirements for importation of plant and plant products, requirements for exportation of plants and plant products, plant quarantine measures, importation and release of exotic biological control agents, importation of living organisms for research, standards of export or import of plant materials, communication mechanisms among partner states (vigilance) and breeding of seed and release of varieties.[186]

The measures that have been used to develop the EAC standards are based on current standards applicable in the three East African countries and also take into account the recommended international standards and practices from organizations such as the IPPC, the OIE and CAC. They also take into account the principles of the WTO's SPS

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[185] *Ibid*

[186] Nyangito. HO, Olielo. T and Magwaro D. " Improving Market Access through Standards Compliance: A Diagnostic and Road Map for Kenya" Reported in Wilson. JS " Standards and Global Trade" *supra* note 21 at P.25

Agreement.[187] Given the increased efforts at regional integration within the East African region, it is encouraging to note that measures have been put in place to ensure harmonized standards. Such harmonized standards would go along way in help curb the spread of diseases at the border points due to regional intra-trading.

There has also been international support geared towards assisting African countries build their capacity for trade generally and in particular SPS related regulations. For example, the G8 Member countries, through the African Action Plan have already pledged support in helping African countries develop their capacity for trade.[188] Section 3.4 of the G8 Africa Action Plan focuses on, *inter alia*, assisting African producers in meeting product and health standards in export markets and providing technical assistance to help African countries engage in international negotiations, and in standards setting systems. However, it remains to be seen whether Kenya, being one of the target countries, will take advantage of these provisions and request for assistance. Such assistance may focus on strengthening of KEBS and KEPHIS. It could also be used to assist farmers comply with these international standards.

5.5 CONCLUSION

This chapter commenced with a discussion of the link between laws and external trade of horticultural products. This was followed by a critical review of the shortcomings of the law as a factor that can enhance international trade. The review was followed by an analysis of various intervention measures by stakeholders within the horticultural

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[187] *Ibid*

[188] The Group of Eight, " G8 Africa Action Plan" July 27,2002, Kananaskis, Canada.

industry that are geared towards enhancing the standards. It is to be hoped that these intervention measures will have the desired objectives of enhancing market access of agricultural products in external markets. Our next chapter, being the final chapter will conclude the thesis. This will be followed by an identification of the salient issues that remains unresolved while attempting to resolve them in the form of recommendations.

CHAPTER SIX

CONCLUSIONS AND RECOMMENDATIONS

6.1 CONCLUSIONS

Throughout this thesis, we have been arguing for the need for Kenya to enhance the quality standards of agricultural products. This is especially so in regard to products targeting the export market. In our call to the Government and other players in the agricultural industry to improve on standards, our focus was primarily on how Kenya makes use of the existing laws to enhance market access of her products through improving on standards.

Chapter two of the thesis introduced the concept of market access. This, it was explained, is a fundamental concept in international trade that describes the extent to which a good or service can compete with locally made products in another country. It was also in Chapter two that we examined the policy instruments used to regulate market access. These are the tariffs and non-tariff measures. The non-tariff measures were then split into quotas, technical barriers to trade (TBTs) and sanitary and phytosanitary (SPS) measures. Given the move towards trade liberalization, enhancement of market access is encouraged. This, we explained, can only be possible with the removal of both the tariffs and the non-tariff barriers including SPS measures.

The Chapter then narrowed down to SPS measures. These measures were then defined in the context of international trade rules specifically the World Trade Organisation (WTO).

The Chapter also examined the role played by SPS measures in international trade. In this regard, both the positive aspects and the negative aspects of the standards were examined. Positive aspects, it was noted, include the enhancement of food safety, animal and plant health while the negative effects of the standards is that SPS measures may be used as non-trade barriers.

Chapter three commenced with an examination of international legal instruments and codes that are concerned with standards. These are actually the instruments that are the originators of most standards implemented through domestic laws. Instruments and codes examined included the Codex Alimentarius, the Convention on Biological Diversity and its Protocol, the Cartagena Protocol on Biosafety to the Convention on Biological Diversity. The link between each of the international instrument and market access was examined with the conclusion being that goods that comply with these instruments are more likely to be accepted in international markets than goods that do not. The WTO's Agreement on the Application of SPS Measures was then critically analysed. This Agreement was given more emphasis since it is considered the principal international law that addresses both the challenges of ensuring quality and safety of goods while at the same time facilitating market access of goods from WTO'S Member countries.

After a review of the international legal instruments on standards, the Chapter then focused on domestic laws regulating the formulation and implementation of standards in Kenya. The major statutes that have a bearing on standards were examined in detail. These included the Public Health Act Chapter 242 Laws of Kenya, the Standards Act

Chapter 496 Laws of Kenya, the Local Government Act Chapter 265 Laws of Kenya and the Environmental Management and Coordination Act, Act Number 8 of 1999. The review of the domestic laws on standards brought to the fore the fact that Kenya is indeed alive to the need to safeguard human, animal and plant life. It also revealed the fact that Kenya actually does have laws geared towards enhancement of standards and quality of produces targeting the export market (The Agricultural Produce (Exports) Act Chapter 319 Laws of Kenya. As to whether these domestic laws on standards actually achieve their desired end, which is ensuring safety and production of high quality standards, this question could only be answered after an analysis of the agricultural sector.

Chapter four was an examination of the agricultural sector. In this regard the crucial role that the agricultural sector plays in the economy was discussed. This was followed by an analysis of the challenges that beset the agricultural sector. Given the size and complexity of the agricultural sector, the discussion narrowed to the horticultural industry, a sub-sector within the wider agricultural sector and of those greatly affected by imposition of SPS measures in the export market. The discussion of the horticultural sector commenced with an analysis of the development of the industry in Kenya. This was followed by an analysis of the role of horticulture in the Kenyan economy. It is after acknowledging that the horticultural industry plays a crucial role in the economy that we discussed the standards that have imposed by external markets of the horticultural products. In this regard, The European Union's Traceability Rules and EUREPGAP were examined.

These two standards were explained while at the same time distinguished to remove confusion that the two refer to one and the same thing. The impact of these requirements in the horticultural sector was then discussed. It is at this point that all the challenges that farmers face in their bid to comply with the standards were examined.

Chapter five concerned itself with the link between the standards laws discussed in Chapter three and the external trade of horticultural products. The Chapter commenced with a focus on how the standards laws of a country can actually facilitate the external trade of a country's goods. This was followed by an inquiry as to whether the Laws of Kenya actually facilitated market access of Kenya's horticultural products. In this regard, various shortcomings of the law were highlighted. These included the fact that the laws were not enforced as they should and also that the multiplicity of laws all regulating the same agricultural products rather than promote quality led to non compliance of standards.

Interventions that have been put in place to address both the legal shortcomings and also market access generally were discussed. These included proposals by the government to consolidate the laws and introduction of training programs on the standards developed by the government for farmers. The interventions by the private sector were also examined. These included development of an industry code, KENYA-GAP that can be benchmarked and harmonized with those in the external markets such as EUREPGAP. Regional interventions such as the efforts of the East African Community were also recognised.

Despite all these efforts by various stakeholders in the horticultural industry, it is not yet time to celebrate. A lot still remains to be done. It is that unresolved part that will inform the recommendations on the way forward.

6.2 RECOMMENDATIONS

The results of this research point to the fact that an entire industry is at risk. We have established that standards imposed in the external market have had great impact on one of the best performing industry in Kenya, the horticultural sector. Concerted efforts must therefore be made to save our industry from collapse due to export bans or rejection in the export market. In this regard, the following measures are recommended:

As already recognized, there are too many statutes regulating the agricultural sector. Though the Government has acknowledged this problem and has even pledged the consolidation of these statutes by the end of 2006, nothing much has been done. Consequently, it is recommended that the government moves with speed and commences the consolidation processes. Such a consolidation, it is submitted, would go along way in alleviating confusion within the agricultural sector and in so doing enhance compliance of the standards embodied in those statutes.

In tandem with the consideration of the enactment of an all-embracing agricultural statute, we must be alive to the laws that are currently in the pipeline. These are the Draft Horticultural Bill of 2001 and the Draft Biosafety Bill of 2003. The Horticultural Bill seeks to legally strengthen the Kenya Horticultural Crops Development Authority

(HCDA) by creating it through a statute rather than the present scenario where it created through the Agricultural Act, Cap 318. Though the Bill proposes that the newly created HCDA will have as one of its function the promotion of standards, the Bill seems to lay more emphasis on the creation of the Parastatal rather than the promotion of standards. As the movers of the Bill put the final touches on the Bill before presenting it to Parliament, there is need to inquire as to what value the proposed legislation will add to the horticultural sector. Will the bill provide a solution to the besieged horticultural farmers or will it merely be an unnecessary addition to the numerous statutes that farmers must comply with?

In regard to the proposed Kenya Biosafety Act, this is not really an agricultural statute as it is concerned with issues that go beyond agricultural issues such as environmental concern. It therefore cannot be consolidated with agricultural statutes though provisions on bio-safety may be incorporated into the proposed single agricultural statute. Furthermore, given lack of adequate regulation of biosafety issues in the country, the Biosafety Bill is a welcome move. The use of or production of Genetically Modified Organisms (GMOs) is a major concern in export markets particularly the European Union, Kenya's key market for horticultural products. In this respect, Kenya must enact biosafety laws that must not only facilitate bio-technology in Kenya but also laws that are geared towards assuaging the consumer be it a local Kenyan or a foreigner that the products are free from harm that may be caused by use of GMO products. Therefore there is need to critically evaluate the Biosafety Bill before presenting it to Parliament as to its efficacy in facilitating acceptance of Kenyan's agricultural products abroad.

It has been observed that the development and implementation of standards is scattered over too many organisations. Time is nigh for the government to take cognisance of this fact and take appropriate action. One strategy the government could adopt and which would be ideal is the designation of a specific institution to deal with all standards-related matter. However, this approach may not be feasible given the diversity of standards involved. For example, environmental standards must be formulated and implemented by an environmental institution such as NEMA while KEPHIS is better suited to deal with standards concerning with plant life.

Perhaps then, a better approach would be the establishment of an inter-ministerial institution that monitors and coordinates all the standards that farmers must comply with. Such a move would reduce fragmentation of responsibilities within different institutions while at the same time reduce inefficiencies that currently characterise the implementation of standards. Such a coordinating institution would also be charged with the responsibility of ensuring that international instruments on standards are domesticated and that Kenyan laws on standards are updated to incorporate new changes at the international level. Furthermore, it would also be charged with ensuring that Kenya gains maximum benefits from the WTO's SPS Agreement. This is especially so as regards provisions of the Agreement that impresses upon an importing country that imposes SPS measures on a developing country to provide technical capacity to the developing country (Articles 9 and 10). Such technical capacity, if provided would assist in capacity building both of the public institutions and the farmers themselves.

Even as we explore the possibilities of either a single standards institution or a coordinating institution, we must remind the government that current institutions charged with the development of standards face numerous challenges which if left unresolved would still rear their heads in whatever type of institution established. These challenges include lack of effective participation in technical committees of international standard setting bodies due to lack of funds.

Another challenge faced by the government institutions dealing with standards is that such institutions have so far not been accredited by international institutions concerned with standards such as Food Plus (the administrators of EUREPGAP). We urge the government to move with speed and invest heavily in capacity building of the laboratories of the said institutions in terms of technical and human resources. Such a move would go along a way in alleviating the cost constraints that farmers face when they are forced to seeking certification and costing services from privately owned foreign institutions. This is because, it is envisaged that such government institutions would offer cheaper services to farmers given their social responsibility nature.

The problem of non-development of standards was also highlighted. This is especially so with regard to environmental standards that are to be established within the Environment Management and Coordination Act (EMCA). The problem is especially most severe as regards development of water quality standards. It is recommended that The National Environmental Management Authority (NEMA), being the concerned governmental institution should urgently develop the standards. This would then lead to farmers being

aware as to what standards apply to the water they use for irrigation and for washing their harvested products. Had Kenya already has such standards and which are strictly enforced, it would have been very easy for the farmers to comply with EUREPGAP since they would already have been practising what EUREPGAP is preaching.

Even where standards have been developed they are sometimes not well enforced. For example, as we have already discussed, the Public Health Act Cap 42, the Local Government Act Cap 265 and EMCA all contain provisions prohibiting pollution of water sources such as rivers. Yet our rivers continue to be choked by all manner of pollutants. Our enforcing institutions must be made aware of the link between use of clean water in farming activities and the acceptance of the resultant produce in international markets. Availability of clean water for the farmers would greatly reduce their water treatment costs and thereby reducing the overall costs of standards compliance.

Another problem that has been identified is that porous borders reduce the effectiveness of border monitoring of spread of diseases during intra-regional trade. Such a problem calls for increased coordination of standards enforcers of neighbouring countries to ensure that diseases are not spread from one country to another during intra-regional trade.

The efforts of the private sector have been acknowledged. It is recommended that the private sector should continue in their efforts to have their code, KENYA-GAP

harmonized with EUREP-GAP Protocol. Such a move would be in line with the spirit of the SPS Agreement that encourages the use of the equivalent standards as between the importing and the exporting country. Further, even as the private sector continue to improve their standards, they must be vigilant and avoid ploys by the importing countries to unjustifiably lock out their goods from the market. The private sector must ensure that they are fully represented in technical meetings of international standard setting organizations. This will ensure that when international standards are set they will incorporate any unique circumstances that Kenyan farmers operate in.

The private sector within the agricultural sector needs to be fully informed so as to be able to differentiate between genuine SPS measures and policy instruments employed purely to restrict market access. This includes use of Technical Barriers to Trade (TBT) such as specific labelling and packaging requirements. For example, requirements that bananas or cucumbers must be straight and not curved (as some importers are fond of insisting) have nothing to do with protection of human life. This is a ploy to lock out those farmers who produce some varieties of bananas or cucumbers that are curved from the export market.

Further, the private sector must continue engaging the government so as to keep it abreast of the challenges they continue to face and whose solution falls squarely at the foot of the government. These include ensuring that rivers are not polluted upstream and that the laboratories of the government's institutions are accredited to international standard setting bodies.

In this era of regional integration, Kenya needs to participate in regional interventions that have been initiated to address the challenges of compliance. Further, as the three East African countries open up their borders to another, there is an urgent need to ensure that the standards used for the three East African countries are uniform. This is especially so for seeds and planting materials that can easily be bought in one country and planted in another. We must ensure that such seeds and planting materials are subject to the same standards in all the three East African countries.

As stakeholders increase their efforts to ensure standards compliance with foreign markets, they must not forget the local consumers. According to officials of the Horticultural Crops Development Authority, Kenya only exports 5% of the total fresh fruits and vegetables produced annually while the remaining 95% of the produce is consumed locally. Local consumers also deserve high quality products. For example had there been enforcement of maize standards consumed locally, Kenyans would not be dying from aflatoxin-related illnesses as is the case currently. Moreover, the same consumers who insists on high standards abroad insist on the same standards when they come to Kenya as tourists. For along time, the trend has been that Kenya exports her best produce while what is left for the local market is, as it were, 'rejects' that cannot be accepted abroad. Such a trend must be discouraged and producers must be educated on the need to ensure that even produce for local market meets international standards.

Finally, there are other challenges that the agriculture farmers face that have nothing to do with standards and therefore beyond the objectives of this thesis. However,

concentrating only on the standards compliance and ignoring the other challenges would not really be helpful to the farmers. The first challenge is that of infrastructure. Transportation of produce from the farm all the way to the retail market abroad is characterised with problems such as poor roads, delays at the customs department and high cargo-handling charges. These are the challenges that the government must address.

A more serious challenge, however may only now be unfolding. This is in connection with the current negotiations between the European Union (EU) and the African, Caribbean and Pacific (ACP) countries. The two blocks of countries are negotiating with the objective of establishing a European Union- ACP countries Free Trade Area[189] by the year 2008. Kenya, being a member of the ACP countries is negotiating together with other countries who make up the Eastern and Southern African (ESA) countries in negotiations known as Eastern and Southern African Countries- Economic Partnership Agreements (ESA-EPA) negotiations.

Currently, these ACP countries enjoy preferential trade arrangements where each country has quantitative quotas of how much of each product it must export to the European Union. Such preferential arrangements have been declared illegal by the World Trade Organization since they discriminate against other countries with no quotas. In additional to the quotas, the European Union applies more favourable trading terms to least developed countries where the least developed countries are allowed to

[189] Free Trade Area refer to the free movement of goods across borders without the goods being levied any duty by the importing country.

export goods to the Eureopean Union without any restrictions (under the Anything But Arms (ABA) terms). The introduction of the Free Trade Area will not affect this arrangement.

The import of these negotiations to Kenya in general is that since she is classified as a developing country, rather than least developed country, she will lose her export quotas without having the ABA terms as a fall back measure to guarantee her unrestricted access of the EU market. For the agricultural producers, it means that their goods will now be competing for the European Union's Market along with similar goods from all over the world. This is unlike goods from least developed countries such as Uganda, Tanzania and Ethiopia which though they may lose their quotas they will still enjoy unrestricted access to the EU's market using the ABA terms

Kenyan farmers, more so horticultural farmers, are aware of this new development and know that come the year 2008, their produce will be at a disadvantage when compared to goods from the neighbouring countries. The farmers, being first and foremost businessmen are now considering shifting their base from Kenya to Ethiopia.[190] Such a move would be disastrous for the Kenyan economy given the role played by the horticultural sector in the economy. There is therefore need for Kenya to successfully negotiate for continued preferential trade agreement with the European Union.

[190] The East African, May 2-8 2005, Nairobi.

To conclude, it is obvious that the horticultural sector faces numerous challenges in its bid to access foreign markets. However, these challenges can be overcome through concerted efforts by the government and the private sector. It is important to note that though this thesis has concentrated on the horticultural industry, the challenges of this industry mirror those of other related industries such as the meat industry and also the fish industry. In addressing the problem of the horticultural farmers the government must remember that standards compliance are not only a problem of horticultural farmers but nearly all Kenyan exporters. In this regard, it is to be hoped that this thesis has contributed to not only highlighting the challenges of the wider agricultural sector but also in providing workable solutions to those challenges, particularly within the realm of the law.

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