

SANITARY AND PHYTOSANITARY STANDARDS:
KENYA'S CHALLENGES IN COMPLYING WITH WTO
STANDARDS

A Dissertation Submitted in Partial Fulfillment of the Requirements for
the Award of a Master of Laws (LL.M) of the University of Nairobi

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DANSON BUYA MUNGATANA

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DECLARATION

I declare that this is my original work and has not been submitted for examination in any other university.

Signature: 

Name: DANSON BUTA MUNZATANA

Date: 6th JUNE 2005

Supervisor

Signature: 

Name: PROF. PATRICIA KAMERI-MBOTE

Date: 6th JUNE 2005

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All those who assisted in the presentation of this dissertation.

Thank you...

ABBREVIATIONS

ACL	Analytical Chemistry Laboratory
BRC	British Retail Consortium
CBD	Convention on Biological Diversity
CA	Competent Authority
EU	European Union
FAO	Food and Agriculture Organisation
FPEAK	Fresh Produce Exporters Association of Kenya
GAP	Good Agricultural Practice
HACCP	Hazards Analysis and Critical Control Point
IPPC	International Plant Protection Convention
ISTA	International Seed Testing Association
KEBS	Kenya Bureau of Standards
KEPHIS	Kenya Plant Health Inspectorate Service
MRL	Maximum Residue Level
NPPOs	National Plant Protection Organisation
NGO	Non Governmental Organisation
NAL	National Agricultural Laboratory
OIE	Office International des Epizooties
PRAs	Plant Breeders Rights
RPPOs	Regional Plant Protection Organisations
SPS	Sanitary and Phytosanitary Standards

TCP	Technical Co-operation Programme
UPOV	Union for the Protection of New Varieties of Plants
UN	United Nations
WTO	World Trade Organisation
WHO	World Health Organisation

SANITARY AND PHYTOSANITARY STANDARDS:

KENYA'S CHALLENGES IN COMPLYING WITH WTO STANDARDS

CHAPTER ONE

RESEARCH PROPOSAL

1.1 Introduction

The proposal is on the sanitary and phytosanitary standards (SPS) in Kenya and the big challenge to comply with these standards. The proposal will first address the background of the problem where we clearly and succinctly define the legal issues raised and the context within which the research is carried out. Second, the statement of the problem will seek to identify what is being investigated which will delimit the scope and set out the parameters of this dissertation. Third, the theoretical framework. Here, we identify and define the various concepts and theories that underpin this research with justification, which theory of law is the basis of this research. Fourth, the literature review. This will serve to illustrate the originality and integrity of this research as well as to show the gaps in other literature that this work seeks to fill. A critical comprehension and review of carefully selected literature will help to define the research problem and delimit it concisely and also to show the difference, in form and substance, from other works on

this topic. Fifth, objectives of the research. Here we set out the purpose that we seek to achieve in this research. It will include a main objective and specific objectives that will identify and define the goals of the research in advance. Sixth, the hypotheses. Here we declare a basic assumption that we seek to test in the research. Finally, the research methodology will indicate clearly how we undertake the research, to address the legal issues or questions raised in the statement of the problem and test the hypotheses.

1.2 Background to the problem

In Kenya SPS standards must be complied with by exporters in order for them to access crucial markets for instance with the EU and the U.S.A. These markets have requirements for these exporters that they must comply with the SPS standards as set out by the three sister organisations and as modified by the SPS agreement in the WTO. There has been growing recognition that sanitary and phytosanitary measures can impede trade in agricultural and food products. Kenyan exporters experience problems in meeting the SPS requirements of developed countries and this can seriously impede their ability to export agricultural and food products. Although there are differential provisions that allow for longer periods of time for developing countries to comply with these standards, eventually Kenya must comply with all these standards in order for its exporters to gain access to these markets. Due to the fact that SPS is a relatively new contact, there has been a difficulty in establishing focal points or national enquiry points. The challenge is that the SPS by its very nature is spread over different departments in the Kenyan government such as the Ministry of livestock and fisheries, Ministry of Agriculture,

Ministry of Health among others. This makes it a challenge for exporters to have a place that can give a one-stop shop.

1.3 Statement of the problem

The effectiveness of enforcement of sanitary and phytosanitary requirements in Kenya is constrained by lack of a codified law and clearly defined institutions and their mandate amongst other trade-distorting issues arising from SPS measures.

The challenge therefore is to create adequate legal and institutional framework for SPS measures and to address the trade distorting impacts of SPS measures.

1.4 Theoretical framework

The main theme of the study is on Sanitary and phytosanitary standards and Kenya's big challenge to comply with international standards. The main concept adopted in the study relates to the role of the main national enquiry point, Kenya Plant Health Inspectorate Service (KEPHIS). It also seeks to examine the effectiveness of SPS requirements in Kenya. Other inquires are on the challenges arising from sanitary and phytosanitary measures. The main theme also attempts to show that law is a part and regulates human conduct and which may be the only instrument for serving the need of the society. I therefore seek to base my study on the positivist school of law, anchoring my approach on the fact that a proper codified law that is well developed and well known will regulate conduct amongst Kenyans especially the exporters.

1.5 Objectives of the research

Main objective

To map the role of the main national enquiry point (KEPHIS) for SPS.

Specific objectives

- 1 To analyse the regulatory framework established by KEPHIS and its effectiveness in ensuring quality agricultural inputs and produce.
- 2 To clearly analyse the various challenges Kenya faces arising from sanitary and phytosanitary measures.
- 3 To make recommendations on how Kenya can address the challenges it faces in complying with WTO standards.

1.6 Broad argument structure

Kenya has to implement sanitary and phytosanitary standards which have been imposed by international bodies. Unfortunately for Kenya, the national institution responsible for implementing the SPS agreement (KEPHIS) is faced with many challenges which need to be reduced or eliminated in order for Kenyan exporters to meet the required standards.

1.7 Hypotheses

The study is based on the following hypotheses:

1. Kenya being a WTO member state must comply with the sanitary and phytosanitary standards as set out in the agreement on the application of sanitary and phytosanitary measures.
2. There is need for Kenya to demonstrate that its domestic measures are equivalent to developed countries requirements.
3. Kenya finds it difficult to trade with developed countries due to the difference of quality requirements. Kenyan exporters should not incur further costs at the points of entry as a result of not meeting the international standards.
4. Kenya needs to explore ways of actively participating in international organizations that set standards and regulations to protect their interest.

1.8 Research questions sought to be answered

- 1 Does Kenya Plant Health Inspectorate service (KEPHIS) have the proper legal framework to serve as a national enquiry point for implementing the SPS agreement?
- 2 Do our national laws on the activities of KEPHIS meet the EU regulations on quality requirements?

1.9 Research methodology

The main mode of research for this dissertation will be library based. Recourse will be had to various articles and journals. Reference will also be made to relevant statutes, handbooks, international treaties and conventions. Great emphasis will also be placed on interviews with various people and other appropriate information sources like the Internet.

1.10 Chapter breakdown

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CHAPTER THREE: CHALLENGES OF THE REGULATORY FRAMEWORK (KEPHIS)

- 3.1 Historical Perspectives
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CHAPTER FOUR: CONCLUSION AND RECOMMENDATIONS

4.1 Conclusion

4.2 Horticulture

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4.4.5 Technical Cooperation and Financial Assistance

CHAPTER TWO

REGULATORY FRAMEWORK ON THE INTERNATIONAL SCENE

2.1 Introduction

International standardisation is one mechanism through which incompatibilities between national standards and technical measures can be overcome, with the objective of facilitating trade.¹ The quality standards demanded by developed countries are high and for some developing countries, difficult to achieve. And, what's more, quality standards get higher as the degree of processing is increased towards a fully manufactured product produced for direct consumption. Overcoming the difficulties of producing goods which comply with the quality standards of consuming countries almost certainly represents the most important challenge for Kenya and other developing countries in a liberalised world.²

Industrialised countries have established systems for analysing food products and controlling sources of contamination. The systems for carrying out this work in Kenya is not as fully established or as rigorous. The local framework has no legal existence. The trend towards a liberalized global market has brought with it the need to institute international standards in goods traded. In order for us to improve this challenges that

¹ Spencer Henson, Kerry Preibisch, Oliver Masakure, "Review of Developing Country Needs and Involvement in International Standards- Setting Bodies," Centre for Food Economics Research, Department of Agricultural and Food Economics, February 2001, The University of Reading.

² Center for food Economics Research (April 2000). Impact of sanitary and phytosanitary measures on developing countries, Spencer Henson, Rupert Loader, Alan Swinbank, Maury Bredahl and Nicole Lux, department of agricultural and Food economics, University of Reading.

Kenya has, it is important for us to explore international standard setting-bodies. There are certain norms created in the international scene that will be important for us to appreciate so that we could improve on Kenya's regulatory framework. These international norms are observers and important contributors to Kenya's regulatory framework. They are discussed below:

2.1.1 FAO/WHO Codex Alimentarius Commission³

The *Codex Alimentarius* Commission, based in Rome, is responsible for *Codex Alimentarius* or food code that is considered the principle global reference point for consumers, food producers and processors, national food control agencies and the international food trade.⁴ It is the international food safety standards-setting body within the UN family of international organizations. Codex was created in 1963 by the Food and Agriculture Organization (FAO) and World Health Organization (WHO) to develop food standards, guidelines, and related texts such as codes of practice under the Joint FAO/WHO Food Standards Program. The main purposes of this program are protecting the health of consumers and ensuring fair trade practices in food trade, and promoting coordination of all food standards work undertaken by international governmental and non-governmental organizations.⁵ It sets standards on limits of additives, chemicals and pesticides and other contaminants. The SPS Agreement designates Codex as the authority

³ The Codex Alimentarius is a collection of international food standards that have been adopted by the Codex Alimentarius Commission (the "codex"). See: www.codexalimentarius.net.

⁴ Spencer Henson, Kerry Preibisch, Oliver Masakure, "[An Article on the Review of Developing Country Needs and Involvement in International Standards- Setting Bodies](#)," Centre for Food Economics Research, Department of Agricultural and Food Economics, February 2001, The University of Reading.

⁵ <<http://www.codexalimentarius.net>>(accessed on 25th of January,2005).

for all matters related to international food safety evaluation and harmonization. Several Codex activities relate to the evaluation of food-borne hazards, although Codex also develops non-health related technical food standards, like nutrition, composition, and quality standards. Codex develops scientific methodologies, concepts and standards to be used world-wide for food additives, microbiological contaminants, veterinary drug and pesticide residues to be used world-wide. It has also developed useful references like the “General Principles on Food Hygiene” and the “General Principles on Meat Hygiene.”⁶ Representatives at this body include 170 UN member countries (only 7% from Africa). In Kenya, the Kenya Bureau of Standards has the mandate of establishing and enforcing quality standards of all products on the Kenyan Market, both locally produced and imported. It is a parastatal established under the Standards Act (Cap 496). Its primary function is to promote standardization in commerce and industry through development of standards, quality control, certification and metrology. It is evident that the roles of KEPHIS and that of KEBS overlap thereby creating a conflict. Given that KEPHIS specializes in plants, the Standards Act should be amended to exclude seeds, planting materials, horticultural and other agricultural produce. The degree to which international standards address the needs of developing countries is dependent on the ability of developing countries to participate in international standards-setting organisations. Developing countries are largely absent from committees but representatives of transnational corporations such as Nestle, Monsanto, United Brands and Coca Cola outnumber the representatives of many countries. The limited participation of developing countries in international standards-setting organisations reflects a range of resource

⁶ “Sanitary and Phytosanitary Measures,” report by the WTO Secretariat, March 2000, the agriculture and commodities Division of the Secretariat.

constraints, including finance, technical and scientific expertise and infrastructure, communications resources etc.⁷ The Department of State participates with other U.S. Government agencies in the work of Codex, especially regarding agricultural biotechnology, labeling, traceability, and legal and budgetary issues.⁸

2.1.2 International Plant Protection Convention (IPPC)⁹

The International Plant Protection Convention (IPPC) is a subsidiary body of the Food and Agriculture Organization (FAO). Its main objectives are to secure a common and effective action to prevent the spread and introduction of pests of plants and plant products, and to promote appropriate measures for their control. The convention extends to the protection of natural flora and plant products. It has developed region-specific lists of plant pests. It also includes both direct and indirect damage by pests including weeds. The provisions extend to cover conveyances, containers, storage places, soil, and other objects or material capable of harboring plant pests. The IPPC develops international plant import health standards, principally on quarantine pests, a “Glossary of Phytosanitary terms,” basic principles governing phytosanitary laws and regulations and harmonized plant quarantine procedures.¹⁰ The IPPC guidelines for pest risk assessment provide a scientific means for governments to evaluate risks from imports. The IPPC

⁷ Spencer Henson, Kerry Preibisch, Oliver Masakure, “Review of Developing Country Needs and Involvement in International Standards- Setting Bodies,” Centre for Food Economics Research, Department of Agricultural and Food Economics, February 2001, The University of Reading.

⁸ U.S. Department of Agriculture Food Safety Inspection Service.

<http://www.fsis.usda.gov/OA/codex/index.htm>.>(accessed on 28th Jan,2005)

⁹ The International Plant Protection Convention (IPPC) is a multilateral treaty administered through the IPPC Secretariat located in FAO’s Plant Protection Service. The convention provides a framework and forum for international cooperation, harmonization and technical exchange in collaboration with regional and national plant protection organizations. For more information see: <http://www.ippc.int>.

¹⁰ “Sanitary and Phytosanitary Measures,” report by the WTO Secretariat, March 2000, The agriculture and commodities Division of the Secretariat.

aims to provide a framework and forum for international co-operation, harmonization and technical exchange in collaboration with National Plant Protection Organizations (NPPOs) and Regional Plant Protection Organizations (RPPOs). In the facilitation of global trade, the IPPC endeavours both to ensure that phytosanitary measures have a scientific basis rather than being used as unjustified trade barriers and to provide dispute settlement mechanisms.

2.1.3 Office International des Epizooties (OIE)¹¹

The Office International des Epizooties (OIE) is the world animal health organization, based in Paris. Its mission is to guarantee the transparency of animal disease status worldwide; to collect, analyze, and disseminate veterinary scientific information; to provide expertise and promote international consensus for the control of animal diseases; and to guarantee the sanitary safety of world trade by developing sanitary rules for international trade in animals and animal products.¹² The OIE develops normative documents relating to rules that Member Countries can use to protect themselves from the introduction of diseases and pathogens, without setting up unjustified sanitary barriers. The main normative works produced by the OIE are: the International Animal Health Code, the Manual of Standards for Diagnostic Tests and Vaccines, the International Aquatic Animal Health Code and the Diagnostic Manual for Aquatic Animal Diseases.

¹¹ The OIE, also known as the World Animal Health Organisation, is a source of information on the occurrence and course of animal diseases and of ways to control these diseases. see: <http://www.oie.int/>.

¹² Office of international Epizootics. <http://www.oie.int/> (accessed on 28th of January, 2005)

OIE standards are recognised by the World Trade Organization as reference international sanitary rules. They are prepared by elected Specialist Commissions and by Working Groups bringing together internationally renowned scientists, most of whom are experts within the network of 156 Collaborating Centres and Reference Laboratories that also contribute towards the scientific objectives of the OIE. These standards are adopted by the International Committee. The OIE's "International Animal Health Code" and Aquatic Animal Health Code" offer international animal health standards and procedures that are periodically amended to take into account the latest scientific research. The OIE develops manuals on: animal diseases; standards for diagnosis, vaccination, epidemiological surveillance, disease control and eradication; procedures such as disinfection and certification; and laboratory equipment. The OIE has also developed methodologies for animal disease risk assessment. It shares scientific information with its member countries and identifies countries that are free of a particular disease.¹³ The OIE provides technical support to Member Countries requesting assistance with animal disease control and eradication operations, including diseases transmissible to humans. The OIE notably offers expertise to the poorest countries to help them control animal diseases that cause livestock losses, present a risk to public health and threaten other Member Countries.

The OIE has a permanent contact to international regional and national financial organizations in order to convince them to invest more and better on the control of animal diseases and zoonosis.¹⁴

¹³ "Sanitary and Phytosanitary Measures," report by the WTO Secretariat, March 1994. WTO, Geneva.

¹⁴ <<http://www.oie.int>> (accessed on 25th of January, 2005).

2.1.4 Sanitary and Phytosanitary Agreement-WTO¹⁵

Sanitary and phytosanitary measures (SPS) are border control measures necessary to protect human, health, animal or plant life or health.¹⁶ Popularly they are often called quarantine measures. Sanitary and phytosanitary 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 must be justified on the basis of their animal and plant health conditions.

In the World Trade Organisation (WTO) context, SPS measures refer to any measure, procedure, requirement, or regulation, taken by governments to protect human, animal, or plant life or health from the risks arising from the spread of pests, diseases, disease-causing organisms, or from additives, toxins, or contaminants found in food, beverages, or feedstuffs.¹⁷ Sanitary measures are those related to human or animal health, and phytosanitary measures deal with plant health. The protection of fish and wild fauna, forests and wild flora are included in this definition while the protection, for example of the environment *per se* and animal welfare are excluded. The World Trade Organisation (WTO) operates as a system. As a system, it establishes multilateral rules to regulate trade in the world. Within its framework there are several agreements and among them is the agreement on the Sanitary and Phytosanitary (SPS) measures. International standards for phytosanitary measures are prepared by the Secretariat of the International Plant Protection Convention (IPPC) as part of the United Nations Food and Agriculture

¹⁵ Agreement on the Application of Sanitary and Phytosanitary Measures, 1994. WTO, Geneva.

¹⁶ Dictionary of Trade Policy terms, Walter Goode, Centre for International Economic Studies University of Adelaide, 1998.

¹⁷ Agreement on the Application of Sanitary and Phytosanitary Measures, 1994. WTO, Geneva. Annex A.

Organisation's global programme of policy and technical assistance in plant quarantine. This programme makes available to FAO Members and other interested parties these standards, guidelines and recommendations to achieve international harmonization of phytosanitary measures, with the aim to facilitate trade and avoid the use of unjustifiable measures as barriers to trade.¹⁸

The Agreement provides national authorities with a framework to develop their domestic policies. It encourages countries to base their SPS measures on international standards, guidelines or recommendations;¹⁹ to play a full part in the activities of international organizations in order to promote the harmonization of SPS regulations on an international basis;²⁰ to accept the SPS measures of exporting countries as equivalent if they achieve the same level of SPS protection;²¹ and, where possible, to conclude bilateral and multilateral agreements on recognition of the equivalence of specific SPS measures.²² Since the drafting and entry into force of the SPS Agreement, a substantial amount of work has been undertaken in the area of risk analysis by the FAO/WHO Joint Codex Alimentarius Commission, the Secretariat of the International Plant Protection Convention and the International Office of Epizootics.²³

¹⁸ Jacques Diouf, Director General-International Standards for Phytosanitary measures, Publication No. 11 April 2004.

¹⁹ See Article 5 of the SPS Agreement.

²⁰ *Supra* note 7 at pg.11

²¹ See Article 4 of the SPS Agreement.

²² *Supra* note 9 at pg. 12

²³ Referred to as the Three Sister Organisations.

2.1.5 Cartagena Protocol on Biosafety to the Convention on Biological Diversity (CBD)²⁴

The Convention on Biological Diversity is the main international instrument for addressing biodiversity issues. It provides a comprehensive and holistic approach to the conservation of biological diversity, the sustainable use of natural resources and the fair and equitable sharing of benefits deriving from the use of genetic resources. Biosafety is one of the issues addressed by the Convention. Biosafety refers to the need to protect human health and the environment from the possible adverse effects of the products of modern biotechnology.²⁵

The conclusion of the Biosafety Protocol has been hailed as a significant step forward in that 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 thus creates an enabling environment for the environmentally sound application of biotechnology, making it possible to derive maximum benefit from the potential that biotechnology has to offer, while minimizing the possible risks to the environment and to human health.

The Objective of the Protocol is to contribute to ensuring an adequate level of protection in the field of the safe transfer, handling and use of living modified organisms resulting from modern biotechnology that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health, and

²⁴ Cartagena protocol on biosafety to the convention on biological diversity,2000.

²⁵ *Supra* note 24 at pg. 2

specifically focusing on transboundary movements.²⁶ The parties to the protocol shall ensure that the development, handling, transport, use, transfer and release of any living modified organisms are undertaken in a manner that prevents or reduces the risks to biological diversity, taking also into account risks to human health.²⁷ They are also encouraged to take into account, as appropriate, available expertise, instruments and work undertaken in international forums with competence in the area of risks to human health.²⁸

2.1.6 International Seed Testing Association (ISTA)

ISTA was founded in 1924, with the aim to develop and publish standard procedures in the field of seed testing. ISTA is inextricably linked with the history of seed testing. With member laboratories in over 70 countries world wide, ISTA membership is truly a global network.

Its mission is to develop, adopt and publish standard procedures for sampling and testing seeds, and to promote uniform application of these procedures for evaluation of seeds moving in international trade.²⁹ Only registered seed companies can import/export seed. All imported seed must be accompanied by an orange certificate of the international Seed Testing Association (ISTA) and for some crops, there must be proof of field inspection. All imported/exported seeds are subject to laboratory quality checks and must meet the gazetted minimum standards.

²⁶ *Ibid* at Article 1

²⁷ *Ibid* at Article 2(2)

²⁸ *Ibid* at Article 2(5)

²⁹ <<http://www.seedtest.org/en/home.html>> (accessed on 25th of January,2005).

2.1.7 The Union for the Protection of New Varieties of Plants (UPOV)

The International Union for the Protection of New Varieties of Plants (UPOV) is an intergovernmental organization with headquarters in Geneva (Switzerland). UPOV was established by the International Convention for the Protection of New Varieties of Plants. The Convention was adopted in Paris in 1961 and it was revised in 1972, 1978 and 1991. The objective of the Convention is the protection of new varieties of plants by an intellectual property right where there is recognition of the intellectual property rights of plant breeders in their varieties on an international basis.³⁰

2.2 Kenya's regulatory framework

International exchange of trade/movement of plants and plant products is crucial in the quest for adequate food production and supply. There being need to ensure that foreign injurious pests, diseases and noxious weeds which do not exist in Kenya are not introduced in the country, Kenya has a very stringent plant introduction and certification procedures since 1930's when the plant quarantine services were started in East Africa. Initially Plant quarantine services were conducted under the Ministry of Agriculture. In 1996, a state corporation (Kenya Plant Health Inspectorate Service, KEPHIS) was established to vigilant for the Government, business sector, scientists and farmers on all matters related to plant health and quality control of agricultural inputs and produce. Through the activities of KEPHIS, the introduction of plant pests, diseases and noxious

³⁰ <<http://www.upov.org>> (accessed on 25th of January,2005).

weed into Kenya is prevented or delayed. The Plant Protection Act (CAP 324), the suppression of Noxious weeds (Cap 325) and the Agricultural produce (Export) Act (Cap 319) provide the legal framework through which the authority carries out phytosanitary regulation service. The imported material must be declared to a KEPHIS Plant Inspector on arrival, together with a phytosanitary certificate issued by the country of origin, indicating adherence to the specifications on the Kenya Plant Import Permit. Importers who intend to use the plant materials for commercial production must obtain consent from the variety breeder. Exporters must have the plant material inspected to ensure compliance with all phytosanitary and other requirements of the importing country.

The Plant Breeders' Rights Legislation became operational in 1975 under the Seeds and Plant Varieties Act (Cap 326) of 1972. The Act was revised in 1991 to conform with developments in the liberalized seed industry. The implementing regulations, the Plant Breeders Rights Regulations were gazetted on 25 November 1994. Consequently, the Plant Breeders Rights Office, under the Kenya Plant Health Inspectorate Service, was established to implement the Act and the regulations.³¹ As outlined in the Seeds and Plant varieties Act (Cap 326) this provides for the protection of newly bred/ discovered plant varieties based on their distinctness, uniformity and stability. Plant Breeders' Rights (PBRs) are rights granted by the State to protect the proprietary rights of plant breeders with regard to breeding and discovery of new plant varieties. A grant of Plant Breeders' Rights for a new plant variety gives the holder the exclusive right to produce for sale and to sell propagating material of the variety. In the case of vegetatively propagated fruit and ornamental varieties, Plant Breeders' Rights give the holder the additional exclusive right

³¹ <<http://www.kephis.org>>(accessed on 25th of January,2005).

to propagate the protected variety for commercial production of fruit, flowers or other products of the variety. The holder of a grant of Plant Breeders' Rights may license others to produce for sale and to sell propagating material of the protected variety. Holders of rights commonly collect royalties from commercialization of their protected varieties.

The Act also governs a set of activities ranging from seed grower registration, field inspection, processing, laboratory tests, marketing, post control and post certification. The production of seed is done by selected farmers in accordance to specified guidelines. Field inspection is undertaken to ensure the variety is not contaminated genetically or physically, remains true to type and is not diseased during production.

2.3 Conclusion

It is evident that standards and technical regulations are an increasingly important factor influencing exports from Kenya. On the one hand, the incidence of standards and technical measures has increased over time, particularly in developed countries. On the other, the predominant exports from developing countries, including industrial goods and food and agricultural products, are subject to a wide range of technical requirements. Furthermore, these requirements are tending to become stricter over time.³² Most developing countries do not have sufficient resources and expertise to meet all the exacting standards required by customers in industrialised countries for food products.

³² Spencer Henson, Kerry Preibisch, Oliver Masakure, “Review of Developing Country Needs and Involvement in International Standards- Setting Bodies,” Centre for Food Economics Research, Department of Agricultural and Food Economics, The University of Reading.

These standards not only apply to the safety of the products but also to its appearance, packaging and labelling of contents.

Meeting these standards requires a long list of systems including quality control at the farm level and in processing, laboratory facilities, access to clean inputs such as water and packaging materials, controlled temperature storage facilities and testing facilities and certification systems. If customers in Kenya are not confident about the standards of any of these facilities they are likely to demand additional testing at the port of discharge and may reject any defective goods. This adds significant costs and uncertainty to any transaction.

Given that Kenya typically implements qualitatively or quantitatively lower SPS standards than developed countries, in principle the SPS Agreement should help to facilitate trade from Kenya to developed countries by improving transparency, promoting harmonisation and preventing the implementation of SPS measures that cannot be justified scientifically. Much of this is dependent, however, on the ability of Kenya to effectively participate in the Agreement. The Agreement itself tries to facilitate this by acknowledging the special problems that Kenya can face in complying with SPS measures and allowing for special and differential treatment:

- Members are instructed to take account of the special needs of developing countries, and in particular least-developed countries, in the development of SPS measures.
- To maintain opportunities for exports from developing countries, where the appropriate level of protection permits scope for the phased introduction of new

SPS measures, longer periods should be given for products that are of special interest to developing countries.

- The SPS Committee is permitted to grant developing countries time-limited exemptions from obligations under the Agreement, taking into account their financial, trade and development needs.
- Members should encourage and facilitate the active participation of developing countries in international organisations such as Codex Alimentarius, OIE and IPPC.
- Members are encouraged to provide technical assistance to other members, in particular developing countries, for the purpose of allowing such countries to meet the level of SPS protection required in their export markets.

Further, the Agreement permits additional time to developing countries to implement all or some of its provisions. Developing countries are permitted an additional two years to comply with all the provisions except those associated with transparency. The least developed countries were permitted an additional five years to comply with the Agreement in its entirety.³³

Contracting Parties to the International Plant Protection Convention (IPPC) agree to promote the provision of technical assistance to other Contracting Parties, in particular developing countries, with the objective of facilitating the implementation of the Convention, improve the effectiveness of their National Plant Protection Organisations

³³ Center for food Economics Research (April 2000). Impact of sanitary and phytosanitary measures on developing countries, Spencer Henson et al, department of agricultural and Food economics, University of Reading.

(NPPOs), and increase their potential to benefit from safe trade. A key element of the work programme of the IPPC Secretariat is to facilitate technical assistance, whether provided bilaterally, through the IPPC Secretariat or other appropriate organizations. However, the budget available to the secretariat for technical assistance is limited and there is great reliance on additional funding from developed country Contracting Parties.³⁴

Developing country members of OIE pay lower annual contributions according to the size of their economy. OIE also pays for delegates to attend the annual meeting of the International Committee in May. There are translations into various languages at the IC meetings, and OIE will pay to bring in other translators. There is also assistance from the Regional Commissions. France, Italy, Japan, China and the EC contribute to the African Regional Commission through the PACE programme. The Regional Offices are not paid by the Central Bureau, but the EC funds the African office and Argentina pays for the Latin American office. OIE, however, does not offer technical assistance to developing countries and there is no policy committee dealing specially with developing.

FAO and WHO provide assistance to Kenya to enable them to participate and take advantage of the Commission's work. In the case of FAO, for example, this is provided through the Technical Co-operation Programme (TCP). Assistance to Kenya can take a variety of forms including training and capacity building. For example, computers and other facilities for electronic communication to enable communication with the Codex Secretariat can be provided under the TCP. Furthermore, FAO plays a role in establishing and strengthening food control agencies, including training in the necessary technical and

³⁴ *Supra* note 33 at pg.117

administrative skills, as well as developing and publishing training manuals on food inspection and quality and safety assurance (e.g. Hazards Analysis and Critical Control Point, HACCP). The Commission works to establish and strengthen national food control systems in developing countries. This often involves conduction workshops and training courses to transfer information, knowledge and skills associated with food control; strengthening laboratory analysis and food inspection capabilities; and providing training in all aspects of food control. The Commission also publishes manuals and texts on food quality control and safety systems.³⁵

Assistance with the difficulties of setting up and administering systems is also available from a number of international development organisations, such as the World Bank and Commonwealth Secretariat, overseas development departments of governments of industrialised countries and NGOs.

Although this assistance may go a long way to help Kenya meet its obligations under the international conventions, Kenya may still lack the necessary resources and experienced personnel to run these systems effectively and to fully participate in the functions of the international norms. In the next chapter, we look at the role and effectiveness of the main national enquiry point in Kenya (KEPHIS) and the challenges it faces.

³⁵ *Supra* note 33 at pg.110

CHAPTER THREE

CHALLENGES OF THE REGULATORY FRAMEWORK (KEPHIS)

3.1 HISTORICAL PERSPECTIVES

3.1.1 Evolution of the National regulatory framework

Early in the development of agriculture in Kenya, the Government realised the negative impacts caused by disease, noxious weeds and pests to agricultural productivity. In 1900s, a National Agricultural Laboratory (NAL) was established in Nairobi to conduct investigation and characterization of major diseases, pests and noxious weeds that were of economic importance. At the same time it was also recognized by the government that soil fertility had important influence on the performance and final production of both cash and food crops. In solving these production constraints, agriculture productivity increased leading to surplus products which were then available for export. The export market was very competitive hence Kenya's agricultural products destined for export had to be of high quality and free from disease and noxious weeds. It became the policy of the government to inspect and grade all agricultural produce destined for export.¹

¹ Kenya Plant Health Inspectorate Service, Strategic Corporate Plan,(2001-2006) Pub. August 2001.

The legal framework for regulatory services in agriculture were developed and enforced fairly early in the country. In 1923, the Agricultural Produce (Export) Act (Cap 319) was enacted. It provided for grading and inspection of agricultural produce to be exported. In 1937, the Plant Protection Act (Cap 324) was enacted to make better provision for the prevention of the introduction and spread of diseases destructive to plants. Around that period (1931) a Plant Quarantine Station was established at Amani, Tanzania to provide quarantine facilities for Management of Disease in imported/ exported agricultural produce for East Africa. This facility was later transferred to Muguga in 1951, and managed by the East African Community.

With the break up of East African Community in 1977, the management of the facility was passed to Kenya. In 1945 the Suppression of Noxious Weeds Act (Cap 325) was enacted to provide for suppression of noxious weeds. In 1955 the Agricultural Act (Cap 318) was enacted in 1957. It was revised, expanded and renamed Seeds and plant Varieties Act (Cap 326) in 1975. This act was to regulate transactions in seeds including testing and certification of seeds and grant of propriety rights to persons breeding or discovering new varieties of plants. The fertilizer and Animal Foodstuffs Act (Cap 345) was enacted in 1967 to regulate importation, exportation and manufacture of fertilizer and animal foodstuffs. Finally, the legal framework for Agricultural Regulatory Services was further strengthened in 1983 when the Pest Control Products Act (Cap 346) was enacted to regulate the importation, exportation, manufacture, distribution and use of products for the control of pests.²

² *Supra* note 1 at pg.4

3.1.2 Establishment of the Kenya Plant Health Inspectorate Service (KEPHIS)

As the government re-organised its administrative systems for effective service delivery, the responsibilities of administering the various regulatory Acts of parliament governing the agricultural sector were fragmented. Several institutions were handling different aspects of these functions. This led to duplication of roles and in some cases there were conflicts of interests. As a result, the enforcement mechanisms intended to regulate the quality control of inputs for agricultural production, import and export of seeds and plant materials, release and protection of new plant varieties as well as general aspects of plant health were greatly weakened. In order to consolidate regulatory acts and strengthen their enforcement mechanisms, Kenya Plant Health Inspectorate service (KEPHIS) was established under the provisions of the State Corporations Act (Cap 446)³ following recommendations jointly prepared by the then Ministry of Agriculture, Livestock development and marketing, and Ministry of Research, Science and technology. Its activities were subsequently consolidated for the improvement of the quality status of agricultural inputs, health of planting and breeding materials for use in agriculture.⁴

³ Legal Notice No.305 of 18th October 1996

⁴ *Supra* note 1 at pg. 16

3.2 Mandate of KEPHIS

KEPHIS is specifically mandated to perform these functions⁵:

- coordinate all matters relating to crop pests and disease control;
- establish service laboratories to monitor the quality and levels of toxic residues in plants as well as their soils and produce;
- advise the Director of Agriculture on appropriate seeds and planting materials for export and import;
- administer Plant Breeders Rights in Kenya and be in the liaison office for the International Union for the Protection of New Varieties of Plants (UPOV), and be the custodian of the Plant Breeders rights register;
- undertake inspection, testing, certification, quarantine control, variety testing and description of seeds and planting materials;
- undertake grading and inspection of plants and plant produce at the ports of entry and exit;
- award scholarships for the study of Plant health services or any other related subject which the Board of Directors considers to be of benefit to the study of plant health;
- enforce standards for good husbandry and the control of pests and diseases in national irrigation schemes in conjunction with the National Irrigation Board;
- develop and implement standards on both imported and locally produced seeds;

⁵ Kenya Plant Health Inspectorate service, Annual Report(July 2002-2003)

- approve all importation and exportation licenses for plants and seed issued by the Ministry responsible for Commerce and Industry before such importation is implemented;
- implement the national policy on the introduction and use of genetically modified plant species, insects and micro-organism in Kenya;
- establish posts at convenient locations for quarantine, inspectorate and quality control of fertilizer and seed, and monitor agricultural inputs and their environmental effects;
- establish strong linkages and collaboration with various local and international governmental organizations so as to execute its tasks more professionally.

3.3 Challenges

This government agency has three basic roles⁶:

- (i) implementing Kenya's laws on plant variety protection,
- (ii) testing and monitoring the quality of seeds and fertilizers and registering companies engaged in their distribution, and
- (iii) phytosanitary management.

KEPHIS is active in the quarantine of germplasm, in the inspection of produce which is imported or exported, the control of trade in endangered species, and in the implementation of national policies related to crop biotechnology. In the past year or so KEPHIS has become a more active participant in the International Plant Protection

⁶ <<http://www.kephis.org>>(accessed on 12th of February,2005).

Convention, although financial limitations have inhibited it becoming increasingly involved in relevant standards-setting processes.

KEPHIS implements a system of phytosanitary and quality checks and issues required phytosanitary certificates.⁷ This function was previously done at the airport by staff of the Ministry of Agriculture. Now a team of 22 staff go to the loading areas of the leading flower and fresh produce companies as well as service the freight depots in and around the airport area where many of the smaller exporters pack and palletize their product.⁸ The inspections are done visually with the aid of magnifying glasses. Depending upon the particular product-and past. Experience with particular exporters inspections will typically involve a sampling of between two and ten percent of the exported product. The proportional sampling is increased when there are apparent problems with particular products or suppliers. During the past two years, actual rejections or retentions of fresh vegetables have been uncommon and when this occurs it is typically for very small quantities. KEPHIS charges an inspection fee for its services, yet these do not cover the full costs of this operation. In other cases, imports may not be prohibited. However, certain restrictions may be put in place, for example border inspection requirements, that effectively bar imports because of the cost and/or time involved.⁹ This is illustrated by the Case below.

⁷ In 2001 it issued some 48,906 phytosanitary certificates for fruits and vegetables. KEPHIS now uses a special type of paper which prevents the duplication and forging of such certificates.

⁸ Steven Jaffee, *From challenge to opportunity: The transformation of the Kenyan fresh Vegetable trade in the Context of Emerging Food Safety and Other Standards*, May 2003.

⁹ Center for food Economics Research (April 2000). *Impact of sanitary and phytosanitary measures on developing countries*, Spencer Henson et al. (eds) department of agricultural and Food economics, University of Reading.

Fresh fish exports from East Africa to the EU¹⁰

Exports of fish from East Africa, mainly originating from Lake Victoria, to the EU have grown considerably through the 1990s and become an important element of agricultural and food exports, as well as the means of livelihood for a considerable number of predominantly small-scale fishermen. For example, in the case of Tanzania, fish and fish product exports were around 48,000 tonnes in 1997 and accounted for 10.2 per cent of total exports by value.¹¹

In December 1997, the EU imposed restrictions on imports of fish from a number of countries bordering Lake Victoria, namely Tanzania, Kenya, Uganda and Mozambique. These restrictions reflected concerns about sanitary standards and the control systems in place in these countries. These restrictions were introduced in two phases.

At the end of 1996, Salmonella was detected in imports of fish from the region and subsequently the EU undertook inspection visits. These concluded that the controls in place were inadequate to guarantee that the EU's hygiene requirements¹² were being complied with and in March 1997 imports were subject to Salmonella testing at the port of entry to the EU. These tests were at the importer's expense.

Further inspection visits were held in late 1997 at a time when there were elevated levels of Cholera in the region. Sanitary conditions in the supply chain were judged to have not improved and, in particular, the 'competent authority' in Tanzania, Kenya, Uganda and Mozambique was not considered to have adequate controls to ensure that the EU's

¹⁰ *Ibid* at note 9

¹¹ *Ibid* at note 9

¹² Laid down under Directive 19/493/EEC of 2000.

hygiene standards were being met. Subsequently further restrictions were imposed, involving testing at the port of entry to the EU for *Vibrio cholera* and *Vibrio parahaemolyticus*. Given that these tests took five days to perform, in practice these restrictions acted to preclude exports of fresh fish to the EU.¹³

These restrictions were lifted in mid-1998 following further inspection visits that indicated that standards of hygiene in the supply chain had improved and the 'competent authority' had implemented appropriate systems of control. It is estimated, in the case of Tanzania for example, that the incomes of fishermen, who had become dependent on exports to the EU, decline by 80 per cent during the period of the second round of restrictions.

In certain cases, exports may be required to meet the same SPS standards as domestic suppliers within the EU, but costs of compliance are high. As a result, developing country exporters may require long periods of time to comply. In other cases, the SPS standards laid down by developed countries are incompatible with the normal methods of production in developing countries. In this case, the costs of compliance act as an absolute barrier to trade; whole systems of production and distribution may need to be changed in order to comply.

KEPHIS is in the process of upgrading its laboratory facilities and is seeking to have it attain full accreditation.¹⁴ Investments of some Ksh.35 million (i.e. \$500,000) have been made in equipment and there is on-going collaboration with the South African National

¹³ *Ibid.* at note 8

¹⁴ <<http://www.kephis.org>>(accessed on 12th of february,2005).

Accreditation Services to train staff and to meet other accreditation requirements.¹⁵ At present, KEPHIS is doing relatively few pesticide residue tests itself with Kenyan exporters generally commissioning private labs at home or abroad to carry out this testing. It is important that KEPHIS be recognized by the EU Commission as a 'competent authority' for phytosanitary and quality inspections in order to minimize the likelihood of disruptions in the flow of Kenyan fresh produce through European entry points.

The Analytical Chemistry Laboratory (ACL) analyses pesticide formulations and residues in a wide range of agricultural produce, soil, water and animal tissues. It also checks formulations of commercial pesticides. Exporters of agricultural produce to overseas markets utilize the facility to ensure compliance with importing country's maximum residue levels (MRLs). The facility is handy in detection of environmental contamination for corrective advise.

In addition agricultural inputs such as fertilizers, foliar feeds, manures, soils and irrigation waters are analysed. Determination of the quality of agricultural inputs at entry, outlets, bulking and manufacturing points is undertaken alongside educating end users on the importance of quality products, safe use and legal rights pertaining to quality of inputs.¹⁶

The Minister may, by order, prohibit, restrict or regulate the importation and exportation of any plants and the soil, packages, coverings or wrappings thereof and of any article or class of articles, whether of a nature similar to plants or not, and of any animals or insects

¹⁵ Steven Jaffee, From challenge to opportunity: The transformation of the Kenyan fresh Vegetable trade in the Context of Emerging Food Safety and Other Standards, an article of May 2003.

¹⁶ <<http://www.kephis.org>> (accessed on 15th of March,2005).

likely to infect any plant with any pest or disease.¹⁷ The minister may

- a) authorize or require the inspection before importation or exportation of any plant or any article likely to infect any plant with any pest or disease, and the grant of a certificate as to the result of any such inspection;
- b) direct or authorize the disinfection or treatment of any plant, and of any article likely to infect any plant with a pest or disease;
- c) authorize the immediate destruction without compensation of any imported plant or article or any plant or article or any plant or article intended to be exported which on inspection appears to be infected with any pest or disease where, in the opinion of an inspector, disinfection is impracticable or will not be a complete safeguard, or delay caused by disinfection would give rise to the risk of the introduction or spread of any pest or disease;
- d) direct or authorize the disinfection or fumigation of any vehicle, vessel or aircraft suspected of harbouring any pest or article likely to infect any plant with disease;
- e) prohibit the importation of plants or classes of plants except at specified ports or places of entry;
- f) direct or authorize the detention of classes of imported plants in any specified place, and prescribe the precautions to be observed during such detention;
- g) direct or authorize the detention of any plant, or any article likely to infect any plant with any pest or disease, which is intended to be exported, and prescribe the precautions to be observed to prevent the risk of the introduction or spread of any pest or disease by such plant or article;

¹⁷ The Plant Protection Act, Cap 324 Laws of Kenya. Section 8(1)

- h) prohibit or control the movement of plants or classes of plants likely to be infected with any pest or disease into or within any specified place or area.

The need for detailed pest risk analyses (PRAs) has posed some constraint on Kenya's trade, although this has been in relation to trade with South Africa, the United States and Japan rather than with the European Union. KEPHIS has a small team focused on this work and has gathered information required for PRAs for several crops including avocado, pineapple, raspberries, cucumber, courgette, and aubergine, although most of these assessments were done in a restricted geographical area. Several exporters have indicated an interest in selling specialty vegetables to certain markets in the United States, yet the prospective cost of a detailed pest risk analysis has been a deterrent. The PRA for any crop would require information on the prevalence of particular pests and diseases within Kenya, the yield reducing effects of these, the locations within the country which are pest free, and the control measures that are being undertaken. While the more limited PRAs which have been carried in Kenya have tended to cost about \$7,500, one exporter estimates a cost of \$25,000 to 30,000 to meet US requirements.¹⁸

Exporters must have the plant material inspected to ensure compliance with all Phytosanitary and other requirements of the importing country. it's worth noting that Kenya's horticulture has especially grown in the past few years. To ensure Kenyan plants and plant products remain competitive in the international market, producers and exporters must adhere to:

- strict hygiene practices and principles on food safety, right from land preparation to first customer

¹⁸ *Supra* note 9 at page 59

- have proper documentation of all actions, from land preparation (including names of contract farmers/growers) to client.
- Have documentation of all pesticides used (the pesticides must be approved by PCPB) their rates and application levels, safety provisions in application, right from land preparation to post harvesting and the final analytical checks of the produce.
- Have proper checking in the field and pack-houses to keep them free of insects and pathogens before presenting the produce for inspection.¹⁹

The Seed and Plant Varieties Act (Cap 326) of the laws of Kenya also governs a set of activities ranging from seed grower registration, field inspection, processing, laboratory tests, marketing, post control and post certification. The production of seed is done by selected farmers in accordance to specified guidelines. Field inspection is undertaken to ensure the variety is not contaminated genetically or physically, remains true to type and is not diseased during production. After the harvest, the seed is processed to remove the broken, diseased or immature seeds, inert material and weed. Laboratory tests are conducted to determine purity, germination capacity, moisture content and health status before the seed is graded into different sizes, treated with protective chemicals, packaged, labeled and sealed. Sealing is done in such a way that the seed can't be removed or changed without damaging the seal and label of the container beyond repair. Only seed meeting minimum set standards is approved for sale. All seed companies in Kenya must be registered with KEPHIS. The companies are required to appoint agents and stockists

¹⁹ *Supra* note 16 at pg. 56

with knowledge, ability and facilities to maintain quality and viability of seeds supplied for sale. The agents and stockists must also be licensed by KEPHIS. The companies must keep records of supplies to the agents and stockists who, in return, must issue receipts for all seeds sold out.²⁰

The minister may by notice in the Gazette declare a plant to be a noxious weed in any area, which shall be specified in the notice, and which may consist either of the whole of Kenya or of one or more districts or portions thereof.²¹ However we notice that the last legal Notice was filed in 1977. Only nine noxious weeds in the whole of Kenya have been declared. There have been numerous other weeds in existence that have not been declared. For example the Prosopis which is widely affecting semi arid areas especially Tana River district. Every person responsible for land within a declared area shall report to an inspector, to a District Commissioner or to the Director the Presence of any noxious weed. He shall also clear the noxious weed, or cause it to be cleared from that land.²²

Another problem affecting the organizational framework of KEPHIS is the dispersal of a wide range of institutions with no statutory powers. This has contributed to the ineffective implementation of the law and has been further complicated by the fact that some organizations such as the Kenya Wildlife service and the Public Works Ministry tend to be developers of land and thus face an inherent conflict arising from it, while at the same time regulating the developments of others.²³ The law should be reformed to streamline regulatory responsibility by requiring that development agencies should not at

²⁰ <<http://www.kephis.org>> (accessed on 15th of March,2005).

²¹ Suppression of Noxious Weeds (Cap. 325) section 3

²² Ibid at section 4(1) (a) & (b).

²³ Personal Interview with Dickson Jilo Martim, Personal Assistant at the Ministry of Lands and Housing on 17th march, 2004.

the same time exercise regulatory functions over KEPHIS. In addition to providing a credible regulatory agency for quality agricultural inputs and produce, KEPHIS should jealously protect its independence and integrity from people and organizations out to hijack its agenda for their own ends. Appointed inspectors should ensure our leaders and the public are well versed with the relevant phytosanitary laws to avoid disruptions in the flow of trade.

The minister may make rules to provide for certain matters relating to agricultural produce intended for export.²⁴ For example, the inspection of animals the produce of which is intended for export, and the inspection of the premises in which animals are slaughtered, or in which produce is prepared, manufactured or otherwise dealt with,²⁵ the percentage which shall be inspected in any one consignment²⁶, the temperature at which conveyance by rail and shipment of the produce shall take place²⁷ and the circumstances under which different kinds of produce may be accepted or rejected, and degraded, regarded or rebranded, by an inspector after examination and inspection.²⁸

A major issue to be contended with is the competence of the Minister in charge. There is an assumption that he is qualified, skilled and knowledgeable in all matters relating to agricultural produce.

Under the leading Acts with regard to phytosanitary services, KEPHIS has not been given any role. Under the Act²⁹

“No person shall export, or cause or permit to be exported, or attempt to export, any

²⁴ The Agricultural produce(Export) Act. Section10(1).

²⁵ *Ibid* at section 10(1) (a).

²⁶ *Ibid* at Section 10(1) (f)

²⁷ *Ibid* at Section 10(1) (g).

²⁸ The Agricultural produce(Export) Act. Section10(1) (i)

²⁹ *Ibid* at note 27.

agricultural produce for which rules are made unless and until such produce has been inspected, or inspected and branded, in manner prescribed by such rules.”³⁰

The control here falls under the Ministry of Agriculture where the inspector is a person generally of specifically designated by the Director of Agriculture to examine or grade or both examine and grade agricultural produce intended for export or to examine animals the produce whereof is intended for export.³¹

A person seeking to export from Kenya may have difficulties on what requirements he ought to meet. This is due to the fact that export requirements are governed by a wide range of laws and regulatory arrangements. One law should come in to consolidate all the scattered laws concerning export and phytosanitary management.

KEPHIS should be recognized by the EU Commission as a 'competent authority' for phytosanitary and quality inspections in order to minimize the likelihood of disruptions in the flow of Kenyan fresh produce through European entry points. One law should provide for the establishment of a one-stop office to cater for all the needs of the exporter. This can be done by establishment of a body corporate to provide for a much shorter, more comprehensive and much more efficient means of evaluating export requirements.

Another significant and on-going process relates to the development of a national standard or code of practice for horticultural industry. This development has its origins in the mid-1990s when a group of farmers and companies operating around Lake Naivaisha formed a task force and created a code of practice to better ensure the sustainable use of the lake for irrigation purposes and the minimization of chemical run-off. In subsequent years, the Kenya Flower Council developed a more elaborated code of practice covering

³⁰ *Ibid* at section 3.

³¹ *Ibid* at section 2.

environmental, social and other dimensions. This has since been refined and an effective system put in place for grower audits and certification. The FPEAK developed its own code of practice, yet this proved to be a large and unwieldy protocol which was not effectively recognized by the industry or overseas clients.³² Within the last couple of years, there have been joint efforts to establish a national standard and these can to fruition with the approval, in April 2002, of the Code of Practice for the Horticultural Industry, by the Kenya Bureau of Standards. This "prescribes the requirements for the responsible and safe production of horticultural products, both edible and ornamental" It is ostensibly geared toward all horticultural production and marketing in Kenya, although many references are made to exporters and its most immediate relevance is for export-oriented supply systems. The scope of the code is very broad, encompassing features of Good Agricultural Practices, product quality management, hygiene and food safety management, supply chain management and traceability, environmental protection, and fostering the safety and well being of workers in the industry.³³

Many of the provisions of the code-especially those related to worker rights and safety and to environmental management are linked to specific requirements under existing Kenyan laws. Other provisions-especially those related to quality management, pack house operations, and product traceability are not grounded in law, but simply include guidelines which can be construed as good practices and which may or may not be required by downstream customers. Interestingly, the code explicitly brings in the notion of 'due diligence' and implies that it will be necessary for grower/exporters to maintain an extensive array of records to demonstrate and prove compliance with provisions of the

³² Steven Jaffee, From challenge to opportunity: The transformation of the Kenyan fresh Vegetable trade in the Context of Emerging Food Safety and Other Standards, May 2003.

³³ Kenya Bureau of Standards(2002) Kenya Standard: Code of practice for the Horticultural industry.

code.³⁴

This national Code thus embodies features of the British Retail Consortium (BRC) and EUREPGAP codes and a blend of other legal and private market requirements. While it would be desirable for firms to engage in the good practices outlined in the Code, what are the implications of the Code as an enforceable standard? It is indicated that the Code will 'provide the basis for the registration of horticultural produce exporters'. However, the majority of the existing smaller exporters do not have the management systems in place to comply and document compliance with many planks of the code. Only the largest six to eight companies could probably be able to fully comply with the code, yet these are essentially the same companies which are already being audited for various private codes.

As a practical matter, will the national code simply serve as a set of useful guidelines or will it in fact be enforced as a standard? If the latter, who will undertake the inspections and enforcement? No official agency is especially well positioned to do the auditing. KEPHIS has the appropriate technical staff yet these are not located in rural areas and that organization is already facing major challenges in fulfilling its mandate to do phytosanitary and other services.³⁵ HCDA does not have a suitable technical staff and is likely also to undergo another major restructuring in the near future. KBS has only limited agro-related staff and these are not located in rural areas.

³⁴ *Supra* note 11 at pg. 33

³⁵ If it were decided that KEPHIS would oversee the implementation of the code, that organisation's capacity- both in terms of personnel and equipment-would need to be enhanced to enable it to carry out the necessary inspections.

In Kenya's flower industry a system of local auditors was created with the assistance of international auditing specialists. Yet this was relatively easier to do in that industry because of its geographical and firm-level concentrations of production. This is more challenging in the fresh produce sector, even if there is not the intention to audit the vast realm of production geared toward the domestic market. Fruit and vegetable production for export remains quite dispersed geographically.³⁶ An initial effort is being made to mimic the cut flower audit system. In 2002, ten people were trained by Bureau Veritas as fruit and vegetable system auditors, having been trained in modules dealing with ISO 9000 and 14000, with SA 8000 and with the national code of practice itself.

It remains uncertain whether this national code will be recognized by international buyers and thus a value placed on obtaining certification.³⁷ Some Kenyan stakeholders would like to see the national code recognized by EUREP as being broadly equivalent to the EUREPGAP, thus enabling growers to obtain certification locally without having to resort to relatively expensive third party auditors.

³⁶ Humphrey, John (2002) The Kenya Fresh Vegetable Export Sector. On file with author.

³⁷ Other external codes have been criticized as not being pertinent to industries in which smallholder farmers and/or small traders play a significant role. The Kenyan code provides some flexibility to accommodate the constraints facing such participants. However, in some regards its specifications are no more relevant than some external codes. For example, it specifies that all agreements with growers will be written and legally binding. It suggests that all growers should have environmental plans and that produce temperature, humidity, and air composition should be maintained and documented at all times.

3.4 Assessment of the Challenges³⁸

Other general identified challenges faced by developing countries, Kenya included are sub-divided into six categories, which serve to distinguish between short and long term resource issues:

3.4.1 Costs of participation³⁹:

Developing countries face considerable costs associated with participation in international standards organisations that progressively increase in line with the stages of participation. Indeed, such costs are considered to be a constraint on participation in international standardisation activities even in developed countries such as the UK.

Important items in this respect include the following:

- **Membership fees**

Although the membership fees of most international standards organisations are tiered according to, amongst other things, national income, the level of such fees remains high for many developing countries, in particular small and/or the least-developed countries.

- **Travel and subsistence**

The costs of travel and subsistence associated with attendance at general and technical committee meetings can be considerable, particularly in view of the fact that multiple meetings may be held in the process of establishing a single standard. Many developing countries do not have the resources available to fund attendance at a large proportion of

³⁸ Spencer Henson, Kerry Preibisch, Oliver Masakure, "Review of Developing Country Needs and Involvement in International Standards- Setting Bodies," Centre for Food Economics Research, Department of Agricultural and Food Economics, The University of Reading.

³⁹ *Ibid* at note 23

such meetings, exacerbated by the fact that national standards bodies themselves tend to be relatively poorly funded. Furthermore, the fact that most international standards-setting organisations are based in Europe and the vast majority of technical meetings are held in developed countries means that developing countries may actually face greater travel and subsistence costs per delegate than the average developed country.

The considerable amount of time required to prepare for and attend meetings at which standards are developed has a high opportunity cost. This is exacerbated by the fact that, because of funding constraints, staff may be fully employed with the internal work of national standards bodies.

- **Opportunity cost of time**

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3.4.2 Resource-based constraints

The scientific and technical resource base of developing countries can be a severe constraint to their effective participation in the setting of international standards. Many developing countries lack basic scientific and technical infrastructure, for example accredited laboratories and other testing facilities, access to scientific and technical journals and books, and research capacity; in particular advanced equipment. As a

consequence, they may be unable to provide scientific and technical data to support their requirements in negotiations as part of the standards-setting process. More broadly, developing countries may be constrained by limitations in their basic communications infrastructure, for example access to good quality telephone, facsimile and e-mail systems. Furthermore, it may mean developing countries are disadvantaged by movements to new forms of communication, for example use of e-mail and teleconferencing, which may be introduced to facilitate their participation. Indeed, in the short to medium term, the increased use of new communication technologies may actually serve to increase the resource costs of participation in international standards setting organisations.⁴⁰

3.4.3 Human capital resources

In addition to their physical resource base, developing countries are also constrained from active participation in international standards-setting by the availability of human capital resources. This includes the availability of personnel with the requisite scientific and technical expertise, knowledge and experience of the standardisation process, skills in the working languages of international standards-setting organisations and or motivation to ensure national requirements are communicated effectively. This is exacerbated by the level of funding typical of national standards bodies in many developing countries, which means that labour resources in general, let alone access to personnel with the required skills, are a major constraint.⁴¹

⁴⁰ *Ibid* at note 23

⁴¹ *Ibid* at note 23

3.4.4 Administrative structures in developing countries

A further problem faced by a number of developing countries is the nature of administrative structures within government, and in relations with the private sector, non-governmental organisations and other interest groups, which constrains their ability to understand and react to proposals for new standards. On the one hand, it may take extended amounts of time to assess the implications of proposed new standards relative to national interests. Certainly the amount of time taken is typically longer than in developed countries, where national systems of standards-setting are tend to be more fully developed and lines of communication with interested parties are more clearly defined. On the other, developing country governments may be less able and or willing to consult the private sector, non-governmental organisations and other interest groups, and, as a consequence, may not be fully aware of the implications of proposed standards in the national context.

3.4.5 Kenya's attitude

The participation of developing countries is also constrained by a range of attitudinal factors, both on the part of developed countries and developing countries themselves. Firstly, developed countries may be sceptical about the scientific and technical abilities of developing countries. This can translate into a reluctance to allow developing countries to play an active role in the institutions of international standards setting organisations, for example by chairing technical committees. Secondly, developing countries may lack confidence in their ability to provide the scientific and technical knowledge and experience to play a prominent role in standards-setting. Furthermore, because of their

limited role to date, they may lack 'ownership' of the standard-setting process, seeing themselves more as 'standard-takers' than 'standardmakers'. Indeed, developing countries can become intimidated by the capacity of developed countries relative to their own capabilities and withdraw from the standards setting process rather than negotiate on the basis of what they can actually achieve.

3.4.6 Administrative structures and procedures of international standards-setting organisations

A final factor limiting the involvement of developing countries in international standards-setting organisations is their established structures and procedures. In a number of these organisations, administrative roles change relatively infrequently and/or involve considerable resource inputs from members that take on such responsibilities. Many of these norms were established at the same time as the organisation, when developed country members were dominant. A good example is Codex. Although the secretariats of General Subject and Commodity Committees are re-appointed by the Commission every two years, only one Committee has ever had a change of secretariat. As a consequence, high income OECD countries hold most secretariats (88%) and there is little scope under the current administrative arrangements for greater developing country participation.⁴² KEPHIS should be recognized by developing countries as a 'competent authority' for phytosanitary and quality inspections.

⁴² *Ibid* at note 23

3.4.7 Public awareness

In Kenya we have a situation where the public is uninformed on regulations governing phytosanitary standards and their implementations in Kenya. There is need to review and amend the relevant Acts and regulations to include provisions for public awareness education thus enhance the provision of quality service.

3.5 Conclusions

The changing regulatory environment within Europe has raised concerns that developing countries will be unable to maintain let alone continue to expand their trade in high-value horticultural products. It is feared that increasingly stringent food safety, phytosanitary and other regulations within Europe will overwhelm the capacities of developing country suppliers and official agencies to comply or result in such high compliance costs as to restrict continued participation in this trade to relatively few growers and exporters. The growing concentration of fresh produce distribution channels-under the coordination of major supermarket companies-is seen as exacerbating this challenge, further increasing the barriers to continued market participation.⁴³

The Kenyan fresh produce experience offers a bright ray of hope. The Kenyan fresh produce industry-with the assistance of the Kenyan Government and of others-is

⁴³ Spencer Henson, Kerry Preibisch, Oliver Masakure, “Review of Developing Country Needs and Involvement in International Standards- Setting Bodies,” Centre for Food Economics Research, Department of Agricultural and Food Economics, The University of Reading.

effectively meeting the challenge of rising standards and indeed using it as an opportunity to redefine the industry's source of competitive advantage. For the past five to seven years significant elements of the industry have been transforming their production, packing, and broader supply chain operations both in response to and in anticipation of changes in official regulations and private standards or protocols. This on-going transformation is enabling the leaders of the industry to re-position themselves into relatively more profitable and faster growing value-added segments of the European fresh vegetable market-at a time' when profit 'margins are generally under pressure in this business. With these investments and product mix adjustments has come substantial growth in employment within the industry.⁴⁴

In recent years, the fresh produce industry in Kenya has become more concentrated, although for nearly fifty years this trade has always featured the dominance of a handful of companies. In an earlier era, the concentration of the trade stemmed from economies of scale in logistics and product sourcing and from superior overseas market relations. The standards factor is a newer element. Yet, this has had far more to do with meeting the quality, market service, and food safety standards of larger private customers than complying with official ED or Member State requirements.

The need for increased product control and traceability has also been an important (yet by no means the sole) factor contributing to more vertical integration within the industry. Smallholder farmers now account for a smaller proportion of (exported) supply than they have previously, although the total volume of smallholder production which is being

⁴⁴ Humphrey, John(2002) the Kenyan Fresh Vegetable Export Sector.Mimeo.

exported has probably not declined. The feared marginalization of such growers is by no means an inevitability. There are basic economic and agronomic reasons for the continued participation of many smallholders in this trade. And, a number of collaborative initiatives-involving Kenyan exporters, industry associations, governmental agencies, and external support programs-are making progress in raising the standards and enhancing the traceable documentation of smallholder production.

The operative standards in the fresh produce market derive from a combination of consumer preferences, private strategies and protocols, and laws and regulations. Various ED harmonization processes notwithstanding, many of the prevailing rules in this trade are demand-driven and thus vary substantially between different supply chains and segments of the European market. Private standards appear to dominate over official requirements in actual practice, although the former are certainly stimulated and conditioned by the latter.

Therefore, Kenyan suppliers do not face one 'standards regime' in Europe, but many. Some customers demand extremely high standards for food safety management, environmental management, etc.; other customers put primary emphasis on competitive pricing. This has resulted in a mirror image within the Kenyan industry with some firms aiming at the top of the market with value-added products and sophisticated management systems and others continuing to aim at a bulk produce market, providing satisfactory quality and service at reasonable prices. Given evolving competitive pressures and the relatively high freight costs which the Kenyan industry incurs, it is not clear if the low

price, low margin component of the Kenyan trade can sustain itself in the future. The future of the industry may therefore mimic the trends of the recent past. That is, Kenya's exports will become increasingly focused on value-added products sold to and through those segments of the market which place an especially high value on well designed and documented systems of food safety and environmental management. Rather than be endangered by the escalation and proliferation of standards, the Kenyan industry seems to be embracing these standards and using them to competitive advantage. As food safety and other requirements are raised by importers and distributors on the European continent, Kenyan exporters believe that they will be well (and better) placed to service these customers.

A half-dozen export companies have already made substantial investments in modernized farming and pack house operations and several other firms are in the process of making similar investments. Significant improvements have and continue to be made in food safety and more general management systems. While there was once an extended time period during which little cooperation occurred among different firms and other stakeholders, the challenge of standards and of raising the industry's competitiveness has engendered a vastly increased level of collaboration both within the private sector and between the industry and the Government of Kenya. One exporter refers to this as "Kenya Inc."

There remains unfinished work, however. Within Kenya important challenges remain in relation to ensuring the application of 'good agricultural practices' and being able to more

fully demonstrate and, document the safety of fresh produce sourced from smallholder farmers. Modalities will need to be developed to enable (smallholder) out grower systems to meet EUREPGAP or similar requirements as the enforcement of these is likely to grow in coming years. For those e small and medium enterprises which are contemplating a shift in business orientation from bulk produce to value-added production there are both financial and technical barriers which still need to be addressed. There is also a need to further strengthen the capacity of KEPHIS and to have it recognized by the ED as being a 'competent authority' for phytosanitary and quality inspection services. KEPHIS needs to consolidate all the scattered laws concerning standards and provide for the establishment of a one stop office where exporters will have their products evaluated and the necessary permission sought and granted. The KEPHIS will be a one stop center for every intending exporter, providing for a much shorter, more comprehensive and much more efficient means of quality control of agricultural inputs, produce, and plant health.

On the side of the market, the efforts to harmonize regulations and inspection services within Europe are still a 'work in progress' mid one which will become even more complicated with the upcoming expansion of the EU. Developing country suppliers are looking for predictability, transparency, and consistency in the further development and application of the governing rules of the game. In many respects, this is not the current norm. The Kenyan trade has thus far encountered relatively few official barriers to its trade into Europe and none which really can be regarded as unreasonable. Still, there is a general, although modest sense of unease about how the emerging rules-with regard to MRLs, phytosanitary matters, quality control, traceability, etc.-will in fact be officially

enforced.

There is a perception both in Kenya and within Europe of a disconnect between the increasingly stringent regulations on paper and the actual capacities of most Member States to enforce these rules. This implies that enforcement will continue to be done by inspection and testing of samples, drawn either randomly or, more likely, purposively. This means that the reputation of a country and of particular products will probably be a significant factor in how intensively one's supplies are subjected to official inspection. Kenya needs to protect its seemingly high reputation for 'clean', high-quality produce. Exporters are uncertain regarding the official penalties for infractions of emerging ED or Member State regulations. Will future infractions result primarily in official communications or warnings, or will there be some automaticity in the issuance of fines, in the detention of supplies, or in suspensions of market access for particular suppliers, or even of entire countries?

Even without such clarity Kenya growers and exporters go about their business under the assumption that standards compliance is a necessity-because it is currently demanded by their leading private customers and will be demanded by other customers in the near future. Other developing country suppliers should adopt a similar posture, although for those suppliers who are focusing on the 'competitive price' segments of the European fresh produce market there will likely remain a medium-term transition period over which they will need to strengthen their food safety and other risk management systems.

CHAPTER FOUR

CONCLUSION AND RECOMMENDATIONS

4.1 Conclusion

While traditional trade barriers in agriculture such as tariffs continue to decline, technical and regulatory barriers are increasingly subject to debate. According to FAO's investigation, more developing countries are experiencing trade obstacles due to SPS measures. For Kenya, SPS measures, which have had an adverse impact, are the requirement that products come from a disease-free (fish), specific processing or treatment of products (fish), allowable maximum levels of pesticide residues (horticultural products).¹

In Kenya, where the agriculture is the mainstay of the economy, regulations of the quality of the agricultural inputs (seeds, fertilizers and agrochemicals) and produce are essential. The responsibilities of administering the various regulating Acts of Parliament governing the agricultural sector were fragmented in the past. In order to consolidate regulatory acts and strengthen their enforcement mechanisms Kenya Health Inspectorate Service (KEPHIS) was established. As discussed earlier, KEPHIS is a state corporation established in 1996. Its activities were subsequently consolidated for the improvement of the quality status of agricultural inputs, health and planting breeding materials for use in agriculture. KEPHIS, as such, acts as government enforcement

¹ An article on Sanitary & Phytosanitary Measures & their Impact on Kenya by Dr. Halima Noor.

agency that vigilates for the government, business sector, scientists, and the farmers in all matters related to quality control of agricultural inputs, produce, and plant health. In addition, it aims at eliminating the regulatory bottlenecks in a liberalized market economy. When it comes to fisheries the Ministry of Health is the competent authority, however, this authority has delegated the responsibility of inspection to the Department of Fisheries and the auditing role to the Kenya Bureau of Standards.

4.2 HORTICULTURE

Kenya produces approximately 3,000,000 tons of vegetables, fruits and cut flowers annually, of which approximately 100,000 tons are exported, with the European Union accounting for 90% of Kenya's horticultural exports. The rapid growth of these sectors have had positive effects on the communities in the form of employment and the national economy in the form of valuable foreign exchange. Notwithstanding the considerable scope for an increase in production and exports. As far as the horticultural industry is concerned, adherence to Maximum Residue Levels (MRLs) requirements is the main concern. Pesticides play an important role in any meaningful food production system. However, unlike other agricultural inputs such as fertilizers, manure, seeds, etc, pesticides pose a potential risk to both human beings and the environment. To effectively control crop pest without necessarily endangering the ecosystem, Good Agricultural Practice (GAP) is a vital ingredient when using these chemicals. It is an internationally agreed practice that when a pesticide is applied to any intended commodity, its residues on any consumable portion must not exceed the MRLs. It is

also necessary to monitor the environment for presence of these harmful chemical residues, which may ultimately find their way into the food chain.

Kenyan fresh produce exporters are to comply with a new European Union (EU) regulation on pesticide application. By fixing the Maximum Residue Levels at "analytical" zero, the new regulations provide that there be no trace of pesticide residue in fruits, vegetables and cut flowers intended for the European markets.

This will result in high compliance cost. This is because Kenya's tropical climate demands the use of frequent applications of pesticides, which nevertheless have over the years proved to be effective. Though, in the horticultural sector, much will depend on the financial ability of the larger concerns and the small-scale farmers to quickly adapt to new measures such as the zero pesticide residue regulations. In fact, European markets have favoured larger producers and exporters, who are able to have some control over their production practices, particularly with regard to the interval between pesticide sprays and picking. Larger producers are also benefiting from the more value-added pre-packs, where French beans in particular are packaged ready for supermarket shelves and immediate cooking. For those that do not have or are unable for commercial reasons to access financial resources for the required changes to be made, the end can only be to close down their operations. Many other individual or entities will be faced with laying off staff in order to compensate for the additional capital expenditure needed for compliance. In either instance, unemployment is a likely scenario as producers seek to survive or alternatively, investment in development will be held back resulting in fewer employment opportunities. Therefore, unless Kenyan

horticultural producers and exporters adapt rapidly to the new measures and forego the use of certain pesticides which have been banned on toxicological, operator safety or environmental grounds and comply with the requirement that fresh produce for export is accompanied by information as to type of pesticide used, they will lose the share of the market they so assiduously built up over the years.

In addition to financial constraints mentioned above, the small-scale farmers face:

4.2.1 Transportation Cost

A fairly small player in the horticultural market, the problems relating to transportation are paramount. As such they do not have the power other large companies have to pay the high cost of airfreight out of Kenya. In particular, airfreight for perishable products, can represent a major barrier to products, which might have met all necessary SPS measures. Such problems effectively represent a lack of access to the facilities or resources that are required to ensure the product still complies with the required measures at all levels of marketing chains. In addition, the high cost of airfreight means that Kenya cannot compete with Gambia and Morocco who have shorter distances and lower airfreight costs.

4.2.2 Lack of Adequate Agricultural policy

Import duties on agricultural inputs, high power bills, and insecurity, poor or non-existent infrastructure have further exacerbated the problem. This important (agricultural) sector receives very little research or extension. For the vast majority of

small holders, foraying into producing for the domestic horticultural products, for both domestic and export production is severely limited.

4.2.3 Limited Access to Credit and Technical Information

Small holders also suffer from limited access to credit and technical information, which is often tied to contracts with particular exporters or embodied in costly, often expatriate consultants. The contributions of research and extension systems, to leveling the information playing field between large-and small-scale producers, has been less than exemplary, leaving the majority of producers to a process of trial and error to obtain technical information from neighbours. Credit through exporter or farmer organized groups has failed largely due to difficulties in trying to enforce contracts.

4.2.4 Weak farmer Institutions

In response to unresponsive state establishments, farmers have formed their own institutions. However, these organizations have not fared well; they have suffered coordination problems and are often captured by political interests.

4.3 FISHING

Until 1996, Kenya relied heavily on the European Union market for her fish exports (70%) with Spain importing the bulk of the commodity. From an annual production of 180,000 tons of marine and fresh water fish and fish products, the bulk totaling 120,000 tons goes to fish processing establishments which in turn export 18,000 tons of fish and fish products earning the country nearly \$55,000,000.

A ban had a significant impact on Nile perch exports to the European Union causing a drop of 66%, a 24% drop in total fish exports from Kenya with a corresponding 32% decrease in value. The EU is a valued market for Kenyan fish and though exports to other destinations continued to grow, the ban significantly affected both the fishers and foreign exchange earnings as evidenced by the decline in quantity and forex. In other words, the rise in quantities of fish exports to other destinations was not matched by commodity value. It should be noted the value dropped much more than quantity because the EU market offer better value for Kenyan fish compared to other destinations. The Ban was lifted in November 2000, following recommendations of the veterinary Committee of the EU. The decision that lifted the ban required that:

- (a) All fisheries products caught in Lake Victoria be subjected to appropriate checking intended to ensure that they are healthy, and do not contain pesticide residue;
- (b) Fish exports certificates in Kenya are aligned to those being used in Uganda and Tanzania.

It should be noted that the ban on fish imports from these two countries had been lifted earlier.

4.3.1 Lack of Sufficient Scientific Evidence

The World Health Organization (WHO) intervened to have the second (1997) ban lifted. The organization in a Note Verbale² from its Director General explained that despite the fact that at least 50 countries have been affected by epidemic or endemic

² A note Verbale is a formal document sent by the Director-General to member states.

cholera since 1961 there has been no documentation of any outbreak of cholera from commercially imported food. The Director-General felt it crucial to elucidate the potential of the bacterium, which causes cholera, *vibrio cholerae* 01, to be transmitted to humans via food. Cases of cholera have occurred occasionally as result of eating food, usually seafood, transported across international borders by individual travelers, but WHO has not documented an outbreak of cholera resulting from commercially imported food, the report emphasized. The foods that are of greatest concern to importing countries are seafood, freshwater fish, and vegetables that may be consumed raw. Furthermore, another UN Agency, FAO noted that the cholera bacteria does not survive proper cooking or drying, and cooked, dried or canned products are considered safe with cholera transmission. Furthermore, the FAO report held:

Epidemiological data suggest that the risk of transmission of cholera from contaminated imported fish is negligible. Only rare and sporadic cases of cholera have occurred in developed countries as a result of eating fish transported across international borders by individuals.

The reaction of the European Union to the Cholera outbreak in 1997, with the consequential damage to Kenya's export earnings as well as Kenya's inability to rapidly and effectively challenge the imposition of the ban on scientific or technical grounds is proof enough that much needs to be done to protect exporting developing countries which are at the mercy of the whim of importing developed countries. The amendment to the Health Certification is now the only requirement demanded by the European Union as an acceptable alternative to the ban, which if imposed, would have caused little if any disruption in exports. With a little good will from the

European Union, this alternative could have been put in place within a matter of days of the Cholera concerns being raised.

According to Article 2(2) of the WTO SPS Agreement:

“Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence...”

Furthermore in Article (4) members are encouraged to take the least trade distorting measures. That the EU did not do this is self-evident. The WHO report discussed earlier also said: The placing of embargoes on importation of food such as seafood, fresh water fish and vegetables is not an appropriate cause of action to prevent the international spread of cholera, and can represent an additional burden on the economy of the affected countries. The WHO believes that the best way to deal with food imports from cholera affected areas is for importing countries to agree, with the food exports, on Good Hygienic Practices (GHP) which need to be followed during food handling and processing to prevent, eliminate or minimize the risk of any potential contamination and to set up arrangements to obtain assurance that these measures are carved out.

4.3.2 Firm Size and Investment in Technology

Despite expansion of Lake Victoria fisheries, with the exception of a small number of trawlers that operate illegally, fishing is still undertaken from wooden boats with a crew

between two to four fisher folk. Relatively few boats are motorized and the main technological advance has been in the type and the size of the net. Facilities on the landing beaches remain rudimentary and are often restricted to a covered area where fish are sold and in some cases a landing jetty. There is rarely a source of potable running water, toilets, chilled storage facilities, or fencing to prevent entry of rodents and domesticated animals to the landing area. Much of the expansion has, however, been through investment by absentee fisher folk, with boats operating by a crew employed on a daily basis as and when fish can be caught and there is sufficient market demand.

The Kenyan government has undertaken a number of initiatives to meet the demands of the European Commission. Changes carried out have been both legislative and reform of procedures for the approval for the export of fish to the EU and the issuing of health certificates. For instance, the Ministry of Agriculture and Rural Development whose mandate is to ensure food safety, quality and security, became the Competent Authority (CA) for fish and fishery products, which took effect on 11th August 2000. This was after the publication of the Fisheries (Fish Quality Assurance) Act. The Regulations were made to ensure hygienic fish handling and processing, in order to assure safety of Kenyan fishery products to consumers.

In addition, the Kenya Bureau of Standards (KEBS) published a code of hygiene practice for the handling, processing, and storage of fish, which applies to all fish regardless of whether for export or for the domestic market. This standard essentially harmonizes Kenyan hygiene requirements for fish with those of the EU.

4.4 RECOMMENDATIONS

4.4.1 Participation in International Standard Setting bodies and the WTO

By participating effectively in international setting bodies and the WTO, would enable Kenya to actualize the potential benefits of the Agreement. Because of Kenya's passive role, it has failed to take advantage of the benefits the SPS Agreement. In international standard setting bodies, developed countries have set standards, with some standards being inappropriate and inconsiderate of the situations of developing countries, making them difficult to implement. Kenya needs, therefore, to explore ways of actively participating in international organizations that set standards and regulations to protect their interests.

However, Kenya faces a number of constraints that limits its ability to participate effectively. The most significant constraint to effective participation in SPS Agreement has been judged to be the insufficient ability to participate effectively in the dispute settlement procedures and to demonstrate that domestic measures are equivalent to developed countries requirements. These constraints in turn reflect poor scientific and technical infrastructure in Kenya. Further, Kenya is less able than developed countries to exploit to their advantage the disciplines and procedures established by the SPS Agreement.

As a result of the complexities mentioned above, the participation of Kenya in these bodies should be addressed from a wider perspective, namely that active participation requires adequate institutional infrastructure, human and financial resources and effective follow up capabilities.

4.4.2 Market Access

Evidence shows that developing countries have comparative advantage in the production of agricultural and food products. Because of this, market access is of great importance if developing countries are to successfully exploit opportunities for high value added food exports to developed countries.

4.4.3 Special and Differential Treatment

Kenya has experienced many problems with the implementation of the provisions of the SPS Agreement given that developing countries typically implement qualitatively or quantitatively lower SPS standards. In principle the SPS Agreement should help to facilitate trade. Article 10 of the Agreement for example states that "developed countries should take account of the special needs of developing countries in the preparation and application of sanitary and phytosanitary measures". Further, the Agreement permits additional time for developing countries to implement all or some of its provisions. This acknowledgement of the special needs of the developing countries if adhered to would facilitate trade. However, despite the acknowledgement of the special needs and circumstances of developing countries, the SPS Agreement (S&D) provisions are a best endeavor provisions and not binding. In addition developing countries concerns are heightened by the fact frequently insufficient time is allowed for them to adjust to requirements as they are introduced. The solution here would to make the S&D provisions binding and that when implementing SPS measures the above Articles are adhered to in both the spirit and the letter of the law.

4.4.4 Coordination and Harmonization with other International Agencies

Under Article 3 of the SPS Agreement members are encouraged to participate in a number of international standard setting organizations most notably Codex Alimentarius, the International Office of Epizootics (IOE) and the International Plant Protection Convention (IPPC). Members are expected to base their SPS measures on the standards and guidelines or recommendations set by these organizations, where they exist.

Under the Agreement members are also required to accept the measures of other members where they can be demonstrated to be equivalent; that they offer the same level of protection. The Agreement also recognizes that SPS risks do not correspond to national boundaries; there may be areas within a particular country that have lower risk than others. The Agreement therefore recognizes that pest or disease-free areas may exist, determined by factors such as geography, ecosystems epidemiological surveillance and the effectiveness of SPS controls.

Notwithstanding the above, Kenya finds it difficult to trade with developed countries due to the difference of quality requirements. A major problem is that there is lack of mutual recognition of inspection and standards. Several major importing countries are asking for sameness in the process rather than equivalence.

In many circumstances the harmonization of SPS standards can act to reduce regulatory trade barriers. This would also protect members from arbitrary or unjustifiable trade barriers. This would also protect members from arbitrary or unjustifiable discrimination due to different SPS standards. It would also reduce cost, as Kenya does not have to meet different standards.

On procedures for instance, to prove that some area are post and disease free or low risk are usually long and burdensome and often include the need to provide complex scientific evidence which is problematic for poor countries. Indeed, given the complexity of SPS issues, harmonization or equivalent standards would be the best option. In the extreme, SPS measures can effectively force exports, and the in-country institutions that represent them, into very specific production and trading method. Such requirements may tie the exporter to a particular trade or a particular country. This arrangement may be lucrative in the short term, but can mean exporters invest relatively heavily in staff, equipment and trading relations, which add to their costs. These may represent a potential burden in the medium to the long-term, for example if trade is halted for any reason. As such harmonization or equivalence of the standards would solve this problem.

4.4.5 Technical Cooperation and Financial Assistance

The huge obstacle for Kenya is the lack of financial or technical resources to implement stringent requirements or even to take a significant role in the standard setting process.

There is also need specifically for Kenya to strengthen technical capacity for challenging the risk assessment by industrialized countries introducing SPS measures. For instance, diarrhea in Kenyan fish exports. Theoretically, Article 9 of the SPS Agreement requires that developing countries be provided with technical assistance to assist them in complying with health and safety standards. But the developed world has not lived up to their obligations in this area. With no technical

assistance, Kenya cannot meet high international standards which is unacceptable for either developed or developing countries as technical assistance will allow Kenya to meet world class standards to both benefit their own citizens and compete effectively in international markets.

Technical assistance offered to Kenya as provided for in the Agreement should be of better quality and should be delivered as and when required. In addition, technical co-operation should be broad based and include financial support. The SPS agreements should include strong language and put clear obligations on developed country members to provide technical and financial support in the field of SPS measures. Kenya has concerns about the level of technical assistance given to facilitate the implementation of the Agreement and/or comply with developing countries requirements. In particular it is claimed that technical assistance often fails to address the fundamental day-to-day problems faced by developing countries many of which relate to the overall level of their economic development. This is evidence that much of the technical assistance is reactionary-it is provided once problems of compliance to SPS requirements in developing countries have been identified-rather than part of a strategy aimed at general capacity building.

In a nutshell the solutions required from developing countries are, amongst others:

- (a) Awareness of the WTO Agreements. Information is available on the Internet.
- (b) Active participation as stakeholders in trade negotiations-input from private sector so that concerns are represented through their governments.

(c) Challenging of measures taken by developed countries.

For Kenya SPS measures are considered to be the most important impediment to agricultural and food exports to the developed world. To a large extent this reflects lack of scientific and technical expertise, information and finance. In addition, the incompatibility of production and/or marketing methods in Kenya is also a major factor affecting access to developed country markets. But it can be said that the significant problems associated with the operation of the SPS Agreement is that developed countries take insufficient account of developing countries needs in setting standards. The length of time allowed between notification and implementation of the SPS requirements and the level of technical assistance provided by developed countries are also considered to be problems.

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