

SANITARY AND  
PHYTOSANITARY  
MEASURES AND THEIR  
IMPACT ON KENYA

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# **SANITARY AND PHYTOSANITARY MEASURES (SPS) AND THEIR IMPACT ON KENYA**

## **Introduction**

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 experiencing trade obstacles due to SPS measures. SPS measures are any measure applied<sup>1</sup>

- (a) To protect human or animal life or health from risks arising from additives, toxins or disease-causing organisms in foods, beverages or foodstuffs;
- (b) To protect human life or health arising from risks arising from diseases carried by animals, plants or products thereof, or from entry, establishment of pests;
- (c) To protect animal or plant life or health from risks arising entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organism;
- (d) To prevent or limit other damage from the entry, establishment or spread of pests.

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).

This article discusses amongst others, factors external and domestic as a result of SPS measures, which have caused adverse terms of trade for Kenya in the fishing and horticultural sectors. The article will round off with recommendations and solutions to the developing countries and especially Kenya to implement the measures for their/her benefit.

## **Horticultural and Fishing Industry**

### **Kenya's Internal Regulatory Structures: Certification and other Domestic Infrastructure**

<sup>1</sup> SPS Agreement, Annex A.

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. 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 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.

## **HORTICULTURE**

### **Background information**

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. In 1999, Kenya exported 16,000 tons of fruits including avocados, mangoes, apples and passion fruit, 46,000 tons of vegetables and 37,000 tons of cut flowers earning the country \$185,000.

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

### *High Cost of Imported Input*

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 favored 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 therefore 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.

### **The Problems of Small-Scale Farmers**

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

#### *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.

#### *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 neighbors. Credit through exporter or farmer organized groups has failed largely due to difficulties in trying to enforce contracts.

### **Lack of Adequate Agricultural policy**

Overall sector policymaking and implementation has not kept pace with developments in the market and in the field.

Import duties on agricultural inputs, high power bills, and insecurity, poor or nonexistent 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.

### **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.

### **Kenya Government and the Horticultural Sector**

The Kenyan government wants to introduce a Bill in Parliament to regulate the sector. One of the key aims is to give legal muscle to the parastatal Horticultural Crops Development Authority (HCDA), to enable it to discipline the sector. The Bill also proposes a levy of one per cent of the turnover to finance the new bureaucracy, which the industry feels it is punitive.

However, the industry has strongly opposed such a plan. They believe that attempts by the government to have a bigger say would strangle private enterprise. According to them horticulture is the last bastion of growth in an economy which has shrunk by negative 0.4 percent last year.

The lobby maintains that they have adhered to the MRL rules of the EU and further continuous training of growers and enforcement of the Fpeak Code of Practice.

They further believe that the Government has achieved growth through the hands-off policy and the government's belated attempts at involvement can only breed market inefficiency and lethargy as has been witnessed in the Coffee and tea sectors.

### **THE FISHING INDUSTRY**

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. Lake Victoria contributes 92% to Kenya's total

This 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.

There was a third ban on fish exports from the three East African States, due to reported use of chemicals for harvesting fish in Lake Victoria. The Member States adopted the EU decision 99/253/EC, which prohibited the import of fish and fishery products from Lake Victoria into the EU, in April 1999.

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 the ban on fish imports from these two countries had been lifted earlier.

### **Lack of Sufficient Scientific Evidence**

The World Health Organization (WHO) intervened to have the second (1997) ban lifted. The organization in a Note Verbale<sup>7</sup> from its Director General explained that despite the fact that at least 50 countries have been affected by epidemic or endemic 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

<sup>7</sup> A Note Verbale is a formal document sent by the Director-General to Member States.

that are of greatest concern to importing countries are seafood, freshwater fish, and vegetables that may be consumed raw <sup>4</sup>.

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<sup>5</sup>.

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 Article S(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:

Press Release WHO/24, [www.who.int/inf-pr-1998/en/pr98-24.html](http://www.who.int/inf-pr-1998/en/pr98-24.html)

<sup>5</sup> Press Release 98/21. [www.fao.org/WAICENT/OIS/PRESS\\_NE/PRESSENG/I998/bren9821.htm](http://www.fao.org/WAICENT/OIS/PRESS_NE/PRESSENG/I998/bren9821.htm)



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'.

### **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<sup>s</sup>.

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.

### **Improvements in the Fishing**

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 11<sup>th</sup> August 2000. This was after the publication of the

<sup>6</sup> See Footnote 4. *ibid.*

<sup>s</sup> Henson et al, footnote 2.

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.

In addition, the Fisheries department planned and implemented a number of activities:

- *Landing Beaches*

Landing beaches improvement is being implemented through community/stakeholder participation. Ten strategic landing sites have been earmarked, with the first phase aimed at:

- Fencing
- Paving Reception area
- Improvement of drainage system
- Provision of insulated fish boxes
- Improvement of the sorting sheds.

The second phase of beach improvement will include the following developments:

- Provision of electricity and water
- Construction of landing jetties
- Modernization of fish reception
- Improvement of access roads.

*Analytical Laboratories*

Building capacity for both chemical and microbiological analysis of fish and environment (water and sediments) is essential to help develop databases that would be used to assure consumers of the safety and quality of Kenya's fish. To this end, construction and renovation laboratories will be used for routine analysis

of the necessary parameters, which will provide the database that would be the reference point for fish safety and quality assurance.

### *Training*

The training and refresher courses for fish inspectors and the industry quality managers is an on-going programme aimed at upgrading fish quality in the country.

The Department is also planning to conduct training of trainers on fish quality control to build training capacity. This is expected to assist in upgrading fish quality through training of frontline fish inspectors, fish handlers, and quality managers. The trained trainers on quality will therefore, be instrumental to enhancement of fish product marketability.

### *Collaborative Approach*

The need to collaborate with local and international fisheries researchers is being emphasized and several memoranda of understanding have been prepared and signed to this effect. Demand driven research, and survey is being promoted to improve information flow and database for better management of fishery resources. The same approach is being developed for all the stakeholders in the fishing industry, with fisheries taking a lead role.

## **SOLUTIONS AND RECOMMENDATIONS AIMED AT PREVENTING ADVERSE TRADE EFFECTS**

### **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.

### **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.

### **Participation in International Standard Setting bodies and the WTO**

By participating effectively in international setting bodies and the WTO, would enable developing countries to actualize the potential benefits of the Agreement. Because of developing countries passive role, they have 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. Developing countries need, therefore, to explore ways of actively participating in international organizations that set standards and regulations to protect their interests.

However, developing countries face a number of constraints that limit their 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 many developing countries. Further, they suggest that developing countries are less able than

developed countries to exploit to their advantage the disciplines and procedures established by the SPS Agreement<sup>9</sup>.

As a result of the complexities mentioned above, the participation of developing countries 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.<sup>10</sup>

### **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, developing countries find 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 discrimination due to different SPS standards. It would also reduce cost, as developing countries do not have to meet different standards. On procedures for instance, to prove that some area are pest 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,

<sup>9</sup> Henson et al, footnote not.

<sup>10</sup> PTO - Communication dated 5<sup>th</sup> July, 1999 from the Permanent Mission of Kenya

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.

### **Technical Cooperation and Financial Assistance**

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

Technical assistance offered to developing countries as provided for the 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.

Developing countries have 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. These 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".

## **Conclusion**

For developing countries 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 developing countries 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<sup>12</sup>.

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.

See Henson footnote 2. <sup>12</sup> *Ibid.*