

# EAC GENEVA FORUM

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## IMPORTANCE AND EFFECTS OF SPS AND TBT MEASURES ON TRADE POLICY AND TRADE RELATIONS

Perspectives from Kenya

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# INTRODUCTION OF THE IMPLICATIONS OF SPS AND STANDARD MEASURES TO KENYA

As tariff barriers continue to reduce for instance at the multilateral level through various rounds of trade negotiations; and at the regional and bi-lateral levels through various trade arrangements, the issue of non-tariff measures becomes more important in accessing markets. The WTO General Agreement on Trade and Tariffs under Article 20, allows members to implement measures to protect human, animal or plant life or health, provided no discrimination or disguised protectionism arises. In addition two WTO agreements of Sanitary and Phytosanitary measures (SPS) and Technical Barriers to Trade (TBT) deal with food safety and animal and plant health and safety, as well as product standards in general. The importance of these measures cannot be underscored, since they are necessary for inter alia environmental protection, health safety, and national security to consumers. However with a multiplicity of such measures imposed by countries, accessing markets of interest has become challenging and costly for producers and exporters. In many instances the measures

are difficult to track and conform to given their diversity, hence the need to analyse these issues and map out possible solutions to overcome the challenges they present in accessing markets of interest.

The objectives of this country update note will be:

- To analyse the effect of SPS and TBT measures on trade for Kenya.
- To analyse extent to which the above measures hinder optimal access to markets of interest to Kenya
- To make proposals for addressing the challenges and access to markets of interest for Kenya, and
- To make proposals on the role of the Geneva based Ambassadors in this process.

The Sanitary and Phytosanitary Agreement (SPS) allows countries to adopt scientifically based measures in order to protect human, animal and plant life or health. It entered into force on January 1995 though the least developed countries were allowed to delay implementation for five years (Article 14).

## Annex A of The Agreement Defines a SPS Measure as any Measure Applied to:

- Protect animal or plant life or Health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease causing organisms;
- Protect human or animal life or health within the territory of the member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs;
- Protect human life or health within the territory of the Member from arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests;
- Prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.

Source: WTO SPS Agreement.

The SPS Agreement pursues two main objectives: first, it recognises the sovereign right of WTO Members to provide the level of health protection they deem appropriate; second, it ensures that SPS measures are not disguised restrictions on international trade. To achieve both objectives, the agreement encourages Members to base their measures on international standards (from the Food and Agriculture (FAO)/World Health Organisation (WHO) Codex Alimentarius Commission, the World Organisation for Animal Health, etc.), guidelines and recommendations.

*Technical Barriers to Trade (TBT) Agreement* on the other hand deals with all technical requirements, voluntary standards and conformity assessment procedures, except when these measures are covered by the SPS Agreement, and ensures that they do not create unnecessary obstacles to trade.

Both *SPS and TBTs* are health-related trade restrictions but there is a different in scope of the two agreements. The SPS agreement applies to a narrowly defined range of health protection measures, but it places quite strict requirements

on these measures, for example that they always be based on scientific principles. The TBT Agreement on the other hand applies to a wide range of technical requirements, and solely notes that available scientific information is one of the relevant elements of consideration in assessing risks.

Kenya as a WTO member is allowed to adopt regulations under both *SPS and TBT* agreements in order to protect human, animal and plant health, environment, wildlife and human safety. The two agreements contain provisions on technical assistance and special and differential treatment to help Kenya implement and take advantage of this agreement. However, despite such support, Kenya faces difficulties in the implementation of both agreements. Besides, Kenya protests regularly against the increasing use of SPS and TBTs by developed countries and view this use as a disguised form of protectionism. Furthermore, producers and exporters should compete with private sector requirements. The development of private standards is recent but very rapid, and one can question whether today

these standards do not influence trade more than public standards do.

Kenya has done away with the use of non-tariff barriers as required by the WTO Agreement on Agriculture (AoA). The concern currently is on the consequences of using technical barriers to trade (TBT) and the sanitary and Phytosanitary Standards (SPS) by the developed countries. Most developing countries, including Kenya, find it difficult to implement the SPS agreement partly because of numerous problems in its implementation and lack of technical capacity to implement it. This is unlike in the developed countries which are using the Agreement to limit access of commodities from developing countries. The new emerging non-tariff issues such as trade and labour standards, trade and environment, trade and competition, and trade and investment are seen as strategies designed by the developed countries.

## MAIN CHALLENGES

### *SPS and Standard measures imposed by markets of interest to Kenya and how they can be addressed.*

In general, Non-tariff barriers such as SPS and TBTs have affected Kenya's access to markets for commodities such as fish and horticulture. The Uruguay Round of Negotiations contains three important elements of which SPS is a major one. These mandate that SPS be applied only to the extent necessary to protect food safety and animal and plant health. This however can constitute unfair technical barriers to trade when used indiscriminately. Provision is also made for possible technical assistance for developing countries to comply with SPS standards of importing countries.

Apart from tariff barriers, Kenya's exports to developed countries markets have been barred by instances of arbitrary imposition of sanitary

and phytosanitary (SPS) measures and the most affected sub-sectors include horticulture and fisheries. Besides, there have been cases where sub-standard commodities that do not meet SPS standards have been dumped in the country. Kenya's positions on SPS is for transparency in implementation by developed countries and for provision of technical support to enable the country undertake risk analysis and participate in international meetings for setting standards.

In Kenya, market access has also been affected by SPS, where fish exports to the European Union faced a ban in 1999 to 2000. This was because Kenya and other East African Countries were unable to meet the EU's hazard analysis critical control points (HACCP) requirement. Although the ban was later lifted, the SPS creates barriers to agricultural trade. The minimum residual pesticide requirement by the EU countries on horticulture produce also poses barriers to trade for Kenyan exports. In general, food standards are used extensively by developed countries to block entry into their markets of agricultural products from developing countries. Unfortunately, developing countries consider the standards set by developed countries not to be transparent. Furthermore, fair implementation of SPS agreement requires both financial and technical resources which Kenya lacks.

SPS measures can and do impede trade in agricultural and food products since in many instances they are incompatible with prevailing systems of production and marketing in developing countries with insufficient account taken of the needs, constraints and problems faced by them. The manner in which the SPS Agreement has been implemented in the interests of the developed countries is a cause for concern.

An acute problem is the lack of appropriate scientific and technical expertise with little technical assistance being given to developing countries. The challenge facing both developed and developing countries is for collaboration of

one with the other to reach accommodation and reconcile the disparate preoccupations relating trade and those relating to the protection of human, animal and plant health and the environment.

Kenya has experienced many problems with the implementation of the provisions of the SPS Agreement and welcomes a review of its operation and implementation. Article 10 of the Agreement for example provides for developed countries to take account of the special needs of developing countries in the preparation and application of sanitary and phytosanitary measures. This should be examined in light of the difficulties that developing countries face in the implementation of the terms of the Agreement. For example:

- Notification procedures should be simplified to assist developing countries to monitor and notify their SPS measures promptly.
- All the vague areas within the SPS Agreement such as references to “reasonable time” should be clarified.
- Technical assistance to developing countries should be of better quality and delivered as and when required.
- The participation of developing countries in international standard setting bodies remains inadequate since it requires adequate institutional infrastructure, human and financial resources and effective follow up capabilities, which are often lacking.<sup>1</sup>

SPS measures can effectively force experts, and the in-country institutions they represent, into specific production and trading methods that may tie the exporter to a particular trade or a particular country. This arrangement, lucrative in the short term, can add to the costs of an exporter in heavy investment in staff, equipment and trading relations that may be a potential burden in the longer term.

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<sup>1</sup> WTO - Communication dated 5<sup>th</sup> July, 1999 from the Permanent Mission of Kenya

The problem identified with small farmers in Kenya is that for instance, compliance costs tend to be high, sometimes prohibitively so. Farmers who wish to break into organic farming destined for the United Kingdom must incur costs running to 10,000 Pounds to ensure compliance with the importer’s organic farming regulations. On the other hand, to the small-scale horticultural farmer the problems relating to transportation are paramount, as they do not have the power other large companies have.

### *Main Example: The cut-flower market in Kenya*

The cut-flower industry has become the fastest-growing sector of the Kenyan economy. Kenya’s cut-flower exports are often cited as a success story in African Agriculture (Minot and Ngigi, 2004). Data from 2006 show that Kenyan horticulture exports account for USD 700 million, growing at 14 percent annually, and are larger than tea and coffee exports. Cut flowers account for 52 percent of total horticultural sector. The Netherlands is a key trade partner of Kenya in the flower industry. For instance, for the past 10 years, the Netherlands imported more than 60 percent of Kenyan flowers. Some of these imports by the Netherlands are re-exported to other EU Countries. The UK imported more than 20 per cent of Kenyan flowers from 1997 to 2006.

CODE TYPE	NAME
Northern environmental and social code certifiers	Milieu Programme Stiftung (MPS)
	EurepGap
European organisations selling flowers with social and environmental labelling	Max Havelaar Switzerland Criteria for Fairtrade Cut Flowers
	Flower Label Programme (FLP)
European retailer codes	Separator company codes in UK usually based on the Ethical Trading Initiative (ETI) base code
Local (Kenyan) membership organisations	Fresh Produce Exporters Association of Kenya (FPEAK)
	Kenya Flower Council (KFC)

Source: Omosa et al. (2005)

The cut-flower industry in Kenya faces both international and national standards. These standards are northern environment and social code certifiers (Milieu Programme Stiftung and EurepGap), European organizations selling flowers with social and environmental labelling (Flower Label Programme and Max Havelaar Switzerland Criteria for Fairtrade Cut Flowers), AND European retailer codes (separate company codes in the UK usually based on the Ethical Trading Initiative base code). Locally, the Kenya Flower Council and Fresh Produce Exporters Association of Kenya have their own codes of conduct.

Both the local and international codes relate to environmental, social and quality standards Cut-flower producers have to comply with one or more of these standards in order to access the foreign market and build a good reputation. However, these standards increase their production costs. All of the companies have cited the growing influence of European retailers in the Kenya Flower industry, both flower producers and exporters have internalised the standards set by their buyers and other stakeholders (designing, certification, testing, labelling and packaging, etc.). However, this is not without cost and induced a shift in their mode of production (such as water and pesticide usage), but it did not cause a product shift. It is interesting to note that Kenya's cut-flower industry is less impacted by SPS and TBT

measures because this sector is owned largely by industries from the countries that impose these measures.

## PERCEPTIONS FROM THE GROUND

Many companies in Kenya claim that almost their entire production is exported to foreign markets, especially the EU. They also indicated that that standards and technical regulations do not preclude them from exporting cut flowers to any developed country market. The cut-flower industry in Kenya is well developed compared with that in other countries, but the companies complain about poor infrastructure and bureaucracy in Kenya, which affect their activities negatively.

## RECOMMENDATIONS INCLUDING ON THE ROLE OF GENEVA AMBASSADORS

A significant number of SPS or TBT measures that are unnecessarily burdensome to trade are still in place in Kenya. It is important for the government of Kenya to put in place procedures

to ensure that SPS and TBT measures are designed and implemented, in the least trade-restrictive way, without compromising legitimate public policy objectives, and set an example for EAC partner states to follow.

Kenya's effective participation in the international and regional standards-setting bodies and be accorded priority and adequate technical assistance.

Specifically the Kenyan Mission to the WTO in Geneva should push for Kenya's technical assistance for the implementation of SPS and TBT agreements with a view to responding to the special problems faced by its exporters. Such technical assistance could include, among other things- building-up capacities in the fields of accreditation, standards, metrology (*weights and measures*) and certification. They should further push for the effective participation of Kenya in the international and regional standards-setting bodies as a priority as well as adequate technical assistance and financial resources provided. (*The WTO has received complaints that its standard-setting role is influenced too greatly by multinational corporations*).

Specifically, such a proposed initiative should assist Kenya in the following areas:

- Strengthening laboratory analysis and food inspection capabilities.
- Providing training in all aspects of food control
- Provide evidence, information and documents on a wide range of related subjects
- Publish manuals on food quality control
- Providing assistance in the strengthening of administrative structures

Although this assistance may go a long way to help Kenya to meet her obligations under the SPS agreement, it may lack the necessary resources and experienced personnel to run these systems effectively and to fully participate in the functions of the Agreement. Specifically, the ambassadors should push for push for