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**Reflections on Biosecurity Legislation in
Developing Countries: increasing market
access or maintaining unequal terms of trade?**

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Themes

- How developing countries have been able to meet the challenges of globalisation and are able to access markets for their agricultural and natural resources products
- Markets in rich countries and in regional trade partners
- Impact of **multilateral agreements** of World Trade Organisation (WTO)
 - ‘*SPS Agreement*’

NAFTA

FREE TRADE AT LAST,
FREE TRADE AT LAST,
THANK **GOD** ALMIGHTY,
WE HAVE FREE TRADE
AT LAST!

WTO

U.S. WORKERS

WORKERS ABROAD

CORPORATE AMERICA

**MASSIVE LAYOFFS,
VANISHING
WORKER RIGHTS**

**SLAVE WAGES,
NO
WORKER RIGHTS**





WE MAY BE SKINNY BUT WE ARE NOT **MAD!**

Outline

- Biosecurity defined and explained
- WTO and barriers to trade
- ***Agreement on Application of Sanitary and Phytosanitary Measures ('SPS Agreement')***
 - Concepts of **standards** and **risk** - application in developing countries
 - Transparency and Trade Facilitation
 - Risk assessment vs. risk analysis
- National legal frameworks for biosecurity in developing countries – where reform needed
- Lessons learned in drafting - how to remove barriers to further reform
- Equitability, democracy and terms of trade
- International trade and environmental protection
- Conclusions/Footnote on Brexit and plurilateral trade agreements
- Acknowledgements

Biosecurity defined

From Food and Agricultural Organisation of the United Nations (FAO):

"Biosecurity is composed of three sectors, namely food safety, plant health and life, and animal life and health. These sectors include food production in relation to food safety, the introduction of plant pests, animal pests and diseases, and zoonoses, the introduction and release of Genetically Modified Organisms (GMOs) and their products, and the introduction and safe management of invasive alien species and genotypes" (FAO, 2001).

Biosecurity and trade: relevance of WTO

- The extent to which, and type of, national Biosecurity measures that can be adopted by a country are now heavily influenced by the laws of the World Trade Organisation. In particular, the *SPS Agreement* requires Member States to ensure that relevant adopted measures, including laws and regulations related to, for example, quarantine requirements, internal surveillance measures and import requirements, are not protectionist in nature and should be as least trade restrictive as possible.

Other frameworks for biosecurity

- Multilateral Environment Agreements (MEAs)
Convention on Biological Diversity, CITES, etc.
- Conflicting or confusing obligations for contracting parties to these conventions as well as being WTO members
- Trade-related environmental measures applied extra-territorially may not be in accord with WTO

Words of caution

- French word 'biosecurité' means biosafety - biosecurity for GMOs
- US usage of biosecurity – prevention of bioterrorism (Patriot Act)

WTO and barriers to trade

- Tariff barriers – import taxes and duties, quotas, subsidies
- Non-tariff measures (NTMs)
 - In biosecurity area, specific import requirements, e.g. criteria used to show food is safe, meat is free of diseases transmissible to livestock, humans and wild animals
- ***NTM becomes Non-tariff barrier (NTB)*** if judged to be unduly restrictive on trade because unjustifiably strict or discriminatory

SPS Agreement – Trade by standards

The SPS Agreement provides a normative framework to ensure that sanitary and phytosanitary (SPS) **measures** are not unduly restrictive of trade because they are not based on scientific evidence/risk assessment (Articles 2,5) or they are discriminatory (Article 2).

Scientific basis of/scientific evidence for SPS measures

- **International Standards** as basis for 'SPS measures' (and standards are measures themselves) play a key part in ensuring that NTMs are not NTBs.
- Otherwise, scientific evidence to justify SPS measure as NTM provided by **risk assessment**
- Confusion between or merging of 'standards' for *quality* and *safety* in some jurisdictions
- Prevailing lack of capacity for risk assessment is most serious barrier to reform of biosecurity legislation in developing countries

Some biosecurity hazards posing biosecurity risks

Sector	Commodity	Hazard
Human health/food safety	Food – fresh and processed	(Chemical) contaminant: pesticides, antibiotics, heavy metals, nitrates, food additives and adulterants
		Food-borne pathogens - bacteria (<i>Salmonella</i> , <i>E. coli</i> , etc. Zoonoses (e.g. brucellosis), viruses, parasites
		Physical hazards – glass, stones, metal fragments, etc.
Animal health/veterinary	Meat and animal products	Contaminants, feed-borne pathogens and physical hazards as above in animal feed
		Animal diseases
		Eggs, semen for breeding
Plant health	Fresh fruit and vegetables	Plant pests – bacteria, fungi, viruses, phytoplasmas, insects, molluscs, mites, rodents, etc.
	Packing material	
	Planting material for propagation – seeds, bulbs, tubers, roots, cuttings	
Habitats and biodiversity	Potentially invasive plants and animals deliberately imported	Invasive, predatory
	GMOs?	

Are SPS standards voluntary or mandatory?

- Agreement on Technical Barriers to Trade (TBT Agreement)
 - Technical Regulations (specifications for imported goods)
 - mandatory
 - Standards (as basis for TRs) are ‘voluntary’
- SPS Standards are official standards, concept of voluntary or mandatory does not apply
- In SPS Agreement, standards are ‘measures’
- International Standards are set by international bodies, e.g. ***Codex Alimentarius (WHO/FAO)*** for food safety
- SPS measures and Technical Regulations are mutually exclusive
- Role of National Standards Institution in SPS?

SPS food standards are ‘Western standards’

- Critics of WTO and globalisation claim that SPS standards were developed for western countries
- Too high or not affordable in developing countries
- But *Codex* expert committees comprise members from developed and developing countries. Standards adopted by consensus.
- Disparity between export driven food production compliant with importing country standards and lack of domestic food safety safeguards is alarming, particularly products that fail to make the grade for export find their way on to the domestic market even though they may be unsafe.
- Indicates neglect of universal right to safe food?

Need for reform of biosecurity legislation in developing countries

Concepts of safe food

1. Basic principle is that food that is not safe should not be placed on the market or withdrawn from the market if necessary.

Then criteria for unsafe food (Codex):

Injurious to health, or

Unfit for human consumption (spoiled, passed sell by date, etc.)

2. Whether is food injurious to health must be determined by risk assessment of the potential hazards causing food poisoning or physical injury. This requires knowing what the hazards are for each type of food - food-borne bacteria, pesticides, etc.

- Important to restrict legislative matters to safety, avoiding 'quality' issues

Food controls in FSU/CIS

Dual system operating:

- Import criteria (SanPin) more or less safety factors although some obsolescence
- GOST for market access

GOST stands for *ГОСУДАРСТВЕННЫЙ СТАНДАРТ*

[State Standards] with standards primarily for quality/composition as Technical Regulations but also incorporating some (obsolete) safety factors (e.g. DDT in bread). Linked with certification of conformity - major problem - authorities using this system for rent seeking with all the accompanying problems of corruption.

- In the West, quality/composition is not an SPS matter (except sometimes for vulnerable consumers).

Hazards Analysis and Critical Control Points (HACCP)

- HACCP is the basic food control system promoted by Codex as the normative requirement
- Responsibility is placed on food producers or processors to ensure safe and hygienic production by ensuring reliable and safe inputs and identification and elimination of hazards during the processes. There is no routine certification but there will be monitoring of e.g., pesticides, and primary producers are required to observe Good Agricultural Practice.

Progress on reform of food controls in CIS

BLACK, R., KIREEVA, I. (2015). Sanitary and phytosanitary issues for the Customs Union of Russian Federation, Belarus and Kazakhstan in relation to trade with other countries and CIS, with special reference to food of non-animal origin and phytosanitary controls. *Journal of World Trade* **49** (5) 802-836.

KIREEVA, I., BLACK, R. (2014) Sanitary and veterinary hygiene requirements for imports of fish and fishery products into Russia – the tensions between regional integration and globalisation. *ERA Forum* **15** (4) 495-418.

BLACK, R., KIREEVA, I. (2010). General overview of the Russian Federation sanitary and phytosanitary legislation in light of the WTO SPS Agreement and EU principles of food safety. *Review of Central and East European Law* **35** (3) 225-255.

Risk in plant health legislation

Pest risk analysis in International Plant Protection Convention

- Plant health measures can only be taken against regulated pests (mainly 'quarantine pests')
- PRA is necessary to determine QPs and each country or harmonised region will have its own unique list of QPs
- PRA is needed to determine the risks of importing each type of commodity from each country of origin and the consequent import requirements (restrictions, need for inspections, treatments, etc.)
- PRA is needed whenever a new type of commodity appears

Consequences of weak pest risk assessment capacity in developing countries

- Lack of specific detailed import requirements, country by country, commodity by commodity
- Reliance on Import Permits (viewed as non-tariff barriers in themselves)
- Other unnecessary requirements such as Phytosanitary Certificate on goods like canned vegetables, roasted nuts that bear no plant health risk
- For approximation to EU Acquis, misunderstanding the purpose of plant passports and farm registration

Legislation for pesticides registration

- Purpose is to ensure food free of harmful pesticide residues and to protect operators and environment

Core legislation:

1. Approval of **active substances**/active ingredients that are actually toxic to pests. Risk assessment is necessary to ensure that they are safe to use (operators, consumers, environment) as well as being effective against particular pests in particular crops
 2. Registration of formulated **products** actually available on the market for farmers to use
- Conflicts between Ministries of Agriculture and Health over jurisdiction
 - Problem of generic pesticides and ‘pesticide equivalence’

Is risk assessment a trade barrier?

Risk assessment is very resource intensive:

- Personal trained in risk assessment not just in professional expertise like food safety, plant health, etc.
- Frameworks and guidelines for RA do not provide methodology so understanding the frameworks is no help in actually doing assessments.
- Requires information resources that are often/usually beyond the budgets of many developing countries
- Requires sophisticated IT

2. Misconceptions about the nature of ‘scientific evidence’ in SPS Agreement – Articles 2 and 5

- Key is ‘uncertainty’
- Risk assessments MUST include statement of the degree of uncertainty. Yes, uncertainty can be quantified.

If a man will begin with certainties, he shall end in doubts; but if he will be content to begin with doubts, he shall end in certainties. Francis Bacon ,The Advancement of Learning (1605), Book I, v, 8.

Risk assessment v. risk analysis

Should 'risk assessment' in SPS Agreement be interpreted as 'risk analysis'?

Laws, like sausages, cease to inspire respect in proportion as we know how they are made. John Godfrey Saxe, 1869

Transparency in SPS Agreement

Article 7/Annex B

- SPS National Notification Authority to collect all relevant legislation and administrative acts to transmit to WTO and trading partners
- SPS Enquiry point to receive all enquiries about the country's SPS measures, particularly import requirements, from both trading partners and prospective traders and importers within the country, *and to transmit to designated experts for answers*
- Neither of these provisions require legislation necessarily but probably the most weakly implemented of all SPS measures
- Rivalry between different bodies from misunderstanding that holding these positions implies some administrative authority

Control Inspection and Approval Procedures (Article 8/Annex C)

- Avoid procedures that are unduly lengthy or costly, or indeed unnecessary.
- Annex C detailed guidance is linked with Trade Facilitation. These principle shave been incorporated into the new WTO Agreement on Trade Facilitation.
- A consequence of international development programme and national projects on **trade facilitation** (World Bank, etc.) is handing over separate sectoral SPS inspection responsibilities to either a single SPS inspection agency or to Customs. Having a unified inspection force is a sensible measure but questions have to be asked when this agency is actually Customs, as has happened with some countries in FSU. This may be more power broking rather than logistics. In the first place there can be a vacuum of technical expertise on which to make risk-based decisions. More importantly, Customs are known to be secretive and corrupt in many developing countries. (Trader in one CIS member country: 'Customs are in the Premier League of corruption').

Equitability, democracy and terms of trade

- Does SPS Agreement promote 'democracy'?

The agreement itself provides an important component of democracy if adopted into national biosecurity legislation by removing arbitrary trade restrictions. However, the prevailing lack of resources to implement it has created an inequitable division between rich and poor countries.

On the plus side:

- Risk assessment or adoption of international standards removes the opportunity for unjustified restrictive measures to go unchallenged.
- Transparency provision means that all measures must be communicated to trading partners, with 'measures' embracing procedures and administrative provisions as well as legislation.
- Before WTO, importing authorities did not have to reveal the sampling procedures so they would not say how many positive results would lead to rejection of a consignment. Now they do.

On the negative side:

- Risk assessment is about information and information is power. Risk assessment can be used to erect trade barriers if the exporting country does not have sufficient capacity in this area.
- Very poor implementation of Article 7/Annex B in many developing countries with lack of transparency detrimental to country's own citizens
- Lack of infrastructure for implementation:
 - Scientists across the various disciplines
 - Poorly trained inspectors
 - Laboratory facilities
 - Antiquated administrative arrangements (Article 8/Annex C)

Lack of political will for legislative reform

- Very lengthy process to adopt new legislation or make amendments to existing primary law
- Weak influence of responsible 'scientific' ministry at cabinet level
- Elected representatives serving needs of political elite rather than their constituencies
- Lack of understanding of science behind SPS Agreement
- Bottlenecks in drafting in typically Attorney General's department

International trade and risks to the environment

- Traditionally, the SPS Agreement covered human, animal and plant health sectors but it is now generally accepted that certain aspects of environmental protection are also included implicitly
- The primary reason is that plants are major components and indeed architects of most natural habitats and so anything harming plants may damage habitats and the homes of other creatures, plant and animal.
- No longer exclusively concerned about agriculture and commercial forestry but protecting 'natural' vegetation as well. Additionally, exotic diseases and pests can be very damaging to wild animals as well as livestock.
- The normative framework for PRA under IPPC now includes 'environmental risk' - essentially organisms, plant or animal that might be **invasive** and GMOs. This is in concordance with the CBD, partly to avoid risk analysis having to be done twice for protecting agriculture and the environment.

Lessons learned from biosecurity drafting – helping to remove barriers to further reform

1. Where do instructions come from and who drafts?

Lessons learned

1. Style very local and that model laws and that normative frameworks like IPPC are a guide to the content the structure. Even neighbouring countries in E Africa can follow the IPPC but have plant health very different in style and structure
2. I had to instruct myself and needed high level legal and political support
3. Needed to be a chameleon in terms of drafting style



2. Avoiding *ultra vires* rule for regulations

- Power of Minister to make regulations
- Many regulations in the biosecurity area are based on highly technical matters
- Possible for regulations to be ruled *ultra vires* because a subject not listed in the appropriate section of the Act

Lesson learned:

3. Be detailed in specifying what regulations may be lawfully made by the Minister.

(For plant health law, this means at least all the topics covered by the International Standards for Phytosanitary Measures under the IPPC – 37 at present with more to come.)

3. Where are the regulations?

- Regulations may be of a very technical nature (and include long Schedules or Annexes)
- Drafting Regulations may not be in original contract of external consultant hired to draft primary legislation
- Lack of regulations may delay passage of Bill through parliament
- However, unlike primary legislation, regulations in different jurisdictions may be very similar

Lesson learned:

4. Regulations could be transposed from normative frameworks or from other countries, in contrast to primary legislation

Drafting in trilingual jurisdiction

Official Gazette n° 37 of 10 September 2012

<p>ITEGEKO N° 30/2012 RYO KUWA 01/08/23012 IMIKORESHEREZE Y'IFUMBIRE MVARUGANDA N'IMITI IKORESHA MU BUHINZI NO MU BWOROZI</p>	<p>LAW N° 30/2012 OF 01/08/23012 ON GOVERNING OF AGROCHEMICALS</p>	<p>LOI N° 30/2012 DU 01/08/23012 PORTANT UTILISATION DES PRODUITS AGROCHIMIQUES</p>
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ISHAKIRO

TABLE OF CONTENTS

TABLE DES MATIERES

UMUTWE WA MBERE : INGINGO
RUSANGE

CHAPTER ONE: GENERAL
PROVISIONS

CHAPITRE PREMIER: DISPOSITIONS
GENERALES

Ingingo ya mbere : icyo iri tegeko
rigamije

Article One : Purpose of this Law

Article premier : Objet de la présente loi

Ingingo ya 2: Ibisobanuro by'amagambo

Article 2 : Definitions of terms

Article 2 : Définitions des termes

UMUTWE WA II: ISHYIRWAHO
RY'INAMA NGISHWANAMA
N'UMWANDITSI W'IMITI
N'IFUMBIRE MVARUGANDA
BIKORESHA MU BUHINZI
N'UBWOROZI

CHAPTER II: ESTABLISHMENT OF
ADVISORY COUNCIL AND
APPOINTMENT OF THE REGISTRAR
OF AGROCHEMICALS

CHAPITRE II: CREATION DU
CONSEIL CONSULTATIF ET
NOMINATION DU REGISTRAIRE DE
PRODUITS AGROCHIMIQUES

Ingingo ya 3: Ishyirwaho ry'Inama
Ngishwanama n'inshingano zayo

Article 3: Establishment of Advisory
Council and its responsibilities

Article 3: Création du Conseil consultatif et
ses attributions

Ingingo ya 4 : Amabwiriza agenga imiti

Article 4 : Regulations with regard to

Article 4 : Règlements régissant les produits

Law on Governing of Agrochemicals

Article 35. Drafting, consideration and adoption of this Law

This Law was drafted in English, considered and adopted in Kinyarwanda.

- Apparent from this are several significant legal inconsistencies in both English and French versions resulting retranslation from Kinyarwanda. Some examples:

Cabinet approved text	Law as enacted	Issues arising
Registrar: means the person appointed by the responsible Minister to administer the pesticide legislation on his behalf.	Registrar: an officer in charge of drawing and managing a list of agrochemicals; [Equivalent in French)	Inconsistent use of ‘registrar’, ‘administrator’ and reference to ‘nearest administrative authority’
Pesticide: adopted FAO definition	‘Pesticide’ not defined, only ‘agrochemical’	‘Pesticide’ used throughout text
‘Registration’ defined	‘Accreditation’ defined (English and French)	‘Registration’ used in text

Plant Health Protection Law Rwanda

Official Gazette n° 22 of 30/05/2016

ITEGEKO N°16/2016 RYO KU WA 10/05/2016
RIGENA UBURYO BWO KURENGERA
UBUZIMA BW'IBIMERA MU RWANDA

LAW N°16/2016 OF 10/05/2016 ON PLANT
HEALTH PROTECTION IN RWANDA

LOI N°16/2016 DU 10/05/2016 PORTANT
PROTECTION DE LA SANTE DES
VEGETAUX AU RWANDA

ISHAKIRO

TABLE OF CONTENTS

TABLE DES MATIÈRES

UMUTWE WAMBERE: INGINGO RUSANGE

CHAPTER ONE: GENERAL PROVISIONS

CHAPITRE PREMIER: DISPOSITIONS
GENERALES

Ingingo ya mbere: Icyo iri tegeko rigamije

Article One: Purpose of this Law

Article premier: Objet de la présente loi

Ingingo ya 2: Ibisobanuro by'amagambo

Article 2: Definitions of terms

Article 2: Définitions des termes

UMUTWE WA II: IYINJIRA RY'IBIMERA
MU GIHUGU

CHAPTER II: IMPORTING PLANTS

CHAPITRE II: IMPORTATION DES
VEGETAUX

Ingingo ya 3: Kwinjiza ikimera n'ikigikomokaho

Article 3: Importing a plant and a plant product

Article 3: Importation d'un végétal et d'un
produit végétal

Ingingo ya 4: Ikimera cyangwa ikigikomokaho
kidakena uruhushya cyangwa icyemezo
cy'ubuziranenge

Article 4: Plant or plant product that does not
require licence and a phytosanitary certificate
for importation

Article 4: Végétal ou produit végétal dont
l'importation ne requiert pas une licence et un
certificat phytosanitaire

Ingingo ya 5: Guhabwa cyangwa kwimwa
uruhushya rwo kwinjiza ibimera
n'ibibikomokaho

Article 5: Granting or refusal of a licence to
import plants and plant products

Article 5: Obtention ou refus de licence
d'importation de végétaux ou de produits
végétaux

Ingingo ya 6: Gutakambira kwimwa uruhushya

Article 6: Appeal against the refusal of granting
a licence

Article 6: Recours contre le refus d'octroi de
licence

Ingingo ya 7: Kwamburwa uruhushya

Article 7: Revocation of a licence

Article 7: Révocation de licence

Final lesson learned

5. Not to expect much if any iterative dialogue even with official drafters

Concluding remarks on SPS Agreement

- SPS Agreement provides the normative framework for ‘Trade by Standards’ but also provides basis for broader application of biosecurity to protect habitats and biodiversity.
- Drafting national law in the SPS sector requires understanding of the underlying science. Typically the normal process of ministry experts instructing official drafters is lacking and even if there was, unlikely to be much iteration to check that the instructions were followed in terms of science.
- Political barriers to legislative reform, particularly to adoption of risk based biosecurity measures
- Also illustrated some of the problems with drafting legislation for pesticides which in my view should be included under the biosecurity umbrella.

Legislation after Brexit

- Continued role of Parliament in overseeing Brexit 'deal' unclear – Article 50 Bill
- Great Repeal Bill to adopt 'all' EU legislation into UK law before 'unnecessary' legislation is removed but will Bill include Directives (e.g. Plant Health Directive 2000/29/EC) as well as Regulations?
- Legislative initiatives may face further legal difficulties, particularly if the Government invokes 'Henry VIII' powers or continues to use prerogative powers
- Whether or not people voting for Brexit in the Referendum knew they were voting for exit from the Single Market, this now seems likely.
- Main question on SPS:
 - Will UK's biosecurity risks increase or decrease if her borders retract to national boundaries?

Brexit, Single Market and WTO

- EU is member of WTO, not UK
- UK was very influential in designing the legislative framework to apply SPS to the Single Market, especially for food safety and plant health
- EU is a 'trade deal' incorporating social, labour and environmental standards as well as pure commodity standards
- EU's food standards largely follow Codex guidelines and therefore are generally consistent with trade liberalisation
- WTO has not abolished tariffs but sets normative levels for tariffs
- (Plurilateral or bilateral) trade deals are struck to take certain aspects of trade outside the WTO regime
- Concessions may be made departing from GATT/SPS standards but beware of Most Favoured Nation (MFN) principle

What next?

- 'Damage limitation' may be necessary to mitigate the effects of a hard Brexit with the default WTO option.
- Environmental Audit Committee: Brexit posed risks for UK farming, the countryside and wildlife unless ministers took concerted action to maintain subsidies and standards; and environmental protections could be weakened unless the government introduces specific legislation that is enforced and not moribund 'zombie' legislation
- The Environment Secretary told the Committee in January not all of the 800 environmental laws could be replicated. Only two-thirds of existing EU environmental legislation could be "rolled forward" with minimal technical changes, she said.
- British farmers may be keen to continue to adhere to current food safety and animal health standards after Brexit but they are concerned that they could face competition from cheaper food from countries with lower food standards as a consequence of new trade deals.

Last words on Brexit

- Other sources that might help answering the question ‘What does “falling to WTO” mean’?
FT Brexit briefing, 25 January
<https://www.ft.com/content/a7ca5fde-e2f7-11e6-9645-c9357a75844a>

LSE Brexit Blog, 1 February <http://blogs.lse.ac.uk/brexit/2017/02/01/brexit-and-free-trade-fallacies-part-two/>
- Echoing the concerns of British farmers, there may be a confusion between food safety and quality among the general public. One gets what one pays for in terms of quality but food safety is essentially a binary matter. If food meets the standards set it is safe. If not, food is unsafe.

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