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Mirror, Mirror on the Wall, Who Has the Fairest Clauses of Us All? Stress-testing the Application of Mirror Clauses to Pesticides

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EXECUTIVE SUMMARY

In less than six months, 'mirror clauses' have taken EU trade policy by storm. To inject 'reciprocity' in trading terms, the French Presidency of the Council is proposing that imported food and feed be produced under the exact same sanitary, phytosanitary, welfare and environmental standards as those imposed on domestic products within the European Union.

The international trade rulebook is both complex and yet relatively straightforward in ensuring that process and production methods applied to imports respond to legitimate justifications and do not result in a disguised barrier to trade. The European Union may learn from the United States' playbook to ensure that mirror clauses are negotiated with trading partners bilaterally, rather than imposed on them unilaterally.

As part of its Farm to Fork strategy, the European Commission has announced two pesticides reduction targets to be attained by 2030, and it is in this framework that questions relating to plant health and international trade have been gaining traction. With pesticides targets set to raise costs for European farmers and productivity levels likely compromised, there are genuine concerns that domestic products will be competitively undercut by imports produced 'less sustainably'.

To grasp the complexity of mirror clauses applied to the phytosanitary sphere, understanding how the European Food Safety Agency authorises and bans active molecules and bio solutions is vital. Appreciating the daily efforts of national customs agents in checking imports for pesticides residues, and coordinating efforts

of Member States on rejected food and feed imports that do not meet EU requirements, is also paramount.

There are warranted societal justifications to impose measures to protect humans, animals, plants and ecosystems. To remain legitimate under international law however, mirror clauses should be 'stress-tested' to avoid being applied as a means to gain competitiveness.

Countries are unequal when it comes to the risk of pests and climate change is already intensifying their distribution with potentially dramatic impact for global food security. When it comes to protecting plant health, regional conditions must be considered to not only avoid inconsistency with WTO rules but also to ensure that mirror clauses do not result in a practical ban on imports from developing countries impacting livelihoods worldwide.

INTRODUCTION

The French Presidency has set out to make ‘mirror clauses’ an imprint on EU trade policy during its time at the helm of the Council. Emmanuel Macron asserts that the French Presidency “will be a great opportunity for promoting what we call mirror clauses and to have social and environmental requirements in our trade agreements.” He professes that reciprocity of standards is “a question of fairness” and that these clauses should be applied to the import of agricultural and food products from the rest of the world.¹

Arguments focusing on fairness are central to the public policy debate on international trade. National authorities and stakeholders often argue that the cards are stacked against them: the playing field tilts in favour of others. Rarely would a country promote another’s standards as ‘higher’ or ‘better’. This is why international law should continue to serve as the reference point to define equity in trading conditions amongst nations.

The Farm to Fork strategy, an integral part of the European Green Deal, is set to impact domestic farmers’ productivity and international competitiveness in view of enhancing agriculture’s contribution to reversing biodiversity loss, protecting the environment, fostering nutritious foods conducive to public health and mitigate climate change. With the implementation of ambitious climate and environmental policies for European agriculture, understandably Europeans wish to ensure that imported food and agricultural goods respect the same rules as their own. To uphold equity, however, any ‘mirror clause’ must be carefully designed to eliminate ‘competition bias’ and not constitute a disguised barrier to trade that may unfairly harm farmers in other parts of the world.

This policy briefing sets out to stress-test the fairness of mirror clauses by first delving into the WTO rulebook and case history. In this section, process and production methods are separated into two main categories: those relating to the sanitary and phytosanitary aims of protecting plant, animal and human health and life, and those relating to characteristics of a product as defined by the Technical Barriers to Trade Agreement. To stress-test mirror clauses in a practical setting, reciprocity is then applied to pesticides and the EU authorisation regime for both chemical molecules and bio solutions.

¹ AGRAFACTS, N°104-21 “Macron says Presidency will seek ‘mirror’ clauses, push ahead on climate goal”, 19 December 2021

1. WHAT IS A MIRROR CLAUSE?

A priori, the aim of a 'mirror clause' is to guarantee that imported products are produced under the exact same sanitary, phytosanitary, welfare and environmental standards as those imposed on domestic products within the European Union. For those on the offensive, mirror clauses are necessary to even out the global level-playing field, to inject more fairness in international trade, particularly for food and agriculture.

'Mirror clauses' are not new. They derive from the Napoleonic Code and are currently enshrined in two areas of French civil law: inheritance and audio-visual labour.² What the French Presidency of the Council is proposing is to extend these civil 'mirror clauses' into a new realm, that of trade policy. What is more uncertain is how the Presidency suggests injecting reciprocity in trading relationships. So far, those proposing mirror clauses have steered clear from defining the legal basis that would underpin such 'reciprocity'. To summarise, there are two means to see a mirror clause applied to process and production methods: negotiate reciprocity as part of a bilateral understanding or impose it as a unilateral measure.

Within the framework of a preferential trade agreement, trading partners can agree to condition more favourable terms of trade based on their adherence to a specific standard. This may be a larger tariff-rate quota or a shorter transition period for tariff de-escalation within the framework of a trade deal. An example of such a mirror clause can be found in the EU-Mercosur association agreement. The tariff rate quota provided for Latin American egg producers includes a requirement to comply with EU animal welfare standards for the protection of laying hens.³

Another means of getting trading partners on board in applying specific process and production methods to their exports is through a negotiated administrative arrangement, out of a wider FTA setting. This can be done via the exchange of administrative letters, or a bilateral Memorandum of Understanding. For instance, to avoid sheep meat from Australia from having been museled as part of its rearing, one could imagine an arrangement that would ensure the protein is accompanied by a compliance certification in exchange for a lower frequency of import controls.⁴

² In inheritance law, a mirror clause allows spouses to apply the same distribution to a life insurance amongst heirs as the proportion chosen for the wider succession. As for labour there are four specific conventions applicable to the cultural sector. A mirror clause allows a film production firm bound by the cinema convention to apply the animation film convention for contractual agents if it decided to embark in an animation remake for instance.

³ Annex 2-A of the EU-Mercosur preferential trade agreement, tariff elimination schedule, page 8

⁴ According to RSPCA Australia, mulesing is a painful procedure that involves cutting crescent-shaped flaps of skin from around the lamb's breech and tail using sharp shears. The resulting wound, when healed creates an area of bare, stretched scar tissues which diminishes the attraction of blowflies thereby reducing the risk of fly strikes.

In both these cases, the EU would have to provide a benefit to the trading partner that outweighs the compliance costs of applying the mirror clause. Such ‘reciprocity’ would apply bilaterally and therefore not be extended to all imports.

A more hostile way of applying mirror clauses to imports is to impose the measure unilaterally. In this situation the EU acts without prior negotiation with its trading partners, and the measure should therefore not be considered as ‘reciprocal’. Depending on the design of the measure, the EU risks imposing rules that are disproportionate and incompatible with the international rulebook, and therefore seeing the mirror clause challenged by trading partners in the WTO.

2. WHAT DOES THE WTO RULEBOOK SAY?

The Marrakesh Agreement, the founding agreement of the World Trade Organization, includes sustainable development as one of the aims Members should pursue. Yet environmental and social ‘process and production methods’, or PPMs, remain a thorny area of international trade law. Both the Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary (SPS) Agreements explicitly mention PPMs but diverge on their potential practical applications in a legal context.

2.1 SANITARY AND PHYTOSANITARY MEASURES AND ANTIMICROBIAL RESISTANCE

The SPS Agreement applies to measures including process and production methods but only when the purpose is explicitly to protect human, animal or plant life or health. An example of such a SPS-related PPM would be the application of a specific heat treatment when exporting an animal protein to guarantee food safety standards. More likely than not, any ‘mirror clause’ proposed by the European Union would fall under TBT, rather than SPS, even if ‘phytosanitary’ features prominently in the title of the measure.

The EU Regulation on veterinary medicines that entered into force on 28 January 2022 could provide a legitimate example of an SPS-related measure. In 2019, more than 1.2 million people died as a result of antibiotic-resistant bacterial infections. In a bid to tackle this public health crisis, the European Commission is drawing up a list of antibiotics that should no longer be used in livestock production. The ‘mirror clause’ will be applied to European farmers and foreign producers alike. In this case, there would seem to be a clear scientific link between the measure and its human health purpose. However, for the measure to remain consistent with the SPS goal of protecting human health while not constituting a

disguised restriction to trade, any competition bias must be eliminated.⁵ The challenge for EU authorities is therefore to draw up a list of critical medicines to human health that are based on antimicrobial resistance risks of populations without be biased towards European producers' economic or competitive interests.

2.2 TECHNICAL BARRIERS TO TRADE MEASURES AND ENVIRONMENTAL PROTECTION

Under the TBT Agreement, any mandatory (and perhaps unilateral) 'reciprocity' clause would be considered a technical regulation if it "lays down product characteristics *or their related* processes and production methods".⁶ The depletion of resources, environmental degradation, forced labour or shoddy animal welfare conditions, should fall under the remit of TBT unless they qualify as an SPS-related PPM.

The first major WTO dispute that called into question a PPM trade barrier was *US-Shrimp* in 1997.⁷ In a marine conservation effort, the United States required shrimp to be caught using trawl nets fitted with a turtle excluder device.⁸ To export shrimp to the US, foreign producers needed to present a turtle excluder device certificate at the border. This 'mirror clause' did not allow countries to enforce their own systems to protect turtles but required a US-standardised device fitted on fishing nets.

The WTO Appellate Body ruled that it was legitimate for the United States to protect marine turtles but the policy was discriminatory as it required imports to enforce an American technical regulation.

"It may be quite acceptable for a government, in adopting and implementing a domestic policy, to adopt a single standard applicable to all its citizens throughout that country. However, it is not acceptable, in international trade relations, for one WTO Member to use an economic embargo to require other Members to adopt essentially the same comprehensive regulatory

⁵ Article 2.3 of the SPS Agreement foresees that Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members. Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade.

⁶ Agreement on Technical Barriers to Trade, Annex A1.1

⁷ DS 58, United States – Import Prohibition of Certain Shrimp and Shrimp Products

⁸ According to NOAA, turtle excluder device consists of metal bars and mesh that fit inside the neck of a trawl net. While shrimp pass between the bars to the back of the net, turtles and other larger animals bump against the metal grid and escape through a flap in the mesh, either at the top or bottom of the net.

program, to achieve a certain policy goal, as that in force within that Member's territory, without taking into consideration different conditions which may occur in the territories of those other Members.”⁹

The WTO also ruled that the United States should have attempted to negotiate a “consensual means of protection and conservation” rather than apply a unilateral measure.¹⁰

Further international adjudication came in the form of the US-Tuna dispute, another case also involving a trade-restrictive PPM barrier for marine conservation.¹¹ To protect dolphins, the United States introduced a ‘dolphin safe’ labelling scheme for tuna to allow consumers to distinguish products based on PPMs. Tuna exporters to the US had to provide specific documentation depending on the area of catch and fishing method to prove they were not using dolphins to corral tuna into fishing nets.¹²

The WTO ruled that adopting a dolphin-safe label for tuna was permitted under the international rulebook, but it should include *all* harmful fishing conditions to protect dolphins and not single out a specific ‘geo-localised’ method.¹³

2.3 MORALITY AND PROCESS AND PRODUCTION METHODS

The European Union has also been defending itself against trading partners on PPMs, including in the EC-Seals case.¹⁴ In the wake of a series of high-profile campaigns kicked-off by Brigitte Bardot’s crusade to save Canadian seals, the EU introduced a general import ban on seal products.¹⁵ This ‘Seal Regime’ included a series of exemptions to the prohibition, such as for indigenous hunts, marine resource management or tourist souvenirs. Canada and Norway claimed the measure was discriminatory. Unlike Greenland, they did not have a valid EU animal welfare certification.¹⁶

⁹ Ibid, Report of the Appellate Body, AB-1998-4, Paragraph 164

¹⁰ Ibid, paragraph 172. For the Appellate Body, the unilateral character of the application of US’ Section 609 heightened “the disruptive and discriminatory influence of the import prohibition and underscores its unjustifiability”

¹¹ DS 381, United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products

¹² Yellowfin tuna fish is often found swimming in schools underneath dolphins. Fisherman in the Eastern Tropical Pacific were using speedboats to chase dolphins towards purse-seine vessels where both dolphins and tuna would get encircled and captured. Source and reading recommendation: Ballance LT, Gerodette T, Lennert-Cody CE, Pitman RL and Squires D (2021) A History of the Tuna-Dolphin Problem: Successes, Failures, and Lessons Learned. *Front. Mar. Sci.* 8:754755. doi: 10.3389/fmars.2021.754755

¹³ Report of the Appellate Body, AB-2012-2. It is worth noting that in this case, tuna that was not considered “dolphin-safe” could still be imported and marketed in the US. The issue was that labelling scheme was discriminatory because it specifically targeted Mexican tuna products and favoured US-caught tuna.

¹⁴ DS 400, European Communities - Measures Prohibiting the Importation and Marketing of Seal Products - Status report by the European Union

¹⁵ <https://www.theguardian.com/film/2006/mar/23/news1>

¹⁶ Ibid, AB-2014-1, para 5.333

The WTO Appellate Body assessed whether the EU was introducing a technical regulation, according to rules laid down in the TBT Agreement. Judges agreed this was not the case yet the ruling shed light on the relationship between PPMs and product characteristics by concluding that a “related” PPM¹⁷ is one that is “connected” or “has a relation” to the characteristics of a product:

*“Such ‘characteristics’ might relate, inter alia, to a product’s composition, size, shape, colour, texture, hardness, tensile strength, flammability, conductivity, density, or viscosity”.*¹⁸

This interlinkage between product characteristics and process and production methods is fundamental to the debate on mirror clauses and reciprocity. One of the core principles of the international rulebook is national treatment. Imported products are not to be treated less favourably than ‘like products’ of national origin, yet often positive or negative environmental and labour externalities do not impact the physical characteristics of a traded product.

To determine whether there is discrimination or not, or WTO incompatibility, ‘likeness’ is assessed using a four-tiered questioning to compare products:

- (1) Do both products share physical characteristics?
- (2) Do both products have the same end-use in the given market?
- (3) Considering minor differences in tastes and habits between countries, can consumers differentiate them?
- (4) What are the products’ tariff classification under the harmonized system?

But what if citizens find certain process and production methods *morally* objectionable?

¹⁷ DS 400, European Communities - Measures Prohibiting the Importation and Marketing of Seal Products - Status report by the European Union, Report of the Appellate Body, AB-2014-1, paragraph 5.12

¹⁸ EC-ABESTOS Ibid, paragraph 5.11 and Report of the Appellate Body, AB-2000-11, paragraph 67

2.4 THE INFAMOUS ARTICLE XX OF GATT HAS RESTRICTIONS TOO

Article XX of GATT establishes the exceptions to the international trade rulebook. When a measure is found inconsistent with the WTO rulebook, it can sometimes be justified under this article. The exceptions include a set of potential reasons a WTO Member may apply PPM standards to imports that are not related to product characteristics, including the conservation of exhaustible natural resources or public morals.

To apply ‘reciprocity’, or introduce a ‘mirror clause’ unilaterally, by calling upon one of these exceptions to the rulebook requires jumping through further legal hoops, not least the dreaded two-tiered test:

- (1) The measure must fit into one of the concerns raised, that is, for instance, the measure must address the environmental concerns, contribute to achieve the objective, and not be highly-trade restrictive;
- (2) Fulfil the requirements of Article XX *chapeau*, ie. to demonstrate that the measure is not arbitrary or present an unjustifiable discrimination against imports, or amongst imports.

In the case of EC-Seals, the Appellate Body agreed that Europeans considered animal welfare to be a matter of public morality but also that the EU had failed to fulfil its non-discrimination obligations. In practice this meant the Commission was required to go back to the drawing board and amend the EC Regulation.

2.5 THE EU’S ROLE IN SAVING THE RULES BASED ORDER

As much as some might wish to critique the ‘judicial overreach’ of the WTO’s Appellate Body, the ‘crown jewel’ of the multilateral trading system has been paramount to the “rules-based” order that today is in peril.

Many consider that the WTO is impeding the enforcement of environmental and social standards but without a common framework for trading, there is a risk of driving more transactional, contingent, power-based requirements that unfairly and disproportionately affect small and least developed countries. Wherever reform of the institution leads, at this present juncture the EU should be weary to not send a signal to Members that the rulebook is irrelevant.

3. STRESS-TESTING FAIRNESS: THE CASE OF PESTICIDES

One of the heated debates on ‘mirror clauses’ is that of pesticides, including compounds such as insecticides, fungicides and herbicides. A pesticide is an active substance, or preparation, used to prevent, control or eliminate undesirable organisms, including plants, animals, fungi or bacteria. Those in favour of mirror clauses argue that fruit, vegetables, food and grain treated with non-EU authorised pesticides should be barred access to the Single Market.

Plant health is increasingly at risk. Plant pests, such as insects, fungi, bacteria and viruses, can have dramatic impacts for farmers, biodiversity and natural ecosystems. The FAO estimates that up to 40% of food crops worldwide are lost to plant pests and diseases every year, and climate change is about to worsen this outlook.

The European Union is neither immune to pests or the calamitous effects of a heating planet. *Xylella fastidiosa*, a bacterium pest first detected in 2013 in Italy has since killed one third of the 60 million olive trees of the Puglia region. The pest has since extended its reach to France, Portugal and Spain, with eradication continuing to be a challenge. The European Commission estimates *Xylella f.* could end up causing EU production *annual* losses of €5.5 billion by affecting 70% of production value of older olive trees without a rapidly implementable solution.¹⁹

Countries are unequal when it comes to risk relating to pests and disease, including within the Single market. Warm and humid environments are generally more conducive to insect populations than cold and arid ones. Heating temperatures increase the risk of pests spreading and provide a more favourable environment for pathogens like fungi to proliferate. Climate change also alters the behaviours of pests, their intensity and geographical distribution, making outbreaks less predictable.²⁰ The recent invasion of desert locusts across the Horn of Africa stands as an inauspicious illustration of how rapidly a small swarm of locusts can transform into a cataclysm of biblical proportions, with the ability to result in a humanitarian crisis.²¹

¹⁹ Older trees are considered to be of over 30 years of age. Today there is no scaled solution available to treat the diseases caused by *Xylella f.* Although field trials of an organic treatment, combined with agro-forestry best practices seem to be giving promising results. https://ec.europa.eu/commission/presscorner/detail/en/IP_19_5981

²⁰ FAO and IPPC, Plant Health and Climate Change factsheet: <https://www.fao.org/3/cb3764en/cb3764en.pdf>

²¹ This pest outbreak is also known as the 2020-2021 Desert locus crisis <https://www.fao.org/locusts/en/>

3.1 PLANT HEALTH AND THE FARM TO FORK STRATEGY

Plant health, and pesticides, are drawing a renewed interest across Europe since the adoption of the new ‘Farm to Fork’ Strategy, a central tenant of the European Green Deal. The European Commission has announced two pesticide reduction targets to be attained by 2030. The executive’s aim is to cut by half the use and risk of chemical pesticides and more hazardous pesticides used in the EU. To reach these ambitious targets, the Commission proposes a three-pronged approach, including a revision of the sustainable use of pesticides directive, better integration of pest management and the promotion of safer alternatives. The Farm to Fork strategy also aims to achieve at least 25% of the EU’s agricultural land under organic farming by 2030.

With less phytosanitary solutions available to them, European farmers are expected to experience a drop in productivity levels and are evidently expressing concerns about loss of international competitiveness. The Commission’s Joint Research Centre’s modelling concludes that implementing the Farm to Fork strategy would lead to a decrease in the EU’s export positions and a worsening of trade deficits.²² Depending on how the pesticide reductions are accounted for though, the EU’s research centre also concludes that the 2030 targets could be mostly achieved through the expansion of organic farming, with pesticide use in conventional farming remaining relatively stable.

In any event, as the Farm to Fork’s list of regulations and delegated acts are gradually adopted, questions relating to farmers’ competitiveness, and how to maintain an international ‘level-playing field’, will continue to gain prominence in the policy debate, not least through calls to impose ‘mirror clauses’ on trading partners.

3.2 EU AUTHORISATION PROCEDURES FOR PHYTOSANITARY SOLUTIONS

To grasp the complexity of mirror clauses applied to the phytosanitary sphere, understanding how the European Food Safety Authority (EFSA) authorises and bans pesticides is vital. Under the EU’s authorisation procedure, only ‘molecule holder’, or the producer of an active substance or plant protection product, may request a market authorisation or its renewal. Once EFSA’s safety assessment gives the scientific ‘green light’, the European Commission’s Standing Committee on Plants, Animals Feed and Food decides whether to

²² Barreiro Hurlé, J., Bogonos, M., Himics, M., Hristov, J., Perez Dominguez, I., Sahoo, A., Salputra, G., Weiss, F., Baldoni, E. and Elleby, C., Modelling environmental and climate ambition in the agricultural sector with the CAPRI model, EUR 30317 EN, Publications Office of the European Union, Luxembourg, 2021, ISBN 978-92-76-20889-1, doi:10.2760/98160, JRC121368.

grant authorisation of the active substance at EU level.²³ The company then must request a market authorisation for the pesticide containing the said active substance.

The manner pesticides are to be applied, however, remain a Member State competence. The regionalisation of application procedures is justified by the fact pests' occurrence diverge from one country to another. Member States with comparable agricultural, plant health risks and environmental condition are grouped together for the purpose of risk assessment. The European Union is therefore split into three main zones: the North that spans the Baltic states and Scandinavia, the South that covers the Mediterranean basin from Portugal to Bulgaria, and the Centre that includes the Benelux, Germany, Romania as well as Ireland.

EFSA assesses every active substance for safety before it can be placed on the market for a limited period and reviews data periodically.²⁴ Considering the costs involved in regrouping all scientific proof including efficacy, toxicity, residues, fate²⁵ and behaviour, ecotoxicology, crop specific usages, patent holders invest in requesting authorisation for molecules only in the locations where there is a commercial gain. This is why the EU pesticide regime is tailored to the specificities of European agriculture and EU-authorised pesticides treat pests common to Europe, not those of Kenya or Peru.²⁶

Pesticides authorised in the European Union are likely to be unauthorised in other parts of the world, not because they have been considered unsafe by regulators but because registration is costly and their use could simply be ill-suited to the country's agricultural production, plant health risk or environmental conditions.

Much in the same vein as medicines, active molecule owners invest in lengthy and costly authorisation processes in markets where registration costs are outweighed by financial benefits. Hence the crucial importance of differentiating between the 'prohibition' and 'non authorisation' of an active substance or biological solution as both concepts are often confused in the policy debate.

²³ Standing Committees deliver opinions that inform the Commission's Directorate General for Health and Food Safety's work on measures that it is planning. The Standing Committees on Plants, Animals, Food and Feed (PAFF) are composed by Member State experts and presided by a Commission representative.

²⁴ Approved active substances are listed in the Implementing Regulation (EU) 540/2011 and are included in the EU's Pesticides Database. The review and renewal reports prepared by EFSA for each active substance are also available in the database: https://ec.europa.eu/food/plants/pesticides/eu-pesticides-database_en

²⁵ Fate assesses substances' behaviour in the environment, that is soil, water, sediment, and air. The process describes where a chemical goes when it gets out into the environment and how it might be chemically transformed in the process.

²⁶ For more information on the Kenyan producers' perspective, recommended reading includes Euractiv's Special Report "Ripple effects: how EU decisions impact African farmers", 21 October 2021, updated on 25 February 2022: https://www.euractiv.com/section/agriculture-food/special_report/ripple-effects-how-eu-decisions-impact-african-farmers/

Prohibition refers to a decision of the European Commission and Member States to not authorise the use of an active substance, or renew its authorisation, on safety or environmental grounds. The scientific assessment of the active substance is conducted by EFSA, together with Member State experts. If together they conclude there is a risk to human health or that safe levels of exposure cannot be determined, the active substance is prohibited from use.

Non authorisation, on the other hand, can occur according to two main scenarios. The molecule holder might not have requested authorisation in the European market or the authorisation may have expired without a request from the manufacturer to renew its license. In such situations, the active substance has not been ‘prohibited’ because it is unsafe. More likely than not, the molecule holder does not have a commercial incentive to request authorisation or renew its licence within the Single Market. In the latter case, a manufacturer’s research and development teams might have made significant scientific progress since the first authorisation. The company’s incentive in this case is to request registration of the more effective or more environmentally friendly solution to meet client demands.

When a pesticide is prohibited or non-authorised, the Maximum Residue Level for imports automatically falls to trace-level meaning that no trace of the substance should be detectable when the food or feed enters the EU Single Market.

3.3 HOW MAXIMUM RESIDUE LIMITS WORK

A Maximum Residue Limit (MRL) is the highest level of a pesticide residue that is legally tolerated in or on food or feed when pesticides are applied correctly using Good Agricultural Practices.²⁷

At multilateral level, the Codex Alimentarius, an intergovernmental organisation established by two United Nations bodies, the Food and Agriculture Organisation and the World Health Organisation is responsible for setting food standards, including MRLs. Before Codex issues a recommendation on an MRL, the Joint Pesticide Residue Committee that is led by WHO and FAO experts conducts a scientific assessment. Codex Alimentarius decisions are enshrined in scientific principles and evidence, and while countries may decide to diverge from Codex in establishing more restrictive measures, these may not surpass Codex-level MRLs in international trade.²⁸

²⁷ ‘Good Agricultural Practices’ are defined by the Food and Agriculture Organization of the United Nations (FAO) as a “collection of principles to apply for on-farm production and post-production processes, resulting in a safe food supply”

²⁸ During the EU’s latest trade policy review in the World Trade Organisation, it is worth noting that the Chairman concluded that “many Members did pose questions and raised concerns regarding certain EU sanitary and phytosanitary measures which in their view were not based on science not on international standards and did not provide adequate opportunity to take into account views of third countries. Measures regarding the setting of maximum residue levels were often mentioned in this respect.” https://www.wto.org/english/tratop_e/tpr_e/tp495_crc_e.htm

Within the Single Market, pesticide MRLs are harmonised with control programmes coordinated amongst Member States. To keep food and feed safe, the European Food Safety Authority sets MRLs for more than 1300 pesticides, with a default ‘trace-level’ of 0.01mg/kg applied to nearly 690 of them.²⁹ These safety rules are applied to all agricultural and food products commercialised in, and imported into, the European Union.

Member States’ food safety authorities are responsible for running MRL checks, with some countries having established pesticide residue observatories. EFSA also runs randomised controls on food and feed consumed in the EU. The latest available figures dating back to 2019 show that 2% of foods analysed had residues exceeding maximum limits so, overall, EU producers show strong enforcement on residue limits.³⁰

3.4 INTERNATIONAL TRADE AND THE RAPID ALERT SYSTEM

International trade and travel contribute to the unintentional spread of pests through plant imports and passenger travel. Member State food safety authorities team-up with customs to check imports for both pests and maximum residue limits at Border Control Posts.³¹ Certain plants and plant products classified as high risk of quarantine or regulated pests must be accompanied by an additional phytosanitary certificate signed-off by the exporting country’s authorities.

Food and feed imports benefit from a highly integrated EU-wide alert system that pre-dates the Internet. RASFF, or the Rapid Alert System for Food and Feed, enables EU Member State food safety authorities, the European Commission and EFSA to report ‘import incidents’ including environmental contamination, faulty labelling, processing or storage conditions, food borne outbreaks or documentation fraud.³² RASFF allows Member State authorities to access laboratory results and official reports in near real-time, with the Commission coordinating with national authorities.

The iRASFF system today keeps customs officials across Europe, in ports and airports, informed on the status of an import and communicates via notification alerts and border rejections. If a tested foreign product does not comply with plant health or food safety standards, the consignment is rejected at the external borders of the EU/EFTA and must be

²⁹ The 2019 European report on pesticide residues in food, European Food Safety Authority, Luis Carrasco Cabrera, Paula Medina Pastor, 7 April 2021 <https://efsa.onlinelibrary.wiley.com/doi/abs/10.2903/sp.efsa.2021.EN-6487>

³⁰ Of these, 1% were considered non-compliant when measurement uncertainty was taken into consideration. <https://efsa.onlinelibrary.wiley.com/doi/full/10.2903/j.efsa.2021.6491>

³¹ A Border Control Post, or BCP, is an inspection post designated to carry out sanitary and phytosanitary checks on imports

³² Members of the European Free Trade Association (Iceland, Liechtenstein, Norway and Switzerland, are also connected to the EU’s RASFF.

returned to the country of origin or destroyed on site, at the exporters' cost. Enforcement of trace-level MRLs and costs relating to potential border rejections are driving the uptake of biopesticides by exporters to the European Union.

3.5 SPEEDING-UP BIOPESTICIDES AUTHORISATION PROCEDURES

The adoption of biopesticides that, by definition, eliminate the risk of leaving a trace of chemical residue on the plant or final product is also being encouraged by growing consumer demand for organics. Biopesticides are pesticides derived from naturally occurring sources, including microorganisms, plants, animals and a few minerals, that control pests by non-chemical means.³³

The global biopesticides markets is expected to grow 14.7% between 2020 and 2025, with North America projected to dominate agricultural inoculation technologies and Europe to become the fastest-growing market for them.³⁴ US dominance is largely explained by the country's accelerated authorisation procedure whereby biopesticides benefit from a separate registration, shorter review times and less data requirements than in the EU. At latest count, the US has soared ahead in authorising over 200 biopesticides whereas the EU lags at around 60.³⁵

Recognising the discrepancy between the Farm to Fork strategy's objectives and the slow path to market for non-chemical solutions via current EFSA procedure, EU Member States recently approved new rules to speed up the authorisation of biological plant protection products, via four legislative instruments that will enter into force in November 2022.³⁶ There are also discrepancies that need to be corrected in the way the European Union considers its relations to third country producers in this respect.

A revealing illustration of an unfortunate policy outcome was a recent case affecting organic lime growers in Brazil. To mitigate the risk of spreading citrus canker disease into the EU, Brazilian lime producers were requested to bathe their fruit in a wash, including a single chemical compound, at the packing house prior to export. In abiding with EU plant health rules, Brazilian lime producers were unable to claim their earned organic certification, with a devaluation in 35% in value of the lime fruit. Researchers from the

³³ Biopesticides are derived from nature, they regroup four main categories: semiochemicals (e.g. pheromones), natural substances (e.g. botanicals, biochemicals), macrobials (e.g. beneficial insects) and microbial such a bacteria or viruses.

³⁴ Biopesticides Market by Type (Bioinsecticides, Biofungicides, Bionematicides, and Bioherbicides), Source (Microbials, Biochemicals, and Beneficial Insects), Mode of Application, Formulation, Crop Application, and Region - Global Forecast to 2025: <https://www.marketsandmarkets.com/Market-Reports/biopesticides-267.html>

³⁵ Current situation and trends of biopesticide regulations in EU, 20 November 2020, Reach 24 <https://www.reach24h.com/en/news/industry-news/current-situation-and-trends-of-biopesticide-regulations-in-eu.html>

³⁶ EU green lights new rules to speed up approval, authorisation of biopesticides, Natasha Foote, 10 February 2022, Euractiv: <https://www.euractiv.com/section/agriculture-food/news/eu-green-lights-new-rules-to-speed-up-approval-authorisation-of-biopesticides/>

University of São Paulo ran randomised tests to seek a solution for the farmers. Their scientific trials demonstrated that the essential oil of clove was more effective than the proposed chemical agent to mitigate risks of citrus canker but the EU had not been solicited to authorise clove oil as a mitigating bio-solution.³⁷ To make matters worse, the authorisation of the chemical active substance for post-harvest wash subsequently expired in the EU market, thereby reducing the MRL to trace-level, leaving small farmers without a solution to export their citrus fruit.

The EU ultimately recognised the inherent scientific properties of clove oil and the Brazilian lime producers regained their organic certification, yet the case demonstrates the complexity and impact of diverse authorisation regimes and international trade, especially for small producers.

3.6 OF THE IMPORTANCE OF AVOIDING AN ‘ELECTIVE PROTECTIONISM’

Considering how the authorisation of molecules works in the EU, the European pesticides regime is tailored to the plant health risks of Europe. Requesting that countries with other prevailing conditions and agricultural production systems use only EU-authorised pesticide is disproportional in relation to its goal. To ensure that any mirror clause applied to pesticides does not constitute a disguised restriction to trade, legislative proposals should be requested to pass a ‘competitive bias’ test to ensure that the aim of the measure is legitimate and is not being used as a form of elective protectionism.

Climate change is changing the movement and intensity of pests worldwide making tailored pesticides and biopesticides, more rather than less important to the agricultural toolbox. If products respect the EU’s stringent residue regime when imported into the European Union, they should be allowed entry into the Single Market.

³⁷ Antibacterial activity of nano emulsions based on essential oils compounds against species of *Xanthomonas* that Cause Citrus Canker, *Biointerface Research in Applied Chemistry*, Volume 12, Issue 2, 2022, 1835-1846 <https://biointerfaceresearch.com/wp-content/uploads/2021/06/20695837122.18351846.pdf>

4. CONCLUSION

For France, ‘mirror clauses’ have become a “central battle” that will not be settled under the country’s time at the helm of the Council.³⁸ The Presidency is expected to present its conclusions on the matter shortly in view of gaining traction with Member States. Austria and Spain seem to already jumped onto the bandwagon with others awaiting to better appreciate the legal basis for the change in paradigm. Sweden, Denmark and the Netherlands have expressed concern over the potential non-tariff barriers, or elective protectionism, that could be introduced as a result of mirror clauses.³⁹

The European Commission recently launched a consultation to assess stakeholders’ views on applying EU health and environmental standards to imports of agricultural and food products in view of producing a report. Part of the rationale behind the report will be to assess the legal feasibility of imposing unilateral mirror clauses on trading partners, particularly as regards conformity with WTO rules.

The international trade rulebook is both complex and yet relatively straightforward in how such measures might apply, particularly in distinguishing whether process and production methods applied to food or feed imports belong to the realm of SPS or TBT. As observed in the case of pesticides, phytosanitary PPMs should not systematically be cornered into an SPS legal straight jacket. The fact that a molecule has not been authorised in the European Union does not translate in a prohibition based on risk.

European farmers are legitimately concerned about the financial and productivity pinch of implementing the Farm to Fork strategy but using mirror clauses as a disguised barrier to trade runs against the same international rulebook that protects them. As scrutinised in the case of the fight against antimicrobial resistance, any tangible proposal of ‘reciprocity’ in international trade must be tested to avoid a ‘competitive bias’ that would compromise its compliance with the rulebook. In designing a ‘mirror clause’, the EU must appropriately consider the legitimate justification behind the measure to ensure coherence with international law and avoid introducing unjustified barriers to trade.

³⁸ “La nouvelle politique commerciale européenne”, JAMAG, 20 October 2021 <https://www.jamag.fr/actualites/presidence-francaise-de-lue-julien-denormandie-et-clement-beaune-unis-sur-les-clauses>

³⁹ “Broad support for greater policy coherence, ‘mirror clause’ sceptics”, Agrafacts, No 17-22, 21 February 2022