



Policy Advocacy Paper

Recent European Parliament Resolution denying import tolerance is bad in WTO law.

Background

On 11th January 2024, the European Parliament adopted a Resolution (B9-0057/2024) **(Resolution)** that will have adverse consequences on the export of agricultural commodities to the EU from non-EU countries.

The Resolution imposes a *hazard-based* pesticides MRL of 0.01 ppm and disallows *risk based* MRLs for all the pesticide no longer used in the EU.

Our analysis shows that this Resolution goes completely against the binding provisions of the WTO Sanitary and Phytosanitary Agreement **(SPS Agreement)** to which all the 27 countries of the EU are Members.

A. What is import tolerance MRL?

Maximum Residue Level (**MRL**) is the maximum acceptable level of a pesticide residue that is legally tolerated in agricultural products when they are traded. It is often measured and expressed in terms of parts per million (ppm or mg/kg).

Import tolerance MRL is the MRL set by an importing country for a pesticide not registered within that country, to meet the needs of international trade among the WTO Members.

The SPS Agreement governs the determination of SPS measures including pesticide MRLs. The SPS Agreement recognizes only those MRLs derived from “risk assessment”.

WTO SPS Agreement enables Member countries to introduce *sanitary* or *phytosanitary measures* including pesticide MRLs, as long as the following conditions, amongst others, are met:

- (i) They are taken only to the extent necessary to protect human, animal or plant life or health and are based on scientific evidence and not maintained without sufficient scientific evidence (Article 2.2);
- (ii) They do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other members and are not applied in a manner which would constitute a disguised restriction on international trade (Article 2.3);



- (iii) They are based on an assessment as appropriate to the circumstances, of the risks to human life or health etc. arising from the presence of contaminants in food, beverage or feedstuffs (**Article 5.1** read with **Annex A**);

In the European Union (EU), pesticide MRLs are governed by the Regulation (EC) No. 396/2005 and 1107/2009. These regulations support “hazard based” assessment of food safety and not the “risk based” assessment as required in the SPS Agreement.

B. Why is import tolerance MRL necessary?

Use of pesticides considerably vary among countries depending on the crops grown, pests and diseases present.

In many WTO Member countries, food/feed commodities may not be lawfully imported and sold if the import contains residues of pesticides not used in the importing country (but used in the exporting country).

Granting import tolerance MRL based on the data submitted by the exporting country ensures smooth flow of trade. Obtaining the import tolerance MRL should be relatively easier when Codex MRL exists for the pesticide concerned.

However, it is important to note that the term “import tolerance MRL” is not to be found in the text of the SPS Agreement. This term seems to be an invention in recent years.

C. The impugned European Parliament Resolution.

On 11th Jan 2024, the European Parliament adopted a Resolution refusing to revise the import tolerance MRL upwards from the current 0.01 ppm to the pesticide Thiachloprid despite positive recommendation from European Food Safety Authority (EFSA). The Parliament Resolution *inter alia*, held and observed:

“.....MRLs should not be set for active substances that are not approved in the Union due to health concerns; therefore no import tolerances should be set for Thiachloprid....

..... Commission to submit a new draft.... lowering all MRLs for Thiachloprid to the limit of determination [0.01 ppm] for all uses and to refuse any requests for import tolerance....”

The directive from the European Parliament to the EFSA simply means this: The EFSA should not accept in future any request for raising the import tolerance MRL from 0.01 ppm for pesticides no longer used in the EU.

It is significant to note that Codex has established Acceptable Daily Intake (ADI) as well as the MRL for Thiachloprid. The Codex MRLs for Thiachloprid in various foods and feeds go up to 10 ppm. A Codex MRL is one of the tools for ensuring that the pesticide residue intake does not exceed the Acceptable Daily Intake (ADI). The Codex MRLs enjoy the presumption of consistency with SPS Agreement. Surprisingly, the European Parliament opted to completely ignore the international standards set by the Codex.



Earlier, in November 2023, the European Parliament Environment Committee rejected a proposal to revise the “hazard based import tolerance” MRL from 0.01 ppm to a risk based MRL of 0.09 ppm for Tricyclazole, a popular fungicide used extensively by the rice growing country including India.

The reasons cited for not revising the hazard based import tolerance MRLs, among others, include the negative impact on the competitiveness of the EU farmers who are deprived of using the same pesticides as third country farmers for effective control of certain pests.

Why does the EU assign the default MRL value of 0.01 ppm to all pesticides no longer used in the EU but still used in many other countries outside the EU?

The 0.01 ppm is the lowest concentration that can be detected and identified for a vast majority of the pesticides while using the Gas Chromatograph and Mass Spectrometry (GC- MS). It is clear that the EU import tolerant MRL policy is driven by the sensitivity of the instrument and not based on risk assessment as required under the SPS Agreement. This is unacceptable.

D. The European Parliament Resolution should be held to be an act in contravention of the WTO law. There are several reasons. Major ones are listed below;

The Resolution is inconsistent with the provisions of SPS Agreement

- Globally, determining pesticide MRLs is governed by the legal framework established under the SPS Agreement. Determining and implementing pesticide MRLs is not an unfettered right in the hands of Member countries of the WTO. They have the right to restrict international trade for the protection of human, plant, or animal health against trade related risks only when such measures are consistent with the relevant principles of the WTO in general and SPS Agreement in particular.

The underlying principle in the Resolution is not based on risk-assessment

- Each WTO Member must base their phytosanitary measures (including pesticide MRLs) on scientific evidence and risk-assessment, which are substantive requirements under the SPS Agreement. *“Theoretical uncertainty is not the kind of risk to be assessed under Article 5.1”* of the SPS Agreement as held by the Appellate Body (AB) Report in the *EC-Hormone* case, para 186. It further states in para 187 *“It is essential to bear in mind that the risk that is to be evaluated in a risk assessment under Article 5.1 is not only risk ascertainable in a science laboratory operating under strictly controlled conditions, but also the risk in human societies as they actually exist There must be a rational relationship between the measure and the risk assessed”*. None of these factors are true for the EU’s hazard based import tolerance of 0.01 ppm.



- Risk assessment consistent with the SPS Agreement is a *sine qua non* for determining the MRLs. The Annex A-4 of the SPS Agreement defines “risk assessment” as “*the evaluation of the potential for adverse effects on human or animal health arising from the presence of... contaminants... [including residues of pesticides] in food, beverages or feed stuff.* The SPS Agreement requires assessment of the potential adverse effects on human health arising from the presence of contaminants in food as held by the AB in *EC-Hormones*, para 206.
- The EU has not produced risk assessments demonstrating existence of adverse effects from the presence of 0.01 ppm of pesticide residue (contaminants). Remember, 0.01 ppm equals 1 gm of a pesticide residue in 100 tons of food commodity. At this trace level, a contaminant would not be biologically, toxicologically or environmentally relevant.
- In the year 2020, in response to a complaint before the SPS Committee, the EU had in fact admitted that their pesticide MRL of 0.01 ppm is not based on a risk evaluation as required by the SPS Agreement. “... *given the concerns identified by EFSA, it is not possible to determine MRLs based on a risk assessment and therefore all MRLs must be lowered to the limit of determination*”.
~ EU statement before SPS Committee, G/SPS/GEN/1847 (21st Oct 2020)

The Resolution fails doctrine of Most-Favoured-Nation (MFN) and National Treatment

- If trade-related environmental or health measures are to be consistent with WTO rules, they cannot result in discrimination between “like products”. The principle of “non-discrimination” stipulates that a member shall not discriminate between “like products” from different trading partners giving them equally “most favoured nation” (MFN) status between “like products” from different trading partners and between its own and like foreign products giving them “national treatment”. The impugned resolution would lead to discrimination between the “like products”.

The Resolution is a disguised restriction on international trade

- Basic obligation contained in Article 2.3 of the SPS Agreement requires that SPS measures (including pesticide MRLs) shall not be applied in a manner which would constitute a disguised restriction on international trade.

E. The resolution violates Article 27 of the Vienna Convention of Law of Treaties (VCLT)

- The provisions of VCLT are applied in all the WTO settlement cases.
- Article 27 of the Vienna Convention clearly states that a Party [in this case EU] cannot invoke the provisions of its internal law as a justification for its failure to perform its obligations under a treaty [including WTO SPS Agreement].



F. Conclusion:

It's evident that the so called "import tolerance" pesticide MRL of 0.01 ppm is carefully designed to be a non-tariff barrier to protect EU's own domestic production from outside competition. The EU is apparently trying to impose "mirror measures" to ensure that the EU's plant protection measures are also applied to the imported products.

The primary purpose of the WTO is to open the trade for the benefit of all Members. However, EU seems to be moving in the opposite direction. The European Parliament Resolution shows "deliberate disregard" to the binding provisions of the SPS Agreement and deviates significantly from the mandatory requirements set thereunder. The non-EU countries should collectively challenge the EU, availing the WTO's Dispute Settlement Understanding (DSU).

Link to the European Parliament Resolution:

https://www.europarl.europa.eu/doceo/document/B-9-2024-0057_EN.pdf

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