



Centre for Environment & Agriculture

Insights into WTO inconsistent pesticide MRLs followed by the European Union.

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Importance of this presentation to India



India ranks 2nd largest in global agricultural output (\$534 bn, 2021). This is 100% larger than EU's agricultural output (\$278 bn, 2021).

Global agriculture export is \$2,140 bn (2021). In this India's share is less than 3% (\$50 bn).

Non-Tariff Barriers especially WTO-SPS inconsistent pesticide MRLs play a major role in restricting our agri. exports.

In the year 2022 alone, the EU rejected 156 consignments exported by India applying WTO inconsistent pesticide MRL of 0.01 ppm. (Source: RASFF)

This presentation explains the contentious WTO inconsistent pesticide MRL followed by the EU and remedial measures available to non-EU WTO Members.

What is Pesticide MRL?



1 **Pesticide Residues:** Traces of pesticides in or on the agricultural commodities at the time of harvest.

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

3 **MRL** is not a toxicological safety standard, but **only a trading standard.**

4 **MRLs widely vary among countries** for a given pesticide/crop.

5 In the EU, the **MRL** can be as low as **0.01 ppm**. This equals **1 gm per 100 tons** of rice or any other agri. commodity. *At this insignificant level, a pesticide would not be toxicologically, biologically or environmentally relevant.*

6 Agricultural commodities that comply with national use/MRLs may be non-compliant while entering the EU when import tolerance MRL of **<0.01 ppm** is applied.

About WTO-SPS Agreement



1

The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) entered into force from 1st Jan 1995.

2

Sanitary relates to human and animal health, phytosanitary relates to plant protection and health.

3

SPS Agreement recognizes the rights of WTO Member countries to adopt science-based measures necessary to ensure food safety , human , animal, or plant life or to protect the territory of a country from pests or diseases.

4

Members are permitted under Article 3.3 to maintain SPS Measures that are higher than the international norms (such as the one set by Codex Alimentarius Commission) but **such measures must be based upon risk assessment described in Article 5.**

5

SPS measures shall not be applied in a manner which constitutes arbitrary or unjustifiable discrimination between WTO Members where similar conditions prevail or as a disguised restriction on international trade.

Basic Rights and Objectives of the SPS Agreement (Article 2)



“.....Members have the right to take sanitary and phytosanitary measures necessary for the protection of human , animal or plant life or health provided that such measures are not inconsistent with provisions of this Agreement”

It is clear that the rights to WTO members to take SPS measures is not absolute and unbridled.

The EU SPS measure stipulating import tolerance pesticide MRL of <0.01 ppm is inconsistent with several substantive obligations in the SPS Agreement.

The EU authorities *a priori* assume existence of uniform risk beyond 0.01 ppm for all the pesticides that are not approved for use in the EU. This uniform assumption is not supported by the SPS Agreement that requires science based, product specific SPS measures.

“There shall be a rational relationship between the SPS measure at issue and corresponding risk”
(Appellate Body in the EC-Hormones case)



Understanding the legal force behind the MRLs

The **Agreement on the Application of Sanitary and Phytosanitary Measures (the SPS Agreement)** entered into force with the establishment of the World Trade Organization (WTO) on 1st Jan 1995. Its provisions are legally binding on all countries that are members of the WTO.

The SPS agreement covers both **sanitary** (human and animal health) and **phytosanitary** (plant health) measures.

The **SPS measures** are applicable to food products of plant and animal origin whether domestically produced or imported.

The SPS Agreement (Article 2.1) allows WTO member countries to set their own SPS standards.

However, the SPS standards must be based on science and do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail.

WTO members can also apply the “precautionary principle”, **temporarily** (Article 5.7) to deal with scientific uncertainty. **This can't remain permanently**

All these would help understanding the varying levels of MRLs among the countries for a given pesticide and agri. commodity/food.

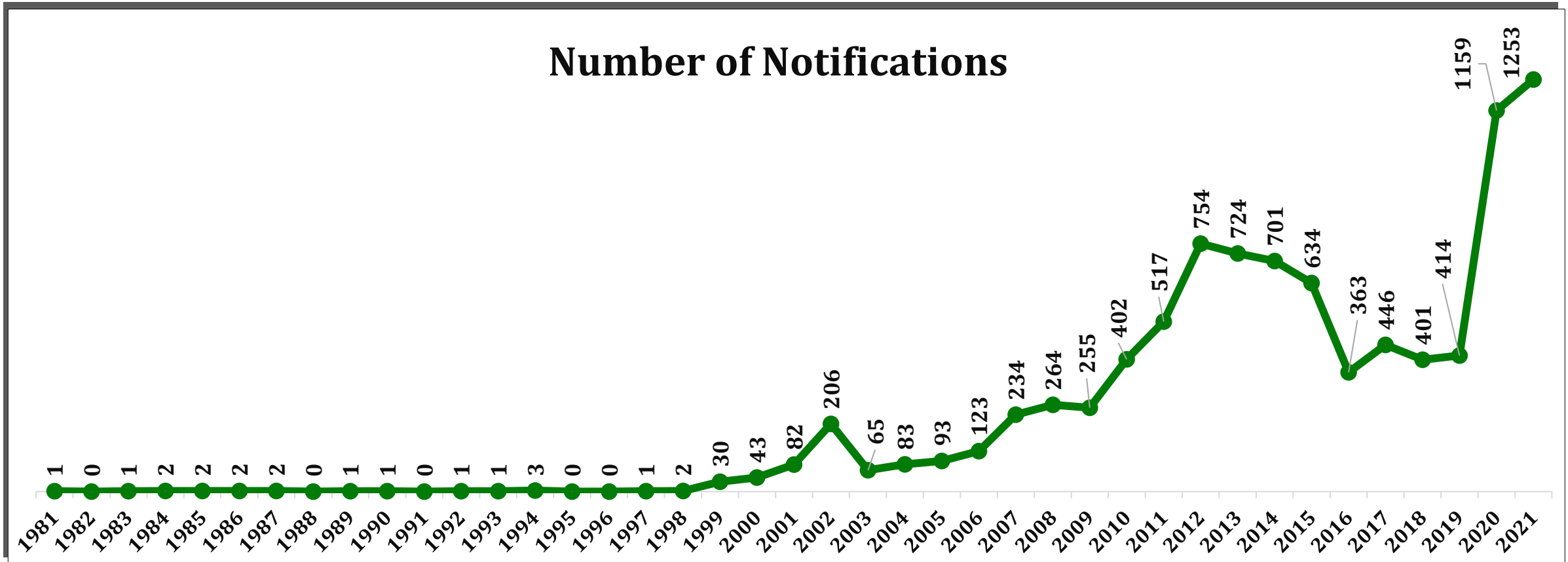
Non-harmonized MRLs and regulatory heterogeneity are a global issue.

An unpleasant truth - The MRLs can at times be politically/commercially driven to deliberately restrict the trade.

Number of Notifications on Pesticides MRL violations from the EU (1981-2021) All Countries. All Products.



Number of Notifications



Source : Notification on Pesticides Residues in the Rapid Alert System for Food and Feed (RASFF) – 2022 from 1981 to 2020, by Marcin Piglowski; data for 2021 extracted from RASFF on 30 July 2022.
Link: <file:///C:/Users/20000294/Desktop/Notificaiton%20on%20Pesticide%20Residues%20in%20the%20Rapid%20Alert%20System%20for%20Food%20and%20Feed.pdf>

**Note the spurt in notifications involving pesticide MRL violations in recent years.
MRLs can be “science coated” trade barriers!**

Understanding EU MRLs for Pesticides.



1

The EU maintains uniform tolerance /MRL of <math><0.01\text{ ppm}</math> for all pesticides that are not approved for use in the EU countries.

2

In the EU, MRLs are set for more than 1300 pesticides covering 378 food products.

3

Of this, a default MRL of <math><0.01\text{ ppm}</math> (<math><0.01\text{ mg/kg}</math>) applies to as many as 690 pesticides.

4

In other words, for over 50% of the pesticides the EU applies <math><0.01\text{ mg/kg}</math> as default MRL.

5

0.01 mg/kg = 1gm for every 100 tons.

6

At this trace level (1 gm in 100 tons), a pesticide residue would not be biologically, toxicologically and environmentally relevant.

7

When tested at this level (0.01 ppm), majority pesticides not used in the EU would certainly show up in the imported consignments.

8

<math><0.01\text{ ppm}</math> MRL is as good as zero tolerance. It acts as a strong non-tariff barrier to agricultural exports, especially from developing countries.

Technical/Legal problems with <0.01 MRL



1

The 0.01 ppm MRL is the Limit of Quantification (LOQ) during laboratory analysis.

2

LOQ is the smallest amount or concentration of a substance that can be determined using Liquid or Gas Chromatography.

3

The EU import tolerance MRL of <0.01 ppm is as good as zero tolerance (non-detectable residue).

4

This effectively means “no quantifiable import tolerance” is currently in place for pesticides not re-registered for use in the EU.

Questions:

1. Is non-detectable pesticide residue level of ≥ 0.01 ppm “based on” the international standards developed by JMPR/CODEX, a requirement under Article 5.1 of the SPS Agreement?
2. Is there evidence of existence of risk arising from pesticide residues ≥ 0.01 ppm in food commodities?

Remember, product specific risk assessment is a *sine quo non* as determined by WTO-Appellate Body in the EC-Hormones Dispute.

<0.01 ppm MRL is not based on risk assessment, admits EU!



"given the concerns identified by EFSA, [while revoking the authorization for a given pesticide] 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 October 2020

The EU admits that the MRL of <0.01 ppm for pesticides is not based on risk assessment.

Clearly, this is inconsistent with WTO Members' obligation under the SPS Agreement. (Article 2.2 & 5.1).

Requirement of non-detectable residue level in the EU



On 10 Feb 2022, EU issued a notification rejecting a consignment of Basmati rice imported from Pakistan although the pesticide level detected was 0.01 ppm.

Notification Ref. No.	Pesticides Found	Analytical Result	EU's MRL Standard	Reason
2022.1891	Carbendazim	0.01 mg/kg (0.01ppm)	<0.01 mg/kg (0.01ppm)	Carbendazim use is not authorised in EU

Source: RASFF (Accessed on 17th August 2022)

- ❑ This is a clear evidence of the EU practicing non-detectable residue level for pesticides not registered over there.
- ❑ This is an indirect way of forcing other countries to use only those pesticides registered in the EU. Remember, EU is the world's largest producer and exporter of pesticides. The EU accounts for ~50% of the global export of pesticides.

Risk Assessment Under Article 5 of SPS Agreement



“Theoretical uncertainty is not the kind of risk to be assessed under Article 5.1”

- Appellate Body Report in EC- Hormone, para 186

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 risk in human societies as they actually exist, in other words, the actual potential for adverse effects on human health in the real world where people live and work and die.

- Appellate Body Report in EC- Hormone, para 187

The Appellate Body stressed that the risk to be assessed must be specific to the substance as used in a specific manner and specific purpose.

Accordingly, the health risks from presence of **≤0.01 ppm** pesticide residues must be established by EU adopting product-by-product approach. It must be an ascertainable risk in the real world where people live, and not merely in a science laboratory.

Remember, **0.01 ppm** means **1 gm of pesticide residue for every 100 tons of food.**

The <0.01 ppm MRL and its inconsistencies with SPS Agreement



Article 1.1

of the SPS Agreement, because it is a sanitary measure under the SPS Agreement that is not "applied in accordance with the provisions of this Agreement";

1

Article 2.1

of the SPS Agreement because *it is inconsistent with the provisions of this Agreement*

2

Article 2.2

of the SPS Agreement, because it is not based on scientific principles, it is maintained without sufficient scientific evidence, and it is not applied only to the extent necessary to protect ... human life or health

3

Article 2.4

of the SPS Agreement because it doesn't conform to the relevant provisions of this Agreement and [therefore] shall not be presumed to be in accordance with the Members obligations under the provisions GATT 1994.... in particular the provisions of Article XX(b);

4



Article 3.1

of the SPS Agreement, because to the EU has failed to base its measure on the existing international standards, guidelines or recommendations where they exist [that of CODEX]

5

Article 3.2

of the SPS Agreement because it doesn't conform to the international standards [therefore] shall not be deemed to be necessary

6

Article 5.1, 5.2 and 5.3

of the SPS Agreement, because it is not based on an assessment, as appropriate to the circumstances, of the risks to human life or health and does not take into account the factors listed in Articles 5.2 and 5.3 of the SPS Agreement

7

Article 5.4

of the SPS Agreement, because when determining the appropriate SPS measures the EU fails to take into account the objective of minimizing the negative trade effects

8



Article 5.5

of the SPS Agreement, because the EU makes arbitrary or unjustifiable distinctions in the levels it considers appropriate and such distinctions result in discrimination or a disguised restriction on international trade in different situations

9

Article 5.6

of the SPS Agreement, because the EU's measure is more trade-restrictive than required and fails to take into account technical and economic feasibility

10

Article 5.7

of the SPS Agreement because the EU measure is not a provisional one

11

Article 10.1

of the SPS Agreement because the EU has not taken into account the special needs of developing country Members

12

Article XX(b) of the GATT 1994

because the EU SPS measures requiring 0.01 ppm MRLs are applied in a manner which *would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.*

13

- Therefore, it is **not justified** under the exception in the Article XX.
- Besides, it **cannot** be considered to be "**necessary**" within the meaning of Article XX.



EU violates the core principles of WTO

“Non-Discrimination”

and

“National Treatment”

are the two inviolable principles of WTO.

Principle of non-discrimination



The WTO members can neither discriminate between their trading partners nor between imported and locally produced goods that are otherwise “like” (similar) products

Principle of national treatment



This requires that imported and locally produced goods should be treated equally by WTO members in terms of competitive opportunities in the domestic market of the importing country.

In the year **2013**, the EU prohibited the use and sale of seeds treated with plant protection products containing **Imidacloprid**, an insecticide.



The **import tolerance** for Imidacloprid was lowered to **<0.01 ppm** in the EU since 26th October 2021



However, between 26th October 2021 till 12th August 2022, as many as **13 emergency authorizations (EAs)** were issued for use of Imidacloprid for seed treatment in the EU countries with MRL of **0.5 ppm**. The EU internal/domestic market MRL was **50 times higher than the import tolerance** for the same pesticide.



This **violates** the principles of “Non-Discrimination” and “National Treatment” of the WTO. Parallely, it also **violates Article 2.3 of the SPS Agreement** (arbitrary and unjustifiable discrimination between members).

The EU uses import tolerance MRLs of <0.01 ppm as coercive economic tool



EU ranks among the world's largest producers, users and exporters of pesticides. Pesticides use among the EU-27 countries remain harmonized. The **<0.01 ppm is a coercive economic tool** to extend this harmony extra territorially , to force non-EU countries use same pesticides as in the EU.

According to one European activist NGO, allowing import of food commodities treated with pesticides that are not approved and available to the EU farmers would negatively affect the competitiveness of the EU agriculture.

".....governments are sometimes pressured to go beyond what is needed for health protection and to use sanitary and phytosanitary restrictions to shield domestic producers from economic competition.....A sanitary or phytosanitary restriction which is not actually required for health reasons can be a very effective protectionist device, and because of its technical complexity, a particularly deceptive and difficult barrier to challenge".

-Understanding the WTO Agreement on Sanitary and Phytosanitary Measures, WTO, May 1998

Can the rest of the world afford to use the same range of pesticides as used in the EU?



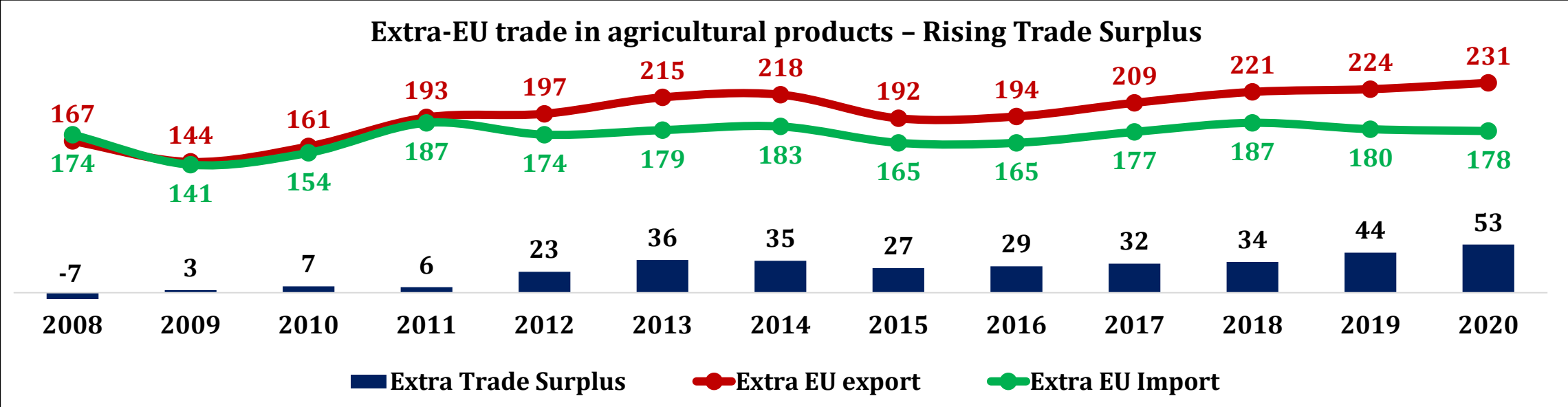
Many commercially important crops grown globally are not grown in the EU. Here is a sample list of food crops;

Sr. no	Crops	World Production	Production in EU	Remark
1	Sugarcane	18,697	0	Not grown in EU
2	Rice	5,047	19	Hardly grown in EU
3	Banana	1,198	7	Hardly grown in EU
4	Mango and Guava	548	0	Not grown in EU
5	Coconut	615	0	Not grown in EU
6	Millet	305	0	Not grown in EU
7	Chick peas	151	0	Not grown in EU
8	Groundnut	536	0	Not grown in EU
9	Papaya	139	0	Not grown in EU
10	Pomegranate	93	0	Not grown in EU
11	Chilies (Dry)	42	0	Not grown in EU
12	Tea	70	0	Not grown in EU
13	Coffee	107	0	Not grown in EU
14	Cashew nut (Shelled)	42	0	Not grown in EU
15	Black pepper	7	0	Not grown in EU

- The climate, crops, pests and diseases vary widely among the countries.
- Therefore, the non-EU countries cannot afford to use the same list of pesticides (as registered in EU) to meet the crop protection requirements.



Disguised trade protectionism fetches EU windfall gains in agricultural trade! The economics behind EU MRL (<0.01 ppm).



Source: WTO Database (Accessed on 8th September 2022) *Extra-EU trade means trade between the EU(27) and all countries outside the EU(27) Unit: \$ bn

- ❑ Since the introduction of **WTO inconsistent import tolerance pesticide MRL of <0.01 ppm** in 2008, extra-EU trade balance has skyrocketed.
- ❑ Extra- EU agri. trade balance jumped from **(-) 7 Bn USD** to whopping **(+) 53 Bn USD**. Hail the protectionist measures of the EU!!!
- ❑ The EU uses import tolerance pesticide MRL of <0.01 ppm in ways to keep out low-cost producers of agricultural commodities so-as-to protect their domestic producers.
- ❑ The hazard-based **import tolerance pesticide MRL of <0.01 ppm** is totally different from “risk assessment” required under **Article 5 of the SPS Agreement**.
- ❑ Article 2 of the SPS Agreement requires Members to ensure any SPS measures be based on scientific principles and not be maintained without sufficient scientific evidence.
- ❑ The EU’s import tolerance pesticide MRL of <0.01 ppm is WTO inconsistent.

Final Word



- ❑ The EU SPS measure requiring pesticide MRL of <0.01 ppm amounts to abuse of the exception granted under GATT XX(b) and is inconsistent with several substantive obligations of the SPS Agreement.
- ❑ It has significant economic and social impacts on non - EU countries.
- ❑ Without realizing that the EU import tolerance MRL of <0.01 ppm is inconsistent with the SPS Agreement and GATT XX(b), a few countries outside the EU have adopted the EU import tolerance. Example: UAE, Saudi Arab, Egypt etc.
- ❑ Rejection of exported consignments applying the hazard based MRL of <0.01 ppm produces serious consequences on agricultural production, price and farmers outside the EU countries.
- ❑ Therefore, countries exporting agri. commodities to the EU shall consider filing a complaint against the EU availing the Dispute Settlement Understanding (DSU) before the WTO.



THANK YOU

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