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Premium

India's 'early harvest' trade deals could run into trouble

Prabhash Ranjan writes: They can be saved from a possible indictment at the WTO if they are designed and presented as “interim agreements” leading to the formation of a free trade agreement.

Written by [Prabhash Ranjan](#) |

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The rise in protectionism ensured that India shied away from signing FTAs in the last seven years despite the Economic Survey 2019-2020 concluding that FTAs have been beneficial for India.

India wishes to fast-track its free trade agreement (FTA) negotiations with several countries like the UK, Australia, the European Union, and Canada. As part of these negotiations, India is keen to conclude an “early harvest” trade deal with some of these countries, liberalising tariffs on select goods. Many commentators welcome India’s rethink on FTA since it marks a departure from the trade protectionism that India has been practising over the past few years. Arvind Subramanian and Shoumitro Chatterjee have argued that between 2014 and 2020, India increased tariff rates on a wide category of products. This reversed the tariff liberalisation policy that successive governments have followed since 1991. The rise in protectionism ensured that India shied away from signing FTAs in the last seven years despite the Economic Survey 2019-2020 concluding that FTAs have been beneficial for India.



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FTAs based on their mutual interests, this freedom is circumscribed by the international law rules contained in the General Agreements on Tariff and Trade (GATT) and the World Trade Organisation (WTO). Being WTO members, these rules invariably apply to India and its prospective FTA partner countries.

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The WTO system is premised on the principle of most favoured nation (MFN), that is, countries are prohibited from discriminating between their trading partners. So, an FTA where countries give preferential access to each other's products at the cost of other countries is inconsistent with the MFN rule. Nevertheless, countries are allowed to sign FTAs subject to certain conditions. One such condition, given Article XXIV.8(b) of GATT, is to eliminate customs duties and other trade barriers on "substantially all the trade" between the FTA member countries. Although the meaning of "substantially all the trade" is not given in the agreement, it is evident that the FTA should cover a very high proportion of trade between the FTA member countries. The reason for this requirement is that since FTAs depart from the MFN principle, which is the foundational rule of the multilateral trading order, such departures should not be easily permitted.



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It is here that India’s “early harvest” trade deals that focus on selective tariff liberalisation could run into rough weather. For instance, the commerce minister, [Piyush Goyal](#), recently said that the “early harvest” deal with Australia would cover half of the goods trade. This is well below the legal requirement of “substantially all the trade”. Any trade deal between WTO member countries that does not cover substantive trade between them will be vulnerable to a legal challenge at the WTO’s dispute settlement mechanism.



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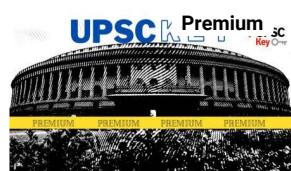
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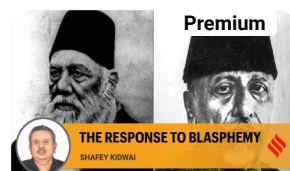
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can be saved from a possible indictment at the WTO if they are designed and presented as “interim agreements” leading to the formation of an FTA. Article XXIV of GATT allows countries to sign interim agreements subject to certain conditions. First, countries can enter into an interim agreement provided it is necessary for the formation of a free trade area. In other words, for the interim

agreement to be consistent with the GATT and WTO requirements, it will have to pass the necessity test. Thus, if India’s measures (such as lowering the tariff rate on a product because it is part of an “early harvest” deal) is challenged on the grounds of violating the MFN principle, India will have to show that it will not be able to enter into an FTA without the measure at issue, that is, without the “early harvest” trade deal.

Second, the interim agreement should include a plan or a schedule for the formation of an FTA within a reasonable period of time. Third, as required by Article XXIV.7(a) of GATT, the interim agreement should be notified to WTO members, who, in turn, can make recommendations if they believe that the interim agreement is not likely to lead to the formation of an FTA. India should be mindful of all these legal requirements since it is pursuing the strategy of arriving at an “early harvest” trade deal before signing a full FTA.

This column first appeared in the print edition on September 15, 2021 under the title ‘Reaping the early harvest’. The writer is professor and vice dean, Jindal Global Law School, O P Jindal Global University. Views are personal



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