



LEGAL CHALLENGES OF AFGHANISTAN'S
MEMBERSHIP AS A LEAST DEVELOPED COUNTRY
TO WTO AND THE WAY FORWARD

BY

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ABSTRACT

Despite the inclusion of special treatment and exception provisions in the Doha Round and the WTO agreements, the ambiguity of the implementation of these principles are rendered ineffective at some instances. There is a durable practice of decision making so-called “by consensus” by WTO, but in reality rich countries exercise immoderate influence within the body. Afghanistan as an LDC country became the 164th country to be part of WTO. However, it is uncertain how much the country could reap benefit from this membership. Thus, the objective of this research is to evaluate the efficiency of WTO’s present set up and its SDT provisions towards LDCs, mainly Afghanistan. Likewise, this research aims to examine Afghanistan’s legal and institutional challenges that serve as a barrier to trade and the needed reforms. This research is founded on doctrinal and non-doctrinal (empirical) research methodologies. The former is largely dependent on primary and secondary sources of WTO, textbook analysis, content analysis and reports of International Organisations while the latter is based on in-depth and semi-structured interviews. Currently, Afghanistan’s legal and regulatory frameworks and enforcement mechanisms is at a terrible shape. Much of the frameworks needed for the encouragement and protection of private investment is still not in place. Its three overlapping systems *Sharia* (Islamic Law), *Shura* (traditional law and practice), and the formal legal system instituted under the 2004 Constitution can be confusing, to both investors and legal professionals, thus driving away the investors from Afghanistan. As the membership of WTO is expected to generally have a positive impact on Afghanistan, this prospect can also be hindered by severe institutional and legal weaknesses caused by Constitutional frameworks in forming executive, judiciary and legislature as well as weak institutional frameworks for the organs in charge of trade. Hence, there is a need for extensive reforms in institutional and legal frameworks of Afghanistan.

ملخص البحث

على الرغم من إدراج المعاملة الخاصة والاحكام المستثناة في جدول أعمال الدوحة و اتفاقات منظمة التجارة العالمية الا أن الغموض في تنفيذ هذه المبادئ يجعلها غير فعالة في الكثير من الحالات. حيث أن هذه التشريعات والقوانين الدائمة لصنع القرار والتي تسمى "بالإجماع" من قبل منظمة التجارة العالمية تقابل بممارسات تعطل عملها على أرض الواقع من قبل الدول الغنية التي تمارس نفوذاً مفرطاً داخل المجلس العام. فعلى سبيل المثال: أفغانستان كبلد من أقل البلدان نمواً أصبحت البلد رقم 164 في قائمة منظمة التجارة العالمية. ومع ذلك، فهي لا تجني أي فوائد من هذه العضوية. وبالتالي، فإن الهدف من هذا البحث هو تقييم كفاءة وضع منظمة التجارة العالمية الحالي وأحكامها المتعلقة بالمعاملة الخاصة والتفاضلية نحو البلدان الأقل نمواً، ولا سيما أفغانستان. يهدف هذا البحث أيضاً إلى دراسة التحديات القانونية والمؤسسية في أفغانستان التي تشكل حاجزاً أمام التجارة والإصلاحات اللازمة. ويعتمد هذا البحث على منهجيات البحث القانوني الفقهي (التقليدي) وغير الفقهي (الاجتماعي). ويعتمد الى حد كبير على المصادر الأولية والثانوية لمنظمة التجارة العالمية، وتحليل الكتب التعليمية، وتحليل المحتوى وتقارير المنظمات الدولية، بينما يعتمد الأخير على مقابلات شبه منظمة. وفي الوقت الحالي، تعد الأطر القانونية والتنظيمية لأفغانستان وآليات إنفاذها في وضع مريع. ولا تزال الكثير من الأطر اللازمة للتشجيع على الاستثمار الخاص وحمايته غير قائمة. وحيث أن نُظم أفغانستان الثلاثة_الشريعة (الشريعة الإسلامية)، الشورى (القانون التقليدي والممارسة)، والنظام القانوني الرسمي الذي تم تأسيسه بموجب دستور 2004_ متداخلة وهذا ما يولد ارتباكاً لدى المستثمرين والمهنيين القانونيين، وبالتالي إبعاد المستثمرين من أفغانستان. ونظراً لأنه من المتوقع أن يكون لعضوية منظمة التجارة العالمية تأثيراً إيجابياً بشكل عام على أفغانستان، فإن هذا الاحتمال يمكن أن يعوقه الضعف المؤسسي والقانوني بسبب الإطار الدستوري في تشكيل السلطة التنفيذية والقضائية والتشريعية، فضلاً عن ضعف الأطر المؤسسية للأجهزة المسؤولة عن التجارة. وبالتالي، تحتاج أفغانستان إلى إصلاح أطرها المؤسسية والقانونية على نطاق واسع.

APPROVAL PAGE

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Dedicated to my beloved parents for their unconditional love and support.

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International Covenant on Civil and Political Rights (ICCPR) 1966
Marrakesh Agreement Establishing the World Trade Organisation 1994
Private Investment Law of Afghanistan (PIL) 2005
The Charter of the United Nations 1945
The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) 1979
Universal Declaration of Human Rights 1948
Understanding on the Balance-of-Payment Provisions of GATT 1994
WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) 1994
WTO Agreement on Textiles and Clothing 1994
WTO Agreement on Technical Barriers to Trade 1994
WTO Agreement on Trade-Related Investment Measures (TRIMs) 1994
WTO Agreement on Implementation of Article VII of GATT 1994 (Customs Valuation) and related decision 1994
WTO Agreement on Preshipment Inspection 1994
WTO Agreement on Import Licensing procedures 1994
WTO Agreement on Agriculture 1994
WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) 1994
Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001
WTO General Agreement on Trade and Tariffs (GATT) 1994
WTO General Agreement on Trade in Services (GATS) 1994

LIST OF ABBREVIATIONS

AGP	Agreement on Government Procurement
AoA	Agreement on Agriculture
AOP	Administrative Office of the President
BOP	balance-of-payment
CEO	Chief Executive Office
CEDAW	The Convention on the Elimination of all Forms of Discrimination Against Women
CDT	Committee on Trade and Development
DCs	Developing Countries
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
DFQF	duty-free and quota-free
GSP	Generalized System of Preferences
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariff and Trade
IDLG	Independent Directorate of Local Governance
ICOIC	Independent Commission for Overseeing the Implementation of Constitution
ICCPR	International Covenant on Civil and Political Rights
ICSID	International Centre for Settlement of Investment Disputes
IMF	International Monetary Fund
ISAF	International Security Assistance Force
ITO	International Trade Organisation
ICs	Industrialised Countries
LARCSC	Independent Administrative Reform and Civil Service Commission
LDCs	Least Developed Countries
MFN	Most Favoured Nations
MITs	Multilateral Investment Treaties
NATO	North Atlantic Treaty Organisation
NEP	New Economic Policy
OECD	Organisation for Economic Cooperation and Development
SDT	Special and Differential Treatment
SPS	Sanitary and Phytosanitary Agreement
SEZ	Special Economic Zone
PIL	Private Investment Law of Afghanistan Regional Trade Agreements
TRIMS	Agreement on Trade-Related Investment Measures
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
TBT	Technical Barriers to Trade
TFA	Trade Facilitation Agreement
UDHR	Universal Declaration of Human Rights
UNCTAD	United Nations Conference on Trade and Development

UNCTC	United Nations Centre on Transnational Corporations
UNDP	United Nations Development Programme Office of the High
UN-OHRLLS	Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States
USSR	Union of Soviet Socialist Republics
WTO	World Trade Organisation

CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND OF THE STUDY

Globalisation has been introduced and ruled the world ever since 19th century, specifically in post-cold war era. Globalisation phenomenon can also be traced back to as early as 1700s as part of international trade. Thus, this phenomenon led to specialisation in international trade in the field of exchange of services, resources and goods.¹

Globalisation is like a deeply rooted tradition. A product produced in an unknown part of the world now could easily be found in any market in the globe. This resulted in the harmonisation of economies and led to the establishment of World Trade Organisation (WTO). WTO is one of the international bodies in charge of trade with the highest power, aimed to uphold commercial interests.²

As WTO was first setup in 1995, only a handful could recognize the importance of this incident. This might partially be due to the establishment of WTO that followed years of neoliberal policies, as can be seen from deregulation as well as investment and trade barriers removal. Albeit seen to be strengthening the system, which was primarily initiated under the General Agreement on Tariff and Trade (GATT) in 1947, WTO was seen to be final phase of a continuous evolution as an alternative to the start of something fundamentally new.³

¹ G A Solanki, "Globalisation and Role of WTO in Promoting Free International Trade," *Journal of Humanities and Social Science*, vol 3, no. 1 (2012): 11–14. See also generally Anthony Giddens, "Globalisation," in *Sociology of Globalisation*, (Routledge, 2018), 19–26; Ulrich Beck, *What Is Globalisation?*, (John Wiley & Sons, 2018); Jan Aart Scholte, *Globalisation: A Critical Introduction*, (Macmillan International Higher Education, 2005).

² Solanki, 11–14.

³ Sarah Joseph, *Blame It on the WTO: A Human Rights Critique*, (Oxford University Press, 2013), 1.

Among the objectives of WTO is to reduce regulatory barriers for conducting business across borders, which does not translate literally to eliminate all barriers even though it is, at most cases. The Schedules record commitments concerning remaining barriers, together with commitments to gradually remove a barrier leading to ‘duty-free’ treatment of imported goods. WTO rules tried to ensure that the remaining barriers are at least transparent and that further reduction may be negotiated by the respective governments. These objectives of WTO are attended by the Schedules through defining customs duties’ upper limit for every imported product, as well as by providing fixed opportunities for foreign services suppliers. These actions will indicate where the exporters and importers stand.⁴

There are various reasons behind the governments’ intentions in joining the WTO, and the main cause is not necessarily higher shares of world trade or improved access to foreign markets. Mostly, business community members as well as government officials would say; ‘We joined the WTO because membership is the “gold standard” for modern policy.’ As part of development strategies, not only reforming and fast emerging economies but also small, deprived and remote countries with scarce resources struggle to join WTO. This is because the membership of WTO demonstrates the economic capability of a country, which has achieved administrative and policy control, and it is capable of dealing with the most powerful economies and the rest of the world on equal basis.⁵

WTO concessions are often observed and described as being ‘locked in’ or to the ‘ratchet effect’ of binding, when one is in WTO, one’s status cannot be withdrawn or reversed, or not without compensation to the least. Fixed costs, including taxes on

⁴ WTO Secretariat, *A Handbook on Reading WTO Goods and Services Schedules*, (Cambridge University Press, 2009), 2.

⁵ *Ibid*, 14.

imported goods and other barriers to market entry, are preferred to be lowered for businesses. WTO compliance is believed to strengthen national institutions and may help in achieving security of property rights e.g. business investments that will define successful economies.⁶

In order to benefit from the UN's Second Development Decade Strategy, a category of structurally very poor countries called least developed countries (LDCs) was developed by the United Nations in the 1970s. Classification criteria was developed by the UN's Committee.⁷ The current UN definition of an LDC is based on three criteria:

1. Income-generating capacity – based on a three-year average estimate of Gross National Income (GNI) per capita (under \$905 for inclusion, above \$1,086 for graduation);
2. Human Assets Index (HAI) – reflecting human development based on indicators of: '(a) health and nutrition, measured by (i) percentage of the population undernourished and (ii) under-five child mortality rate; and (b) education, measured by: (i) gross secondary school enrolment ratio and (ii) adult literacy rate.'
3. Economic Vulnerability Index (EVI) – designed to measure the risk to development posed by exogenous shocks, and is based on an average of the seven following indicators: '(a) population size; (b) remoteness; (c) merchandise export concentration; (d) share of agriculture, forestry and fisheries in Gross Domestic Product (GDP); (e) homelessness owing to natural disasters; (f) instability of agricultural production and (g) instability of exports of goods and services.'⁸

Members of WTO must abide by the WTO agreements as they are legally binding. Unfortunately, applying WTO rules equally to all members is not easy and practical as their development stages differ. For developing and least developed

⁶ Bernard M Hoekman, Aaditya Mattoo, and Philip English, *Development, Trade, and the WTO: A Handbook*, vol. 1 (World Bank Publications, 2002), 524.

⁷ Helen Hawthorne, *Least Developed Countries and the WTO: Special Treatment in Trade*, (Palgrave Macmillan, 2013), 5.

⁸ UN Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States, "Criteria for Identification and Graduation of LDCs," <http://unohrrls.org/about-ldcs/criteria-for-ldcs/> (accessed 20 August, 2018).

countries, allowing flexibility and extra preferences of trade policy disciplines in accomplishing each development objectives are required. Thus, application of different policies and approaches towards developing and least developed countries are manifested in the notion of ‘Special and Differential Treatment’ (SDT).⁹

The special provisions include:

- i. Longer time periods for instigating Agreements and commitments;
- ii. Measures for developing countries to increase trading opportunities;
- iii. Provisions requiring all WTO members to safeguard the trade interests of developing countries;
- iv. Support to help developing countries build the capacity to carry out WTO work, handle disputes, and implement technical standards; and
- v. Provisions related to least-developed country (LDC) Members.¹⁰

Thus, non-reciprocal trade preferences and provisions in the GATT/WTO that allow LDCs greater leeway to retain or use protectionist policies are two of the central planks of so-called special and differential treatment (SDT) in the multilateral trading system.¹¹

In 2004, Afghanistan as one of the poorest countries in the world first requested for the membership of WTO. Despite its abundant mineral resources including iron, copper and chromium as well as precious stones, investments are discouraged due to widespread and continuous security concerns. According to Afghan officials, the WTO

⁹ Akiko Yanai, “Rethinking Special and Differential Treatment in the WTO,” *Institute of Developing Economies*, vol. 2, no. 436 (2013), 1.

¹⁰ World Trade Organisation, “Special and Differential Treatment Provisions,” https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm (accessed 20 August, 2018).

¹¹ Bernard Hoekman and Caglar Ozden, “Trade Preferences and Differential Treatment of Developing Countries: A Selective Survey,” World Bank Policy Research Working Paper, <http://documents.worldbank.org/curated/en/591041468166772176/pdf/wps3566.pdf> (accessed 12 January, 2017).

membership will aid the country to “strengthen its rule of law, establish transparency and lay the foundations for healthy economic growth.” Siamuden Pasarly, Director for public relations at the Afghanistan Chamber of Commerce and Industries commented, “The World Trade Organisation gives us the opportunity to bring reforms in the trade sector. It is also very important for business and transit.”¹²

Afghanistan faces major development challenges after continuous war for almost three decades. The conflict’s aftermath left a huge pile of debt to the citizen of Afghanistan and the incumbent administration in 2001. From 1996 onwards, the Taliban dominated the political scene and caused the country to move backwards in every aspect. The aftereffects of war, the decapitation of state’s primary institutions and a gravely war torn economy resulted in a large scale illiteracy, national ill health, absolute poverty level, and total disintegration of gender equity.¹³ Poverty has actually escalated albeit receiving aid of hundreds of billions dollars. In addition, 95% of today’s development budget of the country relies heavily upon donor aid.¹⁴

1.2 STATEMENT OF THE PROBLEM

Despite the inclusion of special treatment and exception provisions in the Doha Round and WTO agreements, there has been no significant research on the role of LDCs in the WTO. Academic writers generally preferred to look at the developing countries within WTO instead. Similarly, there are also no scholarly writings and exhaustive researches

¹² Shamil Shams, “Will WTO Membership Help Improve Afghanistan’s Economy?,” <https://www.dw.com/en/will-wto-membership-help-improve-afghanistans-economy/a-19437115> (accessed 15 June, 2017).

¹³ Afghanistan National Development Strategy (ANDS), “Islamic Republic of Afghanistan Afghanistan National Development Strategy 1387 – 1391 (2008 – 2013),” http://www.af.undp.org/content/dam/afghanistan/docs/ANDS_Full_Eng.pdf (accessed 20 August, 2018).

¹⁴ Dag Hammarskjöld Foundation, “Implementing Agenda 2030 – Priorities and Challenges for AfghanistanNo Title,” <http://www.daghammarskjold.se/event/implementing-agenda-2030-priorities-challenges-afghanistan/> (accessed 20 August, 2018).

about the roles that WTO can play in Afghanistan. Despite recent developments in Afghanistan, the legal and institutional frameworks of Afghanistan concerning trade is at a terrible shape.

WTO is officially a member-driven ‘one-country one-vote organisation’. In reality, there is a durable practice of decision making so-called “by consensus”, but rich countries exercise immoderate influence within the body. These rich countries are represented by large staffs of lawyers, trade specialists and expert negotiating team in Geneva while some of the world’s least developing countries could not even participate at all. Hence, trade policies are developed in such a way that encompass the rich countries’ interests.¹⁵

In additions, SDT principles were created to assist the developing and least developed countries for their integration in the global economy. Regardless of the presence of these SDT provisions, its effectiveness is still ambiguous. This problem also led to the ambiguity of the implementation of these principles rendering the principle ineffective at some instances.¹⁶

Afghanistan as a least developed country became the 164th country to be part of WTO; the membership is anticipated to bestow benefits including entrance to global supply chains and new markets. However, it is also ambiguous how much the country could reap benefit from these newly found opportunities.

Afghanistan suffers from endemic institutional challenges at every level i.e. executive, legislature and judiciary that serve as a barrier to trade. Lack of separation of

¹⁵ Richard Blackhurst, “Reforming WTO Decision Making: Lessons from Singapore and Seattle,” *Routledge Studies in International Business and the World Economy*, vol. 24 (2001): 295–310.

¹⁶ Uche Ewelukwa Ofodile, “The ‘New’ Development Agenda: Challenges to Operationalizing Special and Differential Treatment,” in *Proceedings of the ASIL Annual Meeting*, vol. 103 (Cambridge University Press, 2009), 423–27; Jean-Marie Paugam, *Reviving the Special and Differential Treatment of Developing Countries in International Trade: The Twin Challenges of Preference Erosion and Differentiation of Developing Countries* (Ifri, 2006).

power between the organs caused by the Constitution and constitutional misinterpretation, weak rule of law implementation, lack of efficiency in the Ministry and organs in charge of trade and a weak judiciary with a frail dispute settlement capacity have caused serious challenges for Afghanistan's investment prospect.

Moreover, Afghanistan's legal and regulatory frameworks and enforcement mechanisms is still at its infancy stage. Much of the frameworks needed for the encouragement and protection of private investment is still not in place. Its three overlapping systems *Sharia* (Islamic Law), *Shura* (traditional law and practice), and the formal legal system instituted under the 2004 Constitution can be confusing to both investors and legal professionals. Moreover, the application of the law is compromised by corruption.

1.3 RESEARCH QUESTIONS

This research aims to answer the following questions:

1. Is the present set up of the WTO and the rules contained in WTO Agreements are efficient to assist LDCs and Afghanistan to achieve economic development?
2. Whether Special and Preferential Treatment are effective in assisting LDCs and Afghanistan to achieve economic development?
3. Is the WTO membership beneficial for Afghanistan as a least developed country and what are the best practices that lessons can be learned from?
4. What are the institutional challenges that serve as a barrier to trade in Afghanistan as a WTO member and what are the needed institutional reforms?
5. What are the legal challenges that serve as a barrier to trade in Afghanistan and what are the needed legal reforms?