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

BY

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A thesis submitted in fulfilment of requirement for the degree of Doctor of Philosophy in Laws

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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 المستثنىة في جدول أعمال الدوحة، وإتفاقيات منظمة التجارة العالمية إلا 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 الأعضاء التي تمارس نفوذاً مفرداً داخل المجلس العام. فال 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 حاجزة أمام التجارة والإصلاحات اللازمة. ويعتمد هذا البحث على منهجيات البحث القانوني التقليدي وغير الفقهي (الاجتماعي). ويعتمد إلى حد كبير على المصادر الأولية والثانوية لمنظمة التجارة العالمية، وتحليل الكتب التعليمية، وتحليل المحتوى ومقارناته، بينما يعتمد الأخير على مقابلات شبه منظمة. وفي الوقت الحالي، تعد الظروف القانونية والتنظيمية لأفغانستان مماثلة لعديد من الدول، ولا تزال الكثير من الأطر القانونية والتنظيمية غير فعالة في وضع أطر القانونية والمؤسساتية. ولا تزال الكثير من البلدان الأقل نمواً ترغب في استغلال الفرص والحماية الفعالة. وحيث أن نظام أفغانستان الثلاثة _ الشريعة الإسلامية، الشورى (القانون التقليدي والممارسة)، والقانون الرسمي _ الذي تم تأسيسه بموجب دستور 2004_ متداخلة وهذا ما يولد ارتباكًا لدى المستثمرين والمهنئين القانونيين، وبالتالي إبعاد المستثمرين من أفغانستان.

ونظراً لأنه من المتوقع أن يكون لعضوية منظمة التجارة العالمية تأثيرًا إيجابياً بشكل عام على أفغانستان، فإن هذا الاحتمال يمكن أن يعوقه ضعف المؤسسات والقانوني بسبب الإطار الدستوري في تشكيك السلطة التنفيذية والقضائية والتشريعية، فضلاً عن ضعف الأطر المؤسسية للأجهزة المسؤولة من التجارة. وبالتالي، تحتاج أفغانستان إلى إصلاح أطرها المؤسسية والقانونية على نطاق واسع.
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Dedicated to my beloved parents for their unconditional love and support.
ACKNOWLEDGEMENTS

Glory and gratitude be to Allah (S.W.T) who hath ordained law and guidance, and has given me the ability to complete this work. May the peace and blessings of Allah be upon Prophet Muhammad (P.B.U.H), Members of his household and his companions.

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# TABLE OF CONTENTS

Abstract .......................................................................................................................................................... ii
Abstract in Arabic ........................................................................................................................................ iii
Approval Page ................................................................................................................................................ IV
Declaration ..................................................................................................................................................... V
Copyright Page ............................................................................................................................................. VI
International Islamic University Malaysia ................................................................................................. VI
Dedication ..................................................................................................................................................... VI
Acknowledgements ...................................................................................................................................... VIII
Table of Contents ....................................................................................................................................... IX
List of Figures ............................................................................................................................................. XIII
List of Cases .................................................................................................................................................. XIV
List of Statutes ............................................................................................................................................. XV
List of Abbreviations .................................................................................................................................. XVI

## CHAPTER ONE: INTRODUCTION ......................................................................................................... 18

1.1 Background of the Study ...................................................................................................................... 18
1.2 Statement of the Problem .................................................................................................................... 22
1.3 Research Questions ............................................................................................................................. 24
1.4 Objectives ........................................................................................................................................... 25
1.5 Literature Review ............................................................................................................................... 25
1.6 Significance of Research .................................................................................................................... 33
1.7 Hypothesis .......................................................................................................................................... 34
1.8 Research Methodology ....................................................................................................................... 34
1.9 Summary of the Research .................................................................................................................. 38

## CHAPTER TWO: WORLD TRADE ORGANISATION AND LEAST DEVELOPED COUNTRIES: ISSUES AND CHALLENGES ................................................................. 40

2.1 Introduction ......................................................................................................................................... 40
2.2 The WTO: Objectives, Scope, Functions, and Structure ..................................................................... 43
2.3 Principle of Non-Discrimination and Trade Liberalisation .................................................................. 47
2.4 The Definition and Nature of LDCs .................................................................................................... 49
2.5 LDCs and World Trade Organisation ................................................................................................. 52
    2.5.2 Doha Ministerial Declaration and LDCs .................................................................................... 56
    2.5.3 Committee on Trade and Development and Sub-Committee on LDCs .................................. 61
2.5.4 WTO Work Programme on LDCs 2013 ...................................................................................... 64
CHAPTER THREE: SPECIAL AND DIFFERENTIAL TREATMENT MEASURES FOR LEAST DEVELOPED COUNTRIES: A CRITICAL ANALYSIS OF ITS ISSUES AND CHALLENGES FOR AFGHANISTAN...... 78

3.1 Introduction ...................................................................... 78
3.2 LDCs in the Heart of SDT .................................................. 80
3.3 The Aims and Objectives of SDT Provisions ....................... 86
3.4 Special and Differential Treatment for Least Developed Countries: Discussion of Main Legal Provisions ................................................. 87
   3.4.1 The Agreement Establishing the WTO .............................. 91
   3.4.2 General Agreement on Tariffs and Trade (GATT) ............. 93
   3.4.3 Enabling Clause for Developing Countries ......................... 100
   3.4.4 General Agreement on Trade in Services (GATS) .............. 103
   3.4.5 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) ............................................................ 107
   3.4.6 Sanitary and phytosanitary (SPS) Agreement ..................... 109
   3.4.7 Waivers ...................................................................... 111
   3.4.8 Understanding on Rules and Procedures Governing the Settlement of Disputes ............................................................ 113
3.5 Monitoring Mechanism of SDT ........................................... 115
3.6 Concerns of Developing and Least Developed Countries in regards to SDT .............................................................. 117
3.7 SDT and its Legal Nature ...................................................... 125
3.8 SDT Relevancy to Afghanistan as a new WTO Member ........ 129
3.9 Conclusion ...................................................................... 133

CHAPTER FOUR: AFGHANISTAN’S ACCESION TO WTO: CHALLENGES AND OPPORTUNITES ................................................................. 136

4.1 Introduction ...................................................................... 136
4.2 General Overview of Afghanistan’s Economy ......................... 138
   4.2.1 Import and Export ............................................................ 144
   4.2.2 Tariff Profile of Afghanistan ............................................. 146
4.3. Afghanistan’s Accession and Commitments to WTO ............ 151
4.4 The Costs and Benefits of Afghanistan’s Membership to WTO .... 158
4.5 Graduation Of Maldives and Botswana from LDC Status: Lessons that Could be Learned ......................................................... 168
   4.5.1 Development of Home-Grown Governance Models ............ 173
   4.5.2 Alignment of economic, social, and industrial policies to the characteristics of the country .................................................. 173
   4.5.3 Importance of international support .................................. 174
4.6 The Impact of Graduation from LDC Status ........................... 174
4.7 Conclusion ...................................................................... 176
CHAPTER FIVE: POST WTO INSTITUTIONAL CHALLENGES FOR AFGHANISTAN AND THE NEEDED REFORMS

5.1 Introduction ........................................................................................................... 179
5.2 Government Structure of Afghanistan ................................................................. 183
  5.2.1 Executive ........................................................................................................... 184
5.3 Ministry of Industry and Commerce of Afghanistan and other Related Agencies ................................................................. 189
  5.3.1 Chamber of Commerce & Industries ............................................................... 195
  5.3.2. Afghanistan High Commission on Investment ............................................. 200
  5.3.3 Afghanistan Investment Support Agency (AISA) ........................................... 204
  5.3.4 Afghanistan’s High Economic Council (HEC) ............................................. 206
  5.3.5 National Trade Facilitation Committee ....................................................... 208
  5.3.6 National Export Strategy (NES) ......................................................... 210
5.4 Judiciary and other Dispute Settlement Bodies ................................................... 211
5.5 The Legislature: The Important Role of Loya Jirga .......................................... 222
5.6 Other Institutional Challenges ............................................................................. 230
  5.6.1 Corruption ...................................................................................................... 230
  5.6.2 Weak Rule of Law Implementation ............................................................... 232
  5.6.3 Human Resources Capacity Building ........................................................... 235
  5.6.4 Business Capacity .......................................................................................... 236
  5.6.5 Political Instability ......................................................................................... 237
  5.6.6 Insurgencies ................................................................................................... 239
  5.6.7 Considerable Dependency on Foreign Aid .................................................... 240
  5.6.8 Complicated Relationship with some of her Neighbouring Countries ........ 241
  5.6.9 Regional Instability ....................................................................................... 244
  5.6.10 Brain Drain ................................................................................................... 245
  5.6.11 Poor Export Capacity ................................................................................... 246
  5.6.12 Poor Governance ......................................................................................... 246
  5.6.13 The private sector: high expectation ............................................................ 248
5.7 The Needed Institutional Reforms ....................................................................... 249
  5.7.1 Reforming Executive .................................................................................... 252
  5.7.2 Reforming Judiciary and other Dispute Settlement Bodies ............... 258
  5.7.3 Reforming Legislature and the Role of Loya Jirga ........................................ 267
5.8 Conclusions .......................................................................................................... 272

CHAPTER SIX: WTO ACCESSION AND THE NECESSARY LEGAL REFORMS FOR AFGHANISTAN ................................................................................. 274

6.1 Introduction ......................................................................................................... 274
6.2. Afghanistan’s Constitution and the Need for Constitutional Law Reform ...................................................................................... 277
  6.2.1 Amending Inconsistent and Contradictory Provisions of the Constitution .................................................................................. 286
  6.2.2. Battle of Constitutional Interpretation: Independent Commission for Overseeing the Implementation of the Constitution (ICOIC) or Supreme Court? ........................................ 298
6.3 Other Legal Challenges of Afghanistan in Post WTO Membership
and the Attempted Law Reforms ..........................................................306
6.3.1 Reforming Private Investment Laws.............................................311
6.3.2 Reforming Competition Laws.......................................................321
6.3.3 Reforming Laws related to TRIPS ..................................................329
6.3.4 Reforming Laws related to Trade-Related Investment
   Measures (TRIMS) ........................................................................333
6.3.5 Islamic Law ................................................................................335
6.3.6 Protection of Property Rights .......................................................338
6.3.7 Reforming Laws in other legal areas ............................................341
6.4 Anti-Dumping Laws: An Immense Necessity .................................344
6.5 Subsidies and Countervailing Measures .......................................350
6.6 Safeguards ..................................................................................354
6.7 Conclusions ................................................................................355

CHAPTER SEVEN: CONCLUSION AND SUGGESTIONS ................357

7.1 Summary and the Findings.............................................................357
7.2. Recommendations ....................................................................363
7.3 Suggestions for further Research .................................................373

REFERENCES..................................................................................376
# LIST OF FIGURES

<table>
<thead>
<tr>
<th>Figure 1.1</th>
<th>WTO Organisational Chart</th>
<th>47</th>
</tr>
</thead>
<tbody>
<tr>
<td>Figure 1.2</td>
<td>Top Export of Afghanistan’s Non- Agricultural Products</td>
<td>140</td>
</tr>
<tr>
<td>Figure 1.3</td>
<td>Top Export of Afghanistan’s Agricultural Products</td>
<td>140</td>
</tr>
<tr>
<td>Figure 1.4</td>
<td>Trade Profile of Afghanistan</td>
<td>143</td>
</tr>
<tr>
<td>Figure 1.5</td>
<td>Afghanistan’s Major Export Trading Partners and Duties</td>
<td>145</td>
</tr>
<tr>
<td>Figure 1.6</td>
<td>Afghanistan’s Tariffs and Imports by Product Groups</td>
<td>148</td>
</tr>
<tr>
<td>Figure 1.7</td>
<td>Afghanistan Government’s Organisational Chart Source</td>
<td>186</td>
</tr>
<tr>
<td>Figure 1.8</td>
<td>Organisational Chart of Ministry of Industry and Commerce</td>
<td>191</td>
</tr>
<tr>
<td>Figure 1.9</td>
<td>Organisational Chart of Afghanistan’s Chamber of Commerce and Industries</td>
<td>196</td>
</tr>
<tr>
<td>Figure 2.1</td>
<td>ACCI National Networks</td>
<td>198</td>
</tr>
<tr>
<td>Figure 2.2</td>
<td>ACCI Joint Chambers &amp; Business Councils, International Partners and Memberships</td>
<td>200</td>
</tr>
<tr>
<td>Figure 2.3</td>
<td>Members of High Commission on Investment</td>
<td>202</td>
</tr>
<tr>
<td>Figure 2.4</td>
<td>Organisational Chart of Independent Commission for Overseeing the Implementation of the Constitution (ICOC)</td>
<td>301</td>
</tr>
<tr>
<td>Figure 2.5</td>
<td>Ease of Doing Business in Afghanistan</td>
<td>320</td>
</tr>
</tbody>
</table>
LIST OF CASES

DS27: European Communities — Regime for the Importation, Sale and Distribution of Bananas
DS26: European Communities — Measures Concerning Meat and Meat Products (Hormones)
DS146: India — Measures Affecting the Automotive Sector
Republic of Korea - Restrictions on Imports of Beef - Complaint By New Zealand
Report of the Panel adopted on 7 November 1989 (L/6505 - 36S/234)
DS90: India — Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products
European Communities — Conditions for the Granting of Tariff Preferences to Developing Countries, India on 5 March 2002
DS306: India — Anti-Dumping Measure on Batteries from Bangladesh
DS267: United States — Subsidies on Upland Cotton
DS265: European Communities — Export Subsidies on Sugar
DS434: Australia — Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packagin
DS58: United States — Import Prohibition of Certain Shrimp and Shrimp Products
LIST OF STATUTES

Afghanistan Commercial Code 1955
Afghanistan Civil Code 1977
Afghanistan’s Banking Law 2003
Afghanistan Constitution 2004
Havana Charter 1948
Independent Commission for Overseeing the Implementation of Constitution (ICOIC Law) of Afghanistan 2010
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

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

² Solanki, 11–14.
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

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.  

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. 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.’

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

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


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.”

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. 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.

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

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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.\textsuperscript{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.\textsuperscript{16}

Afghanistan as a least developed country became the 164\textsuperscript{th} 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


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?