
EMERGING PARADIGM OF WTO FOR THE TRADE AND INTELLECTUAL PROPERTY RIGHTS GROWTH OF AFGHANISTAN: A LEGAL DISCOURSE

*Sayed Mahdi Sadat Nasiri*¹

Abstract

WTO membership has always been a key component of Afghanistan's overarching strategic goals. Joining the WTO was seen as a chance for a post-conflict, landlocked, and least-developed economy to create economic stability, enhance regional security and cooperation, reduce poverty, and bring about peace. Afghanistan has been trying to join the multilateral trading system for eleven years. The article analyses the advantages and disadvantages of Afghanistan's WTO membership while seeking to explain the difficulties that would arise after accession. Afghanistan's development priorities will be met by the terms and conditions of its WTO membership. Among them include promoting domestic reforms for the country's transition to a prosperous market economy, luring capital, and job-generating investments. The study employed a doctrinal method of research and was limited to the accession of Afghanistan to the WTO.

Keywords: *WTO, TRIPS, Accession, role of WTO in Afghanistan, trade and service*

¹ *Independent author,*

**Email: sayedmahdisadatnasiri@gmail.com*

ORCID: <https://orcid.org/0000-0002-5469-6192>

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1.0 INTRODUCTION

Members of the Working Party saw Afghanistan's accession package as being of a very high caliber and one that would increase the multilateral trading system's reliance on rules and give a long-term plan for internal reforms in Afghanistan that are grounded in law. As discussed in this chapter, Afghanistan's WTO accession process was a learning experience in which its governmental, academic, business, and civil society organizations all improved their capabilities,² utilizing this admission as a stimulus to quicken structural reforms and strengthen market mechanisms. Afghanistan has been able to create a more favorable trade and investment environment with effective laws and trade policies thanks to the huge reforms completed during this period.³ On an MFN basis, all WTO Members will be subject to its WTO responsibilities. In their remarks, members commended Afghanistan for its commitment to comprehensive changes that are WTO-compliant.⁴

Tariff reduction, government revenue, trade expansion, consumer welfare, and overall economic health are all independent variables.⁵ The findings demonstrate that tariff reductions will benefit Afghan consumers and improve the economy's overall wellbeing.⁶ However, a reduction in tariffs will result in a decline in tax revenue for the government and a significant increase in imports, which could cause some worry about a negative trade balance.⁷ The paper's last section examines the post-WTO accession concerns, paying particular attention to development, institutional, and legal issues.⁸

2.0 MARKET ACCESS FOR GOODS AND SERVICES

Afghanistan completed 9 bilateral agreements for goods market access and 7 bilateral agreements for services as part of the accession discussions.⁹ Afghanistan has agreed to tariff concessions and obligations that cap tariff rates at an average of 13.5% for all goods.¹⁰ This

² Sayed Qudrat Hashimy and Jackson Simango Magoge, 'Role of WTO in the Promotion of Trade and IPR in Afghanistan' (16 August 2021) <<https://papers.ssrn.com/abstract=4043959>> accessed 15 January 2023.

³ 'Will WTO Membership Boost Trade and Investment in Land-Locked Afghanistan? - IGC' <<https://www.theigc.org/blog/will-wto-membership-boost-trade-and-investment-in-land-locked-afghanistan/>> accessed 15 January 2023.

⁴ Hashimy and Magoge (n 3).

⁵ Sayed Qudrat Hashimy and Jackson Magoge, 'Role of WTO in the Promotion of Trade and IPR in Afghanistan' (2022) Volume 7 1, 3.

⁶ 'Getting the Fundamentals Right: The Early Stages of Afghanistan's WTO Accession Process - Oxfam Policy & Practice' <<https://policy-practice.oxfam.org/resources/getting-the-fundamentals-right-the-early-stages-of-afghanistans-wto-accession-p-114503/>> accessed 15 January 2023.

⁷ Hashimy and Magoge (n 3) 2.

⁸ Hashimy and Magoge (n 3).

⁹ 'Will WTO Membership Boost Trade and Investment in Land-Locked Afghanistan? - IGC' (n 4).

¹⁰ Sayed Qudrat Hashimy, 'Impact of WTO Agreement Accession on Trade and a Few Intellectual Property Rights

average is 33.6% for agricultural items whereas it is only 10.3% for non-agricultural goods. When it became a member of the WTO, Afghanistan pledged to join the Information Technology Pact (ITA), a multilateral agreement that allows parties to totally abolish duties on IT products covered by the ITA Agreement.¹¹

Additionally, 243 tariff lines will be heading for Afghanistan's export tariffs. Of these, 24.2% and 29.6% are bound at 2.5% and 10%, respectively. Afghanistan has committed specifically to 11 service sectors, including 104 sub-sectors, in the area of services.¹² These consist of:

2.1 Horizontal Commitments

The state will grant the authority to lease land to foreign nationals or legal entities for up to 90 years (this term could be extended). From January 1, 2021, Afghanistan will no longer require contractors and licence holders under the Minerals Law 2014 and the Hydrocarbons Law 2009 to acquire services that are comparable and equal in terms of quality, quantity, and cost to services provided by foreign countries.¹³ Entry will be allowed for one year for intra-corporate transferees and individuals in charge of establishing a commercial presence in Afghanistan (this period may be extended annually); for service providers and individuals selling services without establishing a commercial presence in Afghanistan, entry will be allowed for 180 days over the course of one year.

2.2 Telecommunications

No restrictions except from those mentioned in the horizontal commitments. accepted the WTO Basic Telecommunications Agreement's application.¹⁴

2.3 Insurance

There are no restrictions on commercial presence or consumption abroad. Regarding insurance of risks associated with commercial aviation, space launches, and freight (including satellites), with such insurance to cover any or all of the following: the goods being transported, the vehicle transporting the goods, and any liability arising therefrom; and goods in international transit - there will be no restrictions on market access and national treatment, respectively, six and ten years after accession.¹⁵

in Afghanistan' (n 1) 2.

¹¹ Sayed Qudrat Hashimy, 'Impact of WTO Agreement Accession on Trade and a Few Intellectual Property Rights in Afghanistan' (n 1).

¹² *ibid* 10.

¹³ *ibid* 11.

¹⁴ *ibid* 53.

¹⁵ *ibid* 56.

2.4 Banking:

There are no restrictions on the commercial presence of internationally renowned banks and specialised banks in terms of the acceptance of deposits and other repayable monies from the general public. free for others. Afghanistan will have the authority to set restrictions on how much money can be moved.¹⁶

2.5 Distribution

Foreign investment must be at least Afs 6 million (about \$120,000 USD), inflation-adjusted, in order to have a commercial presence.

2.6 Bilateral Deals

The following countries have bilateral market access agreements with Afghanistan: a- On goods: Canada, the European Union, Japan, Korea, Norway, Chinese Taipei, Thailand, Turkey, and the United States. As well as b- On services with: China Taipei, Canada, the European Union, Japan, Korea, Norway, and the United States. The WTO Secretariat compiles the outcomes of all concluded, signed, and deposited bilateral agreements into a Schedule of Concessions and Commitments on Goods ("Draft Goods Schedule") and a Schedule of Specific Commitments on Services after the conclusion of all bilateral market access negotiations between interested members and the acceding government ("Draft Services Schedule").¹⁷ The Schedules, when approved, make all WTO Members' "Final Market Access Offers" for access to the market available.

2.7 Rules Package

Afghanistan's Accession Working Party Report includes 37 explicit commitment paragraphs on their rules package.

3.0 GENERAL COMMITMENTS RELATED TO THE TRADE REGIME

Every STE in Afghanistan will operate in accordance with the WTO Agreement. Afghanistan will adhere to the WTO's rules when implementing its pricing policy. Before becoming a member of the WTO, Afghanistan will pass the entire set of laws needed for admittance. In accordance with WTO obligations, Afghanistan's laws and regulations will grant people or businesses impacted by administrative actions subject to WTO provisions the ability to appeal those actions to a higher authority, the courts, or another independent tribunal.¹⁸

¹⁶ *ibid* 55.

¹⁷ Sayed Qudrat Hashimy, 'Impact of WTO Agreement Accession on Trade and a Few Intellectual Property Rights in Afghanistan' (n 2) 25.

WTO rules will be universally enforced throughout Afghanistan's customs territory and any other areas it controls. The central authorities of Afghanistan will take action to enforce WTO terms where they become aware of a situation where they are not being applied or are being applied inconsistently, without requiring the parties affected to file a court case.

The ability to do import and export business will be available to both Afghan and foreign natural people and legal entities. A natural person or a legal entity based abroad must either: (i) enter into a purchase-sale agreement with an Afghan legal entity or natural person in Afghanistan; or (ii) register as a legal person operating in Afghanistan in order to become an importer of record. Afghanistan will comply with its WTO requirements in all laws and regulations governing the right to import or export products as well as any fees, charges, or taxes imposed on such rights. Foreign trade will not be restricted to those who make investments in Afghanistan.

4.0 SPECIFIC COMMITMENTS ON THE IMPORT REGIME

Afghanistan will become an Information Technology Agreement participant. Afghanistan will not apply other duties and charges, except for the 0.2% Red Crescent Tax applied on most tariff lines.¹⁹ The Red Crescent Tax will be eliminated within 15 years from the date of accession. Afghanistan will implement tariff exemptions in conformity with the WTO provisions. Afghanistan will apply its fees or charges imposed on or in connection with importation and exportation in accordance with Article VIII of the GATT 1994.²⁰

The prices for customs storage and licences to import drugs and medical equipment, in particular, will comply with WTO rules. Afghanistan's internal taxes and charges on imports will be applied in complete compliance with all WTO obligations, including laws, rules, and other policies. There will be no longer be an import fixed tax of 3%. Before the start of 2021, the 2% fixed import tax will be removed. Value Added Tax (VAT) will take the place of the Business Receipts Tax (BRT) levied on imports no later than before 1 January 2021. The WTO Agreement will be followed when applying the VAT.²¹

¹⁸ *ibid* 45.

¹⁹ Sayed Qudrat Hashimy and Jackson Magoge (n 6) 5.

²⁰ *ibid* 6.

²¹ Sayed Qudrat Hashimy, 'Impact of WTO Agreement Accession on Trade and a Few Intellectual Property Rights in Afghanistan' [2021] SSRN Electronic Journal 37 <<https://www.ssrn.com/abstract=4291992>> accessed 15

Afghanistan will stop imposing quantitative limitations or other non-tariff measures on imports and will not do so in the future (such as licensing, quotas, bans, permits, prior authorization requirements, licencing requirements, and other restrictions having equivalent effects that cannot be justified under the provisions of the WTO Agreement).²²

Afghanistan will lift its ban on the import of plasters, gypsum, anhydride, table salt, and cotton seeds. Afghanistan may enact WTO-compliant balance of payments measures if necessary. Afghanistan shall implement the Decision 4.1 on Valuation of Carrier Media Bearing Software for Data Processing Equipment as well as the Agreement on Customs Valuation. It will not value imports using fixed valuation schedules or minimum prices.²³

The Rules of Origin Agreement will be complied with by Afghanistan's laws and regulations. Upon request from an exporter, importer, or any other person with a legitimate reason, the Afghanistan Customs Department will arrange for an evaluation of the import's origin. Before trading in the questioned items begins, requests for such assessments will be welcomed; the assessments will be enforceable for three years.²⁴ If a preshipment inspection programme is implemented, it will operate in accordance with the WTO Agreement. Charges and fees for preshipment inspection will be in accordance with GATT 1994 Article VIII. Entities engaged in preshipment shall develop and maintain processes for appeal.²⁵

5.0 LEGAL DISCOURSE AND PROSPECTIVE

In accordance with the pertinent WTO Agreements, Afghanistan will administer and implement commercial policy measures stipulated in its legislation intended to defend home industry or otherwise advance national commercial interests. Afghanistan won't implement the necessary WTO-compliant laws before applying any anti-dumping, countervailing, or safeguard measures. Such actions will only be used in accordance with the pertinent WTO regulations. Afghanistan shall abolish any tariffs, taxes, fees, or other charges imposed on exports that do not comply with Article VIII of the GATT 1994. Exports will no longer be subject to the 2% fixed tax as of January 1, 2021.²⁶

January 2023.

²² 'WTO | 2021 News Items - Event Marks 5 Years of Afghanistan's WTO Membership' <https://www.wto.org/english/news_e/news21_e/acc_09aug21_e.htm> accessed 15 January 2023.

²³ Sayed Qudrat Hashimy and Jackson Magoge (n 6) 9.

²⁴ Sayed Qudrat Hashimy, 'Impact of WTO Agreement Accession on Trade and a Few Intellectual Property Rights in Afghanistan' (n 22) 45.

²⁵ 'WTO | 2021 News Items - Event Marks 5 Years of Afghanistan's WTO Membership' (n 23).

Afghanistan won't adopt or sustain any industrial subsidies that are against the law. Any subsidy programmes will be administered by it in accordance with the SCM Agreement. Measures to promote exports shall be used in accordance with WTO guidelines. Agricultural Policies: Afghanistan will bind agricultural export subsidies at zero. Technical barriers to trade (product standards and certification): Full implementation of the TBT Agreement will start from 1 January 2018. During the transition period, existing TBT measures will be applied on a non-discriminatory basis. Any changes made in Afghanistan's laws, regulations and practice during the transition period will not result in a lesser degree of consistency with the TBT Agreement than existed at the date of accession. Sanitary and phytosanitary (SPS) measures: Full implementation of the SPS Agreement will start from 1 January 2020.²⁷

During the transition period, existing SPS measures will be applied on a non-discriminatory basis. Any changes made in Afghanistan's laws, regulations and practice during the transition period will not result in a lesser degree of consistency with the SPS Agreement on than existed at the date of accession. Afghanistan will consult with Members upon request, if they deem that any measures applied during the transition period affect their trade negatively.²⁸

Afghanistan's investment policy will be compliant with trade-related investment measures (TRIMS). By the end of 2020, all local content criteria for commodities in the Hydrocarbons Law of 2009 (applicable to suppliers) and the Law on Minerals of 2014 (applicable to owners of licences and authorizations) will be repealed.²⁹

Free zones and special economic zones: Any free zones or SEZs created in Afghanistan will be managed in accordance with WTO rules. Businesses will not be restricted from setting up shop and conducting business in these zones due to export performance,³⁰ trade balance, or local content obligations.³¹ When entering the rest of Afghanistan, goods produced in any such zones or territories will be subject to standard customs procedures, including the imposition of duties

²⁶ Michael A Newton, 'Community-Based Accountability in Afghanistan:: Recommendations to Balance the Interests of Justice' in Larry May and Elizabeth Edenberg (eds) (1st edn, Cambridge University Press 2013) <https://www.cambridge.org/core/product/identifier/9781139628594%23c04017-3-1/type/book_part> accessed 27 November 2022.

²⁷ Sayed Qudrat Hashimy, 'Impact of WTO Agreement Accession on Trade and a Few Intellectual Property Rights in Afghanistan' (n 2) 57.

²⁹ Hashimy, Sayed Qudrat (2022): Impact of WTO Agreement Accession on Trade and A Few Intellectual Property Rights in Afghanistan. figshare. Thesis. <https://doi.org/10.6084/m9.figshare.21706889.v1>

³⁰ Sayed Qudrat Hashimy and Jackson Magoge (n 6).

³¹ Sayed Qudrat Hashimy, 'Impact of WTO Agreement Accession on Trade and a Few Intellectual Property Rights in Afghanistan' (n 22).

and taxes. Transit: In accordance with the WTO Agreement, in particular Article V of the GATT 1994, Afghanistan will implement any laws, rules, or other measures governing the transit of products.³² Government Procurement: Within a year after its admission, Afghanistan will begin talks to join the Agreement on Government Procurement.³³

Intellectual Property Rights (TRIPS) Related to Trade: No later than January 1, 2019, the TRIPS Agreement will begin to be fully implemented. The TRIPS Agreement's Articles 3, 4, and 5 will take effect as of the date of entry. Any adjustments made to Afghanistan's laws, rules, or practices during the transitional period won't cause them to be less consistent with the TRIPS Agreement's terms than they were on the day of accession. When the transition phase is over, Afghanistan will look for technical support to ensure that its ability to enforce a legal system compliant with TRIPS.³⁴

Services: As of January 1, 2021,³⁵ Afghanistan will no longer require mining and hydrocarbon companies to give indigenous suppliers first priority. Foreign service providers will not be subject to less favourable competition rules than are used for domestic service providers.³⁶

The licencing requirements and processes in Afghanistan will not stand alone as a barrier to accessing the services industry.³⁷ Afghanistan would stipulate acceptable timelines for assessment and decision-making by all pertinent bodies in its licencing procedures and conditions.³⁸ Requests for licences from applicants will be accepted without specific invitation.³⁹ If the application was deemed full in accordance with Afghan internal rules and regulations, the competent authorities of Afghanistan will inform the applicant and, in the case of incomplete applications, offer a chance to correct deficiencies.⁴⁰ The applicant will be given prompt written notice of the grounds for any termination or denial of their application. In the

³² Sayed Qudrat Hashimy, 'Impact of WTO Agreement Accession on Trade and a Few Intellectual Property Rights in Afghanistan' (n 2) 67.

³³ Sayed Qudrat Hashimy and Jackson Magoge (n 6) 10.

³⁴ Sayed Qudrat Hashimy, 'Impact of WTO Agreement Accession on Trade and a Few Intellectual Property Rights in Afghanistan' (n 22) 14.

³⁵ Correa Carlos M., *Trade-Related Aspects of Intellectual Property Rights* (1st edn, Oxford University Press 2007) 45.

³⁶ Sayed Qudrat Hashimy, 'Impact of WTO Agreement Accession on Trade and a Few Intellectual Property Rights in Afghanistan' (n 2) 78.

³⁷ Sayed Qudrat Hashimy, 'Protection of Video Games under Indian and the United States of America Copyright Law' (17 June 2022) 15 <<https://papers.ssrn.com/abstract=4138875>> accessed 15 January 2023.

³⁸ Sayed Qudrat Hashimy, 'An Analysis of Naked Licensing in the Case of Trademark Law in the U.S., U.K. And India' (3 January 2022) 13 <<https://papers.ssrn.com/abstract=3999020>> accessed 15 January 2023.

³⁹ Sayed Qudrat Hashimy, 'Protecting Geographical Indications in Afghanistan' (10 November 2022) 16 <<https://papers.ssrn.com/abstract=4324242>> accessed 15 January 2023.

⁴⁰ Sayed Qudrat Hashimy and Nyamwero Bwire Nyamwero, 'The Anti-Competitive Effect of Mergers on Competition in Tanzania and India' (9 February 2022) 13 <<https://papers.ssrn.com/abstract=4030842>> accessed 15 January 2023.

event that professional licencing exams are held, they will be scheduled at regular intervals.

Prior to January 1, 2021, the competent regulatory bodies will be disassociated from and not a subordinate of any of the service providers they regulate for the services listed in the Schedule of Specific Commitments on Services of Afghanistan. The option to select their partners will be available to foreign providers.

Transparency: Afghanistan will put into effect the WTO Agreements' notification and publication requirements for transparency.⁴¹ Except for laws, regulations, and other measures involving a national emergency or security,⁴² or for which publication will impede law enforcement, no law, regulation, judicial decision, administrative ruling, or other measure of general application pertaining to or affecting trade in goods, services, and TRIPS will take effect prior to being published.⁴³ The Ministry of Commerce and Industries will publish all laws and regulations pertaining to the scope and amount of fees and charges imposed by Afghanistan on or in connection with importation and exportation in one place or on one website.⁴⁴

Afghanistan will make available all laws, rules, and other general-applicable policies relating to or impacting the trade in services. The effective date of these laws, regulations, and other measures, as well as the general range of services or activities impacted, will be included in the publication of these laws, regulations, and other measures.⁴⁵ Along with the licencing requirements and procedures, it will also publish a list of all organisations in charge of allowing, approving, or regulating service operations for each service sector. Prior to going into force, the licence guidelines and conditions will be published.⁴⁶

Any rules or other general applicability implementing measures that Afghanistan proposes to adopt will be made public. It will give interested parties (including Members) a fair chance to offer feedback on the proposed regulation or implementing measure. There will be a fair amount of time between the date the rule or other implementing measure is published and the date it goes into effect.⁴⁷ Afghanistan will deliver each initial notification that the WTO Agreement requires. Afghanistan will also notify the WTO of any further laws, rules, or other actions that require notification under the WTO Agreement. Afghanistan's rules of origin will be communicated to the WTO Committee on Rules of Origin, the SCM Committee will be

⁴¹ Hashimy, 'An Analysis of Naked Licensing in the Case of Trademark Law in the U.S., U.K. And India' (n 39).

⁴² Carlos M. (n 36) 4.

⁴³ Hashimy and Nyamwero (n 41).

⁴⁴ Hashimy, 'Protecting Geographical Indications in Afghanistan' (n 40).

⁴⁵ Hashimy and Nyamwero (n 41).

⁴⁶ Sayed Qudrat Hashimy, 'Impact of WTO Agreement Accession on Trade and a Few Intellectual Property Rights in Afghanistan' (n 22) 15.

⁴⁷ Sayed Qudrat Hashimy and Emmanuel Elimhoo Kimey, 'Protection of Digital Contents under Indian Copyright Law in the Light of International Conventions' 5 14.

informed of all pertinent details about subsidy programmes, and the TRIPS Council will be informed of draught and finalised TRIPS legislation.⁴⁸ For as long as the programme is in place, Afghanistan will update WTO Members on changes to its privatisation plan.⁴⁹ Afghanistan will not implement anti-dumping, countervailing, or safeguard measures until it notifies the relevant WTO Agreements of the required laws.⁵⁰ Afghanistan will give notice of any changes to its export-related duties, taxes, fees, and charges on the day of their publication or at least 30 days before the changes take effect.⁵¹

6.0 CONCLUSION

Afghanistan formally joined the World Trade Organization (WTO) in 2016 to enhance its chances for international trade. This voyage, however, started much earlier. Afghanistan made the reform of its then-existing trademark rules one of its promises to join the WTO. In order to comply with the Agreement on Trade-Related Aspects of Intellectual Property Rights, nations must generally modify their intellectual property (IP)-related laws before joining the WTO (TRIPS). Although Afghanistan has passed several IP-related laws, such as the 2009 Law on Trade Marks Registration, it still does not fully comply with TRIPS because it makes no mention of trademark licencing and is unclear about the conditions for both trademark validity and usage. On December 17 in Nairobi, Kenya, during the 10th Ministerial Conference of the World Trade Organization (WTO), the terms of Afghanistan's admission into the renowned international trade organisation were formally agreed. Afghanistan will have till June 2016 to formally ratify the agreement and join the WTO as its 164th Member, joining an international trading body that oversees approximately 95% of global trade. Afghanistan undertook comprehensive legislative and administrative reforms in areas like trade policy, customs, food safety, plant and animal health, intellectual property, and standardisation as part of its preparations. Both Afghan consumers and enterprises, as well as foreign companies looking to do business in Afghanistan, will gain from these reforms.

⁴⁸ Sayed Qudrat Hashimy and Jackson Simango Magoge, 'The Legal Implications of "Perverse, Arbitrary, and Mala Fide" as Explicit Grounds for Challenging Credit Ratings in India' [2021] SSRN Electronic Journal 4 <<https://www.ssrn.com/abstract=4012335>> accessed 15 January 2023.

⁴⁹ Sayed Qudrat Hashimy, 'Impact of WTO Agreement Accession on Trade and a Few Intellectual Property Rights in Afghanistan' (n 22) 45.

⁵⁰ Jayashree Watal, *Intellectual Property Rights in the WTO and Developing Countries* (Oxford University Press 2001).

⁵¹ Yearwood Ronnie R.F., *The Interaction between World Trade Organisation (WTO) Law and External International Law* (Routledge Taylor & Francis Group 2012).

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