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GLOBALISATION OF LEGAL SERVICES – FEARS OF AFRICAN COUNTRIES

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PUBLICATIONS

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Legal Aspects of International Environmental Protection (1996)
Current Legal Issues for Gas Production and Utilisation in Nigeria (1997)
The Office of the Company Director - Rights, Duties and Liabilities (1998)
Corporate Social Responsibility in the Petroleum Industry (1999)
Oil and Gas Arbitration (1999)
Legal Framework of the Petroleum Industry (2000)
The Nigerian Power Sector: An Industry in Transition (2001).
Local Content-Provision of Professional Legal Services in the Petroleum Industry (2004)
Good Governance & Africa's Development (2007)

AKINJIDE & CO PUBLICATIONS:

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19. International Commercial Arbitration and Multi-National Corporations
20. Democracy and the Challenges of Succession in Nigeria
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23. Part 1: Company Director: Is He the Only Directing Mind and Will of the Company?
    Part 2: Power and Leadership? What Power and What Leadership?
24. Good Governance, Oil & Gas, and National Development
25: Recent Guidelines Relating to World Freezing Orders, that is, MAREVA Injunction
26. Globalisation of Legal Services – Fears Of African Countries, 2007.

GLOBALISATION OF LEGAL SERVICES – FEARS OF AFRICAN COUNTRIES

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Introduction

The **General Agreement on Trade in Services (GATS)** is the first multilateral trade agreement to cover **trade in services**. Its creation was one of the major achievements of the Uruguay Round of trade negotiations from 1986 to 1994. It entered into force in January 1995. GATS is the counterpart to the earlier **General Agreement on Tariffs and Trade (GATT)** which deals with trade in goods. Under the new agreement, GATT was replaced by the **World Trade Organisation (WTO)**, which today has 150 members.

The GATS covers 12 core service sectors:

- Business Services (including Professional Services and Computer Services)
- Communication Services
- Distribution Services
- Educational Services
- Environmental Services
- Financial Services (including Insurance and Banking)
- Health-Related and Social Services
- Tourism and Travel-Related Services
- Recreational, Cultural and Sporting Services
- Transport Services
- Other Services not included elsewhere

Defining The Concept

The rules for international trade in services are set by member countries of the WTO and are contained in the GATS. Under the Agreement, individual WTO members make specific undertakings on the degree of access foreign service providers will enjoy in their market, and whether they are treated differently than local service providers.

The GATS is structured so that each WTO member makes their own individual commitments on opening up their market to competition from

foreign suppliers. It is an entirely voluntary system. There is no compulsion. WTO members can make no commitments at all by leaving entire sectors out of their schedules. The GATS permits member countries to undertake progressive opening of service sectors and integration into the multilateral trading system at their pace. The nature and extent of the GATS commitments are strictly a matter of choice for WTO member governments. They are policy issues based on members' assessments of their national development needs, strategy and priorities.

There are 4 "modes" for services to be delivered:

Mode 1: Cross-Border Supply

Where a service is supplied from one country to another through telecommunications or postal infrastructure. In this case the service travels across the border but not the lawyer or the client e.g. *a lawyer in England prepares a legal advice which is sent via mail or e-mail to a client in Nigeria.*

Mode 2: Consumption Abroad

Where consumers from one country purchase a service in another country. Here the client travels abroad to seek services of an overseas based lawyer e.g., *An American company comes to Nigeria to obtain legal advice from a Lagos-based firm.*

Mode 3: Commercial Presence

The service is provided within a country by a locally established affiliate, subsidiary or representative office of a foreign-owned and controlled entity. In this case, a lawyer from one country establishes an office in another country e.g. *An American law firm establishes a branch office in Abuja.*

Mode 4: Movement of Natural Persons (or "fly-in fly-out")

Where individuals travels to another country to provide a service. A lawyer from one country travels to another country temporarily to deliver legal services e.g. *a lawyer travel with a client from England to assist the client in conducting contract negotiations during the client's visit to Nigeria.*

The general obligations of WTO members under the GATS are:

Most-Favoured-Nation (MFN) Treatment

Favour one, favour all. MFN means treating one's trading partners equally on the principle of non-discrimination. Under the GATS, if a country allows foreign competition in a sector, equal opportunities in that sector should be given to service providers from all other WTO members.

Market Access

In the sectors in a member's schedule of commitments, the member cannot take measures which restrict market access. Examples of measures which would restrict market include: quotas, economic needs test, foreign shareholding limits.

National Treatment

The member cannot discriminate between domestic and foreign service providers; foreign firms must be treated as favourably as domestic firms.

Members agreed to start the current "round" of WTO negotiations in November 2001, in Doha, Qatar. This round is known as the **Doha Round** and involves all 150 members.

The services negotiations are conducted on a request – offer basis, where a WTO member **requests** better access to a particular services sector in another WTO member's economy. This is followed by an **offer** to grant all, some or none of the access requested.

Whose Agenda Is It Anyway?

Consider the following quotes:

"England is arguably the greatest global exporter of legal services and the rest of the world does not seem to like it …….It is in our interest as English Solicitors to ensure that we can practice under home title in as many countries as possible" *Neil Rose, Law Gazettee (1996)*. (Official Magazine of the Law Society of England and Wales)

"It *[legal service liberalization]* could give City law firms opportunities in key target countries where they are currently either banned or limited in what

they can do, such as India, Korea, Japan and China. "*Law Gazette (2003).*

"The Law Society's international unit will send a representative to India next month on a familiarization visit, with the aim of reviving a stalled dialogue on liberalization of legal services and laying of the groundwork for future lobbying. The visit will include meetings with the Bar Councils of India, Delhi and Mumbai, industry trade bodies, the Indian Law Commission, Indian firms, UK firms in India, and the British High Commission. Alison Cook, the Society's head of International, said the trip had been planned to take place in advance of visits schedule this year by the Attorney-General, Lord Goldsmith, and the Lord Chancellor's Department Minister, Baroness Scotland." *Law Gazette (2003).*

"Rather than the Law Society and other professional bodies having to knock on the door of each country to which they would like their members to have access, the WTO – through the General Agreement on Trade in Services (GATS) – offers the opportunity to walk through several doors at the same time …….**Unsurprisingly, it all comes down to money**. A report by the Organisation for Economic Co-operation and Development (OECD) examining the GATS talks on legal services shows how the stakes are getting much bigger …….. The two major exporters of legal services are the US and UK. Between 1986 and 1999, US exports rose 26-fold to $2.6 billion, while the UK's trade in legal services doubled between 1997 and 2002 to £.8 billion" *Law Gazette (2004).*

"Services dominate the economic landscape of advanced economies, accounting for close to 70 percentage of production and employment in the OECD area…….. ……..OECD countries dominate global trade and investment in services". "Open Services Market Matter", OECD Policy Brief (2000).

"Services now account for almost 70% of production in high-income OECD countries." *Opening up Trade in Services: Crucial for Economic Growth – OECD Policy Brief (2005).*

Law Society President Fiona Woolf "will call on EU negotiations to prioritise legal services in their imminent work on free trade agreements with India, Korea, and the Association of Southeast Asian Nations countries". *Bilaterals Org (2007).*

"The UK legal services industry is a world leader in the provision of legal services internationally. There are significant investment opportunities for

UK law firms in India, but restrictions in the practice of law in India make it impossible for UK law firms to pursue these opportunities fully". *Memorandum by Clifford Chance LLP to the House of Commons Select Committee on Trade & Industry (January 2006)*

"Despite its small size, the United Kingdom is the fifth-largest trading nation in the world. Due to its reliance on trade, the UK has a major stake in maintaining a vigorous and open world trading system, and it favours the launch of a new round of trade negotiations focused on further liberalization of agriculture, industry products and services" *Global Trade Negotiations (2007).*

"American trade policy works toward opening markets throughout the world to create new opportunities and higher living standards for families, farmers, manufacturers, workers, consumers, and businesses" *Mission Statement, Officer of the United States Trade Representatives (OUSTR)*

"…the dominant sector of the U.S. economy is services ….. In 2005, the services industries accounted for 68 percent of U.S. GDP and 79 percent of real GDP growth ……..**Eight of every 10 U.S. jobs are in the services sector**……. ……..International services markets offer huge opportunities for U.S firms and their employees, ……..The United States is the world's leading services-exporting nation,……While the United States runs trade deficits in goods, it enjoys large trade surpluses in services… Total elimination of global barriers to trade in services, by one estimate, would raise U.S annual income by over $460 billion, or $6,850 per family of four" *Services Trade Fuels Growth of U.S Economy, (OUSTR).*

"In 2005-6, service industries represented 71 per cent of Australia's GDP. Services also accounted for over one fifth of Australia's total exports and employed 84 per cent of Australian workers in 2006" *Department of Foreign Affairs and Trade, Australian Government.*

It is patently obvious from the above extracts that the agenda to liberalise legal services is being propelled by the developed countries. **Exports of Legal services in the UK totalled £2.167 billion in 2005** according to the *International Financial Services, London*. It is of critical national interest for advanced industrial countries to create new jobs in the services sector as their economies transform from agriculture and manufacturing to the provision of highly skilled services.

Crisis? What Crisis?

The developed countries are knocking at our door, insisting that we let them in and give them access to our legal markets. What should be our response? Do we oblige them simply for the asking? What do they promise us in return? We need to enquire very carefully into these "offers" and "requests". We must put our house in order before opening the door to outsiders. As a sovereign nation, and indeed as a continent, our actions must be dictated purely by our national interests. We should make haste slowly, bearing in mind that a WTO commitment once given is extremely difficult to reverse.

We need to examine the industrialized western countries antecedents, their track record in their dealings with the developing world where their economic interests are involved. In my view, the lessons of history should be a powerful guide, warning us of the pitfalls of credulity and complacency.

Arguably, there is no better guide than the Nobel Laureate in Economies, Joseph Stiglitz, former chairman of the Council of Economic Advisers in the Clinton administration, and Chief Economist at the World Bank (1997-2000). Mr. Stiglitz in his latest book **"Making Globalisation Work"** (2006) gives us the benefit of his views as an insider, exposing the driving forces behind the globalisation agenda of the West. I will quote extensively from his book:

"Economics has been driving globalisation …….. but politics has shaped it. The rules of the game have been set by the advanced industrial countries – and particularly by special interests within those countries – and, not surprisingly, they have shaped globalization to further their own interests. **They have not sought to create a fair set of rules, let alone a set of rules that would promote the well-being of those in the poorest countries in the world." (Pg. 4).**

"…two new economic institutions were established: The International Monetary Fund and the World Bank. At the time, much of the developing world was still colonized; t**hese institutions were clubs of the rich countries**, and their governance reflected this. They quickly established "old boy" rules to enhance their control: the United States agreed that Europe could appoint the head of IMF, with an American in the number two position; and Europe agreed that the U.S President could appoint the head of the World Bank … the IMF failed in its major mission of ensuring global financial stability – as evidenced so starkly in the global crisis at the end of the 1990s, which affected every major emerging market economy that had followed the

IMF's advice. As the IMF crafted policies to respond to the crisis, it seemed more often to focus on saving the western creditors than on helping the countries in crisis and their people. There was money to bail out Western banks but not for minimal food subsides for those on the brink of starvation. Countries that had turned to the IMF for guidance failed in sustained growth, **while countries like China, which followed its own counsel, had enormous success." (Pg. 18).**

"East Asia demonstrated the success of a course markedly different from the Washington Consensus, with a role for government far larger than the minimalist role allowed by market fundamentalism. Meanwhile, Latin American embraced the Washington Consensus policies more wholeheartedly than any other region (indeed, the term was first coined with reference to policies advocated for that region). **Together, the failures of Latin America and the successes of East Asia provide the strongest case against the Washington Consensus." (Pg. 35).**

"As globalization and new technology reduce the gap between parts of India and China and the advanced industrial countries, the gap between Africa and the rest of the world is actually increasing" (Pg. 57)

"By whatever standards one uses, today's international trading regime is unfair to developing countries" (Pg. 74)

"For forty years trade liberalization had focused on opening up markets for manufactured goods – at the time, the comparative advantage of the United States and Europe …….: today it is China and other developing countries that have a comparative advantage in many areas of manufacturing. Unknowingly, for four decades, trade negotiations had been working to open up markets for China! With manufacturing in the developed world shrinking – today it represents only 11 percent of American employment and output – American and European trade negotiations would have to deliver something in services (which are now over 70 percent of America's economy, and nearly that in Europe and Japan) and in intellectual property to satisfy their constituents. They succeeded. (Pg. 77).

"By the same token, liberalization of unskilled labour services would have led to a far greater increase in global efficiency than liberalization of skilled labour services (like financial services), the comparative advantage of the advanced industrial countries. Yet negotiators focused on liberalizing services." (Pg. 78)

"The United States and Europe have perfected the art of arguing for free trade while simultaneously working for trade agreements that protect themselves against imports from developing countries. Much of the success of advanced industrial countries has to do with shaping the agenda – they set the agenda so that the markets were opened for the goods and services that represented their comparative advantage. Western negotiators almost take for granted that they can control what gets discussed, and determine the outcomes. As the United States and the EU push for opening up markets for services, they do not thing (as they logically should): by and large, services are labour intensively, by and large, it is the developing countries that have an abundance of labour; and therefore, by and large, a fair services sector liberalization will be of especial benefit to developing countries. They think: we can liberalise the high-skilled services which represent our comparative advantage now, and we can make sure, one way or the other, not to liberalise services that are intensive in unskilled labour**. From the very beginning of the discussion, they had in mind an unbalanced agreement." (Pg. 78-79).**

[N.B. that the Annex to the GATS deals with negotiations on individuals' rights to stay **temporarily** in a country for the purpose of providing a service. It specified that the agreement does not apply to people seeking **permanent employment** or to conditions for obtaining citizenship, permanent residence or permanent employment.]

"Developed countries are rich in capital and technology, while developing ones have an abundance of unskilled labour. What each country produces reflects it resource endowment. A country with skilled labour produces skill-intensive goods and services. The Uruguay Round expanded trade negotiations into the area of services. But, not surprisingly, it covers the liberalization of services such as banking, insurance and, information technology – all sectors in which the United States has a comparative advantage – while leaving unskilled services such as shipping and construction, entirely off the agenda." (Pg.88).

"The developed countries are rich in capital, which move around the world looking for the highest returns. Developing countries have an abundance of unskilled workers, who want to move around the world in search of better jobs. For the past couple of decades, the United States and the EU have pressed with considerable success, for liberalization of capital markets, which enable investment to flow more freely round the world, arguing that this is good for global efficiency. But even modest liberalization of labour flows would increase global GDP by amounts that are an order or magnitude greater than the most optimistic estimates of the benefits of capital market

liberalization. Furthermore, liberalizing migration would benefit developing countries. For one thing, workers employed in the developed world send remittances back home; already billions of dollars are being sent back every year. In 2005, Mexico received an estimated $19 billion in remittances, second as a source of foreign exchange only to oil; for Latin America as a whole, remittances in 2005 were $42 billion …… **Developed countries do, of course, allow the migration to their country of high-skilled labour, because they see clearly the benefit to themselves of doing this …….this amounts to taking the developing countries most valuable intellectual capital without compensation: after the developing countries have invested their scarce dollars in education, the developed countries, often inadvertently, try to skim off their best and brightest." (Pg.89).**

"The problems of unfairness start in the beginning: with setting the agenda. We have seen how the past focus on manufacturing has moved to high-skill services, capital flows and intellectual property rights. A development-oriented trade agenda would be markedly difference. First, it would remain narrowly focused on those areas where a global agreement is needed to make the international trade system work. The developing countries simply do not have the resources to negotiate effectively on a broad range of topics. And second, it would focus on areas of benefit to developing countries: unskilled-labour-intensive services and migration. There are some new topics that would be added: circumscribing bribery, arms sales, bank secrecy, and tax competition to attract businesses, all of which hurt developing countries and all of which can be controlled by international cooperation." (Pg. 97-98).

[It seems that the more things change, the more they remain the same: trade between the advanced industrial countries and Africa remains at the centuries old practice of exchanging glass beads for treasure and slaves!].

"Money is flowing uphill, from the poor to the rich."! (Pg. 245).

"The problem is that there is a democratic deficit in the way that globalization has been managed. The international institutions (the International Monetary Fund, the World Trade Organisation), who have been entrusted with writing the rules of the game and managing the global economy, reflect the interests pf the advanced industrial countries or more particularly, special interests (like agriculture or oil) within those countries. This imbalance is in some cases the result of distorted voting rights; at other times, it comes from the sheer economic power of the countries and interests involved. The imbalance is seen both in the agenda and in the outcomes in every arena of globalization,

from trade to the environment to finance. We see it in both what is on the agenda and what is not." (Pg. 276).

How Do the Advanced Industrial Countries Approach WTO Negotiations?

The complex nature and far-reaching consequences of the GATS negotiations necessitate a painstaking process in order to get the benefits of globalization while avoiding the ills. Even the Organisation for Economic Co-operation and Development (OECD) warns that –

"Considerable care must be given to assessing the nature, pace and sequencing of liberalization undertakings and regulatory reform in order to both reap the benefits of greater market openness and ensure that public policy goals such as the protection of consumers are attained. These challenges can be particularly acute for developing countries, which are likelier on average to have weaker regulatory regimes and enforcement capacities, and therefore need adequate provision of technical assistance and capacity building." *Managing Request –Offer Negotiations Under GATS: The Case Of Legal Services by Massimo Grosso, OECD Trade Working Paper No 2.*

United Kingdom

The UK adopts a multi-faceted approach in the on-going WTO Doha Round negotiations.

The European Union – which speaks on behalf of all 27 member states at the WTO (UK included) – made a liberal offer on legal services and made requests to dozens of countries about restrictions placed on foreign lawyers. The corporate power of the EU is brought to bear upon individual countries to gain market access.

The Law Society (the regulatory and representative body for solicitors of England & Wales) enjoins solicitors to take an active role in the WTO negotiations. In this regard, the Law Society has formed a **GATS Working Group** to spearhead the efforts to liberalise legal markets globally.

Both the **Lord Chancellor's Department** and the **Department for Constitutional Affairs** are also actively engaged in the advocacy for liberalization of legal services.

The Department of Trade and Industry recognizes the legitimate role of NGOs in formulating trade policy and has established regular contact with these bodies through the **Trade Policy Consultative Forum**, bringing together NGOs such as development charities, business associations, trade unions and consumer groups.

The House of Commons Select Committee on Trade and Industry is also involved and it recently called for submission of evidence on trade and investment export opportunities in legal services

United States of America

The **Office of the U.S. Trade Representative (USTR)** is responsible for developing and coordinating U.S. international trade policy. USTR is part of the Executive Office of the President. The head of USTR is the U.S. Trade Representative, a cabinet member. USTR consults with other government agencies on trade policy matters through the **Trade Policy Review Group (TPRG) and the Trade Policy Staff Committee (TPSC)**. The TPSC is supported by more than 90 sub-committees responsible for specialized areas. If agreement is not reached in the TPSC, or if a significant policy question is being considered, then such issues are taken up by the TPRG. The final tier is the **National Economic Council (NEC)** chaired by the President.

A private sector advisory committee was established by the U.S. Congress to ensure that U.S. trade policy adequately reflects U.S. commercial and economic interests. There are 26 **advisory committees**, with a total membership of 700 advisers. The advisory committees provide information and advice with respect to US negotiating objectives before entering into trade agreements and on the operation of any trade agreement once entered into. The USTR administers the policy advisory committee system. The **American Bar Association** is represented on the **"Services and Finance Industries" Trade Advisory Committee.**

USTR also provides detailed briefings on a regular basis for the **Congressional Oversight Group.** Notably, the **U.S.– Nigerian Trade and Investment Agreement** entered into in February, 2000, was signed by the U.S Trade Representative. The Vice-President signed for Nigeria.

Australia

Australia has tabled three (3) negotiating proposals promoting the liberalization of trade in legal services in the current Doha Round. These

proposals were developed by the **Australian Government Attorney-General's Department**, with input from the **International Legal Services Advisory Council (ILSAC)**, members of the legal profession and the **Department of Foreign Affairs and Trade (DFAT).**

ILSAC is a high level consultative forum established in 1990, to advise the Attorney-General and the Australian Government on enhancing the international presence and improving the international performance of Australia's legal and related services. The ILSAC promotes the liberalization of legal services and promotes Australia as a regional business/financial headquarter. Members of ILSAC are drawn from both government and private sector.

ILSAC articulated an export development strategy for Australia in legal services, particularly in the markets of the Asia-Pacific region – ***Australian Legal Services Export Development Strategy, 2003-2006.***

Overview

This brief survey demonstrates the high level of deliberations and consultations, research, analysis and consensus that underpin the WTO negotiating positions of the advanced industrial countries.

The common position seems to be the promotion of a system that would enable foreign law firm's access to a host country to:

1) practice foreign law (home country, third-country and international)

2) voluntarily enter into commercial association with host country lawyers and law firms; and

3) have the right to use own firm name.

Our "Emerging" Brethren's Approach

India

India is described as "one of the world's most fiercely protectionist legal markets" *(Law Gazette, Feb 2007).*

In the same vein, Alex Pease of Allen & Overy commenting on the cooperation agreement signed earlier this year -2007- by the Law Society with two private law groups in India (the Society of Indian Law Firms and the Bar Association of India) said:

"So far as the book of that liberalisation is concerned, we are at the end of the preface and yet to start the first page of the introduction".

The Law Society itself admitted that "the people with whom we have signed this agreement are not the regulatory authorities and aren't in a position of declaring the market open or not."

Significantly, **the Bar Council of India**, India's legal regulatory body, is categorically anti-liberalisation. The Secretary of the Bar Council of India, Shri Radhakrishman, insists that "It has been made clear, time and again, that any agreement or memorandum made with voluntary bodies like the Society of Indian Law Firms and the Bar Association of India aren't binding on the legal profession, as they are not authorized to make any commitments on behalf of the legal profession."
He clarified that the Bar Council accepted the invitation of India's Ministry of Commerce to be on the Trade Committee "to make its stand more clearly visible against the entry of foreign lawyers in India in whatever form".

India's Ministry of Commerce, in its website, last year hosted a document titled ***"A Consultation paper on Legal Services Under GATS In Preparation for the On-going Services Negotiations at the WTO."***

The Discussion Paper's goal was to increase awareness within the legal fraternity of the issues and "to gather input regarding the kind of approach India should take and the types of goals the legal services sector would like to see achieved during these service negotiations …….. to generate a discussion on India's trade potential in legal services and to truly understand the situation of this sector, input from all stakeholders in necessary".

The Consultation paper "represents a step in the consultation process aimed at determining the negotiating position of the Indian Legal Services sector."

The Consultation Paper posed several pertinent questions to be answered, such as:

- "What is the potential for the Indian lawyers if they want to expand their services to get market access in other countries?

- Whether it is imperative to first create a liberalized regime domestically for the Indian Lawyers/Advocates before considering any form of liberalisation? This would in effect allow consolidation in the legal profession, which allows Indian Advocates to attain global standards and would allow them to compete with the best of the best.

- Whether India should allow FLCs (Foreign Legal Consultant) or foreign firms in a phased manner, after domestic reforms are in place or not at all?

- What should be a logical response to the various requests made on us at the WTO, including the ongoing plurilateral negotiations?"

The Discussion paper noted that the services industries already play an important role in the Indian economy and are growing faster than other components of the Indian GDP. The WTO press release dated 11.4.2006, reported that India has improved its ranking as a leading exporter in world trade in commercial services form 16th rank in 2004 to the 10th rank in 2005.

"….the Indian economy is fast integrating into the global economy. While a number of foreign companies are investing in India, Indian companies are also buying foreign companies on a regular basis. This requires capacity building of Indian lawyers and Indian law firms in areas such as international law, third country law, patents law, etc. so that they can not only advise the foreign companies in India, but also support Indian companies acquiring assets abroad." *(Extract from Consultation Paper).*

The position at present is that:

"India has not undertaken any commitment in the legal services sector during the Uruguay Round of negotiations. It has neither offered for any commitments in the legal services in its Initial Offer nor in its Revised Offer submitted at the WTO during the course of on-going Services negotiations under GATS. FDI is not permitted in this sector. International firms are not allowed to establish offices in India. Moreover, Indian advocates are not permitted to enter into profit sharing arrangements with persons other than Indian advocates. Foreign law firms are not permitted to open offices in India as per the Advocates Act 1961 and they are also prohibited from giving any legal advice that would constitute practicing of Indian law."

"In India, legal services can be provided only by natural persons who are citizens of India, who are on the rolls of advocates in the states where the service is to be provided. The service provider can either be a sole proprietorship or a partnership firm consisting of persons similarly qualified to practice law." *(Extract from Consultation Paper).*

Domestic restrictions on Indian legal practitioners are many:

i. "Partnerships are the only permitted model of practice for law firms in India.
ii. Further modes of practice such as limited liability partnerships or Limited Liability Corporation are not permitted.
iii. Limitation on the number of partners to 20. This limits the growth and size of Indian law firms.
iv. Ban on advertising.
v. Practise of law is treated as a profession and not an industry resulting in lack of finance for lawyers.
vi. Multidisciplinary practicing firms not allowed

Having functioned in such a limited framework for the past fifty years, the Indian legal profession is today ill-equipped to compete on par with international lawyers, who have grown their practices in liberalized regimes and have vast resources at their disposal. It is further to be noted that there are only a few firms in India having the expertise to handle commercial work for multinationals." *(Extract from Consultation Paper)*

Crafting India's Negotiating Strategy

In his address at a seminar organized by the Columbia University Business School on 19th January, 2007, India's Minister of Commerce & Industry, Shri Kamal Nath said:

"With a view to improving the awareness about the rights and obligations arising from the WTO agreements and to evolve the position of India in negotiations under the Doha Work Programme, the Government has been holding periodic consultations with the concerned Ministries/Departments of Central Government, Governments of States and Union Territories, industry associations, export promotion councils, farmers groups, civil society and consumer organizations, research institutions and other stakeholders. The Government has instituted Expert Groups consisting of persons of eminence in their respective area for providing advice and guidance, and research studies have been commissioned to examine the implications for

stakeholders. Periodically, seminars, workshops and symposia are held with interested parties with the cooperation of the WTO Secretariat, the UNCTAD, ESCAP and other multi-lateral bodies, universities and industry associations. The Department of Commerce website has a separate webpage on "India and WTO", which explains provisions of the agreements and updates the stakeholders on the status of the negotiations ……**India has been engaged in the WTO negotiations to ensure that its core concerns and interest continue to be adequately addressed at each stage of the negotiations.** As required by the exigencies of the on-going negotiations, India has been submitting proposals in the various negotiating bodies of the WTO with a view to pursuing its national interests and to protect the interests of the farmers, industry, service providers and trading entities. **Our negotiation objectives have been developed based on analytical work and an intensive process of dialogue with the stakeholders."** *(Emphasis mine).*

The unshakeable consensus among the Indian legal fraternity is that while, in principle, there is no objection to the entry of foreign law firms into India, first, there must be a level playing field. Citing India's unhappy experience with the entry of Multinational Accounting Firms (MAFs) such KPMG and Ernst & Young into the accounting sector, Rajiv Luthra, a lawyer who chaired the Indian side of the Joint Economic Trade Committee (JETCO) set up by the UK and India to boost bilateral trade said:

"If you want to annihilate the profession, yes, open it up, and three months later there will be no Indian firms left. There were a lot of accounting practices which all got annihilated. Now it is five firms who rule the roost and everyone else barely exists."

"Competition with foreign firms even within India calls for **extreme preparation.** And the timing of liberalisation has to be precise." – Mr. M. R. Venkatesh, *Courting Trouble, Hindu Business Line.*

The preferred approach in India is to embark on liberalisation of trade in legal services in stages. First, internal/domestic liberalisation must take place **before** external liberalisation. Internal anti-competitive barriers must come down before opening the door to others, i.e. a sizeable number of domestic legal firms must acquire pan-India presence first.

China

China became a member of the WTO on December 11, 2001. As part of the conditions for accession to the WTO agreements, **China was compelled by**

the advanced industrial countries to agree to liberalise trade in services, including legal services.

Accordingly, foreign law firms can provide legal services in China, **but only in the form of representative offices.** A foreign law firm can only open one representative office to be located in one of the designated Chinese cities. Foreign representative offices are only allowed to provide clients with consultancy on the legislation of the country/region where the lawyers of the law firm are permitted to engage in lawyer's professional work, and on international conventions and practices. **Only Chinese law firms can deal with Chinese legal affairs.**

The Pros and Cons

Pros

1. If a country is seeking to attract foreign direct investment then such foreign investors and their banks will feel more comfortable investing their money if they can be accompanied by professional advisers who know their business.

2. The big financial deals require sign-off from international law firms with requisite experience in multi-jurisdictional commercial interests.

3. Open markets will allow greater competition, dynamism, innovation and choice to the consumer.

4. Transfer of know-how and expertise to local lawyers.

Cons

1. The argument that open markets in legal services will promote economic growth is disingenuous; it is clear that it is the other way round. Foreign lawyers from the advanced industrial countries are "following the money", seeking entry into markets that are already enjoying growth. The greatest pressure for market access is directed at the so-called BRIC [Brazil, Russia, India, China] countries which are the new economic powerhouses and vitally important markets.

2. Foreign law firms will have a stultifying effect on the ability of local law firms to develop the capacity to handle high-value transactions. Further, the meager advisory work on local law currently referred to local lawyers will cease.

3. Foreign law firms will have unfair competitive advantage unless restrictive regulations on local firms are first lifted to create a level playing field.

4. The much touted benefits of liberalization are unproven, while past experience has shown its destructive effects on local markets and displacement of labour.

Current Nigerian Position

Nigeria did not make an offer to liberalise trade in legal services during the Uruguay Round. We are now being requested in the Doha Round to do so. All the restrictions and constraints of the Indian legal market apply to Nigeria (see Legal Practitioner Act, Cap 207 Laws of the Federation of Nigeria 1990 & Rules of Professional Conduct). However, unlike India, we do not have any recognizable growth in the export of services (except, of course, the acute brain drain of our best and brightest to the developed countries).

The Rest of Africa

So far, only five (5) out of the fifty-four (54) African countries have opened their legal markets to foreign lawyers. Namely, **Gambia, Rwanda, Lesotho, South Africa and Sierra Leone**. With the possible exception of South Africa that has a strong competitive edge in the legal services market, it is difficult to see the reasoning behind the liberalization policy of the other four (4) countries. It would be useful if the NBA could do a study of the experience of these countries post-liberalisation.

The Way Forward

Even the chief proponents of liberalization of trade in legal services acknowledge that liberalisation should be very carefully calibrated.

The OECD in its Policy Brief "*Opening Up Trade in Service: Crucial for Economic Growth" warned:*

"The complexity of liberalising services trade under the GATS should not be underestimated, particularly in light of the limited administrative and negotiating capacity of many developing countries. **A country needs to gather significant knowledge before it can submit sensible market opening requests and offers**. This includes identifying opportunities and challenges for its exporters, determining its capacity building needs and

assessing the likely social impact of liberalisation.

Preparing for the negotiations therefore needs a multi-stakeholder approach involving all relevant governmental agencies (and negotiators), legislators, regulators, business and civil society. Mechanisms for co-ordination and consultation are critical to **put forward a coherent view that represents the best possible national position."**

The antecedents of the advanced industrial countries demonstrate clearly that it behooves us to guard our national interests jealously. To this end, a ***root and branch*** reform is need in the manner in which WTO negotiations are carried out by Nigeria. The architecture of the whole process must be reconstructed to allow an open, transparent, participatory and democratic process. We have the talent and the knowledge that we can tap into within Nigeria and in the Diaspora, to ensure that we do not sell our children's birthright for a bowl of potage. We should emulate the painstaking and nuanced approach of the Indian Government to WTO negotiations. We must build capacity, invest in research and get all stakeholders involved in order to participate meaningfully in the current Doha Round.

The Nigerian Bar Association is to be commended for starting the discourse on this matter. We must do more. We should set up a **Working Group on WTO** that will collate views of members of the profession; make a study tour to other countries ***(a visit to India is a must)*** to exchange ideas on the issues; conduct symposia; and prepare a Position Paper on the subject for submission to the President, the Federal Attorney-General, the Minister of Foreign Affairs, and the Minister of Commerce respectively.

The NBA should lobby the Federal Government to set up Reform Committees to over-haul and modernize both the Administration of Justice System and the legal profession in order to strengthen the local Bar and gear us up to compete globally. [Compare **Lord Woolf's Report** on ***Access to Civil Justice*** (1995) and **Sir David Clementi's Report** of the **Review of the Regulatory Framework for Legal Services in England and Wales** (2004)].

The Federal Government, as the biggest spender in the economy, should be urged to adopt a policy of using the services of domestic law firms in order to help grow the local legal market. In the event that foreign legal assistance is required, the local firm should instruct the foreign firm. Presently, the country is haemorrhaging fees to international law firms in hard currency in the tens, if not hundreds, of millions of dollars annually. Government policy should aim to position the Nigerian Bar as a continental leader in the legal

services trade. After cutting our teeth on the African Continent, we can then think global. We must first dominate the local market, then expand outwards to the African Continent before going Inter-Continental. That was how it was done in Europe. Legal services liberalisation occurred first within the EU in the 1980s and expanded globally thereafter.

It is symptomatic of the closeted approach to WTO negotiations in Nigeria that we do not know for sure if Nigeria has made any "offers" in this regard in the ongoing Doha Round. Even if so, "nothing spoilt" as we say in Nigeria! Offers are mere negotiating positions and can be withdrawn while we get our house in proper order.

If Nigeria leads the way, it will be doing a great service to the rest of Africa who sadly are waiting for us to assume the mantle of leadership that is naturally ours.

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