

GLOBALISATION OF LEGAL SERVICES – WHAT SHOULD NIGERIA DO?

Our readiness to embrace globalization of Legal services cannot be adequately addressed without an understanding of the policy framework that underpins the process and the implications for our profession.

What Is Globalization?

Globalization essentially is the worldwide process of homogenizing prices, products, wages, rates of interest and profits. The primary objective is to breakdown impediments that unnecessarily clog relations amongst countries and thereby create fully integrated world economy where Borders, Jurisdictions would thin out and be replaced by homogenous economies and products, integration of economies around the world, particularly through trade and financial flows. The term sometimes also refers to the movement of people (labor) and knowledge (technology) across international borders. There are also broader cultural, political and environmental dimensions of globalization that are yet to be covered.

It refers to an extension beyond national borders of the same market forces that have operated for centuries at all levels of human economic activity—village markets, urban industries, or financial centers.

The conventional wisdom among the proponents of globalization is that markets promote efficiency through competition and the division of labor—the specialization that allows people and economies to focus on what they do best. Global markets offer greater opportunity for people to tap into more and larger markets around the world. It means that they can have access to more capital flows, technology, cheaper imports, and larger export markets.

Globalization relies on three forces for development:

- The role of human [migration](#)
- International [trade](#), and rapid movements of [capital](#) and
- Integration of financial [markets](#).¹

What we see in the regime of globalization is the evolution of the world system to the point where corporations and governments work hand in glove to accelerate the circuits of capital around the world and across boundaries².

Is the objective to create a stateless entity where cultural distinctions are reduced to the barest minimum and full integration of trade in goods and services is achieved? All rather lofty ideals which have over time precipitated the following questions.

¹ Globalization: Threat or Opportunity? Compiled by IMF Staff April 2000

² Beyond the World Trade Organisation: Joel Kovel, Green Party of New York

1. Would globalization mean the withering away of the Nation-state and National Governments?
2. Will the movement towards economic integration have adverse consequences for the people of the less developed countries?
3. Would market forces protect people from their governments?
4. Does globalization cater for the developing and undeveloped economies as it would the developed ones?
5. Does it champion ideals such as independence, equality, freedom etc?

Whilst the theme of this paper limits our scope, and our mandate not being to provide possible answers to the rhetorical questions it must however be imperatively noted that an understanding of the full blown concept of globalization cannot be achieved without answering these questions in their full blown proportions.

Globalization has been described as “a journey. But it is a journey towards an unreachable destination –“the globalized world”. A globalized economy could be defined as one in which neither distance or national borders impede economic transactions. This would be a world where the costs of transport and communication would be zero and the barriers created by differing national jurisdictions had vanished. Needless to say, we do not live in anything even close to such a world. And since many of the things we transport (including ourselves) are physical, we never will.”³

One of the vehicles used in championing the cause of globalization is none other than the World Trade Organisation (WTO).The WTO was created as a result of the Uruguay Round trade negotiations and is one of the world’s leading economic institutions. It is an international organization responsible for global rules governing trade among nations. The WTO serves as a forum for on-going multilateral trade negotiations aimed at **liberalizing** world trade and administration of resulting trade agreements.⁴

Trade Liberalization is the primary focus of the WTO and its trade agreements are reached based upon a consensus of participating members and ratified domestically by each member. Trade liberalization essentially focuses on removing impediments involved in the provision and procurement of goods and services thereby fortuitously affecting and consequently increasing the wealth of the respective countries. Services currently account for over 60 percent of global production and employment. Many services, which have long been considered genuine domestic activities, have increasingly become internationally mobile. This trend appears likely to continue, owing to the introduction of new transmission technologies.

³ Will the Nation State Survive Globalization?: Article written by Martin Wolf January 2001

⁴ The World Trade Organisation: Article Posted on www.wto.org

The primary consideration of the WTO in liberalizing trade is to induce the economic prosperity of member states. It seeks to achieve this by accession of member states to its multifarious agreements inclusive of the General Agreement on Trade in Services (GATS), our primary concern.

What significantly sets the WTO apart from other similar treaty based agreements is that it has **teeth**. What this means is that there is an established administrative mechanism in dealing effectively with erring members. The treaty based agreements are backed by the coercive powers of the organization itself. This is most evident in its capacity to override the laws of nation-states, as well as key treaties between states such as agreements on human rights and biodiversity or on issues of global warming, all which testify to the status of globalization today and to the dangers it poses to humanity and nature alike.⁵

THE GENERAL AGREEMENT ON TRADE IN SERVICES

(a) THE VEHICLE

The General Agreement on Trade in Services GATS is one of the landmark achievements of the Uruguay Round, which entered into force in January 1995. The GATS, a multi lateral treaty based agreement was inspired by essentially the same objectives as its counterpart in merchandise trade, the General Agreement on Tariffs and Trade (GATT): creating a credible and reliable system of international trade rules; ensuring fair and equitable treatment of all participants (principle of non-discrimination); stimulating economic activity through guaranteed policy bindings; and promoting trade and development through progressive liberalization.

GATS is one of the 60 agreements and decisions signed in 1994 at the conclusion of the Uruguay Round of negotiations. When countries signed GATS they committed themselves to periodic negotiations to progressively eliminate barriers to international trade in services without requiring further approval from other member states⁶ as evidenced in Article 19 of the agreement which compels members to enter in negotiation of specific commitments **“directed to the reduction or elimination of the adverse effects on trade in services of measures as a means of providing effective market access. This process shall take place with a view to promoting the interests of all participants on a mutually advantageous basis and to securing an overall balance of rights and obligations.”**⁷

Essentially **the agreement comprises of legally binding rules set for trade in all commercial services, the intention being to spur economic growth by removing barriers limiting trade in services and enabling countries to attract foreign investment by opening highly regulated services to international competition.**

It is noteworthy that the drive to liberalize the service sector is strongly supported by global corporations. According to Mr. Robert Vastine, President of the U.S coalition of

⁵ Beyond the World Trade Organisation: Joel Kovel, Green Party of New York

⁶ Trading services: an opening or a noose? By Gumisai Mutume From Africa Recovery, vol.16, April 2002

⁷ General Agreement on Trade in Services: Annex 1B

services industries “the overarching objective of the global business community through GATS should be a contestable, competitive market in every sector and in every WTO member country”⁸

b) THE MECHANICS OF GATS

GATS is structurally complex and is largely based on the existence of the 4 modes of supply namely-

- Cross border supply
- Consumption abroad
- Commercial presence
- Movement of natural persons

As well as 2 distinct legal parameters, **Market access** and **National treatment** to determine conditions of market entry and participation. The relatively complex structure of the agreement is intended to enable members to accommodate sector- or mode specific constraints that they may encounter in the Scheduling process⁹. Obligations under GATS can be classified into

General obligations-

- Most favoured nation
- Development of disciplines in domestic regulation
- Transparency
- Progressive liberalization

Sector specific obligations-

- Schedule of specific commitments
- National treatment
- Market access

Given the fact that service liberalization pursuant to GATS applies in principle to all service sectors, the potential consequence for the legal profession maybe far reaching and a detailed analysis using the operative parts of the agreement that relate to this topical discussion as a fore guide is proffered. A brief discussion of the relevant provisions of the GATS is useful.

- **Article 2¹⁰**- The Most Favoured Nation principle. This requires all member states to apply equal treatment to each and every member services or service supplier operating within its territory. Article 2.2 provides conditions under which discriminatory measures may be meted out to nations but makes the Council for Trade in Services the determining body. This obliges a country to treat other companies from WTO countries as its own in effect other Law firms as well.

⁸ Trading services: an opening or a noose? By Gumisai Mutume From Africa Recovery, vol.16, April 2002

⁹ GATS Training Module: Cap 8 Misconceptions about the GATS

¹⁰ General Agreement on Trade in Services: Annex 1B

- The role of developing countries is accentuated in **Article 4** which seeks to increase their participation. This is to be achieved through **negotiated specific commitments** that imbibe ideals such as strengthening domestic service capacity and efficiency, improvement of access to distribution channels, liberalization of market access in sectors and modes of supply of export interest to them. Further, **Article 4.3** reveals the premium placed on developing countries by placing a special priority on least developed countries in the implementation of negotiated specific commitments.
- **Article 6** is of special interest to our discourse. It focuses largely on the Domestic Regulation of Trade in Services. The provision makes it mandatory for all measures stipulated in the agreement to apply in totality to all negotiated specific commitments. Also Article 6.4 focuses on the **development of disciplines on domestic regulation**. The implication of this provision is far reaching. It empowers the Council of Trade in Services to develop through appropriate bodies necessary disciplines in order to ensure that issues such as **qualification requirements, technical standards, and licensing requirements** do not constitute unnecessary barriers to trade in services.
- **Article 12** provides instances where exceptions to the agreement are permitted i.e in the event of serious balance-of-payments or external financial difficulties but it does not permit use of this exemption **for the protection of a particular service sector**. Also any reservations or exemptions shall be notified to the General Council.
- **Article 14** provides general exceptions which do not constitute restriction on trade in services. The thrust of the provision is to allow exemptions from the agreement in the interest of public safety, order, morals and health and other aesthetic parameters.
- **Article 16** revolves round one of the two central themes of the Agreement which is **Market Access** and this essentially functions as an incentive for member states. Under their individual specific commitments, members are not allowed to unilaterally impose limitations in form of quotas, service operations, service suppliers, value of service transactions, number of persons that may be employed in a service sector.... In sector specific areas.
- **Article 17** is on the other central theme, **National treatment**. The provision is to the effect that no discriminatory measures will be meted out against service suppliers of member states in favour of domestic suppliers.
- **Article 18** is on additional commitments and the idea is to allow members latitude to negotiate commitments as regards services that are not subject to market access and national treatment. Areas such as qualifications, standards and licensing can be negotiated.

- **Article 19** of **Part 2** borders on Progressive Liberalization (Negotiation of Specific Commitments). The implication of this provision aside from mandating negotiations on a 5 year basis is to essentially accelerate market access. Members go into successive rounds of negotiation to achieve progressively higher levels of liberalization. Progressive liberalization occurs on the tide of 2 important considerations-
 1. The **National Policy Objectives** of each member.
 2. The **Level of Development** of each individual member.
- **Article 20** makes it compulsory for each member to set out in a schedule the specific commitments it undertakes with specifications on market access, national treatment and additional commitments.
- **Article 21** allows a member to modify its commitments in its schedule after 3 years has elapsed having given 3 months notice to the Council of Trade in Services. The Council also establishes procedures for rectification or modification of schedules. **The modifying member must also negotiate compensatory adjustments with the affected member which could either be monetary or conceding another sector in lieu of the one withdrawn.**

The overall effect of the above is that GATS seeks to price open markets for the benefit of transnational corporations at the expense of national economies, workers and other groups in the developing economies.

With the acceleration of world economic integration, Law firms have become increasingly concerned with advising clients on international transactions covering a variety of business concerns including mergers and acquisitions with foreign companies and contractual arrangements for franchises, dealerships and product sales. The multi-jurisdictional nature of transactions requiring multi-jurisdictional advice underpins the evolution that has occurred in Law. In such situations therefore, Lawyers and Law firms are regarded as part of the infrastructure of commerce.

The consequent effects as relates to the legal profession would mean that conglomerates would rather deal with international law firms with multi-jurisdictional spread than domestic law firms. Such international law firms could operate through two of the four modes of service supply namely commercial presence and presence of natural persons.

Furthermore, the mistake of the past has always been to ratify agreements without proper consideration of their implications over a protracted period of time or analyzing their impact only to find ourselves hamstrung.

What Advantage would be obtained from opening our legal market to foreign law firms?

It has been argued that entry of global law firms would create broad based synergies and amalgams between the global firms and local firms which would strengthen local content. But this benefit is largely questionable given the large cross borders disparities existing between developed and developing economies.

Traditionally, the Legal Profession has been regarded differently from other types of services given the distinct cultural/national flavour of law, the territorial jurisdiction of the courts and the fact that lawyers are admitted / licensed to practice on a jurisdictional basis. These are the same qualification barriers which GATS seeks to circumvent as evinced in Article 6 and 6.4 in particular.

Another major issue is that of representation. It has been contended that the GATS policies are written by and for corporations with inside access to the negotiations. For example, the U.S Trade representative gets heavy input for negotiations from 17 Industry Sector Advisory Committees. Citizen input by consumer, labour organizations is consistently ignored. How can there be fairness in its policies if there is no adequate representation. This is further worsened by the alarming statistic that asserts that the richest 20 percent of the Worlds population consume 86 percent of the world's resources while the poorest 80 percent consume just 14 percent.¹¹

Aside from the need to protect nationalistic interests the envisaged situation would not augur well for the development of the law profession given the lopsided imbalance that would be created following the entry of the better established international Law firms.

ISSUES ARISING

1. Licensing / Classification Issue: As indicated above the peculiar nature of law as reflected in the national character of each country's legal system makes the issue of Licensing come to the fore. The classification of Legal services under the service sectoral classification has been criticized as being too myopic. Several classification criteria have been suggested to accommodate the multi jurisdictional flavour of the Law. The U.S suggests that the service classification list should be understood to include the provision of legal advice or legal representation in such capacities as counseling in business transactions, participation in the governance of business organizations, mediation, arbitration and non-judicial resolution services, public advocacy and lobbying.

The Australian approach is to give members the opportunity to make commitments in respect of widely recognized areas of law and type of service without describing the service provider as a foreign lawyer, legal practitioner, advocate, foreign legal consultant or any other term used by individual members. Australia proposes that definition of legal services should be expanded to include the following sub categories:

¹¹ Criticisms against GATS: Individual comments against the WTO

Home Country Law (advisory services); Home Country Law (representative services) – these are related to the legal practitioners home country or jurisdiction in which he has a legal right to practice.

Third Country Law (advisory services) – limited to providing advice or consultancy services in the law of a third country where the practitioner has competence in the law of that country.

Third Country Law (representative services) - extends to representing clients before a court or judicial body in the law of a third country where the practitioner has competency to practice.

Host Country Law (advisory services) – limited to providing advice or consultancy services in the law of the host country.

Host Country Law (representative services)- extends to representing clients before a court or judicial body in the law of the host country.

International Law (advisory services) –limited to providing advice or consultancy services in international law.

International Law (representative services)- extends to representing clients before a court or judicial body in international law.

International commercial arbitration services- extends to the right to the right to prepare and appear in international commercial arbitration on behalf of clients.

Other ADR services, preparation and certification of legal documents and other legal advisory or consultancy services.

According to the proposed sub- categories, this would allow Members to make commitments with certainty where meaningful market access can be provided to foreign legal practitioners while, where considered appropriate, restricting access to the practice of host country law, the primary domain of local practitioners¹². The summary of the Australian approach is a limited access and redefinition of terminologies.

The cultivation of proposed sub-categories under the services sector classification would eventually still lead to the same end; proliferation of the major international law firms that would stifle the development of domestic practitioners.

2. Scope of Practice: this is also closely related to the classification of legal services. The main theme here is what areas should be left for external practitioners to practice and which should be regarded as being in the domain of local practitioners. Whether there is a mitigated limited licensing approach

¹² Negotiating Proposal: Legal Services Classification. Communication from Australia.

or a full licensing it does not still work in our favor given the lopsided development in favour of the developed countries.

3. Reciprocity: The issue has always been whether true reciprocity can be achieved if we open our doors for all to enter. A most pragmatic consideration would be for our domestic practitioners to be assured entry into the legal field of foreign members.

Can this really be achieved given the difficult hurdles that are usually placed by their bodies to restrict access?

Can we actually compete with them on a global scale?

Can we be assured that whatever agreement we enter into won't be honoured more in breach than in adherence?

All of these questions go a long way in determining the direction we as a professional body should take.

In light of all of the above I would like to suggest that we be unequivocal in our stance and for once in our own interests say NO. However filtered the application of the agreement might be introduced it does more damage than good to our precocious legal profession. It will invariably jettison whatever progress that we might have achieved. We want to be able to compete with the Global firms but at our pace and on our turf not through by hurried accession to an agreement without analyzing its potential pitfalls.

I would therefore suggest that we embark on the following.

- Capacity building
- The Government of Nigeria (State/ Federal) should seek to use the services of Nigerian professionals.
- Revamping legal education in line with present day realities.

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