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Laurel S. Terry
lterry@psu.edu

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THE GATS AND LEGAL SERVICES IN LIMERICK

*Laurel S. Terry**

INTRODUCTION

In 1994, when the U.S. became a member of the newly-created World Trade Organization (WTO), it signed the General Agreement on Trade in Services or GATS. The GATS is the first world trade agreement to cover services rather than goods and it applies to legal services. U.S. lawyers, legal educators, judges and legal services regulators need to become familiar with the GATS because it may influence, to some degree, the regulation of lawyers in the U.S. The verses that follow provide an introduction to the GATS and summarize the developments that have occurred since the GATS was signed.

There once was a treaty named GATS¹
Covering sales by lawyers—not hats.²
In the WTO,
We'll reap what we sow.
Attorneys don't have it down pat.

* Laurel S. Terry is a Professor of Law at Penn State Dickinson School of Law (LTerry@psu.edu). She would like to thank Howard Warshaw and Bob Rains for all their help, even though they couldn't convince her California ear that parry and wary don't rhyme. Her non-rhyming articles on the GATS are available at <http://www.personal.psu.edu/faculty/l/s/lst3/> (last visited Jan. 13, 2007).

1. The General Agreement on Trade in Services (GATS) is contained in Annex 1B to the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations. General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 33 I.L.M. 1125, 1167 (1994), available at http://www.wto.org/english/docs_e/legal_e/final_e.htm (last visited Jan. 13, 2007) [hereinafter GATS]. The GATS was the first world trade agreement to include services within its scope. For a discussion of the GATS' relation to legal services, see Laurel S. Terry, *GATS' Applicability to Transnational Lawyering and its Potential Impact on U.S. State Regulation of Lawyers*, 34 VAND. J. TRANSNAT'L L. 989 (2001), as revised in 35 VAND. J. TRANSNAT'L L. 1387 (2002). Additional articles are available at the American Bar Association GATS webpage, <http://www.abanet.org/cpr/gats/articles.html> (last visited Jan. 13, 2007).

2. The General Agreement on Tariffs and Trade (GATT) dates from 1949 and deals with the sale of goods (such as hats). General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A11, 55 U.N.T.S. 187 (1947). In contrast to the GATT treaty, GATS dates from 1994 and covers services, rather than goods. See Terry, *supra* note 1, at 994 n.9.

Ninety-four, it got going you know.³
 At the outset, the going was slow.⁴
 Then it was fast;⁵
 For now that seems past.⁶
 But watch out or you might say, "Oh no!"⁷

3. The GATS negotiations concluded on December 15, 1993; the final agreements were signed on April 15, 1994 in Marrakech, Morocco and took effect January 1, 1995. *See* Summary of the Final Act of the Uruguay Round, http://www.wto.org/English/docs_e/legal_e/ursum_e.htm (last visited Jan. 13, 2007); Terry, *supra* note 1, at 998.

4. Article XIX of the GATS treaty required WTO Members to enter into successive rounds of negotiations not later than five years after entry into force. *See* GATS, *supra* note 1, art. XIX(1). These GATS Article XIX negotiations originally were referred to as the GATS 2000 negotiations. These negotiations are now referred to as the Doha negotiations or the market access negotiations or as Track 1 of the GATS. Information about these negotiations is available on the Track 1 page of the ABA GATS webpage, http://www.abanet.org/cpr/gats/track_one.html (last visited Jan. 13, 2007) [hereinafter Track 1 of the GATS]. These negotiations began more than five years after the GATS came into force because of delays caused by the protests that took place during the WTO's 1999 conference in Seattle, Washington. *See generally* Seattle 99: The Third Ministerial Conference, http://www.wto.org/english/thewto_e/minist_e/min99_e/min99_e.htm (last visited Jan. 13, 2007).

5. The GATS 2000 negotiations were folded into the WTO's Doha Round negotiations, which included not only the GATS, but negotiations regarding the GATT, the intellectual property agreement known as TRIPS, and other topics. WTO Members agreed during their Fourth Ministerial Conference in Doha, Qatar that they would begin the negotiations that are now known as the Doha Round. *See* World Trade Organization, Ministerial Declaration of 14 Nov. 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002), *available at* http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm (last visited Jan. 13, 2007) [hereinafter Doha Ministerial Declaration].

The initial Doha Round deadlines were quite ambitious; WTO Members originally agreed to conclude their negotiations by January 1, 2005. *Id.* ¶ 45.

Even after the original deadline slipped, WTO Members continued to set ambitious deadlines. For example, in Dec. 2005, during the 5th Ministerial Meeting in Hong Kong, WTO Members agreed to try to conclude their negotiations by the end of 2006. *See* World Trade Organization, ministerial Declaration of 18 December 2005, WT/MIN(05)/DEC, at Annex C ¶ 11 (2005), *available at* http://www.wto.org/english/thewto_e/minist_e/min05_e/final_text_e.doc (last visited Jan. 13, 2007) [hereinafter Hong Kong Ministerial Declaration]. *But see* Paul Paton, *Legal Services and the GATS: Norms as Barriers to Trade*, 9 NEW ENG. J. INT'L & COMP. L. 361, 372 (2003) (describing the pace of the Doha negotiations as "glacial").

6. In July 2006, the Doha negotiations collapsed. *See* WTO News, *General Council Supports Suspension of Trade Talks*, July 27-28, 2006, http://www.wto.org/english/news_e/news06_e/gc_27july06_e.htm (last visited Jan. 13, 2007). At the time this limerick was published, the Doha negotiations had resumed. *See* WTO News, *Lamy: "We have resumed negotiations fully across the board"*, Feb. 7, 2007, http://www.wto.org/english/news_e/news07_e/gc_dg_stat_7feb07_e.htm (last visited Feb. 15, 2007). It was not at all clear, however, what the results would be of the resumed negotiations. Moreover, it is important to realize that even if the Doha negotiations do not result in further agreement, this failure would not invalidate the existing commitments in the GATS.

7. For an interesting article describing how some representatives of the U.S. legal

In November '01 in Qatar,
World Trade Members did come from afar.
They made some new rules⁸
Without any duels;
No Seattle-like spars marred Qatar!⁹

Mid-'02 all the "re-quests" were due;
Nine months later the "offers" were too.¹⁰
In Hong Kong once again-
We met foe and friend.
Advances there were but a few.¹¹

profession were surprised and disappointed by the final results of the 1993 Uruguay Round negotiations, see Karen Dillon, *Unfair Trade?*, AM. LAW., Apr. 1994, at 52, 54-56.

8. During the Doha Ministerial meeting, WTO Members agreed on "rules" or guidelines for the Doha GATS negotiations. See Doha Ministerial Declaration, *supra* note 5, ¶ 28. In doing so, they built upon the "roadmap" or rules they had established for the GATS 2000 negotiations. See Council for Trade in Services, *Guidelines For The Scheduling Of Specific Commitments Under The General Agreement On Trade In Services (GATS)*, S/L/J92 (Mar. 28, 2001). Several years after the Doha Ministerial Conference, WTO Members agreed upon a supplemental set of "rules" or negotiating guidelines. See General Council, *Doha Work Programme*, WT/L/579 (Aug. 2, 2004). During the 2005 Hong Kong Ministerial meeting, WTO Members agreed on an additional set of rules. See Hong Kong Ministerial Declaration, *supra* note 5. These four documents constitute the primary set of "rules" for the GATS negotiations and are available on the ABA GATS webpage. Track 1 of the GATS, *supra* note 4.

9. From the perspective of the WTO, the 4th Ministerial held in Doha, Qatar proceeded much more smoothly than did the 3rd Ministerial held in Seattle, Washington, which was disrupted by numerous protests. See, e.g., Press Release 160, Mike Moore, WTO Dir-Gen (Dec. 7, 1999), http://www.wto.org/english/thewto_e/minist_e/min99_e/english/press_e/press160_e.htm (last visited Jan. 13, 2007).

10. The Doha Ministerial Declaration, *supra* note 5, set June 30, 2002 as the target deadline for initial "requests" and March 31, 2003 as the target deadline for initial "offers." Doha Declaration, *supra* note 5, ¶ 15. The Doha negotiations have occurred primarily through a request-offer process. Each WTO Member may send "requests" to other countries identifying the other country's trade barriers that it would like to see eliminated. Countries respond to all of the requests they receive with a document called their "offer" in which they indicate the new trade commitments they are prepared to make. While the requests can use any format, the "offers" show proposed revisions to a country's *Schedule of Specific Commitments*. For more information about legal services and the request-offer process, see OECD Trade Policy Working Paper No. 2, *Managing Request-Offer Negotiations Under The GATS: The Case Of Legal Services*, TD/TC/WP(2003)40/FINAL (June 14, 2004), available at http://www.abanet.org/cpt/gats/track_one.html (last visited Jan. 13, 2007).

11. The results of the WTO's Sixth Ministerial Conference, held December 13-18, 2005 in Hong Kong, are memorialized in the Hong Kong Ministerial Declaration, *supra* note 5. For a statement summarizing the U.S. government reaction at the conclusion of the Hong Kong WTO meeting, see Press Release, Remarks by USTR Portman at the Closing Press Briefing,

They set a new deadline—it's true.
Feb '06 the next items were due.
 They met this new date,
 The "group work" wasn't late.¹²
But thereafter the talks went askew.¹³

The talks didn't die they just stalled.
Doha's back even if you're appalled.
 So take a deep breath.
 It won't be your death.
And learn what these GATS terms are called.

Our "requests" name their rules that we hate
Such as whether our law firms can mate.
 There are places you see
 Where they do disagree
With our rules that we think are so great.¹⁴

(Dec. 19, 2005), http://www.ustr.gov/Document_Library/Transcripts/2005/December/Remarks_by_USTR_Portman_at_the_Closing_Press_Briefing.html (last visited Jan. 13, 2007).

12. The Hong Kong Ministerial Declaration called for "plurilateral" or collective requests to be made by the end of February 2006. Hong Kong Ministerial Declaration, *supra* note 5, at Annex C, ¶ 11. The U.S. was part of a group of WTO Members that prepared a legal services collective request by the February 28, 2006 deadline. See *Collective Request Legal Services*, Mar. 13, 2006, <http://www.tradeobservatory.org/library.cfm?refID=78740> (last visited Jan. 13, 2007).

13. See *Suspension of Trade Talks*, *supra* note 6 (regarding the July 2006 collapse of the Doha Round negotiations).

14. The legal services "requests" by the U.S. government asked other countries to grant outbound U.S. lawyers rights that are comparable to the rights offered to inbound foreign lawyers in the ABA Model Foreign Legal Consultant Rule. For example, the U.S. "requested" that U.S. lawyers working in other countries be able to employ and partner with non-U.S. lawyers. The Office of the U.S. Trade Representative (USTR) has prepared a redacted summary of its legal services' requests, however, the USTR has not released the complete text of the U.S. requests because requests are considered confidential government-to-government documents. Summary of Proposed Reference Paper on Legal Services, http://www.abanet.org/cpr/gats/us_request.doc (last visited Jan. 13, 2007).

Now our “offer” responds to “requests.”
Will their lawyers soon join us as guests?¹⁵
Should our rules be changed?
It could be arranged;
It’s an issue they’ve asked us to test.¹⁶

The progress goes forth on two tracks;¹⁷
“Accountancy Disciplines”—they’re facts.¹⁸
There’s talk in Geneva—
Should lawyers use these-a?
Will countries come up with new pacts?¹⁹

15. The U.S. filed its original “offer” in March 2003; the legal services portion of this offer was the same as the 1994 *U.S. Schedule of Specific Commitments*. On May 31, 2005, the U.S. submitted a revised offer. Among other things, this revised U.S. offer would add six additional state foreign legal consultant rules to the 1994 *U.S. Schedule of Specific Commitments*. See Legal Services Excerpt of the Revised U.S. Offer (May 31, 2005), http://www.abanet.org/cpr/gats/legal_svcs_offer.pdf (last visited Jan. 13, 2007).

16. Other countries have sent “requests” to the U.S., asking specific U.S. states to make changes in some of their rules that apply to foreign lawyers. Although the USTR has not made public the requests that the U.S. has received, the organization called Public Citizen has posted a leaked copy of these requests on its website, http://www.citizen.org/documents/leaked_WTO_Service_requests.pdf (last visited Jan. 13, 2007). Pages 1-9 of this 410 page document address “business services” and include other countries’ requests for changes in U.S. legal services rules. *Id.* Later pages in this document list, in alphabetical order, the requests directed toward each U.S. state. *Id.*

17. Some commentators have referred to Track 1 and Track 2 of the GATS. See, e.g., Laurel S. Terry, *Further Developments Regarding the GATS and Legal Services: Extending the Accountancy Disciplines to Lawyers*, 73 B. EXAMINER 14 (Aug. 2004); Robert E. Lutz et al., *Transnational Legal Practice Developments*, 39 INT’L LAW. 619, 620 (2005). GATS Track 1 refers to the GATS Article XIX negotiations. *Id.* GATS Track 2, on the other hand, involves the efforts by WTO Members to respond to GATS Article VI(4), which requires WTO Members “to develop any necessary disciplines.” GATS, *supra* note 1, art. VI(4). Disciplines are somewhat similar to regulations; for additional information see *infra* notes 18-22.

18. To date, WTO Members have adopted one set of disciplines, the so-called Accountancy Disciplines adopted in December 1998. See *Disciplines on Domestic Regulation for the Accountancy Sector Adopted by the Council for Trade in Services on 14 December 1998*, S/L/64 (Dec. 17 1998), <http://www.abanet.org/cpr/gats/accounting.doc> (last visited Jan. 13, 2007) [hereinafter *Accountancy Disciplines*]. This Decision specifies that the *Accountancy Disciplines* are intended to be integrated into the GATS at the conclusion of the Doha Round negotiations, but until the Doha Round is concluded, WTO Members should not adopt measures that would be inconsistent with these disciplines. *Decision on Disciplines Relating to the Accountancy Sector, Adopted by the Council for Trade in Services on 14 December 1998*, S/L/63 ¶¶ 2-3 (Dec. 15, 1998).

19. WTO discussions about the GATS Track 2 issues take place in the WTO Working Party on Domestic Regulation (WPDR). The Chair of this Working Group recently prepared

These “Disciplines” make people wary;
They say rules should be “necessary.”²⁰

Who knows what it’ll mean—
It remains to be seen.

So some think that lawyers should parry.²¹

Could law schools be pressured to change?
Could ABA-rules be seen as deranged?

Foreigners’d be happy as clams
If they could take bar exams.

They may ask not to be so estranged.²²

a document that summarizes the existing disciplines proposals and debates. See WTO Working Party on Domestic Regulation, *Disciplines on Domestic Regulation Pursuant to GATS Article VI:4, Consolidated Working Paper, Note by the Chairman*, Job (06)/225, (July 2006), [http://www.tradeobservatory.org/library.cfm?refID=88415#search=%22JOB\(06\)%2F225%22](http://www.tradeobservatory.org/library.cfm?refID=88415#search=%22JOB(06)%2F225%22) (last visited Jan. 13, 2007) [hereinafter *Consolidated Paper on Disciplines*]. For additional information on GATS Track 2 issues, including some of the country proposals summarized in this paper and selected law review articles, see Track 2 of the GATS, http://www.abanet.org/cpr/gats/track_two.html (last visited Jan. 13, 2007). This ABA webpage includes links to Australia’s proposed disciplines for legal services and links to comments by various bar associations about whether the WTO *Accountancy Disciplines*, *supra* note 18, would be suitable to apply to the legal profession.

20. The WTO *Accountancy Disciplines* included a requirement that certain regulations cannot be more trade restrictive than necessary to fulfill a legitimate objective. *Accountancy Disciplines*, *supra* note 18, ¶ 2. Some WTO Members are reluctant to include a “necessity” clause in any new disciplines. See *Consolidated Paper on Disciplines*, *supra* note 19, nn. 1 & 2.

21. Several bar associations have expressed caution about extending disciplines to the legal profession. For example, in July 2006, the ABA unanimously adopted a resolution regarding the GATS Track 2 issues in which it expressed caution. See *ABA, Recommendation and Report 105 (adopted July 2006)*, <http://www.abanet.org/leadership/2006/annual/onehundredfive.doc> (last visited Jan. 13, 2007). For a list of policy papers, including papers prepared by the International Bar Association, Union Internationale des Avocats, Canadian Bar Association, Federation of Law Societies of Canada, and the Council of Bars and Law Societies of Europe, see Track 2 of the GATS, *supra* note 19.

22. In many U.S. states, one may not sit for the bar exam and may not be licensed as a lawyer unless one has attended an ABA-accredited law school. See ABA Section of Legal Education and National Conference of Bar Examiners, *Comprehensive Guide to Bar Admission Requirements 2006*, at Charts III and IV, http://www.ncbex.org/fileadmin/mediafiles/downloads/Comp_Guide/2006CompGuide.pdf (last visited Jan. 13, 2007). It is conceivable that foreign lawyers who wish to practice in the U.S. might ask for the right to sit for a U.S.-bar exam without having attended an ABA-accredited law school, citing the GATS.

So come all ye lawyers out there;
Tell your bars and your reps that you care.
 They won't learn what you think
 'Less you tell them—don't shrink.
Your views with your rep you should share.²³

23. The USTR, in conjunction with other departments of the government, is responsible for preparing the U.S. negotiating proposals regarding legal services. The USTR is statutorily required to consult with private-sector industry groups and also publishes federal register notices requesting input about how the negotiations should proceed. *See* Terry, *supra* note 1, at 1060-61. For information about these comments, see Position Papers, Resolutions and Testimony Relevant to Track 1, http://www.abanet.org/cpr/gats/track_one_position.html (last visited Jan. 13, 2007).