2011

# International Initiatives that Facilitate Global Mobility in Higher Education

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# INTERNATIONAL INITIATIVES THAT FACILITATE GLOBAL MOBILITY IN HIGHER EDUCATION

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2011 MICH. ST. L. REV. 305

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## INTRODUCTION

As the Association of American Law Schools' Section of Education 2011 Annual Meeting Program entitled "Higher Education and Immigration" made clear, U.S. higher education operates in a global environment in which U.S. students and faculty travel to other countries, and foreign students and faculty travel to the U.S. This phenomenon has great benefits, but it also can give rise to tensions and conflict, some of which are addressed by other articles in this Symposium.

This Article does not directly address issues related to immigration or the tensions or conflict that global mobility may create. Instead, this Article identifies a number of international initiatives that have contributed to, reflect, or facilitate global higher education mobility. Section I sets the stage

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by presenting statistics about global higher education mobility. Section II focuses on a number of international initiatives that promote such mobility. These "hard law" and "soft law" international initiatives include, *inter alia*, European Union initiatives, the Bologna Process which led to the creation of the European Higher Education Area, and higher education initiatives of the Asia Pacific Economic Cooperation (APEC), the World Trade Organization, the United Nations, and the Organization of Economic Cooperation and Development (OECD). The Article concludes with some observations about these developments.

It is beyond the scope of this Article to provide a comprehensive analysis—or even a comprehensive listing—of the many international initiatives relevant to global higher education mobility. Accordingly, the goals of this Article are two-fold: 1) to give the reader a sense of the breadth, depth, and influence of international initiatives regarding higher education; and 2) to motivate the reader to learn more about these initiatives. While many readers have some knowledge of the statistics regarding global mobility, far fewer are likely to be aware of the many "hard law" and "soft law" forces that lie behind these numbers.[1]

## I. HIGHER EDUCATION GLOBAL MOBILITY

There are many sources one could cite to discuss the increased global mobility in higher education.[2] This Article relies on three sources that everyone interested in U.S. higher education should be familiar with. These three items are: 1) a 2010 World Trade Organization report on higher education;[3] 2) a 2009 U.S. government statistical report that includes a chapter

1. This article refers a number of times to "hard law" and "soft law" initiatives. This article does not explore the meaning of these terms, because other scholars have already done so. Instead, this article uses the term "hard law" initiatives to refer to initiatives that create legally binding obligations that have explicit consequences for failure to comply. "Soft law" initiatives are those that involve something less than legally binding obligations. *See generally* Laurel S. Terry, *An Introduction to the Financial Action Task Force and its 2008 Lawyer Guidance*, 2010 J. PROF. LAW. 3, 7 n.15; Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 J. LEGAL ANALYSIS 171, 174 (2010) (defining soft law as "nonbinding rules or instruments that interpret or inform our understanding of binding legal rules or represent promises that in turn create expectations about future conduct"); ANDREW T. GUZMAN ET AL., INTERNATIONAL ORDER WITHOUT LAW: THE POWER OF SOFT LAW IN GLOBAL GOVERNANCE (2011).

2. *See, e.g.*, *Philip G. Altbach*, BOSTON COLLEGE, http://www.bc.edu/schools/lsoe/facultystaff/faculty/altbach.html (last visited Feb. 15, 2011) (listing recent publications and activities).

3. Council for Trade in Services, *Background Note by the Secretariat: Education Services*, S/C/W/313 (Apr. 1, 2010) [hereinafter WTO 2010 Secretariat Report], *available at* http://docsonline.wto.org/DDFDocuments/t/S/C/W313.doc. This 2010 report from the World Trade Organization [WTO] was an updated version of the Secretariat background note that the WTO originally issued in 1998. *See* Council for Trade in Services, *Background Note*

on higher education;[4] and 3) the annual "Open Doors" data issued by the Institute of International Education.[5] All of these sources (and others[6]) reach the same conclusion—there has been tremendous growth in transnational and cross-border higher education and this growth is likely to continue.

The WTO, for example, reported that "[b]etween 1999 and 2007, the number of international students doubled from 1.75 million to nearly 3 million."[7] In 2007, more than one-third of these students were from Asia, with China sending the most students.[8] If one excludes intra-EU mobility, which is arguably a special case, it is estimated that the number of international students has grown by more than 80% between 1999 and 2007.[9] The WTO report contains the table reproduced below which includes data about the nationality of "outbound" students:[10]

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*by the Secretariat: Education Services*, S/C/W/49 (Sept. 23, 1998), *available at* http://www.wto.org/english/tratop_e/serv_e/w49.doc.

4. Recent Trends in U.S. Services Trade: 2009 Annual Report, Inv. No. 332-345, USITC Pub. 4084, (July 2009) (Final) at 4-1 [hereinafter 2009 Recent Trends], *available at* http://www.usitc.gov/publications/332/pub4084.pdf.

5. *See Open Doors Data 2010*, INSTITUTE OF INTERNATIONAL EDUCATION, http://www.iie.org/en/Research-and-Publications/Open-Doors/Data (last visited Feb. 15, 2011) [hereinafter *Open Doors*].

6. *See, e.g.*, EVA EGRON-POLAK & ROSS HUDSON, INTERNATIONALIZATION OF HIGHER EDUCATION: GLOBAL TRENDS, REGIONAL PERSPECTIVES, IAU 3RD GLOBAL SURVEY REPORT (2010) and the sources listed in the bibliography of the reports cited *supra* notes 3-5. For example, pages 28-31 of the WTO 2010 Secretariat Report, *supra* note 3, contain a bibliography that includes other sources. The items cited include several papers prepared by AALS panelist Philip Altbach including World Conference on Higher Education, 2009, *Trends in Global Higher Education: Tracking an Academic Revolution; A Report Prepared for the UNESCO 2009 World* Conference *on Higher Education*, U.N. Doc. ED.2009/CONF.402/INF.5 (2009) (by Philip G. Altbach et al.). WTO 2010 Secretariat Report, *supra* note 3, at 28. The National Center for Educational Statistics (CES), which is sponsored by the U.S. Department of Education Institute of Education Sciences, also contains useful statistics, including links to OECD higher education statistics. *See, e.g.*, *International Data Table Library*, CES, http://nces.ed.gov/surveys/international/table-library.asp (last visited Feb. 15, 2011).

7. WTO 2010 Secretariat Report, *supra* note 3, ¶ 34 (footnote omitted).

8. *Id.* ¶¶ 34, 36.

9. *Id.* ¶ 38.

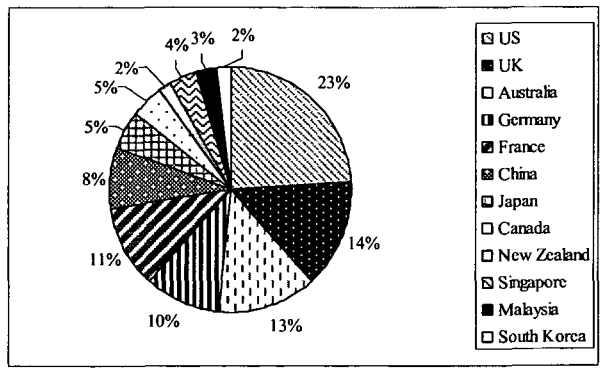
10. *Id.* ¶ 35.

Table 4: Students abroad by sending region: 1999 and 2007

| | 1999 (thousands) | 2007 (thousands) | % increase | % share in 2007 |
|---|---|---|---|---|
| North America | 60 | 90 | 50.0 | 3.8 |
| Latin America and the Caribbean | 100 | 170 | 70.0 | 7.1 |
| EU 15 | 100 | 100 | 0.0 | 4.2 |
| Central and Eastern Europe | 190 | 310 | 63.2 | 12.9 |
| Arab States | 120 | 190 | 58.3 | 7.9 |
| Central Asia | 60 | 100 | 66.7 | 4.2 |
| South and West Asia | 100 | 250 | 150.0 | 10.4 |
| East Asia and the Pacific | 440 | 810 | 84.1 | 33.8 |
| Sub-Saharan Africa | 90 | 220 | 144.4 | 9.2 |
| Not Specified | 60 | 160 | 166.7 | 6.7 |
| Total (excluding intra EU 15) | 1,320 | 2,400 | 81.8 | 100.0 |
| Intra EU 15 Students | 270 | 240 | (11.1) | |
| Total with Intra EU 15 Students | 1,590 | 2,640 | 66.0 | |

The WTO report also included data about the *destinations* of these global students, including the pie chart reproduced below:[11]

**Figure 2:** Distribution of students abroad according to national destination, 2007




11. *Id.* ¶ 37.

As this chart shows and the WTO report observes, North America and Western Europe are still the "top destinations" for globally mobile students; the countries that attract the most foreign students are the U.S., the U.K., and Australia, in that order.[12] The report notes, however, that the rate of increase (110%) is highest for East-Asia and the Pacific.[13] One explanation for this is that "[s]tudents from Asia-Pacific are increasingly choosing to study in destinations within the region."[14] Australia, for example, had a 200% growth rate between 1998 and 2008.[15]

The WTO reported increased mobility not only with respect to students, but also with respect to programs and institutions.[16] The WTO report attributed this overall growth to a "combination of supply and demand factors."[17] Supply side factors included: "advances in information and communication technologies, the emergence of new private actors in the provision of education services, government policies towards improving access to post-secondary education, new revenue generating strategies by education providers, individual student choices and requirements of employers for higher level qualifications and language skills."[18] Demand side factors included "increasing numbers of secondary school graduates seeking entry to tertiary level education."[19] The extent of growth has been striking: there was a 43% growth rate in OECD countries and 77% growth in developing countries.[20]

One explanation for the growth in international higher education trade is that labor markets demand "new and changing competencies such as adaptability, knowledge of latest technologies, and the ability to acquire new skills independently."[21] There has also been a greater demand for English competency.[22] When you combine the increased domestic demand for higher education[23] and the fact that, in "many economies, the demand for

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12. *Id.*

13. *Id.* ¶ 36.

14. *Id.* ¶ 37 (footnote omitted).

15. *Id.*

16. *Id.* ¶ 23. See *id.* ¶¶ 45-49, for a discussion of program mobility. See *id.* ¶¶ 50-56, for institution mobility.

17. *Id.* ¶ 28.

18. *Id.* ¶ 28. *See also* 2009 Recent Trends, *supra* note 4, at 4-1 ("To enhance supply, certain governments have increased funding for university infrastructure improvements and permitted public universities to exercise more authority over their financial affairs to better compete in providing higher education services.").

19. WTO 2010 Secretariat Report, *supra* note 3, ¶ 29.

20. *Id.* ¶ 29.

21. *Id.* ¶ 30 (footnote omitted).

22. *Id.* ¶ 30.

23. *See, e.g.*, U.S. DEP'T OF EDUC., INST. OF EDUC., NAT'L CTR. FOR EDUC. STATISTICS, TABLE B.3.04. OECD: TRENDS IN TERTIARY GRADUATION RATES, BY PROGRAM

tertiary level education far exceeds domestic capacity,"[24] it is not surprising to discover that there has been a dramatic increase in international trade in higher education.

The recent WTO report elaborates upon the reasons why domestic demand for higher education has increased. Education is seen as conveying both economic and social benefits. The 2010 WTO Secretariat Note conveyed this idea when it stated that "[e]ducation is widely considered as a key factor in promoting economic growth and involves the use of significant resources."[25] Moreover, these benefits are seen as "benefits [that] flow not only to the individual but also to society."[26] The WTO Report observed that:

> Higher education has been shown to have an important impact on all economies, with primary and secondary education contributing the most to growth in low income economies. Education raises productivity, which leads to an overall increase in the level of output, though the exact amount by which education contributes to economic growth varies. Productivity improvements have a long lasting impact on the human capital stock thus allowing an economy to grow at a more rapid pace than previously possible. An improvement in a population's level of education also has the effect of facilitating the innovation, transfer and absorption of technology. . . . In addition to economic effects, education has been shown to bring widespread societal benefits such as lower crime, better governance, better health and interpersonal trust.[27]

Presumably for these reasons, governments have been willing to invest in education, including global cross-border education. APEC economies spend at least US$1.6 trillion annually on education or 6.7% of GDP.[28] In 2009, OECD economies spent an average of 6.1% of their collective GDP on education.[29] Developing countries have spent 4.5 to 5% of GDP, although there are regional differences.[30] Countries vary in terms of how much of this investment comes from private funds and how much from government funds.[31] They also vary significantly with respect to the num-

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TYPE AND COUNTRY: 1995 AND 2000 TO 2007, *available at* http://nces.ed.gov/surveys/international/tables/B_3_04.asp.

24. WTO 2010 Secretariat Report, *supra* note 3, ¶ 29.

25. *Id.* ¶ 10. *See also* 2009 Recent Trends, *supra* note 4, at 4-1 ("In recent years, economic growth, increased personal income, the perceived advantages of degrees and research fellowships from prestigious universities abroad and demand-inducing government policies have all propelled demand for education services. Demand drivers have also included the proliferation of collaborative programs and degrees between universities in different countries, as well as the spread of universities establishing branch campuses abroad.").

26. WTO 2010 Secretariat Report, *supra* note 3, ¶ 11.

27. *Id.* ¶¶ 10-11 (footnotes omitted).

28. *Id.* ¶ 10.

29. *Id.* ¶ 11.

30. *Id.* ¶ 11. "In both Central Asia and in East Asia and the Pacific, public expenditure was reported at only 2.8 per cent of GDP." *Id.*

31. *Id.* ¶¶ 13-15.

ber of students in their country studying in private higher education institutions as opposed to public institutions.[32] The WTO report included data suggesting that investment in education is money well spent, noting that for "OECD members, the net public return from an investment in tertiary education exceeds US$50,000 on average for each student."[33]

U.S. government studies convey a picture similar to that found in the 2010 WTO report. For example, in July 2009, the U.S. International Trade Commission issued a report entitled *Recent Trends in U.S. Services Trade* that focused on professional services, including higher education services.[34] The *Recent Trends* report found that there had been growth with respect to the number of foreign students inbound to the U.S. (which is considered U.S. exports) and growth in U.S. students "outbound" to other countries (considered to be U.S. imports).[35] "In recent years, India, China, Korea and Japan were the four principal home countries of foreign students in U.S. universities."[36] Korean and Japanese students primarily come to the U.S. as undergraduates; Chinese and Indian students primarily come as graduate students.[37] "[T]hree-fourths of graduate-level university students from China and India who study abroad do not return to their home country."[38] Similar to the WTO Report, the *Recent Trends* report highlighted changes in the patterns of cross-border higher education mobility, noting that:

> The competition to recruit foreign students has intensified in recent years. Although, historically, the United States is the top destination of students who choose to study abroad (and who contributed $15.5 billion to the U.S. economy in 2008),

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32. *Id.* ¶¶ 17-19.

33. *Id.* ¶ 11.

34. *See* 2009 Recent Trends, *supra* note 4.

35. *Id.* at 4-1 ("U.S. exports, which represent expenditures by foreign students at U.S. universities, increased by 7 percent in 2007, the fastest rate since before the terrorist attacks on September 11, 2001. U.S. imports, which represent expenditures by U.S. students at foreign universities, increased by 1 percent in 2007, slower than in the period from 2002 through 2006, due to the trend toward shorter duration, and therefore less expensive, study abroad by U.S. students.").

36. *Id.* at 4-5.

37. *Id.* at 4-5.

38. *Id.* As capacity in these countries increases, one might expect this pattern to change. Experts predict that in the future, most of the growth in the world's economy will take place in the "BRIC" or "BRICS" countries. *See generally Goldman Sachs*, BRICS, http://www2.goldmansachs.com/ideas/brics/index.html ("Over the next 50 years, Brazil, Russia, India and China—the BRICs economies—could become a much larger force in the world economy. We map out GDP growth, income per capita and currency movements in the BRICs economies until 2050."). BRIC is the acronym for Brazil, Russia, India, and China. The term "BRICS" emerged in 2010 after China formally invited South Africa to join the BRIC countries, which sometimes negotiate together. *See, e.g.*, Bloomberg News, *South Africa Invited to Join Emerging Nations Group*, N.Y. TIMES, Dec. 25, 2010, at B2.

> the proportion of foreign students attending U.S. institutions relative to universities elsewhere outside their home country is diminishing.[39]

The *Recent Trends* report also pointed out that the "foreign students in the United States as a percentage of the world total of foreign students decreased from about 23 percent in 2004 to 21 percent in 2006, continuing a downward trend since 2001."[40]

The *Recent Trends* report reflected data through 2007. More recent reports indicate that despite the dramatic global recession, cross-border global higher education trade has increased since 2007 rather than decreased. According to the 2010 *Open Doors* report, new international student enrollment in the U.S. increased 15.8% during academic year 2008-09 and 1.3% during academic year 2009-10.[41] The total number of international students in the U.S. increased 2.9% in fall 2009 compared to the previous year.[42]

These statistics are undoubtedly one of the reasons why, during the AALS Annual Meeting, Professor Philip Altbach was rather optimistic with regard to the U.S. situation. He observed that although the U.S. will have greater competition for international students in the future and will have a smaller percentage of the global total, U.S. numbers are likely to continue to grow since the number of students studying abroad is increasing.

Although this prediction is likely to be true, I continue to be cautious and believe that it is prudent for U.S. higher education stakeholders to monitor the developments discussed in the next section of this Article. Both the 2010 WTO Report and the 2009 *Recent Trends* report indicate that competition in higher education is increasing and that U.S. growth in the higher education sector is slower than the growth of others—arguably significantly slower. Thus, if U.S. higher education does not want to end up in the same situation as U.S. car manufacturers, which lost a significant portion of their market share, it would be wise not to rest on past successes or on the U.S.'s current market dominance. In my view, it will be particularly important to monitor those aspects of these international initiatives that address recognition and make global mobility easier.

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39. 2009 Recent Trends, *supra* note 4, at 4-1.

40. *Id.* at 4-2 (footnote omitted).

41. *Open Doors*, *supra* note 5, at 1. *See also* Michael A. Olivas, *What the "War on Terror" Has Meant for U.S. Colleges and Universities*, *in* DOCTORAL EDUCATION AND THE FACULTY OF THE FUTURE 249, 250-51 (Ronald G. Ehrenberg & Charlotte V. Kuh, eds., 2009), reprinted at http://chronicle.com/weekly/v55/i11/11a04601.htm.

42. *Open Doors*, *supra* note 5, at 1.

## II. INTERNATIONAL HIGHER EDUCATION INITIATIVES

As the prior section illustrated, there are a tremendous number of students who cross international borders for higher education purposes and these numbers are increasing. This section explores international higher education initiatives that address mobility and in many cases, facilitate this mobility.

### A. European Union Initiatives

The European Union (EU) has assumed a leading role in promoting cross-border higher education within the EU, but its influence is felt beyond its borders since some of its initiatives have been emulated elsewhere. As a preliminary matter, it is worth noting that the EU is an economic and political union of twenty-seven EU Member States.[43] Its powers are set forth in its founding treaties as supplemented and amended by subsequent treaties. The most recent amendment is the Treaty of Lisbon, which gave the EU a full legal identity.[44] These treaties established a number of different institutions including the courts, the Parliament, the Council, and the Commission.[45] The treaties set forth areas in which the EU has exclusive competency and the areas in which it shares competency with EU Member States. Generally speaking, authority over education matters is reserved to the EU Member States.[46] The EU's influence in the area of education is primarily limited to "soft law" measures—often with money attached—that are designed to influence Member State higher education developments.[47]

The ERASMUS Programme is one of the oldest and most important examples of this type of EU "soft law" measure. The ERASMUS Programme began in 1987 as an initiative to support student exchanges.[48] It gave students the opportunity to study at a university or higher-education

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43. *The Member Countries of the European Union*, EUROPA, http://europa.eu/about-eu/member-countries/index_en.htm (last visited Feb. 15, 2011).

44. *See Treaty of Lisbon: The treaty at a glance, EUROPA,* http://europa.eu/lisbon_treaty/glance/index_en.htm. *See also* EUROPEAN COMM'N, YOUR GUIDE TO THE LISBON TREATY 1-5 (2009), http://ec.europa.eu/publications/booklets /others/84/en.pdf; *Legislation and Treaties*; EUROPA, http://europa.eu/documentation /legislation/index_en.htm#78.

45. *See, e.g., EU Institutions and Other Bodies*, EUROPA, http://europa.eu /institutions/index_en.htm (last visited Feb. 15, 2011).

46. *See, e.g.*, Laurel S. Terry, *The Bologna Process and Its Impact in Europe: It's So Much More than Degree Changes*, 41 VAND. J. TRANSNAT'L L. 107, 121 (2008) [hereinafter Terry, *Bologna*] (citing Julian Lonbay, *Reflections on Education and Culture in EC Law*, *in* CULTURE AND EUROPEAN UNION LAW 243, 270 (Rachael Craufurd Smith ed., 2004)).

47. *Id.*

48. European Comm'n, *The ERASMUS Programme*, EUROPA, http://ec.europa.eu/education/lifelong-learning-programme/doc80_en.htm (last updated June 8, 2010) [hereinafter *ERASMUS Programme*].

establishment in another EU participating country.[49] It also supported teacher and staff exchanges, funding teacher exchanges, "joint preparation of courses, intensive programs such as collaborative summer programs, and thematic networks among departments and faculties across Europe."[50] The ERASMUS Programme was one of several programs that fell under the umbrella of the Socrates Program, which later became the Socrates II program,[51] and thereafter became the Lifelong Learning Programme (LLP).[52]

The ERASMUS Programme has had a widespread impact. More than 2.2 million students have participated since it started in 1987, as well as 250,000 higher education teachers and other staff.[53] The ERASMUS Programme "has promoted and financed almost all student flows within the European Union (EU) and into the EU from the candidate countries of Central and Eastern Europe."[54]

Although the ERASMUS Programme originally was set up to fund exchanges within the EU, the program was later expanded to include exchanges outside the EU. The Erasmus Mundus and Erasmus Mundus II programs, for example, seek to promote cross border higher education exchanges among EU higher education stakeholders and those outside the EU.[55] Perhaps because of its experiences with the Erasmus Mundus program, the EU now sponsors other global cross-border mobility programs, including the Atlantis program that fosters EU-U.S. exchanges.[56]

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49. *Id.*

50. *See* Terry, *Bologna*, *supra* note 46, at 123.

51. *See, e.g.*, *Summaries of EU Legislation: Socrates – Phase II*, EUROPA, http://europa.eu/legislation_summaries/education_training_youth/general_framework/c11043_en.htm (last updated Feb. 19, 2007).

52. *See ERASMUS Programme*, *supra* note 48.

53. *Id.*

54. *See* WTO 2010 Secretariat Report, *supra* note 3, at 12, n. 73 (citing Sajitha Bashir, Trends in International Trade in Higher Education: Implications and Options for Developing Countries, 12 (The World Bank Education Working Paper Series No. 6)).

55. *See, e.g.*, Laurel S. Terry, *The Bologna Process and Its Implications for U.S. Legal Education*, 57 J. LEGAL ED. 237, 251 (2007) [hereinafter Terry, *Bologna & Law*]; European Comm'n, *Erasmus Mundus – Scholarships and Academic Cooperation*, EUROPA, http://ec.europa.eu/education/external-relation-programmes/doc72_en.htm (last updated Feb. 11, 2011); European Comm'n, Erasmus Mundus – Programme Guide, EUROPA, http://eacea.ec.europa.eu/erasmus_mundus/programme/programme_guide_en.php (last updated June 18, 2010). The European Commission recently closed a consultation seeking guidance about the parameters of the program(s) that will replace the Erasmus Mundus Program. *See* European Comm'n, *Consultations: Public Consultation on the Future EU Programme for International Cooperation in Higher Education and Human Capital Development*, EUROPA, http://ec.europa.eu/dgs/education_culture/consult/higher_en.html (last updated Sept. 14, 2010) (consultation closed Nov. 30, 2010).

56. *See, e.g.*, European Comm'n, *EU-US Co-operation in Higher Education and Training: The Atlantis Programme*, EUROPA, http://ec.europa.eu/education/eu-usa/doc1156_en.htm (last updated June 10, 2010); EUROPEAN COMM'N & U.S. DEP'T OF EDUC., EU-US COOPERATION PROGRAMME IN HIGHER EDUCATION AND VOCATIONAL

The needs of the ERASMUS Programme led directly to the creation of another EU initiative that has been highly influential—the European Credit Transfer and Accumulation System (ECTS). In order for a student to participate effectively in the ERASMUS Programme, that student's home institution needed a mechanism that would allow it to recognize the time the student spent in the host country.[57] The EU developed the ECTS as the primary means for such recognition.[58] The ECTS system subsequently was expanded in order to help standardize credit accumulation systems, as well as facilitating credit transfer.[59] Because the ECTS has been embraced by the Bologna Process, described *infra,* its influence extends well beyond the borders of the EU.[60] It has influenced a number of different fields, including the field of law.[61]

The EU's "Lisbon Strategy" is another EU initiative that is relevant to higher education mobility. The European Council adopted its Lisbon Strategy in March 2000; it included a set of strategic goals to "strengthen employment, economic reform, and social cohesion as part of a knowledge-based economy."[62] The conclusions of the 2000 Lisbon meeting were me-

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TRAINING, ATLANTIS: PROGRAMME GUIDE (Dec. 2009), *available at* http://eacea.ec.europa.eu/extcoop/usa/2010/docs/guidelines_en.pdf.

57. *See* Terry, *Bologna*, *supra* note 46, at 123.

58. *Id.*

59. *See* European Comm'n, *European Credit Transfer and Accumulation System (ECTS)*, EUROPA, http://ec.europa.eu/education/lifelong-learning-policy/doc48_en.htm (last updated Oct. 4, 2010).

60. *See, e.g.*, *infra* note 88 (describing the use of ECTS in the Bologna Process Stocktakings).

61. President's Newsletter, Letter from Jacek Petzel, President of the ELFA Board (2010), Eur. L. Faculties Ass'n, *available at* http://elfa-afde.eu/Documents/Presiden tial%20Letter-JACEK2010.pdf ("There are still law faculties in Europe that have not adopted ECTS system yet. As Bologna system is going to be implemented in the Russian Federation and Ukraine, the Board has resolved to create a list of ECTS experts to aid the law faculties with this issue. In order to do so we are calling experts willing to perform this task to put forward their candidatures. The final list shall be created in October."). *See also* Julian Lonbay, *Assessing the European Market for Legal Services: Developments in the Free Movement of Lawyers in the European Union*, 33 FORDHAM INT'L L.J. 1629 (2010).

62. *Presidency Conclusions, Lisbon European Council*, EUROPA (Mar. 23-24, 2000), http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/00100-r1.en0.htm [hereinafter Lisbon Strategy]. For an explanation of the role of the EU Council, see *The Council of the European Union*, CONSILIUM, http://www.consilium.europa.eu/showPage.aspx?id=242&lang=en (last visited Feb. 15, 2011). As the European Council explains on its website:

> The [European] Council is the main decision-making body of the European Union. The ministers of the Member States meet within the Council of the European Union. Depending on the issue on the agenda, each country will be represented by the minister responsible for that subject (foreign affairs, finance, social affairs, transport, agriculture, etc.).
>
> The presidency of the Council is held for six months by each Member State on a rotational basis.

morialized in a seventeen-page document that contained a number of specific suggestions, including the often-cited statement that the EU should "become the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion."[63] The European Council has, on several occasions, endorsed and refined the Lisbon Strategy that it originally adopted in 2000.[64]

The European Council has also adopted a number of related policies. For example, in May 2009, the Council adopted its *Education and Training (ET) 2020* strategy, which built on its prior work, identified four strategic objectives and identified a number of points of agreement.[65] Another related policy is the May 2010 Council document that sets forth its understandings with respect to the internationalization of education.[66]

The European Commission has taken a number of steps to implement the Council's education strategies. For example, the Commission developed a work plan for the Lisbon Strategy that included a number of specific benchmarks.[67] The Commission has also been active with respect to the *Education & Training (ET) 2020* plan.[68] It has proposed 2014 as the launch date of both its new International Higher Education Programme and its Education and Training Programme and has conducted consultations that seek guidance on the shape of these two new programs.[69]

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As this website explains, with respect to certain legislation, the Council and the Parliament have a co-decision process. *Id.*

63. Lisbon Strategy, *supra* note 62, ¶ 5.

64. *See, e.g.*, Terry, *Bologna*, *supra* note 46, at 124-27 (discussing the subsequent Council endorsements and refinements).

65. *See* COUNCIL OF THE EUROPEAN UNION, COUNCIL CONCLUSIONS ON A STRATEGIC FRAMEWORK FOR EUROPEAN COOPERATION IN EDUCATION AND TRAINING ("ET 2020") 2-7 (2009), *available at* http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/educ/107622.pdf.

66. *See* Council Conclusions of 11 May 2010 on the Internationalisation of Higher Education, 2010 O.J. (C 135) 12.

67. *See generally* European Comm'n, *Main Policy Initiatives and Outputs in Education and Training since the Year 2000: Higher Education Reform*, EUROPA, http://ec.europa.eu/education/lifelong-learning-policy/doc1124_en.htm (last updated June 2, 2010); Terry, *Bologna*, *supra* note 46, at 125-26 (describing various benchmarks, including the amount of GDP that should be spent on education).

68. *See, e.g.*, 2010 Joint Progress Report of the Council and the Commission on the Implementation of the 'Education and Training 2010 Work Programme', 2010 O.J. (C 117) 1; European Comm'n, *Main Policy Initiatives and Outputs in Education and Training Since the Year 2000: Strategic Framework for European Cooperation in Education and Training ("ET 2020")*, EUROPA, http://ec.europa.eu/education/lifelong-learning-policy/doc1120_en.htm (last updated Dec. 13, 2010). *See generally* European Comm'n, *Europe 2020*, EUROPA, http://ec.europa.eu/eu2020/index_en.htm (last visited Feb. 15, 2011).

69. *See* European Comm'n, *Consultations: Public Consultation on Next-generation EU Programmes – Education, Training and Youth Policy*, EUROPA, http://ec.europa.eu/dgs/education_culture/consult/index_en.html (last updated March 7,

Although the EU recently has been involved in a number of new international cross-border higher education initiatives, many of its older initiatives remain important. For example, an initiative called Eurydice provides "those responsible for education systems and policies in Europe with European-level analyses and information which will assist them in their decision making."[70] The Eurydice network gathers together detailed descriptions and overviews of thirty-three national education systems "(National Education systems and Policies)" [formerly known as Eurybase]; comparative thematic studies devoted to specific topics of community interest "(Thematic Studies)"; indicators and statistics "(Key Data Series)"; and facts and figures related to education, including national education structures, school calendars, salary comparisons, education levels, and required teaching time "(Facts and Figures)."[71] Eurydice was established in 1980 and includes a European Unit that is based in Brussels and a number of "National Units" that are based in their respective countries.[72] Thus, Eurydice is among the important EU initiatives that have facilitated higher education cross-border mobility.

In sum, it is important to realize that there has been a tremendous amount of intra-EU higher education mobility and also, more recently, mobility between the EU and the rest of the world. It is equally important to realize, however, that there have been a number of EU initiatives that have facilitated this cross-border movement. As the later sections of this Article will demonstrate, many of these EU initiatives have been influential well-beyond the EU's borders.[73] Thus, when one studies international initiatives related to higher education global mobility, it is important to study these and other EU initiatives.[74]

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2011); European Comm'n, *Consultations: Consultation on Priorities for modernisation of higher education in Europe:education, research and innovation*, EUROPA, http://ec.europa.eu/dgs/education_culture/consult/index_en.html (last updated March 7, 2011) (consultation on Europe 2020).

70. European Comm'n, *About Eurydice*, EUROPA, http://eacea.ec.europa.eu/education/eurydice/about_eurydice_en.php (last updated Feb. 25, 2011).

71. *Id.*

72. *Id.* The 37 national units include units in the "27 Member States, Switzerland, Liechtenstein, Norway and Iceland as members of the Free Trade Area (EFTA), Turkey and Croatia." *Id.*

73. *See, e.g.*, *infra* note 88 and accompanying text (describing the impact of the EU's ECTS in Bologna Process countries, which includes 20 non-EU countries).

74. It is beyond the scope of this article to address all of the EU's initiatives that are related to cross-border higher education. Many of the initiatives discussed in this article – and other initiatives not mentioned in this article – are listed on the webpage of the European Commission Directorate devoted to education and culture and on the subpage devoted education and training. *See* European Comm'n, *Education and Culture*, EUROPA, http://ec.europa.eu/dgs/education_culture/index_en.htm (last visited Feb. 15, 2011); *Education & Training*, EUROPEAN COMM'N, http://ec.europa.eu/education/index_en.htm (last visited Feb. 15, 2011).

B. The European Higher Education Area (EHEA) and the Bologna Process

A second set of important regional developments are those related to the Bologna Process, which is the initiative that led to the creation of the European Higher Education Area or EHEA. The Bologna Process was a massive undertaking that dramatically reshaped higher education throughout Europe (not just the EU) and that has begun to have a profound impact outside of Europe as well. This Article identifies some of the aspects of the Bologna Process/EHEA that already have had, or will have, an impact on cross-border higher education mobility. It explores these developments very briefly by talking about the "who, what, when, where and why" of the Bologna Process and the resulting EHEA.

Starting with the question of "who," the Bologna Process began when the education ministers from four EU countries met in Paris in 1998.[75] Because these ministers and others met the following year in Bologna, for a time this initiative was known as Sorbonne-Bologna.[76] Later, however, it was referred to simply as the "Bologna Process."[77] By 2010, when the EHEA was officially launched, its members included the European Commission and forty-seven countries, including all twenty-seven of the EU countries and twenty non-EU countries.[78] The number of participating countries is likely to expand in the future.[79]

With respect to the issue of "what," the goals of the Bologna Process and the EHEA were exceedingly ambitious; they set out to remake the face of higher education in Europe so that it would be more competitive and to establish the European Higher Education Area by 2010. Over the course of ten years and seven ministerial-level meetings, they established ten "action

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75. *See* Terry, *Bologna*, *supra* note 46, at 156.

76. *Id.* at 110 n.1.

77. *See, e.g.*, *History of EHEA*, EHEA, http://www.ehea.info/article-details.aspx?ArticleId=3 (last visited Feb. 15, 2011) [hereinafter EHEA, History] (the documents and webpages linked from this page include a variety of different Bologna Process logos).

78. The forty-seven Bologna Process members include the twenty-seven EU Member States and twenty non-EU countries: (1) Albania, (2) Andorra, (3) Armenia, (4) Azerbaijan, (5) Bosnia and Herzegovina, (6) Croatia, (7) Georgia, (8) the Holy See, (9) Iceland, (10) Kazakhstan, (11) Liechtenstein, (12) Moldova, (13) Montenegro, (14) Norway, (15) Russian Federation, (16) Serbia, (17) Switzerland, (18) Former Yugoslav Republic of (FYRO) Macedonia, (19) Turkey, and (20) Ukraine. *Compare Members*, EHEA, http://www.ehea.info/members.aspx (last visited Feb. 15, 2011), *with Country Profiles*, EUROPA, http://europa.eu/abc/european_countries/eu_members/index_en.htm (last visited Feb. 25, 2011) (listing the member states of the EU).

79. *See generally* Terry, *Bologna*, *supra* note 46, at 113-14 n.14 (describing applications by Kazakhstan, Kosovo, the Kyrgyz Republic, the Turkish Republic of Northern Cyprus, and Israel).

lines," an overarching social dimension, and a "global strategy."[80] These items were set forth in the declarations and communiqués that they signed at the conclusion of the Ministerial Conferences.[81] The Bologna Process members also adopted two "action items," which are the European Quality Assurance Standards and the Framework of Qualifications.[82] This led to the

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80. Terry, *Bologna*, *supra* note 46, at 115-17. The ten action lines were:

1. Adoption of a system of easily readable and comparable degrees;
2. Adoption of a system essentially based on two cycles;
3. Establishment of a system of credits;
4. Promotion of mobility;
5. Promotion of European cooperation in quality assurance;
6. Promotion of the European dimension in higher education;
7. Lifelong learning;
8. The partnership of higher education institutions and students;
9. Promoting the attractiveness of the European Higher Education Area (EHEA); and
10. Doctoral studies and the synergy between the EHEA and the European Research Area.

*Id.* For information on the global strategy, see BOLOGNA FOLLOW-UP GROUP, THE EUROPEAN HIGHER EDUCATION AREA (EHEA) IN A GLOBAL CONTEXT: REPORT ON OVERALL DEVELOPMENTS AT THE EUROPEAN, NATIONAL AND INSTITUTIONAL LEVELS (2009)(Working Group report approved by the BFUG on Feb. 12-13, 2009 and made available to the Benelux Ministerial Conference attendees), *available at* http://www.ond.vlaanderen.be/hogeronderwijs/bologna/conference/documents/2009_EHEA_in_global_context.pdf; Benelux Bologna Secretariat, *European Higher Education in a Global Context*, BOLOGNA PROCESS, http://www.ond.vlaanderen.be/hogeronderwijs/bologna/actionlines/global_context.htm (last visited Feb. 25, 2011). For links to the Ministerial Conferences, see EHEA, *Ministerial Conferences*, http://www.ehea.info/article-details.aspx?ArticleId=43 (last visited June 7, 2011).

81. *See* EHEA, History, *supra* note 77 (includes links to the Communiqués).

82. Terry, *Bologna*, *supra* note 46, at 120. *See* THE BERGEN CONFERENCE OF EUROPEAN MINISTERS RESPONSIBLE FOR HIGHER EDUC., EUROPEAN QUALITY ASSURANCE STANDARDS (2005) [hereinafter Standards and Guidelines for Quality Assurance], *available at* http://www.ond.vlaanderen.be/hogeronderwijs/bologna/documents/050520_European_Quality_Assurance_Standards-May2005.pdf (providing a simple reference to the standards and guidelines); *see also* EUROPEAN ASS'N FOR QUALITY ASSURANCE IN HIGHER EDUC., STANDARDS AND GUIDELINES FOR QUALITY ASSURANCE IN THE EUROPEAN HIGHER EDUCATION AREA (2005), *available at* http://www.ehea.info/Uploads/Documents/Standards-and-Guidelines-for-QA.pdf; THE BERGEN CONFERENCE OF EUROPEAN MINISTERS RESPONSIBLE FOR HIGHER EDUC., FRAMEWORK OF QUALIFICATIONS FOR THE EUROPEAN HIGHER EDUCATION AREA, http://www.ehea.info/Uploads/Documents/QF-EHEA-May2005.pdf. *See generally Main Documents*, EUROPEAN HIGHER EDUCATION AREA [EHEA], http://www.ehea.info/article-details.aspx?ArticleId=73 (last visited Feb. 15, 2011). The Standards and Guidelines for Quality Assurance addresses both internal and external quality assurance reviews. The Qualifications Framework identifies the suggested outcomes and competences for each of the three degree cycles (i.e., the bachelor degree, the master's degree, and the doctorate) and the number of credits required to achieve each degree. For additional information on qualifications framework, see [*International*] *Qualifications Frameworks Conference April 2010*, NATIONAL QUALIFICATIONS AUTHORITY OF IRELAND,, http://www.nqai.ie/QualificationsFrameworksConference2010.html (last visited June 8,

establishment of the new *Register of European Higher Education Quality Assurance Agencies*, which is now operational.[83]

The broad impact of the Bologna Process is evident if one reviews the influential "Stocktaking" reports that were prepared before the 2005, 2007, and 2009 Ministerial Conferences.[84] These reports showed each Member's progress with respect to concrete and detailed benchmarks that had been circulated to Bologna Process members ahead of time. A number of these benchmarks addressed issues relevant to recognition and thus higher education mobility.[85] For example, the Stocktaking Reports measured members' progress in implementing the "Diploma Supplement." The Diploma Supplement is a standardized form that can be attached to a diploma in order to explain its meaning to those located in another country.[86] The Diploma Supplement was originally developed by the United Nations' UNESCO, was later expanded by UNESCO, the European Commission, and the Council of Europe, and, thereafter, was embraced by the Bologna Process Members, who have made its adoption one of their primary goals.[87]

In addition to measuring members' progress in implementing the Diploma Supplement, the 2005, 2007, and 2009 Bologna Process Stocktaking reports measured progress on other benchmark items related to recognition and mobility. Even a cursory review of these three stocktaking reports

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2011); European Comm'n, *European Qualifications Framework for Lifelong Learning: The Second Issue of the EQF Newsletter Has Just Been Published*, EUROPA, http://ec.europa.eu/education/news/news2464_en.htm (last updated July 26, 2010).

83. *See* CONFERENCE OF MINISTERS RESPONSIBLE FOR HIGHER EDUC., LONDON COMMUNIQUÉ ¶ 2.14 (2007), *available at* http://www.ond.vlaanderen.be/hogeronderwijs/bologna/documents/MDC/London_Communique18May2007.pdf (endorsing register); EUROPEAN ASS'N FOR QUALITY ASSURANCE IN HIGHER EDUC, OCCASIONAL PAPERS NO. 13, REPORT TO THE LONDON CONFERENCE OF MINISTERS ON A EUROPEAN REGISTER OF QUALITY ASSURANCE AGENCIES 5 (2007), *available at* http://www.enqa.eu/files/ENQA%20occasional%20papers%2013.pdf. The European Quality Assurance Register for Higher Education is now operational and has its own website. *See* EQAR, http://www.eqar.eu/ (last visited Feb. 15, 2011).

84. *See* BOLOGNA PROCESS STOCKTAKING REPORT (2005) [hereinafter 2005 STOCKTAKING], *available at* http://www.ond.vlaanderen.be/hogeronderwijs/bologna/documents/BPStocktaking9May2005.pdf; BOLOGNA FOLLOW-UP GROUP, BOLOGNA PROCESS STOCKTAKING REPORT (2007) [hereinafter 2007 STOCKTAKING], *available at* http://webarchive.nationalarchives.gov.uk/20100202100434/dcsf.gov.uk/londonbologna/uploads/documents/6909-bolognaprocessst.pdf; BOLOGNA FOLLOW-UP GROUP, BOLOGNA PROCESS STOCKTAKING REPORT (2009) [hereinafter 2009 STOCKTAKING], *available at* http://www.ond.vlaanderen.be/hogeronderwijs/bologna/conference/documents/Stocktaking_report_2009_FINAL.pdf.

85. *See* Terry, *Bologna*, *supra* note 46, at 172-74, 184-87, 221-26 (summarizing the first two stocktaking reports).

86. *See* Terry, *Bologna*, *supra* note 46, at 136.

87. *Id. See also infra* note 88 (including an excerpt from the 2009 Bologna Process Stocktaking which described the progress that has been made in implementing the Diploma Supplement).

shows the dramatic changes and progress by Bologna Process members.[88] Independent reports have confirmed the influential nature of the Bologna Process.[89]

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88. The "mobility" benchmarks in the three stocktaking reports included items that focused on the recognition of degrees and study periods, including the stage of implementation of diploma supplement; implementation of the principles of the Lisbon Recognition Convention (LRC); and the stage of implementation of ECTS. *See* 2009 STOCKTAKING, *supra* note 84, at 66. The Stocktaking reports assigned color-coded scores (green-red) to each Bologna Process member for each benchmarked item. In each successive Stocktaking, however, more was required in order to obtain a particular color or score. For example, in the 2005 Stocktaking, the "green" score required that "ECTS credits are allocated ***in the majority*** *of Higher Education programmes*, enabling credit transfer and accumulation." 2005 STOCKTAKING, *supra* note 84, at 21 (emphasis added). In the 2007 Stocktaking, the "green" score required that "ECTS credits are allocated ***in all*** *first and second cycle programmes*, enabling credit transfer and accumulation." 2007 STOCKTAKING, *supra* note 84, at 33 (emphasis added). By 2009, the "green" score required that "ECTS credits are allocated to all components of *all [higher education] programmes* enabling credit transfer and accumulation, AND ECTS credits are demonstrably linked with learning outcomes." 2009 STOCKTAKING, *supra* note 84, at 77 (emphasis added) (footnotes omitted). The 2009 Stocktaking included the following summary of EHEA progress:

> Quality assurance
>
> 10. All countries have introduced external quality assurance (QA) systems including self-assessment and external review; nearly all publish assessment results and carry out follow-up measures. . . .
>
> . . . .
>
> 13. There has been some progress towards achieving a greater level of international involvement in the critical areas of participation in external review teams and membership of ENQA or other international QA networks, but there are still quite a large number of countries whose quality assurance agencies are not yet full members of ENQA.
>
> Recognition
>
> 14. The Diploma Supplement (DS) is being implemented but not as widely as would have been expected. Despite the commitment to issuing the DS to all graduates automatically, free of charge and in a widely spoken European language by 2005, just over half of the countries have managed to implement it fully by 2009.
>
> 15. There seems to be widespread compliance of national legislation with the Lisbon Recognition Convention, yet there is a long way to go before there is a coherent approach to recognition of qualifications within the EHEA. The interpretation of the Convention's principles, as well as recognition procedures and terminology, differ enormously across countries. The contemporary approaches use quality assurance status, learning outcomes and level as the main criteria; some others first look at formal issues, content of the curriculum and the duration of studies.
>
> 16. ECTS has been part of the Bologna Process since 1999 and credits are widely used for credit transfer and accumulation but in a number of countries ECTS is still not fully implemented. There are two main challenges that are encountered in fully implementing ECTS: measuring credits in terms of student workload and linking them with learning outcomes.

2009 STOCKTAKING, *supra* note 84, at 14-15. *See also* 2005 STOCKTAKING, *supra* note 84, at 35-38; 2007 STOCKTAKING, *supra* note 84, at 28-34.

89. *See, e.g.*, DON F. WESTERHEIJDEN ET AL., THE BOLOGNA PROCESS INDEPENDENT ASSESSMENT, THE FIRST DECADE OF WORKING ON THE EUROPEAN HIGHER EDUCATION AREA,

The European Higher Education Area website no longer refers to the Bologna Process's "action lines" but instead refers to the EHEA "work programme."[90] This work programme does not correspond perfectly to the Bologna Process's ten action lines, but it is obvious that the original action lines provide the history and context for the current EHEA work programme.[91] As of January 2011, the items listed on the EHEA's work programme included the following items:

1. Social dimension
2. Mobility
3. Lifelong learning
4. Employability
5. Qualification frameworks/ Degree structures
6. Education, research and innovation
7. International openness
8. Data collection/Reporting on the BP implementation
9. Funding
10. Quality assurance
11. Recognition
12. Transparency tools
13. Student Centered Learning[92]

Having addressed the "who" and "what" of the Bologna Process/EHEA, one can now turn to the issues of "when," "where," and "why" these matter. As noted earlier, the Sorbonne-Bologna Process began in 1998, when the Sorbonne Declaration was signed.[93] Between 2001 and 2010, there were six additional Ministerial Conferences and numerous meetings.[94] The reason why the dates and locations of these Ministerial

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EXECUTIVE SUMMARY, OVERVIEW AND CONCLUSIONS (2010), *available at* http://www.ond.vlaanderen.be/hogeronderwijs/bologna/2010_conference/documents/IndependentAssessment_executive_summary_overview_conclusions.pdf (assessment prepared by a consortium that consisted of the Center for Higher Education Policy Studies (CHEP), the International Centre for Higher Education Research Kassel (INCHER-Kassel) and an organization called ECOTEC). For additional evaluations, *see generally Bologna Ministerial Anniversary Conference 2010 in Budapest and Vienna*, *infra* note 138.

90. *See, e.g.*, EHEA, http://www.ehea.info/ (last visited Feb. 15, 2011) (follow the "work programme" hyperlink in the left-hand menu).

91. *Compare id.*, *with supra* note 80 (showing significant overlap between the two lists).

92. EHEA, *supra* note 90.

93. *See supra* note 75 and accompanying text. It should be noted, however, that sections of the EHEA website now point to 1999 and the Bologna Declaration as the start of the Bologna Process. *Compare* EHEA, http://www.ehea.info/ (last visited Feb. 15, 2011) ("As the main objective of the Bologna Process since its inception in 1999 . . . ."), *with Basic Information*, BERLIN SUMMIT 2003, http://www.bologna-berlin2003.de/en/basic/index.htm (last visited Feb. 15, 2011) (listing both the Sorbonne Declaration and Bologna Declaration).

94. *See, e.g.*, Terry, *Bologna*, *supra* note 46, at 114, 156-95 (discussing the 2001-2007 Ministerial Conferences and additional meetings).

Conferences are important is because—starting with the 2003 meeting in Berlin—the Ministerial Conference host country served as the Bologna Process "Secretariat" and created a webpage that contained Bologna Process materials.[95] These webpages have now been archived (*i.e.*, frozen in time) and contain many useful items, including studies, PowerPoint presentations, and other materials. Thus, in addition to the current EHEA webpage, it is useful for researchers to be familiar with the Berlin Bologna Website (covering 2001 to 2003),[96] the Bergen Bologna Website (covering January 2004 to 2005),[97] the U.K. Bologna Website (covering 2005 to 2007),[98] and the Benelux Bologna Website (covering 2007 to June 2010, including the 2009 Leuven Ministerial Conference and the 2010 Vienna-Budapest Conference).[99]

These Bologna Process developments are important not only because of their impact within Europe, but also because of their impact outside Europe. Some of the European impact was described in the prior paragraphs that referred to the 2005, 2007, and 2009 Bologna Process Stocktaking Reports.[100] What is equally noteworthy, however, is the number of related but independent European projects that were launched as a result of the Bologna Process or reinvigorated because of it. Although it is beyond the scope of this Article to do more than list some of these related developments, this list illustrates the broad impact of the Bologna Process. These related initiatives include the following:

- *ENIC/NARIC Network*, providing information on instruments for recognition of diplomas, the Diploma Supplement, Credit transfer systems, and ECTS;[101]

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95. *See id.* at 117-18.

96. BERLIN SUMMIT 2003, http://www.bologna-berlin2003.de/ (last visited Feb. 15, 2011)(includes documents created in preparation for the 2003 Berlin Summit, which were posted by the German entities that hosted a website and effectively functioned as the Bologna Process Secretariat. Technically, however, the position of "Secretariat" was not created until the Berlin Communiqué was adopted during the 2003 Berlin Summit. Terry, *Bologna*, *supra* note 46, at 117, n.46).

97. Bologna Process, FROM BERLIN TO BERGEN AND BEYOND, http://www.bologna-bergen2005.no/ (last visited Feb. 15, 2011) (documents generated between 2003 and 2005 and posted by the Bergen Bologna Secretariat).

98. *Welcome to the Bologna Process: Bergen - London Website (1 July 2005 - 30 June 2007)*, BOLOGNA SECRETARIAT WEBSITE, http://webarchive.nationalarchives.gov.uk/20100202100434/http://www.dcsf.gov.uk/londonbologna/index.cfm?fuseaction=content.view&CategoryID=1 (last visited May 22, 2011) (archived version of the website created by the UK Bologna Secretariat covering 2005-2007).

99. BOLOGNA PROCESS BENELUX 2009, http://www.ond.vlaanderen.be/hogeronderwijs/bologna/ [hereinafter BENELUX BOLOGNA WEBSITE] (2007-2010 documents posted by the Benelux Bologna Secretariat).

100. *See supra* text accompanying notes 84-89.

101. ENIC-NARIC.NET, http://www.enic-naric.net/ (last visited Feb. 15, 2011); *see also* Terry, *Bologna*, *supra* note 46, at 137.

- *ENQA*, which was formed in 2000 in order to "'promote European co-operation in the field of quality assurance'";[102]
- *ECA*, which is the European Consortium for Accreditation in higher education and "aims for the mutual recognition of accreditation and quality assurance decisions";[103]
- *The Tuning Project*, which was created by universities in order to develop "a framework of comparable and compatible qualifications . . . which should be described in terms of workload, level, learning outcomes, competences and profile";[104]
- *Europass*, promoting transparency of qualifications;[105]
- *U-Map*, a "project in which the European classification of higher education institutions is further developed and implemented" with a goal of promoting transparency;[106]
- The new *Study in Europe* webpage;[107]
- *EUCEN Observatory for University Lifelong Learning*;[108] and
- *Academic Cooperation Association,* whose "goal is to promote innovation and internationalisation of European higher education while maintaining a global outreach"[109]

The Bologna Process has had an impact on the European legal field, as well as in other parts of higher education.[110] Both the European Law Facul-

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102. ENQA, http://www.enqa.eu/ (last visited Feb. 15, 2011); Terry, *Bologna*, *supra* note 46, at 141-42 (citation omitted).

103. Eur. Consortium for Accreditation (ECA), http://www.ecaconsortium.net/ (last visited Feb. 15, 2011).

104. *Aims and Objectives*, TUNING EDUC. STRUCTURES IN EUROPE, http://tuning.unideusto.org/tuningeu/index.php?option=content&task=view&id=3&Itemid=26 (last visited Feb. 15, 2011). The Tuning Project was developed in 2000 as a pilot project by a group of European universities. *Background*, TUNING EDUC. STRUCTURES IN EUROPE, http://tuning.unideusto.org/tuningeu/index.php?option=content&task=view&id=2&Itemid=25 (last visited Feb. 15, 2011).

105. EUROPASS, http://europass.cedefop.europa.eu/ (last visited Feb. 15, 2011).

106. U-MAP, http://www.u-map.eu/ (last visited Feb. 15, 2011).

107. xSTUDY.EU: STUDY IN EUROPE, http://www.xstudy.eu/ (last visited June 8, 2011).

108. EUCEN OBSERVATORY FOR UNIV. LIFELONG LEARNING, http://www.lifelonglearning-observatory.eu/ (last visited Feb. 15, 2011).

109. *Who We Are*, ACADEMIC COOPERATION ASS'N (ACA) SECRETARIAT, http://www.aca-secretariat.be/index.php?id=30 (last visited June 8, 2011).

110. *See, e.g.*, Terry, *Bologna*, *supra* note 46, at 210-16, 227-28 (summarizing Council of Bars and Law Societies of Europe (CCBE) data about post-Bologna changes in legal education and qualification requirements). As evidence of the continuing impact of the Bologna Process, the CCBE has removed from its website the lengthy (more than 200 pages) "Training Committee" document that I analyzed in my *Bologna* article. *See id.* at 210-16, 227-28; *see also Training Committee,* CCBE, http://www.ccbe.eu/index.php?id=94&id_comite=13&L=0 (last visited Feb. 15, 2011). When asked why it had been removed, the CCBE Secretary General indicated that changes continued to take place and

ties Association (ELFA) and the Council of Bars and Law Societies of Europe (CCBE) monitor and participate in Bologna Process-related developments.[111]

In addition to these European-based initiatives, there are a number of global developments that have been influenced by, or trace their origin to, the Bologna Process. These initiatives have occurred around the world, including in Asia, Africa, Australia, and North America. For example, in Asia, the education ministers of a number of Southeast Asian countries have held conferences on the Bologna Process.[112] After a November 2008 conference, ten countries agreed to focus on a number of issues that are among those addressed in the Bologna Process.[113] These issues included: "a) [creating an] ASEAN Quality Framework and Curriculum Development; b) Student Mobility; c) Leadership; d) E-learning and Mobile learning; and e) ASEAN Research Clusters."[114] They agreed to set a target date of 2015 to develop their "higher education common space."[115] Their 2011 activities include a workshop focusing on "'Analysis of Cross Border Higher-Education (CBHE) for Regional Integration and Labor Market in East Asia,'" "The 4th ASEAN Quality Assurance Roundtable Meeting," and a "Workshop on Institutional Restructuring in Higher Education in Asia."[116]

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thus the survey was no longer accurate. *See* Email from Jonathan Goldsmith, CCBE Secretary General, to author (Jan. 25, 2011) (on file with author).

111. *See* Terry, *Bologna*, *supra* note 46, at 152-55; *ELFA Resolution on the Bologna Process* (2010), EUROPEAN LAW FACULTIES ASS'N, http://elfa-afde.eu/ResolutionsLjublja na2010.aspx (last visited June 8, 2011); *AGM Fribourg 2009*, EUROPEAN LAW FACULTIES ASS'N, http://elfa-afde.eu/Fribourg.aspx (last visited Feb. 15, 2011) (agenda and links to documents related to a 2009 conference on Convergence of Legal Education and Doctoral Studies in Europe); *FAQ Bologna*, EUROPEAN LAW FACULTIES ASS'N, http://elfa-afde.eu/bologna.aspx (last visited Feb. 15, 2011); EUROPEAN LAW FACULTIES ASS'N, CONFERENCES (undated word document), *available at* http://elfa-afde.eu/Documents/CONFERENCES.doc (last visited Mar. 17, 2011); *Legal Education in Europe*, EUROPEAN LAW FACULTIES ASS'N, http://elfa-afde.eu/legal.aspx (last visited Feb. 15, 2011) (citing Bologna Process developments); Julian Lonbay, *Quality Assurance, Accreditation and European Legal Education*, ELIXIR, http://elixir.bham.ac.uk/quaacas/ (last updated Apr. 6, 2008).

112. *See, e.g.*, *Seminar on The Bologna Process and the Future Direction of (Regional) Higher Education*, SEAMEO RIHED, *available at* http://www.rihed.seameo.org/index.php?option=com_content&task=view&id=92&Itemid=44 (last visited Feb. 15, 2011); EU-ASIA HIGHER EDUCATION PLATFORM, EAHEP ROUND TABLE (2009), *available at* http://www.eahep.org/images/RT2/RT2_program.pdf.

113. Lloyd Armstrong, *An Asian "Bologna Process" Moves Forward*, CHANGING HIGHER EDUCATION (Dec. 14, 2008), http://www.changinghighereducation.com/2008/12/an-asian-bologna-process-moves-forward.html.

114. *Id.*

115. *Id.*

116. *SEAMEO RIHED Calendar of Activities 2011*, SEAMEO RIHED, http://www.rihed.seameo.org/index.php?option=com_content&task=view&id=151&Itemid=44 (last visited Feb. 15, 2011).

One of their ongoing programs is a study on quality assurance models in Southeast Asian higher education.[117] There have been other conferences in Asia focusing on Bologna Process developments.[118]

The Bologna Process has also had an impact throughout Africa. A number of different countries and organizations have been following, and in some cases implementing, Bologna Process reforms.[119] Indeed, even in those situations in which African countries have rejected certain aspects of the Bologna Process reforms, they have nevertheless embraced the Bologna Process goal of achieving greater harmonization.[120]

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117. *See id.*

118. *See, e.g.*, TAKAO KAMIBEPPU, WHY INCREASE CROSS-BORDER STUDENT MOBILITY IN ASIA?: PROSPECTS AND CHALLENGES (2009), *available at* http://www.eahep.org/images/RT2/kamibeppu-eua%20rt%202009.7.pdf.

119. *See, e.g.*, Jane Marshall, *WEST AFRICA: Universities Discuss Quality Assurance*, U. WORLD NEWS (Dec. 7, 2008), http://www.universityworldnews.com/article.php?story=20081205094750597 (discussing a quality assurance conference that included discussions and debates about the Bologna Process); *WEST AFRICA: Universities Agree on Regional Strategy*, U. WORLD NEWS (Nov. 9, 2008), http://www.universityworldnews.com/article.php?story=20081106154854798 (referencing the Bologna Process when discussing the recent agreement); Emmanuel T Nwaimah, *CAMEROON: New University Part of Tertiary Reforms*, U. WORLD NEWS (Oct. 12, 2008), http://www.universityworldnews.com/article.php?story=20081010091141564 (noting that after 29 countries signed the Bologna agreement in 1999 "to harmonise their degree structures into a common three-level bachelor-masters-doctoral system, most French-language public universities in Cameroon followed suit"); *ALGERIA: Variable Progress in Bologna's Fifth Year*, U. WORLD NEWS (Aug. 2, 2009), http://www.universityworldnews.com/article.php?story=20090731104244279 (noting that Algeria, which is not a Bologna Process member, was in the fifth year of its process of implementing Bologna Process reforms); Karen MacGregor, *AFRICA: Bologna Responses Follow Ex-colonial Lines*, U. WORLD NEWS (Mar. 9, 2008), http://www.universityworldnews.com/article.php?story=20080306105437257 (noting that "[t]he Bologna process is impacting on higher education in Africa, in some countries directly but in others slowly and circuitously" and quoting a South African commentator as noting that "'[i]t is pushing the region into looking at its own quality assurance frameworks and the portability of qualifications'"); *TUNISIA: Higher Education Must 'Professionalise'*, U. WORLD NEWS (Aug. 3, 2008), http://www.universityworldnews.com/article.php?story=20080731154324675 (noting that the Higher Education Minister called on the university "family" to take on the role of setting up reforms, "introducing the Bologna degree structure").

120. *See, e.g.*, *Arusha: EAC Ministers Veto Proposal for Regional Accreditation of Universities*, ORINFOR - RWANDA BUREAU OF INFORMATION AND BROADCASTING, Jan. 30, 2011, http://www.orinfor.gov.rw/printmedia/topstory.php?id=2118 (reporting that during a January 2011 Ministerial meeting, the East Africa Council of Ministers in charge of Education, Science and Technology, Culture and Sports recently rejected a proposal that would have allowed the Inter University Council for East Africa to grant regional accreditation for universities, but a Deputy Secretary General nevertheless indicated that "harmonization of education systems and training curricula in the region was of priority in the integration process"); *see also* Gilbert Nganga, *EAST AFRICA: Moves to Harmonise Higher Education*, U. WORLD NEWS (Oct. 17, 2010), http://www.universityworldnews.com/article.php?story=20101015201714445 (describing the bill that would have allowed

The Bologna Process has also had an impact in Oceania. For example, the Australian government has been following Bologna Process developments for a number of years and in 2006, it issued a report entitled *The Bologna Process and Australia: Next Steps*.[121] It maintains a webpage devoted to this topic and has a ministerial advisory group.[122] In November 2010, the government announced that in 2011, it would introduce legislation to establish a new "Tertiary Education Quality and Standards Agency" which it subsequently did.[123] Moreover, many Australian universities and law schools seem to be responding to Bologna Process developments.[124] Aus-

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regional accreditation). *See generally* INTER-U. COUNCIL FOR E. AFR., http://www.iucea.org/ (last visited Feb. 15 2011).

121. *See* AUSTRALIAN GOV'T, DEP'T OF EDUC., SCI. AND TRAINING, THE BOLOGNA PROCESS AND AUSTRALIA: NEXT STEPS (2006), *available at* http://www.dest.gov.au/NR/rdonlyres/D284E32F-98DD-4A67-A3C2D5B6F3F41622/9998/ BolognaPaper.pdf. This report concluded, *inter alia*, that:

> The Bologna Process could have a number of implications for the acceptance of Australian higher education awards and options for student mobility. It has significant political support within Europe and applies to around 4000 institutions hosting 16 million students.
>
> It is an important process that is receiving considerable attention, not only within Europe, but from a range of other countries. It presents challenges to, and opportunities for, Australia's relationship with Europe as well as Asia and raises the importance of developing effective multilateral dialogue with Australia's key Asian education partners about future directions in higher education. Australia has developed close links with Asia through education as this is a key driver in developing understanding and fostering closer economic linkages, including facilitating the movement of students and skills.
>
> . . . If Australia is not able to maintain alignment with these developments, a significant proportion of the current 32,000 European enrolments in Australian institutions may find other destinations more attractive. Similarly should Asian countries or institutions choose to align with the Bologna Process, Europe may become a more attractive destination for those students.

*Id.* at 1-2.

122. *See The Bologna Process*, AUSTRALIAN GOV'T, AUSTRALIAN EDUC. INT'L, http://www.aei.gov.au/AEI/GovernmentActivities/BolognaProcess/default.htm (last visited Feb. 15, 2011).

123. *See* Media Release, Christopher Evans, Australian Minister for Tertiary Education, Skills, Jobs and Workplace Relations, Establishment of the Tertiary Education Quality and Standards Agency (Nov. 15, 2010), *available at* http://www.deewr.gov.au/Ministers/Evans/Media/Releases/Pages/Article_101115_144405.aspx; *TEQSA Legislation*, AUSTRALIAN GOV'T, DEP'T OF EDUC., EMP'T AND WORKPLACE RELATIONS, http://www.deewr.gov.au/HigherEducation/Policy/teqsa/Pages/TEQSALegis lation.aspx (last visited June 8, 2011).

124. *See, e.g.*, Glyn Davis, *From the Vice-Chancellor: Bologna is Now a Metaphor for 'Globalisation'*, 15 UNINEWS, no. 17, 2006, *available at* http://archive.uninews.unimelb.edu.au/news/3682/index.html; THE UNIV. OF MELBOURNE & UNIV. OF NEW ENGLAND, PROPOSAL FOR AN AUSTRALIAN HIGHER EDUCATION GRADUATION STATEMENT 9-11 (2008), *available at* http://www.deewr.gov.au/HigherEduca

tralia also appears to be one of the driving forces behind the APEC-Bologna Process initiatives described in the next section of this Article.[125]

New Zealand also has been following these developments with interest. For example, the New Zealand government issued a report on the compatibilities between the New Zealand higher education system and the Bologna Process and opportunities for enhanced engagement and alignment.[126]

From a regional perspective, North America has been less active in following and implementing the Bologna Process reforms than have other regions of the world. Although the Organization of American States (OAS) has been active in the higher education field, these efforts do not appear to include Bologna Process-type reforms. The OAS includes as members the thirty-five independent states of North and South America, and the Caribbean.[127] In addition to these thirty-five members, the OAS includes sixty-three permanent observer countries, including the EU.[128] The OAS sponsors a website called the *Educational Portal of the Americas*.[129] This website includes information on scholarships, university consortiums, educational loans, and distance learning, among other topics.[130] But there is no reference to the Bologna Process.[131]

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tion/Programs/Quality/QualityAssurance/Documents/GraduationStatementFinalReport.pdf (project included a consortium of 14 Australian universities).

125. *See infra* notes 147-155 and accompanying text. Several of the APEC studies indicate that they were prepared under the auspices of the Australian government. In the legal services context, rather than the higher education services context, Australia has taken a leading role in organizing APEC initiatives. *See* Laurel S. Terry, *From GATS to APEC: The Impact of Trade Agreements on Legal Services*, 43 AKRON L. REV. 875, 895-98 (2010) [hereinafter Terry, *From GATS to APEC*].

126. *See* N.Z. MINISTRY OF EDUC. & N.Z. QUALIFICATIONS AUTH., NEW ZEALAND AND THE BOLOGNA PROCESS, *available at* http://www.ond.vlaanderen.be/hogeronderwijs/bologna/documents/NZandBologna.pdf. This paper states that its purpose was to identify comparability between the European higher education reforms known as the Bologna Process and New Zealand's tertiary education system. It outlines action government agencies will take to enhance New Zealand's engagement with the Bologna Process at the system level. It also provides a framework within which New Zealand institutions can consider their own alignment to the Bologna Process. *Id.* at 2.

127. *Member States*, ORG. OF AM. STS., http://www.oas.org/en/about/member_states.asp (last visited Feb. 15, 2011).

128. *Who We Are*, ORG. OF AM. STS., http://www.oas.org/en/about/who_we_are.asp (last visited Feb. 15, 2011) ("Today it comprises the 35 independent states of the Americas and has granted permanent observer status to 63 states, as well as to the European Union. The Organization of American States constitutes the principal political, juridical, and social governmental forum in the Hemisphere.").

129. EDUC. PORTAL OF THE AMS., http://www.educoas.org/Portal/?culture=en (last visited Feb. 15, 2011).

130. *Id.* Although the OAS has played less of a policy-development role than some of the other regional or international organizations, those who are interested in higher education mobility issues would do well to check its website.

131. *Id.*

Although North America as a region does not appear to have embraced the Bologna Process, individual countries within North America are actively following these developments. For example, the University of Alberta, Canada held a conference entitled *Canadian Perspectives on the Bologna Process*.[132] The Association of Universities and Colleges of Canada (AUCC) has been actively monitoring Bologna Process developments and has issued several policy statements.[133] In 2008, for example, AUCC members agreed to "commit to undertaking a course of action to address the implications of the Bologna Process for Canadian universities and plan a path forward for engaging with our European partners, both old and new, in a spirit that mirrors Europe's own renewal in higher education."[134] The Canadian Information Centre for International Credentials and the Canadian Council of Ministers of Education are also following the Bologna Process developments, the latter of which issued a report on that topic in 2008.[135] It is beyond the scope of this Article to get into the details of how the Bologna Process is or is not changing Canadian higher education, but it is clear that it is a development that is being monitored at the government, university, and association level.

Finally, one might turn to the U.S. Is the Bologna Process relevant to U.S. higher education even though it is a European initiative? My answer to that question is a resounding "yes" for several reasons. *First*, as is true elsewhere in the world, a number of important U.S. higher education stakeholders are actively following, and in some cases making efforts to implement, Bologna Process initiatives. The U.S. Department of Education, the Council of Higher Education, and other important U.S. higher education stakeholders are among those who monitor Bologna Process developments.[136] *Second*, as this very brief survey suggests, stakeholders around the

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132. *Conference: Canadian Perspectives on the Bologna Process*, U. OF ALTA. INT'L, http://www.uofaweb.ualberta.ca/uai/bologna.cfm (last visited Feb. 15, 2011).

133. *See* ASS'N OF UNIVS. AND COLLS. OF CAN., THE BOLOGNA PROCESS AND IMPLICATIONS FOR CANADA'S UNIVERSITIES: REPORT OF THE 2009 AUCC SYMPOSIUM, *available at* http://www.aucc.ca/_pdf/english/publications/bologna_report_e.pdf; ASS'N OF UNIVS. AND COLLS. OF CAN., AUCC STATEMENT: CANADIAN UNIVERSITIES AND THE BOLOGNA PROCESS (2008) [hereinafter AUCC STATEMENT], *available at* http://www.aucc.ca/_pdf/english/statements/2008/bologna_process_06_20_e.pdf.

134. AUCC STATEMENT, *supra* note 133, at 1.

135. *See* Canadian Info. Ctr. for Int'l Credentials, THE BOLOGNA PROCESS: THE EUROPEAN HIGHER EDUCATION AREA (EHEA), 1998-2010, http://www.cicic.ca/698/bologna-process.canada (last visited Feb. 15, 2011); COUNCIL OF MINISTERS OF EDUC., CAN., THE EUROPEAN HIGHER EDUCATION AREA (EHEA): THE BOLOGNA PROCESS (2008), *available at* http://www.cicic.ca/docs/bologna/2008_CMEC-BolognaReport.en.pdf.

136. *See infra* notes 238-57 and accompanying text. For more information about the monitoring efforts of U.S. stakeholders, including the Council of Higher Education and others, see Terry, *Bologna & Law*, *supra* note 55, at 240-41. *See also* CLIFFORD ADELMAN, THE BOLOGNA PROCESS FOR U.S. EYES: RE-LEARNING HIGHER EDUCATION IN THE AGE OF

world are following Bologna Process/EHEA developments. If a global "consensus" were to develop as to a particular soft law policy (*e.g.*, the ECTS system), that could have an impact on U.S. higher education because there might be global pressure on the U.S. to harmonize its systems to the global consensus. The WTO Secretariat, for example, has spoken positively of the Bologna Process's efforts at developing "recognition" principles:

> The Bologna Process, although of European origin, is also a leading instrument on the issue of harmonisation and comparability of programmes and degrees. The process, with the goal of permitting students, faculty and graduates to move freely across national borders, started with 29 economies and now includes over 40, with the inclusion of many developing countries.[137]

*Third*, and perhaps most importantly, the Bologna Process developments have influenced international "hard law" and "soft law" developments in which the U.S. participates, including higher-education related initiatives of the Asia Pacific Economic Cooperation, the World Trade Organization, the Organization of Economic Cooperation and Development and the United Nations UNESCO. A number of these developments are discussed in the sections that follow.

In sum, the Bologna Process and the European Higher Education Area are exceedingly important developments to be aware of when studying global higher education mobility. These initiatives, which are multi-faceted, have promoted mobility and recognition and have led to a number of concrete policy changes in countries around the world. The EHEA is a repository for a tremendous amount of information including conferences materials, studies, and reports on many topics relevant to higher education global mobility.[138]

### C. Higher Education Initiatives of the Asia Pacific Economic Cooperation (APEC)

Because many readers may be unfamiliar with the Asia Pacific Economic Cooperation (APEC), it is worthwhile to briefly introduce the organi-

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CONVERGENCE (2009), *available at* http://www.ihep.org/assets/files/EYESFINAL.pdf; *2010 Annual Conference Presentations*, ASSOCIATION OF INTERNATIONAL EDUCATION ADMINISTRATORS (AIEA), http://www.aieaworld.org/events/2010-conf-presentations.htm (last visited Feb. 15, 2011) (including Bologna Process presentations).

137. WTO 2010 Secretariat Report, *supra* note 3, ¶ 86 (footnote omitted).

138. *See, e.g.*, Second Bologna Policy Forum, Vienna, 12 March 2010: "Building the Global Knowledge Society: Systemic and Institutional Change in Higher Education, BOLOGNA PROCESS, http://www.ond.vlaanderen.be/hogeronderwijs/bologna/forum2010/index.htm (last visited Feb. 15, 2011); Bologna Ministerial Anniversary Conference 2010 in Budapest and Vienna, BOLOGNA PROCESS, http://www.ond.vlaanderen.be/hogeronderwijs/bologna/2010_conference/index.htm (last visited Feb. 15, 2011); *see generally EHEA Work Programme*, *supra* note 90.

zation before focusing on its higher education initiatives. APEC is an organization that consists of twenty-one countries that are, roughly speaking, located around the Pacific Ocean.[139] Although there are only twenty-one members, it is a significant group because they represent approximately 40% of the world's population, 54% of world GDP, and 44% of world trade.[140] APEC's mission is to provide a forum for facilitating economic growth, cooperation, trade, and investment.[141] APEC conducts its work in a variety of ways, including through its Leaders' Meetings, Ministerial Meetings, Senior Officials' Meetings, various committees and expert groups, and through its Secretariat, which currently is located in Singapore.[142] Each year, a different country is designated as the APEC "Host Economy" which means that country serves as the APEC Chair and is responsible for hosting a number of different meetings during the year.[143] The United States is the APEC "Host Economy" in 2011 which means that there will be a number of APEC meetings throughout the U.S. during 2011, culminating in a November 2011 Ministerial Meeting in Hawaii.[144] In contrast to some organizations, APEC operates on the basis of non-binding commitments that are

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139. *See Member Economies*, ASIA-PAC. ECON. COOPERATION, http://www.apec.org/About-Us/About-APEC/Member-Economies.aspx htm (last visited Feb. 15, 2011). APEC Members include: Australia, Brunei Darussalam, Canada, Chile, the People's Republic of China, Hong Kong, Indonesia, Japan, Republic of Korea, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, The Philippines, Russia, Singapore, Chinese Taipei, Thailand, the United States, and Vietnam. *Id.*

140. *See About APEC*, ASIA-PAC. ECON. COOPERATION, http://www.apec.org/About-Us/About-APEC.aspx (last visited Feb. 15, 2011).

141. *Mission Statement*, ASIA-PAC. ECON. COOPERATION, http://www.apec.org/About-Us/About-APEC/Mission-Statement.aspx (last visited Feb. 15, 2011).

142. *APEC Secretariat*, ASIA-PAC. ECON. COOPERATION, http://www.apec.org/About-Us/APEC-Secretariat.aspx (last visited Feb. 15, 2011). APEC describes the role of the Secretariat as follows:

> [The APEC Secretariat] operates as the core support mechanism for the APEC process. It provides coordination, technical and advisory support as well as information management, communications and public outreach services.
>
> The APEC Secretariat performs a central project management role, assisting APEC Member Economies and APEC fora with overseeing more than 250 APEC-funded projects. . . .

*Id.*

143. *See How APEC Operates*, ASIA-PAC. ECON. COOPERATION, http://www.apec.org/About-Us/How-APEC-Operates.aspx (last visited Feb. 15, 2011) ("Every year one of the 21 APEC Member Economies plays host to APEC meetings and serves as the APEC Chair. The APEC host economy is responsible for chairing the annual Economic Leaders' Meeting, selected Ministerial Meetings, Senior Officials Meetings, the APEC Business Advisory Council and the APEC Study Centres Consortium.").

144. *See, e.g.*, *APEC 2011 at a Glance*, APEC 2011 USA, http://www.apec2011usa.org/apec-at-a-glance/ (last visited June 1, 2011); Terry, *From GATS to APEC*, *supra* note 125, at 892-93.

developed on a consensus basis.[145] Consequently, its higher education initiatives, which are described below, are "soft law" rather than "hard law" initiatives.[146]

APEC is actively interested in higher education issues. Many of these activities take place under the auspices of the APEC Education Network (EDNET), which is part of APEC's Human Resources Development Working Group which maintains an education "wiki."[147] This group has issued or commissioned a number of reports, surveys, and studies that address higher education issues.[148] A number of these reports recommend greater cooperation and recognition.[149] APEC has spent significant resources exploring issues related to the Diploma Supplement and supporting its use.[150] These include an APEC diploma supplement "wiki," which includes, *inter alia*, documents from a 2010 conference on this topic, sample Diploma Supplements from Europe, Australia, and New Zealand, and links to study results and presentations.[151]

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145. *See About APEC*, *supra* note 140.

146. *See supra* note 1 (discussing the distinction between hard and soft law).

147. *See Education Network (EDNET)*, APEC HRDWG WIKI, http://hrd.apecwiki.org/index.php/Education_Network_%28EDNET%29 (last visited Feb. 15, 2011).

148. *See, e.g.*, APEC HUMAN RES. DEV. WORKING GRP., MEASURES AFFECTING CROSS BORDER EXCHANGE AND INVESTMENT IN HIGHER EDUCATION IN THE APEC REGION (2009), *available at* http://publications.apec.org/publication-detail.php?pub_id=165; *International Education: Research Findings*, APEC HRDWG WIKI, http://hrd.apecwiki.org/index.php/International_Education:_Research_Findings#Background_-_Policy_paper_on_trade_in_education_services (last visited Feb. 15, 2011) (summarizing APEC studies); *Transnational Education*, APEC HRDWG WIKI, http://hrd.apecwiki.org/index.php/Transnational_Education (last visited Feb. 15, 2011) (summarizing APEC resources on this topic).

149. *See, e.g.*, CTR. FOR INT'L ECON., APEC AND INTERNATIONAL EDUCATION (2008), *available at* http://www.apecknowledgebank.org/file.aspx?id=1641 (exploring patterns and benefits of cross-border education exchange within APEC, including higher education). This report concluded, *inter alia*, that:

> There is considerable scope, therefore, for cooperation between APEC economies to improve understanding and enhance systems for quality assurance, accreditation, qualifications recognition and data collections to enhance policy development.

*Id.* at 5.

150. *See, e.g.*, articles cited *infra* note 151. For additional information about what APEC Members have learned about the Bologna Process/EHEA implementation of the Diploma Supplement, see STEPHEN ADAM, THE DIPLOMA SUPPLEMENT, LESSONS LEARNED: THE EUROPEAN EXPERIENCE, *available at* http://hrd.apec.org/images/3/3c/European_Diploma_Supplement_-_Prof_S_Adam.pdf.

151. *See, e.g.*, *Higher Education Diploma Supplement*, APEC HRDWG WIKI, http://hrd.apecwiki.org/index.php/Higher_Education_Diploma_Supplement (last visited Feb. 15, 2011); RICHARD JAMES, SETTING THE SCENE: THE APEC PROJECT IN THE CONTEXT OF INTERNATIONAL TRENDS TOWARDS DIPLOMA SUPPLEMENTS, *available at* http://hrd.apec.org/images/c/c8/Setting_the_scene_-_Prof_R_James.pdf; RICHARD JAMES & KERRI-LEE HARRIS, DIPLOMA SUPPLEMENTS IN THE APEC REGION: STUDY FINDINGS, *available at* http://hrd.apec.org/images/4/41/Study_Findings_-_Dr_KL_Harris.pdf.

APEC has also focused on the "qualifications framework" concept that the Bologna Process has explored.[152] It issued a report that was intended to "facilitate increased transparency and reliability of information about qualification frameworks across the APEC region, share knowledge and skills and identify future areas of collaboration."[153] Because seven APEC countries currently have national qualifications frameworks, but the U.S. does not, the U.S. is likely to be hearing more about national qualifications frameworks in the future.[154] In short, although APEC has no power to coerce its members, the U.S. may face pressure to comply if APEC Members develop a consensus about higher education initiatives, such as a standardized credit accumulation system, a diploma supplement, and recognition principles.[155]

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152. *See, e.g.*, APEC HUMAN RES. DEV. WORKING GRP., MAPPING QUALIFICATIONS FRAMEWORKS ACROSS APEC ECONOMIES, (2009), *available at* http://publications.apec.org/publication-detail.php?pub_id=802.

153. *Id.* at 1.

154. *Id.* This report describes a national qualification framework in the following manner:

> A qualifications framework is an instrument for classifying qualifications according to a set of criteria for levels of learning outcomes. . . .
>
> . . . .
>
> The NQFs [national qualification frameworks] in operation in the member economies of APEC are diverse in their structure, coverage, operational purposes and governance. They aim to provide greater transparency for qualifications, support for skills standards systems, a means of managing quality assurance, and facilitate the international recognition of qualifications. Some economies use the NQFs as a basis for credit systems for transfer across education and training levels and institutions.

*Id.* The seven APEC members that have a national qualification framework system are Australia, Hong Kong SAR China, Malaysia, New Zealand, Singapore, Thailand and the Philippines. The survey showed, *inter alia*, that:

> Most NQFs contain descriptors of qualifications and units, and the descriptors are based on a taxonomy of learning outcomes at least for the [vocational education and training] sector. . . . Most of the NQFs include measures of the volume of learning, and a formula for estimating the amount of learning required to achieve a qualification. Credit frameworks have been developed in New Zealand and Singapore and they are under development in some other economies. All the NQFs have an associated public register of qualifications. Recognition tools are being introduced in Australia and are under discussion in New Zealand. The NQFs in each economy are managed by a national agency. Compliance with the NQF is supported by systems of quality assurance though its operation tends to be shared by a number of agencies. The frameworks have been supported by legislation or by government regulation.

*Id.* at 1-2.

155. In the legal services sector, APEC has taken a leadership role following the slowdown in the WTO's Doha negotiations. *See generally* Terry, *From GATS to APEC*, *supra* note 125. Thus, in the higher education sector, APEC similarly might prove to be influential.

D. Higher Education and the World Trade Organization

Although U.S. higher education stakeholders undoubtedly should pay attention to the Bologna Process and to APEC's "soft law" higher education initiatives, it is even more important that such stakeholders are familiar with the "hard law" (and soft law) obligations that emanate from the World Trade Organization (WTO)'s General Agreement on Trade in Services (the GATS).[156] A WTO Member's failure to comply with its GATS's "hard law" obligations can have consequences beyond exclusion from the organization. This section will briefly explain the structure of the GATS and then turn to its impact on higher education.

The GATS is one of several agreements annexed to the agreement that created the World Trade Organization (WTO). The GATS was signed in 1994 and took effect on January 1, 1995.[157] It was the first global trade agreement to cover services.[158] The WTO currently has 153 members and a number of "observers" who plan to become members.[159] WTO headquarters are located in Geneva and the WTO Secretariat provides administrative support.[160] The WTO Secretariat's *2010 Background Note on Education Services* identifies some of the reasons why governments have been and continue to be interested in including education services within the coverage of the GATS.[161]

One can think of the GATS as having three basic kinds of obligations:

1. mandatory (automatic) obligations;

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156. The General Agreement on Trade in Services 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, 1869 U.N.T.S. 183, 33 I.L.M. 1125, 1167 (1994) [hereinafter GATS], *available at* http://www.wto.org/english/docs_e/legal_e/26-gats.pdf.

157. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement], *available at* http://www.wto.org/english/docs_e/legal_e/04-wto.pdf.

158. *See* Terry, *From GATS to APEC*, *supra* note 125, at 882.

159. *See Members and Observers*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Feb. 15, 2011) [hereinafter *WTO Members*].

160. *See What is the WTO?*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm (last visited Feb. 15, 2011); *see also Overview of the WTO Secretariat*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/secre_e/intro_e.htm (last visited Feb. 15, 2011).

161. WTO 2010 Secretariat Report, *supra* note 3, ¶ 2 ("The education sector's importance is well recognized. Education plays a crucial role in fostering personal and social development, as well as economic growth. . . . Over time, trade in education services, particularly at the tertiary [higher education] level, has been growing in importance. Driving factors include a combination of demographic changes, technological developments, national development goals, and governmental reforms to the funding and provision of higher education.").

2. additional (mandatory) obligations that a country can elect to be bound by; and
3. future obligations.[162]

The mandatory (automatic) obligations consist of those GATS provisions that apply to all 153 WTO Members by virtue of their membership in the WTO. The mandatory automatic obligations include, for example, the obligation of "transparency" and the "most-favored nation" provision, which prohibits a WTO Member from discriminating among the other WTO Members but instead requires that the member treat all WTO Members (and their citizens) equally.[163] Because most countries in the world are WTO Member States, higher education services in most countries, including the U.S., are subject to at least some provisions in the GATS.[164] The U.S. Department of Education maintains a webpage devoted to the GATS and trade in education services.[165]

In addition to its "automatic" provisions, the GATS includes a number of additional obligations that become mandatory only if a WTO member "opts in." WTO Members choose, ***on a sector-by-sector basis***, whether to "opt in" to these additional obligations.[166] Although a WTO Member theoretically could opt in with respect to ***all*** possible service sectors, most if not all WTO Members have not done so. Instead, each country has indicated on a document called its "*Schedule of Specific Commitments*" ("*Schedule*") those service sectors for which it is willing to make additional commitments

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162. Technically, there are really four different kinds of obligations. But the fourth is rare and I have relegated it to a footnote. The fourth GATS category consists of one subsection of one rule; this subsection gave countries the option, at the time they first joined the WTO, to opt out, on a limited time basis, from the otherwise automatic obligation to comply with the most favored nation (MFN) provision in the GATS. *See also infra* note 163 (discussing the one MFN exemption in the education sector).

163. GATS art. II (Most-Favored-Nation Treatment), art. III (Transparency). When countries first join the WTO, they are/were allowed, for a limited time period, to exempt themselves from the MFN provision. FYR Macedonia is the only country with an MFM exemption that appears on the WTO's database. *See* WTO Services Database (report generated Feb. 3, 2011 on file with author). *Accord* WTO 2010 Secretariat Report, *supra* note 3, ¶ 69.

164. *See WTO Members*, *supra* note 159.

165. *Trade in Education Services*, U.S. DEP'T OF EDUC., INT'L AFF. OFF., http://www2.ed.gov/print/about/inits/ed/internationaled/trade.html (last updated July 13, 2009). The U.S. has circulated within the WTO several documents related to higher education. *See, e.g.*, Council for Trade in Services, *Communication from the United States: Education Services*, S/C/W/55 (Oct. 20, 1998); Council for Trade in Services, *Communication from the United States: Higher (Tertiary) Education, Adult Education, and Training*, S/CSS/W/23 (Dec. 18, 2000).

166. *See, e.g.*, GATS art. XVII (indicating that a country assumes market access commitments only for the modes and sectors listed on a *Schedule*); *see also infra* note 179 (the U.S. *Schedule* includes commitments for some sectors but not all sectors).

(except as otherwise noted on its *Schedule.*)[167] A country files its *Schedule* when it joins the WTO. Many WTO Members have used the WTO Secretariat's recommended language when indicating the "sector(s)" for which that WTO Member is willing to assume additional obligations. The Secretariat's recommended language is found in its so-called "Sectoral Classification" paper.[168] (For many service sectors, the WTO Secretariat's classification system incorporated by reference the United Nation's "CPC" classification system.)[169]

The Secretariat's recommended classification system divided the education sector into five subsections.[170] Higher education services are one of these five subsections.[171] The recommended higher education classification included additional subdivisions that a WTO Member might elect to use when making its optional commitments.[172] As of April 2010, there were forty-two countries that had assumed some type of additional "opt-in" obligations for the higher education subsector.[173]

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167. *See* LAUREL TERRY & JONATHAN GOLDSMITH, GATS GENERAL AGREEMENT ON TRADE IN SERVICES: A HANDBOOK FOR INTERNATIONAL BAR ASSOCIATION MEMBER BARS 16-24 (2002) [hereinafter IBA GATS Handbook], *available at* http://www.personal.psu.edu/faculty/l/s/lst3/IBA%20GATS%20Handbook%20final.pdf (includes a discussion of *Schedules*).

168. *See, e.g.*, LAUREL S. TERRY, TABLE SHOWING LEGAL SERVICES COMMITMENTS IN THE 1994 URUGUAY ROUND (2007), http://www.personal.psu.edu/faculty/l/s/lst3/presentations%20for%20webpage/Table%20Showing%20Legal%20Services%20Commitments%20in%20the%201994%20Uruguay%20Round.pdf. It appears that most countries that made education commitments used the classification system recommended by the WTO Secretariat. *See infra* note 189.

169. *See* Council for Trade in Services, *Background Note by the Secretariat: Legal Services*, S/C/W/43 ¶¶ 16-18 (July 6, 1998) (discussing the WTO legal services classification and the United Nations CPC classification system).

170. *See* World Trade Organization, *Note by the Secretariat: Services Sectoral Classification List*, MTN.GNS/W/120 (July 10, 1991) [hereinafter WTO Secretariat Sectoral Classification Paper]. For more information on classification, see generally Terry, *From GATS to APEC*, *supra* note 125, at 909 n.140.

171. WTO Secretariat Sectoral Classification Paper, *supra* note 170. *See also* WTO 2010 Secretariat Report, *supra* note 3, ¶¶ 6-9 (discussing the classification of education services).

172. WTO 2010 Secretariat Report, *supra* note 3, ¶¶ 6-7. This section noted that at the time of the original WTO Sectoral Classification list, higher education was divided into Post-Secondary Technical and Vocational Education Services (CPC 92310) and Other Higher Education Services (CPC 92390). *Id.* The former refers to sub-degree technical and vocational education, while the latter refers to education leading to a university degree or equivalent. *Id.* As the WTO 2010 Secretariat Report pointed out, the United Nations subsequently amended its classification system for higher education. *See id.* ¶¶ 8-9 (describing the new UN CPC system).

173. *See* WTO 2010 Secretariat Report, *supra* note 3, ¶ 60. Of the 23 countries that acceded to the WTO after 1995, only two such Members (Mongolia and Ecuador) did not make any commitments in the education sector. *Id.* ¶ 57 & n.110.

If a country lists a particular sector, subsector, or sub-subsector (such as higher education) on its *Schedule of Specific Commitments*, this means that, *except as otherwise noted on its Schedule,* it has agreed to comply with GATS Articles XVI and XVII.[174] The "market access" provision found in GATS Article XVI focuses primarily on quantitative restrictions.[175] The "national treatment" provision found in GATS Article XVII is, in essence, an equal protection type of provision as between that WTO Member State and all other WTO Members.[176]

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174. GATS arts. XVI, XVII (referring to the terms, limitation and conditions specific in a *Schedule*).

175. GATS art. XVI. It states:

> 1. With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member ,treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.
>
> 2. In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:
>
> > a. limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;
> >
> > b. limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
> >
> > c. limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;
> >
> > d. limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test;
> >
> > e. measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and
> >
> > f. limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.

*Id.* (footnotes omitted).

176. GATS, *supra* note 156, at art. XVII. It states:

> 1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers
>
> 2. A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.
>
> 3. Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or ser-

When a WTO Member State agrees to be bound by some or all of these otherwise optional Article XVI and XVII obligations, it does so according to four different "modes of supply" by which the service might be supplied.[177] To put the GATS language in terms that might be more accessible, Mode 1 refers to the situation in which the service itself (*i.e.*, the "product") crosses an international border. Thus, in the higher education sector, this would apply to correspondence schools or online or virtual higher education programs. Mode 2 refers to the situation in which the WTO Member States' citizens and residents leave their own country in order to obtain the service. Thus, Mode 2 would refer to the situation in which U.S. students travel to another country to study abroad. Mode 3 refers to the ability of foreign firms to establish themselves in the U.S. In the higher education sector, this would refer to the ability of a foreign university or institution to physically establish a branch in the United States. The final mode—Mode 4—refers to the ability of individuals, such as foreign service providers and service users, to cross the border into that WTO Member State. In the higher education sector, this would include the ability of foreign faculty and students to study in the U.S. (It should be noted that Mode 4 does not include any immigration or visa-related limitations since those issues are excluded from the coverage of the WTO and the GATS.)[178]

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vice suppliers of the Member compared to like services or service suppliers of any other Member.

*Id.* (footnote omitted).

177. GATS art. I, ¶ 2. This Article states:

For the purposes of this Agreement, trade in services is defined as the supply of a service:

a. from the territory of one Member into the territory of any other Member;

b. in the territory of one Member to the service consumer of any other Member;

c. by a service supplier of one Member, through commercial presence in the territory of any other Member;

d. by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.

*Id.*

178. *See, e.g.*, GATS *Annex On Movement Of Natural Persons Supplying Services Under The Agreement*, ¶ 4 ("The Agreement shall not prevent a Member from applying measures to regulate the entry of natural persons into, or their temporary stay in, its territory, including those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across, its borders, provided that such measures are not applied in such a manner as to nullify or impair the benefits accruing to any Member under the terms of a specific commitment.") (footnote omitted); *see also* WTO 2010 Secretariat Report, *supra* note 3, ¶ 80 ("Restrictions on the presence of natural persons (mode 4) commonly relate to immigration requirements, quotas on numbers of mode 4 service suppliers, nationality or residence requirements and labour market tests. Often, these are horizontal measures which are not specific to the education sector. In education, mode 4 commitments typically apply to teachers, academics, managers or marketing staff travelling across national borders to either set up franchise and twinning arrangements, or to provide instruction. The easing of

The U.S. has not yet made any GATS higher education "additional" commitments,[179] but as the later sections of this Article explain, the U.S. has "offered" to make such additional commitments in the future. The U.S. higher education GATS "offer" is reprinted below.[180] This excerpt illustrates how a country such as the U.S. could "opt in" to the additional GATS commitments using the four modes of supply explained above and how a country could specify its "except as otherwise noted" limitations to Article XVI's market access requirements and Article XVII's national treatment requirements.[181] If a country does not intend to make any promises, the document will say "unbound" next to the particular mode of supply.[182] If a country has not inserted any "except as otherwise noted" limitations, the document will say "none" next to the particular mode of supply.[183] The current U.S. offer includes the terms "none" and "unbound,"

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restrictions for such specialized personnel would facilitate trade undertaken under cross-border supply and/or through commercial presence.") (footnote omitted). Paragraph 80 included a footnote that said "See, however, GATS Annex on Movement of Natural Persons Supplying Services Under the Agreement." *Id.* at 25 n.138. Interestingly, at least one WTO Member State included work permit related issues in its *Schedule*. *See, e.g.*, Council for Trade in Services, *European Community and Its Member States: Schedule of Specific Commitments, Supplement 2, GATS/SC/31/Suppl.2* (July 28, 1995) at 14-15 ("[Mode 4]: Unbound except for F and L concerning the temporary entry of professors where: as indicated in the horizontal section under (iii) and subject to the following specific limitations:

F: - The professors have obtained an employment contract from a university or other higher education institution.

- The work permit is delivered for a period not exceeding nine months renewable for the duration of the contract.

- Compliance with an economic needs test is required unless those professors are designated directly by the Minister in charge if [sic] higher education.

- The recruiting institution must pay a tax to the International Migration Office.").

179. The U.S.'s original education commitments are found in a document entitled General Agreement on Trade in Services, *The United States of America: Schedule of Specific Commitments*, GATS/SC/90 (Apr. 15, 1994) at 51. For additional information on the meaning of the symbols used in WTO documents and how to locate documents on the WTO's documents online webpage, see Terry, *From GATS to APEC*, *supra* note 125, at 900, n.107.

180. *See* Council for Trade in Services, *United States: Revised Services Offer*, TN/S/O/USA/Rev.1 (2005) at 68-69 [hereinafter U.S. Education Offer]. The U.S. filed an "offer" in 2003, which was replaced by the 2005 revised offer cited above. *See* Council for Trade in Services, *Communication from the United States: Initial Offer*, TN/S/O/USA (Apr. 9, 2003) at 61-62. (Because of printing constraints, this law review articles lists the proposed new language in bold font, rather than highlighting it.)

181. According to GATS art. XX, ¶2, if a particular limitation constitutes both a market access and a national treatment limitation, it only needs to be listed once—in the market access column.

182. IBA GATS Handbook, *supra* note 167, at 24.

183. *Guide to Reading the GATS Schedules of Specific Commitments and the List of Article II (MFN) Exemptions*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/serv_e/guide1_e.htm (last visited Feb. 15, 2011).

along with a national treatment "except as otherwise noted" type of limitation. The items listed in bold print below are the new items the U.S. included in its offer:

| Modes of Supply: 1) Cross-border supply 2) Consumption abroad 3) Commercial presence 4) Presence of natural persons | | | |
|---|---|---|---|
| Sector or subsector | Limitations on market access | Limitations on national treatment | Additional Commitments |
| **C. Higher Education Services (except flying instruction) (CPC 923)[38]** | **1) None<br>2) None<br>3) None<br>4) Unbound, except as indicated in the horizontal section** | **1), 2), 3), 4) The granting of U.S. federal or state government funding or subsidies may be limited to U.S.-owned institutions, including land grants, preferential tax treatment, and any other public benefits; and scholarships and grants may be limited to U.S. citizens and/or residents of particular states. In some cases, such funding, subsidies, scholarships, and grants may only be used at certain state institutions or within certain U.S. jurisdictions.** | |
| **[38] For transparency purposes, individual U.S. institutions maintain autonomy in admission policies, in setting tuition rates, and in the development of curricula or course content. Educational and training entities must comply with requirements of the jurisdiction in which the facility is established. In some jurisdictions, accreditation of institutions or programs may be required. Institutions maintain autonomy in selecting the jurisdiction in which they will operate, and institutions and programs maintain autonomy in choosing to meet standards set by accrediting organizations as well as to continue accredited status. Accrediting organizations maintain autonomy in setting accreditation standards. Tuition rates vary for in-state and out-of-state residents. Additionally, admission policies include considerations of equal opportunity for students (regardless of race, ethnicity, or gender), as permitted by domestic law, as well as recognition by regional, national, and/or specialty organizations; and required standards must be met to obtain and maintain accreditation. To participate in the U.S. student loan program, foreign institutions established in the United States are subject to the same requirements as U.S. institutions.** | | |

Most of the other U.S. education commitments remained the same:

| Modes of Supply: 1) Cross-border supply 2) Consumption abroad 3) Commercial presence 4) Presence of natural persons | | | |
|---|---|---|---|
| Sector or subsector | Limitations on market access | Limitations on national treatment | Additional Commitments |
| D. Adult Education (except flying instruction) **(CPC 924)** | 1) None<br>2) None<br>3) The number of licenses for cosmetology schools in Kentucky is limited to 48 total licenses, with a total of 8 licenses allowed for operation of such schools per congressional district<br>4) Unbound, except as indicated in the horizontal section | 1), 2), 3), 4) Scholarships and grants may be limited to US citizens and/or residents of particular states and may, in some cases, only be used at certain states institutions or within certain US jurisdictions. | |

| | | | |
|---|---|---|---|
| E. Other Education Services **(CPC 929)** | 1) None<br>2) None<br>3) None<br>4) Unbound, except as indicated in the horizontal section | 1), 2), 3), 4) Scholarships and grants may be limited to US citizens and/or residents of particular states and may, in some cases, only be used at certain states institutions or within certain US jurisdictions. | |

Although it can be difficult for non-trade experts to understand the structure and meaning of a country's *Schedule of Specific Commitments*, it is important that U.S. higher education stakeholders learn how to read a GATS *Schedule* so that they can evaluate for themselves whether they approve of the U.S. higher education offer or whether they have alternative or additional recommendations. The U.S. offer does not include any limitations on market access for the Modes 1-3 delivery methods of higher education.[184] The U.S. offer is "unbound," however, with respect to mode 4 market access.[185] In other words, the U.S. is not offering to make any commit-

184. It is admittedly very difficult to distinguish between items that should be placed on a Member's Schedule as "limitations" and items that would be subject to GATS Article VI:4 domestic regulation disciplines regarding qualification, licensing and technical standards. *See generally* Laurel S. Terry, *But What Will the WTO Disciplines Apply To? Distinguishing Among Market Access, National Treatment and Article VI:4 Measures When Applying the GATS to Legal Services*, PROF. LAW., 2003 SYMP. ISSUE at 83. *See also infra* notes 203-208 and accompanying text. Nevertheless, I was surprised to see that there were not any additional limitations listed for Modes 1 and 3. I would not be surprised to learn that state and federal regulations affecting Modes 1 and 3 exist and that some might label these as market access or national treatment limitations. As the U.S.-Antigua gambling case, discussed below, demonstrated, if such limitations exist and if they are not included on the U.S.' *Schedule*, there could be consequences for the U.S. from those WTO Member States that can establish an injury. *See infra* notes 202-205 and accompanying text.

185. *See* U.S. Education Offer, *supra* note 180, at 68 ("Unbound, except as indicated in the horizontal section."). In the column in which the service subsector is listed, the U.S. has included a footnote. The footnote sets forth the following explanation for the sake of transparency:

> For transparency purposes, individual U.S. institutions maintain autonomy in admission policies, in setting tuition rates, and in the development of curricula or course content. Educational and training entities must comply with requirements of the jurisdiction in which the facility is established. In some jurisdictions, accreditation of institutions or programs may be required. Institutions maintain autonomy in selecting the jurisdiction in which they will operate, and institutions and programs maintain autonomy in choosing to meet standards set by accrediting organizations as well as to continue accredited status. Accrediting organizations maintain autonomy in setting accreditation standards. Tuition rates vary for in-state and out-of-state residents. Additionally, admissions policies include considerations of equal opportunity for students (regardless of race, ethnicity, or gender), as permitted by domestic law, as well as recognition by regional, national, and/or specialty organizations; and required standards must be met to obtain and maintain accreditation. To participate in the U.S. student loan program, foreign institutions

ments with respect to the right of foreign individuals to come into the U.S. in order to consume or provide higher education services. Turning to the "national treatment" column in the current U.S. "offer," this column includes a national treatment "limitation" for modes 1-4; these limitations are identical.[186] Thus, the U.S. has agreed not to discriminate between U.S. citizens and others except as set forth in this limitation.

The WTO maintains on its webpage a "matrix" that lists, for each of the five education subsectors, including the 5(C) higher education subsector, those WTO Member States that have made additional commitments for that subsector.[187] (As noted earlier, the U.S. is *not* among the forty-two countries that currently have opted to assume additional mandatory obligations in the higher education subsector.[188]) The WTO has a webpage where one can generate an Excel or a pdf document that includes additional details about each of these forty-two sets of "additional" higher education commitments.[189]

The forty-two countries that have elected to be bound in the higher education sector by the "additional" obligations found in GATS Articles XVI and XVII include developed countries and developing countries, English speaking and non-English speaking countries, countries that are among the largest "exporters" or providers of cross-border higher education services (Australia and the EU) and countries that are among the largest "importers" of cross-border higher education (China and Japan).[190]

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established in the United States are subject to the same requirements as U.S. institutions.

*Id.* at 68 n.38. Interestingly, in the next education subsector, which is adult education services, the caveats are found in the market access "limitations" column of the U.S. offer, rather than in a "transparency" footnote. *Id.* at 69.

186. *See id.* at 68. This "national treatment" limitation states:

1), 2), 3), 4) The granting of U.S. federal or state government funding or subsidies may be limited to U.S.-owned institutions, including land grants, preferential tax treatment, and any other public benefits; and scholarships and grants may be limited to U.S. citizens and/or residents of particular states. In some cases, such funding, subsidies, scholarships, and grants may only be used at certain state institutions or within certain U.S. jurisdictions.

*Id.*

187. *Member/Sector Matrix Report: 05. Educational Services*, WORLD TRADE ORG., http://tsdb.wto.org/default.aspx (approximately halfway down the page, in the drop down menu under the heading "See which Members have made commitments in a specific sector," select "05 Educational Services" and click "go.") (last visited June 3, 2011) [hereinafter *Matrix Report*].

188. *Id.*

189. *Trade in Services Database*, WORLD TRADE ORG., http://tsdb.wto.org/default.aspx (last visited Feb. 15, 2011). Copy of the WTO Education Commitments available from author (LTerry@psu.edu).

190. *See Matrix Report*, *supra* note 187. The Matrix lists the following forty-two countries as having made higher education GATS commitments: Albania, Armenia, Australia, Cambodia, Cape Verde, China, Congo, Costa Rica, Croatia, Czech Republic, Estonia,

In addition to the GATS's automatic obligations, and any additional GATS obligations that appear on a country's *Schedule of Specific Commitments*, the GATS imposed on its Member States a pair of future obligations. GATS Articles VI and XIX require certain future activity by the 153 countries that have elected to become WTO Members. Article XIX required WTO Members, within five years, to begin additional negotiations regarding further liberalization.[191] These negotiations currently are known as the Doha Round of Negotiations, the Doha Development Agenda, or the Doha Round for short.[192] As noted in the prior paragraph, the U.S. has indicated in the current, ongoing Doha Round Negotiations, its tentative willingness to add higher education services to the list of its "additional obligations."[193]

The second "future obligation" is found in GATS Article VI(4). This Article requires WTO Members to consider the development of "any necessary disciplines" on domestic regulation.[194] "Disciplines" might be analo-

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European Community, FYR Macedonia, Georgia, Hungary, Jamaica, Japan, Jordan, Kyrgyz Republic, Latvia, Lesotho, Liechtenstein, Lithuania, Mexico, Moldova, Nepal, New Zealand, Norway, Oman, Panama, Poland, Saudi Arabia, Sierra Leone, Slovak Republic, Slovenia, Switzerland, Chinese Taipei, Tonga, Trinidad and Tobago, Turkey, Ukraine, and Vietnam. *Id.*; *accord* WTO 2010 Secretariat Report, *supra* note 3, ¶ 60 and Annex 6 (p.39) (identifies the same forty-two countries as having made higher-education commitments).

191. GATS art. XIX. This provision states, *inter alia*:

> In pursuance of the objectives of this Agreement, Members shall enter into successive rounds of negotiations, beginning not later than five years from the date of entry into force of the WTO Agreement and periodically thereafter, with a view to achieving a progressively higher level of liberalization. Such negotiations shall be directed to the reduction or elimination of the adverse effects on trade in services of measures as a means of providing effective market access.

*Id.*

192. The current negotiating round was launched in Qatar, Doha. The Doha Round takes its name from this location. *See* Terry, *From GATS to APEC*, *supra* note 125, at 913 n.145; *Doha Development Agenda: Negotiations, Implementation and Development*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/dda_e/dda_e.htm (last visited Feb. 15, 2011). "For a lighthearted look at the GATS, which was written before the U.S. pronunciation of "Qatar" became "Cutter," see Laurel S. Terry, The GATS and Legal Services in Limerick, 15 MICHIGAN ST. J. INT'L L. 635 (2007), http://www.americanbar.org/content/dam/aba/migrated/cpr/gats/GATS_in_Limerick.authcheckdam.pdf.

193. *See supra* notes 179-180 and accompanying text.

194. GATS art. VI, ¶4. This provision states in pertinent part:

> With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, *inter alia*:
>
> a. based on objective and transparent criteria, such as competence and the ability to supply the service;
>
> b. not more burdensome than necessary to ensure the quality of the service;
>
> c. in the case of licensing procedures, not in themselves a restriction on the supply of the service.

gized to regulations.[195] To date, WTO Members have only reached agreement with respect domestic regulation disciplines for the Accountancy Sector, but WTO Members are discussing "horizontal" domestic regulation disciplines that could apply to all service sectors.[196] Although the issue is not yet definitively resolved, it is likely that if WTO Members adopt any domestic regulation disciplines, they will only apply to those service sectors found on a Member's *Schedule*.[197]

What is the relevance of these two GATS "future obligation" provisions to U.S. higher education? First, as noted earlier, the U.S., like several other countries, has submitted a "higher education" offer.[198] If the Doha Round reaches a successful conclusion and the U.S. *Schedule of Specific Commitments* is modified in a manner consistent with its current higher education offer, then, as the paragraphs below explain, the commitments in the offer would become enforceable, violation of which could lead to consequences. Thus, when thinking about the volume and conditions of higher education cross-border mobility, the U.S. higher education community must

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*Id.*

195. For more information about GATS domestic regulation disciplines, see Terry, *From GATS to APEC*, *supra* note 125, at 952-62. *See also Track 2 of the GATS*, AM. B. ASS'N, http://www.americanbar.org/groups/professional_responsibility/policy/gats_international_agreements/track_two.html (last visited June 3, 2011) (includes relevant domestic regulation "disciplines" documents).

196. Terry, *From GATS to APEC*, *supra* note 125, at 953-55. Although WTO Members agreed on the content of the Accountancy Disciplines, these disciplines will not become effective until the end of the Doha Round of negotiations. *Id.* at 953.

197. *See, e.g.*, Working Party on Domestic Regulation, *Informal Note by the Chairman: Draft: Disciplines on Domestic Regulation Pursuant to Gats Article VI:4, Second Revision*, (Mar. 20, 2009) (Room Document), ¶ 10, http://www.tradeobservatory.org/library.cfm?refID=106851 ("These disciplines apply to measures by Members relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards affecting trade in services where specific commitments are undertaken. They do not apply to measures to the extent that they constitute limitations subject to scheduling under Article XVI or XVII.").

198. *See* U.S. Education Offer, *supra* note 180, at 68. Australia, Switzerland, Japan, and New Zealand are among the other countries that have submitted higher education "offers" in the ongoing WTO Doha negotiations. For Australia and Japan, these "offers" represent improvements on the obligations they previously assumed on their *Schedule*. *See, e.g.*, Council for Trade in Services, *Communication from Australia: Negotiating Proposal for Education Services*, S/CSS/W/110 (Oct. 1, 2001); Council for Trade in Services, *Communication from Japan: Negotiating Proposal on Education Services*, S/CSS/W/137 (Mar. 15, 2002). For Switzerland, New Zealand and the U.S., this represents the first time that they have agreed to "opt in" to the higher education subsector and assume market access and national treatment obligations, except as otherwise noted. *See, e.g.*, Council for Trade in Services, *Communication from Switzerland: Education Services and the GATS: The Experience of Switzerland*, TN/S/W/39 (Apr. 4, 2005); Council for Trade in Services, *Communication from New Zealand: Negotiating Proposal for Education Services*, S/CSS/W/93 (June 26, 2001); U.S. Education Offer, *supra* note 180, at 68.

consider not only the U.S.'s current GATS commitments, but the commitments that may emerge in the future.

The domestic regulation "disciplines" future obligation could also be relevant to U.S. higher education. The issue of domestic regulation "disciplines" has been quite contentious and it is not yet clear what, if anything, WTO Members will agree upon.[199] If domestic regulation disciplines are adopted, however, they are likely to affect certain aspects of U.S. higher education. This is because GATS Article VI(4) refers to qualification, licensing and technical standards.[200] One of the issues under discussion is the issue of what "recognition" one WTO Member State must provide to service providers and users from another WTO Member State. This issue of "recognition" is an important issue for the higher education sector. Thus, U.S. stakeholders should have an interest in monitoring the WTO's domestic regulation "disciplines" developments.

It is important to realize that unlike some of the international initiatives discussed earlier in this Article, the GATS involves "hard law" requirements. If a country fails to live up to the GATS's mandatory obligations or if a WTO Member assumes additional obligations in the higher education sector and fails to live up to those additional obligations, then other WTO Members may impose retaliatory trade sanctions.[201] The sanctions for failure to comply with the GATS can be quite significant.

The gambling dispute between the U.S. and Antigua and Barbuda provides a useful example of the "hard law" nature of the GATS. In 2003, WTO Member Antigua and Barbuda complained that U.S. enforcement of internet gambling restrictions was inconsistent with the promises found on the U.S. *Schedule of Specific Commitments* since the U.S. had made commitments in the category of "other recreation services," but had not created an "except as otherwise noted" exclusion for U.S. laws that restrict gambling.[202] The U.S. argued, *inter alia,* that it had not intended to offer "com-

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199. *See, e.g.*, WTO Working Party on Domestic Regulation, *Informal Note by the Chairperson: Disciplines on Domestic Regulation Pursuant to GATS Article Vi:4, Annotated Text*, (Mar. 14, 2010) (Room Document), http://www.americanbar.org/content/dam/aba/migrated/cpr/gats/discipline.authcheckdam.doc; MARKUS JELITTO, WTO NEGOTIATIONS ON DISCIPLINES ON DOMESTIC REGULATION: MAIN ELEMENTS AND STATE OF PLAY (2010), *available at* http://www.unescap.org/ tid/projects/gats10_s6.pdf; Council for Trade in Services, *NEGOTIATIONS ON TRADE IN SERVICES: Report by the Chairman, Ambassador Fernando de Mateo, to the Trade Negotiations Committee,* TN/S/36 (Apr. 21, 2011).

200. GATS, *supra* note 156, at art. VI, ¶4; *see also* Terry, *But What Will the WTO Disciplines Apply To?, supra* note 184, at 100, 112.

201. *Compare* GATS art. XVI (Market Access), *with* GATS art. XXI (Modification of Schedules), *and* GATS art. XXIII (Dispute Settlement and Enforcement).

202. *See generally* Report of the Appellate Body, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/AB/R (Apr. 7, 2005).

mitments" in the gambling sector.[203] The WTO Appellate Body rejected this argument. It found that in light of the suggested WTO classification system for gambling services and the lack of clarity in the U.S. *Schedule* about its intentions, the U.S. had made additional commitments that covered gambling.[204] It also found that U.S. federal gambling restrictions were inconsistent with the additional commitments found on the U.S. GATS *Schedule.*[205] After this decision and some further procedural actions, several WTO Members threatened to retaliate against the U.S. by ignoring copyright restrictions on U.S. intellectual property by copying U.S.-produced movies.[206] This retaliatory "remedy" could have had a significant impact on the U.S. entertainment business, which may explain why the U.S. commenced negotiations to provide "compensation" to those WTO Members who had complained about the impact of U.S. gambling prohibitions on their own Internet gambling industries.[207] Following this threat, the U.S. agreed to revise its commitments and provide compensation to the affected WTO Members.[208]

As this brief summary of a complicated topic has shown, when one considers international initiatives that affect higher education, one must place the GATS at or near the top of the list. The GATS has created "hard law" obligations for its 153 members. Moreover, a significant number of WTO Member States have chosen, in the higher education sector, to be bound by the additional obligations found in GATS Articles XVI and XVII. As part of the ongoing WTO Doha negotiations, other countries, including the U.S., have "offered" to assume these additional obligations at the conclusion of the current Doha Round of negotiations. Thus, one cannot truly understand global higher education mobility without understanding the role of the GATS and the obligations that particular countries may or may not have undertaken.

### E. Additional International Initiatives—UNESCO and the OECD

Although the GATS is arguably the most important international "hard law" initiative that affects U.S. higher education, there are several other international organizations that have been active in the higher education field and whose policies and activities are worth noting. These include UNESCO, which is the acronym used to describe the United Nations Edu-

203. *Id.* ¶¶ 14-20.
204. *Id.* ¶ 373(B).
205. *Id.* ¶ 373(C).
206. *See* Terry, *From GATS to APEC*, *supra* note 125, at 915-16.
207. *Id.*
208. *Id.* at 916 n.156.

cational, Scientific, and Cultural Organization.[209] UNESCO works "to improve education worldwide believing it to be key to social and economic development."[210] As the only United Nations entity with a mandate to support national capacity-building in higher education, UNESCO has played a leading role in focusing attention on higher-education issues.[211] "Higher education" is one of its designated "themes"; it focuses on the following subtopics: 1) reform and innovation; 2) international university cooperation; 3) quality assurance; 4) recognition; and 5) teacher education.[212] Thus, anyone interested in international higher education initiatives should be sure to consult the relevant UNESCO webpage and review its many documents, policies and initiatives.[213]

For purposes of this Article, one of the most important of UNESCO's initiatives is the 1997 Lisbon Convention.[214] The Lisbon Convention was jointly developed by UNESCO and the Council of Europe in order to supplement the existing conventions concerning recognition of higher-education degrees.[215] As of January 2011, fifty-one countries had signed

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209. *Education: About Us*, UNESCO, http://www.unesco.org/new/en/education/about-us/ (last visited Feb. 15, 2011). It seeks to:

> [1] provide international leadership to create learning societies with educational opportunities for all populations. [2] provide expertise and foster partnerships to strengthen national educational leadership and the capacity of countries to offer quality education for all. [3] work as an intellectual leader, an honest broker and clearing house for ideas, propelling both countries and the international community to accelerate progress towards these goals. [4] facilitate the development of partnerships and monitors progress, in particular by publishing an annual Global Monitoring Report that tracks the achievements of countries and the international community towards the six Education for All goals.

*Education: Mission*, UNESCO, http://www.unesco.org/new/en/education/about-us/how-we-work/mission/ (last visited Feb. 15, 2011).

210. *Education: About Us*, *supra* note 209.

211. *See generally Education*, UNESCO, http://portal.unesco.org/education (last visited Feb. 15, 2011).

212. *See generally Higher Education*, UNESCO, http://www.unesco.org/new/en/education/themes/strengthening-education-systems/higher-education/ (listing subtopics as hyperlinks in the left-hand menu).

213. *See generally id.* (follow hyperlinks to "Publications," "Conventions and Recommendations," "Conferences"). For some specific examples, see UNESCO, HIGHER EDUCATION IN A GLOBALIZED SOCIETY: UNESCO EDUCATION POSITION PAPER (2004), *available at* http://unesdoc.unesco.org/images/0013/001362/136247e.pdf; *Brain Gain Initiative*, UNESCO, http://www.unesco.org/en/higher-education/reform/brain-gain-initiative/ (last visited Feb. 15, 2011).

214. Convention on the Recognition of Qualifications Concerning Higher Education in the European Region, Council of Eur.-UNESCO, Apr. 11, 1997, C.E.T.S. No. 165 [hereinafter Lisbon Convention], *available at* http://unesdoc.unesco.org/images/0011/001112/111238mb.pdf.

215. *Explanatory Report to the Convention on the Recognition of Qualifications Concerning Higher Education in the European Region*, COUNCIL OF EUR.,

and ratified the Lisbon Convention; the U.S. has signed but not ratified the Convention.[216] The Lisbon Convention contains nine major points of agreement with respect to recognition of higher education degrees:

1. "[h]olders of qualifications issued in one country shall have adequate access to an assessment of these qualifications in another country";
2. there should be no discrimination "on any ground such as the applicant's gender, race, colour, disability, language, religion, political opinion, national, ethnic or social origin";
3. the body undertaking the assessment has the "responsibility to demonstrate that an application does not fulfill the relevant requirements";
4. each country has an obligation to recognize higher education qualifications and degrees as similar to its own "unless it can show that there are substantial differences between its own qualifications and the qualifications for which recognition is sought";
5. "[r]ecognition of a higher education qualification issued in another country shall have one or both" of two consequences: "access to further higher education studies, including relevant examinations and preparations for the doctorate, on the same conditions as candidates from the country in which recognition is sought;" and "the use of an academic title, subject to the laws and regulations of the country in which recognition is sought";
6. "[a]ll countries shall develop procedures to assess whether refugees and displaced persons fulfil the relevant requirements for access to higher education or to employment activities, even in cases in which the qualifications cannot be proven through documentary evidence";
7. "[a]ll countries shall provide information on the institutions and programmes they consider as belonging to their higher education systems";
8. "[a]ll countries shall appoint a national information centre, one important task of which is to offer advice on the recognition of foreign qualifications to students, graduates, employers, higher education institutions and other interested parties or persons"; and

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http://conventions.coe.int/Treaty/EN/Reports/Html/165.htm. For a list of additional conventions relevant to higher education, see Lisbon Convention, *supra* note 214, pmbl.

216. *Convention on the Recognition of Qualifications Concerning Higher Education in the European Region: Special Conditions of Opening for Signature*, COUNCIL OF EUR., http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=165&CM=8&DF=03/02/2011&CL=ENG (last updated Feb. 3, 2011) [hereinafter Lisbon Signatories]. Two countries had signed, but not ratified, the Lisbon Convention. *Id.*

9. "[a]ll countries shall encourage their higher education institutions to issue the Diploma Supplement to their students in order to facilitate recognition."[217]

The committee responsible for implementing the Lisbon Convention has adopted a number of supplementary documents.[218] These include the *Recommendations on the Recognition of Joint Degrees* (June 2004), the *Code of Good Practice in the Provision of Trans-national Education* (June 2001), the *Recommendation on Criteria and Procedures for the Assessment on Foreign Qualifications* (June 2001), and the *Recommendation on International Access Qualifications* (June 1999).[219] These documents are clearly relevant with respect to global cross-border mobility issues.

Although the U.S. has signed but not ratified the Lisbon Convention, this Convention is one of the primary reasons why the U.S. maintains the U.S Network for Education Information (USNEI).[220] USNEI is designated by the United States to function as the official U.S. information center on matters of recognition and mobility, which is required by the Lisbon Convention. USNEI thus participates in the ENIC/NARIC Network, which was mentioned earlier in this Article.[221]

The USNEI website serves as a useful central point for a variety of information. Its website includes information:

1. For International Students and Professionals, [including] information and links about coming to the United States, recognition of foreign qualifications, accredited U.S. institutions and programs, avoiding frauds, and financial aid;
2. For International Educators and Officials, [including] information about the U.S. education system, U.S. accreditation and quality assurance, recognized institutions, avoiding fraudulent providers, and related resources;
3. For U.S. Students, [including] information about studying abroad, financial aid, and links to official information about education in other countries;
4. For U.S. Educators, [including] information about international education, other education systems, teaching overseas and the recognition of foreign education within the United States; an

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217. The Lisbon Convention—What Is It?, http://www.bologna-bergen2005.no/Docs/03-PNY/Lisbon_for_pedestrians.pdf (last visited Feb. 15, 2011).

218. *See The Lisbon Recognition Convention*, COUNCIL OF EUR., http://www.coe.int/t/dg4/highereducation/Recognition/LRC_en.asp (last visited Feb. 15, 2011) (providing links to several supplementary documents).

219. *Id.*

220. *See About USNEI*, U.S. DEP'T OF EDUC., http://www2.ed.gov/about/offices/list/ous/international/usnei/edlite-about.html (last updated Feb. 11, 2008).

221. *Id. See also supra* note 101 (citing the ENIC/NARIC network).

5. For U.S. Human Resources Professionals and Officials, [including] information about foreign education systems, recognized foreign institutions, and U.S. credential evaluation for foreign degree-holders.[222]

This information can be helpful to others beyond the groups designated. For example, when the American Bar Association began considering whether to develop a policy on foreign lawyer recognition, it wanted to learn how other professions had handled comparable issues. It therefore consulted the webpages and staff of USNEI.[223]

The Organization for Economic Cooperation and Development (OECD) is another organization with a global reach that has been active in the field of higher education. The mission of the OECD is to "promote policies that will improve the economic and social well-being of people around the world."[224] Although its membership is limited to thirty-four of the world's most developed countries, it has an "enhanced" relationship with China and Russia, works in partnership with more than seventy other countries, and also works in tandem with other organizations.[225] Accordingly, its reach is broad. The OECD works through data collection, analysis, discussion, decisions, implementation, peer reviews, and multilateral surveillance.[226] OECD initiatives are "soft law" rather than "hard law" because the consequence of a failure to comply is exclusion from the group, rather than "hard law" remedies. Nevertheless, in my experience, OECD policies and reports are influential and the U.S. is often a leading participant.

The OECD has a "Directorate" of education that includes higher education among its activities.[227] Its "Higher Education and Adult Education"

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222. *U.S. Network for Education Information*, U.S. DEP'T OF EDUC., http://www2.ed.gov/about/offices/list/ous/international/usnei/edlite-index.html (last updated Dec. 12, 2007).

223. *See, e.g.*, AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR: REPORT OF THE SPECIAL COMMITTEE ON INTERNATIONAL ISSUES 12-13, 19-21 (2009) (citing USNEI data), *available at* http://apps.americanbar.org/legaled/accreditation/International%20Issues%20Report%20(final)%20(2).DOC; *see also Accreditation and Quality Assurance*, U.S. DEP'T OF EDUC., http://www2.ed.gov/about/offices/list/ous/international/usnei/us/edlite-accreditation.html (last updated Feb. 21, 2008).

224. *About OECD*, OECD, http://www.oecd.org/pages/0,3417,en_36734052_36734103_1_1_1_1_1,00.html (last visited Feb. 15, 2011).

225. *Members and Partners*, OECD, http://www.oecd.org/pages/0,3417,en_36734052_36761800_1_1_1_1_1,00.html (last visited Feb. 15, 2011) (stating, *inter alia*, that it now has enhanced engagement with some non-member countries and that it also "maintains co-operative relations with more than 70" non-member economies).

226. *What We Do and How*, OECD, http://www.oecd.org/pages/0,3417,en_36734052_36761681_1_1_1_1_1,00.html (last visited Feb. 15, 2011).

227. *See Directorate for Education*, OECD, http://www.oecd.org/department/0,3355,en_2649_33723_1_1_1_1_1,00.html (last visited Feb. 15, 2011).

web portal provides access to its many activities in this area.[228] The OECD collects statistics, issues reports, sponsors conferences, and develops policies, including guidelines and best practices documents, among other things.[229] The OECD's online education database includes statistics about "expenditure[s], foreign student enrollments, graduates by age and field of education, enrollment by type of institution and total population by sex and age."[230] The OECD's program on institutional management in higher education "brings together higher education institutions and governments to share best practices, ideas and potential models to meet these challenges through networks, studies and research."[231] The OECD also sponsors the Centre for Education for Research and Innovation's (CERI).[232] One of CERI's projects is called "University Futures" and has as its purpose informing and facilitating "strategic change to be made by government decision-makers and other key stakeholders in higher education."[233] To accomplish this, it sponsors "analytical and thematic stud[ies] of the major relevant trends and [it promotes] dialogue [among] the stakeholders and experts in higher education."[234] Another important OECD higher education initiative is a project known as AHELO, which will develop a feasibility study for the international assessment of higher education learning outcomes.[235]

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228. *Higher Education and Adult Learning*, OECD, http://www.oecd.org/topic/0,3699,en_2649_39263238_1_1_1_1_37455,00.html (last visited Feb. 15, 2011).

229. *See Programme on Institutional Management in Higher Education (IMHE)*, OECD, http://www.oecd.org/topic/0,3699,en_2649_35961291_1_1_1_1_37455,00.html (last visited Feb. 15, 2011); *see also Programme on Institutional Management in Higher Education (IMHE): Publications & Documents*, OECD, http://www.oecd.org/findDocument/0,3770,en_2649_35961291_1_1_1_1_37455,00.html (last visited Feb. 15, 2011) (including links to the following kinds of items: Annual Reports, Best Practices, Country Surveys/Reviews/Guides, Events/Conferences/Meetings, Guidelines, Manuals, Sources and Methods, News Releases, Newsletters/Brochures, Other OECD Documents, Policy Briefs, Proceedings, Publications, Reports, Speeches, Staff Papers/Presentations, Statistics, Data and Indicators, Websites, Who's Who/ CVs/Authors, and Working Papers).

230. *Programme on Institutional Management in Higher Education (IMHE): Statistics*, OECD, http://www.oecd.org/statisticsdata/0,3381,en_2649_35961291_1_119656_1_1_37455,00.html (last visited Feb. 15, 2011).

231. *Programme on Institutional Management in Higher Education (IMHE)*, *supra* note 229.

232. *Centre for Educational Research and Innovation (CERI)*, OECD, http://www.oecd.org/department/0,3355,en_2649_35845581_1_1_1_1_1,00.html (last visited Feb. 15, 2011).

233. *Centre for Educational Research and Innovation (CERI) - University Futures*, OECD, http://www.oecd.org/document/18/0,3746,en_2649_35845581_31245522_1_1_1_1,00.html (last visited Feb. 15, 2011).

234. *Id.*

235. *Testing Student and University Performance Globally: OECD's AHELO*, OECD, http://www.oecd.org/document/22/0,3746,en_2649_35961291_40624662_1_1_1,00.html (last visited Feb. 15, 2011). According to the OECD:

AHELO will be a tool for:

The AHELO test is intended "to be global and valid across diverse cultures, languages and different types of institutions" and to "provide data on the relevance and quality of teaching and learning in higher education."[236] In other contexts, OECD guidelines have proved to be very influential and thus AHELO is an initiative worth watching for those interested in higher education global mobility.[237]

As this very brief survey has demonstrated, anyone who is interested in higher education international initiatives—including mobility—must be sure to consult the OECD's website and its many initiatives and reports.

### F. U.S. Interest in Higher Education International Initiatives

The prior subsections have reviewed a number of higher education international initiatives and entities interested in these issues. But what about the U.S.? Is there interest in the U.S. in these issues? Do these initiatives matter? The answer to these questions is "yes." To illustrate the importance of the GATS and the other international initiatives discussed in this Article, one has only to look at the U.S. Department of Education, which has several offices whose mission it is to focus on these international initiatives. One of the most important of these offices is the International Affairs Office, which is located in the Office of the Secretary and "leads and coordinates the Department's international activities and serves as the Department's liaison office to international organizations, ministries of education

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- Universities: to assess and improve their teaching[;]
- Students: to make better choices in selecting institutions[;]
- Policy-makers: to make sure that the considerable amounts spent on higher education are spent well[; and]
- Employers: to know if the skills of the graduates entering the job market match their needs.

*Id.* (emphasis omitted).

236. *Id.*

237. *See, e.g.*, *OECD Experts Meeting on Services, July 2009*, OECD, http://www.oecd.org/document/53/0,3746,en_2649_36344374_46257909_1_1_1_37431,00.html (last visited Feb. 15, 2011) (including sessions on the development of a Services Trade Restrictiveness Index (STRI) index for professional services). The STRI index recently was cited in support of proposed reforms to the regulation of the Greek legal profession. Jonathan Goldsmith, *How Eurozone Bailouts Affect Lawyers*, L. SOC'Y GAZETTE (Jan. 31, 2011), http://www.lawgazette.co.uk/euro-blog/how-eurozone-bailouts-affect-lawyers (quoting an IMF report about Greece, Goldsmith notes that the "'Government proposes legislation to remove restrictions to competition, business and trade in restricted professions including: the legal profession, to remove unnecessary restrictions on fixed minimum tariffs, the effective ban on advertising, territorial restrictions on where lawyers can practice.' The basis is an Organisation for Economic Co-operation and Development report on regulatory indicators"). This is one of many examples that shows the influence of soft law OECD initiatives—in this case the STRI barriers report.

abroad, and the diplomatic community in the United States."[238] This office administers International Education Week and the International Visitor's Program.[239] More significantly for purposes of this Article, however, the International Affairs Office is responsible for the U.S. Network for Education Information (USNEI), coordinates the education aspects of U.S. bilateral agreements, and coordinates work with UNESCO, the OECD, the OAS, and APEC.[240] The International Affairs Office is also responsible for cooperation with the EU and for other bilateral cooperation efforts on specific projects.[241] Finally, it coordinates with a number of federal agencies with respect to international and education issues.[242] Although it is a relatively small office of six individuals, it monitors developments around the world.[243] Each staff member has responsibility for monitoring a particular section of the world and/or a particular international initiative related to higher education.[244]

In addition to its International Affairs Office, the U.S. Department of Education includes an Advanced Training and Research Group which is responsible for certain international initiatives,[245] and the International Studies Group, which is responsible for other international initiatives.[246] The two groups are jointly responsible for administering another group of pro-

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238. *Initiatives: International Affairs Office*, U.S. DEP'T OF EDUC., http://www2.ed.gov/about/inits/ed/internationaled/index.html (last updated June 1, 2011).

239. *International Activities*, U.S. DEP'T OF EDUC., http://www2.ed.gov/about/inits/ed/internationaled/activities.html (last updated May 4, 2011).

240. *See id*; *About USNEI, supra* note 220; *International Education Partners*, U.S. DEP'T OF EDUC, *http://www2.ed.gov/about/inits/ed/internationaled/partners.htm* (last updated May 4, 2011).

241. *International Education Partners, supra* note 240.

242. *See* U.S. DEP'T OF EDUC., *Initiatives: Interagency Cooperation*, http://www2.ed.gov/about/inits/ed/internationaled/interagency.html (last updated May 4, 2011).

243. *See, e.g.*, *IAO Staff and Contact Information*, U.S. DEP'T OF EDUC., http://www2.ed.gov/about/inits/ed/internationaled/contacts.html (last updated Sept. 27, 2010).

244. *See, e.g.*, *id.*; *see also* Telephone Conference with Maureen McLaughlin, Director, International Affairs Office (Dec. 10, 2010).

245. *OPE Functional Statements International and Foreign Language Education Programs*, U.S. DEP'T OF EDUC., http://www2.ed.gov/about/offices/list/om/fs_po/ope/langeducation.html (last updated Oct. 21, 2010). Currently, this group is responsible for the following programs or initiatives: Foreign Language and Area Studies Fellowships; International Research and Studies; Language Resource Centers; American Overseas Research Centers; Fulbright-Hays Doctoral Dissertation Research Abroad; and Fulbright-Hays Faculty Research Abroad. *Id.*

246. *Id.* It is responsible for the following programs or initiatives: Centers for International Business Education; Business and International Education; Undergraduate International Studies and Foreign Language; Institute for International Public Policy; Fulbright-Hays Group Projects Abroad; Fulbright-Hays Seminars Abroad/Special Bilateral; and Technological Innovation and Cooperation for Foreign Information Access. *Id.*

grams related to international higher education.[247] Another Department of Education webpage includes links to the various international programs it administers[248] whereas yet another webpage presents this information organized by topic rather than program.[249] There are additional Department of Education offices that are involved with international initiatives. For example, the Department of Education's Office of Planning, Evaluation and Policy Development (OPEPD) is responsible for the Asia Pacific Network for Education Web Portal and for the APEC Knowledge Bank Website.[250] The current Secretary of Education clearly sees international education as offering a "win-win" opportunity for the U.S.[251]

Another important initiative of the U.S. Department of Education is its National Center for Education Statistics (NCES), which includes an International Activities Program that monitors how U.S. education compares with education in other countries.[252] Although much of the NCES's data focuses on primary education, it also publishes higher education data and information.[253] NCES also has a webpage with links to other sources of information

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247. *Id.* The two groups are jointly responsible for the "administration of the international programs funded through Title VII, HEA including, but not limited to: EC-US Atlantis[;] North American Mobility[;] US-Brazil[; and] US-Russia." *Id.*

248. *See International Education Programs Service – Home Page*, U.S. DEP'T OF EDUC., http://www2.ed.gov/about/offices/list/ope/iegps/index.html (last updated May 19, 2011).

249. *International Programs Directory – By Topic*, U.S. DEP'T OF EDUC., http://www2.ed.gov/about/inits/ed/internationaled/programs-topics.html (last updated Aug. 16, 2010).

250. *International Programs Directory – By Office*, U.S. DEP'T OF EDUC., http://www2.ed.gov/about/inits/ed/internationaled/programs-offices.html (last updated Aug. 16, 2010). For general information on the structure of the Department, see *ED Organization Chart*, U.S. DEP'T OF EDUC., http://www2.ed.gov/about/offices/or/index.html (June 14, 2010).

251. *See, e.g.*, Arne Duncan, *Back to School: Enhancing U.S. Education and Competitiveness*, FOREIGN AFF. (Nov.-Dec. 2010), http://www.foreignaffairs.com/articles/66776/arne-duncan/back-to-school ("At the same time, international competition has increased international collaboration. In the new knowledge economy, education is a public good unconstrained by national boundaries. The U.S. economy, for example, benefits enormously from the inflow of foreign products and well-educated immigrants." "Americans must realize that expanding educational attainment everywhere is the best way to grow the pie for all."); *The Win-Win Game. Secretary Duncan's Remarks to the Council on Foreign Relations,* NEW YORK CITY (Oct. 19, 2010), http://www.ed.gov/news/speeches/education-and-international-competition-win-win-game-secretary-duncans-remarks-council ("The virtuous cycle, not the vicious cycle, is the pathway to prosperity.").

252. *International Activities Program*, NAT'L CENTER FOR EDUC. STAT., http://nces.ed.gov/surveys/international/ (last visited Feb. 15, 2011).

253. *See, e.g.*, DAVID C. MILLER ET AL., COMPARATIVE INDICATORS OF EDUCATION IN THE UNITED STATES AND OTHER G-8 COUNTRIES: 2009, (2009) at 12-13 (includes higher education comparative charts), *available at* http://nces.ed.gov/pubs2009/2009039.pdf; *see also Surveys and Programs: International Activities Program - IAP*, NAT'L CENTER FOR

and data concerning international education, including both U.S. and non-U.S. sources and governmental and non-governmental sources.[254]

The Department of Education is not the only U.S. governmental entity involved in global higher education issues. The U.S. Department of Homeland Security administers the Student and Exchange Visitor Program (SEVP), which helps monitor the nonimmigrant student and exchange visitor (F, M, & J visa categories) process.[255] The Department of Homeland Security is not the only federal agency, other than the Department of Education, that is involved in international higher education issues. The Department of Education's International Affairs Office is responsible for interagency cooperation with the other federal agencies and departments that are involved in issues related to education.[256] According to its webpage, this Interagency Working Group currently is comprised of representatives from ***more than twenty-five*** federal departments and agencies.[257]

Thus, as this brief summary has shown, the U.S. government is heavily involved in issues related to global higher education mobility, and considers it important to monitor the international initiatives discussed in this

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EDUC. STAT., http://nces.ed.gov/surveys/SurveyGroups.asp?Group=6 (last visited June 13, 2011).

254. *International Activities Program – Other Sources for International Education Information and Data*, NAT'L CENTER FOR EDUC. STAT., http://nces.ed.gov/surveys/international/other-sources.asp (last visited Feb. 15, 2011).

255. *See International Student and Exchange Visitor Program (SEVP) – About Us*, U.S. DEP'T OF HOMELAND SECURITY, http://www.ice.gov/sevis/index.htm (last visited June 13, 2011).

256. *International Student and Exchange Visitor Program (SEVP) – About Us*, U.S. DEP'T OF HOMELAND SECURITY, http://www.ice.gov/sevis/index.htm (last visited June 13, 2011).

257. *Interagency Cooperation – International Affairs Office*, U.S DEP'T OF EDUC., http://www2.ed.gov/about/inits/ed/internationaled/interagency.html (last updated May 4, 2011).

258. *See About Us*, U.S. INTERAGENCY WORKING GROUP, http://www.iawg.gov/about/ (last visited June 13, 2011). The mission of the Interagency Working Group is to:

> establish a clearinghouse to improve data collection and analysis of international exchanges and training; promote greater understanding of and cooperation on common issues and challenges faced in conducting international exchanges and training programs; identify administrative and programmatic duplication and overlap of activities by the various United States Government agencies involved in government-sponsored international exchanges and training programs; develop a coordinated strategy for all government-sponsored international exchanges and training programs; develop recommendations on performance measures for all United States Government-sponsored international exchanges and training programs.

*See id.* For an example of the type of information the Interagency Working Group provides, *see Information Resources for Students*, U.S. INTERAGENCY WORKING GROUP, http://www.iawg.gov/resources/student_info/ (last visited Feb. 15, 2011).

Article. While one might examine the activities of other U.S. higher education stakeholders, U.S. government activities can serve as a proxy for evaluating the level of U.S. interest in international higher education initiatives. As this section has shown, there is great interest in the international initiatives discussed in this section of the Article.

## CONCLUSION

It is well-known that there has been a dramatic increase in international cross-border mobility among higher education students. What is perhaps less well-known is that this phenomenon has been accompanied by a dramatic increase in the number of international initiatives that address higher education issues. While it can be difficult to ascertain cause and effect and whether there is a correlation between increased mobility and the increased number of initiatives, it is clear that the phenomenon and these initiatives can be mutually reinforcing. As the WTO's 2010 report demonstrates, the increasing amount of international trade in education services fosters more interest in developing international initiatives that promote such mobility. Many of the initiatives discussed in this Article in turn facilitate or encourage this global mobility. Thus, one of the "take-away" points of this Article should be an appreciation of the depth and breadth of international higher education initiatives and their possible impact on higher education mobility.

The other important point that readers should take away from this Article is the realization that the U.S. is a party to hard law and soft law initiatives of which the reader may have been unaware and that many of these initiatives are likely to influence the shape of U.S. higher education.

For both of these reasons, it is important for U.S. stakeholders and those interested in U.S. higher education to be aware of these developments and to participate in the ongoing dialogues and debates about the shape they should take.