Transnational Legal Practice 2009

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INTERNATIONAL LEGAL DEVELOPMENTS IN REVIEW: 2009

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Transnational Legal Practice 2009

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I. Introduction

The economic downturn exerted enormous influence on lawyers and law firms from late 2008 throughout 2009, both in their domestic and transnational activities. Among the global firms based in the United States, unprecedented layoffs became the norm. According to the National Law Journal:

Attorneys in the international offices of the nation's top law firms weren't spared a pummeling by a recession that hit global proportions in 2009. A big piece of the four percent decline in the total number of attorneys at large law firms came from losses in international offices. . . . Law firms with significant foreign practices saw their numbers in those offices decline—often sharply—as they struggled to adjust to plummeting demand from clients.1

The economy also severely affected firms based outside the United States.2 Despite these challenges, cross-border legal services remain important.3 Indeed, according to

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3. See Recent Trends in U.S. Services Trade, USITC Pub. 4084, at 6-1 (July 2009), available at http://www.usitc.gov/publications/332/pub4084.pdf [hereinafter 2009 Recent Trends]. The 2009 Recent Trends report noted that legal services are among the professional service sectors that have experienced strong growth and that have helped the U.S. trade balance. It described U.S. legal services as “very competitive in the global market,” noting that they “accounted for fifty-four percent of global revenue in 2007 and comprised seventy-five of the top 100 global firms ranked by revenue.”
some, they provide a buffer against the financial constraints of the downturn.⁴

Our report for 2009 addresses a number of important transnational legal practice developments. Perhaps the most closely followed changes in 2009—both inside and outside of the United States—were the developments related to the 2007 U.K. Legal Services Act. The Legal Services Act promises to affect not only U.K. lawyers and law firms but also U.S.-based global firms that often are their primary competitors. In particular, U.S.-based firms with offices in the U.K. (often staffed with U.K.-licensed solicitors, among others) must consider how the new U.K. regulations will impact their work. France, Canada, Australia, Scotland, and other jurisdictions also have initiated the process of reconsidering lawyer regulation. As the rules of the game are rewritten for U.S. competitors, the ability of U.S.-based firms and U.S.-licensed lawyers to compete effectively is implicated. Moreover, U.S. regulators are considering how best to respond to these changes and to those posed by globalization and advances in technology. We begin our discussion in Section II by focusing on transnational legal practice developments outside of the United States. Section III addresses transnational legal practice developments within the United States. In Section IV, we turn to trade activities regarding legal services, including the General Agreement on Trade in Services (GATS), bilateral agreements, and regional trade blocs. We conclude with a “watch list” for the coming year. Although our review here is brief and there are topics we have not addressed, we reference additional source material throughout the article.⁵


During 2009, several international bar associations worked to develop various kinds of lawyer codes of conduct or commentary to existing codes. The International Bar Association has been drafting a “commentary” to accompany its IBA General Principles of the Legal Profession (Sept. 2006). The Union Internationale des Avocats is planning an April 2010 conference to work towards development of a global code of lawyer conduct. An International Law Association committee is drafting a code of conduct for lawyers practicing before international tribunals that it hopes to adopt in 2010. See Laurel S. Terry, Handout of Codes of Conduct for International Tribunals and Arbitration for Panel Session on Challenges of Transnational Legal Practice: Advocacy and Ethics at the American Society of International Law 103rd Annual Meeting (Mar. 27, 2009), available at http://www.personal.psu.edu/faculty/l/s/lst3/presentations%20for%20webpage/ASHL_Terry_Codes_International_Tribunals.pdf.

The Council of the Bar and Law Societies of Europe’s (CCBE) 2009 electronic newsletters explain a number of additional important developments, including a study on cross-border legal aid; an EU proposal that would require European lawyers who lobby to register; a proposed EU study on the impact of the EU money laundering directives on the legal profession; FATF developments; CCBE guidance about lawyers’ obligations with respect to electronic communication, metadata, and the Internet; and the EU’s massive E-Justice project, which is developing information and communication technologies (ICT) in the field of justice, including a European portal that should help simplify judicial procedures. See, e.g., CCBE-INFO No. 22 (Council of the
II. Transnational Legal Practice Developments Outside of the United States

A. The U.K. Legal Services Act 2007

The U.K. Legal Services Act (LSA) has been the subject of efforts towards implementation as well as further study and discussion of its mandate. It remains a topic of interest not only in the United Kingdom, but also in the United States and elsewhere. For example, in May 2009, the LSA was a primary focus of a conference organized for the Conference of Chief Justices by the ABA Standing Committee on Professional Discipline, the ABA Center for Professional Responsibility, and the Georgetown Law Center for the Study of the Legal Profession. The overall purpose of the conference was to extend to the Chief Justices conversations about globalization’s influence on the profession, including how the LSA affects activities and actors outside of the United Kingdom. The conference also sought to recognize the reality that, given widespread cross-national practice and the presence of U.S.-based law firms abroad, regulatory changes in other countries—particularly in England (home of the largest overseas offices of U.S. firms, in terms of headcount)—are likely to influence U.S. firms and lawyers.

The LSA has three main components:

- it dramatically reshapes the regulation of legal practice in England and Wales, including creating a new Legal Services Board comprised of a majority of non-lawyers and chaired by a non-lawyer;
- it revamps the complaints system for lawyers; and
- it creates a framework that will enable England and Wales to follow in the wake of Australia by authorizing alternative business structures (ABS) that include multidisciplinary practices and publicly-traded law firms.

The Council of Bars and Law Societies of Europe (CCBE) is the representative organization of more than 700,000 European lawyers through its member bars and law societies from thirty-one full member countries, and ten further observer countries. Id.


9. See, e.g., Carole Silver et al., Between Diffusion and Distinctiveness in Globalization: U.S. Law Firms Go Global, 23 GEO. J. LEGAL ETHICS ___ (forthcoming 2010). For example, an ongoing study of approximately sixty large U.S. law firms by Carole Silver found that these firms support 376 offices overseas, where approximately 8,000 lawyers are working, and three-quarters of these lawyers are working in offices located in Europe. A 2007 study by International Financial Services, London indicates that there are over 100 U.S. law firms with London offices, and that there are a similarly large number of U.K. solicitors and firms in the United States. Legal Services, CITY BUS. SERIES 3 (Int’l Fin. Serv., London, Eng.), Feb. 2007, available at http://www.ifsl.org.uk/upload/CBS_Legal_Services_2007.pdf.

The LSA puts in place a new regulatory regime headed by the Legal Services Board (LSB). The LSA separates the regulatory and representative functions for solicitors and barristers. Representation here refers to the role typically assumed by a professional association working on behalf of the interests of its members. The Solicitors Regulatory Authority (SRA) and Bar Standards Board (BSB) are the “regulatory” arms for solicitors and barristers, and are supervised as “front line regulators” by the LSB, while the Law Society of England and Wales and the Bar Council are the “representational” arms. The LSB began operations in 2009. Its front-line regulators have addressed several issues raised by the LSA, including, for example, developing regulations to authorize non-lawyer managers and employees to own up to one-quarter of the equity ownership interests in a law firm. According to the Chief Executive Offices of the LSB, establishing a framework for implementing the authorization of outside equity ownership by non-lawyers is a high priority. In addition, sole practitioners are now regulated as entities, an important development because it adds a new layer of regulation.

In 2009, the Law Society commissioned two reports that are significantly influencing the discussion surrounding regulation of lawyers in the United Kingdom. The “Smedley Report” recommends that the SRA separately regulate law firms representing sophisticated corporate clients. Smedley also recommends that certain principles might be applied differently to these firms. The “Hunt Report,” issued after Smedley, takes a broader approach and responds to certain of Smedley’s propositions. Where Smedley recommended that a separate division of the SRA should regulate firms providing certain kinds of corporate legal work, Hunt recommended a unified approach as a long-term target.
addition to the Hunt and Smedley reports, the SRA and the LSB issued several important consultations on a wide range of issues related to the LSA.\textsuperscript{20} The U.K. regulatory changes have elicited a direct response from the Council of Bars and Law Societies of Europe (CCBE), among others in Europe. The CCBE opposes outside equity ownership of law firms, a form of ABS referred to above in the description of the LSA’s main components, and criticizes aspects of the proposed conflict of interest and confidentiality rules.\textsuperscript{21} Thus, the negotiation of the U.K. changes with regard to interaction with other EU member countries remains to be worked out, and we anticipate this to be an area of importance in the future.

B. \textbf{Other Legal Profession Reform Initiatives}

Although the U.K. changes have garnered the most attention, several other countries enacted and considered lawyer regulatory reform initiatives during 2009. In France, for example, President Sarkozy appointed the Darrois Commission to do an in-depth study of France’s legal profession.\textsuperscript{22} The Commission’s much anticipated March 2009 report recommends that: 1) French \textit{avocats} be allowed to work in-house, which would allow them to benefit from the 98/5/EC Establishment Directive; 2) \textit{avocats} be able to share fees with notaries under certain circumstances; 3) partnerships between various legal professions in France, including with French notaries, be permitted; and 4) a legal aid fund financed by taxes of lawyers’ practices be established.\textsuperscript{23}

Scotland also considered changes to its lawyer regulatory regime, and in 2008, the government issued a consultation paper addressing structural regulation of the profession, the lawyer discipline-complaints system, and the issue of alternative business structures.\textsuperscript{24} The Law Society of Scotland responded in 2009 by embracing the “modernisation of legal services by allowing for alternative business structures.”\textsuperscript{25} The report urged the Scottish Government to quickly take the necessary steps to amend or repeal legislation that cur-
rently impedes or prevents ABSs; the Legal Services (Scotland) Bill was introduced in September 2009 and was under discussion at the time this article was written.26

Changes in lawyer regulation have been implemented outside of Europe, too. Korea, for example, adopted a foreign legal consultant regulation in anticipation of its market liberalization.27 In addition, a Korean think tank recently suggested allowing non-lawyers to own interests in law firms.28 The discussion of this proposal in Korea is just beginning, and we anticipate it will be taken up in the context of liberalization as foreign and Korean law firms engage more directly.29

C. FOREIGN LAWYER ADMISSION DEVELOPMENTS OUTSIDE OF THE UNITED STATES

Several important international initiatives in 2009 relate to U.S. lawyers seeking admission in other countries. The Federation of Law Societies of Canada’s Task Force on the Canadian Common Law Degree issued its final report, which was the culmination of a two-year consultation process.30 The Task Force recommended that common law Canadian jurisdictions adopt a uniform national requirement for bar admissions and that the National Committee on Accreditation apply this national requirement in assessing the credentials of applicants educated outside Canada. Part of the impetus for the report was the fact that “the number of internationally trained applicants for entry to bar admission programs has greatly increased and the requirement for equivalency has created a need to articulate what law societies regard as the essential features of a lawyer’s academic preparation.”31

Australia, too, has been active on this issue. In July 2009, the Australian Law Admissions Consultative Committee (LACC) issued its “Uniform Principles for Assessing Overseas Qualifications,” which allow foreign-educated applicants to qualify as Australian lawyers provided that certain course and skill requirements are met.32 The exact nature of

31. Id. at 3.

the courses depends on the foreign applicant’s original training. Graduates from certain foreign countries must also take more “make-up” courses.

In England and Wales, the current system for foreign lawyer admission is known as the Qualified Lawyers’ Transfer Test (QLTT). The SRA has decided, in principle, to create a new structure, to be called the Qualified Lawyer Transfer Scheme (QLTS). The QLTS will: 1) ensure competence by assessing all candidates against the same set of standards; 2) allow lawyers to apply from a larger number and wider range of jurisdictions than at present; 3) substitute new practical exercises to objectively assess applicants’ practice experience in the law of England and Wales in place of the current experience requirement; and 4) introduce a separate English language test for international applicants, which must be passed before an applicant is eligible to take the QLTS assessments. The SRA will likely submit QLTS regulations implementing these changes to the LSB in 2010.

These three initiatives are significant to any U.S. lawyers seeking to qualify in these jurisdictions. Additionally, they provide a basis for comparison as U.S. regulators consider similar foreign lawyer admission issues.

III. U.S. Transnational Legal Practice Developments

A. State Implementation of Limited Admission Multijurisdictional Practice Rules

Several developments last year relate to limited licensing for foreign-educated law graduates and foreign-licensed lawyers, including state implementation of the ABA’s foreign lawyer multijurisdictional practice (MJP) recommendations. The ABA has urged all states to adopt rules permitting foreign lawyers to practice as foreign legal consultants (FLCs) without taking a U.S. qualification examination (ABA MJP Recommendation #8). It also has urged adoption of a Model Rule for Temporary Practice by Foreign Lawyers that would allow a foreign lawyer to engage in temporary practice on terms similar to the MJP rules for domestic lawyers (ABA MJP Recommendation #9). Virginia and Iowa adopted new FLC rules in 2009, which brings the total to thirty-one U.S. jurisdictions with FLC rules. Also in 2009, Virginia authorized temporary practice by foreign lawyers through

its new version of ABA Model Rule of Professional Conduct 5.5. 39 Although the ABA does not currently have a policy regarding foreign in-house counsel, Connecticut and Virginia both adopted rules (effective in 2009) permitting foreign corporate counsel registration, bringing the total number of states with such a provision to six. 40

As cross-border legal practice increases, regulators worry about foreign lawyer accountability and the need for lawyer discipline cooperation. 41 Responding to this concern, during 2009, the Conference of Chief Justices (CCJ) adopted resolutions setting forth lawyer discipline cooperation protocols with both the Law Council of Australia and the Council of Bars and Law Societies of Europe (CCBE). 42

B. Full Admission for Foreign Educated Applicants

In addition to the limited licenses described above, foreign law graduates and foreign lawyers often seek full admission in the United States. At the ABA Section of International Law Spring Meeting in April 2009, representatives of regulatory bodies and the bar in California, the District of Columbia, and New York discussed their jurisdictions’ regulatory and administrative approaches to foreign lawyer and law graduate admission. 43 The topic of full admission also was a principal focus of a Special Committee on International Issues of the Section of Legal Education and Admissions to the Bar that met over the rules of the Supreme Court of Virginia Part 1A, Rule 1A.7, Certification of Foreign Legal Consultants, available at http://www.abanet.org/cpr/mjp/flc_va.pdf; see generally Laurel S. Terry, Summary of State Action on ABA MJP Recommendations 8 & 9 (Sept. 26, 2009), http://www.abanet.org/cpr/mjp/8_and_9_status_chart.pdf.


41. See 2008 Year in Review, supra note 10, at 954-56.


43. ABA Section of International Law, Multiple Bar Admissions: Getting Qualified Outside the USA (Washington, D.C., Spring Meeting 2009) (includes materials from California, Washington D.C., and New York bar examination representatives) (on file with author). See also National Conference of Bar Examiners, Plenary Meeting (Baltimore, Md., April 2009) (panelists include speakers from Australia and Ireland and the Peking University School of Transnational Law and a session on Trends in International Practice) (on file with author).
course of 2009.\textsuperscript{44} The Committee issued a report regarding this and other issues in July 2009. In response, the Section Council created an international committee, which is considering development of a model rule on bar eligibility for foreign law graduates, among other things. The issue of recognition of foreign educational credentials and licensing is a fundamental issue underlying international agreements.\textsuperscript{45} At the same time, in the United States, certain state regulators and members of the Section of Legal Education and Admissions to the Bar have expressed concern about the effect of such recognition on domestic admission requirements.

Several 2009 developments raise interesting issues for lawyer admission rules that traditionally have required graduation from a U.S.-based ABA-accredited law schools. First, Massachusetts authorized a graduate of the online Concord Law School (which is not accredited by the ABA Section of Legal Education and Admissions to the Bar) to sit for its bar examination.\textsuperscript{46} Second, the ABA Section of Legal Education and Admissions to the Bar is anticipating in the near future an application for accreditation by the Peking University School of Transnational Law.\textsuperscript{47}

C. ABA COMMISSION ON ETHICS 20/20

In August 2009, incoming ABA President Carolyn B. Lamm appointed a new commission to study the impact of globalization and technology on legal practice and regulation.\textsuperscript{48} The Commission’s work is guided by three principles: “protecting the public, preserving core professional values of the American legal profession, and maintaining a strong, independent, and self-regulated profession.”\textsuperscript{49}

President Lamm asked the Commission to review the ABA Model Rules of Professional Conduct and the U.S. system of lawyer regulation. In November 2009, the Commission issued for comment its Preliminary Issues Outline, setting forth initial subjects for its consideration. The Commission sought and continues to welcome comments regarding that document and its work generally. The Ethics 20/20 Commission held its first public hearing in February 2010 and will be meeting regularly during 2010.\textsuperscript{50}


\textsuperscript{45} International Committee Report, supra note 44, at 12-14.

\textsuperscript{46} See Thomas Grillo, Web Degree No Bar for this Lawyer, BOSTON HERALD, June 24, 2009.

\textsuperscript{47} See, e.g., Stephen T. Yandle, Peking University, School of Transnational Law, Remarks at the Inaugural Symposium of the Joseph G. Miller and William C. Becker Institute for Professional Responsibility, University of Akron School of Law (Oct. 9, 2009); see also Bill Henderson, Coming Soon . . . to China: A New ABA-Accredited Law School, Peking University School of Transnational Law STL Media Kit (Nov. 28, 2008), http://stl.xbpu.edu.cn/en/article.asp?articleid=107.


\textsuperscript{49} Id.

\textsuperscript{50} See ABA Commission on Ethics 20/20, Calendar, http://www.abanet.org/ethics2020/ (last visited Feb. 8, 2010).
IV. Trade Negotiations Affecting Legal Services

During 2009, most of the U.S. activity regarding trade in legal services occurred along regional and bilateral lines. But there were some developments worth noting with respect to the multilateral General Agreement on Trade in Services (GATS).

A. GATS Negotiations

The GATS is an annex to the Agreement that created the World Trade Organization (WTO) and applies to cross-border services, including legal services. All 153 WTO Members are bound by certain provisions of the GATS, but other GATS provisions apply only if a country lists a particular service sector, such as legal services, on a document called its Schedule of Specific Commitments (Schedule). A country’s legal services commitments are listed on its GATS Schedule according to four different “modes of supply” or methods of delivering legal services.

The GATS includes two articles requiring future action by WTO Members. Article XIX of the GATS requires WTO Members, within five years of the GATS’ 1995 effective date, to negotiate to further liberalize trade in services. In the legal services context, this is generally referred to as GATS Track #1. GATS Article VI(4) requires WTO Members to develop “any necessary disciplines” to ensure that domestic regulation measures do not create unnecessary barriers to trade. In the legal services context, this second obligation is generally referred to as GATS Track #2.

1. GATS Track #1

Despite deadlines with regard to GATS Track #1, little progress has been made due in part, no doubt, to the problems in global financial markets and the credit and liquidity crises. WTO Members held their Seventh Ministerial Conference in Geneva the week of November 30, 2009. Prior to its commencement, the Chair announced that the upcoming Ministerial was “not intended as a negotiating meeting.”

52. See Laurel S. Terry, From GATS to APEC: The Impact of Trade Agreements on Legal Services, 43 AKRON L. REV. ___ (forthcoming 2010) [hereinafter GATS to APEC].
53. See id. at 52; GATS, supra note 51, art. I(2).
54. GATS, supra note 51, art. XIX.
55. See GATS to APEC, supra note 52.
56. Id.
57. GATS, supra note 51, art. VI(4).
was “The WTO, the Multilateral Trading System, and the Current Global Economic Environment.”

As we write, the outcome of the GATS Track #1 negotiations remains uncertain. Even if the Doha “progressive liberalization” negotiations collapse, however, the United States and other WTO Members remain bound by their prior commitments and obligations.

2. **GATS Track #2**

The WTO’s Working Party on Domestic Regulation (WPDR) currently is responsible for developing any disciplines (i.e., regulations) required by GATS Article VI(4). The most significant 2009 Track #2 development was the WPDR Chair’s April 2009 circulation of a second revised set of draft disciplines, although in substance this document was substantially similar to the January 2008 draft disciplines. Despite WTO Members’ repeated statements about their commitment to developing disciplines, the WPDR’s 2009 Annual Report reveals difficulty in reaching consensus. The Report explains that “large gaps in ambition for the disciplines remained, and progress of work was linked to progress on the market access negotiations. Several delegations were open to the idea of a reality check on the disciplines as a complementary element to technical work.”

The current U.S. position on the GATS disciplines issue appears to be the same as it was previously. The United States has indicated that it remains cautiously supportive of these endeavors.
B. OTHER U.S. FREE TRADE AGREEMENTS

Although U.S. and global interest shifted from the GATS to bilateral and regional agreements during 2007 and 2008, there was little U.S. bilateral trade activity during 2009. U.S. free trade agreements with Oman took effect in January 2009, and with Peru in February 2009, but three other U.S. free trade agreements (with Colombia, Panama, and Korea), while signed, still await Congressional approval. The little U.S. movement with respect to bilateral trade agreements differs from what occurred in other countries. While the U.S.-Korea FTA was awaiting approval, Korea signed an FTA with the EU and with India, and India signed an additional FTA with the ASEAN countries.

There is much interest within the U.S. legal community in opening the Indian legal services market. This was addressed during the ABA briefing trip to India in January 2009, organized by the ABA Section of International Law’s International Legal Exchange (ILEX). Although ABA representatives expected there would be follow-up discussions regarding transnational legal practice issues, little has occurred in the intervening months. A recent article on the Indian legal market offers insight into the absence of progress.


72. See EU, South Korea Sign Free Trade Accord, 13 BRIDGES WKLY TRADE NEWS DIGEST 36 (Oct. 21, 2009); India Signs Trade Deals with South Korea, ASEAN, 13 BRIDGES WKLY TRADE NEWS DIGEST 30 (Sept. 9, 2009).


74. See ABA Section of International Law, ILEX Briefing Trip to India, (Jan. 4-10, 2009), http://www.abanet.org/intlaw/intlpro/trips/india.html.

75. Id.

There were, however, some process developments in 2009 that potentially are quite important. For example, in July 2009, the Obama Administration solicited comments on whether, in the future, there should be a standardized template for bilateral investment treaties (BITs). The Administration also announced its plans to re-charter the statutorily-required private sector advisory groups known as ITAC to prohibit participation by registered lobbyists. This proposal has been controversial.

C. The APEC Legal Services Initiative

Contrary to the paucity of trade activity in 2009 regarding the GATS or U.S. bilateral trade agreements, important regional initiatives occurred. The Asia-Pacific Economic Cooperation (APEC) is one example. APEC is comprised of twenty-one country members, including the United States, that represent approximately forty percent of the world’s population, fifty-four percent of world GDP, and forty-three percent of world trade. In 2008, APEC agreed to fund a legal services initiative, designed to “facilitate the provision of services in foreign and international law,” including the “rights for foreign lawyers to work in association with host economy lawyers.” Although APEC is not a treaty organization and operates by consensus, developments made pursuant to the Legal Services Initiative may be influential because of the identity of its members.

In furtherance of its legal services initiative, APEC circulated a questionnaire to its members to learn about regulation of foreign lawyers. Responses were summarized and discussed, among other issues, at a July 2009 “capacity building workshop” in Singapore. The questionnaire has been used to develop a report on domestic regulatory approaches, including contact information for the appropriate regulatory authorities in each jurisdiction and information about whether a jurisdiction: 1) has a rule permitting tempo-
rary practice; 2) provides for limited licensing of foreign lawyers; 3) allows foreign lawyers to seek full licenses to practice the law of the jurisdiction; and 4) allows foreign lawyers to enter into commercial associations with local lawyers or local firms. While the survey generated responses from many APEC jurisdictions, not all responses were complete, and fewer than half of U.S. jurisdictions responded at all. In light of the potential usefulness of this sort of aggregation of information, the ABA Task Force on International Trade in Legal Services is continuing its efforts to encourage U.S. states to respond. The United States will be the APEC “Host Economy” in 2011; this may lead to APEC becoming the subject of increased focus by the U.S. government in the coming years.

V. Conclusion

Regulation of transnational legal practice continues to evolve nationally, regionally, and through trade agreements. We anticipate that increased attention will be focused on the relationship of regulation and transnational legal practice, and that as regulators in one jurisdiction revisit national approaches to regulation, those in other jurisdictions will respond directly or indirectly through their own considerations. We look forward to the resulting dialogue in the coming years.

87. The terms “fly-in, fly-out” and “FIFO” are sometimes used to refer to temporary practice by a lawyer in a foreign jurisdiction in which the lawyer is not admitted. See Legal Services Initiative–Questionnaire, supra note 84.

88. See APEC Final Inventory, supra note 82, at 5, 9-13.
