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A Proposal to Prevent Offshoring: An Analysis of the Latest Anti-Offshoring Proposals

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A PROPOSAL TO PREVENT OFFSHORING: AN ANALYSIS OF THE LATEST ANTI-OFFSHORING PROPOSALS

*James Emilcar**

I. INTRODUCTION

Many companies are increasingly becoming aware of their ability to reduce costs significantly by offshoring personnel.[1] Indeed, a concern over the issue of offshoring has swept the country.[2] Many Americans are concerned that this business practice results in American job-loss.[3] Offshoring—that is, moving jobs to a lower wage location—is a common effect of globalization.[4] Globalization is a process by which companies of different nations integrate into the international economy.[5] This process is driven by international trade and investment and fueled by innovative technological developments.[6] The concept of globalization provokes much debate and controversy for the American populace.[7] For some Americans, globalization is a beneficial and inevitable development. For others, it represents the cause of many domestic economic issues.

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[1] Devashish Mitra & Priya Ranjan, *Offshoring And Unemployment*, NAT'L BUREAU OF ECON. RES. 1 (June 2007), http://www.nber.org/papers/w13149.pdf. One such statement was made by an IBM executive who said, "Globalization means a lot of jobs, opening a lot of locations in places we had never dreamt of before, going where there is low- cost labor, low-cost competition, shifting jobs offshore," while Hewlett Packard CEO Carly Fiorna stated in testimony before Congress that "there is no job that is America's God-given right anymore." *Id.*

[2] Roger Bybee, *Will Anger Over Offshoring, Free Trade Deals, Cost Obama Re-election in 2012?*, IN THESE TIMES (Nov. 07, 2011, 5:08 PM), http://www.inthesetimes.com/working/entry/6820/obamas_weak_narrative_on_job_loss_2_could_have_huge_impact_on_labor_20/ ("An October *Wall Street Journal*/NBC News poll reported on by the *Wall Street Journal* showed the remarkably strong and widespread public anxiety—86% overall—over the export of jobs: 'In the recent WSJ/NBC poll, 83 percent of blue-collar workers agreed that outsourcing of manufacturing to foreign countries with lower wages was a reason the U.S. economy was struggling and more people weren't being hired; no other factor was so often cited for current economic ills.' ").

[3] Mitra & Ranjan, *supra* note 1, at 1 ("Recent estimates by Forrester Research of job losses due to offshoring equaling a total of 3.3 million white collar jobs by 2015 . . . .").

[4] "The expansion of offshoring—i.e. the relocation abroad of both material and service tasks, which are part of a larger process of production—is one of the defining characteristics of the current stage of globalization." Christoph Ernst & Diego Sánchez-Ancochea, *Offshoring and employment in the developing world: The case of Costa Rica*, INT'L LAB. OFFICE 1, http://www.ilo.org/public/english/employment/download/wpaper/wp4.pdf.

[5] *See* JAGDISH BHAGWATI, IN DEFENSE OF GLOBALIZATION 3 (2004) ("Economic globalization constitutes integration of national economies into the international economy through trade, direct foreign investment (by corporations and multinationals), short-term capitol flows, international flows of workers and humanity generally and flows of technology . . . .").

[6] *See id.*

[7] *See id.* at 3-4.

Proponents argue that offshoring increases profitability for businesses, and is beneficial for both producer and consumer because it allows companies to lower their production cost, which results in lower prices.[8] However, during the offshoring process, many American workers lose their jobs[9] because, in order to employ this cost-saving strategy and transfer their operations abroad, multinational companies shut down local operations.[10] Americans who worry about the negative effects offshoring has on the U.S. labor market are at odds with those who view offshoring as just the latest expansion of international trade. In essence, the controversy's focal point is whether the benefits and advantages of offshoring outweigh its damaging effects on the economy.[11]

Recently, technological advancements have widened the category of jobs subject to foreign competition.[12] Americans fear that the economy will continually lose jobs, not only in the manufacturing sector, but also in sectors once presumed immune to foreign competition.[13] Moreover, Americans worry that the increasing export of American jobs to foreign countries will harm the United States and its working class.[14] As Americans increasingly become aware of the detrimental effects offshoring may have on the economy, unemployment has become a palpable fear for all. The unemployed constituency has imposed a tremendous amount of pressure on policymakers to resolve this matter.

Concerns regarding the offshoring dilemma cross political and demographic lines, compelling calls for legislation to decelerate or deter offshoring in order to protect American workers from this perceived threat to their livelihood.[15] In response, legislators have intro-

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[8] Kris Maher, *Career Journal: Next on the Outsourcing List—Job Shift to Cheaper Countries Could Threaten More Careers: Analyst, Architects, Attorneys*, WALL ST. J., Mar. 23, 2004, at B1.

[9] Douglas A. Irwin, *Comment* in JAGDISH BHAGWATI & ALAN S. BLINDER, OFFSHORING OF AMERICAN JOBS: WHAT RESPONSE FROM U.S. ECONOMIC POLICY? 71, 72 (Benjamin M. Friedman, ed., 2009) ("[The] [a]djustment to offshoring will be of major magnitude, will last a long time, and will create millions of losers . . . [, and] the transition will be massive and disruptive and nasty . . . [,] historically unprecedented . . .[,] large and potentially disruptive force for the United States[.] [Thus] leading to a massive, lengthy, and painful transition as millions of workers are rudely reallocated by the unforgiving market.").

[10] *See* Leo Hindery, Jr., *The Myths of Offshoring- The Imperative of Manufacturing*, HUFFINGTON POST (Feb. 15, 2011, 10:30 AM), http://www.huffingtonpost.com/leo-hindery-jr/the-myths-of-offshoring-t_b_823334.html.

[11] Alan S. Blinder, *Offshoring: Big Deal, or Business as Usual? in* BHAGWATI & BLINDER, *supra* note 9, at 43 ("[T]he United States has always done a woefully inadequate job of what economist call 'compensating losers.' It has been known since the beginning of trade theory that changes in international trade creates both winners and loser. The basic gains-from-trade 'theorem' is that the gains to the winners exceed the losses to the losers, leaving the nation as a whole ahead.").

[12] *See id.* at 22-23 (arguing that the rapid improvements in information and communications technology will render jobs, even service jobs, vulnerable to offshoring); *see also* Sharon Otterman, *Trade: Outsourcing Jobs*, COUNCIL ON FOREIGN RELATIONS (Mar. 28, 2011), http://www.cfr.org/pakistan/trade-outsourcing-jobs/p7749 ("[The] Boston-based consultancy Forrester estimates that 400,000 service jobs have been lost to offshoring since 2000, with jobs leaving at a rate of 12,000 to 15,000 per month. . . . By 2015, Forrester predicts, roughly 3.3 million service jobs will have moved offshore, including 1.7 million "back office" jobs such as payroll processing and accounting, and 473,000 jobs in the information technology industry.").

[13] Irwin, *supra* note 9, at 73 ("Thirty to forty million American jobs are potentially offshorable and the gross job losses will be huge, leading to a great deal of . . . displacement.").

[14] *See* Jagdish Bhagwati, *Don't Cry for Free Trade, in* BHAGWATI & BLINDER, *supra* note 9, at 8-9 (explaining the effect of the media frenzy surrounding free trade and discussing the various points in American history when free trade was blamed for market failure).

[15] *See* Lael Brainard & Robert E. Litan, THE BROOKINGS INST., Policy Brief No. 132, "OFFSHORING" SERVICE JOBS: BANE AND BOON—AND WHAT TO DO? 1, http://www.brookings.edu/papers/2004/04macroeconomics_brainard.aspxmacroeconomics_brainard.aspx (discussing the various approaches to combating the offshoring

duced many bills aimed at preventing offshoring, such as the Creating American Jobs and Ending Offshoring Act ("S. 3816"); Offshoring Prevention Act ("S. 45"); Offshoring Prevention Act ("H.R. 2280"); and America Recruits Act of 2011 ("S. 1247") (collectively the "Offshoring Bills").

The Offshoring Bills aptly reflect the growing concern of the American populace. The Offshoring Bills attempt to protect American workers and promote American jobs through financial incentives.[16] In short, the Offshoring Bills propose better treatment of U.S. companies that operate domestically in comparison to those that move their operations abroad.[17]

The Offshoring Bills would curb the practice of offshoring by making it unattractive for American companies to offshore American jobs. For example, S. 3816 grants American companies a two-year payroll tax holiday, which reduces the amount of Social Security taxes they would have to pay for local employees who replace workers that were doing similar jobs overseas.[18] S. 45 taxes income of controlled foreign corporations derived from imported property.[19] Lastly, S. 3816 eliminates tax deductions that multinational companies can currently use for business expenses associated with the cost of moving operations overseas.[20] For example, a company would not be able to deduct the cost of moving a manufacturing plant to China as a business expense.

In general, the purpose behind the Offshoring Bills is that the U.S. Tax Code should not actively reward American corporations for creating jobs overseas.[21] In the past, a number of states and the U.S. Congress have proposed similar bills, and this pattern will likely continue in the future.[22]

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dilemma and reasoning that policymakers should refrain from counterproductive approaches, such as anti-offshoring proposals.)

[16] 156 CONG. REC. S8330-01 (daily ed. Dec. 1, 2010) (statement of Sen. Richard Durbin) ("If a company thinks it is in its best interest, profit motive to locate overseas, so be it. Let them make that decision. But we should not encourage it. We should not subsidize it. We should not reward it. The reward should actually go to the business that stay [local,] hiring American workers . . . .").

[17] *See id.*

[18] The Creating American Jobs and Ending Offshoring Act, S. 3816, 111th Cong. §§ 101(e), 201(a) (2010). The current employer share of the social security payroll tax is 5.3% per employee. *Social Security Rate Taxes*, SOCIAL SECURITY ADMINISTRATION, http://www.ssa.gov/oact/progdata/oasdiRates.html (last visited Oct. 18, 2011).

[19] Offshoring Prevention Act, S. 45. 111th Cong. § 2(a) (2011).

[20] The Creating American Jobs and Ending Offshoring Act, S. 3816, 111th Cong. §§ 101(e), 201(a) (2010).

[21] 156 CONG. REC. S8330-01 (daily ed. Dec. 1, 2010) (statement of Sen. Richard Durbin) (stating that the reward in the tax code "should not be in the area where we are creating tax incentives for companies to move jobs overseas"); *Obama Says End Reward for Hiring Overseas*, BOSTON GLOBE, Oct.17, 2010, at 10 ("End tax breaks that reward some U.S. companies with overseas subsidiaries and encourage those businesses to create jobs in other countries, President Obama is telling Congress."). *See also* James E. P. Sisto, *Canada and U.S. Approaches—Outsourcing, Offshoring, Nearshoring, Legal Aspects, Possible Conflicts, Economic Impact and Job Effects*, 31 CAN.-U.S. L.J. 335, 336 (2005) ("The U.S. Tax Code . . . includes foreign tax credits and deferral of taxes until profits are repatriated to the United States. So, as a result of the U.S. Tax Code, indeed, there may be some, not incentive, but benefit, for offshore activity, in that you don't pay the U.S. 30% corporate tax-rate.").

[22] *See* Jennifer L. Dauer, *A Summary of Issues Raised in "Offshoring" Legislation*, 40 PROCUREMENT LAW 10, 13 (2005) ("Offshoring is an area of heightened interest in numerous states as the states seek to protect their citizens from perceived unfair competition and threats to the privacy of personal information."); *see also Anti-Outsourcing Efforts Down But Not Out*, NAT'L FOUND. FOR AM. POLICY (Apr. 2007), http://www.nfap.com/pdf/0407OutsourcingBrief.pdf.

The question presented in this Note is whether the proposals aimed at preventing offshoring will be ineffective and ultimately "protectionist" without creating American jobs. This Note will examine the issues surrounding the offshoring dilemma and provide an analysis of the many obstacles these anti-offshoring bills will likely encounter if enacted. Section II of this Note will provide background information on the offshoring dilemma. Section III will provide a brief outline of the Offshoring Bills. Section IV will analyze the Offshoring Bills' effect on the competitiveness of American-based multinational companies in the global marketplace. Section V focuses on whether the purpose and potential effect of the proposed Bills contravene certain obligations of the United States under various international trade agreements. Section VI provides alternative solutions that may help stimulate the economy apart from these anti-offshoring proposals.

II. BACKGROUND

A. What is Offshoring?

Given the American public's concern regarding the possible negative economic effects engendered by offshoring, it is necessary to understand what offshoring is, in order to determine whether we should welcome it or fear it. Offshoring is an employer's decision to relocate a business operation from one country to another.[23] Sometimes the term "offshoring" is confused with the term "outsourcing," which is a different business practice.[24]

Outsourcing occurs when a company contracts with another company or individual to perform a task that is traditionally done in-house.[25] Although, the outsourced task is not performed within the company, it does not cross international borders. Almost every organization outsources in some way.[26] In contrast, a company offshores when it decides to move jobs out of the country, whether or not the task is outsourced.[27] Thus, when a company

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[23] *See* THOMAS L. FRIEDMAN, THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY 114-115 (2005) ("Offshoring . . . is when a company takes one of its factories that is operating in Canton, Ohio, and moves the whole factory offshore to Canton, China. There, it produces the very same product in the very same way, only with cheaper labor, lower taxes, subsidized energy, and lower health-care costs.").

[24] *See* Blinder, *supra* note 11, at 20 ("Citibank can outsource the back-office functions of its U.S. credit card business to a company in South Dakota or to one in South Korea. In the latter case, the jobs are also offshored; in the former case, they are not."); *see also* NEOIT, ONSHORE VERSUS OFFSHORE OUTSOURCING: SIGNIFICANT DIFFERENCES REQUIRE UNIQUE APPROACHES 3 (2003), http://www.neoadvisory.com/pdfs/Whitepapers/Offhsore_Versus_ Onshore.pdf ("Whereas [outsourcing] is typically assessed on the basis of infrastructure leverage, domain expertise or process knowledge, offshor[ing]. . . is primarily assessed on the cost basis for consistent quality of service, and capacity to leverage global resources.").

[25] Brad L. Peterson, *When and Why Companies Outsource and Offshore,* 1 OUTSOURCING AND OFFSHORING 2007: PROT. BUS. FUNCTIONS (Practicing L. Inst., New York, N.Y.), Sept. 2007, at 15 ("Outsourcing occurs when a company . . . turns over responsibility, in whole or in part, for an internal business function to an outside supplier."); *see also* Friedman, *supra* note 23, at 24 (stating that the term "outsourcing" technically applies anytime a business contracts out work previously done in-house, whether or not that work is performed overseas).

[26] *See id.*

[27] Blinder, *supra* note 11, at 20 ("Thus, Microsoft offshores (but does not outsource) jobs when it moves jobs from its software laboratory in Redmond, Washington, to its laboratory in Cambridge, England. But if Microsoft hires another company to provide software lab services in the United States, those jobs are outsourced but not offshored.").

decides to offshore, it shifts its production of goods or services to an overseas location.[28] Normally, the transport of the business operation is from a high-wage country to a low-wage country.[29]

Offshoring has become a common business practice for American companies seeking to improve operations and lower costs.[30] Many companies throughout the United States are aware of the numerous benefits that derive from the decision to offshore. These include lower wage rates, non-unionized labor, and lower fixed costs.[31] Hence, it is not surprising that many companies decide to offshore, when wage rates in offshore sites are a fraction of what they are in the United States.[32]

Although the predominant reason a company decides to offshore a part of its operation is to increase profits by "improving operations" and "reducing overall cost,"[33] there are also a number of other reasons. For instance, a company may seek the opportunity to gain "access and proximity to large markets,"[34] or access a "large pool of educated low-cost foreign labor."[35]

The offshoring dilemma has sparked a large debate among business owners, politicians, workers, and economists. Corporations may reason that the money saved from low labor-costs benefits consumers and shareholders because it lowers prices and corporate costs.[36] Therefore, offshoring creates a win-win situation for both producers and consumers. Furthermore, it is argued that offshore locations have many unemployed or underemployed people qualified to perform work, making it impractical not to employ them at a lower rate.[37]

In contrast, politicians and displaced workers point to the millions of unemployed American workers, who have been out of work for a significant amount of time, to highlight the negative effects of offshoring.[38] Supporting their viewpoint is the fact that from "2000 to

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[28] *Id.* (defining "offshoring" as when "U.S. firms shift[s] service[s] and manufacturing activities abroad to unaffiliated firms or their own affiliates."); *see also Offshoring—What is Offshoring*? SOURCINGMAG.COM, http://www.sourcingmag.com/content/what_is_offshoring.asp (last visited (Apr. 03, 2011).

[29] Peterson, *supra* note 25, at 19.

[30] *See* Colleen Walsh Schultz, *To Offshore or Not to Offshore: Which Nations Will Win a Disproportionate Share of the Economic Value Generated from the Globalization of White-Collar Jobs?*, 29 HOUS. J. INT'L L. 231, 239 (2006) ("Offshoring generates economic value through three main sources: lower labor costs, improved productivity, and expanded scope of services.").

[31] Peterson, *supra* note 25, at 19.

[32] *Id.*

[33] *See id.* at 15.

[34] OFFICE OF SEN. JOSEPH LIEBERMAN, OFFSHORE OUTSOURCING AND AMERICA'S COMPETITIVE EDGE: LOSING OUT IN THE HIGH TECHNOLOGY R&D AND SERVICES SECTOR 20 (2004), http://lieberman.senate.gov/assets/pdf/off_shoring.pdf (" With a combined population of 2.4 billion China and India are huge potential markets for U.S. products and services. By moving offshore, corporations can gain regulatory approval, perform their market search, and customize their products and services accordingly in a timely manner.").

[35] *Id.* at 3.

[36] Peterson, *supra* note 25, at 7, 22.

[37] *See id.* at 15 ("Due to the surplus of labor and the low cost of living in developing nations, the labor cost savings can be as high as 90%. Total cost of an engineer in China is approximately $15,000 per year, a tenth of the cost in Silicon Valley. Indian programmers receive roughly a third to a tenth the hourly wage of American programmers.").

[38] Adam Mordecai, *Anti-Offshoring Legislation: The New Wave of Protectionism—The Backlash Against Foreign Outsourcing of American Service Jobs*, 5 RICH. J. GLOBAL L. & BUS. 85, 86 (2005).

2005, U.S. multinational companies eliminated as many as 2.1 million jobs, while adding 784,000 abroad."[39]

B. Common Offshoring Locations

A company that decides to offshore their operations procures cost reductions, which make this business practice very attractive. The idea to relocate a number of jobs to low-cost territories is not a novel practice.[40] In the past, many companies relocated manufacturing firms from the North and Midwest to low-cost regions in the South and West.[41] For instance:

> In the 1980s and 1990s back office service functions moved from the high cost metropolitan areas to low-cost places like Tampa and Tulsa, while many lower and moderate skilled manufacturing jobs moved to developing nations. Now, instead of relocating to another state and limiting the offshorable jobs to manufacturing, companies have begun to relocate a multitude of jobs to overseas locations.[42]

Once a company decides to offshore, the next step is the selection of an offshore site. When doing so, companies consider which foreign laws are least burdensome and least costly.[43] Because cost reduction is the predominant purpose, companies take into account factors such as the minimum wage rates and foreign taxes.[44] Furthermore, employment conditions, such as the rules, policies, regulations, and cultural norms of the offshore site, are considered.[45] Thus, if the cost of doing business in the foreign country is low enough to override other unfavorable factors, the company will likely choose to offshore.

Although other countries have made successful entries into the global marketplace, countries such as India, the Philippines, and China have traditionally been the most popular offshoring destinations.[46] Among them, China appears more advanced than other regions at

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[39] David J. Lynch, *Does Tax Code Send U.S. Jobs Offshore?*, USA TODAY, Mar. 20, 2008, http://www.usatoday.com/money/perfi/taxes/2008-03-20-corporate-tax-offshoring_N.htm; *see also* U.S. Dept. of Labor, Bureau of Labor Statistics, *The Employment Situation*, http://www.bls.gov/news.release/pdf/empsit.pdf.

[40] Diana Farrell, *Beyond Offshoring: Assess Your Company's Global Potential*, HARV. BUS. REV., Dec. 2004, at 82.

[41] *See* Mordecai, *supra* note 38, at 87 (briefly tracing the development of service-oriented offshoring).

[42] Farrell, *supra* note 40, at 82. "In the 1990s, companies in a handful of industries, such as consumer electronics, pushed globalization even further by relocating their component production and final assembly to countries with the strongest cost advantages." *Id.* at 84.

[43] Prior to transferring operations overseas, the employer takes into consideration the "impact of foreign and domestic laws on the employees and the company." Kerry R. Weinger & Dominika Korytek, *Offshoring and Outsourcing: A Roadmap for the Employer*, 17 INT'L HUM. RES. J. (SPECIAL ISSUE) 2 (2008).

[44] *See* Peterson, *supra* note 25, at 19 ("Wage rates in popular offshore destinations are often only a fifth or a third of wage rates for comparable skills in high-wage countries. This is the primary driver for offshor[ing].").

[45] *Id.* A company should be aware of the domestic consequences of offshoring, the respective international laws, and foreign institutional law. *See* Weinger & Korytek, *supra* note 43, at 2-3.

[46] *See generally* Weinger & Korytek, *supra* note 43 (discussing the variety of benefits that India, China, and the Philippines offer to companies); *see also* Roger C. Altman, *The Great Crash 2008*, FOREIGN AFF., Jan./Feb. 2009, at 2, 11-12 (highlighting the strength of both India and China despite the recent economic crisis); Pankaj Ghemawat & Thomas Hout, *Tomorrow's Global Giants: Not the Usual Suspects*, 86 HARV. BUS. REV., Nov. 2008, at 80, 80 ("Western companies' interest in emerging markets, especially China and India, is reaching a new level of intensity.").

attracting multinational corporations. In particular, many companies choose China as their offshore site because the Chinese labor laws are more employer-friendly than those in India and the Philippines.[47] For example, China's labor laws are extremely lenient with respect to labor unions and their regulation.[48] In contrast, India has more laws aimed at protecting the employee's interests, rather than the employer's.[49]

C. Which Jobs Are Vulnerable to the Offshoring Dilemma?

Grim news reports exacerbate the public's unrest as Americans learn that an ever-increasing number of domestic jobs are vulnerable to foreign competition.[50] Given the rapid growth in technology and the state of the economy, no one can be sure which jobs are off-shorable. Typically, jobs are potentially offshorable because of the characteristics of the tasks they entail, such as "labor intensive jobs" or "information based jobs that are considered 'non-core' to the business."[51]

Traditionally, labor-intensive jobs, such as manufacturing, were offshorable because labor constitutes a large share of the production cost.[52] However, jobs such as billing and accounting are becoming offshorable because technological advancements are lowering the cost, and increasing the efficiency, of producing information services at a lower-cost site.[53] Aggravating this trend is the development of broadband and wireless technology, which has greatly reduced the costs associated with transporting information over international boundaries.[54]

Furthermore, certain characteristics may make a job more vulnerable to offshoring. This is especially true where the job-related functions are "codifiable."[55] In essence, a job is "codifiable" where the work-related task could be reduced to a set of rules or instructions that

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[47] Weinger & Korytek, *supra* note 43.

[48] *See id.* ("China [is] more lenient with respect to dealing with labor unions . . . [however t]he [only] challenge with China is that it is in a constant transition, . . . the employer might never feel secure as to the status of the laws.").

[49] *Id.* ("India has many labor laws driven to protect the employees and although there is employment at will, the labor unions have great power in India.").

[50] *See, e.g.*, Robert Oak, *Most of the Job Loss is from Offshoring, Not the Recession*, NEWS POST MAGAZINE (Mar. 7, 2010), *available at* http://www.economicpopulist.org/content/most-job-loss-offshoring-not-recession ("Most of the job loss is from off-shoring, not the recession. But Washington acts as if nothing can be done to limit the off-shoring and protect our economy."); *see also* Blinder, *supra* note 11, at 20 (quoting David Letterman in 2006: "President Bush is on an eight day tour of Asia. He's visiting American jobs").

[51] *See* Peterson, *supra* note 25, at 25.

[52] C. ALAN GARNER, OFFSHORING IN THE SERVICE SECTOR: ECONOMIC IMPACT AND POLICY ISSUES 2 (2004), http://www.kansascityfed.com/Publicat/ECONREV/PDF/3Q04garn.pdf (providing an analysis of offshorable jobs).

[53] *Id.* at 17 (defining jobs that collect, manipulate, or organize information such as accounting, billing and payroll, as information based); *see also* Richard B. Freeman, *Comment* in BHAGWATI & BLINDER, *supra* note 11, at 64 (arguing that the transfer of technology to developing countries means that workers in those countries can compete in more work activities with workers in advanced countries and that many office jobs can be done at any locale that is connected to the global information technology communications network).

[54] *See* Brainard & Litan, *supra* note 15, at 1 ("The digitization of information and expanded bandwidth abroad are enabling companies to outsource to low- wage countries . . . .").

[55] *See* GARNER, *supra* note 52, at 17 ("Answering routine customer inquiries can often be reduced to a simple set of instructions.").

a foreign employee can apply without difficulty.[56] These jobs are vulnerable to offshoring because job functions that are reducible to a set of instructions are ministerial and require less discretion.[57]

Nevertheless, some jobs are not offshorable because the work must be performed instantaneously and within the physical proximity of the customer.[58] For instance, economists predict that personal service jobs, such as taxi drivers or brain surgeons, are likely to remain in the United States.[59] Although they are at such opposite ends of the spectrum, both require the simultaneous physical presence of the producer and consumer, thus making them difficult to offshore.

Similarly, doctors, lawyers, and teachers must practice a tremendous amount of judgment in how they handle their daily tasks, making their jobs more difficult to execute from a foreign site.[60] However, various back-office functions such as finance, accounting, human resources, administration, procurement, payroll, legal accounting, benefits management, and information technology have become offshorable.[61] To be sure, this growing trend stems from the technological improvements that continue to expand the scope of business functions by making it easier and more convenient to perform these job functions over international boundaries.[62]

D. The State of the Economy and Legislative Response

The current feeling of economic anxiety in the United States, coupled with the rise of the unemployment rate, has intensified the debate over offshoring and its implications for the future prosperity of American workers. The Bureau of Labor Statistics reports that the unemployment rate in the United States had risen to nearly 9.1% in 2010 from the reported 4.2% in the year 2000.[63] This is largely due to unfavorable economic conditions that have forced a large number of firms to shut down operations and lay off many employees.[64] The offshoring dilemma has become a legitimate concern for both the American public and policy-

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[56] *Id.* "At call centers, for example, employees who make sales calls or conduct telephone surveys can often follow a written script and provide standard answers to frequently asked questions." *Id.* at 18.

[57] *Id.*

[58] *See id.*

[59] *See supra* text accompanying notes 54-56; *see also* Blinder, *supra* note 11, at 23 ("Personal service jobs . . . are the ones that either cannot be delivered electronically (e.g. child care) or that suffer degradation of quality when so delivered (e.g. surgery).").

[60] *See* GARNER, *supra* note 52, at 17. *But see* Freeman, *supra* note 53, at 65 (arguing that although "[d]octors in low-wage countries cannot send hospital services or conduct surgery over the internet, . . . they can deliver those services to patients via health tourism.

[61] *See* GARNER, *supra* note 52, at 18-19 (crediting electronic communication and globalization for future increased offshoring of impersonal services).

[62] *See id.* at 33, n.16 ("For example, improved quality and lower cost for videoconferencing might make it easier to perform less codifiable jobs from abroad. However, jobs that are good candidates for offshoring also may tend to be performed by computers in the future. Advances in voice recognition technology, expert systems, and artificial intelligence may eventually allow computers to handle many customer services jobs and perhaps even routine x-ray screening."); *see also* Farrell, *supra* note 37, at 84 (stating that due to the "plummeting telecommunications costs and the digitization of some paper-based business processes, many service jobs and back-office functions are now being performed remotely.").

[63] *See Bureau of Labor Statistics Data*, BUREARU OF LABOR STATISTICS, http://data.bls.gov/timeseries/lns14000000 (last visited Sept. 19, 2011) [hereinafter DOL].

[64] *See id.*

makers. In an effort to address the issue of offshoring-related job-loss, President Obama's administration has adopted an overt domestic job-creation policy.[65] However, the competitive advantage a company stands to gain by offshoring staff may prove to be a formidable opponent as legislators grapple with the offshoring dilemma.

1. Potential Offshoring Advantages

Businesses and consumers alike have found that offshoring can lead to dramatically lower costs, which can lead to an increase in supply and a corresponding reduction in price. The fact that labor costs in foreign countries are significantly lower than those in the United States is the preeminent incentive to offshore.[66] While the cost of land and other resources may be less abroad, the principal difference between the United States and common offshore locations is the wage rate.[67]

For example, "University of California, Berkeley, Professor Martin Kenney estimates that the total annual costs per call center employee in India is $10,354, compared to $55,598 in the United States."[68] Besides a reduction in labor cost, multinational firms also receive benefits such as lower-cost health insurance and lower pension contributions.[69] Thus, the global benefits for a domestic company to offshore significantly outweigh its local, negative impacts.[70]

In addition to the benefits previously mentioned, some companies decide to offshore because they gain the ability to operate around the clock.[71] For example, some companies develop software twenty-four hours a day, with teams across the globe operating in different time zones.[72] These companies gain a competitive advantage by stepping up production. Thus, a company may decide to offshore because:

> The most popular offshore destinations, [China,] India and the Philippines, are half a world away from the United States. As a result work can be

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[65] BOSTON GLOBE, *supra* note 21 ("There is no reason why our tax code should actively reward them for creating jobs overseas, [President] Obama said in his weekly radio and Internet address yesterday, 'Instead, we should be using our tax dollars to reward companies that create jobs and businesses within our borders.' ").

[66] GARNER, *supra* note 52, at 12; *see also* Farrell, *supra* note 37, at 88 ("The first and most obvious, cost-saving opportunity is in labor. The wage differentials between developed and developing nations are so large that they invariably offset any extra capital investments or management costs required to relocate jobs.").

[67] Farrell, *supra* note 40, at 88.

[68] ROBERT D. ATKINSON, PROGRESSIVE POLICY INSTITUTE, UNDERSTANDING THE OFFSHORING CHALLENGE 8 (May 2004), http://www.dlc.org/documents/Offshoring_0504.pdf ("The typical salary range for computer programmers is $5,000 to $9,000 per year in China and $6,000 to $10,000 in India, compared to $60,000 to $90,000 in the United States.").

[69] *See* GARNER *supra* note 52, at 12.

[70] *See* Freeman, *supra* note 53, at 65 ("Some economists see offshoring as part of trade, whose positive impacts on the economy override any negative impacts on particular groups.").

[71] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, OFFSHORING: U.S. SEMICONDUCTOR AND SOFTWARE INDUSTRIES INCREASINGLY PRODUCE IN CHINA AND INDIA 15 (2006) ("Because of the availability of the internet, teams can work 7 days a week, 24 hours per day to meet customer needs worldwide.").

[72] *See* Victor Godinez, *Sunshine 24/7 As EDS' Work Stops in One time Zone, it Picks Up in Another*, DALLAS MORNING NEWS, Jan. 2, 2007, at 1D (describing how work at Electronic Data Systems Corporation "flows westward across the globe during the day from one EDS to the next, following the sun so that projects can be services almost 24 hours a day with less expensive staff.").

> shipped to the offshore supplier at the end of the day in the United States and be completed by the beginning of the next work day.[73]

Furthermore, due to the lower wages in offshore locations, some companies can afford to overstaff so that they can work around the clock.[74] This is beneficial because the high number of employees may improve the quality of the work. Companies that employ this practice gain an advantage because it allows them to replenish the store shelves with their product at a faster rate than their counterparts. To summarize, firms that offshore gain a cost advantage over domestic companies. This advantage allows them to sell products at a lower price or to maintain a steady price while retaining greater net profits.[75] This freedom in turn allows companies to offer attractive pricing terms in light of their significantly lower production and labor costs.

Nevertheless, even where the foreign cost of doing business is significantly lower than the domestic cost, a large number of obstacles to offshoring remain. For instance, differences in laws, culture, language, policies, regulations, and standards play an enormous role in a company's decision to offshore.[76]

2. Legislative Response

The advantages that accompany offshoring make it particularly difficult for legislators to effectively combat the offshoring dilemma. As a result, during his 2008 campaign, President Obama promised to reduce tax rates for companies that, among other prerequisites, maintained or increased domestic jobs.[77] The many anti-offshoring proposals demonstrate the Democrats' continued attempts to enact these anti-offshoring bills and, consequently, to protect American jobs and minimize the advantages derived from offshoring.

Politicians are aware that the current labor market data intensifies the American public's worries about job security.[78] The fact that the economy is improving at a slower pace than initially predicted[79] increases the amount of pressure on legislators to remedy this issue. While the data on offshoring suggests that it is not the primary reason for the state of the economy,[80] policymakers still worry as to how substantial its future impact will be.[81]

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73 Peterson, *supra* note 25, at 20.

74 OFFICE OF SEN. JOSEPH LIEBERMAN, *supra* note 34 ("Corporations are increasingly aware of the availability of large quantities of well educated, motivated, and much more affordable labor in foreign countries.").

75 *See supra* text accompanying notes 71-74.

76 *See* Peterson, *supra* note 25, at 20; *see also* Farrell, *supra* note 40, at 86.

77 BOSTON GLOBE, *supra* note 21.

78 *See* DOL, *supra* note 63.

79 *See* Jeffry Bartash, *U.S. economy gains 80,000 jobs in October, Unemployment rate falls to 9.0% from 9.1%*, MARKET WATCH (Nov. 7, 2011, 6:53 PM), http://www.marketwatch.com/story/us-economy-gains-80000-jobs-in-october-2011-11-04 ("The economy gained a net 80,000 jobs in October, with the jobless rate falling to 9.0% from 9.1%, the Labor Department said Friday. Economists surveyed by MarketWatch predicted a net gain of 90,000 jobs.").

80 *See* Sharon Otterman, *Trade: Outsourcing Jobs*, COUNCIL ON FOREIGN RELATIONS (Nov. 11, 2011, 2:45 PM), http://www.cfr.org/pakistan/trade-outsourcing-jobs/p7749#p6.

81 "The offshoring of high-skill jobs, especially to low-cost countries like India and China, has received significant attention by America's public and policy makers. It has been frequently highlighted in American media reports, and the U.S. Congress has held a number of hearings on it. The new offshoring phenomenon has arisen in a variety of policy debates, including health care, employment adjustment assistance, education, taxes,

These unanswered questions have generated four groups of policymakers with differing views on how to effectively deal with the problems created by the offshoring dilemma.

The first group views the offshoring dilemma as an opportunity. This group claims that offshoring increases global prosperity and ultimately will be a great benefit for the American economy.[82] Therefore, they believe we should "ignore it and do nothing."[83] Simply put, in their view, anti-offshoring legislation does nothing more than exacerbate an already substandard economy.[84]

Another group takes the position that the government should reject offshoring and protect American workers from losing their jobs to foreign competition.[85] This "protectionist" view opposes the concept of globalization and advocates for laws that discourage offshoring.[86] This group believes that laws regarding the offshoring dilemma should not only discourage the practice, but should also establish penalties or economic sanctions for companies that decide to offshore domestic operations.[87]

A third group of policymakers takes the position that we should "subsidize and hand out."[88] This group believes that policymakers should be concerned with granting tax cuts and regulatory relief to domestic firms. This belief is predicated on the contention that such assistance will enable U.S. businesses to compete with companies in low-wage countries.[89] Thus, their argument is that attempting to prevent offshoring is proposing to stop the inevitable because, as a matter of survival, some corporations have to offshore in order to compete globally for market share. Therefore, a more sound approach would be to design proposals aimed at increasing the competitiveness of American companies.[90]

The final group claims that offshoring is inevitable, and thus the proper response is that America should "adapt and innovate."[91] In essence, their position is that America cannot secede from the global economy. Therefore, the nation has no choice but to draft policies that benefit domestic firms and allow them to be more productive, while helping American workers become more skilled.[92] Specifically, they believe that "[t]he proper response to [offshoring] is to enhance our nation's ability to specialize in innovative, high-value-added work, and

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old-age pensions, and innovation." Ron Hira, *The Offshoring of Innovation*, ECONOMIC POLICY INSTITUTE (Nov. 12, 2011, 1:28 PM), http://www.epi.org/publication/bp226/.

[82] ATKINSON, *supra* note 68, at 3 ("They take the . . . attitude that the market will ensure that all works out for the best. [However,] absent public policy, offshoring will be a net benefit for the U.S. . . . while trade normally boosts global prosperity, it does not always boost a nation's prosperity, particularly if it is subject to significant distortions as currently exist in both services and goods trade.").

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.* ("Such steps are probably doomed to failure for no other reason than because the new information and communications technologies make global production inevitable. Moreover, since America is the beneficiary of considerable insourcing foreign investment that creates good jobs here we should be wary of the risk that protectionism could trigger a destructive trade war.").

[88] *See id.*

[89] *See id.*

[90] *See id.* Such a strategy designed to reduce labor cost differentials through subsidies is simply the opposite of protectionism: "It makes companies marginally more competitive, but it would also lower our standard of living as taxpayers would have to pay higher taxes" to allow these tax cuts. *Id.*

[91] *See id.*

[92] *Id.*

fight more vigorously to end distortions in trade, while boosting aid to workers and communities hurt by global competition."[93]

Most of the proposed anti-offshoring bills are in accord with the reject-and-protect notion. Although, their provisions may not directly reflect this principle, their overriding purpose is to provide some form of protection for American workers. For instance, prior to the Offshoring Bills, federal legislators recommended eliminating federal grants and tax incentive to businesses that decide to offshore.

In 2004, The Domestic Workforce Protection Act eliminated tax benefits for companies that decide to offshore.[94] Additionally, the Defending American Jobs Act of 2004,[95] proposed several changes, including denying federal grants, contracts, loan guarantees, and other types of federal funding to businesses that chose to offshore.[96] This proposal never became law. Most of these anti-offshoring bills are subject to attack on protectionist grounds because they either prevent companies from offshoring or offer incentives to restrict offshoring. The most recent of these proposed solutions are the Offshoring Bills.

The Democratic Policy Committee ("DPC") recognizes that the American workforce is dealing with the "most significant financial challenges since the Great Depression."[97] Its position is that offshoring leads to Americans losing their jobs, which in turn results in an increase in the unemployment rate.[98] The DPC considers offshoring as one of the many factors that have led to the increasing unemployment rate, particularly in the manufacturing sector, where the country has lost a significant amount of jobs during the recession.[99]

III. THE ANTI-OFFSHORING PROPOSALS

In an effort to remedy this situation, democrats have made anti-offshoring bills a top priority.[100] For example, on September 21, 2010, Senator Durbin proposed a Bill that provides tax cuts for companies that create American jobs and provides disincentives for companies that wish to move American jobs overseas. Despite the federal government's obligations under various international agreements that aim to eliminate trade barriers, such as the North

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93 *Id.*

94 S. 2235, 108th Cong. § 4(a) (2004) (disallowing a tax deduction for certain royalty payments made by a corporation to an affiliated entity organized and operated outside the United States, and denying tax benefits for corporations that attempt to avoid U.S. taxation by using tax havens).

95 The Defending American Jobs Act, H.R. 3888, 108th Cong. § 2 (2004). The Bill was introduced by Independent Rep. Bernard Sanders and proposed to impose financial penalties on companies that failed to hire U.S. workers because jobs were being sent offshore. Press Release, Congressman John Conyers, Introducing Anti-Outsourcing Legislation that Would Stop Corporate Welfare for Companies that Export U.S. Jobs Overseas (Mar. 3, 2004), http://www.house.gov/list/press/mi14_conyers/108_3_3_04.shtml.

96 *See* Press Release, Congressman John Conyers, *supra* note 95.

97 DEMOCRATIC POLICY COMMITTEE, http://dpc.senate.gov/dpcdoc.cfm?doc_name[-111-2-151 (last visited Nov. 7, 2011) [hereinafter DPC]. *See also United States Unemployment Rate*, TRADING ECONOMICS (2011), http://www.tradingeconomics.com/united-states/unemployment-rate (providing a bar graph of the unemployment rate over a user-specified period). The unemployment rate in the United States was 9.6 percent in September of 2010. *Id.* From 1948 through 2010, the U.S. unemployment rate averaged 5.7 percent, reaching a historic high of 10.8 percent in November of 1982 and a record low of 2.5 percent in May of 1953. *Id.*

98 *See* DPC, *supra* note 97.

99 *Id.*

100 *See id.*

American Free Trade Agreement ("NAFTA"), discussed in section V of this Note, members of Congress continually propose a number of these anti-offshoring measures, and will likely continue to do so.[101]

The tax laws are used as instruments of public policy as well as fiscal policy, and certain taxpayers are inevitably favored, with others less favored or even disadvantaged. The Offshoring Bills are perfect examples of the use of the tax law. The Offshoring Bills attempt to amend the Internal Revenue Code by creating incentives for domestic companies to hire American workers and keep American jobs in the United States instead of relocating overseas.[102] For example, S. 3816 provides a payroll tax cut for companies that return jobs to the United States from overseas. S. 3816 also ends tax loopholes that encourage offshoring.[103]

S. 45 and H.R. 2280 are arguably the descendants of S. 3816, due to their comparable measures and underlying purpose. Their purpose is to "amend the internal revenue code of 1986 to provide for the taxation of income of controlled foreign corporations attributable to imported property."[104] S. 45 was introduced by Senator Sheldon Whitehouse on January 25, 2011. H.R. 2280 was introduced in the House of Representatives on June 22, 2011 by Representative David Cicilline.

S. 1247, America Recruits Act of 2011 ("S. 1247"), is also similar to the aforementioned bills, but differs in its approach. S. 1247 focuses primarily on improving America's competitiveness by taking a more proactive approach. For example, section four of S. 1247 creates a committee known as the "United States Economic Competitiveness Commission" whose duties, among others, includes an ongoing assessment and reporting of the United States in the global economy "in order to offer recommendations to the government for the improvement of the United States over time."[105]

IV. THE ANTI-OFFSHORING PROPOSALS' EFFECT ON THE GLOBAL MARKETPLACE

The offshoring dilemma has successfully incorporated countries like India into the global market and made them viable participants in multinational production chains.[106] Proponents of offshoring worry that the anti-offshoring bills would provoke retaliation from other nations.[107] This result would be very unfavorable to a U.S business entity that is attracted to

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[101] *See generally*, Offshoring Prevention Act, S. 45. 111th Cong. § 2 (2011); Offshoring Prevention Act, H.R. 2280, § 2 (2011); America Recruits Act of 2011, S. 1247 111th Cong. §§2-10 (2011) ("To develop and recruit new, high-value jobs to the United States, to encourage the repatriation of jobs that have been off-shored to other countries, and for other purposes.").

[102] *See* 156 CONG. REC. S8330-01 (daily ed. Dec. 1, 2010) (statement of Sen. Richard Durbin) ("When a company . . . decides to send jobs overseas, to close down a local production facility, and to ship those jobs and that production facility to another country—China, Mexico, wherever it happens to be, we reward them. We give them tax benefits and tax deductions to help facilitate that decision. Many of us believe that is upside-down.").

[103] *See* S. 3816 § 201.

[104] *See* Offshoring Prevention Act, S. 45. 111th Cong. § 2 (2011); Offshoring Prevention Act, H.R. 2280, § 2 (2011).

[105] *See* America Recruits Act of 2011; S. 1247 111th Cong. § 4(c)(1) (2011).

[106] *See* Emily Parker, *Animal Spirits in India*, WALL ST. J., Jan. 15, 2004, at A14.

[107] Shannon Klinger & Lynn Sykes, *Exporting the Law: A Legal Analysis of State and Federal Outsourcing Legislation*, NAT'L FOUND. FOR AM. POLICY 3 (Apr. 2004), http://www.nfap.com/researchactivities/studies/NFAPStudyExportingLaw_0404.pdf.

the size and potential of a foreign market because it would decrease the business' ability to compete in the global marketplace.[108]

U.S. companies have come to understand that workers in emerging-market countries can do the same work as a local worker, but at a fraction of the local worker's wages. Notably, the National Association of Manufacturers ("NAM") argues that the proposed legislation's tax increases would create additional costs for U.S. companies, making them less competitive in the global marketplace and halt domestic job creation.[109] A competitive business environment places companies under pressure to find new markets and increase revenues; thus, as new technologies reduce the barriers of time and distance, many businesses find that foreign expansion abroad is no longer optional, but rather a necessary long-term strategy. The measures in the Offshoring Bills would serve as a deterrent to a company wishing to migrate abroad, thereby hindering its growth and expansion.[110] If a company does not grow or develop, it places itself at a severe disadvantage in the marketplace.[111]

The reasoning behind NAM's position is that if a good or service is produced at a lower cost in a foreign location, importing the good or service is more advantageous than producing it domestically.[112] Furthermore, another argument put forth by opponents of the Offshoring Bills is that protectionist strategies will not create jobs.[113] Essentially, this argument is predicated upon the theory that using retaliatory tools, such as introducing protectionist measures designed to prevent offshoring, aggravate an already bad economy. For example, "very simply suppose that a hurricane does damage to Florida. If [the governor] were to

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[108] Mordecai, *supra* note 38, at 92 ("To protect American jobs in the immediate future, the United States could erect barriers to foreign trade and discourage offshoring by U.S. companies, thus slowing the pace of competition.").

[109] Letter from Jay Timmons, Exec.Vice President, Nat'l Ass'n of Mfr., to Senators (Sep. 27, 2010), *available at* http://www.nam.org/~/media/BA59F38E5CB94E609A77E2FC88D34A16/S3816_the_Creating_American_Jobs_and_Ending_Offshoring_Act.pdf.

[110] Martin N. Baily & Diana Farrell, *Exploding the Myths about Offshoring*, MCKINSEY GLOBAL INST. 1 (Apr. 2004), http://www.mckinsey.com/mgi/reports/pdfs/exploding_myths/explodingoffshoringmyths.pdf.

[111] *See* Letter from R. Bruce Josten to U.S. Senate (Sep. 23, 2010), *available at* http://www.uschamber.com/issues/letters/2010/letter-urging-senate-oppose-consideration-s-3816 ("S. 3816 would also significantly curtail deferral, reversing longstanding tax policy and subjecting American worldwide companies to immediate double taxation on the earnings of their foreign subsidiaries. Limiting deferral would hinder the global competitiveness of these American companies, impede U.S. economic growth, and ultimately result in the loss of jobs – both at the companies directly impacted and companies in their supply chains.").

[112] Bailey & Farrell, *supra* note 110, at 2 ("The most obvious source of value is the cost savings enjoyed by U.S. companies. For every dollar of corporate spending that moves offshore, U.S. companies save 58 cents. Companies can reinvest the savings in new business opportunities; pay additional earnings out to shareholders, or both. Often, U.S. companies and customers obtain better-quality services from abroad.").

[113] *See* Josten, *supra* note 111 ("S. 3816 would create a payroll tax holiday for employers moving jobs to the United States from overseas in a purported attempt to stimulate job growth. However, the concept of economic growth is not a zero-sum game. Replacing a job that is based in another country with a domestic job does not stimulate economic growth or enhance the competitiveness of American worldwide companies."); Alan Greenspan, Chairman, Fed. Reserve Bd., Remarks at the Boston College Finance Conference 2004 (Mar. 12. 2004), *available at* http://www.federalreserve.gov/boarddocs/speeches/2004/20040312/default.htm (last visited Nov. 29, 2011) ("Time and again though our history, we have discovered that attempting merely to preserve the comfortable features of the present, rather than reaching for new levels of prosperity, is a sure path to stagnation.").

respond to this by shutting off trade with the rest of the United States, if not the world, he would only be increasing Florida's anguish."[114]

To further illustrate the problem with the anti-offshoring approach, consider the following question: What differentiates an employee displaced by technological advancements from a worker displaced by offshoring? The simple answer is nothing. An American worker, who loses his job to offshoring suffers the same consequences as a worker displaced by new technology. Thus, both workers are unemployed because there is a more efficient method of executing their job functions. Both innovative technology and offshoring result in job losses for American workers. As a result, the question that must be posed is: Are policymakers prepared to enact legislation that creates incentives for inventors to refrain from developing new efficient technology? As absurd as this sounds, this will be the effect of the anti-offshoring approach. The anti-offshoring approach attempts to discourage a beneficial business practice because of its short-term effects.

Common sense supports the conclusion that a prohibition against offshoring will tend to mitigate its practice and retain American jobs at a higher level than in a completely free market. However, these anti-offshoring proposals will not significantly advance the best interest of the nation in the long term. In order to prosper, America needs to invite trade with our global economic partners. Foreign companies employ U.S. workers. Foreign governments and individuals buy American products. Foreign production allows U.S. companies to compete in the global marketplace, which in turn allows the U.S. consumer to buy less expensive products. Thus, it is unwise to propose bills that will reduce the competitiveness of American companies in the global marketplace, hinder the progress of the American economy, and remove the United States from its role as the leader among industrialized nations.[115]

V. CONFLICT BETWEEN FEDERAL ANTI-OFFSHORING LEGISLATION AND INTERNATIONAL TRADE AGREEMENTS

Groups who oppose the anti-offshoring proposals argue that legislation banning offshoring may be in direct violation of several international trade agreements.[116] Many countries currently involved in offshoring are members of the World Trade Organization, which establishes rules of trade between nations. Federal legislation interfering with free trade may be in violation of several trade agreements to which the United States is a signatory, including

[114] *See* Bhagwati, supra note 14, at 9. *See also* Pascal Lamy, Director-General, World Trade Organization, Speech at the Lowy Institute for International Policy: The values of the multilateral trading system, (Mar. 2, 2009), *available at* http://www.wto.org/english/news_e/sppl_e/sppl117_e.htm (arguing "[l]et's imagine for a second that the US decides to close its automobile market to imports, let's say Chinese, Japanese and European automobiles, worth US$ 80 billion. It is highly probable that the Chinese, Japanese and Europeans would decide to close their markets to American planes, cranes and chemicals, all this worth US$ 120 billion. . . . The domino effect that such moves could cause would be devastating. This is why isolationism, even "smart" isolationism as some are advocating, is a recipe for global slump. And this is why resisting protectionism and avoiding an aggravation of the current crisis is an imperative today.").

[115] *See* Josten, *supra* note 111; *see also* Lamy, *supra* note 114.

[116] Dauer, *supra* note 22, at 12.

NAFTA,[117] the Uruguay Round Agreements,[118] and Agreement on Government Procurement ("GPA").[119]

Although many of the anti-offshoring proposals do not fit perfectly within the scope of these trade agreements, the potential effect of the Offshoring Bills may be in violation of several existing obligations. The GPA imposes obligations on its signatories to treat foreign suppliers, goods, and services "no less favorable" than domestic suppliers, goods, and services.[120] In addition, the GPA prohibits discrimination against domestic suppliers who might have foreign owners or who provide foreign goods or services.[121]

If any of the Offshoring Bills were to become law, they may run afoul of the GPA in several ways. For example, S. 3816's measure that proposes a payroll tax cut for companies that return jobs to the United States, providing that they replace a foreign worker with a domestic worker, renders employers who offshore ineligible to receive this tax cut. This system grants benefits to employers based on whether or not they migrate abroad. Such legislation may place the United States in violation of existing international trade agreements because it offers a tax break and increases the attractiveness of the United State's business environment, which impliedly discourage the relocation of operations to a foreign territory.[122]

Furthermore, measures in the Offshoring Bills disrupt free trade and clearly discriminate against foreign territories and foreign suppliers. Measures that are designed to decrease the participation of American companies in the international market are protectionist.[123] Although one can argue that having a competitive advantage is normal in a business environment, this advantage is unfair and discriminatory when the government provides it as a means of discouraging a domestic employer from relocating abroad. Therefore, this protectionist measure may contravene the GPA's anti-discrimination provision.

[117] *See* North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993) (codified at 19 U.S.C. § 3301-3473) (providing for the liberalization of trade relations between the U.S., Canada, and Mexico).

[118] *See* Uruguay Round Agreements Act, Pub. L. No. 103-465, §§ 2512-2518 (2007) (codified at 19 U.S.C. § 3501-3624) (providing for the liberalization and expansion of world trade and the development of a framework through which members negotiate international terms of competition); 7 U.S.C. § 903 (2007).

[119] *See* Agreement on Government Procurement, Apr. 15, 1994, *available at* http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm [hereinafter GPA] (stating that the GPA was intended to liberalize state and federal provisions that formerly discriminated against multinational suppliers); General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Sept. 1994, 33 I.L.M 1125 (1994).

[120] GPA, *supra* note 119, art. 3(1) (requiring that parties to the Agreement accord the products, services, and suppliers of any other party to the Agreement treatment no less favorable than they give to their domestic products, services, and suppliers).

[121] *Id.* art. 3(2); *see Overview of the Agreement on Government* Procurement, WORLD TRADE ORGANIZATION (2011), http://www.wto.org/english/tratop_e/gproc_e/gpa_overview_e.htm ("[E]ach Party is required to ensure that its entities do not treat domestic suppliers differently on the basis of a greater or lesser degree of foreign affiliation or ownership as well as to ensure that its entities do not discriminate against domestic suppliers because their good or service is produced in the territory of another Party.").

[122] "With respect to all laws, regulations, procedures and practices regarding government procurement covered by this Agreement, each Party shall provide immediately and unconditionally to the products, services and suppliers of other Parties offering products or services of the Parties, treatment no less favourable than: (a) that accorded to domestic products, services and suppliers; and (b) that accorded to products, services and suppliers of any other Party." GPA, *supra* note 119, art. 3(1).

[123] Protectionism is defined as "[t]he protection of domestic businesses and industries against foreign competition by imposing high tariffs and restricting imports." BLACK'S LAW DICTIONARY (9th ed. 2009).

Conversely, the Offshoring Bills may not be within the purview of the GPA because their provisions have no direct bearing on what the government purchases or the procedures for purchasing goods or services. However, as the collective purpose behind the Offshoring Bills is the production of domestic jobs and the protection of employers who hire American citizens, a domestic employer bidding on a government contract would likely receive preferential treatment. It would defeat the very purpose of the anti-offshoring approach if Congress were to grant local suppliers a tax break as a means of attaining a competitive edge over local suppliers with foreign production sites, but then award a government contract to a company whose product is produced at an offshore site.

VI. ALTERNATIVE RESPONSES TO OFFSHORING

A more effective approach to the offshoring problem would be to address the root issues of stimulating job growth in areas impacted by offshoring. The United States, as it has done in the past, should adopt proposals designed to combat the problems created by those job lost due to offshoring.[124] Policymakers should address the significant challenges faced by displaced workers by increasing the support for retraining programs.[125] For instance, policymakers should seek to improve adjustment assistance programs. In particular, expanding the requisite criteria of adjustment assistance programs to make the programs available to a larger class of unemployed workers, many of who are currently unqualified due to these requirements. The Trade Adjustment Assistance law limits benefits to workers who are age fifty or older and are displaced by trade and offshoring.[126] It also requires that the displaced worker

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[124] *See* Bhagwati, *supra* note 11, at 12 ("The first Adjustment Assistance program in the United States goes back to 1962 during the Kennedy Round negotiations.").

[125] "Training is provided to certified workers who do not have the skills to secure suitable employment in the existing labor market. Training is targeted to a specific occupation and provided to help certified workers secure employment at a skill level similar to or higher than their layoff employment, and sustain that employment at the best wage available. Based on the individual's existing skills and labor market conditions, training will be of the shortest duration necessary to return the individual to employment . . .". *Trade Adjustment Assistance (TAA) and Alternative Trade Adjustment Assistance (ATAA) Services and Benefits*. U.S. DEP'T OF LABOR (Apr. 25, 2011), http://www.doleta.gov/tradeact/benefits.cfm.

[126] *See* Trade Act of 1974, 19 U.S.C. § 2272 (2011); *see also* U.S. DEP'T OF LABOR, TRADE ADJUSTMENT ASSISTANCE PROGRAM: QUESTIONS AND ANSWERS FOR PARTICIPANTS 3 (2011), http://www.doleta.gov/tradeact/pdf/Q_A_Feb_12Reversion_FINAL.pdf.

The group eligibility requirements under the Trade Act of 2002 state in that a group of laid-off workers can be certified for assistance if:

> (2)(A)(i) the sales or production, or both, of such firm have decreased absolutely;
> (ii)(I) imports of articles or services like or directly competitive with articles produced or services supplied by such firm have increased;
> (II) imports of articles like or directly competitive with articles—
> (aa) into which one or more component parts produced by such firm are directly incorporated, or
> (bb) which are produced directly using services supplied by such firm,
> have increased; or
> (III) imports of articles directly incorporating one or more component parts produced outside the United States that are like or directly competitive with imports of articles incorporating one or more component parts produced by such firm have increased; and
> (iii) the increase in imports described in clause (ii) contributed importantly to such workers' separation or threat of separation and to the decline in the sales or production of such firm; or

identify the cause of displacement, which can sometimes be difficult.[127] Assistance is only effective if it is attainable, and limiting the eligible category of workers to a select few renders this assistance program ineffective.

The assistance programs should also be available to workers who are permanently displaced for other reasons, such as improvements in technology and shifts in consumer demand. This would increase the number of eligible individuals, allow these workers to recover from their job loss by receiving the proper assistance, and effectively address the unemployment problem as a whole, not just the offshoring dilemma.[128] In brief, policymakers should focus on improving these programs and others like it so that these programs can be successful in their purpose, as opposed to proposals that discourage offshoring, which have proven to be unsuccessful.[129]

Policymakers need to direct their efforts at improving the American education system so that American workers are able to compete in a new economy, thus providing workers with the necessary skills to adapt to the effects of offshoring.[130] Economists believe there is a correlation between the educational requirements of a job and the degree to which it can be offshored. For example, in 2005, the unemployment rate was 7.6% among those who did not have a high school degree, 4.7% among those with a high school degree, 3.9% among those with some education beyond high school, and 2.3% among those with a bachelor's degree or higher.[131] Therefore, America should increase investment in education and increase support for the retraining programs offered by some community colleges.

In sum, policymakers should avoid proposing protectionist measures, and should instead seek to implement effective assistance to an unemployed constituency and do more to facilitate adjustment assistance programs that train and re-educate U.S. citizens.

> (B)(i)(I) there has been a shift by such workers' firm to a foreign country in the production of articles or the supply of services like or directly competitive with articles which are produced or services which are supplied by such firm; or
>
> (II) such workers' firm has acquired from a foreign country articles or services that are like or directly competitive with articles which are produced or services which are supplied by such firm; and
>
> (ii) the shift described in clause (i)(I) or the acquisition of articles or services described in clause (i)(II) contributed importantly to such workers' separation or threat of separation.

19 U.S.C. § 2272(a) (2011).

[127] *See* Barnard & Litan, *supra* note 15, at 8.

[128] Blinder, *supra* note 11, at 43 (stating that the Trade Adjustment Assistance and Reform Act of 2002 created a small wage-loss insurance program for workers above a certain age who lose their jobs to import competition or offshoring).

[129] These programs will provide unemployed workers with some stability and ease the transition between jobs. *See id.* at 44 ("The U.S. government must find ways to transform our inadequate social safety net into an effective social trampoline that bounces displaced workers into productive employment-thereby helping the nation return to Lyndon Johnson's original Great Society concept: "a hand up not a handout.").

[130] *See* Barnard & Litan, *supra* note 15, at 6 ("Cultivating a competitive, highly skilled workforce means strengthening the kindergarten through twelfth-grade curriculum, investing in science and engineering higher education, and restoring funding to community colleges and retraining programs.").

[131] *See* U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: LABOR FORCE, EMPLOYMENT, AND EARNINGS 339 (2007), http://www.census.gov/prod/2006pubs/07statab/labor.pdf.

VII. CONCLUSION

A company offshores when it decides to relocate parts of its operations from a high-wage labor market to a low-wage labor market.[132] Companies employ this practice as a means of reducing costs and penetrating the international market.[133] Simply put, this cost saving strategy increases the companies' profit margin. However, this increase in net profits costs thousands of American workers their livelihood.

Moreover, once a company decides to offshore a part of its operations, the company has a multitude of options to choose from when selecting the relocation site.[134] Many of the popular offshore sites frame some of their laws to attract multinational companies, making it even harder not to employ this cost saving strategy.[135] The availability of lower labor costs, resources, and favorable production conditions are particularly attractive to multinational corporations.[136]

To be sure, offshorable jobs involve impersonal job functions. These functions usually require work that necessitates little or no face-to-face customer interaction.[137] However, there is a developing trend of relocating a wide range of information technology enabled services, such as computer programming and software development.[138] In addition, workers whose job functions primarily involve the production and compiling of information are increasingly becoming offshorable. Above all, routine and less skilled jobs are the most vulnerable to offshoring. Nonetheless, the difficulty of "codifying" certain job functions and the need for face-to-face customer interaction guarantees that a large number of high-skilled jobs will remain in the United States.

The Offshoring Bills' inadequate use of federal subsidies and tax incentives to oppose offshoring are subject to attack on a variety of grounds. The fact that so few similar bills have become law is evidence that legislators recognize this limitation.[139] The notion that protecting American jobs will protect the American economy is without merit and "protectionist" measures are not an effective solution to the offshoring dilemma. Protectionist measures will probably cause trade partners to retaliate and impose sanctions that will undermine the competitiveness of American products in world markets. This loss of competitiveness in turn will essentially harm the American economy, rather than benefit it. By using financial

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132 Peterson, *supra* note 25, at 19.

133 Farrell, *supra* note 40, at 82 ("In the past few years, companies have become aware that they can slash costs by offshoring: moving jobs to lower wage locations. [Nevertheless,] this practice is just the tip of the iceberg in terms of how globalization can transform industries, according to research by the McKinsey Global Institute (MGI). The institute's yearlong study suggests that by streamlining their production processes and supply chains globally, rather than just nationally or regionally, companies can lower their costs.").

134 Peterson, *supra* note 25, at 15, 19; Weinger & Korytek, *supra* note 43, at 1.

135 John F. Delaney & Laurie S. Hane, *Outsourcing and Offshoring 2011: Key Developments*, OUTSOURCING 2011: STRUCTURING, NEGOTIATION AND GOVERNANCE, (Practicing L. Inst., New York, N.Y.) Sept. 2011, at 158 ("2010 has seen continued growth in outsourcing to Asia as the global economy recovers and companies look to further reduce costs in the wake of the global recession by offshoring to lower cost jurisdictions. Offshoring to China has grown further in 2010, boosted by the Chinese government's announcement of generous tax incentives to outsourcing service providers in China's most important cities.").

136 *See* Farrell, *supra* note 40, at 88; *see also* Schultz, *supra* note 31, at 239.

137 *See* GARNER, *supra* note 52, at 18.

138 *See id.* at 16.

139 *See supra* notes 96-97.

incentives to curb offshoring, the Offshoring Bills increase the cost of doing business domestically, thus punishing companies who offshore.

Although Americans instinctively want to protect American jobs, should any of the current or future anti-offshoring proposals become law, it will likely lead to a counterproductive result. First, the increase in business expenses will probably result in companies having to adopt alternative cost saving methods in order to absorb the increased cost of doing business. For instance, some companies may layoff workers, a result that contradicts the very purpose of the anti-offshoring approach; namely, the protection and retention of American jobs. Lastly, affected companies may calculate whether it is more beneficial to comply with the measures embedded in the Offshoring Bills or to move their entire operations to a locale where the cost of doing business is significantly cheaper and to import their products into the United States. Thus, the conclusion will also be American job-loss.