

# Anti-Offshoring Legislation and United States Federalism: The Constitutionality of Federal and State Measures Against Global Outsourcing of Professional Services

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*This paper seeks to build upon earlier works analyzing U.S. federal and state legislation that conflict with the United States' obligations under international agreements. Several of these earlier works conclude that such conflicting legislation violates the Constitution on a variety of grounds and is therefore legally invalid. An analysis of the relationship between state laws, federal laws, and international agreements reveals many areas of legal uncertainty and ambiguity. The findings of this paper both validate and undermine the results of these earlier works.*

*This paper is divided into six parts. First, it details the emergence and effect of offshoring of professional services on the U.S. economy. Second, it explores the economic and public policy concerns which surround offshoring. Third, it addresses federal and state government responses to offshoring. Fourth, it examines the constitutional implications of state offshoring restrictions against government contracts and private entities. Fifth, it focuses on federal legislation against offshoring, and potential conflicts with international agreements. Finally, it concludes with an assessment of the effectiveness of trade dispute settlement mechanisms for services.*

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## I. INTRODUCTION

Offshore outsourcing, or “offshoring,” is a business practice that involves shifting the production of goods and services abroad in order to increase efficiency of labor, energy, and other resources of a firm.<sup>1</sup> In recent years, such practice has evolved to include offshoring of relatively high-wage professional services. Offshoring has contributed to overall global economic interdependence and growth. In parallel, nations have entered into international trade agreements that seek to eliminate barriers to providing services across national borders.<sup>2</sup> The resulting changes to local economies and public policy concerns have led to significant opposition to offshoring.<sup>3</sup> The conflicting economic and political agendas arising from such disparate points of view create a legal quagmire for democratic countries such as the United States, as its federal system recognizes the dual sovereignty of both its national and state governments. At the same time that the U.S. government is entering into international trade agreements, state and federal legislators are proposing and enacting laws that conflict with these agreements.<sup>4</sup>

Several earlier works examining this issue have concluded that conflicting state legislation violates the U.S. Constitution on a variety of grounds and is therefore legally invalid.<sup>5</sup> This paper attempts to build upon and question the validity of some of these conclusions.<sup>6</sup> An analysis of the relationship between

1. Amar Gupta, David A. Gantz, Devin Sreecharana & Jeremy Kreyling, *Evolving Relationship Between Law, Offshoring of Professional Services, Intellectual Property, and International Organizations*, 21 INFO. RESOURCES MGMT. J. 103, 103 (2008).

2. Barnali Choudhur, *The Façade of Neutrality: Uncovering Gender Silences in International Trade*, 15 WM. & MARY J. WOMEN & L. 113, 137–38 (2008).

3. Gupta, Gantz, Sreecharana, & Kreyling, *supra* note 1, at 104.

4. SHANNON KLINGER & M. LYNN SYKES, EXPORTING THE LAW: A LEGAL ANALYSIS OF STATE AND FEDERAL OUTSOURCING LEGISLATION 2 (2004), available at [http://www.nfap.com/researchactivities/studies/NFAPStudyExportingLaw\\_0404.pdf](http://www.nfap.com/researchactivities/studies/NFAPStudyExportingLaw_0404.pdf). (describing proposed and enacted legislation at the federal and state level that restrict outsourcing abroad, examining the problems that such laws encounter, and discussing the harmful consequences that will likely result).

5. See, e.g., *id.* at 12 (noting an analysis by the National Foundation for American Policy, which concluded courts will likely find that prohibitions on overseas state contract work are a violation of the Foreign Commerce clause of the U.S. Constitution and that state laws which provide preferential in-state treatment may also violate the Constitution).

6. For a background on these conclusions, see STUART ANDERSON, THE NAT’L FOUND. FOR AMERICAN POLICY, CREEPING PROTECTIONISM: AN ANALYSIS OF STATE AND FEDERAL GLOBAL SOURCING LEGISLATION (2003), available at

state law, federal law, and federal trade agreements<sup>7</sup> reveals areas of legal uncertainty and ambiguity. Part II of this paper details the emergence and effect of offshoring professional services on the U.S. economy. Part III explores the economic and public policy concerns surrounding offshoring. Federal and state government responses to offshoring are addressed in Part IV, while Part V examines the constitutional implications of state offshoring restrictions against government contracts and private entities. Part VI focuses on federal legislation against offshoring and potential conflicts with federal trade agreements. Part VII concludes with an assessment of the effectiveness of trade-dispute settlement mechanisms for services.

## II. OFFSHORING OF PROFESSIONAL SERVICES

Throughout the past half century, U.S.-based businesses have engaged in offshoring across a wide range of industries.<sup>8</sup> Initially, offshoring occurred primarily in the manufacturing industry, as producers sought lower-wage, nonunionized labor and lower fixed costs in Latin America and Asia.<sup>9</sup> The end of World War II also spurred U.S.-based businesses to establish foreign affiliates in Europe, as these businesses were eager to profit from the postwar rapid expansion in economic activity and the formation of the European Economic Community.<sup>10</sup>

The advent of the fiber optic cable in the 1990s, which led to extremely low communication costs, enabled offshoring of some tasks of the service industries.<sup>11</sup> The resulting decreased costs of telephone and internet services worldwide led to the relocation of low-wage telephone service positions.<sup>12</sup> Additionally, the demand for computer programmers in the late nineties to fix the “Y2K problem”

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<http://www.nfap.net/researchactivities/studies/creepingProtect.pdf>; Beverley Earle et al., *A Finger in the Dike? An Examination of the Efficacy of State And Federal Attempts to Use Law to Stem Outsourcing*, 28 NW. J. INT'L L. & Bus. 89 (2007); KLINGER & SYKES, *supra* note 4; James E. Meadows, *The Outsourcing Revolution 2004: Protecting Critical Business Functions Dealing with the Offshore Outsourcing Controversy*, 807 PRACTICING L. INST.: PATS., COPYRIGHTS, TRADEMARKS, AND LITERARY PROP. COURSE HANDBOOK SERIES [PLI/Pat] 413 (Fall 2004); Colleen Walsh Schultz, Comment, *To Offshore or Not to Offshore: Which Nations Will Win A Disproportionate Share of the Economic Value Generated from Globalization of White-Collar Jobs?*, 29 HOUS. J. INT'L L. 231 (2006); Michael A. Zuckerman, Note, *The Offshoring of American Government*, 94 CORNELL L. REV. 165 (2008).

7. With the exception of bilateral investment treaties (which are beyond the scope of this paper), the United States has yet to sign on to international trade treaties. See U.S. Dep't of Commerce, Int'l Trade Admin., Free Trade Agreement, <http://trade.gov/fta/> (last visited Mar. 5, 2009) (listing all United States free trade agreements). The focus of this paper is limited to executive trade agreements that have received Congressional approval. See Curtis A. Bradley, *Unratified Treaties, Domestic Politics, and the U.S. Constitution*, 48 HARV. INT'L L.J. 307, 321–22 (2007) (stating that executive agreements are most commonly used for international trade agreements).

8. See Gupta, Gantz, Sreecharana, & Kreyling, *supra* note 1, at 103–04 (discussing outsourcing in the manufacturing and service industries).

9. *Id.* at 103–04.

10. JAMES K. JACKSON, *OUTSOURCING AND INSOURCING JOBS IN THE U.S. ECONOMY: EVIDENCE BASED ON FOREIGN INVESTMENT DATA*, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, No. RL32461, CRS-12 (2008), (May 4, 2005), *available at* [http://digitalcommons.ilr.cornell.edu/key\\_workplace/520/](http://digitalcommons.ilr.cornell.edu/key_workplace/520/) [hereinafter CRS REPORT].

11. See Gupta, Gantz, Sreecharana, & Kreyling, *supra* note 1, at 104 (discussing concern by U.S. policymakers of the prospect of widespread outsourcing of high-wage professional service positions).

12. *Id.*

exceeded the domestic supply available in the United States and other developed countries and led to an increase in offshoring and greater awareness of the availability of low-cost skilled workers abroad.<sup>13</sup> In recent years, the phenomenon of offshoring of relatively high-wage professional-service positions has emerged and has become fairly widespread.<sup>14</sup> The affected industries include: software development, banking and brokerage, and medical and legal services.<sup>15</sup>

### III. ECONOMIC AND PUBLIC POLICY CONCERNS SURROUNDING OFFSHORING OF PROFESSIONAL SERVICES

The expansion of offshoring of professional services has raised a variety of concerns, chief among them being domestic job loss.<sup>16</sup> An analysis of foreign investment and employment trends, however, indicates that there is no direct cause-and-effect relationship between these events.<sup>17</sup> For example, the U.S. economic downturn between 2002 and 2004 was symptomatic of a reduction of workforces on a global scale rather than any sole action on the part of U.S. businesses.<sup>18</sup> A comparison between the average number of jobs created each year by the U.S. economy and by foreign affiliates of U.S. parent companies also undermines any causal relationship, as indicated in the following data compiled by the U.S. Department of Commerce:<sup>19</sup>

Time Period	Average Number of Civilian Jobs Created in U.S. Economy	Average Number of Civilian Jobs Created by Foreign Affiliates of U.S. Parent Companies
1982–1992	2,000,000	24,000
1992–2002	1,700,000	300,000
2003–2006	2,000,000	300,000 (data from 2004–2005 only) <sup>20</sup>

13. Webcast: *Zepacec Technology Risks for Health-Care Providers*, WALL ST. J. (Oct. 28, 2008), <http://online.wsj.com/article/SB122426733527345133.html#articleTabs%3Dvideo> (last visited Mar. 1, 2009).

14. Gupta, Gantz, Sreecharana, & Kreyling, *supra* note 1, at 104.

15. *Id.*

16. *Id.*

17. CRS REPORT, *supra* note 10, at 7.

18. See BRINK LINDSEY, CATO INST. CTR. FOR TRADE POL'Y STUD., *JOB LOSSES AND TRADE: A REALITY CHECK 10–11* (2004) (stating decrease in jobs is cyclical relating to recent downturn in the economy), available at <http://www.freetrade.org/pubs/briefs/tbp-019.pdf>; CRS REPORT, *supra* note 10, at 11 (“Employment among the overseas affiliates of U.S. parent companies continued to add workers through 2001, before they also were forced to reduce their total number of workers in 2002 due to slowing economic growth abroad.”).

19. CRS REPORT, *supra* note 10, at 15.

20. *Id.*

Between 1992 and 2005, these offshoring jobs constituted only about six percent of all jobs created in the U.S. economy.<sup>21</sup> While outsourcing may not necessarily be the culprit for domestic layoffs, it can be viewed as being part of an economic globalization process that does result in temporary and long-term displacement of certain groups of workers.<sup>22</sup>

Opponents of offshoring have also expressed public policy concerns, such as protection of privacy.<sup>23</sup> Because the relocation of professional-services work in certain industries requires the transfer of a consumer's medical, personal, or financial information, some critics fear that such data may be misused or stolen.<sup>24</sup> Another public policy concern involves engaging in business with foreign nations that do not adhere to U.S. ethical and democratic principles.<sup>25</sup> Regardless of whether these concerns have evidentiary support or are otherwise valid, political representatives at local, state, and federal levels have responded to and fomented these concerns by introducing bills and enacting legislation against offshoring as a means to garner the support of their constituencies.<sup>26</sup>

#### IV. FEDERAL AND STATE GOVERNMENT RESPONSES TO OFFSHORING

Offshoring remains a relevant political issue, as political representatives have publicly denounced and proposed restrictive measures against the practice in recent years.<sup>27</sup> During his 2008 presidential campaign, then Senator Barack Obama adopted a tax platform that promised to lower tax rates for companies that, among other requirements, maintained or increased U.S. jobs relative to foreign jobs.<sup>28</sup> Such a platform is yet another example of an established trend of anti-offshoring legislative measures carried out at both the federal and state levels.<sup>29</sup> From 2003 to 2004, state legislators in over forty states introduced 200 anti-outsourcing bills, five of which became law.<sup>30</sup> Between 2005 and 2006, 190 bills were introduced, seven of which became law.<sup>31</sup> As of April 10, 2007, 41 bills were introduced, none of which have been enacted.<sup>32</sup> Because such state actions

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21. *Id.*

22. NAT'L FOUND. FOR AMERICAN POLICY, ANTI-OUTSOURCING EFFORTS DOWN BUT NOT OUT 2 (2007), available at <http://www.nfap.net/pdf/0407OutsourcingBrief.pdf> [hereinafter ANTI-OUTSOURCING EFFORTS].

23. *See id.* at 7 (discussing state legislation introduced in 2005 and 2006 to restrict sending personal data).

24. *See id.* at 7–8 (discussing measures taken in foreign countries to protect data).

25. *See Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 45 (1st Cir. 1999) (stating that “human rights conditions in Burma are deplorable” and criticizing the Massachusetts Burma Law, which “restricts the ability of Massachusetts and its agencies and authorities to purchase goods or services from individuals or companies that engage in business with Burma”).

26. *See ANTI-OUTSOURCING EFFORTS*, *supra* note 22, at 2 (noting the role of self interest and anti-offshoring issues in political campaigns).

27. *Id.* at 1–6.

28. BARACK OBAMA'S COMPREHENSIVE TAX PLAN pt. II (2008), <http://www.barackobama.com/taxes/> (follow “Full Obama Tax Plan” hyperlink) (last visited Mar. 4, 2009).

29. ANTI-OUTSOURCING EFFORTS, *supra* note 22, at 2–7.

30. *Id.* at 2.

31. *Id.* at 4.

32. *Id.* at 5.

impact foreign nations and U.S. obligations under international trade agreements, they may be unconstitutional.<sup>33</sup> Federal legislation may likewise be unconstitutional.<sup>34</sup> These issues are considered in detail in the following sections.

## V. THE CONSTITUTIONALITY OF STATE LEGISLATION ON OFFSHORING

Whether state anti-offshoring legislation violates the Constitution depends on the scope and restriction of the legislation in question. When these state actions undermine or conflict with the federal government's right to create and maintain a uniform foreign policy in commerce and dealings with other nations,<sup>35</sup> they may be unconstitutional on any of the following grounds (or some combination): the Doctrine of Preemption; the Federal Foreign Affairs Power; and the Federal Commerce Power.<sup>36</sup> The inherent ambiguity and exceptions expressed in federal statutes and trade agreements, however, may allow certain state actions to withstand Constitutional challenges, as they reveal Congress's acquiescence or endorsement of state laws regulating certain aspects of professional services.<sup>37</sup> State outsourcing legislation may be classified into two main categories: (1) restrictions against performance of public contract work overseas; and (2) restrictions or penalties imposed against private entities for relocating jobs overseas.<sup>38</sup>

### A. *Restrictions Against Performance of Public Contract Work Overseas*

This type of legislation imposes some form of limitation on the performance of contracts directly under state control between private businesses and the state.<sup>39</sup> There are varying levels of restrictions, the most restrictive requiring that the site of contract performance be in the United States, and that only persons authorized to work in the United States perform the contract.<sup>40</sup> A less stringent restriction is known as in-state or U.S.-based "preferences," where domestic goods and services receive preferential treatment.<sup>41</sup> Other, more subtle forms of anti-offshoring legislation require a vendor submitting a bid to disclose the site of contract performance and establish committees and/or studies on ways to

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33. KLINGER & SYKES, *supra* note 4, at 2.

34. *Id.*

35. *Id.* at 6.

36. *Id.* at 2.

37. See *Trojan Techs., Inc. v. Pennsylvania*, 916 F.2d 903, 908 (3d Cir. 1990) (holding that the Agreement on Government Procurement is an example of the President and Congress disavowing any intentions of preempting state legislation, because it did not include all state and local purchases, only purchases by federal agencies specifically listed).

38. See KLINGER & SYKES, *supra* note 4, at 4–16 (discussing narrower categories such as: bans on performing public contract work overseas, state bills requiring public contracts to be performed by individuals authorized to work in the United States and state bills restricting call centers and sending data overseas, among others).

39. *Id.*

40. *Id.*

41. *Id.* at 11.

reduce offshoring.<sup>42</sup> While the majority of these restrictions apply to all foreign nations, it is important to note that some target only a specific country or set of countries.<sup>43</sup> Because of the varying level of restrictions, the different parties involved, and the industries affected, such pieces of legislation must be evaluated on a case-by-case basis to determine their constitutionality.

### 1. Potential Violations Under the Supremacy Clause

Because such anti-offshoring legislation involves parties and activities beyond the nation's borders, it triggers the Doctrine of Preemption by potentially entering into the federal domain of international affairs, and conflicting with existing federal statutes or international agreements. The Constitution grants Congress the power to preempt state law.<sup>44</sup> In mandating federal dominance over states, the Framers of the Constitution met their desire for uniformity in areas of national concern.<sup>45</sup> Even if a Congressional act contains no express provision for preemption, state law must when Congress intends to "occupy the field;" and even if Congress has not occupied the field, where state law is preempted to the extent that it conflicts with a federal law.<sup>46</sup> The U.S. Supreme Court has found preemption where it is impossible for a private party to comply with both state and federal law.<sup>47</sup> Alternatively, state law is invalid when it is an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.<sup>48</sup>

#### a. Contract Offshoring Legislation May Interfere with Congressional Intent to Occupy the Field of Foreign Affairs

Congress intends preemption when a federal statute is so pervasive as to occupy the field<sup>49</sup> or when the subject matter is traditionally reserved to the federal government.<sup>50</sup> The field of foreign affairs is subject matter within the

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42. ANTI-OUTSOURCING EFFORTS, *supra* note 22, at 4–5. In 2005, North Carolina passed a law requiring vendors submitting a bid for state contracts to disclose the location of contract performance; Maine, New Jersey, and Washington established task forces on outsourcing. *Id.*

43. *See Natsios*, 181 F.3d at 53 (discussing the mechanism created by a Massachusetts law that inquired whether a bid was being made for doing business in Burma).

44. U.S. CONST. art. VI, cl. 2.; *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000).

45. *See Am. Ins. Assoc. v. Garamendi*, 539 U.S. 396, 413 (2003) ("There is, of course, no question that at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy, given the 'concern for uniformity in this country's dealings with foreign nations' that animated the Constitution's allocation of the foreign relations power to the National Government in the first place." (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n. 25 (1964))).

46. *Crosby*, 530 U.S. at 372.

47. *Garamendi*, 539 U.S. at 421.

48. *Crosby*, 530 U.S. at 372–73.

49. *See Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992) ("Absent explicit pre-emptive language, we have recognized at least two types of implied pre-emption: field pre-emption, where the scheme of federal regulation is 'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.'").

50. *See Natsios*, 181 F.3d at 74 ("The Supreme Court has repeatedly cited *Hines* for the proposition that an 'Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'").

exclusive realm of the federal government.<sup>51</sup> Specifically, “[p]reemption will be more easily found where states legislate in areas traditionally reserved to the federal government, and in particular where state laws touch on foreign affairs.”<sup>52</sup>

While the imposition of offshoring limitations on state contracts unavoidably touches on foreign affairs,<sup>53</sup> the ambiguity and complexity surrounding the issue of traditional areas of the federal government renders uncertain the conclusion that Congress intended blanket-wide preemption of all these state actions. Certain types of restrictions likely fall within the area of traditional federal concern, most notably those conveying a political message about particular foreign nations or policies.<sup>54</sup> In *Crosby v. National Foreign Trade Council*, the Supreme Court invalidated Massachusetts’s Burma sanctions law under the Supremacy Clause because it expressed moral views regarding conditions in Burma that, among other things, “compromise[d] the very capacity of the President to speak for the Nation with one voice dealing with other governments.”<sup>55</sup> There, Massachusetts sought to restrict authority of its agencies in buying goods or services from companies doing business with Burma, but the purpose of that restriction was to express disapproval about a foreign nation’s policies.<sup>56</sup> Much earlier, the Supreme Court in *Zschernig v. Miller* invalidated an Oregon probate statute imposing conditions on landownership to non-U.S. residents because an evaluation of those conditions enabled state judges to express cold war attitudes, which are points of view reserved for the federal government.<sup>57</sup>

While state measures that send a political message are subject to preemption, an analysis of other restrictions is not as clear-cut. It is uncertain whether the requirement that only persons authorized to work in the United States may perform a state contract intrudes upon a traditional area of federal concern.<sup>58</sup> According to the Supreme Court in *Hines v. Davidowitz*, “the regulation of aliens is so intimately blended and intertwined with responsibilities of the national government that where it acts, and the state also acts on the same subject, ‘the act of Congress, or the treaty, is supreme; and the law of the State,

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51. *Id.* at 49; see *Garamendi*, 539 U.S. 396 at 413 (“There is, of course, no question that at some point an exercise of state power that touches on foreign relations must yield to the National Government’s policy, given the ‘concern for uniformity in this country’s dealings with foreign nations’ that animated the Constitution’s allocation of the foreign relations power to the National Government in the first place.” (quoting *Banco Nacional*, 376 U.S. at 427 n.25)).

52. *Natsios*, 181 F.3d at 73.

53. KLINGER & SYKES, *supra* note 4, at 4.

54. See *Zschernig v. Miller*, 389 U.S. 429, 437–38, 444 (1968) (invalidating an Oregon probate statute governing inheritance of land by non-resident aliens because of its impact on foreign affairs).

55. *Crosby*, 530 U.S. at 381.

56. *Id.* at 384.

57. *Zschernig*, 389 U.S. at 437–38.

58. Compare *Hines v. Davidowitz*, 312 U.S. 52 (1941) (holding that the Pennsylvania Alien Registration Act is preempted by the Federal Alien Registration Act because the state’s power to legislate in the area of foreign relations is subordinate to that of the federal government under the Supremacy Clause), with *De Canas v. Bica*, 424 U.S. 351 (1956) (holding that a California Labor Code provision should not be deemed preempted by Federal law in the absence of Congress’s clear intent to do so).

though enacted in the powers not controverted, must yield to it.”<sup>59</sup> There, the Court found that the federal Alien Registration Act preempted Pennsylvania’s Alien Registration Act on the following grounds: (1) it had an impact on the general field of foreign relations, and (2) Congress had enacted a complete scheme of regulation that provided a standard for the registration of aliens.<sup>60</sup> Similarly, state laws restricting persons authorized to work in the United States will likely be invalidated if they contain guidelines that conflict, curtail, complement, or add to the regulations that Congress has set forth.<sup>61</sup>

The reasoning employed by the Supreme Court in *De Canas v. Bica*, however, suggests that if such a restriction adopted federal standards, it may withstand preemption.<sup>62</sup> There, the Court upheld a California law barring employers from knowingly hiring illegal aliens if that employment adversely affected lawful resident workers.<sup>63</sup> Even though Congress created a comprehensive scheme for regulation and immigration, the rationale behind the Court’s reasoning rested on the assumption that the California statute applied to those aliens who were unable to work in the United States under pertinent laws and regulations.<sup>64</sup> In conclusion, the *Hines* and *De Canas* decisions show that while a state action may intrude upon federal areas of concern, the method by which that action is carried out determines its constitutionality.<sup>65</sup>

b. Contract Offshoring Legislation May Conflict with International Agreements

The Constitution forbids state laws from conflicting with federal laws and treaties.<sup>66</sup> Article VI provides:

[T]he Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.<sup>67</sup>

While no federal statute thus far exists on the regulation of offshoring by states, federal treaties and executive agreements supporting free trade may provide another basis for preemption.<sup>68</sup> Treaties may trump state laws, as the

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59. *Hines*, 312 U.S. at 66.

60. *Id.* at 66–67.

61. *Id.*

62. *De Canas*, 424 U.S. at 355.

63. *Id.* at 352–54.

64. *Id.* at 355–56.

65. There are a host of state immigration statutes, including the Employer Sanctions Law in Arizona, that have not been successfully challenged to date as being in conflict with federal immigration law and policy. See, e.g., *Chicanos Por La Causa, Inc. v. Napolitano*, 544 F. 3d 976, 985 (9th Cir. 2008) (holding that an Arizona state law targeting employers who hire illegal aliens is not preempted by federal law).

66. U.S. CONST. art. VI, cl. 2.

67. *Id.*

68. See KLINGER & SYKES, *supra* note 4, at 2 (stating that the Thomas-Voinovich Amendment, a federal law, may violate U.S. trade obligations under the World Trade Organization’s Government Procurement Agreement).

Supremacy Clause considers the former to be within the same category as provisions of the Constitution and federal statutes.<sup>69</sup> Even though the Constitution does not mention executive agreements, they likely receive the same treatment as federal treaties, because the Supreme Court has ruled such agreements to prevail over state law and policy every time they have been challenged.<sup>70</sup> Both instruments may include all subjects of negotiation between the federal government and other nations.<sup>71</sup>

One of the ways in which these instruments trump state laws is when they are implemented by federal legislation.<sup>72</sup> Despite such Congressional approval, however, there may be exceptions within these treaties and executive agreements that protect most state laws from judicial challenges.<sup>73</sup> Thus, provisions contained in these instruments must be examined on a case-by-case basis to determine their constitutionality. The following executive trade agreements, which are implemented by federal legislation, reveal the uncertainty behind Congress's intent to bind all states to these treaties' government procurement commitments.

The federal government has signed onto several international agreements that received explicit Congressional approval and also contained government procurement provisions.<sup>74</sup> For example, state contract legislation impacts U.S. membership in the World Trade Organization's 1994 Agreement on Government Procurement ("GPA"), which bars consenting state and federal agencies from placing restrictions on the location of public contract work.<sup>75</sup> A central tenet of the GPA binds parties to the recognition that:

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69. U.S. CONST. art. VI, § 2.

70. *United States v. Pink*, 315 U.S. 203, 230 (1942) ("A treaty is a 'Law of the Land' under the supremacy clause (art. VI, cl. 2) of the Constitution. Such international compacts and [executive] agreements as the Litvinov Assignment have a similar dignity."). See generally *United States v. Belmont*, 301 U.S. 324, 331 (1937) (mentioning the supremacy of treaty over state laws and policies); *Dames & Moore v. Regan*, 453 U.S. 654, 680 (1981) (stating that Congress implicitly grants the President power to settle international disputes by executive agreements).

71. *De Geofroy v. Riggs*, 133 U.S. 258, 266 (1890); see *Pink*, 315 U.S. at 230 (stating that treaties and agreements have similar effect).

72. *Foster & Elam v. Neilson*, 27 U.S. 253, 254 (1829) ("[W]hen the terms of the stipulation import a contract...when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court."), *overruled in part on other grounds*, *United States v. Percheman*, 32 U.S. 51 (1833); *Sei Fuji v. California*, 242 P.2d 617, 620 (1952) (stating a treaty does not automatically supersede local laws inconsistent with it unless treaty provisions are self executing).

73. See generally *Uruguay Round Agreements Act*, Pub. L. No. 103-465, §§ 341-344, 108 Stat. 4809, 4951-55 (1994) (codified as 19 U.S.C. §§ 2512-2518 (2007) and 7 U.S.C. § 903 (2007)) (stating that no person other than the U.S. has any cause of action or defense under any of the Uruguay Round Agreements); *North American Free Trade Agreement*, H.R. Rep. No. 103-361 (1991), reprinted in 1993 U.S.C.C.A.N. 2552 2566-57 [hereinafter NAFTA] (stating that no person other than the United States shall have a cause of action under NAFTA).

74. *E.g.*, *Agreement on Government Procurement*, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 4(b), 33 I.L.M. 1125, available at [http://www.wto.org/english/docs\\_e/legal\\_e/gpr-94\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/gpr-94_01_e.htm) [hereinafter GPA]; NAFTA, *supra* note 73 (Agreement replaces state or local law, recommended by the Ways and Means committee).

75. ANTI-OUTSOURCING EFFORTS, *supra* note 22, at 6.

laws, regulations, procedures and practices regarding government procurement should not be prepared, adopted or applied to foreign or domestic products and services and to foreign or domestic suppliers so as to afford protection of domestic products or services or domestic suppliers and should not discriminate among foreign products or services among foreign suppliers.<sup>76</sup>

The GPA stresses the importance of nondiscrimination by nations through their government procurement practices, noting in Article III that the signed entities may not “treat a locally-established supplier less favorably than another . . . on the basis of . . . foreign affiliation or ownership” or “on the basis of the country of production of the good or service being supplied.”<sup>77</sup>

At first glance, it would be logical to conclude that because the federal government agreed to such nondiscriminatory practices, state restrictions running afoul of such a commitment would be preempted.<sup>78</sup> The GPA’s scope and coverage under Article 1, however, underscores the importance of evaluating these state actions on a case-by-case basis, as the agreement includes an Appendix submitted by each signatory listing exceptions to services and parties on the national and sub-national level.<sup>79</sup> Annex 2 of the United States’ Appendix is a list of “Sub-Central Government Entities” which agree to abide by the GPA.<sup>80</sup> Only 36 states are signatories, several of which limit the GPA’s application to certain state agencies within their executive branches.<sup>81</sup> Also, several states exempt certain goods and services, such as the procurement of construction grade steel<sup>82</sup> and software,<sup>83</sup> and the agreement does not apply to any federally funded mass transit and highway projects.<sup>84</sup> In addition to requiring a state’s consent for the GPA to apply, the agreement further notes that it “shall not apply to any procurement made by a covered entity on behalf of non-covered entities at a different level of government.”<sup>85</sup> Those two provisions may plausibly be interpreted to mean that the federal government’s membership means little without a state’s parallel acceptance of the GPA.

Furthermore, U.S. courts have diverged with respect to invalidating state restrictions on the basis of a conflict with the GPA. In *Trojan Technologies v. Pennsylvania*, the Third Circuit held that the GPA failed to preempt a state law requiring that goods purchased by state contractors be produced only with American steel.<sup>86</sup> The court saw the GPA’s express enumeration of federal agencies, and omission of states, as a signal of Congress’s acquiescence to a state’s “Buy American” statute.<sup>87</sup> Also, the court’s examination of the GPA’s

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76. GPA, *supra* note 74, at 7.

77. *Id.* at 9.

78. ANTI-OUTSOURCING EFFORTS, *supra* note 22, at 6.

79. GPA, *supra* note 74, at 8.

80. *Id.* app. 1, annex 2, 1–6; *see id.* art. I, para. 1 (specifying that the agreement applies to procurements by entities listed in Appendix 1).

81. *Id.* app. 1, annex 2, 1–6.

82. *Id.* at 6.

83. GPA, *supra* note 74, at 1.

84. *Id.* at 6.

85. *Id.*

86. *Trojan Techs., Inc. v. Pennsylvania*, 916 F.2d 903, 908 (3d Cir. 1990).

87. *Id.*

legislative history led it to conclude that Congress was mainly concerned with fair trade and reciprocal trade barrier reductions, and thus it would be anomalous if it intended unilateral elimination of state trade barriers.<sup>88</sup>

The Third Circuit's reasoning is at odds with one of the California Courts of Appeals, which invalidated California's "Buy American" statute because it amounted to state usurpation of federal authority.<sup>89</sup> The California court reasoned that the existence of international trade agreements is evidence of the federal government's exclusive power to set national policy in foreign trade.<sup>90</sup> Because these agreements directly or indirectly regulate the nation's commercial relations as a whole with the rest of the world, state regulations impermissibly impede national trade policies.<sup>91</sup> Thus, any state statute involving foreign trade automatically conflicts with a federal treaty, rendering it invalid on preemption grounds.<sup>92</sup>

The United States' membership in the North American Free Trade Agreement ("NAFTA") also presents uncertainty, because that agreement reflects federalism concerns shared by all signatory federal system nations (Canada, Mexico, and the United States).<sup>93</sup> NAFTA includes exceptions that may allow states to survive constitutional challenges.<sup>94</sup> Similar to the GPA, NAFTA establishes government procurement provisions that bind its signatories to equal treatment towards domestic and foreign suppliers, products, and services.<sup>95</sup> And just as with the GPA's Appendices, NAFTA's chapter on government procurement allows for modifications and exceptions to these provisions.<sup>96</sup> In Annex 1001.1b-2, signatories, including the United States, have provided their own list of services excluded from coverage.<sup>97</sup> Annex 1001.1a-1 lists only fifty-six federal agencies that have consented to be bound,<sup>98</sup> while Annex 1001a.3 only conditionally binds a signatory's state and provincial governments.<sup>99</sup> Compliance by these sub-national entities must result from "consultations" in accordance with Article 1024, which requires that all signatories:

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88. *Id.*

89. *Bethlehem Steel Corp. v. Bd. of Comm'rs of Dept. of Water & Power of City of L.A.*, 276 Cal. App. 2d 221, 225 (Cal. Dist. 2 Ct. App. 1969).

90. *Id.* at 226–27.

91. *Id.* at 226.

92. *See id.* ("Only the federal government can fix the rules of fair competition when such competition is on an international basis. Foreign trade is properly a subject of national concern, not state regulation.")

93. Sidney Weintraub, *NAFTA and U.S. Economic Sovereignty*, in *NAFTA AND SOVEREIGNTY TRADE-OFFS FOR CANADA, MEXICO AND THE UNITED STATES* 135, 137–38 (Joyce Hoebing et al. eds., 1996).

94. *See generally* NAFTA, *supra* note 73, ch. 12, 14; 19 U.S.C. §§ 3301–3473 (providing states with the ability to enact provisions, including restrictions, that fall within the allowed exceptions and reservations).

95. *Id.* ch. 10, § A, art. 1003(1)–(2)

96. *Id.* ch. 10, § A, art. 1001(2).

97. *Id.* ch. 10, Annex 1001.b–2 § B (A), (D), (J), (M), (S), (V).

98. *Id.* ch. 10, Annex 1001.1a–1.

99. NAFTA, *supra* note 73, ch. 10, Annex 1001a.3.

*endeavor* to consult with their state and provincial governments with a view of obtaining commitments, on a *voluntary and reciprocal basis*, to include within this Chapter procurement by state and provincial government entities and enterprises.<sup>100</sup>

Given the similarities shared by both NAFTA's government procurement agreement and the GPA, it may be likely that Congress never intended a unilateral commitment among states.<sup>101</sup> Furthermore, NAFTA-implementing legislation in the United States provides further evidence of Congress's concern for state sovereignty, as the statute reiterates the treaty's "federal-state consultation process to identify inconsistencies between state laws and NAFTA provisions and the potential for grandfathering pre-existing state laws."<sup>102</sup>

Additionally, Congress's implementation of NAFTA by statute imposes another limitation to challenges against conflicting state statutes that do not fall within the above exception categories.<sup>103</sup> Regarding legal challenges to state laws, section 3312(b)(2) of the statute stipulates that:

[n]o state law, or the application thereof, may be declared invalid as to any person or circumstance on the ground that the provision or application is inconsistent with the Agreement, *except in an action brought by the United States* for the purpose of declaring such law or application invalid.<sup>104</sup>

While the paucity of case law provides no conclusive judicial position, the few NAFTA-based challenges that have been raised indicate that U.S. courts interpret the statute to exclude all private causes of action against states.<sup>105</sup> Such exclusion means that claims arising solely from NAFTA violations, not initiated by the federal government itself, are excluded from the subject matter jurisdiction of courts, thereby preventing them from addressing the merits of the case, let alone the constitutionality of such violations.<sup>106</sup> For example, the Nebraska Supreme Court in *In re Collins* rejected review of a NAFTA claim brought by a Canadian lawyer on the basis of lack of subject matter jurisdiction.<sup>107</sup> Although that court acknowledged that the state violated NAFTA by treating foreign and U.S.-based lawyers unequally by imposing an exam on foreigners, the federal statute barred the court from adjudicating the claim.<sup>108</sup> Thus, the federal statute's limitation of standing to the federal government intentionally precludes NAFTA from being used as a mechanism for invalidating state laws by preventing injured private parties from presenting their claims.

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100. *Id.* ch. 10, § D, art. 1024(3) (emphasis added).

101. *Trojan Techs.*, 916 F.2d at 907–08.

102. *Weintraub*, *supra* note 93, at 138.

103. 19 U.S.C. § 3312 (establishing the relationship of NAFTA with U.S. law and state law).

104. *Id.* § 3312(b)(2) (emphasis added).

105. *Berriochea Lopez v. U.S.*, 309 F. Supp. 2d 22, 28 (D.D.C. 2004); *In re Collins*, 561 N.W.2d 209, 211 (Neb. 1997).

106. *Berriochea Lopez*, 309 F. Supp. 2d at 27–28; *In re Collins*, 561 N.W.2d at 224.

107. *In re Collins*, 561 N.W.2d at 211.

108. *Id.* at 211.

c. The Enforcement of State Contract Outsourcing Restrictions  
May Pose an Obstacle to the Accomplishment and Execution of  
Congress's Objectives

Even if there is no clear conflict between state laws and federal treaties or executive agreements, a state statute must still yield if it constitutes a sufficient obstacle to Congressional objectives.<sup>109</sup> A determination of whether a state statute meets this definition “is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects.”<sup>110</sup> Where federal foreign objectives are involved, the Supreme Court considers the international response as a factor in such an assessment.<sup>111</sup>

In *Crosby*, the Court underscored the relevance of such a factor in explaining that its invalidation of the state's Burma Law not only conflicted with a federal statute, but also threatened to frustrate federal statutory objectives.<sup>112</sup> Congressional authorization for the President to develop a multilateral strategy towards Burma, a goal that necessarily involved the participation of other countries, required the Court to judge the state law's effects by the response of the international community.<sup>113</sup> The federal objective for coalition building was frustrated when the state law prompted the nation's allies and trading partners to file formal protests, thereby preventing the President from speaking with one voice on the nation's policy towards Burma.<sup>114</sup>

In *Faculty Senate of Florida International University v. Roberts*, a federal court likewise upheld the importance of state conformity with federal objectives. Here, the Court ruled that Congress's full objectives under the federal acts governing sanctions on designated terrorist countries were frustrated by the state's Travel Act restriction. The restriction was with respect to state and non-state funds, that are necessary to administer the use of non-state funders for travel to those countries.<sup>115</sup> The Act impaired Congress's promotion of democratic reform in those countries, a strategy that permitted travel for academic and research purposes.<sup>116</sup> Furthermore, the President was unable to terminate sanctions associated with the Act. Consistent with the Court's reasoning in *Crosby*, the court in *Faculty Senate* held that such prevention of the Presidential authority to speak with one voice for the nation in dealing with designated terrorist countries frustrated federal objectives.<sup>117</sup>

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109. *Hines v. Davidowitz*, 312 U.S. 52, 66 (1941).

110. *Crosby*, 530 U.S. at 373 (citing *Hines*, 312 U.S. at 67).

111. *See Crosby*, 530 U.S. at 384–85 (finding Massachusetts's law regarding trade restrictions with Burma preempted).

112. *Id.*

113. *Id.*

114. *See id.* at 383 (noting that the European Union and Japan lodged formal complaints with the World Trade Organization (“WTO”), claiming the state law violates certain provisions of Agreement on Government Procurement, and that as a result the United States had to be in international dispute proceedings under auspices of WTO).

115. *Faculty Senate of Florida University v. Roberts*, 574 F. Supp. 2d 1331, 1352.

116. *See id.* (noting that university support is required to approve licenses issued for certification that such travel is affiliated with the university and also that such support requires the expenditure of indirect state funds for various administrative tasks).

117. *Id.* at 1353–54.

Based on the above, state contract offshoring legislation may likewise frustrate Congress's overall objectives and impede the Presidential authority to speak with one voice. In particular, state bills that seek to restrict performance of government contract work overseas violate Congress's free-trade objectives. By enacting the GPA and NAFTA through legislation, Congress approved of their goal of eliminating barriers to trade and services among member nations and expressly authorized the President to make any further changes to their provisions.<sup>118</sup> Because these state contract restrictions conflict with Congress's aims and are proposed without the President's involvement and consent, they pose an obstacle to the accomplishment and execution of Congress's overall objectives.

## 2. Contract Offshoring Legislation May Violate the Federal Foreign Affairs Power

The impact of state restrictions on public contracts may invoke preemption against these state actions under the Constitution's Foreign Affairs Power. The Constitution grants power over foreign affairs to the federal government.<sup>119</sup> The framers of the Constitution shared a "concern for uniformity in [the United States'] dealings with foreign nations."<sup>120</sup> This concern led to the Constitution's allocation of this power to the national government.<sup>121</sup> To encroach on the Federal Foreign Affairs Power arising to the level of preemption, the state action must have more than "some incidental or indirect effect on foreign countries."<sup>122</sup> State action having more than an incidental or indirect effect is preempted even if there is no conflict between the state action and any affirmative federal action in the state law's subject area.<sup>123</sup>

A determination of whether a state action has more than an incidental or indirect effect rests on the following five factors: 1) design & intent of the law; 2) amount of purchasing power the law affected; 3) possibility of other states following the example; 4) protests lodged by other foreign countries; and 5) differences between state and federal approaches.<sup>124</sup> While not all factors are required, courts look for some combination of those factors to rule that a state action has more than an incidental or indirect effect on foreign affairs.<sup>125</sup>

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118. 19 U.S.C §§ 3512(b), 3317(3), (5).

119. Congressional authority related to foreign affairs includes the power to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense, and general Welfare of the United States" and "[t]o regulate commerce with foreign nations." U.S. CONST. art. I, § 8, cl. 1, 3 (declaring that presidential authority includes being "Commander in Chief" and having the power "to make Treaties"); *id.* art. II, § 2, cl. 1–2.

120. *Garamendi*, 539 U.S. at 413 (*quoting* *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964)).

121. *Id.*

122. *Zschernig v. Miller*, 389 U.S. 429, 433–435 (1968).

123. *Garamendi*, 539 U.S. at 418.

124. *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 53–54 (1st Cir. 1999).

125. *Id.* at 53; *Faculty Senate*, 574 F. Supp. 2d at 1348–52. *See generally Zschernig*, 389 U.S. at 429 (finding preemption by focusing on the design and intent of the law and protests lodged by foreign governments).

a. The Design and Intent of State Contract Restrictions

The effect of the design and intent of a state law is more than incidental or indirect when it makes a political statement pertaining to foreign affairs, even if the federal government is silent on the subject matter in question.<sup>126</sup> As discussed under the Supremacy Clause analysis above, the Court in *Zschernig* invalidated an Oregon probate statute that barred inheritance by nonresident aliens because that statute enabled state judges to express their anti-communist beliefs against certain foreign regimes.<sup>127</sup> The statute's requirements of "minute inquiries concerning the actual administration of foreign law, into the credibility of foreign diplomatic statements, and into speculation whether the fact that some received delivery of fund"<sup>128</sup> resulted in more than an incidental or indirect effect on foreign countries because it allowed state judges to justify their decisions based on their foreign policy attitudes.<sup>129</sup> Even though the federal government was silent on the issue, the Court believed that foreign policy attitudes fell within its domain.<sup>130</sup> As a result, the statute's implementation had "great potential for disruption or embarrassment"<sup>131</sup> that would "adversely affect the power of the central government to deal with" problems of international relations.<sup>132</sup>

Federal courts have followed the Supreme Court by finding that political opinion has more than an incidental or indirect effect on foreign affairs. In *National Foreign Trade Council v. Natsios*, a federal court invalidated the same Massachusetts Burma Law at issue in *Crosby* as a violation of the Federal Foreign Affairs Power, citing the law's design and intent as one of the bases for its reasoning.<sup>133</sup> The First Circuit in *Natsios* held that Massachusetts' expression of its moral views on Burma's human rights violations crossed the "threshold level of involvement in and impact on foreign affairs which the states may not exceed."<sup>134</sup> In justifying such a holding, the First Circuit put particular emphasis on the Court's view in *Zschernig* that a violation of the federal foreign affairs power occurs where a state's policy may disturb foreign relations even though no federal treaty or statute exists on that subject matter.<sup>135</sup> The federal court in *Faculty Senate* likewise cited political opinion on foreign affairs as one of its rationales for invalidating Florida's Travel Act.<sup>136</sup> The Travel Act's inclusion of non-state funds, in addition to state funds, in the state's restriction against travel

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126. See generally *Zschernig*, 389 U.S. at 432 (holding that Oregon statute constituted an intrusion by state into field of foreign affairs, which the Constitution entrusts to the President and Congress); *Natsios*, 181 F.3d at 75 (holding in part that the Massachusetts Burma Law was unconstitutional by encroaching on the federal government's exclusive power over foreign relations); *Faculty Senate*, 574 F. Supp. 2d at 1351 (holding in part that Florida Travel Act had more than an incidental impact on federal foreign affairs power).

127. See *Zschernig*, 389 U.S. at 441 (stating that "a State could not deny admission to a traveler from East Germany nor bar its citizens from going there").

128. *Id.* at 435.

129. *Id.* at 437.

130. *Id.* at 441.

131. *Id.* at 435.

132. *Zschernig*, 389 U.S. at 441.

133. *Natsios*, 181 F.3d at 53.

134. *Id.* at 52.

135. *Id.* at 52–53.

136. *Faculty Senate*, 574 F. Supp. 2d at 1348.

to Cuba “demonstrates that the design and intent of the law is more than just a state spending decision, but also a political statement of condemnation on the designated countries.”<sup>137</sup> Here, the “design and intent” factor would likely not apply to the majority of state contract legislation introduced thus far.<sup>138</sup> Most of these bills indiscriminately apply to all foreign nations and do not contain specific language condemning a foreign nation’s policies that would infringe on the federal foreign powers.<sup>139</sup>

b. State Outsourcing Legislation Will Likely Have an Economic Impact on Foreign Nations

A state action has more than an incidental or indirect effect when it is able to “effectuate [the law’s] design and intent and has had an effect” on the foreign nations involved.<sup>140</sup> In *Natsios*, the economic impact of the state’s Burma Law exceeded an incidental or indirect effect because the state’s authorities and agencies held \$2 billion in purchasing power.<sup>141</sup> In *Faculty Senate*, the court determined that while economic impact was “not totally quantified,” the Travel Act’s effect was great given the size of the university, the prevention of disbursement of a variety of non-state funds, and the state’s geographic closeness to Cuba—one of the designated countries in question.<sup>142</sup> The fact-specific inquiry that *Natsios* and *Faculty Senate* employ to determine a state law’s economic impact suggests that state contract legislation must also be evaluated on a case-by-case basis.<sup>143</sup> Both of these cases also indicate that, to the extent foreign nations are deprived of an economic benefit to which they are otherwise entitled, such legislation would have an economic impact that would infringe on the Federal Foreign Affairs Power.<sup>144</sup>

c. Contract Offshoring Legislation Will Likely Be Followed by Other States

A state action has more than an incidental or indirect effect when it triggers or has the potential to trigger a broader pattern of state and local intrusion.<sup>145</sup>

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137. *Id.*; see *Miami Light Project v. Miami-Dade County*, 97 F. Supp. 2d 1174, 1180 (holding that county ordinance was outside scope of its power because the “stated purpose of [a county ordinance was] to protest and condemn Cuba’s totalitarian regime”).

138. See generally ANTI-OUTSOURCING EFFORTS, *supra* note 22 (discussing recent contract legislation introduced in several different states).

139. *Id.*

140. *Natsios*, 181 F.3d at 53.

141. *Id.*

142. See *Faculty Senate*, 574 F. Supp. 2d at 1350 (noting that the economic impact is more than “incidental or indirect,” considering various factors).

143. See *Natsios*, 181 F.3d at 53 (outlining a combination of factors to determine state law’s effect on foreign relations); *Faculty Senate*, 574 F. Supp. 2d at 1350 (outlining fact analysis to determine that Travel Act has more than an “incidental or indirect” impact on foreign affairs).

144. See *Faculty Senate*, 574 F. Supp. 2d at 1350 (finding that strong state interest cannot make lawful an otherwise impermissible intrusion into the federal government’s foreign affairs power and noting that an impermissible “embargo” existed when Florida effectively eliminated academic relations with designated countries).

145. See *Natsios*, 181 F.3d at 53 (noting that threat to federal foreign affairs power is magnified when viewed as part of a broader pattern of state and local intrusion).

The Court observed in *Zschernig* that “the probate courts of various States have launched inquiries into the type of governments that obtain in particular foreign nations” when determining whether the Oregon statute would have a significant effect on the nation’s foreign affairs.<sup>146</sup> In *Natsios*, the First Circuit noted that many municipalities have passed laws similar to Massachusetts’ Burma Law, and that “amici inform [the court] that other states and large cities are waiting in the wings.”<sup>147</sup> As a result, the court concluded that the effects of the state law may be magnified if Massachusetts proves to be a bell weather for other states, rendering the impact of the state law as more than incidental or indirect.<sup>148</sup> In *Faculty Senate*, the court reasoned that Florida’s status as the fourth largest state in the nation may likewise have the same bell weather effect.<sup>149</sup> It feared that other states would follow suit, thereby magnifying the Travel Act’s effect to a curtailment of exchange of ideas with the designated terrorist countries in question.<sup>150</sup>

Here, the increase in proposed state offshoring legislation in recent years sharing similar restrictions and conditions shows that such state actions fall within a broader pattern of state and local intrusion. In 2003, only four states introduced offshoring legislation; none of these became law.<sup>151</sup> In 2004, more than two hundred bills related to offshoring were introduced in more than forty states; five of these bills became law.<sup>152</sup> In Alabama, while there are no restrictions on procurement decisions, the law encourages state and local entities to use state-based professional services.<sup>153</sup> In Colorado, state agencies may contract for personal services performed outside the country “if it is clearly demonstrated” that there will be no reduction in quality of services and privacy rights are included.<sup>154</sup> Indiana passed legislation imposing price preferences for state companies for state contracts.<sup>155</sup> North Carolina has a preference for state or national products and services.<sup>156</sup> Finally, Tennessee has a preference for call centers employing U.S. citizen employees for state contracts.<sup>157</sup> In 2005, 190 bills were introduced to restrict or report on global sourcing; seven bills that placed some manner of restriction became law and three that established commissions or studies became law.<sup>158</sup> It is worth noting that among the bills passed, one of them represents the most restrictive anti-offshoring legislation in the nation thus far by barring state contracts from being performed overseas.<sup>159</sup> In 2007, forty-one anti-offshoring bills were introduced.<sup>160</sup>

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146. *Zschernig*, 389 U.S. at 433–34.

147. *Natsios*, 181 F.3d at 53.

148. *Id.*

149. *Faculty Senate*, 574 F. Supp. 2d at 1350–51.

150. *Id.*

151. ANTI-OUTSOURCING EFFORTS, *supra* note 22, at 2.

152. *Id.* at 2–3.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. ANTI-OUTSOURCING EFFORTS, *supra* note 22, at 2–3.

158. *Id.* at 4.

159. *Id.*

160. *Id.* at 5.

While the 2007 figure is less than that in previous years, and none of the 2007 bills have become law:

one can see the continued legislative activity among state legislators who have introduced bills in the past. Connecticut, Minnesota, Arizona, New York, Hawaii and California remain among the most active states with bills introduced to restrict state services, call center operations or state involvement in international trade agreements.<sup>161</sup>

Thus, the substantial number of anti-offshoring bills introduced to state legislatures from 2004 to the present affirms a pattern of state and local intrusion in foreign affairs.

d. Contract Offshoring Legislation May Prompt Protests by Other Foreign Countries

Evidence of retaliation by the international community supports a finding that a state law has more than an incidental or indirect effect on the Federal Foreign Affairs Power.<sup>162</sup> The Supreme Court has historically given much weight to such evidence, given its desire to prevent the nation from “disruption or embarrassment” in its dealings with other countries.<sup>163</sup> The Court in *Zschernig* cited Bulgaria’s objections to the Oregon probate statute to show that the law affected foreign relations.<sup>164</sup> In *Natsios*, the First Circuit considered protests from other countries and trading allies, noting that their outrage was “evidence of the great potential for disruption or embarrassment caused by the Massachusetts law.”<sup>165</sup> The Supreme Court anticipates that “[r]etaliatio[n] by some nations could be automatic” in response to treaties requiring reciprocity in trade matters.<sup>166</sup> Here, the likelihood of international retaliation against state contract offshoring legislation depends on the reciprocal rights of the international agreements in question.<sup>167</sup> As discussed earlier, both the GPA and NAFTA contain exceptions, approved by foreign nation members, to certain state restrictions that violate the principle of national treatment.<sup>168</sup> Furthermore, these agreements extend similar exceptions for foreign nation members as well.<sup>169</sup>

e. Contract Offshoring Legislation May Differ from the Federal Approach in Foreign Policy

In the case of anti-offshoring legislation, a state that conflicts or adopts a different methodology likely has more than an incidental or indirect effect on

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161. *Id.*

162. *Natsios*, 181 F.3d at 54.

163. *Zschernig*, 389 U.S. at 434–35.

164. *Id.* at 436–37.

165. *Natsios*, 181 F.3d at 54.

166. *Japan Line, Ltd. v. County of L.A.*, 441 U.S. 434, 453 n.18 (1979).

167. *See id.* (discussing examples of asymmetrical terms in foreign agreements that increase the risk of retaliation).

168. GPA, *supra* note 74, art. XXIII; NAFTA, *supra* note 73, Ch. 12.

169. GPA, *supra* note 74, art. XXIII; NAFTA, *supra* note 73, Ch. 12.

foreign policy.<sup>170</sup> In *Garamendi*, the Supreme Court held the Federal Foreign Affairs Power pre-empted California's Holocaust Victim Insurance Relief Act ("HVIRA") because of the differences between state and federal approaches.<sup>171</sup> Conflicting with the President's executive agreement with Germany that all Holocaust-era claims be settled with the German Foundation,<sup>172</sup> HVIRA required insurance companies to report details of policies they sold to persons in Europe during the Holocaust to the state insurance commissioner.<sup>173</sup> Like Massachusetts' Burma Law in *Crosby*, the impact of HVIRA limited the effective exercise of the President's power.<sup>174</sup> Also, HVIRA's requirement to publicly disclose information and policies beyond what the federal government requires "employs a different, state system of economic pressure, and in so doing undercuts the President's diplomatic discretion and the choice he has made in exercising it."<sup>175</sup> Here, as discussed in the Supremacy Clause analysis above, state contract offshoring legislation likely impedes the federal objective of a global free trade policy, as evidenced by Congressional approval of treaties such as the GPA and NAFTA.<sup>176</sup>

### 3. Contract Offshoring Legislation May Violate the Federal Foreign Commerce Clause

State contract offshoring restrictions may also impinge on Congressional authority to regulate commerce with foreign nations, thereby violating the Federal Foreign Commerce Clause. The Commerce Clause grants Congress the power "[to] regulate Commerce with foreign Nations, and among several States, and with the Indian Tribes."<sup>177</sup> The rationale for granting such authority to Congress was not only to "[restrict] protectionist policies, but...also [to restrain] the states from excessive interference in foreign affairs."<sup>178</sup> To determine whether a state action violates the Federal Foreign Commerce Clause, the courts consider the following questions: a) whether the law facially discriminates against foreign commerce; b) whether the law interferes with the ability of the federal government to speak with one voice; and c) whether the law attempts to regulate conduct beyond its borders.<sup>179</sup> State laws affecting foreign commerce are subject to a higher level of scrutiny than those only affecting domestic commerce.<sup>180</sup> Thus, such a state action is permissible only when it does not affect

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170. See *Garamendi*, 539 U.S. at 398 (stating "state action with more than incidental effect on foreign affairs is preempted, even absent any affirmative federal activity in the subject area of the state law, and hence without any showing of conflict").

171. *Id.* at 397.

172. *Id.*

173. *Id.* at 409–10.

174. *Id.* at 413.

175. *Id.* at 399; see also *Faculty Senate*, 574 F. Supp. 2d. at 1350 (Florida's Travel Act differs from the federal approach in preventing academic and research-related offshoring).

176. See *supra* notes 43–143 and accompanying text (providing an analysis of the Supremacy Clause).

177. U.S. CONST. art. I, § 8, cl. 3.

178. *Natsios*, 181 F.3d at 66.

179. *Id.* at 66–67.

180. *Japan Line*, 441 U.S. at 446.

foreign commerce to “any significant degree, a far more difficult task than in the case of interstate commerce.”<sup>181</sup>

a. State Contract Outsourcing Legislation May Facially Discriminate Against Foreign Commerce

Similar to the balancing test applied for the Domestic Commerce Clause, courts ask the following two questions for a finding of facial discrimination in its foreign counterpart: (1) whether the state action discriminates against foreign commerce in effectuating a legitimate local public interest;<sup>182</sup> and (2) if so, whether that state has a compelling interest to achieve that legitimate local public interest.<sup>183</sup> A state action that facially discriminates against foreign commerce to advance its legitimate goals is invalid absent a compelling justification.<sup>184</sup>

In evaluating the first question of whether a state action discriminates against foreign commerce, state legislation that relates to foreign policy questions violates the Foreign Commerce Clause if it implicates foreign issues which must be left to the federal government or violates a federal directive.<sup>185</sup> The First Circuit in *Natsios* reasoned that a state action fails to withstand such a Constitutional challenge even if it meets the following criteria required to withstand domestic Commerce Clause scrutiny: treating foreign and domestic companies in same manner; not discriminating in favor of in-state businesses; or not furthering local economic interests.<sup>186</sup> In *Natsios*, the court found the Massachusetts’ Burma Law to be facially discriminatory because it directly attempted to regulate the flow of foreign commerce between 1) companies or persons doing business in Burma, and 2) companies or persons with businesses based in Burma.<sup>187</sup> The court noted that “[w]hen the Constitution speaks of foreign commerce, it is not referring only to attempts to regulate the conduct of foreign companies; it is also referring to attempts to restrict the actions of American companies overseas.”<sup>188</sup> Such a broad definition of foreign commerce likely includes most types of state contract legislation against outsourcing, as these measures seek to restrict the actions of foreign and American companies overseas to some degree.<sup>189</sup> Even more subtle forms of state contract legislation, such as the requirement that a vendor submitting a bid disclose the site of contract performance or preference for domestic services when all other bidding terms are equal, may be seen as an effort to regulate a firm’s activity abroad.<sup>190</sup>

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181. *Natsios*, 181 F.3d at 68.

182. *See Natsios*, 181 F.3d at 67.

183. *See Kraft Gen. Foods, Inc. v. Iowa Dept. of Revenue & Fin.*, 505 U.S. 71, 81 (1992) (stating that without a compelling justification a state may not advance its legitimate goals by means that facially discriminate against foreign commerce).

184. *Id.*

185. *Container Corp. of Am. v. Franchise Tax Bd.* 463 U.S. 159, 194 (1983).

186. *Natsios*, 181 F.3d at 67.

187. *Id.* at 68.

188. *Id.*

189. KLINGER & SYKES, *supra* note 4, at 4, 5.

190. *See ANTI-OUTSOURCING EFFORTS*, *supra* note 22, at 4 (describing how in 2005 North Carolina passed a law requiring vendors submitting a bid for state contracts to disclose the location of contract performance; Maine, New Jersey, and Washington established task forces on

If a state action is found to discriminate against foreign commerce, a court then assesses whether that state has a compelling interest to achieve that legitimate local public interest.<sup>191</sup> Facially discriminatory laws survive only if they are designed to protect a state's traditional area of concern, which includes natural resources or the health and safety of its citizens.<sup>192</sup> Such laws must also not needlessly obstruct interstate commerce or place the state "in a position of economic isolation."<sup>193</sup> Furthermore, the criteria for discrimination may not be based solely on the origin of the product or service, and the restriction in question must be the only effective method for protection of a traditional area of concern.<sup>194</sup> Treaties, such as the GPA and NAFTA also recognize such a protection.<sup>195</sup> For example, an exception to the GPA in Article XXIII (2) lists that:

nothing in this Agreement shall be construed to prevent any Party from imposing or enforcing measures: necessary to protect public morals, order or safety, human, animal or plant life or health or intellectual property, or relating to the products or services of handicapped persons, of philanthropic institutions or of prison labor.<sup>196</sup>

Most state contract offshoring legislation will not likely fall within any of these strict and narrowly construed exceptions, as they do not cover categories of traditional state concern and use origin as the sole discriminatory criteria.<sup>197</sup>

b. Contract Offshoring Legislation May Impede the Federal Government's Ability to Speak With One Voice

A state law can violate the Foreign Commerce Clause by impeding the federal government's ability to "speak with one voice" in foreign affairs because such state actions harms "federal uniformity in an area where federal uniformity is essential."<sup>198</sup> Here, as discussed in the Supremacy Clause analysis above, state contract outsourcing legislation likely prevents the federal government from expressing a uniform approach to its foreign trade policy, as evidenced by Congressional approval of trade agreements such as the GPA and NAFTA.<sup>199</sup>

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outsourcing).

191. See *Kraft*, 505 U.S. at 81 (explaining that a state must have a compelling justification).

192. See *Maine v. Taylor*, 477 U.S. 131, 151 (1986) (recognizing that a state retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources); *Oregon Waste Systems, Inc. v. Dep't of Env't Quality of Oregon*, 511 U.S. 93, 101 (1994) (stating that a safety or health reason unique to nonhazardous waste from other states would be a justification to discouraging the flow of such waste into Oregon). Traditional areas of state concern merit further analysis in the area of professional services, as states regulate several service industries, including finance, insurance, and legal and medical professions.

193. *Taylor*, 477 U.S. at 151 (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935)).

194. *Id.* at 151-152.

195. GPA, *supra* note 74, art. XXIII (2); NAFTA, *supra* note 73, art. 715.

196. GPA, *supra* note 74, art. XXIII (2); NAFTA, *supra* note 73, art. 715.

197. See ANTI-OUTSOURCING EFFORTS, *supra* note 22, at 2-6 (detailing state legislation that restricts global sourcing).

198. *Japan Line*, 441 U.S. at 448-49.

199. See analysis of the Supremacy Clause *supra* pp. 636-644 (discussing possible Constitutional

What is uncertain, however, is whether foreign trade policy is an area in which uniformity is essential. Several federal and state courts have held that when Congressionally approved agreements contain exceptions for government-purchased goods and services, Congress did not intend to require unilateral elimination of trade barriers.<sup>200</sup> The Third Circuit in *Trojan Technologies* viewed that the GPA had no intent to preempt “Buy American” statutes, as the agreement contained language that the national governments will “*persuade* local governments of the benefits of free trade,” and “[i]f anything . . . the President and Congress have *disavowed* any intent to supersede such state legislation.”<sup>201</sup> In opposition to this view, the California appellate court in *Bethlehem Steel Corp.* rejected its state’s “Buy American” statute, holding that uniformity in foreign trade was essential. In the court’s estimation, the “opportunity for potential conflict is too great to permit the operation of the state law.”<sup>202</sup> Given such divergent interpretations, it is unclear whether foreign trade is an area that warrants essential uniformity.

c. Contract Offshoring Legislation May Attempt to Regulate Conduct Beyond a State’s Borders

At this stage of the analysis, the key question is “whether the practical effect of the regulation is to control conduct beyond the boundaries of the state.”<sup>203</sup> In *Natsios*, the First Circuit held that Massachusetts’ Burma Law violated the Foreign Commerce Clause because it conditioned state procurement decisions on conduct that occurs in Burma.<sup>204</sup> Here, the most restrictive forms of offshoring contract legislation likely affects conduct beyond a state’s borders in the same way. For example, measures that seek to restrict the site of state contract performance or only allow individuals authorized to work in the United States to perform these contracts discourage foreign or American-based companies from engaging in business activities in foreign nations.<sup>205</sup>

d. Market Participant Exception Under the Foreign Commerce Clause

Even if contract offshoring legislation violates the Foreign Commerce Clause, it may withstand a Constitutional challenge under the Market Participant Doctrine. Although the Supreme Court has yet to decide whether the Market Participant Doctrine in the Domestic Commerce Clause applies to the Foreign Commerce Clause, lower courts have applied this Doctrine to provide an

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violations of anti-offshoring legislation).

200. *Trojan Techs.*, 916 F.2d at 907; see *K.S.B. Technical Sales Corp. v. N.J. Dist. Water Supply Comm’n of the State of N.J.*, 381 A.2d 774, 784–85 (N.J. 1977) (listing Supreme Court cases that hold that in the absence of a finding of congressional intent to preempt the field, states retain residual power to make legislation that affects commerce).

201. *Trojan Techs.*, 916 F.2d at 908.

202. *Bethlehem Steel Corp. v. Bd. of Comm’r of the Dept. of Water and Power of the City of L.A.*, 80 Cal. Rptr.800, 804 (Cal. Ct. App. 1969).

203. *Healy v. Beer Institute*, 491 U.S. 324, 336 (1989).

204. *Natsios*, 181 F.3d 38, 75 (1st. Cir. 1999).

205. *Cf. KLINGER & SYKES*, *supra* note 4, at 4 (stating that companies will not receive government funding if the companies engage in business activities in foreign nations).

exemption for state actions that may otherwise interfere with the latter clause.<sup>206</sup> Under the Market Participant Doctrine, “if a State is acting as a market participant, rather than as a market regulator, the dormant Commerce Clause places no limitation on its activities.”<sup>207</sup> Because the Commerce Clause applies principally to state taxes and regulatory measures impeding free private trade in the national marketplace, the Constitution does not bar states themselves from acting as parties to a commercial transaction.<sup>208</sup> The doctrine is limited to the extent that a state may not regulate the downstream regulation of a market in which it is not a participant.<sup>209</sup> In this context, it should be pointed out that most bills under consideration involve the states regulating the market, and not acting as a participant.<sup>210</sup>

In *White v. Massachusetts Council of Construction Employers, Inc.*, the Supreme Court applied the doctrine to uphold a mayoral order requiring that all construction projects funded in whole or in part by city and federal funds be performed by at least half of Boston residents.<sup>211</sup> The Court rejected the claim that the order violated the Commerce Clause because the order did not regulate contracts to which the city was a party, but employment contracts between private contractors and their employees.<sup>212</sup> The Court reasoned that Boston is not limited by formal contract privity because the order “covers a discrete, identifiable class of economic activity in which the city is a major participant” and that “[e]veryone affected by the order is, in a substantial if informal sense, ‘working for the city.’”<sup>213</sup>

The Third Circuit in *Trojan Technologies* applied the *White* court’s rationale to strike down a Foreign Commerce Clause challenge to Pennsylvania’s “Buy American” statute.<sup>214</sup> Just as the *White* court saw employees of a private contractor having a relationship with the city, the Third Circuit saw suppliers of a local public entity to be “supplying for the state.”<sup>215</sup> The Third Circuit reasoned that the state’s role as the ultimate controlling public purchaser enabled it to have the same right as private purchasers to specify the source of steel to be used.<sup>216</sup> The First Circuit in *Natsios*, however, rejected the Third Circuit’s extension of the Market Participant Doctrine for the following reasons: 1) the scope of the Foreign Commerce Clause is greater than its Domestic counterpart; and 2) state regulation of Foreign Commerce is inherently risky (which involves preventing the federal government from speaking with one voice and retaliation

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206. See *Trojan Techs.*, 916 F.2d 903 (holding that state buy-American statutes cannot violate the foreign commerce clause as long as the state is acting only as a market participant); *K.S.B. Technical Sales Corp. v. N.J. Dist. Water Supply Comm’n of the State of N.J.*, 381 A.2d 774, 784–85 (N.J. 1977) (holding that the New Jersey buy-American statute do not violate the commerce clause in the absence of federal legislation).

207. *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 93 (1984).

208. *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 207 (1983).

209. *Wunnicke*, 467 U.S. at 99 (noting that as a seller of timber, Alaska was unable to require that timber harvested from state lands be processed within the state before exportation).

210. ANTI-OUTSOURCING EFFORTS, *supra* note 22, at 5–6.

211. *White*, 460 U.S. at 206.

212. *Id.* at 211 n.7.

213. *Id.*

214. *Trojan Techs.*, 916 F.2d at 910.

215. *Id.* at 911.

216. *Id.*

by foreign nations).<sup>217</sup> Just as with the Foreign Commerce Clause, it is uncertain whether the Market Participant Doctrine extends to state contract offshoring legislation.

*B. Restrictions or Penalties Imposed Against Private Entities Imposed for Relocating Jobs Overseas*

In addition to legislation restricting global outsourcing of state contracts, states have also introduced measures that seek to prevent firms from transferring business activities abroad. These restrictions fall into three categories: 1) regulation of overseas call center operations;<sup>218</sup> 2) transfer of private information overseas;<sup>219</sup> and 3) ineligibility for government benefits.<sup>220</sup> The introduction of such bills occurred between 2004 and 2007.<sup>221</sup> While a few of these bills have been vetoed by Governors or failed to pass and become law, most are still awaiting approval.<sup>222</sup>

1. Regulation of Overseas Call Center Operations

In the first category, several states have introduced bills restricting overseas call centers by regulating calls that involve their residents.<sup>223</sup> The type and degree of restrictions vary by state, requiring call centers to: 1) identify location upon request (California, but vetoed by the Governor; and<sup>224</sup> North Carolina);<sup>225</sup> 2) identify their calling location (Ohio);<sup>226</sup> 3) report the location of employees and hired contractors (California, but vetoed by the Governor);<sup>227</sup> or 4) identify the call location and transfer the call to a U.S. call center upon request of consumer (Washington;<sup>228</sup> and New Jersey<sup>229</sup>).

State legislation that seeks to regulate overseas call centers may violate the Federal Affairs Power, as the design and effect of such laws arguably send a political statement pertaining to foreign affairs.<sup>230</sup> Requiring operators to identify their location imparts a prejudicial or xenophobic message with regards to that location.<sup>231</sup> The following New Jersey bill serves as an emblematic example of the extremity of such regulations:

217. *Natsios*, 181 F.3d at 72.

218. ANTI-OUTSOURCING EFFORTS, *supra* note 22, at 6.

219. *Id.* at 7–8.

220. Meadows, *supra* note 6, at 428–29.

221. ANTI-OUTSOURCING EFFORTS, *supra* note 22, at 2–6.

222. *Id.* at 6.

223. ANDERSON, *supra* note 6.

224. ANTI-OUTSOURCING EFFORTS, *supra* note 22, at 3.

225. ANDERSON, *supra* note 6, at 8.

226. H.B. 459, 125th Gen. Assembly, Reg. Sess. (Ohio 2004).

227. ANTI-OUTSOURCING EFFORTS, *supra* note 17, at 3.

228. H.B. 2351, 58th Leg., Reg. Sess. (Wash. 2004).

229. ANDERSON, *supra* note 6, at 8.

230. *See generally Zschernig*, 389 U.S. 429; *Natsios*, 181 F.3d at 38; *Faculty Senate*, 574 F. Supp. 2d 1331.

231. ANDERSON, *supra* note 6, at 9.

Within the first 30 seconds of answering a telephone call made by a person to an inbound call center, an employee at the call center shall identify: himself, by stating his name; the name of his employer; the location of the municipality, state and country in which he is located; and if applicable, the name and telephone number of a customer service representative of the entity utilizing the services of his employer.<sup>232</sup>

Additionally, the legislation requires that upon a caller's request, a foreign in-bound call center must reroute the call to a call center location in the United States.<sup>233</sup> Once U.S. residents are informed that they are speaking with a foreigner, framers of such a bill expect customers to hang up or protest in response.<sup>234</sup> Such intent or reactions may be classified as a foreign policy attitude that only the federal government has the right to express or encourage against the international community.<sup>235</sup> It is worth noting that the implementation of these disclosure requirements may likely result in the opposite effect that legislators intended. For example, E-LOAN, an on-line lending company, introduced an automated system that allowed customers to choose to speak to someone abroad or in the United States.<sup>236</sup> Approximately 87% preferred the former option, partly because of the potential for receiving quicker action on their mortgage loan requests.<sup>237</sup>

As discussed in the Federal Foreign Affairs analysis above, if the effect of these bills precipitate or result in consumer protest, the reasoning of the Court in *Zschernig* likely supports a finding that they violate the Federal Foreign Affairs Power by enabling parties other than the federal government to express foreign policy attitudes.<sup>238</sup> State regulation of call centers may also implicate the Foreign Commerce Clause, as it touches on foreign policy questions<sup>239</sup> and has the practical effect of controlling conduct beyond the boundaries of the state.<sup>240</sup>

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232. *Id.* at 7

233. *Id.* at 8.

234. *Id.* at 9.

235. *Cf. Zschernig*, 389 U.S. 429 at 437–39, 438 n.8 (1968) (discussing that the design of Oregon's probate statute enabled state judges to express their anti-communist ideology when evaluating real property transfers involving eastern European citizens).

236. Saritha Rai, *Financial Firms Hasten Their Move to Outsourcing*, N.Y. TIMES, Aug. 18, 2004, available at <http://query.nytimes.com/gst/fullpage.html?res=9E07E6D9103FF93BA2575BC0A9629C8B63&scp=2&sq=saritha%20rai%20%22financial%20firms%22&st=cse>.

237. *Id.*

238. *See Zschernig*, 389 U.S. 429 at 441 (“The Oregon law does, indeed, illustrate the dangers which are involved if each State, speaking through its probate courts, is permitted to establish its own foreign policy.”).

239. *See Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 194 (1983) (discussing possible international and federal implications of state tax policies).

240. *See Healy v. Beer Inst.*, 491 U.S. 324, 336–37 (1989) (discussing the limits of the Constitutional power of a state's regulations to impact conduct outside its borders in the context of the U.S. Commerce Clause).

## 2. Restrictions of Private Data Transfers Overseas

In the second category, private data transfers include voting and financial information.<sup>241</sup> Several states are considering the requirement of a customer's permission before sending his or her information overseas.<sup>242</sup> In particular, Connecticut introduced a bill in 2004 forbidding a vendor to release financial, credit, or identification of customers overseas.<sup>243</sup> In the same year, California also sought to bar the sharing of private information in violation of a state law, but the Governor vetoed the proposal.<sup>244</sup> In 2005, however, California successfully passed a bill preventing voter information from being sent abroad.<sup>245</sup>

State regulations of private entities may violate the Supremacy Clause as such regulations are subject to preemption by federal statutes and treaties.<sup>246</sup> Unlike state legislation restricting government contracts, several federal statutes exist that may conflict with state restrictions on information transfers by private entities.<sup>247</sup> The following federal statutes seek to protect consumer privacy in much the same way as these state regulations: The Fair Credit Reporting Act ("FCRA");<sup>248</sup> the Health Insurance Portability and Accountability Act ("HIPAA");<sup>249</sup> and the Gramm–Leach–Bliley Act ("GLBA").<sup>250</sup> While these federal statutes may contain provisions that wholly or partially preempt their state counterparts, it is important to remember that state intrusion into an area of federal regulation is by itself insufficient to activate preemption.<sup>251</sup> As discussed earlier, state restrictions that adopt federal standards likely withstand constitutional challenges,<sup>252</sup> but those state restrictions that conflict, curtail, complement, or add to federal standards will likely be found unconstitutional.<sup>253</sup>

These private data restrictions may also present a potential conflict with federal treaties and other international agreements, because they prevent Congress from achieving its overall objectives in eliminating trade barriers with

241. A.B. 1741, 2004, Reg. Sess. (Cal. 2005); H.B. 3186, 58th Leg., Reg. Sess. (Wash. 2004); S.B. 400, 2004 Gen. Assembly, February Sess. (Conn. 2004).

242. H.R. 1289, 64th Gen. Assembly, 2nd Reg. Sess. (Colo. 2004); S. 400, Feb. Sess. (Conn. 2004).

243. S. 400, Feb. Sess. (Conn. 2004).

244. ANTI-OUTSOURCING EFFORTS, *supra* note 22, at 3.

245. *Id.* at 4.

246. *See id.* at 6 (discussing how state contract bans on outsourcing likely violate the Constitution's Foreign Commerce Clause).

247. *See* Pub. L. No. 91-508, 84 Stat. 1114 (1970) (codified as amended at 15 U.S.C. § 1681 (1970)) (amending the Federal Deposit Insurance act to ensure banks maintain certain records); Health Insurance Portability and Accountability Act, Pub. L. No. 104-191, 110 Stat. 1936 (1996) (amending the Internal Revenue Code of 1996); Gramm-Leach-Bliley Financial Modernization Act, Pub. L. No. 106-102, 113 Stat. 1338 (1999) (codified as amended at 15 U.S.C. §§ 6801–6827 (1999)) ("enhanc[ing] competition in the financial services industry").

248. Pub. L. No. 104-191, 110 Stat. 1936 (1996).

249. Pub. L. No. 104-191, 110 Stat. 1936 (1996).

250. Pub. L. No. 106-102, 113 Stat. 1338 (1999). For a detailed analysis of potential conflict between federal laws and state bills in the area of consumer privacy protection, *see* KLINGER & SYKES, *supra* note 4; Meadows, *supra* note 6; Earle et al., *supra* note 6, at 109–11.

251. *See generally* *Hines*, 312 U.S. 52 (holding that a federal alien registration act was supreme over the Pennsylvania Alien Registration Act); *DeCanas*, 424 U.S. at 354 (holding that the "[p]ower to regulate immigration is unquestionably exclusively a federal power").

252. *De Canas*, 424 U.S. at 355–56.

253. *Id.*

member nations. The federal statute enacting NAFTA, section 3317(b)(5) “Congressional Intent Regarding Future Accession,” states that general objectives of NAFTA and future trade agreements include “the elimination of other barriers to market access for United States goods and services . . .<sup>254</sup> and the elimination of acts, policies, and practices which deny fair and equitable market opportunities . . . .”<sup>255</sup> The WTO’s General Agreement on Trade in Services (“GATS”) likewise aspires to trade reciprocity. Article VII commits members to the following principles of “National Treatment”:

In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.<sup>256</sup>

Despite such Congressional objectives, it is also important to note that these agreements may also include exceptions for state regulation of certain industries, just as they did with government procurement contracts discussed earlier. As the text in the GATS’ “National Treatment” clause above notes, equal treatment is warranted unless a member nation places “conditions and qualifications set out” in attached schedules.<sup>257</sup> For example, the United States has schedules containing exceptions for banking, financial and professional services that list state restrictions on licensing and location requirements.<sup>258</sup> In particular, the “GATS USA Financial Services Commitments” has a provision for the “transfer of financial information, and financial data processing and related software by suppliers of other financial services.”<sup>259</sup> Additionally, NAFTA’s requirements for cross-border trade in services, outlined in its chapter 12, exempts current conflicting state statutes from judicial scrutiny by grandfathering those statutes. Under “Reservations” in article 1206(2), “[e]ach Party may set out in its Schedule to Annex I, within two years of the date of entry into force of this Agreement, any existing non-conforming measure maintained by a state or province, not including a local government.”<sup>260</sup> Given the presence of state restrictions on such schedules, Congress likely did not intend to regulate unilaterally the industries contained therein.

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254. 19 U.S.C. § 3317(b)(5)(E).

255. *Id.* § 3317(b)(5)(F).

256. General Agreement on Trade in Services art. XVII(1), Apr. 4, 1994, *available at* [http://www.wto.org/english/docs\\_e/legal\\_e/26-gats\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm) [hereinafter GATS].

257. *Id.*

258. World Trade Organization, Database: Table of Commitments, <http://tsdb.wto.org/default.aspx> (under the “Electronic Schedule” heading and “Entire Specific Commitments” subheading, choose “USA” and “Database Output,” then select “go”) (last visited Mar. 17, 2008).

259. *Id.*

260. NAFTA, *supra* note 73, art. 1206(2).

### 3. Ineligibility for Government Benefits

In the third category, several states have proposed making businesses ineligible for certain state benefits if they engaged in global outsourcing.<sup>261</sup> In 2004, Connecticut sought to disqualify businesses from economic development grants and loans for seven years if they terminated employees in order to transfer work overseas.<sup>262</sup> A 2004 New York bill required employers receiving tax credits, loans, grants, infrastructure upgrades, and other government benefits to repay all the aid they received if jobs were outsourced outside of the state.<sup>263</sup> Similarly, Ohio sought to make employers ineligible for state tax incentives, loans, loan guarantees, or grants for up to five years if they create a net loss of in-state jobs as a result of global outsourcing.<sup>264</sup>

State attempts to bar state funding or state tax incentives for businesses engaging in global outsourcing likely pose no constitutional challenges, as U.S. courts view such measures as a legitimate exercise of state spending power.<sup>265</sup> In *Faculty Senate*, a federal court held that even though Florida's ban on travel to terrorist countries interfered with the Federal Foreign Affairs Power, the law would otherwise be valid if the legislature had limited the ban to the use of state funds to direct travel costs.<sup>266</sup> In that situation, "it would be easy [for the court] to find that such limitation was a discretionary spending decision entitled to deference."<sup>267</sup> The court's judgment further supports such judicial deference, as the ban against use of state funds for travel was upheld while all other aspects of the law were unconstitutional.<sup>268</sup> Here, such outsourcing restrictions are likewise limited to the use of state funds and deemed legitimate discretionary spending decisions.

## VI. FEDERAL LEGISLATION AGAINST OFFSHORING

Despite the federal government's commitment to international agreements that aim to eliminate trade barriers, members of Congress have proposed a number of anti-outsourcing bills similar to those crafted by state legislatures. Such federal initiatives fall into the following categories: 1) federal contracts; 2) data transfers overseas; and 3) government benefits. While they do not face the same constitutional challenges as their state counterparts, they potentially violate U.S. obligations under international trade agreements.

Federal legislators have introduced several proposals with varying levels of restrictions for the performance of government contracts. Among those introduced, the following failed to pass into law: 1) the American Manufacturing Retention Act (2003), requiring that any prospective contractor working with federal agencies employ at least fifty percent of its employees in the United

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261. Meadows, *supra* note 6, at 428.

262. *Id.*

263. *Id.*

264. *Id.*

265. See *Faculty Senate*, 574 F. Supp.2d at 1348 (holding that the Florida Travel Act was invalid for having more than an incidental impact on federal foreign affairs power).

266. *Id.*

267. *Id.*

268. *Id.* at 1359.

States;<sup>269</sup> and 2) the United States Workers Protection Act (known as the “Dodd Amendment,” and introduced in 2004 and 2005), barring both state contract work receiving federal funds and federal contract work from being performed overseas unless the President considers such performance necessary in the interests of national security.<sup>270</sup>

In 2004, Congress enacted the Thomas–Voinovich Amendment (“TVA”), which became law as part of a federal omnibus appropriations act.<sup>271</sup> The TVA stipulates that “[an] activity or function of an Executive agency . . . may not be performed by a contractor outside of the United States.”<sup>272</sup> Such a mandate requires domestic and foreign businesses seeking federal government contracts to use domestic workers in performing contract work.<sup>273</sup>

Congress has considered several proposals restricting the transmittal of personal data overseas, none of which have yet to become law. In 2005, Senator Hillary Clinton introduced “The Safeguarding Americans From Exporting Identification Data Act,” which forbids the disclosure of “personally identifiable information regarding a resident of the United States to any foreign branch, affiliate, subcontractor, or unaffiliated third party located in foreign country.”<sup>274</sup> A similar bill was introduced in the House of Representatives, which includes restrictions and regulations on data sent abroad.<sup>275</sup> Neither of these bills ever became law.<sup>276</sup>

Federal legislatures have proposed denying federal grants and tax incentive to firms engaging in global outsourcing. A 2004 Senate bill, titled “The Domestic Workforce Protection Act” mandated the elimination of tax benefits for companies that outsource operations overseas and a ban against certain offshore royalty payments.<sup>277</sup> That same year, a House bill titled “Defending American Jobs Act of 2004,” was introduced. The bill denied federal grants, contracts, loan guarantees, and other types of federal funding, to business that outsourced jobs.<sup>278</sup> Just as with bills restricting private data transfers, these initiatives never became law.<sup>279</sup>

269. ANDERSON, *supra* note 6, at 16.

270. United States Workers Protection Act of 2004, S. 2094, 108th Cong. (2004); H.R. 3820, 108th Cong. (2004); United States Workers Protection Act of 2005, H.R. 3406, 109th Cong. (2005).

271. Meadows, *supra* note 6, at 439.

272. Consolidations Appropriations Act of 2004, Pub. L. No. 108-199, § 647(e), 118 Stat. 3 (2004).

273. KLINGER & SYKES, *supra* note 4, at 19–20.

274. ANTI-OUTSOURCING EFFORTS, *supra* note 22, at 8.

275. *Id.* at 9.

276. Govtrack.us: A Civic Project to Track Congress, <http://www.govtrack.us/congress/bill.xpd?bill=s109-810> (last visited Mar. 3, 2009); Govtrack.us: A Civic Project to Track Congress, <http://www.govtrack.us/congress/bill.xpd?bill=h109-1653> (last visited Mar. 3, 2009).

277. Meadows, *supra* note 6, at 432.

278. *Id.*

279. Govtrack.us: A Civic Project to Track Congress, <http://www.govtrack.us/congress/bill.xpd?bill=h108-3911> (last visited Mar. 3, 2009); Govtrack.us: A Civic Project to Track Congress, S. 2235: Domestic Workforce Protection Act, <http://www.govtrack.us/congress/bill.xpd?bill=s108-2235> (last visited Mar. 3, 2009).

A. *Conflict Between Federal Offshoring Legislation and International Trade Agreements*

Of the three categories of federal anti-outsourcing legislation above, federal contract restrictions present the strongest case for violations of U.S. commitments to international trade agreements. As discussed earlier, the federal government has pledged to extend equal treatment to domestic and foreign suppliers, goods, and services under the GPA.<sup>280</sup> A major critique of the TVA is that its mandate requiring employment of U.S. workers violates the GPA's principles of national treatment and non-discrimination.<sup>281</sup> The TVA's application to both domestic and foreign companies fails to meet the equal treatment requirement, because foreign companies may have to relocate in order to secure a bid, but their domestic counterparts need not incur any relocation costs.<sup>282</sup> Furthermore, the TVA discriminates against domestic businesses that currently engage in global outsourcing, because these businesses must agree to produce all goods and services domestically before winning a contract.<sup>283</sup>

While such critiques may be valid, the TVA may not necessarily violate the GPA for the same reasons that state contract legislation potentially avoids conflict with such an agreement. First, the United States' inclusion of Annex I to the GPA, which expressly lists executive agencies to be bound, indicates that not all executive agencies are parties to the agreement.<sup>284</sup> Second, Congressional approval of the Uruguay Round Trade Agreements (which includes the GPA) through legislation prevents any WTO-based challenges to U.S. law.<sup>285</sup> The federal statutory version of the agreement dictates that U.S. law "prevail in conflict" and that "[n]o provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect."<sup>286</sup> Furthermore, where there is a conflict between a federal statute and federal treaty, the Supreme Court holds that the "one last in date will control."<sup>287</sup>

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280. GPA, *supra* note 74, at 7.

281. Meadows, *supra* note 6, at 439.

282. *Id.*

283. KLINGER & SYKES, *supra* note 4, at 19.

284. See GPA, *supra* note 74, Annex 1 (1)–(5) (omitting agencies not bound).

285. 19 U.S.C.A. § 3512(a)(1).

286. *Id.*

287. *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) ("When the stipulations are not self-executing, they can only be enforced pursuant to legislation to carry them into effect, and such legislation is as much subject to modification and repeal by congress as legislation upon any other subject . . . By the constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but, if the two are inconsistent, the one last in date will control...").

## VII. THE EFFECTIVENESS OF SERVICE TRADE DISPUTE SETTLEMENT MECHANISMS

The questionable commitment of the federal and state governments to international agreements in the services trade, and the uncertainty of obtaining a judicial remedy in U.S. courts, compel a review of existing alternative dispute mechanisms. Already implemented in several treaties are trade settlement dispute bodies and procedures, but their effectiveness is relatively unknown in the area of services, given the paucity of the service-related conflicts that have been addressed.

International trade agreements, such as the WTO, and regional trade agreements, such as NAFTA, include dispute settlement procedures to resolve conflicts in lieu of judicial intervention.<sup>288</sup> For resolutions of disputes between WTO member states, a panel of trade experts is formed to resolve the matter. A Dispute Settlement Body's ("DSB") decision must be followed unless a consensus of members rejects it, which has never happened.<sup>289</sup> The WTO also provides for a review of the panel decision by an Appellate Body.<sup>290</sup> Should the losing party fail to comply with the decision, the prevailing party may impose compensatory trade sanctions against the losing party.<sup>291</sup>

For NAFTA, the first step involves consultations between the affected nations. Should the matter remain unresolved, parties bring their dispute before a panel established under NAFTA's chapter 20.<sup>292</sup> The initial requests for consultation and then a panel are filed with the Free Trade Commission ("FTC").<sup>293</sup> A party that is dissatisfied with the FTC's efforts to mediate the dispute may request the formation of an independent panel charged with fact-finding and issuing initial and final reports.<sup>294</sup> If parties are unable to agree on a remedy after receiving these reports, they are required to decide on trade compensation for the injured party.<sup>295</sup> Should no settlement be reached within thirty days, the injured party may suspend the offending party's NAFTA benefits equivalent to those that the panel has concluded were impaired.<sup>296</sup>

Both of these processes may be insufficient to resolve trade disputes. While the vast majority of parties comply with DSB rulings, compliance is by no means certain. In some cases, offending member nations have employed delay tactics or retroactively modified their schedule of commitments to avoid compliance

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288. See NAFTA, *supra* note 73, ch. 20 "Institutional Arrangements and Dispute Settlement Procedures."

289. World Trade Organization, *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Apr. 15, 1994, available at [http://www.wto.org/english/docs\\_e/legal\\_e/28-dsu.doc](http://www.wto.org/english/docs_e/legal_e/28-dsu.doc).

290. *Id.*

291. *Id.*

292. David A. Gantz, *Government-to-Government Dispute Resolution Under NAFTA's Chapter 20: A Commentary on the Process*, 11 AM. REV. INT'L ARB. 481, 482 (2001).

293. *Id.*

294. *Id.*

295. *Id.*

296. NAFTA, *supra* note 73, ch. 20 "Institutional Arrangements and Dispute Settlement Procedures."

with final rulings.<sup>297</sup> For example, a 1997 WTO appellate body's ruling that the European Union violated its wholesale distribution service commitments in the banana market is currently still in dispute.<sup>298</sup> The EU modified its banana import regime in response to the DSB ruling, but such an effort failed to achieve compliance and triggered another WTO complaint and adverse ruling.<sup>299</sup> A WTO gambling case involving the United States and Antigua is an example of a member's attempt to modify its annex of concessions in an effort to avoid compliance.<sup>300</sup> Although such a tactic failed to relieve the United States of its sanctions, the United States changed its national treatment commitments to exclude online gambling in response to an adverse 2007 WTO ruling that found it to be in violation of the GATS provision forbidding restrictions against recreational services.<sup>301</sup>

Second, international trade panel decisions have no binding legal authority when further remedy is sought within the judicial systems of member nations. For example, U.S. jurisprudence does not integrate international law with municipal law.<sup>302</sup> The Supreme Court holds that both areas of law are separate and discrete legal systems without incorporation.<sup>303</sup> Several U.S. courts have held that international trade dispute settlement decisions are not binding on the United States, even though non-compliance violates U.S. international obligations, and in the case of the WTO or NAFTA, non-compliance may be subject to trade sanctions imposed by the prevailing Member nation.<sup>304</sup> It is important to note, however, that the Supreme Court takes international law into consideration, and instructs that any potentially conflicting federal statute should never be construed to violate international law if another construction is possible.<sup>305</sup>

## VIII. CONCLUSION

As other researchers have concluded, current and proposed local, state, and federal laws and restrictions against offshoring of professional services, as well as prevailing and planned barriers and disincentives in this arena, violate the provisions of the Constitution and commitments to the WTO. At the same time, the partial ambiguity surrounding the Constitutionality of U.S. federal and state legislation against offshoring and the time-consuming mechanisms for seeking redress, coupled with the questionable effectiveness of settlement mechanisms of

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297. See Gary Hufbauer & Sherry Stephenson, *Services Trade: Past Liberalization and Future Challenges*, 10 J. INT'L ECON. L. 605, 615 n.24 (2007) (the dispute was temporarily resolved with a bilateral agreement in 2001, but the case is now back on the WTO panel).

298. *Id.*

299. *Id.*

300. See Yevgeniya Rosen, *Notes and Recent Developments, Taking Chances: The United States's Policy on Internet Gambling and its International Implications*, 26 CARDOZO ARTS & ENT. L.J. 873 (2009) (discussing the WTO's decision and the United States's unsuccessful appeal in the Antigua gambling dispute).

301. Hufbauer and Stephenson, *supra* note 297, at 615–16.

302. *Foster & Elam*, 27 U.S. at 274–75.

303. *Id.* at 279.

304. See *Timken Co. v. U.S.*, 354 F.3d 1334, 1345 (Fed. Cir. 2004); *Corus Staal BV v. Dep't of Commerce*, 395 F.3d 1343, 1348 (Fed. Cir. 2005).

305. *Murray v. The Charming Betsy*, 6 U.S. 64, 121 (1804).

free trade agreements, leads to an uncertain outlook for successful judicial challenges in the immediate future.

So far, many of the state and federal bills on outsourcing introduced to date have not been enacted. Whether this will change with a new U.S. presidential administration, as well as a world-wide recession, remains to be seen. The first major law, allocating hundreds of billions of funding in new projects, contained clauses that favored U.S. companies,<sup>306</sup> and attracted immediate negative reactions from foreign governments; even several members of Congress felt that the passage of such a law would lead to similar restrictive measures by other countries.<sup>307</sup>

The United States has been a strong sponsor of reciprocal government procurement agreements since the 1970s and has also signed onto subsequent free trade agreements that contain government procurement provisions similar to those outlined in chapter ten of NAFTA. Support for these types of agreements arises from the belief that non-discriminatory requirements for government procurement benefit U.S. firms selling goods and services abroad. These agreements provide more opportunities for U.S. firms to export both goods and services. The reverse situation regarding the validity of current and potential barriers on the import of services, as well as the legality of federal and state legislation on offshore outsourcing, will gradually get resolved through judicial decisions.

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306. American Recovery and Reinvestment Act of 2009, H.R. 1, 111th Cong. § 1110 (2009).

307. David E. Sanger, *Senate Agrees to Dilute "Buy America" Provisions*, N.Y. TIMES, Feb. 4, 2009, available at <http://www.nytimes.com/2009/02/05/us/politics/05trade.html>.