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FEDERAL TRADE ADJUSTMENT ASSISTANCE FOR WORKERS: BROKEN EQUIPMENT

JESSICA SCHAUER*

THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY. By Thomas Friedman. New York: Farrar, Straus and Giroux, 2005.

Abstract: In *The World Is Flat*, Thomas Friedman argues that the convergence of various events and technologies over the past few decades have created a greater interconnectedness among individuals across the globe. One of the hallmarks of this latest wave of globalization has been the outsourcing of American jobs to foreign countries such as India. Friedman suggests that, in light of this trend, a comprehensive plan is needed to help Americans prepare for competition in the global economy. This Book Review analyzes whether the Federal Trade Adjustment Assistance program (TAA), part of the Trade Act of 1974, is a viable means for providing job training and assistance to Americans who have lost jobs due to offshore outsourcing. It concludes that the TAA program is largely ineffective and suggests various modifications.

INTRODUCTION

According to Thomas Friedman, globalization has occurred in three stages.¹ “Globalization 1.0” began in 1492, when exploration of the New World caused states to become interconnected.² “Globalization 2.0” was spurred on by the industrial revolution, as multinational companies became interconnected and created a global economy.³ The third stage, “Globalization 3.0,” is the focus of Friedman’s new book, *The World is Flat*.⁴ Friedman asserts that Globalization 3.0 arose through the convergence of various events and technologies that together have lowered barriers to interacting on a global scale,

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¹ THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* 9 (2005).

² *Id.*

³ *Id.*

⁴ *Id.* at 10.

“flattening” the world such that individuals are now interconnected.⁵ One visible aspect of this new interconnected or “flat” world is the outsourcing of American jobs, particularly high-tech and service sector jobs, to foreign countries like India.⁶ While Friedman contends that the newest wave of globalization will prove to be a positive force in the long run, he acknowledges that it can also have a devastating impact on individuals whose jobs have been outsourced.⁷ In order to temper the impact of globalization on individual American workers and to prepare them for competition in the global economy, Friedman outlines a plan that he calls “Compassionate Flatism.”⁸ One element of Compassionate

⁵ *Id.*

⁶ See FRIEDMAN, *supra* note 1, at 24, 103–13. The term “outsourcing” technically applies any time a business contracts out work previously done in-house, whether or not that work is performed overseas. See Daniel W. Drezner, *The Outsourcing Bogyman*, FOREIGN AFF., May/June 2004, at 22, 24; C. Alan Garner, *Offshoring in the Service Sector: Economic Impact and Policy Issues*, ECON. REV., Third Quarter 2004, at 5, 6, available at <http://www.kc.frb.org/PUBLICAT/ECONREV/Pdf/3Q04garn.pdf>. Meanwhile, “offshoring” refers to the transfer of work to a foreign country, whether it is performed by another office of the same company or a separate company. *Id.* at 5. Because of the prevalence of “offshore outsourcing,” however, the two are often used interchangeably. See, e.g., Drezner, *supra* at 22. Offshore outsourcing has become a salient political topic and was frequently discussed during the 2004 Presidential election. See Robert Atkinson, *Meeting the Offshoring Challenge*, 2004 PROGRESSIVE POL’Y INST. 1, available at <http://www.ppionline.org/documents/offshoring2-0704.pdf>; Carolyn Lochhead, *Outsourcing: Fed Chairman Warns U.S. Against Protectionist Cures*, S.F. CHRON., Feb. 21, 2004, at A1; *U.S. Election 2004: Grappling with Globalisation*, ECONOMIST, Oct. 9, 2004, at 14, 15 [hereinafter *Grappling with Globalisation*]. Both major candidates, Republican George W. Bush and Democrat John Kerry, announced plans to decrease the number of jobs going overseas. See *id.* The centerpiece of Kerry’s plan was the elimination of “tax loopholes,” or deferment options that increase the profitability of hiring overseas workers, whereas President Bush focused upon lowering corporate taxes to “make America a better place to do business.” Atkinson, *supra* at 1; *Grappling with Globalisation*, *supra* at 15. The two candidates also sparred over the issue during the televised presidential debates. See President George W. Bush & Sen. John Kerry, *The Third Bush-Kerry Presidential Debate* (Oct. 13, 2004), http://www.debates.org/pages/trans2004d_p.html [hereinafter *Debates*].

⁷ FRIEDMAN, *supra* note 1, at 276; Thomas J. Manley & Scott M. Hobby, *Globalization of Work: Offshore Outsourcing in the IT Age*, 18 EMORY INT’L L. REV. 401, 406 (2004) (“Economists defend job offshoring as just one more element of free trade that, in the long run, works to the benefit of all parties involved. They are equally ready, however, to acknowledge the severe economic, political, and social dislocation that job offshoring can cause in the short run.” (footnotes omitted)).

⁸ FRIEDMAN, *supra* note 1, at 280. Compassionate Flatism, in Friedman’s description, “is a policy blend built around five broad categories of action for the age of flat: leadership, muscle building, cushioning, social activism, and parenting.” *Id.* Regarding the “leadership” prong of this plan, Friedman states that globalization requires leaders who will support policies aimed at large-scale advancement of science and technology. *Id.* at 283. In particular, Friedman suggests a presidential push for alternative energy and energy conservation modeled on the “moon race” of the 1960s. *Id.* The “cushioning” portion, according to Friedman, would consist of a wage insurance program, so that workers who

Flatism, what Friedman terms “muscle building,” involves creation of a workforce with “lifetime employability.”⁹ Friedman states that lifetime employment with a single employer will become increasingly rare as globalization accelerates, and thus American workers must be prepared properly for frequent career changes.¹⁰ The measures Friedman proposes to achieve this goal are twofold: creation of portable benefits that employees can take from job to job, and lifelong learning opportunities so that workers can sharpen their skills and attain higher value-added work if their jobs are sent overseas.¹¹

This Book Review will focus on the second measure, lifetime learning, and will assess whether federal Trade Adjustment Assistance (TAA), part of the Trade Act of 1974, is an effective route for providing education and training to those who have already lost jobs to outsourcing.¹² Part I discusses the problems faced by individuals and families affected by offshore outsourcing. Part II provides an overview of the TAA program, including amendments made in 2002 as part of the Trade Act of 2002. Part III addresses three problem areas in the TAA program. First, it is insufficient in its scope, as it fails to reach the high-tech and service-sector jobs that are now being lost to foreign outsourcing.¹³ Second, it is poorly administered and under-funded, and as a result many displaced workers currently eligible for assistance have difficulty obtaining it.¹⁴ Third, the training provided by the program is largely ineffective.¹⁵ This Book Review concludes that, although the changes made in 2002 significantly improved the TAA program, TAA as it currently exists fails as an effective provider of education and job training to those who have lost their jobs to foreign outsourcing. Insofar as advanced training and education are “muscle build-

are forced to take jobs at a lower pay rate due to outsourcing would be compensated for that decrease. *Id.* at 293. “Social activism” would involve increased collaboration between nongovernmental organizations and corporations in order to foster a corporate “moral conscience,” and “parenting,” would require strong parental encouragement of education, particularly in the fields of science, engineering and technology. *Id.* at 297, 303–06.

⁹ *Id.* at 284.

¹⁰ *Id.*

¹¹ *See id.*

¹² *See* 19 U.S.C. §§ 2271–2331 (Supp. I 2002).

¹³ *See* 19 U.S.C. § 2272.

¹⁴ *See* Brad Brooks-Rubin, *The Certification Process for Trade Adjustment Assistance: Certifiably Broken*, 7 U. PA. J. LAB. & EMP. L. 797, 798 (2005).

¹⁵ *See* Paul T. Decker & Walter Corson, *International Trade and Worker Displacement: Evaluation of the Trade Adjustment Assistance Program*, 48 INDUS. & LAB. REL. REV. 758, 773 (1995).

ing,” Trade Adjustment Assistance is the broken exercise equipment gathering dust in the corner of the American economy.

I. THE EFFECTS OF OFFSHORE OUTSOURCING

Joan Pounds is a single mother and former information technology (IT) representative for Agilent Technologies.¹⁶ Discussing her job at Agilent, Pounds stated, “I walked to work when I was seven months’ [sic] pregnant in a blizzard and stayed for three more shifts . . . I did that because I cared about the company.”¹⁷ Despite that show of dedication, Pounds was laid off in July of 2003, after her employer contracted with a firm in India to do her job.¹⁸ She had to train her own replacements via teleconference.¹⁹ After being laid off, Pounds sent out twenty-five resumes a week but was unable to find full-time employment, forcing her to take a part-time job as a senior citizen caregiver at seven dollars an hour.²⁰ Since then, it has been hard just to get by.²¹ With no medical benefits, she must pay the costs of treatment for her son’s bipolar disorder out of pocket, and in 2004 she sold her house at a loss two days before it was to be foreclosed.²²

Unfortunately, stories like Pounds’s are becoming increasingly common.²³ U.S. job losses due to offshoring doubled between 2001 and 2004, and various research institutes have predicted that offshore outsourcing will continue to increase.²⁴ McKinsey Global Institute es-

¹⁶ Jennifer Reingold, *Into Thin Air*, FAST Co., Apr. 2004, at 76, 81. Pounds is profiled in a 2004 article in the magazine FAST COMPANY which relates the experiences of forty IT employees who lost their jobs to offshore outsourcing. *Id.* at 67–82. Other profiled workers include Corey Goode and James Victor. *Id.* at 77, 82. Goode worked on a contract basis with Microsoft, providing support for their call centers; part of his job included setting up user accounts for workers in Bangalore, India, who would replace domestic employees. *Id.* at 77. Just before the birth of his first child, Goode learned that his own job was moving to India. *Id.* Victor lost his contract programming job with First Data due to outsourcing and was evicted from his apartment. *Id.* at 82. Although he was among the lucky ones to have found a new job relatively soon, at 51 years old he stated, “I don’t see myself in a situation where I can ever retire.” *Id.*

¹⁷ *Id.* at 81.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *See id.*

²² Reingold, *supra* note 16, at 81.

²³ *See id.*; Drezner, *supra* note 6, at 24.

²⁴ Mara Lee, *Ohio Hit Hard By Job Drain*, DAYTON DAILY NEWS, Oct. 19, 2004, at D1; Drezner, *supra* note 6, at 24. Sources note, however, that predictions regarding the offshore outsourcing trend are “subject to considerable uncertainty” due to the newness of

timates a 30% to 40% increase in the volume of offshore outsourcing per year for the next five years.²⁵ Forrester Research predicts that 3.3 million white collar jobs will be sent overseas by 2015.²⁶ Deloitte Research predicts that by 2009 two million financial-sector jobs will have been outsourced.²⁷ In one scenario, research firm Gartner predicts that as many as 25% of all IT jobs could be outsourced to other countries by 2008.²⁸ For those whose jobs are sent overseas, it is notoriously difficult to find new work.²⁹ As of 2000, the U.S. General Accounting Office reported that only 75% of dislocated workers found new employment and those who did made less than 80% of their previous wage.³⁰ Hardest hit are older workers who have become established in their careers.³¹ For example, Doug Hill worked as a automotive design contractor for Lear Seating for years before his job was sent over seas; because he had been unable to find full-time work, he worked part-time at a veterans' benefits office.³² Asked about his prospects in April of 2004, Hill stated, "I'm done . . . I know that. Who's going to hire me? I'm 60. I'm just living one day at a time, and I do a lot of praying."³³

II. TRADE ADJUSTMENT ASSISTANCE: BACKGROUND

Theoretically, the Trade Adjustment Assistance program should be available to help people like Pounds and Hill who have lost jobs due to

the phenomenon, the structural changes it is likely to cause, and the likelihood that it will be affected by political events. *See* Garner, *supra* note 6, at 11.

²⁵ *See* Garner, *supra* note 6, at 11.

²⁶ Drezner, *supra* note 6, at 24. The jobs most likely to go overseas are those that are labor intensive, information-based, can be reduced to a routine set of instructions, and can be monitored from a distance. Garner, *supra* note 6, at 17. Nonetheless, the range of activities that can be outsourced is vast—the *New York Times* even reported in December, 2005 that computer game enthusiasts have begun outsourcing the early rounds of their games to Chinese players. *See* David Barboza, *Ogre to Slay? Outsource it to the Chinese*, N.Y. TIMES, Dec. 9, 2005, at A1.

²⁷ Drezner, *supra* note 6, at 24.

²⁸ Reingold, *supra* note 16, at 78.

²⁹ *See* U.S. GEN. ACCOUNTING OFFICE, TRADE ADJUSTMENT ASSISTANCE: TRENDS, OUTCOMES, AND MANAGEMENT ISSUES IN DISLOCATED WORKER PROGRAMS 15 (2000) [hereinafter GAO 2000].

³⁰ *Id.*

³¹ *See* Reingold, *supra* note 16, at 79–80; *see also* Garner, *supra* note 6, at 15 (citing a study of displaced manufacturing workers that found that, “[o]lder, less educated workers with long tenures in their job were unemployed longer or, if reemployed, were more likely to experience earnings losses exceeding 30 percent.”).

³² Reingold, *supra* note 16, at 79.

³³ *Id.* at 80.

international trade.³⁴ Trade Adjustment Assistance was first included in the Trade Expansion Act of 1962, a bill regulating foreign trade, as an alternative to traditional, protectionist forms of import relief such as tariffs.³⁵ The 1962 Act, however, contained stringent standards regarding the conditions under which aid could be received, and as a result the assistance provisions were under-utilized.³⁶ The Trade Act of 1974 modified the earlier provisions, loosening the eligibility criteria and placing oversight of the program with the Department of Labor, rather than the U.S. Tariff Commission.³⁷ In 2002, Congress once again significantly revised the program and combined it with the adjustment assistance program provided under the North American Free Trade Agreement implementing legislation (NAFTA-TAA).³⁸

To receive benefits under the program, workers must satisfy both group and individual qualifications.³⁹ To achieve group certification, a group of three or more workers must first file a petition with the Department of Labor (DOL).⁴⁰ The group of workers must show that they have been laid off and that either sales of articles produced by the workers' firm have decreased while imports of competitive articles have increased or that the firm has shifted production to a foreign country with which the United States is a partner in certain trade agreements.⁴¹

³⁴ See Atkinson, *supra* note 6, at 11.

³⁵ Whitney John Smith, *Trade Adjustment Assistance: An Underdeveloped Alternative to Import Restrictions*, 56 ALB. L. REV. 943, 950 (1993); GAO 2000, *supra* note 29, at 7.

³⁶ See Smith, *supra* note 35, at 950.

³⁷ See Trade Act of 1974, Pub. L. No. 93-618, §§ 221-222, 88 Stat. 1978, 2019 (1975); GAO 2000, *supra* note 29, at 7.

³⁸ See Trade Act of 2002, Pub. L. No. 107-210, §§ 111-125, 116 Stat. 933, 936-946 (2002).

³⁹ 19 U.S.C. § 2272-2273 (Supp. I 2002).

⁴⁰ 19 U.S.C. § 2272; U.S. Dep't. of Labor, Trade Adjustment Assistance Fact Sheet, <http://www.doleta.gov/programs/factsht/taa.cfm> (last visited Mar. 20, 2005) [hereinafter DOL Fact Sheet].

⁴¹ DOL Fact Sheet, *supra* note 40. The group eligibility requirements under the Trade Act of 2002 state in relevant part that a group of laid-off workers can be certified for assistance if:

(2)(A)(i) sales or production, or both, of [the workers'] firm or subdivision have decreased absolutely

(ii) imports of articles like or directly competitive with articles produced by such firm or subdivision have increased; and

(iii) the increase in imports described in clause (ii) contributed importantly to such workers' separation or threat of separation and to the decline in sales or production of such firm or subdivision; or

(B)(i) there has been a shift in production by such workers' firm or subdivision to a foreign country of articles like or directly competitive with articles which are produced by such firm or subdivision; and

Once the group of workers is certified, individual workers must then file applications individually to determine eligibility for adjustment assistance.⁴² Individual workers are eligible if they were terminated within two years of the group certification, had worked for at least twenty-six weeks at a rate of at least \$30 per week during the year prior to termination, have exhausted all rights to state unemployment insurance, and have either enrolled in a training program or received a waiver of the training requirement from DOL.⁴³ Under the program, eligible workers can receive income support for an additional fifty-two weeks following termination of state unemployment benefits, tax credits for health insurance, job search and relocation allowances, as well as “104 weeks of approved training in occupational skills, basic or remedial education, or training in literacy or English as a second language.”⁴⁴

Trade Adjustment Assistance was unquestionably improved by the 2002 amendments. The most fundamental changes were the creation of health insurance tax credits and merger of the program with NAFTA-TAA, but the program was improved in more subtle ways as well.⁴⁵ For example, structural problems regarding the provision of training were addressed.⁴⁶ Nonetheless, even with these changes in place, the program still suffers from serious deficiencies.

(ii)(I) the country to which the workers' firm has shifted production of the articles is a party to a free trade agreement with the United States;

(II) the country to which the workers' firm has shifted production of the articles is a beneficiary country under the Andean Trade Preferences Act, African Growth and Opportunity Act, or the Caribbean Basin Economic Recovery Act

(III) there has been or is likely to be an increase in imports of articles that are like or directly competitive with articles which are or were produced by such firm or subdivision[.]

19 U.S.C. § 2272(a). Note that these requirements exclude individuals in service industries from coverage. *See id.*

⁴² 19 U.S.C. § 2293(a) (Supp. I 2002).

⁴³ 19 U.S.C §§ 2273(a), 2273(c) (Supp. I 2002).

⁴⁴ 19 U.S.C. §§ 2293, 2296–2298 (Supp. I 2002); 26 U.S.C. § 35 (2004); DOL Fact Sheet, *supra* note 40. Workers requiring remedial training may receive an additional twenty-six weeks of training benefits and income support. 19 U.S.C. § 2296(a)(2). The TAA statute also theoretically provides wage insurance to older workers, but due to vague drafting and restrictive regulations promulgated by DOL, the provision was “effectively stillborn.” 19 U.S.C. § 2315 (Supp. I 2002); Roger Lowenstein, *Jobs*, N.Y. TIMES, Sept. 5, 2004 § 6 (Magazine), at 54.

⁴⁵ *See* Trade Act of 2002 §§ 111–125, 201. The amendments also made the program moderately more inclusive by allowing some secondary workers to receive benefits. *See* Trade Act of 2002 § 113(a).

⁴⁶ Trade Act of 2002 § 116. Under prior versions of the act, training was provided for up to twenty-four months but income support ended after only eighteen. U.S. GEN. AC-

III. TRADE ADJUSTMENT ASSISTANCE: ASSESSMENT

A. Scope

TAA currently only extends to a small subset of those whose jobs are offshored.⁴⁷ Because the Act is phrased such that it covers only workers involved in production of an “article,” workers in service-sector jobs are excluded from its scope.⁴⁸ Furthermore, in practice, DOL has interpreted the word “article” very narrowly, excluding software that is not embodied in tangible form such as a CD-ROM or diskette.⁴⁹ This limits the types of workers able to receive benefits under the Act.⁵⁰ These limitations on the types of workers who can receive benefits through the program have been widely criticized for a number of reasons.⁵¹ First, the number of IT and service sector jobs moving overseas is rapidly rising.⁵² According to the survey-based predictions of Cambridge, Massachusetts firm Forrester Research, 3.4 million U.S. service jobs, or 6.4% of the jobs in affected categories, will go overseas by 2015.⁵³ The fact that this trend has developed rather quickly and has affected a group of workers not previously touched by offshore outsourcing has caused “a very large proportion

COUNTING OFFICE, TRADE ADJUSTMENT ASSISTANCE: EXPERIENCES OF SIX TRADE-IMPACTED COMMUNITIES 15 (2001) [hereinafter GAO 2001]. Thus, some recipients were forced to leave training prior to the expiration of their training benefits. *Id.* The 2002 amendments increased the number of weeks recipients could receive income support so as to eliminate that problem. *See* Trade Act of 2002 § 116(a). Prior versions of the act also created difficulties for recipients who needed remedial, literacy or English language training prior to beginning occupational training. *See* GAO 2001, *supra*, at 20. The 2002 amendments provide an additional twenty-six weeks of training to such recipients, enabling them to complete both remedial and occupational training. Trade Act of 2002 § 116(c). Finally, prior to the 2002 amendments, income support was suspended during a break in training lasting longer than fourteen days. GAO 2001, *supra*, at 17. This meant that trainees taking courses at community colleges could not receive income support during semester breaks. *Id.* The 2002 amendments rectified this problem by increasing the fourteen day limit to thirty days. *See* Trade Act of 2002 § 116(b).

⁴⁷ 19 U.S.C. § 2272; *see also* Lee, *supra* note 24, at D1 (stating that only 31% of unemployed workers applied for TAA, partly because it does not extend to white-collar workers).

⁴⁸ *See* Lee, *supra* note 24, at D1.

⁴⁹ *See* Former Employees of IBM Corp., Global Servs. Div. v. U.S. Sec’y of Labor, 387 F. Supp. 2d 1346, 1351 (Ct. Int’l Trade 2005).

⁵⁰ *See id.*

⁵¹ *See* Lowenstein, *supra* note 44, at 54; William J. Holstein, *Cutting the Losses from Outsourcing*, N.Y. TIMES, July 3, 2005, § 3, at 8.

⁵² Manley & Hobby, *supra* note 7, at 404.

⁵³ *Id.*

of the labor force [to] feel very vulnerable.”⁵⁴ Moreover, due to the fact that these workers’ pre-layoff salaries are generally higher than salaries for manufacturing workers who have been in the workforce a comparable numbers of years, they receive relatively less from unemployment insurance, and have a more difficult time securing scholarships to help pay for retraining.⁵⁵

Also, limits on access to the program are imposed based on the foreign country to which one’s job has been sent.⁵⁶ TAA is only available to workers whose jobs have been sent to countries that are partners to free trade agreements or beneficiaries under the Andean Trade Preference Act, African Growth and Opportunity Act, or the Caribbean Basin Economic Recovery Act.⁵⁷ These restrictions mean that those whose jobs are outsourced to China and India—by far the most popular destinations for offshoring among U.S. companies—are not eligible for TAA.⁵⁸

Although there is some hope of change, it is slow in coming.⁵⁹ Democratic Senator Max Baucus of Montana has, for at least the fourth time in as many years, introduced legislation that would amend

⁵⁴ Lochhead, *supra* note 6, at A1. Outsourcing is also fueling worries among investors, especially average investors, according to a July 2005 Gallup poll. Dennis Jacobo, *High Energy Prices, Job Outsourcing—Not Terrorism—Worry Many Investors*, GALLUP BRAIN, July 25, 2005. available at <http://poll.gallup.com/content/default.aspx?CI=17443>.

⁵⁵ Mara Lee, *Idled Workers Lead Outsourcing Backlash: Little Protection in Place as Companies Send More Jobs Offshore*, DAYTON DAILY NEWS, Aug. 23, 2004, at A1.

⁵⁶ 19 U.S.C. § 2272(a)(2)(B)(ii) (Supp. I 2002).

⁵⁷ *Id.* According to DOL, the nations to which the TAA applies are: Canada, Mexico, Chile, Israel, Singapore, Hashemite Kingdom of Jordan, Bolivia, Columbia, Ecuador, Peru, Benin, Botswana, Cameroon, Cape Verde, Central African Republic, Chad, Republic of Congo, Cote d’Ivoire, Djibouti, Eritrea, Ethiopia, Gabon, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Madagascar, Malawi, Mali, Mauritius, Mozambique, Namibia, Niger, Nigeria, Rwanda, San Tome and Principe, Senegal, Seychelles, Sierra Leone, South Africa, Swaziland, Tanzania, Uganda, Zambia, Antigua and Barbuda, Aruba, the Bahamas, Belize, British Virgin Islands, Costa Rica, Montserrat, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, the Dominican Republic, Nicaragua, Panama, St. Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Trinidad and Tobago, Dominica, and Netherlands Antilles. U.S. Dep’t of Labor, Free Trade Agreement & Beneficiary Countries, http://www.doleta.gov/tradeact/2002act_freetradeagreements.cfm (last visited Feb. 23, 2006) [hereinafter DOL Countries].

⁵⁸ See DOL Countries, *supra* note 57; Manley & Hobby, *supra* note 7, at 405. Eighty-four percent of companies engaged in offshore outsourcing have sent jobs to India and forty-five percent have sent jobs to China. Manley & Hobby, *supra* note 7, at 405.

⁵⁹ See S. 1309, 109th Cong. (2005) (version of bill currently under consideration in the Senate); Press Release, Senator Max Baucus, U.S. Senate Comm. on Fin., Baucus Works to Help Displaced Service Workers: Senator Introduces Bill to Expand Trade Adjustment (June 23, 2005), available at <http://finance.senate.gov/press/Bpress/2005press/prb062305b.pdf> [hereinafter Baucus].

the Trade Act of 1974 to eliminate both the "article" and "trade agreement" limitations.⁶⁰ Republicans in Congress have been wary of the bill, however, citing concerns regarding the expense of providing health benefits to an enlarged group of recipients.⁶¹ In 2002, Baucus introduced the proposal along with other amendments to the Act.⁶² Although many of the proposed TAA amendments were signed into law, including a substantial increase in the program budget, the provision to extend assistance to service workers was struck from the final version of the bill.⁶³ Baucus again proposed the legislation extending TAA to include service workers in the Trade Adjustment Assistance Equality for Service Workers Act of 2004.⁶⁴ The bill again was defeated, despite a solid majority in favor of the proposal, this time by a procedural measure.⁶⁵ In 2005, Baucus proposed the legislation a third time as an amendment to the U.S.-Central America-Dominican Republic Free Trade Agreement (CAFTA).⁶⁶ The Finance committee adopted the language, but the amendment was stripped out of the final implementing bill sent back by the Bush Administration.⁶⁷ A week later, Baucus again introduced the legislation stating, "[f]rankly, I am disappointed to have to introduce this bill yet again."⁶⁸ Given the amendment's history, its passage this time seems uncertain at best.

It is similarly uncertain whether the Department of Labor will loosen its definition of "article" so as to include more high-tech workers. In 2003, a group of laid-off software programmers from IBM petitioned for TAA benefits.⁶⁹ The Department of Labor denied them

⁶⁰ Baucus, *supra* note 59; see S. 1309.

⁶¹ See Emily Johns, *Coleman Amendment to Aid Jobless Fails in Senate*, STAR TRIB. (Minneapolis), May 5, 2004, at 1D. Republican Senator Don Nickles, who helped defeat the amendment in 2004, objected to the cost of the bill and asked, "how socialistic do you have to get?" *Id.*

⁶² Baucus, *supra* note 59.

⁶³ Paul Blustein, *White House Warms Up to Worker Aid*, WASH. POST, Mar. 13, 2004, at E01.

⁶⁴ Baucus, *supra* note 59; see S. 2157, 108th Cong. (2004).

⁶⁵ Johns, *supra* note 61, at 1D.

⁶⁶ Baucus, *supra* note 59; see S. 1309.

⁶⁷ Baucus, *supra* note 59; see S. 1309. President Bush has been intermittently supportive of TAA. See Debates, *supra* note 6; Blustein, *supra* note 63, at E01. Despite cutting the proposal from the CAFTA implementing legislation, he cited the 2002 amendments, particularly the increase in the program's budget, with approval during the presidential debates, and hinted in March of 2004 that he would support expansion of the program to cover service workers. Debates, *supra* note 6; Blustein, *supra* note 63, at E01.

⁶⁸ Baucus, *supra* note 59.

⁶⁹ See *Former Employees of IBM Corp., Global Servs. Div. v. U.S. Sec'y of Labor*, 387 F. Supp. 2d 1346, 1347 (Ct. Int'l Trade 2005).

certification, stating that the software they produced was not an “article” for purposes of the TAA.⁷⁰ The programmers challenged their denial in the U.S. Court of International Trade (CIT), which has oversight of the process.⁷¹ CIT remanded the petition to Labor based on the fact that the department had not sufficiently investigated whether the software produced by the plaintiffs was embodied in tangible form on a CD-ROM or diskette, and thus was an “article” under DOL’s traditional definition.⁷² CIT also urged DOL to reconsider its practice of distinguishing between production of software embodied in tangible form and software transmitted electronically.⁷³ The court stated that the U.S. International Trade Commission (USITC), upon whose guidelines Labor had relied in creating that distinction, had since done away with it.⁷⁴ Some observers are skeptical of DOL’s willingness to change this standard, citing concerns with funding within the department.⁷⁵ Nonetheless, it is clear that if TAA is to be an effective provider of training to those affected by offshore outsourcing, the scope of the program must be expanded.

⁷⁰ *Id.*

⁷¹ *See id.*

⁷² *Id.* at 1353.

⁷³ *Id.*

⁷⁴ *Former Employees of IBM Corp., Global Servs. Div.*, 387 F. Supp. 2d at 1353. USITC issued a cease and desist order in March of 1998 prohibiting the importation of software related to hardware logic emulation systems that violated patents held by a U.S. corporation. *In re Certain Hardware Logic Emulation Systems and Components Thereof*, Inv. No. 337-TA-383, 1998 WL 307240, at *1 (USITC 1998). USITC’s order reached electronic transmissions of the software as well as embodiments of it in tangible form. *Id.* at *8. The Commission stated,

a cease and desist order that did not prohibit electronic transmission would be meaningless as to the software since respondents would be free simply to transmit the software electronically to a U.S. customer, who could then copy it onto a diskette or other tangible medium for use with an infringing emulation system . . . it would be anomalous for the Commission to be able to stop the transfer of a CD-ROM or diskette containing respondents’ software, but not be able to stop the transfer of the very same software when transmitted in machine readable form by electronic means.

See id.

⁷⁵ *See* Blustein, *supra* note 63, at E01 (quoting former congressional aide Howard Rosen, who helped draft the 2002 legislation amending the TAA and commented that DOL will not ease this restriction because the department is “nickeling and diming”). In November 2005, DOL again rejected the IBM workers petition, this time making no comment regarding the “article” requirement but instead finding that the workers had not met the requirement for “employment decline,” or that an insufficient number of workers in their division had been laid off. *See* Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance, 70 Fed. Reg. 68,098, 86,099 (Nov. 9, 2005).

B. Administration and Funding

Although administration of TAA was simplified in 2002 when it was combined with NAFTA-TAA, the DOL certification process remains, by all accounts, nightmarish.⁷⁶ From 2001 through 2004, the Court of International Trade upheld only 12.5% of DOL's denials of group certification.⁷⁷ The CIT's Judge Ridgway, in *Former Employees of Chevron v. U.S. Secretary of Labor*, expressed her frustration with DOL's handling of the TAA certification process,

this case stands as a monument to the flaws and dysfunctions in the Labor Department's administration of the nation's trade adjustment assistance laws . . . [this case is part of] the growing line of precedent involving court-ordered certifications of workers, evidencing the bench's mounting frustration with the Labor Department's handling of these cases. Clearly, there is a message here. Only time will tell whether the Labor Department, and Congress, are listening.⁷⁸

The DOL is supposed to investigate the facts surrounding petitioning workers' separation from employment, but the department's process for doing this has been described as "perfunctory," "sloppy and inadequate" and "dereliction of duty."⁷⁹ The DOL's general practice is to ask a human resources employee at the firm from which the petitioning workers have been laid off the reasons for the separation.⁸⁰ Due to public perceptions of offshore outsourcing, employers have a strong incentive not to admit that their former employees' jobs were lost due to overseas transactions.⁸¹ As a result, the information from which DOL works is less than accurate.⁸²

⁷⁶ See Brooks-Rubin, *supra* note 14, at 797.

⁷⁷ *Id.* at 806.

⁷⁸ *Former Employees of Chevron v. U.S. Sec'y of Labor*, 298 F. Supp. 2d 1388, 1348 (Ct. Int'l Trade 2003); Brooks-Rubin, *supra* note 14, at 797.

⁷⁹ See, e.g., *Former Employees of IBM Corp., Global Servs. Div. v. U.S. Sec'y of Labor*, 387 F. Supp. 2d 1346, 1350 (Ct. Int'l Trade 2005); *Former Employees of Chevron*, 298 F. Supp. 2d at 1348; *Former Employees of Hawkins Oil & Gas v. U.S. Sec'y of Labor*, 814 F. Supp. 1111, 1115 (Ct. Int'l Trade 1993).

⁸⁰ See Brooks-Rubin, *supra* note 14, at 804.

⁸¹ *Id.* at 822; Reingold, *supra* note 16, at 79. A Zogby International poll conducted in 2004 found that 62% of Americans felt that the government should tax or legislate against companies that engage in outsourcing, and 71% felt outsourcing was bad for the economy. Zogby International, News Item Regarding Views on Offshore Outsourcing, <http://www.zogby.com/news/ReadNews.dbm?ID=870> (released Sept. 22, 2004). Feeding off of that public sentiment, 2004 presidential candidate John Kerry referred in his stump speeches

Brad Brooks-Rubin, author of a comprehensive critique of the certification process, offers several suggestions to address these administrative problems, including improvement of the TAA petition used by workers and a requirement that DOL speak to third parties in their investigations.⁸³ Brooks-Rubin also asserts that much of DOL's difficulty in handling the certification process stems from poor definition of the requirement that workers be engaged in "production."⁸⁴ In other words, the standard used by DOL to distinguish between manufacturing and service-sector jobs is unclear.⁸⁵ He suggests that a clearer standard should be drafted, and that petitions from certain industries for which the "production" standard is a persistent problem should be analyzed using separate, industry-specific criteria.⁸⁶ A much simpler solution, however, would be to eliminate the "production" requirement altogether by extending TAA to cover service workers.⁸⁷ If the need to distinguish between manufacturing and service workers were eliminated, any confusion arising from the "production" standard would become moot.

In addition to being poorly administered, TAA training programs are insufficiently funded.⁸⁸ Training programs are administered through each individual state, and some states have reported major funding shortfalls.⁸⁹ For example, in 2000 New Jersey reported having to temporarily shut down the training program at the end of several quarters and wait for new funding to arrive.⁹⁰ Four states have had waiting lists for training.⁹¹ Funding for training was increased from \$80,000,000 to \$220,000,000 as part of the 2002 amendments, but states continue to exhaust their TAA funds, partly because the demand for training increased substantially in 2002.⁹² The U.S. General Accounting Office re-

to companies that had outsourced jobs as "Benedict Arnolds." *Grappling with Globalisation*, *supra* note 6, at 14.

⁸² See Brooks-Rubin, *supra* note 14, at 822; Reingold, *supra* note 16, at 79.

⁸³ Brooks-Rubin, *supra* note 14, at 818.

⁸⁴ *Id.* at 800.

⁸⁵ See *id.*

⁸⁶ *Id.* at 824 (stating, as an example, that specific tasks within the textile industry such as cutting, sewing, and shipping should be pre-defined as either production or non-production jobs in order to simplify the certification process).

⁸⁷ See *id.*

⁸⁸ U.S. GEN. ACCOUNTING OFFICE, TRADE ADJUSTMENT ASSISTANCE: REFORMS HAVE ACCELERATED TRAINING ENROLLMENT, BUT IMPLEMENTATION CHALLENGES REMAIN 4 (2004) [hereinafter GAO 2004].

⁸⁹ GAO 2000, *supra* note 29, at 15.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Trade Act of 2002, Pub. L. No. 107-210, § 117, 116 Stat. 941 (2002); GAO 2004, *supra* note 88, at 4. The increase in demand for training funds is probably due to a sharp

ports that in 2004, thirty-five states expected that available training funds would not cover the amount they would obligate and spend.⁹³ Eighteen states estimated that these funds would fall short by more than a million dollars.⁹⁴ These funding problems have forced some states to reduce the quality of benefits available to recipients by imposing or lowering caps on the amount spent per TAA participant.⁹⁵ Until these serious funding and administrative problems are addressed, TAA will continue to fail to provide adequate assistance to displaced workers.

C. Training Benefits

Empirical studies demonstrate that the training currently provided to TAA recipients does not actually afford them any measurable benefit in terms of earnings.⁹⁶ The vast majority of those who receive training benefits under TAA seek specific job-related training in new occupations, and the majority of this training is provided by vocational centers and community colleges.⁹⁷ This type of training program has influential supporters, but research shows that it is actually ineffective in terms of increasing either the probability that a trainee will find work or the wages earned once a new job is found.⁹⁸

A comprehensive assessment of the effect of TAA-sponsored training on the wages of trainees was completed ten years ago by Mathematica Policy Research.⁹⁹ The study concluded that, while the wages of those who had completed training under the TAA exceeded those of nontrainees in absolute numbers, that wage differential was attributable

decrease in manufacturing employment over the past several years. *Id.* at 30. The General Accounting Office states the number of manufacturing jobs in the U.S. decreased by 1.3 million between 2001 and 2002, a drop of almost 8%. *Id.* Competition from imports is at least partially responsible for this decline. *Id.*

⁹³ GAO 2004, *supra* note 88, at 31.

⁹⁴ *Id.*

⁹⁵ *Id.* at 34.

⁹⁶ See Decker & Corson, *supra* note 15, at 773.

⁹⁷ GAO 2000, *supra* note 29, at 13; Decker & Corson, *supra* note 15, at 763.

⁹⁸ Decker & Corson, *supra* note 15, at 773; see Alan Greenspan, Remarks at the Boston College Fin. Conf. (Mar. 12, 2004), available at <http://www.mcbre.org/Library/GreenspanEdRemarks.pdf>. Former Federal Reserve Chairman Alan Greenspan favors using community colleges for job re-training, and expressed this view as the keynote speaker at the Boston College Finance Conference in 2004. See Greenspan, *supra*.

⁹⁹ Decker & Corson, *supra* note 15, at 758. Due to amendments made in 2002, the TAA program has undergone significant changes since the Mathematica study was completed. See Trade Act of 2002, Pub. L. No. 107-210, §§ 111–125, 116 Stat. 933, 936–946 (2002). Nonetheless, the amendments did not significantly change the types of training provided under the act, and thus the findings of that study remain applicable to the program in its current iteration. See *id.*

entirely to personal differences between the two groups rather than the receipt of training itself.¹⁰⁰ Those who received training tended to be younger and better educated.¹⁰¹ When those differences were taken into account through regression analysis, there was no statistically significant difference between the earnings of the two groups.¹⁰² These findings are consistent with those from studies of other government-sponsored job retraining programs as well, especially those associated with welfare-to-work programs.¹⁰³

Nonetheless, the importance of education and training should not be downplayed. The Educational Testing Service reports that adults who lack formal schooling and a solid base of literacy skills are at a significantly higher risk of poverty.¹⁰⁴ In addition, retraining programs have been shown to have a major effect on workers' confidence and productivity.¹⁰⁵ The same researchers who reported in 1995 that the training provided under TAA did not affect trainees' wages reported that a majority of trainees felt that their training helped them both to find a new job and succeed at that job once they found it.¹⁰⁶ Furthermore, there is a growing "numbers gap" in terms of educational achievement in America which has exacerbated the offshoring problem.¹⁰⁷ The International Adult Literacy Survey (IALS), completed in 1998, found that the United States ranked only twelfth among the twenty high-income countries surveyed in terms of the literacy proficiency of its adult population.¹⁰⁸ This comes as lower income countries like China are turning out more and more workers with advanced degrees.¹⁰⁹

According to economists James J. Heckman and Lance Lochner, the problem with government retraining programs is a fundamental misunderstanding in policy circles as to the sources of skill founda-

¹⁰⁰ Decker & Corson, *supra* note 15, at 770–71.

¹⁰¹ *Id.* at 772.

¹⁰² *Id.*

¹⁰³ See James J. Heckman & Lance Lochner, *Rethinking Education and Training Policy: Understanding the Sources of Skill Formation in a Modern Economy*, in SECURING THE FUTURE 47, 72 (Sheldon Danziger & Jane Waldfogel eds., 2000) (stating that welfare-to-work programs also had little effect on participants pay rates and employment rates).

¹⁰⁴ Andrew Sum et al., *The Twin Challenges of Mediocrity and Inequality: Literacy in the U.S. from an International Perspective*, 2002 EDUCATIONAL TESTING SERVICE 5, available at <http://www.nupr.neu.edu/03-02/ets.pdf>.

¹⁰⁵ See Decker & Corson, *supra* note 15, at 763.

¹⁰⁶ *Id.*

¹⁰⁷ See FRIEDMAN, *supra* note 1, at 271; Sum, *supra* note 104.

¹⁰⁸ Sum, *supra* note 104, at 9.

¹⁰⁹ FRIEDMAN, *supra* note 1, at 271.

tion.¹¹⁰ Though public policy tends to focus upon formal schooling as the primary source of skills and knowledge, as much as one-third to one-half of all skill formation occurs on the job, but this training is often neglected because it is difficult to measure.¹¹¹ Heckman and Lochner suggest shifting the emphasis of the TAA education and training programs from formal, classroom-based models to employer-based, on-the-job programs.¹¹²

An on-the-job training model also comports well with Friedman's vision of lifetime learning.¹¹³ Friedman describes a training program used by the credit card company CapitalOne.¹¹⁴ When CapitalOne began to outsource computer-related jobs to India it also developed a cross-training program for the workers most likely to be affected.¹¹⁵ The cross-training program took workers that have specialized in a particular aspect of the company's computer systems or business and trained them in a variety of related areas.¹¹⁶ Programs like this benefit both the employer and employee: cross-trained workers are in a better position to find new work if they are laid off, and are more valuable to CapitalOne if retained.¹¹⁷ Compared to the type of training provided by TAA, programs like CapitalOne's are superior in another important respect: they are proactive rather than reactive.¹¹⁸ The program assists workers *before* they are actually laid off, thereby getting them back to work faster.¹¹⁹

Hindering a move to employer-based training programs is the fact that, partly due to the increase in offshoring, the overall rate at which workers move from job to job has increased.¹²⁰ As a result, employers may be less willing to invest in the training of employees whose skills have become obsolete—when an employee's average tenure is only a

¹¹⁰ Heckman & Lochner, *supra* note 103, at 48.

¹¹¹ *Id.* at 49.

¹¹² *Id.* at 79. The state officials actually running these programs seem to agree that the TAA program would benefit from stronger ties to the businesses that will ultimately hire trainees. GAO 2001, *supra* note 46, at 4.

¹¹³ See FRIEDMAN, *supra* note 1, at 290.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ See FRIEDMAN, *supra* note 1, at 290.

¹¹⁹ See *id.*

¹²⁰ See Kenneth G. Dau-Schmidt, *High-Velocity Labor Economics: A Review Essay of Working in Silicon Valley: Economic and Legal Analysis of A High-Velocity Labor Market* by Alan Hyde 6 U. PA. J. LAB. & EMP. L. 847, 847 (2004) (book review).

few years, the return is simply not worth the investment.¹²¹ New incentives need to be created.¹²² TAA allows training subsidies to be used for employer-based training, but these provisions are rarely used and only available after displacement has occurred.¹²³ A dialogue with employers needs to be opened, and the program's structure needs to be adjusted so as to allow effective, proactive, employer-based programs to flourish.

CONCLUSION

When economists speak of globalization, they often note that it creates "short-term losses" but "long-term gains."¹²⁴ The reality, however, is that those who now bear the burden of the losses will likely never themselves see the gains. As a matter of simple justice, we owe aid to those who have been affected by the landslide of globalization. Furthermore, if these displaced workers are ignored, a political backlash is inevitable.¹²⁵ No doubt, aid for displaced workers is expensive. The cost, however, is more than offset by the potential gains to be made through globalization, and increasing the education and training levels of American workers has the potential to create a more productive economy in and of itself.¹²⁶ Trade Adjustment Assistance deserves more serious contemplation and administration. It is well worth the cost of getting it right.

¹²¹ *Id.* at 848.

¹²² *See id.*

¹²³ *See* 19 U.S.C. §§ 2291, 2296(c) (Supp. I 2002); GAO 2000, *supra* note 29, at 13; Decker & Corson, *supra* note 15, at 763.

¹²⁴ *See, e.g.*, Garner, *supra* note 6, at 20.

¹²⁵ FRIEDMAN, *supra* note 1, at 296–97 (“If you are not a compassionate flatist—if you are just a let ’er rip free-market capitalist—you are not only cruel, you are a fool. You are courting a political backlash by those who can and will get churned up by this flattening process, and that backlash could become ferocious if we hit any kind of prolonged recession.”).

¹²⁶ *See* Garner, *supra* note 6, at 20; FRIEDMAN, *supra* note 1, at 284.

