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**SESSION 11: CANADA AND U.S. APPROACHES –
OUTSOURCING, OFFSHORING, NEARSHORING. LEGAL
ASPECTS, POSSIBLE CONFLICTS, ECONOMIC IMPACT AND
JOB EFFECTS.**

INTRODUCTION

James E. P. Sisto

We will stay on session, begin our next session, and hopefully, those out in the lobby will join us as their schedules allow.

My name is James Sisto. I am an attorney with Squires, Sanders & Dempsey. My practice is in Columbus, and I have known Henry [King] for many years, and I thank him for including me in the conference and for annually bringing this conference to Case Western; on a very important topic with our very important neighbor to the north.

Canada and U.S. approaches to outsourcing, offshoring, nearshoring. Right away we know there are going to be some definitional issues, and I am going to let both of our speakers tackle those. Legal aspects, certainly; possible conflicts, without a doubt; and economic impact and job effects I think are to be debated and discussed.

Our speakers will be providing a good balance of the issues, both a macroeconomic and a policy view, as well as a view from the perspective of a legal practitioner. So we will have a very well balanced presentation. Although these issues have been debated in the public for many years, the field of play was certainly elevated about a year ago with our most recent presidential elections here in the United States. What did Bush say? Did he mean what he said? Who told him to say it? And then, of course, what did Kerry say Bush said, and what did Bush mean when he said it? These were the issues from a year ago that faced us, and I have to apologize a little bit because a high school mate of mine, Greg Mankiw, was at the heart of this because he is the governor – excuse me – the President’s advisor. He is the Chairman of Economic Advisors, and he made a statement that, frankly, offshoring, or offshore, is just a new way of doing international trade. More things are tradable now than were tradable in the past, and that’s a good thing.¹ And this

¹ The Economic Report of the President: Testimony Before the J. Economic Comm., 108th Cong. (2004) (statement of N. Gregory Mankiw, Chairman, Council of Economic Advisors).

was included in the President's annual economic report last year, about a year ago this time, about thirteen, fourteen months ago.²

Well, trade issues are easy fodder in political campaigns, and they present challenges for any candidate to their positions. Kerry blamed Bush for giving company incentives to offshore jobs.³ What exactly was he referring to, and what did he mean? What he probably meant to say was that the U.S. Tax Code, which is convoluted, complex, and is not something that President Bush or his Administration developed or implemented, includes foreign tax credits and deferral of taxes until profits are repatriated to the United States. So, as a result of the U.S. Tax Code, indeed, there may be some, not incentive, but benefit, for offshore activity, in that you don't pay the U.S. 30% corporate tax-rate.⁴ That certainly isn't something that was created by the Bush Administration, the Clinton Administration, the Ford – we can go back as far as you want, and they are still there.

In the United States, the political reaction and minority response to outsourcing, nearshoring, and offshoring, has been to propose legislation in an attempt to restrict this loss, or what has been termed in the press as "loss of jobs."⁵ There is both federal-level and state-level legislation that has been proposed, and that is pending.⁶ Even Cleveland's own Senator George Voinovich, generally considered a free trader, is the co-author of one of these bills.⁷ I am not sure of the status of that bill, or where it has gone, but that was about a year ago. Most of these bills would seek to ban or restrict the use of foreign labor in government contracting – which is a favorite target of legislators – primarily in cost centers where contractors would be restricted from having operations outside the United States, or in the case of a state, outside of the state.⁸

Anybody who, like myself, might have children in school and would be using Sally Mae right now to finance some of that education will know you

² See *Economic Report of the President*, H.R. Doc. No. 108-145 (2004).

³ See Andrew Martin, *Kerry's Economic Stance Betrays U.S. Interest*, KENTUCKY KERNEL, APR. 7, 2004.

⁴ Nanette Byrnes & Louis Lavelle, *The Corporate Tax Game*, BUS. WK. ONLINE, Mar, 31, 2003, available at http://www.businessweek.com/magazine/content/03_13/b3826058.htm.

⁵ Adam Mordecai, *Anti-Offshoring Legislation: The New Wave of Protectionism*, 5 RICH. J. GLOBAL & BUS. 85, 96 (2005).

⁶ See *id.*

⁷ See Andrew Mollison, *GOP Ban on "Offshoring" Federal Jobs Angers Business Groups*, COX NEWS SERVICE, Jan. 29, 2004.

⁸ See U.S. Senate Roll Call Votes 108th Congress-1st Session, Passage of H.R. 2673-The Agriculture Appropriations for FY 2004 (Nov. 6, 2003), available at http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=108&session=1&vote=00444; National Foundation for American Policy, A Section of H.R. 2673, <http://www.nfap.net/researchactivities/globalsourcing/federalBills/AmendmentHR2989and2673.pdf> (see section 647(e) limiting the use of foreign contractors) (last visited Nov. 13, 2005).

can get somebody on the phone at eleven o'clock at night. And that's a great, a great thing for me with a law practice, to be able to come home and be able to resolve those issues outside of the eight o'clock to five o'clock time frame. But, I note the accent. And I have asked several times – and since I do travel to India, in particular, I said, "Where exactly are you located? Are you in China, or are you in Bangalore?" "I'm sorry, we are not allowed to answer that question." That is the usual answer. Now, Senator Kerry, in the campaign, wanted them to have to answer that question. That was part of his plan, is that the consumer would, therefore, recognize that this company, whoever you were using, would have to identify where you were talking to them,⁹ and this would somehow, I guess, chill the use of this offshoring.

Well, our speakers will present, as I said, two different views of this, one from a macropolicy side, and one from a missioner side. We have Glen Hodgson, Vice President and Chief Economist of the Conference Board of Canada, which is Canada's leading economic think tank and consultancy, and he is responsible there for overseeing the Board's macroeconomic outlook products, tourism, and customized research, as opposed to customs, I believe, which is something different. Prior to his position with the Conference Board, Glen was with the export development – with Export Development Canada in several senior positions.

Immediately following his presentation, Marcelo Halpern from Latham & Watkins will jump in to talk about the legal aspects of outsourcing, nearsourcing, farsourcing, and whatever it may be, and he has provided – comes to us very well prepared to do this, having provided legal advice across the full spectrum of corporate America, from Fortune 100s down to small entrepreneurial startups. And particularly, he has been involved in international business and outsourcing transactions during the course of his career. With no further ado, I will turn this over to Glen.

⁹ Jay Lyman, *Lawmakers, Tech Leaders Debate Offshoring*, TECHNEWSWORLD, Jan. 8, 2004, available at <http://www.technewsworld.com/story/32557.html>.

