

COMMENT

CAN WE PROVIDE A LEVEL PLAYING FIELD FOR U.S. CORPORATIONS AND INCREASE U.S. JOBS WHILE REPEALING THE EXTRATERRITORIAL INCOME ACT?*

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I. HISTORY RELATED TO THE DISPUTE WITH THE EUROPEAN UNION OVER THE EXTRATERRITORIAL INCOME EXCLUSION (ETI) ACT

A. Introduction

U.S. businesses continue to see disadvantages in the U.S. tax laws causing an outflow of jobs and a persistent loss of domestic revenue.¹ Two issues face the United States Congress: first, Congress must repeal the Extraterritorial Income (ETI) provisions; and second, they must find a way to bring American jobs back into the United States. Additionally, Congress must consider and balance the current health of the United States economy with a tax plan that will stimulate the growth of U.S. multinational companies and increase their ability to compete in today's global economy. Congress must find ways to bring back \$300 billion in American jobs² while stopping the current flow of jobs from leaving U.S. borders to pursue cheaper labor markets and better tax provisions than the United States Internal Revenue Code.³ More and more, U.S. workers face global competition at almost every job level and continue to lose jobs to cheaper markets.⁴

Congress needs to find ways to provide tax incentives to U.S. businesses that will enable them to compete internationally and will provide a level playing field with respect to taxes for U.S. multinational companies and their global competition. This can be done through making the following changes to the Internal Revenue Code:

1. Create an indirect value added tax, similar to the European system;

1. See *Impact Act of Trade Law Challenges on U.S. Small Bus.: Hearing Before the House Comm. on Small Bus.*, 108th Cong. 1 (2003) (statement of Owen E. Herrnstadt, Dir., Trade & Globalization Dep't, Int'l Ass'n of Machinists), available at <http://www.lexis.com>.

2. See *U.S. – China Economics (Part II): Hearing Before the House Comm. on Ways and Means*, 108th Cong. (2003) [hereinafter *Thomas Hearings Part II*] (Statement of James Jarrett, Vice President of Legal and Gov't Affairs, and Dir. of Worldwide Gov't Affairs, Intel Corp.), available at <http://www.lexis.com>.

3. *Id.* at 36 (statement of Richard Trumka, Secretary-Treasurer, AFL-CIO), available at <http://www.lexis.com>.

4. Charles Schumer & Paul Craig Roberts, *Second Thoughts on Free Trade*, N.Y. Times, Jan. 6, 2004, at A23, available at <http://www.lexis.com>; see generally Chris Edwards, *The U.S. Corporate Tax and the Global Economy*, 18 CATO INST. TAX & BUDGET BULLETIN (2003), at <http://www.cato.org/pubs/tbb/tbb-0309-18.pdf>.

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2. Increase incentives for research and development;
3. Reduce the effective corporate tax rate to 32 percent;
4. Provide provisions for the repatriation of income for companies that continue to keep money overseas; and
5. Make available certain tax incentives for companies that maintain production facilities/jobs within the continental U.S. and phase out the incentives as the companies move facilities across international borders.⁵

Congress must also stanch the flow of current and future jobs across U.S. borders, find ways to create new jobs, and increase the education of future workers in order to maintain the United State's standing in the global markets.

B. World Trade Organization

An ongoing battle between the United States and the European Union regarding taxation of U.S. exports resumed in October 1999 when the World Trade Organization (WTO) found the United States Foreign Sales Corporation (FSC) Act violated the 1994 General Agreement on Tariff and Trade (hereinafter GATT 1994).⁶ The United States responded to the original violation on November 15, 2000, when President Clinton signed the FSC Repeal and Extraterritorial Income Exclusion (ETI) Act into law.⁷ Immediately following the enactment of the ETI Act, the European Union again alleged that the United States provided U.S. corporations with unfair trade subsidies in violation of the GATT 1994 Agreement.⁸ For a second time, the World Trade Organization made a final ruling that the U.S. tax

5. See *Thomas Hearings Part II, supra* note 2 (statement of James Jarrett, Vice President of Legal and Gov't Affairs, and Dir. of Worldwide Gov't Affairs, Intel Corp.).

6. See World Trade Organization Panel Report on U.S.—Tax Treatment for “Foreign Sales Corporations,” WT/DS108/R n.193 (Oct. 8, 1999); WTO Secretariat, *Update of WTO Dispute Settlement Cases*, WT/DS/OV/15 (Sept. 17, 2003) [hereinafter WTO Secretariat], available at 2003 WL 22161820, *153 (W.T.O.).

7. FSC Repeal and Extraterritorial Income Exclusion Act of 2000, Pub. L. No. 106-519, 114 Stat. 2423; see also WTO Secretariat, *supra* note 6.

8. See Charles Gnaedinger & Warren Rojas, *U.S. Lawmakers, Lobbyists Continue ETI Act Repeal Clash*, TAX ANALYSTS, Sept. 10, 2003 (“The World Trade Organization ruled that the ETI [extraterritorial income] provisions grant an illegal trade subsidy to U.S. businesses, and it has empowered the European Union officials to impose trade sanctions as of 1 January 2004, unless Congress rescinds the trade rules.”).

provisions violated the treaty.⁹ In this final ruling, the Appellate Body Report, dated January 14, 2002, made four findings pertaining to the implemented ETI provisions:

1. the ETI provisions continue to provide a prohibited export subsidy, under the [Agreement on Subsidies and Countervailing Measures] SCM Agreement, and fails to fall within the exception detailed in Footnote 59 of the SCM Agreement since the measure was not implemented to prevent double taxation of foreign-source income;
2. the ETI provisions violate Article 8 of the WTO Agriculture Agreement and provides an export subsidy to U.S. corporations;
3. the ETI provisions violate the foreign articles/labor limitations of Article III:4 of GATT 1994 by permitting more favorable treatment to products made within the U.S. than those with an origination outside the U.S.; and
4. the ETI replacement provisions fall short of the WTO's prior recommendation that the FSC subsidy be withdrawn by November 1, 2000.¹⁰

These four violations enable the European Union to impose punitive sanctions upon the United States if Congress did not repeal or replace the ETI provisions.¹¹ The WTO rulings challenged Congress to move quickly to provide a tax solution repealing the ETI provision as well as provide a tax solution for U.S. companies enabling U.S. based companies to compete in the global market.¹²

The European Union planned to proceed with trade sanctions against the U.S. totaling over \$4 billion annually since the U.S. did not pass legislation complying with the WTO ruling

9. See WTO Secretariat, *supra* note 6, (stating that on Appeal, the appellate body "upheld the [body's] findings that the U.S. acted inconsistently with its obligations under the SCM Agreement, the Agreement on Agriculture, and the GATT 1994 through FSC amended legislation.")

10. World Trade Organization Appellate Body Report on U.S. – Tax Treatment for "Foreign Sales Corporations," WT/DS108/AB/RW (Jan. 14, 2002) [hereinafter WTO Appellate Body Report] (quoting all four rulings of the Appellate Body).

11. See *FY04 Supplemental Faces Markup, Floor Debate in Senate*, NAT'L J. CONGRESS DAILY, Sept. 23, 2003, available at <http://www.lexis.com> [hereinafter *FY04 Supplemental*].

12. Jim Snyder, *Tax Battle on Exports Heating Up*, THE HILL, Sept. 10, 2003, available at Lexis, News & Business, News Group File.

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by January 1, 2004.¹³ One European Union Official stated, “The longer [the U.S] take[s] to revoke the measures, the more it will hurt,”¹⁴ and the European Union fully intended to impose “small tariffs on a wide range of US imports rather than more punitive tariffs on a smaller list.”¹⁵ The European Commission’s spokesman, Willy Helin, indicated they intended to develop a plan imposing “tariffs on selected U.S. products at 5% beginning in March,”¹⁶ which would provide the U.S. with a three-month reprieve from sanctions arising from inaction by the January 1, 2004 deadline. The European Commission then directed that the European Union could increase the percentage by 1 percent each month until a ceiling of 17 percent would be reached in March 2005.¹⁷ This essentially meant that the European Union would be able to impose a sanction of approximately \$17 Million¹⁸ in March of 2004 and this amount would be increased every month thereafter by one percent.¹⁹ Clearly, the longer it took the U.S. to repeal this measure the more the penalties would hurt U.S. businesses.

The Senate and the House each proposed ways to repeal the ETI provisions in 2003 and 2004.²⁰ Yet, the European Union claimed those proposals within the Senate and the House that provided for a transition period for phasing out the ETI provisions would still prompt sanctions by the WTO.²¹ Arancha Gonzalez, EU Commission Trade Spokeswoman, told reporters that the “U.S. has already had three years²²” and therefore, the WTO did not intend to provide an extra three years for

13. See *FY04 Supplemental*, *supra* note 11; *EC Threatens to Hit US for GBP 700M*, EVENING NEWS, Oct. 3, 2003 at 7 (stating “[w]e would impose sanctions if and when the illegal FSC Foreign Sales Corporation is not replaced by the end of the year.”), available at <http://www.lexis.com>.

14. Edward Alden & Tobias Buck, *US Facing EU Sanctions Over Dollars 4bn Tax Break for Exporters: Washington is Unlikely to Meet a Year-End Deadline*, FIN. TIMES, Oct. 27, 2003, at 9, available at <http://www.lexis.com>.

15. *Id.*

16. Joel Kirkland, *EC Mulls Incremental Penalties for US FSC Tax Break*, CHEMICAL NEWS & INTELLIGENCE, Oct. 21, 2003, available at <http://www.lexis.com>.

17. Martin B. Tittle, *The European Commission’s Proposed FSC-ETI Sanctions* (2003), at http://www.martintittle.com/publications/FSC_sanctions.pdf.

18. *Id.*

19. *Id.*

20. See Alden & Buck, *supra* note 14. The House of Representatives passed H.R. 4250, “The American Jobs Creations Act of 2004,” on June 17, 2004, whose relevant sections to this paper contain the same or similar provisions to H.R. 2896 unless otherwise indicated. STAFF OF JOINT COMM. ON TAXATION, 108TH CONG., COMPARISON OF CERTAIN PROVISIONS OF H.R. 4520 AS PASSED BY THE HOUSE OF REPRESENTATIVES AS AMENDED BY THE SENATE: PROVISIONS RELATING TO INT’L TAX REFORM & SIMPLIFICATION FOR U.S. BUSS., JCX-63-04, at 1 (Comm. Print 2004), available at <http://www.house.gov/jct/x-63-04.pdf>. On May 11, 2004, the Senate passed S. 1637, but the Senate amended H.R. 4520 on July 15, 2004 and substituted the text and title of S. 1637, “The Jumpstart Our Business Strength (JOBS) Act.” *Id.*

21. See Alden & Buck, *supra* note 14.

22. *US’s Grassley Urges EU to Keep Cool On Bid to Repeal FSC*, MARKET NEWS INT’L, Oct. 3, 2003, available at 2003 WL 66878908.

compliance with their rulings.²³ This response from the EU Commission elicited surprise from many in Congress due to a similar case between the U.S. and the European Union.²⁴ In this dispute, commonly referred to as the *Bananas* dispute, the U.S. permitted the European Union, which was already two years past compliance of a WTO directive regarding European banana import quotas, with an additional five-year transition period to comply with the WTO directives.²⁵ Senator Charles Grassley (R-IA) responded, "I would think the European Union would have some appreciation for the extent of this undertaking and show some restraint and patience, just as the United States did in the banana case, a case in which the EU still hasn't fully complied."²⁶ Ultimately, even the White House encouraged Congress to pass legislation avoiding trade sanctions by the European Union.²⁷ This directive stemmed from the fact that the European Union, under the WTO directive, retained the right to impose such significant punitive sanctions upon the United States if the ETI provision was not repealed or replaced.²⁸

As mentioned, part of the European Union's concern stemmed from three bills proposed to Congress that provided for transition relief going beyond the 2004 tax year.²⁹ The Senate proposed a bill providing for three years of general transition relief and unlimited relief for existing, binding contracts.³⁰ The House had competing versions in the two separate bills, one proposed by Representative Bill Thomas (R-CA), and one jointly proposed by Representative Phil Crane (R-IL) and Charles Rangel (D-NY).³¹ Under the Thomas version, passed by committee, the proposed bill provided two years of declining ETI benefits.³² The Crane/Rangel version provided for five years of

23. *Id.*

24. *See id.*

25. *Id.*

26. *Id.*

27. *See* Scott McClellan, White House News Briefing (Oct. 29, 2003), in FDCH POL. TRANSCRIPTS, Oct. 29, 2003, available at <http://www.lexis.com>.

28. *See* Andrew Osborn, *Brussels 4bn Tit-For-Tat Threat to US*, GUARDIAN, Oct. 3, 2003, available at <http://www.lexis.com>.

29. *See* Martin B. Tittle, *U.S. ETI Repeal and Transition Relief*, 32 Tax Notes International 43, 43-44, (Oct. 6, 2003) (discussing Jumpstart Our Businesses Strength (JOBS) Act, S. 1637, 108th Cong. (2003); American Jobs Creation Act of 2003, H.R. 2896, 108th Cong. (2003); and Job Protection Act of 2003, H.R. 1769, 108th Cong. 1st Sess. (2003)).

30. *Id.*

31. *See* American Jobs Creation Act of 2003, H.R. 2896, 108th Cong. (2003); Job Protection Act of 2003, H.R. 1769, 108th Cong. 1st Sess. (2003).

32. *See* Tittle, *supra* note 29, at 43. The House of Representatives modified their proposal for FSC/ETI transition relief in 2004 as follows: the FSC/ETI repeal provides 100 percent relief for transactions prior to 2005, 80 percent relief from transactions during 2005, and 60% of the ETI benefits for 2006; by 2007 the FSC/ETI benefits will be zero. *See* American Jobs Creation Act of 2004, H.R. 4520, 108th Cong. § 101(d) (2d Sess. 2004).

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general transition relief and unlimited relief for existing, binding contracts.³³ A representative for the WTO claimed these provisions remained noncompliant with the WTO directives because they did not absolutely repeal the measure.³⁴ In 2003, the hope remained that the European Union and the United States would ultimately resolve the matter by coming to an agreement regarding a set transition period just as the U.S. did with the European Union in the *Bananas* case.³⁵

II. GENERAL TAX BACKGROUND

A. *United States Tax Structure*

Typically, under the Internal Revenue Code, the United States imposes an income tax upon U.S. citizens, U.S. residents, U.S. corporations and citizens that conduct business worldwide, and most foreign corporations conducting business within the jurisdiction of the United States.³⁶ However, the U.S. may not impose a tax on a non-citizen or a non-citizen corporation doing business within the jurisdiction of the United States if a treaty exists between the U.S. and that corporation's country preventing such taxation.³⁷ The United States Internal Revenue Code imposes a tax upon the gross income of citizens and residents.³⁸ Generally, the U.S. does not impose a tax upon foreign corporations, but does impose taxation on foreign-source income when the gross income is "effectively connected with the conduct of a trade or business within the United States."³⁹ The United States, under the Foreign Tax Credit, "allows foreign income taxes to be credited dollar-for-dollar against the U.S. income tax of U.S. citizens and residents."⁴⁰ However, the Internal Revenue Code sets a limitation the foreign tax credit should not exceed.⁴¹ "The effect of the credit limitation is to tax the foreign-source income at the higher of the U.S. or foreign rates, with the foreign . . . country reaching into the taxpayer's pocket first and the U.S. receding to the extent of the foreign

33. See Tittle, *supra* note 29, at 44.

34. *Id.*

35. See *US's Grassley Urges EU to Keep Cool On Bid to Repeal FSC*, *supra* note 22.

36. See FED. R. CIV. P. 1332(c) (stating that under U.S. law, a corporation chartered under the jurisdiction of the United States is deemed a citizen of the United States); JOSEPH M. DODGE ET AL., *FEDERAL INCOME TAX: DOCTRINE, STRUCTURE, AND POLICY: TEXT, CASES, PROBLEMS* 319 (1995).

37. See DODGE, *supra* note 36, at 319.

38. See I.R.C. § 63(a) (West 2004); I.R.C. § 61(a) (defining gross income as "income from whatever source derived").

39. I.R.C. § 882(b).

40. DODGE, *supra* note 36, at 320; see also I.R.C. § 901.

41. See I.R.C. § 904; DODGE, *supra* note 36, at 320.

tax.”⁴²

B. Worldwide Income v. Territorial Income Taxes

In order to understand the ramifications of the WTO ruling on American businesses, it is important to understand some key differences in the United States and the European Union nations. First, the United States has a worldwide tax system while the European Nations have a territorial tax system.⁴³ A worldwide tax system means resident individuals are taxed on their worldwide income, apart from where the income is earned.⁴⁴ The U.S. then uses the foreign tax credit to enable taxpayers to prevent double taxation by providing a dollar-for-dollar credit on tax paid in a foreign nation.⁴⁵ The policy behind this decision was to promote economic efficiency, so as not to distort the decision of whether or not to invest at home or abroad.⁴⁶ The worldwide income system promotes horizontal equity with other U.S. taxpayers, since “a resident taxpayer earning income abroad should be subject to tax at the same effective rate as a taxpayer earning the same amount of income domestically.”⁴⁷ Additionally, the structure of the U.S. tax code enables vertical equity in taxpayers since citizens earning higher amounts of income will be taxed at higher tax rates.⁴⁸ The United States implemented a direct tax, or an income tax, years ago to provide a competitive advantage to U.S. corporations and ultimately ended up implementing a system putting U.S. global companies at a distinct disadvantage.⁴⁹ The distinction between the U.S. direct tax and an indirect tax becomes important as Congress determines how to restructure the tax code to benefit U.S. businesses. Assuredly, Congress will be reminded that the United States remains the only industrialized country to tax citizens on worldwide income, even if the citizen resides outside the country.⁵⁰

42. DODGE, *supra* note 36, at 321.

43. See STAFF OF JOINT COMM. ON TAXATION, 108TH CONG., THE U.S. INT’L TAX RULES: BACKGROUND AND SELECTED ISSUES RELATING TO THE COMPETITIVENESS OF U.S. BUSS. ABROAD, JCX-68-03, at 6-7, 10, [hereinafter U.S. INT’L TAX RULES] (Comm. Print 2003), available at <http://www.house.gov/jct/x-68-03.pdf>.

44. *Id.* at 2.

45. *Id.* at 2, 10-11.

46. *Id.* at 2.

47. *Id.* at 3.

48. *Id.*

49. U.S. INT’L TAX RULES, *supra* note 43, at 7-8.

50. *Id.* at 3.

C. *Ramifications*

Now, most European nations have a territorial tax system meaning the taxing nation taxes only income earned within its borders, regardless of the taxpayer's residence.⁵¹ These territorial taxes are imposed primarily through excise taxes, known as a value-added tax (VAT).⁵² Many VAT taxes are refunded if the goods or products leave the country.⁵³ For instance, the French impose a value-added tax of up to 25 percent of the retail price of items, but turn around and then refund or waive the tax on goods that leave the country.⁵⁴ This is contrary to the United States, in which state and local governments impose the excise taxes and those excise taxes are *not* refunded when goods are exported.⁵⁵ Arguably, a territorial tax system exhibits more efficiency because it taxes all investment within a particular country the same, regardless of the residence of the investor.

A company in a pure territorial system will obviously achieve greater benefits if the tax is lower than a worldwide company will.⁵⁶ For example, if a U.S. corporation does business in Ireland, which imposes a 12.5 percent corporate tax,⁵⁷ a U.S. corporation will also be subject to the United States' thirty-five percent corporate tax. The corporation will then claim a dollar-for-dollar credit for the 12.5 percent tax paid to Ireland,⁵⁸ but it will still be responsible for remitting the tax imposed by Ireland.⁵⁹ So in essence, they pay the full 35 percent federal corporate income tax, which remains the higher corporate tax imposed by the two countries.⁶⁰ This leaves U.S. corporations at a distinct disadvantage: a U.S. business with \$100 profit will have \$65 left after taxes, whereas an Irish business with the same profit will have \$87.5 after taxes have been taken into

51. See *id.* at 6; Jonathan E. Kaplan, *Big Five Fight EU Tax Tactic*, THE HILL, Jan. 13, 2004, available at <http://www.hillnews.com/news/030503/eutax.aspx>.

52. See Kaplan, *supra* note 51.

53. See *Impact of Fin. & Prof'l Serv. Exports on Small Bus.: Hearing Before the House Comm. on Small Bus.*, 107th Cong. (2001) (statement of David L. Aaron, Senior Int'l Advisor, Dorsey & Whitney), available at <http://www.lexis.com>.

54. *Id.*

55. *Id.*

56. See U.S. INT'L TAX RULES, *supra* note 43, at 27-28.

57. See Daniel J. Mitchell, Ph.D., *Making American Companies More Competitive*, HERITAGE FOUND. REPORTS, Sept. 29, 2003, available at <http://www.lexis.com>; Eric Axler, *KPMG's Corporate Tax Rate Survey 3* (January 2003), at http://www.us.kpmg.com/microsite/global_tax/ctr_survey/.

58. See Mitchell, *supra* note 57.

59. *Id.*

60. *Id.*

consideration.⁶¹ Companies that pay only a territorial tax to Ireland would certainly be more competitive from the start than U.S. companies.

Additionally, the United States' 2003 effective tax rate continued to remain steady from 2002 to 2003 at forty percent, second only to the highest effective tax rate in Japan at 42 percent.⁶² While the United States corporate tax rate remains steady, the international trend remains to decrease tax rates.⁶³

The WTO ruled the ETI provisions to be a prohibited export subsidy.⁶⁴ Chairman Thomas believes the difference in the WTO rulings between the U.S. and the European Nations is that the U.S. violation is due to a direct income tax break through the ETI Act.⁶⁵ The European Nations impose a similar break for EU companies through their indirect Value Added Tax, which is most likely WTO compliant.⁶⁶ The value-added tax is an indirect tax, a tax businesses pay on sales made within that particular country.⁶⁷ The countries imposing a value-added tax (VAT) then commonly turn around and rebate or waive the tax on sales that are sold to other countries and for exporters.⁶⁸ Essentially this is the same thing the U.S. attempted to do with the ETI Act, but because the ETI Act provided subsidies contingent upon the exportation of "property manufactured, produced, grown, or extracted within the United States" it was ruled a violation.⁶⁹ Although a similar provision exists for property produced or held for use outside the U.S., the appellate body declined to provide an opinion on whether this also violated the Agreement on Subsidies and Countervailing Measures (SCM Agreement).⁷⁰

Although this practice appears to also constitute an export subsidy, the VAT falls outside of the scope of the WTO agreements because it remains an indirect tax and the

61. See *id.*

62. See Axler, *supra* note 57 (providing the U.S. Federal tax rate is 35 percent and state and local taxes generally range from 1 percent-12 percent as opposed to a Japanese effective tax rate that includes a corporate income tax at 30 percent in addition to taxes that include business, prefectural and municipal taxes).

63. *Id.* (supplying effective tax rates for different countries: Denmark: 30%, France: 34.33%, Norway: 28%, United Kingdom: 30%, Switzerland: 24.1%).

64. WTO Appellate Body Report, *supra* note 10, at 77-78.

65. See Martin B. Tittle, *U.S. Foreign Tax Creditability for VAT: Another Arrow in the ETI/E-VAT Quiver*, 30 TAX NOTES INT'L 809, 809 (2003), available at <http://www.martintittle.com>.

66. See *id.* at 817.

67. See *An Examination of U.S. Tax Policy and Its Effect on the International Competitiveness of U.S.-Owned Foreign Operations: Hearing Before the Senate Comm. on Finance*, 110th Cong. 2 (2003) [hereinafter *Examination of U.S. Tax Policy*] (written statement of Martin B. Tittle, Researcher, University of Michigan Law School), available at <http://www.martintittle.com/publications/SFC071503.html>.

68. See U.S. INT'L TAX RULES, *supra* note 43, at 8.

69. WTO Appellate Body Report, *supra* note 64, at 2-3, 7-8.

70. *Id.* at 35-37.

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agreements address only direct taxes such as the United States income tax.⁷¹ Additionally, the VAT tax probably does not violate the WTO because the “credit is not specifically related to exports.”⁷² If the United States added a foreign tax credit for VAT taxes as a solution for relieving double taxation, the U.S. would put Chairman Thomas’s insight regarding direct and indirect taxes into practice.⁷³ It might appear that consumers of products and goods that are exported would then have the added burden of this value added tax. However, if implemented, the “[r]eal burden of the VAT tax may not fall entirely on consumers but may in part be passed back to suppliers through lower prices received by producers.”⁷⁴

U.S. businesses also face a new challenge due to the European Union’s implementation of an E-VAT that will provide further disadvantage to the competitiveness of U.S. e-businesses. The European Union “[required] non-European Union merchants to begin paying VAT on July 1, 2003 for certain on-line sales of products including software, databases, images, text, music, films, games and ‘distance teaching.’”⁷⁵ Non-European Union merchants paid taxes at an applicable rate based on the recipient’s member state for VAT.⁷⁶ European Union electronic retailers must charge nontaxable persons the VAT rate of the country of the recipient and will be required to pay the VAT rate of the country in which they are registered and located.⁷⁷ Non-European Union internet companies will not be allowed to deduct their input VAT on their VAT returns as European Union taxable persons are permitted.⁷⁸ Instead, non-European Union internet companies must file their returns, pay all the VAT tax on sale (output VAT), and then later apply separately for the refund due on their input VAT.⁷⁹ This increased administrative burden denies U.S. companies of the time value of money, and imposes an increased burden that their European Union competitors will not have.⁸⁰ US internet businesses will most likely not be permitted to shift the VAT tax due on consumers because the European competitors can charge lower VAT or no

71. See U.S. INT’L TAX RULES, *supra* note 43, at 8.

72. Tittle, *supra* note 65, at 818.

73. *Id.* at 810.

74. *Examination of U.S. Tax Policy*, *supra* note 67, at 4.

75. Tittle, *supra* note 65, at 813.

76. *Id.* at 814.

77. *Id.* at 813-14.

78. *Id.* at 813.

79. *Id.* at 815.

80. *Id.*

VAT at all.⁸¹ Again, this places a hardship on U.S. competitors and a hurdle other European internet companies will not face.

III. INCENTIVES FOR GLOBAL COMPETITIVENESS

In 2001, the Congress and President Bush provided the American people with a tax cut that continues to stimulate the economy. The tax cut had a marked effect on the United States gross domestic product, which grew at record levels in the second half of 2003.⁸² In fact, the third quarter of 2003 saw the highest growth rate, at 7.2 percent, in nineteen years.⁸³ The tax cut enabled businesses to invest in capital, equipment and provided research and development tax credits.⁸⁴

A. *Research and Development Tax Credit*

The research and development tax credits may be one of the most important aspects of the tax incentives that must be continued in order to increase an American company's global competitiveness. In testimony provided by Kenneth W. Dam to the Senate, Mr. Dam stated "[s]pending on research and development allows the United States to maintain its competitive advantage in business and be unrivaled as the world leader in scientific and technological know-how."⁸⁵ Non-financial multinational companies conducted approximately \$142 billion of research and development in 1999.⁸⁶ Only about 10 percent of the research and development performed by these companies occurred outside the U.S.⁸⁷

Part of the problem is that while the U.S. continues to pursue increased knowledge as our source of wealth in the world market, that knowledge has the potential to be exported and applied anywhere in the world.⁸⁸ Nevertheless, "[f]oreign production may provide the opportunity for the export of firm-

81. See *Examination of U.S. Tax Policy*, *supra* note 67, at 4.

82. See Gretchen Morgenson, *The No-Bang, All-Whimper Recovery*, N.Y. TIMES, Jan. 11, 2004, available at <http://www.nytimes.com/2004/01/11/business/yourmoney/11watch.html>.

83. See *US – China Economic Relations and China's Role in the Global Economy: Hearing Before House Comm. on Ways and Means*, 108th Cong. (2003) [hereinafter *U.S. – China Hearing*] (statement of Rep. William M. Thomas).

84. *Id.* at 8-9 (statement of John B. Taylor, Under Secretary for Int'l Affairs, U.S. Dep't of Treasury).

85. *WTO Decision on the Extraterritorial Income Exclusions Provisions and International Competitiveness: Hearing Before the S. Comm. on Finance*, 107th Cong. (2002) [hereinafter *WTO Decision*] (statement of Kenneth W. Dam, Deputy Secretary, U.S. Dep't of Treasury), available at <http://www.ustreas.gov/press/releases/po3295.htm>.

86. *Id.*

87. See *id.*

88. See *id.*

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specific know-how, and domestic exports may be enhanced by the establishment of foreign production facilities through supply linkages and service arrangements.”⁸⁹ The establishment of foreign production facilities is not always detrimental to the American workers, but may guarantee the ability of U.S. multinationals to compete in foreign markets.⁹⁰ If U.S. companies increase their ability to compete, this provides direct opportunities within the U.S. for American workers.⁹¹ Therefore, the U.S. tax laws must not place barriers or hurdles for U.S. companies, but rather, should provide incentives and inducements to enable them to compete with foreign companies in both the domestic and world markets. The results of a change in U.S. tax laws must encourage companies to expand in the U.S. rather than move their businesses into international territories. Today’s technology market remains chaotic with ever increasing changes and innovations in technology. The U.S. continues as one of the leading technological producers, but in order to keep continuing on this path, the U.S. must invest in research and development to outpace other technology and knowledge-driven nations in advances and innovations. By increasing the research and development tax credit, U.S. businesses will also have reason to invest domestically to retain the know-how and thus stimulate purchases, exports and jobs.⁹²

B. Retain U.S. Production within the U.S. Borders

Many businesses continue to move their production-based facilities to other countries. In 1960, 18 of the world’s twenty largest corporations were headquartered in the United States.⁹³ By 1996, the number had dropped to eight.⁹⁴

New Political stability is allowing capital and technology to flow far more freely around the world. Strong educational systems are producing tens of millions of intelligent, motivated workers in the developing world (India and China), and

89. *Id.*

90. *Id.*

91. *WTO Decision*, *supra* note 85.

92. *See id.*

93. *Extraterritorial Income Regime: Hearing Before the Subcomm. on Select Revenue Measures of the House Comm. on Ways and Means*, 107th Cong. (2002)(statement of the Hon. Bill Archer, Senior Policy Advisor, Pricewaterhouse Coopers LLP), *available at* <http://www.waysandmeans.house.gov/legacy/srm/107cong/4-10-02/4-10arch.htm>.

94. *Id.*

inexpensive high-bandwidth communications make it feasible for large work forces to be located and effectively managed anywhere.⁹⁵

One of the primary reasons companies move outside the United States is the ability to find cheap labor.⁹⁶ In China, the legal minimum wage for a manufacturing position remains \$56 a month and an average wage of 25 cents an hour.⁹⁷ However, according to a study conducted by a Chinese Commission, no one enforces the legal wage minimum.⁹⁸ So in essence, a Chinese worker might work for almost 50 hours at an increased wage of 60 cents an hour, for what the U.S. would pay one worker to work for one hour.⁹⁹ Software engineers make \$150,000 here in the United States, whereas a team of equal caliber engineers earn on average \$20,000 per year internationally.¹⁰⁰ Therefore, the U.S. government needs to provide American workers with the skills and flexibility necessary to adjust to changes in the global marketplace.

Approximately sixty-five percent of Chinese exports, come from joint ventures with companies from the west who choose to make investments in China.¹⁰¹ The three largest contract manufacturers in the world have moved operations to China.¹⁰² Not to mention, over 520 U.S. factories had previously moved to Mexico and relocated to China over the past year and a half.¹⁰³ One reason for the mass exodus of U.S. manufacturing jobs may be the way China structured their tax code to benefit itself and provide increased incentives to international businesses to manufacture within its borders.¹⁰⁴ China's effective tax rate currently sits at 33 percent, comprised of a 30 percent state tax and a 3% local tax.¹⁰⁵ Domestic companies may be given a different set of tax laws and regulations to follow.¹⁰⁶ The tax rate

95. Charles Schumer & Paul Craig Roberts, *Second Thoughts on Free Trade*, N.Y. TIMES, January 6, 2004, <http://www.nytimes.com/2004/01/06/opinion/06SCHU.html>.

96. *See id.*

97. *Thomas Hearings Part II*, *supra* note 2, at 36 (statement of Richard Trumka, Secretary-Treasurer, AFL-CIO).

98. *Id.*

99. *US - China Hearing*, *supra* note 83, at 19 (statement of Rep. Becerra).

100. Schumer & Roberts, *supra* note 95.

101. *Thomas Hearings Part II*, *supra* note 2, at 37 (statement of Jeb Head, President, Atkins & Pearce, Inc.).

102. *Id.* at 38 (statement of Jeffrey Somple, President, Mack Molding Company - Northern Division).

103. *Id.* (statement of Richard Trumka, Secretary-Treasurer, AFL-CIO).

104. *See Axler*, *supra* note 57, para. 11 (presenting tax rates and policies applicable to Foreign Investment Enterprises in China).

105. *Id.*

106. *Id.*

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reduces to only fifteen percent or twenty-four percent if foreign investors locate their facilities within a specially designated one of China.¹⁰⁷ Additionally, the local three percent tax may be reduced or entirely waived by the local government.¹⁰⁸

James Jarrett, of Intel Corporation, stated before the House Ways and Means Committee that Congress needed to implement the following five solutions in order to enable U.S. corporations to compete with China in retaining U.S. business investments.¹⁰⁹ First, the U.S. needed to arm U.S. companies with a competitive tax policy through the FSC/ETI replacement.¹¹⁰ Second, Congress must extend the tax credit for research and development.¹¹¹ Additionally, the U.S. must provide better K-12 education, especially in the areas of math and science.¹¹² Congress must maintain their position on avoiding any protectionism.¹¹³ Finally, because U.S. based companies cannot compete on the basis of wages, the U.S. must compete in productivity.¹¹⁴ These same considerations should be contemplated as Congress moves forward in looking to make U.S. companies more competitive globally.

For instance, I believe Congress must take a look at education considerations, since salaries continue to jump due to the high cost of post high-school education and the increased needs of college and graduate students to pay back educational loans. In looking for work, students may be willing to take a decrease in pay if their college loans were paid back in part or in full by the companies, who were then able to deduct the expense, or the students themselves were able to deduct the loan against their income in future years. Additionally, colleges must work with businesses to begin training upcoming U.S. workers to meet the needs of business and looking for emerging technological advances instead of solely providing a big picture view of various different subjects. Schools must teach the theory behind the mechanics to develop analytical abilities. One of the areas failing in education remains the lack of graduating student's ability to analyze, strategize, and develop tactics for addressing a planned course of action and the bumps in the road surely to happen. As Sun Tzu states, "[w]hat enables the wise sovereign and the good

107. *Id.*

108. *Id.*

109. See *Thomas Hearings Part II*, *supra* note 2 (statement of James Jarrett, V.P. of Legal and Gov't. Affairs and Dir. of Worldwide Gov't. Affairs, Intel Corp.).

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

general to strike and conquer, and achieve things beyond the reach of ordinary men, is *foreknowledge*.”¹¹⁵ Students should be taught to evaluate their strengths and weaknesses, those of others, and how to analyze the advantages arising from each of these. Students must be taught to deal with ambiguities that surround a well laid plan that has gone bad. In other words, they must deal with the “fog of war” and war’s ambiguities or business’s ambiguities.¹¹⁶ Future business leaders must be able to understand the plan, analyze potential conflicts and determine the critical path within the plan in order to make businesses more successful and to compete internationally.

C. *Complication of the U.S. Tax Code*

The complication of the U.S. tax code also contributes to the disadvantage faced by U.S. multinational companies.¹¹⁷ In testimony before the House Ways and Means Committee, Bill Archer stated “43.7 percent of U.S. income tax compliance costs were attributable to foreign source income even though foreign operations represented only 26-30 percent of worldwide employment, assets and sales.”¹¹⁸ Tax rules may also determine where the companies’ headquarters will be located.¹¹⁹ “[R]ecent studies have shown that between seventy-three and eighty-six percent of large cross-border transactions involving U.S. companies have resulted in the merged company being headquartered abroad.”¹²⁰ Congress should realize this means U.S. workers are losing out on potential job opportunities and increased buying power to the U.S. economy.

In the 1980s and 1990s, two major tax themes were to “reduc[e] the marginal tax rates that discourage work and investment; and reduce the bias against saving inherent in any income tax.”¹²¹ Congress must reconsider these goals and continue the international trend to reduce the effective tax rate

115. SUN TZU, *THE ART OF WAR* 77 (James Clavell ed., Delacorte Press 1983) (6th Cent. B.C.).

116. CARL VON CLAUSEWITZ, *ON WAR* 120 (Michael E. Howard & Peter Paret, eds., 1976) (stating the concept of “fog and friction,” which is now commonly referred to as “the fog of war”).

117. See generally Robert F. Bennett, *Constant Change: A History of Federal Taxes*, Joint Econ. Comm. (September 12, 2003), at <http://jec.senate.gov/studies> (analyzing the complications of U.S. tax policies).

118. *Extraterritorial Income Regime: Hearing Before the Subcomm. on Select Revenue Measures of the House Comm. on Ways and Means*, 107th Cong. (2002) (statement of Hon. Bill Archer, Senior Policy Advisor, Pricewaterhouse Coopers LLP) (quoting economists who surveyed Fortune 500 companies), available at <http://www.waysandmeans.house.gov/legacy/srm/107cong/4-10-02/4-10arch.htm>.

119. *Id.*

120. *Id.*

121. Bennett, *supra* note 117, at 3.

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for all corporations.¹²² Additionally, Congress should encourage depreciation rules promoting investment by permitting firms to deduct more quickly the cost of investment from their tax liability.¹²³

IV. EXTRATERRITORIAL INCOME ACT

The Extraterritorial Income Act repeal remains a “serious issue with significant consequences for U.S. businesses and the U.S. economy.”¹²⁴ U.S. based companies *must* be able to compete in a global economy.

The Extraterritorial Income Act included the new Internal Revenue Sections 114, 941, 942, and 943 of the Internal Revenue Code.¹²⁵ These ETI provisions provided an exemption from U.S. tax for a portion of the income earned from foreign sales.¹²⁶ The provisions were implemented to provide U.S. companies with comparable tax treatment to tax treatment common in many other countries.¹²⁷ ETI provisions allow taxpayers to elect certain tax treatment based upon qualifying provisions.¹²⁸ The ETI Act permitted U.S. exporters to exclude from federal corporate income tax up to fifteen percent of their foreign trade income from taxable income credited to foreign trading gross receipts.¹²⁹ Numerous multinational U.S. companies were able to take “advantage of the law, often through tax-exempt divisions in the Bahamas, Barbados, Bermuda, and the U.S. Virgin Islands,” which enabled them to reduce the effect of the increased U.S.

122. See generally Axler, *supra* note 57 (noting the international trend of lowering corporate tax rates).

123. See Bennett, *supra* note 117, at 4.

124. *WTO Decision on the Extraterritorial Income Exclusions Provisions and International Competitiveness: Hearing Before the Senate Comm. on Finance*, 107th Cong. (2002) (testimony of Kenneth W. Dam, Deputy Sec., U.S. Dep’t of Treasury), available at <http://www.ustreas.gov/press/releases/po3295.htm>.

125. See FSC Repeal and Extraterritorial Income Exclusion Act of 2000, *supra* note 7.

126. U.S. Dep’t of State, *Treasury’s Dam Testifies on WTO Ruling/U.S. Tax Code, Says “Meaningful Changes” to U.S. Tax Code Necessary*, July 30, 2002, available at <http://usinfo.state.gov/ei/Archive/2003/Dec/31-20405.html>.

127. *WTO Decision on the Extraterritorial Income Exclusions Provisions and International Competitiveness: Hearing Before the House Comm. on Ways and Means*, 107th Cong. (2002) (testimony of Barbara Angus, Int’l Tax Counsel, U.S. Dep’t of Treasury), available at <http://www.ustreas.gov/press/releases/po3295.htm>.

128. See STAFF OF JOINT COMM. ON TAXATION, 107TH CONG., BACKGROUND AND HISTORY OF THE TRADE DISPUTE RELATING TO THE PRIOR-LAW FOREIGN SALES CORP. PROVISIONS AND THE PRESENT-LAW EXCLUSION FOR THE EXTRATERRITORIAL INCOME AND A DESCRIPTION OF THESE RULES, JCX-83-02, at 10 (Comm. Print 2002).

129. See Christian Bourge, *Commentary: Shocked to Find Taxes Paid*, UNITED PRESS INT’L, Oct. 21, 2003, available at <http://www.lexis.com>; I.R.C. § 941(a)(1)(C) (2000) (defining “qualifying foreign trade income” as “the amount of gross income which, if excluded, will result in a reduction of the taxable income of the taxpayer from such transaction equal to the greatest of: 15 percent of the foreign trade income derived from the transaction.”).

corporate tax.¹³⁰ The ETI Act also allowed exporters to exclude the greater of: (a) 1.2 percent of their foreign trading gross receipts (not to exceed 200 percent of 15 percent of foreign trade gross receipts calculated above) from the transaction, (b) 30 percent of the foreign sale and leasing income derived, or (c) 15 percent of the foreign trade income derived from the transaction¹³¹ on the sale of qualified U.S. origin goods.¹³² Essentially, the primary purpose of the ETI Act was to counteract the competitive advantages European companies achieve through reduced corporate tax rates, VAT tax rebates, as well as various other indirect subsidies the European Nations provide to their international companies.¹³³

Therefore, solely repealing the ETI Act without implementing other measures will have a detrimental impact on U.S. businesses as they try to compete in the global market. The ETI repeal will remove a 5.25% tax break for U.S. exporters.¹³⁴ The repeal also will wipe out Subpart F of the ETI Act that provides anti-deferral rules on foreign-based company sales and service income, will erase the foreign personal holding company and foreign investment company rules, and will cut the number of foreign tax credits from nine to three.¹³⁵ Furthermore, repeal of the ETI will remove the 90% limitation on foreign tax credits in the alternative minimum tax calculations.¹³⁶ All of these repeal measures, without additional action, will aggravate U.S. global companies' positions in the international markets.

130. Borge, *supra* note 129.

131. I.R.C. § 941(a)(1).

132. See I.R.C. § 943(a)(1) (designating qualified foreign trade property as property: "(A) manufactured, produced, grown, or extracted within or outside the United States, (B) held primarily for sale, lease or rental in the ordinary course of trade or business for direct use, consumption or disposition outside the United States, and (C) not more than 50 percent of the fair market value of which is attributed to — (i) articles manufactured, produced, grown or extracted outside the United States, and (ii) direct costs for labor . . . performed outside the United States.").

133. See *FSC/ETI Repeal and Cooperatives: Hearing on H.R. 1769 Before the Senate Fin. Comm.*, 108th Cong. 2-3 (2003) (testimony of John B. Campbell, V. P. of Gov't Relations and Indus. Prods., Ag Processing Inc.).

134. See Tittle, *supra* note 65, at 812.

135. See *id.*; U.S. INT'L TAX RULES, *supra* note 43, at 30 (discussing a proposal for reducing the baskets from nine to two. The rules would have only two baskets for active or passive income, while [s]eparate foreign tax credit limitation categories are provided for the following items of income: (1) passive income; (2) high withholding tax interest; (3) financial services income; (4) shipping income; (5) certain dividends received from a noncontrolled section 902 foreign corporation (a '10/50 company'); (6) certain dividends from a domestic international sales corporation or former domestic international sales corporation; (7) taxable income attributable to certain foreign trade income; (8) certain distributions from a foreign sales corporation or former foreign sales corporation; and (9) any other income not described in items (1) through (8) (so-called "general basket" income). Thus, nine baskets are reduced to two)); American Jobs Creation Act of 2003, H.R. 2896, 108th Cong. § 1083 (2003); American Jobs Creation Act of 2004, H.R. 4520, 108th Cong. § 303 (2004) The 2004 version provides for only two tax credit baskets: 1) passive category income; and 2) general category income).

136. Tittle, *supra* note 65, at 812.

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V. 2003 PROPOSALS IN CONGRESS

In 2003, various proposals were introduced in the House and Senate to repeal the ETI Act.¹³⁷ Congress believed the repeal could increase the competitive position of U.S. companies conducting international business as well as retain jobs within the U.S.¹³⁸ The repeal of the ETI Exclusion Act could return approximately \$50 billion to the U.S. treasury over the next ten years.¹³⁹ Congress could reallocate those funds to the other tax relief measures in the three proposed bills under discussion.¹⁴⁰ The WTO dispute directly affected several U.S. companies such as Motorola and other mobile-phone manufacturers as well as high-tech firms, telecom carriers, and software producers.¹⁴¹ However, the issue remained of critical importance to the manufacturing industry which desperately needed a boost after suffering a loss of 2.7 million jobs over the preceding three years.¹⁴²

A. *American Jobs Creation Act of 2003 (H.R. 2896)*

House Speaker Dennis Hastert (R-IL) provided critical support for Thomas's bill on October 2, 2003,¹⁴³ by including a provision allocating \$40 billion, of the \$50 billion from the repeal of the ETI Act, toward a three percent income tax rate cut to manufacturers.¹⁴⁴ Thomas declared this added incentive would provide the manufacturing industry a boost after 37 consecutive

137. See Jumpstart Our Businesses Strength (JOBS) Act, S. 1637, 108th Cong. (2003); American Jobs Creation Act of 2003, H.R. 2896, 108th Cong. (2003); Job Protection Act of 2003, H.R. 1769, 108th Cong. (1st Sess. 2003).

138. Press Release, House Comm. on Ways and Means, Thomas Leads Bipartisan Delegation to WTO Trade Ministerial Members to Emphasize Meaningful Market Access on Agriculture (Sept. 9, 2003), at <http://waysandmeans.house.gov/News.asp?FormMode=print&ID=117>.

139. See Jeffrey Silva, *Competing Bills Address Export Issue*, RCR WIRELESS NEWS, Sept. 15, 2003, available at <http://www.lexis.com>.

140. See S. 1637; H.R. 2896; H.R. 1769. On May 11, 2004, the Senate originally passed S. 1637. See STAFF OF JOINT COMM. ON TAXATION, 108TH CONG., COMPARISON OF CERTAIN PROVISIONS OF H.R. 4520 AS PASSED BY THE HOUSE OF REPRESENTATIVES AND AS AMENDED BY THE SENATE, JCX-63-04, at 1 (Comm. Print 2004), available at <http://www.house.gov/jct/x-62-04.pdf>. The House of Representatives passed H.R. 4250, "The American Jobs Creations Act of 2004," on June 17, 2004 and the Senate amended H.R. 4520 on July 15, 2004. *Id.* The Senate substituted the text and title of S. 1637, "The Jumpstart Our Business Strength Act" (JOBS). *Id.*

141. See Silva, *supra* note 139.

142. See Joel Kirkland, *US Senate Bill to Cut Manufacturers' Taxes, Kill FSC*, CHEMICAL NEWS & INTELLIGENCE, Sept. 18, 2003, available at <http://www.lexis.com>; *Snowe Urges Finance Leaders to Adopt SBIC Reform Provisions in ETI Replacement Bill; Change Would Boost Manufacturing Sector, Stem Job Losses*, U.S. NEWswire, Sept. 17, 2003, available at <http://www.lexis.com> (estimating a job loss of 2.6 million in the manufacturing sector since July of 2000).

143. See Martin Vaughan, *Thomas Gains Critical Backing From Hastert for Tax Bill*, NAT'L J. CONG. DAILY, Oct. 3, 2003, available at <http://www.lexis.com>; H.R. 4520 (The House of Representatives passed the American Jobs Creations Act of 2004, H.R. 4520, on June 17, 2004).

144. See Vaughan, *supra* note 143.

months in which the manufacturing sector lost jobs.¹⁴⁵

With the increased support, the House Ways and Means Committee passed the Thomas bill 24-15 on October 28, 2003.¹⁴⁶ The bill passed after serious cuts in the original proposed bill.¹⁴⁷ Ultimately, Thomas lowered the overall cost of his bill from approximately \$128 billion to approximately \$60 billion¹⁴⁸ over the next ten years.¹⁴⁹ Thomas' funding would stem primarily from the \$50 billion from the repeal of the ETI Act and \$17 billion from the extension of customs user fees through 2013.¹⁵⁰ One of the biggest arguments against Thomas' bill was that the bill was not revenue neutral, unlike the Senate (Grassley/Baucus) bill and the rival House bill (Crane/Rangel).¹⁵¹ The administration continued to put pressure on the House to pass a revenue neutral bill.¹⁵² However, ultimately the significant drop in overall cost provided the needed impetus to get the bill passed in Committee.¹⁵³

Thomas proposed to reduce the tax rate for businesses with taxable income less than \$20 million from thirty-five percent to thirty-two percent, provide AMT (alternative minimum tax) relief, as well as various other proposed tax relief for American businesses.¹⁵⁴ The FSC/ETI repeal would be gradually transitioned to provide a buffer for multinational companies. Multinational companies would retain 100% of their ETI benefits for year 2003, eighty percent for year 2004 through year 2005, and sixty percent for 2006.¹⁵⁵ Thomas proposed to allow companies with "binding contracts" in effect prior to January 14,

145. See Josephine Hearn, *Thomas to Lobby GOP on Tax Breaks*, THE HILL, Oct. 8, 2003, available at <http://www.lexis.com> (The 37th month of consecutive job loss for the manufacturing industry was September 2003).

146. See Edward Alden, *House Republicans to Back Dollars 60bn Company Tax Cuts*, THE FIN. TIMES LTD., Oct. 29, 2003, available at <http://www.lexis.com>.

147. See Josephine Hearn, *Thomas Sets FSC Markup Date at Last: Chairman Says he has Gained Support Needed to Pass Proposed Provisions*, THE HILL, Oct. 21, 2003, at 7, available at <http://www.lexis.com>.

148. *Id.*

149. See Alden & Buck, *supra* note 14.

150. See John Shaw, *US House Tax Panel OKs FSC/ETI Bill with No Repatriation Plan*, THE MAIN WIRE, Oct. 28, 2003, available at <http://www.lexis.com>.

151. See Gnaedinger & Rojas, *supra* note 8.

152. *See id.*

153. See William L. Watts, *House Panel Approves International Tax Bill*, CBS MARKET WATCH, Oct. 28, 2003, available at <http://www.lexis.com>.

154. H.R. 2896 §§ 1001—02; see I.R.C. § 11(b) [showing corporate rate at 35% to be changed by House Bill 2896].

155. See S. 1637, § 101(e). The House of Representatives modified their proposal for FSC/ETI transition relief in 2004. See American Jobs Creation Act of 2004, H.R. 4520, 108th Cong. § 101. The FSC/ETI repeal provides 100 percent relief for transactions prior to 2005, 80 percent relief from transactions during 2005, and 60% of the ETI benefits for 2006. *Id.* § 101(c)-(d). The FSC/ETI benefits will be zero by 2007. See *id.* § 101(d).

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2002 to retain FSC or ETI benefits.¹⁵⁶ However, the European Union continued to balk at both this plan and the three-year phase out provision in the Grassley/Baucus bill.¹⁵⁷ It remains questionable whether this will meet the compliance requirements of the WTO in repealing the ETI Act and not providing unfair trade subsidies to U.S. organizations. However, the U.S. and the European Union will hopefully achieve some reasonable solution as the U.S. did with the EU in the *Bananas* dispute.¹⁵⁸

The Thomas bill and the Grassley/Baucus bill provided many incentives that would continue to help businesses compete and would create and bring jobs back to the United States.¹⁵⁹ Some of these provisions included a manufacturing rate cut, an across the board rate cut, alternative minimum tax relief, increased section 179 deduction limits, and a repatriation provision.¹⁶⁰ The various bills provided other incentives to the small businessperson to help with the impact of the jobs lost within the manufacturing industry.¹⁶¹

1. Rate Cut

The mainstay of the Thomas bill was the tax rate cut.¹⁶² Thomas proposed to reduce the tax rate for manufacturing and production companies to thirty-four percent for years 2004-2006 and then further cut the rate to a thirty-two percent target by 2007.¹⁶³ The rate cut provided for in the Thomas bill also provided an across the board rate cut for all corporations with less than \$20 million of taxable income.¹⁶⁴ This across the board rate cut would be thirty-three percent for years 2004-2006 for companies with under \$1 million of taxable income.¹⁶⁵ Thirty-two percent in years 2007 and 2008 for companies with taxable income under \$1 million, 32 percent in years 2009 through 2011 for companies with taxable income under \$5 million, and finally in 2012 and all corporations with taxable income under \$20 million would receive the 32 percent tax rate.¹⁶⁶ U.S. corporations

156. H.R. 4520 § 101(f).

157. See Vaughan, *supra* 143 (claiming the Senate bill still violates the WTO rules due to the three-year phase out provision of ETI Act).

158. See *EU Should Keep Cool On Bid to Repeal FSC*, MARKET NEWS INT'L, Oct. 3, 2003, available at <http://www.lexis.com>.

159. See generally H.R. 2896; S. 1637.

160. See H.R. 2896 § 1; S. 1637.

161. See S. 1637; H.R. 2896; H.R. 1769. See also Watts, *supra* note 153.

162. See Shaw, *supra* note 150; H.R. 4520 §§ 102-03.

163. See H.R. 2896 §§ 1001-02.

164. See *id.* § 1002; I.R.C. § 11(b) [showing corporate rate at 35% to be changed by House Bill 2896].

165. H.R. 2896 § 1002.

166. See *id.*

needed this type of immediate tax relief to provide a stimulus to the economy, and also to enable them to use their § 179 expense allocation. The tax rate cut moved U.S. multinational companies more in line with the European Countries and other OECD (Organization for Economic Consideration and Development) member countries.¹⁶⁷ The average European Country tax rate in 2003 was 31.68 percent¹⁶⁸ and the average OECD countries falls at 30.79 percent.¹⁶⁹

2. *Alternative Minimum Tax (AMT) Relief*

The individual and corporate alternative minimum tax can be a particular problem for taxpayers because it puts individuals and corporations in the position of tax liability despite the fact they have little or no tax liability.¹⁷⁰ “Corporations can become AMT payers for three main reasons:

1. a high level of investment in assets such as equipment and structures;
2. low taxable income due to cyclical downturns, strong international competition, or other factors; and/or
3. low real interest rates, which encourage firms to invest, thus making their deductions more ‘depreciation intensive.’”¹⁷¹

The Thomas bill removed the current 90 percent limitation on the use of net operating losses (NOL) against AMT.¹⁷² Furthermore, the bill got rid of the 90 percent limitation on the use of the foreign tax credits against AMT. The bill provided an expansion of the AMT relief from gross receipts of \$7.5 million to \$20 million,¹⁷³ which would effectively exempt ninety-seven percent of corporations out of the AMT provision.¹⁷⁴ While these provisions provided companies with much needed relief from AMT, Congress should reevaluate repealing the AMT provisions

167. See Axler, *supra* note 57.

168. See *id.*

169. See *id.*

170. See I.R.C. § 55.

171. Margo Thorming, *Repeal of the AMT, U.S. Investment, And Economic Growth*, ACCF CENTER FOR POLICY RESEARCH SPECIAL REPORTS (1995), at <http://www.accf.org/repamt.htm>.

172. See H.R. 2896 § 1031; H.R. 4520 § 241.

173. See H.R. 2896 § 1032; H.R. 4250 § 242.

174. See THE AMERICAN JOBS CREATION ACT OF 2003: SUMMARY OF H.R. 2896 AS PASSED BY COMMITTEE 2 (Oct. 2003), available at <http://waysandmeans.house.gov/media/pdf/fsc/fscsummary.pdf>.

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altogether in order to simplify the tax code and provide companies with the greater ability to plan for their annual tax liability.

AMT repeal has been introduced in the past and should probably be reconsidered with the overall tax reforms necessary to corporate America in the future. Research conducted by DRI/McGraw Hill for the period of 1996-2005 concluded that the repeal of the AMT tax would: increase fixed investment, raise the Gross Domestic Product, increase labor productivity, reduce the cost of capital, and ultimately create 100,000 jobs between 1998 and 2002.¹⁷⁵ If the goal of Congress remains to provide workers with jobs, the repeal of the AMT would provide many incentives for American companies.¹⁷⁶ American companies could plan for and increase their investments in equipment while the AMT repeal would begin creating jobs.¹⁷⁷

3. *Section 179 Expensing*

The section 179 expensing provision was extended through 2007. The measure provided for an increase from \$25,000 to \$100,000, indexed for inflation, in the amount allowed to be immediately deducted for capital purchases.¹⁷⁸ The capital expenditure limitation would also increase from \$200,000 to \$400,000, also indexed for inflation.¹⁷⁹ This provision supplied immediate deduction relief to companies to invest domestically in new equipment.¹⁸⁰ The increased deduction limit would hopefully provide the added incentive for companies to invest with the increased tax benefit. As companies invest to take advantage of the §179 election, there should be additional money flowing into the economy¹⁸¹ and should essentially create new jobs for employees as demand increases for equipment.

4. *Net Operating Loss Relief*

An original provision in the Thomas bill allowed the net operating losses incurred in 2003 to carry back for five years. (It

175. See Thorning, *supra* note 171.

176. See *id.*

177. See *id.*

178. I.R.C. § 179(b)(1); H.R. 4520 § 201.

179. I.R.C. § 179(b)(2); H.R. 4520 § 201.

180. See H.R. 4520 § 201.

181. Press Release, House Comm. on Ways and Means, Thomas Announces Comm. Action on H.R. 2896, the "American Jobs Creation Act of 2003," and H.R. 2571, the "Rail Infrastructure Development and Expansion Act for the 21st Century" (Oct. 29, 2003), at <http://waysandmeans.house.gov/legis.asp?formmode=read&id=927>.

was previously limited to two.)¹⁸² This provision would have enabled businesses to amend prior returns to receive refunds on their past tax returns.¹⁸³ Unfortunately, this provision was stricken from the bill in Committee.¹⁸⁴ This provision had the potential of putting refunds back into corporation's bank accounts to increase research, development and expansion projects.

5. S-Corporation Reforms

The Thomas bill proposed allowing three generations of family members in an S-corporation to be treated as a single shareholder.¹⁸⁵ Plus, Thomas proposed to expand the number of allowable shareholders in an S-corporation from the current number of 75 to an expanded number of 100.¹⁸⁶ This increase provided some relief to small business owners by allowing more people to be included in the S-Corporation.¹⁸⁷ The shareholders could take advantage of remaining a separate taxable entity with the profits flowing directly through to the shareholders' tax return and also maintain the various fringe benefit advantages inherent in the S-corporation structure.¹⁸⁸

6. Repatriation Provision

The Thomas bill did not include a provision permitting U.S. companies a "temporary window to repatriate overseas income at a much reduced tax rate."¹⁸⁹ Repatriating profits meant allowing companies to bring profits earned and kept overseas back into the United States without having to pay the thirty-five percent corporate tax, but instead only pay 5.25% on any money brought back into the U.S.¹⁹⁰ Thomas' original bill allowed multinational

182. STAFF OF JOINT COMM. ON TAXATION, 108TH CONG., TECHNICAL EXPLANATION OF H.R. 2896, "THE AMERICAN JOBS CREATION ACT OF 2003," JCX-72-03, at 1, 23-24 (Comm. Print 2003), available at <http://www.house.gov/jct/x-72-03.pdf>.

183. See *id.*

184. Compare H.R. 2896 § 1051 (Jul. 25, 2003), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_bills&docid=f:h2896ih.txt.pdf, with H.R. 2896 (Nov. 21, 2003), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_bills&docid=f:h2896rh.txt.pdf (The introduced version's Subtitle F-5-Year of Certain Net Operating Losses no longer exists in the bill reported out of committee).

185. See H.R. 2896 § 1041.

186. See *id.* § 1042.

187. See *id.*

188. See *id.* § 1041-51.

189. Shaw, *supra* note 150, available at <http://www.lexis.com>.

190. Harvey Coustan, *Seeking Shelter*, TAX CITINGS, Jan./Feb. 2004, at <http://www.insight-mag.com/insight/04/01-02/col-9-pt-1-TaxCitings.asp?forprint>. The Senate retains this provision in their version of the 2004 bill. See JOINT COMM. ON TAXATION, 108TH CONG., COMPARISON OF CERTAIN PROVISIONS OF H.R. 4520 AS PASSED BY THE HOUSE OF REPRESENTATIVES AND AS AMENDED BY THE

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corporations to “repatriate profits earned in tax havens overseas at a reduced rate of 5.25 percent rather than the current 35 percent.”¹⁹¹ This provision would have provided up to \$400 billion in capital being brought back into the U.S.¹⁹² The repatriation provision would increase domestic investment and move the tax system towards a territorial tax based system, which would put U.S. corporations on more of a level field with other international corporations.¹⁹³ Congress might even look to provide a permanent exemption for repatriated foreign earnings solely to provide an enticement for companies to continue to invest and bring money back to the U.S. The senate version sponsored by Senator Charles Grassley (R-IA) and Senator Max Baucus (D-Mont.) also provided a repatriation provision¹⁹⁴ and the lack of one in the House version was criticized.¹⁹⁵

Thomas gathered support from big corporations throughout the U.S. for his proposed bill.¹⁹⁶ CEO’s from major corporations, such as Coca-Cola, GM, AOL Time Warner, Bank of America, Merrill Lynch and others provided backing for the Thomas bill.¹⁹⁷

B. Jumpstart Our Business Strength (JOBS) Act (S. 1637)

1. In General

Senators Charles Grassley (R-IA) and Max Baucus (D-Mont.) introduced the JOBS Act, the leading bill in the Senate.¹⁹⁸ The bill was referred to the Senate Finance Committee, which ultimately approved the Grassley/Baucus bill on October 1,

SENATE: JOB CREATION TAX INCENTIVES FOR MANUFACTURING, SMALL BUSINESS, AND FARMING JCX-62-04, at 14 (2004). The House version contains a temporary 85% deduction if the taxpayer adopts a plan to reinvest foreign earnings for dividends received by a domestic corporation from its controlled foreign subsidiary. *Id.*

191. John Shaw, *Senate on Recess; US House to Focus on Iraq, GSEs, FSC Repeal*, MAIN WIRE, Oct. 6, 2003 [hereinafter *Senate on Recess; US House to Focus on Iraq, GSEs, FSC Repeal*], available at <http://www.lexis.com>.

192. *See id.*

193. *See* Gnaedinger & Rojas, *supra* note 8.

194. *See* Alden & Buck, *supra* note 14, at 9 (stating that the Grassley Bill provides that multinational corporations may repatriate as much as \$400 Billion in retained foreign earnings at a reduced corporate tax rate of 5.25 percent rather than the current 35 percent rate).

195. *See* Alden, *supra* note 146 (proclaiming “[t]he effort is politically risky for House Republicans. . . Daschle . . . called the bill ‘an outrageous demonstration of irresponsibility’ that would require borrowing to finance tax cuts for multinational companies.”).

196. *See* John Shaw, *US House Tax Panel’s Thomas Gets Key CEOs to Back FSC Bill*, MARKET NEWS INT’L, Sept. 10, 2003, LEXIS, Nexis Library, Newsgroup File.

197. *See id.*

198. *See* S. 1637.

2003.¹⁹⁹ The proposed bill remained revenue neutral and provided increased revenue to corporations, approximately \$56 billion, through a reduction of the corporate tax rate from 35 percent to 32 percent.²⁰⁰ Senator Kerry, the ranking member of the Committee on Small Business and Entrepreneurship, approved amendments to the Grassley/Baucus bill that extended the JOBS Act to include sole proprietors and partnerships of small employers.²⁰¹ Kerry also endorsed an amendment that was added to the bill that “exempt[ed] debenture Small Business Investment Companies (SBICs) from the unrelated business taxable income (UBTI) rules,” which “[should] attract more institutional investors and provide financing to more cutting-edge small businesses and small manufacturers.”²⁰² It was believed the amended bill would provide an increase in venture capital investment in small businesses.²⁰³

2. *Proposals and Differences*

Senators Grassley and Baucus proposed the Extraterritorial Income Exclusion Act would be phased out in the following percentages: 2003 - no change; 2004 and 2005 - 80 percent of the benefits remain; and 2006 - only 60 percent of the ETI benefits will remain.²⁰⁴ The phase out period along with the tax rate reduction provided an incentive for companies to make long-term investments, which ultimately helped to keep jobs within the United States.²⁰⁵ However, the European Union continued to claim the Senate bill violated the WTO rules due to the three-year phase out provision of ETI Act.²⁰⁶ Grassley flatly rejected the European Union’s contention.²⁰⁷

The Grassley/Baucus bill did include a provision allowing multinational corporations to repatriate as much as \$400 billion in retained foreign earnings at a reduced corporate tax rate of 5.25% rather than the current thirty-five percent rate.²⁰⁸

199. See *Senate Panel Passes International Tax Bill*, AFX NEWS LTD., Oct. 1, 2003, available at <http://www.lexis.com>.

200. *Id.* (“Revenue neutral” meaning that the increased revenue, \$50 Billion, received due to the repeal of the ETI Act will be redistributed to corporations through the reduction of the corporate tax rate).

201. *Kerry Provisions Boost U.S. Manufacturing, Increase Job Growth, Spur Small Business Investment*, U.S. NEWSWIRE, Oct. 2, 2003, available at <http://www.lexis.com>.

202. *Id.*

203. *Id.*

204. See S. 1637 § 101(e).

205. Nick Jonson, *Two Bills May Satisfy EU Demands to Change Tax Structure, AIA Says*, AEROSPACE DAILY, Oct. 1, 2003, available at <http://www.lexis.com>.

206. See Vaughan, *supra* note 143.

207. *Id.*

208. Alden & Buck, *supra* note 14.

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The Grassley/Baucus bill also provided over \$100 billion in business tax breaks over the next decade.²⁰⁹ Supporters believed the measure would bring \$400 billion in capital back to the United States.²¹⁰

The Senate Finance Committee “reaffirmed its support for Internal Revenue Code Section 911 that exempts from taxation the first \$80,000 of income earned by US Citizens who work overseas. Section 911 enhances the competitiveness of the aerospace industry and other American companies that depend on international customers and supply chains.”²¹¹

No other country besides the U.S. taxes any level of foreign earned income and the elimination of Section 911 could lose an estimated 150,000 U.S. based jobs.²¹²

The Grassley/Baucus bill “omit[ed] existing leasing contracts from the repeal”²¹³ (the Thomas version did the same).²¹⁴ Pascal Lamy, The European Trade Commissioner identified this provision as a source of concern for the EU since it extended ETI benefits for an indefinite period.²¹⁵

In provisions similar to the Thomas bill, the Senate version repealed the 90 percent limitation on the use of foreign tax credits against AMT, repealed the 30 percent tax on specified US source capital gains of nonresident individuals, and repealed rules applying to foreign personal holding companies and foreign investment companies.²¹⁶

Senators Grassley and Baucus proposed a 20-year tax carry forward for foreign tax credits designated at 5 years.²¹⁷ The effective date of their bill was December 31, 2004.²¹⁸ The Thomas bill would also raise revenue with respect to penalty provisions

209. John Shaw, *US Sen. Grassley: Senate 'Has to Vote' on FSC/ETI Repeal this Year*, THE MAIN WIRE, Oct. 14, 2003, available at <http://www.lexis.com>.

210. *Id.*

211. Alexis Allen, *AIA Hails Grassley-Baucus Tax Reform Bill: Measure Will Spur Manufacturing Growth and Exports*, PR NEWswire, Oct. 1, 2003, available at http://www.aia-aerospace.org/aianews/press/2003/rel_10_01_03.cfm.

212. *Id.*

213. Josephine Hearn, *Lease Tax Breaks are on EU's Hit List*, THE HILL, Oct. 15, 2003, <http://www.lexis.com>.

214. *Id.*

215. *Id.*

216. See S. 1637, (regarding personal holding company income rules as they apply to foreign investment companies).

217. See *id.* § 201.

218. *Id.*

for various tax shelters that are also part of the Senate CARE Act (S. 476).²¹⁹

The U.S. might consider moving towards a territorial tax system as the Joint Committee on Taxation recommended.²²⁰ The move in that direction would provide U.S. companies with the same benefits European nations now receive.²²¹ It would certainly increase their competitive abilities and provide for a less complex tax system and hopefully decrease the 43.7% of the compliance cost of administratively dealing with the foreign tax laws of multinational companies.²²² In doing so, Congress should have considered implementing a provision similar to one found in the Crane/Rangel bill that essentially provided a tax benefit to U.S. corporations that produced goods and services within the United States.²²³ A U.S. corporation that produced 100% of their goods within the U.S. would receive the full advantages of the tax benefit.²²⁴ U.S. corporations producing goods and services outside the U.S. would receive a pro rata portion of the designated benefit for the amount of production done within the U.S.²²⁵

The Thomas and Grassley/Baucus bills passed their respective Committees²²⁶ and were subsequently voted on in the House and the Senate.²²⁷ Hopefully, the relief provided in 2004 will be sufficient to prevent businesses from continuing to leave the U.S. in search of more favorable tax laws.

VI. CONCLUSION

The recession and the U.S. economy are just now beginning to rebound. The possibility of sanctions being imposed upon American companies would have seriously impacted our recovery. To avoid these sanctions, the United States repealed

219. See H.R. 2896 § 3001-02; CARE Act of 2003, S. 476, 108th Cong. (1st Sess. 2003).

220. See Daniel J. Mitchell, *Making American Companies More Competitive*, THE HERITAGE FOUNDATION, Sept. 29, 2003, available at <http://www.lexis.com>.

221. See *id.*

222. See *Extraterritorial Income Regime: Hearing Before the Subcomm. on Select Revenue Measures of the House Comm. on Ways and Means*, 107th Cong. (2002) (statement of the Hon. Bill Archer, Senior Policy Advisor, Pricewaterhouse Coopers LLP), available at <http://waysandmeans.house.gov/legacy/srm/107cong/4-10-02/4-10arch.htm>.

223. See Job Protection Act of 2003, H.R. 1769, 108th Cong. § 250 (1st Sess. 2003) (providing that a corporation will be able to deduct "10% of the qualified production activities income of the corporation for the taxable year.>").

224. See *id.*

225. See *id.*

226. See Shaw, *supra* note 150.

227. See STAFF OF JOINT COMM. ON TAXATION, 108TH CONG., COMPARISON OF CERTAIN PROVISIONS OF H.R. 4520 AS PASSED BY THE HOUSE OF REPRESENTATIVES AND AS AMENDED BY THE SENATE, JCX-63-04, at 1 (Comm. Print 2004), available at <http://www.house.gov/jct/x-62-04.pdf>.

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the ETI Act in 2004. On May 11, 2004, the Senate originally passed Senate bill 1637.²²⁸ The House of Representatives then passed H.R. 4250, "The American Jobs Creations Act of 2004," on June 17, 2004, which contained the same or similar provisions as the 2003 version of the bill.²²⁹ The Senate then amended H.R. 4520 on July 15, 2004.²³⁰

American international businesses should now find they have a greater ability to compete in the international arena with these tax changes. Currently, the U.S. tax rate represents one of the highest tax rates imposed upon international corporations.²³¹ Small business remain dependant upon the U.S. manufacturing industry, for which the bill provides much needed tax relief.²³² The hope remains to provide an incentive for American businesses to remain in the U.S. Otherwise, the number of Americans that will be unemployed will increase and more jobs will be lost to foreign workers. However, we also need to continue a positive trend in giving American workers the skills and flexibility necessary to adjust to changes in the global marketplace.

U.S. companies already operate at a disadvantage due to US tax laws.²³³ Effective tax rates of other countries remain significantly less than the U.S. effective rate of 40%, ensuring U.S. corporations start-off with a barrier to global competitiveness.²³⁴ European Union based companies maintain a competitive advantage over U.S. based companies due to the valued added tax (indirect tax) on exports and their territorial tax systems excluding foreign income from taxation.²³⁵

U.S. businesses, after Congress implements adequate tax measures, will receive a decreased tax burden and find they are able to allocate additional resources to expand and hire and will increase the U.S. domestic economy. The United States must continue to provide incentives for the companies that remain based in the U.S. to retain jobs here in America and provide additional incentives for them to invest capital domestically in their business. This will ultimately bring additional jobs to the American people. If Congress creates a market for purchasing

228. *See id.*

229. *See id.*

230. *See id.*

231. *See Axler, supra* note 57.

232. *See Watts, supra* note 154.

233. *See Extraterritorial Income Regime: Hearing Before the Subcomm. on Select Revenue Measures of the House Comm. on Ways and Means, 107th Cong. (2002), at <http://waysandmeans.house.gov/legacy/srm/107cong/4-10-02/4-10arch.htm> (statement of the Hon. Bill Archer, Senior Policy Advisor, Pricewaterhouse Coopers LLP); Axler, *supra* note 57.*

234. *See Axler, supra* note 57.

235. *See U.S. INT'L TAX RULES, supra* note 43, at 8.

equipment and increasing our ability to export to other nations, they will ultimately create jobs for U.S. workers and increase our competitive position in international arenas.²³⁶ Congress must look for innovative ways to bring the cheap labor into the U.S., to increase foreign spending within our economy, and find ways to bring foreign companies here to the U.S. rather than continue to see the exodus of U.S. companies merging with foreign companies or moving production facilities to lower taxed countries.²³⁷ A strategy used to avoid excess taxes and keep consumer prices low.

The controversial repatriation provisions provide the most benefits for American businesses. The repatriation provision would enable companies to bring profits earned back into the United States by paying a significantly reduced tax.²³⁸ The U.S. economy needs the increased domestic investment and the stimulus that bringing \$400 billion back into our economy would generate.²³⁹ Congress should also consider completely repealing the individual and corporate AMT provisions. This repeal, along with tax benefits, would enable companies to better plan for the future and plan for future tax consequences the company would face.²⁴⁰ This repeal would create numerous jobs, while at the same time simplifying the tax code for individuals as well as corporations.²⁴¹

The primary benefits of the The American Jobs Creations Act of 2004 will be felt by the manufacturing industry, and it is agreed the industry needs continued help. However, the multinational corporations who received the ETI benefits will not receive comparable reductions in any of the new, proposed bills.²⁴² The House and Senate need to continue to look to the future of American businesses and find a way to balance their revenue needs with the needs of U.S. corporations to be globally competitive. U.S. corporations must make decisions in the best interests of their shareholders and employees and they will

236. Press Release, House Comm. on Ways and Means, Thomas Announces Committee Action on H.R. 2896, the "American Jobs Creation Act of 2003," and H.R. 2571, the "Rail Infrastructure Development and Expansion Act for the 21st Century" (Oct. 29, 2003, at <http://waysandmeans.house.gov/legis.asp?formmode=read&id=927>).

237. See Schumer & Roberts, *supra* note 95.

238. See Shaw, *supra* note 191.

239. See *id.*

240. See Thorning, *supra* note 172.

241. *Id.*

242. See *The WTO's Challenge to the FSC/ETI Rules and the Effect on America's Small Businesses: Hearing Before the House Comm. on Small Bus.*, 108th Cong. (2003), <http://www.house.gov/smbiz/hearings/108th/2003/030910/herrnstadt.html> (prepared Statement of Owen E. Herrnstadt).

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continue to move outside the U.S. if foreign tax laws provide them with the better global advantage both competitively and through tax incentives that increase bottom-line profit margins.

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