

THE FAIR TRACK TO EXPANDED FREE TRADE: MAKING TAA BENEFITS MORE ACCESSIBLE TO AMERICAN WORKERS

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I. INTRODUCTION

The trade adjustment assistance (TAA) that American production workers are entitled to—if they are certified by the U.S. Department of Labor to have lost their jobs due to increased imports or shifts in production to foreign countries—might appear to be little more than a token provision of extended unemployment benefits and training of questionable value.¹ When considered in light of the political economy of

1. Over the years there have also been plenty of skeptics about the efficacy of the TAA program. *See, e.g.*, Malcom D. Bale & John H. Mutti, *Income Losses, Compensation, and International Trade*, 13 J. HUM. RES. 278, 283–84 (1978) (“[F]rom the experience of our sample of displaced shoe workers, even if benefits were granted to a larger number of workers, each individual would be compensated for only a very small portion of his actual loss. The actual payments have been characterized by organized labor as band-aid treatment, because the subsequent wage loss as well as the many nonmonetary losses from displacement are not directly addressed.”) (footnote omitted); Paul T. Decker & Walter Corson, *International Trade and Worker Displacement: Evaluation of the Trade Adjustment Assistance Program*, 48 INDUS. & LAB. REL. REV. 758, 772–73 (1995) (“Our findings demonstrate that the [TAA] is currently well-targeted—it serves workers who are permanently displaced from their jobs and who have greater difficulty in becoming re-employed than do similar [unemployed workers] . . . , [but they also] suggest that TAA training did not have a substantial positive effect on earnings of TAA trainees, at least in the first three years after the initial [unemployment insurance] claim.”). *See also* I. M. DESTLER, *AMERICAN TRADE POLITICS* 326–28 (4th ed. 2005) (“[A]id for trade-displaced workers has received lukewarm support where it most matters—from the Department of Labor, which administers the programs, and from the union movement, which has regarded the programs as a second-best alternative to limits on import growth. The 2002 reforms in [TAA] responded to this concern. . . . Authorized funding for the program was roughly tripled. The pool of eligible workers was expanded—to those whose plants sold inputs to manufacturers hurt by imports and to some of those hurt by shifts of production to other countries. . . . Yet the results have been disappointing. Worker participation has remained low—about 48,000 workers in 2003 Participation will surely expand with time, and program advocates have formed a new [TAA] Coalition to speed this process. Just as surely, the TAA program will prove inadequate to the need. One reason is limitations in its mechanisms: Government-managed retraining courses have a mixed track record at best. . . . [M]oreover, it is a mistake to try. For in welfare terms, the distinction is arbitrary. A displaced worker whose plant moves, downsizes, or restructures because of domestic competition or technological change suffers essentially the same losses as one whose plight can be attributed to imports. If help for trade-impacted workers is appropriate, why not help for all who are displaced from their jobs?”)

trade liberalization, however, TAA is the primary method of compensating workers for trade-related job displacement.² At times over the past three decades, TAA has been the quid pro quo for fast track authority; the political bargain struck on behalf of American production workers with free trade advocates.³ Without fast track negotiating authority, the Executive branch would have great difficulty reaching

They are equally victims of a rapidly changing American economy.”) (footnote omitted). See generally U.S. GEN. ACCOUNTING OFFICE, GAO-01-59, TRADE ADJUSTMENT ASSISTANCE: TRENDS, OUTCOMES, AND MANAGEMENT ISSUES IN DISLOCATED WORKER PROGRAMS 4-5 (2000) [hereinafter GAO 2000 REPORT] (reporting that less than 1% of the \$1.3 billion in TAA services and benefits payments from 1995-1999 went for job search and relocation assistance and that limited data on TAA and NAFTA TAA program outcomes regarding reemployment and wage maintenance make it difficult to evaluate the program’s effectiveness, and identifying “three issues that affect the delivery of assistance to trade-impacted workers: standardizing worker eligibility rules, placing time limits on training enrollment, and improving program administration”); U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-04-1012, TRADE ADJUSTMENT ASSISTANCE: TRADE ADJUSTMENT ASSISTANCE: REFORMS HAVE ACCELERATED TRAINING ENROLLMENT, BUT IMPLEMENTATION CHALLENGES REMAIN 2,4 (2004) (describing implementation difficulties with 2002 TAA program changes, including the new forty day limit for processing petitions, and reporting that states were exhausting TAA funds and using other federal employment and training resources to serve many TAA-eligible workers); U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-06-43, TRADE ADJUSTMENT ASSISTANCE: MOST WORKERS IN FIVE LAYOFFS RECEIVED SERVICES, BUT BETTER OUTREACH NEEDED ON NEW BENEFITS 6 (2006) [hereinafter GAO 2006 REPORT] (recommending, after conducting a study of layoffs at five plants, that the Department of Labor (DOL) provide guidance to state and local unemployment offices to ensure better understanding of TAA benefits among potentially eligible workers).

2. TEX. WORKFORCE COMM’N, TWC TRADE ADJUSTMENT ASSISTANCE 2002-2003 EXIT COHORT 1 (2004). See also Bale & Mutti, *supra* note 1, at 278 (“In general, the elimination of trade-distorting devices increases a country’s real income. Yet, while significant progress toward reducing trade impediments between industrial countries has been made, many barriers still remain. Why is this the case? Perhaps the most likely reason is that economists have failed to address adequately the problem of income redistribution that accompanies trade liberalization. When a tariff is lowered, consumers benefit, but factors involved in producing domestic substitutes are made worse off. Part of the loss occurs because displaced resources are not immediately absorbed into alternative production. Another loss results because displaced resources may earn less in subsequent employment than before being displaced. Although it is possible for the gainers to compensate the losers, and still end up as gainers, full compensation usually is not provided.”) (footnote omitted).

3. DESTLER, *supra* note 1, at 295-98 (describing how TAA was central to the 2002 renewal of TPA).

multilateral, regional, and bilateral trade agreements.⁴ And once reached, Congress would have no practical chance of passing those agreements as negotiated without an up-or-down vote with limited congressional debate and no amendments.⁵ Because of the changing nature of U.S. trade politics, TAA remains an important feature in the political economy of U.S. trade liberalization.⁶

This paper does not claim that further trade liberalization is impossible without changes to the TAA program. It is not a political assessment of whether workers hurt by expanded free trade have enough power to block fast track. Nor is it an economic assessment of the efficacy of the TAA program. Instead, this paper builds the case, from a legal perspective, for how and why the Department of Labor (DOL or the Agency) can and should improve the process of certifying workers' eligibility to apply for TAA benefits and suggests how Congress could

4. See, e.g., Michael A. Carrier, *All Aboard the Congressional Fast Track: From Trade to Beyond*, 29 GEO. WASH. J. INT'L L. & ECON. 687, 719–21 (1996) (highlighting the importance of fast track negotiating when other countries lack incentives to negotiate and when there are many countries participating in the negotiating process); Hal Shapiro & Lael Brainard, *Trade Promotion Authority Formerly Known as Fast Track: Building Common Ground on Trade Demands More Than a Name Change*, 35 GEO. WASH. J. INT'L L. REV. 1, 10–31 (2003) [hereinafter *Trade Promotion*] (providing an even more thorough review of fast track (trade promotion) authority and describing the renewal of TPA in 2002 in particular).

5. Carrier, *supra* note 4, at 687.

6. See DESTLER, *supra* note 1, at 305 (“[T]he 2002 combination of TPA and TAA epitomizes the sort of balanced approach that, sufficiently enhanced, could build stronger protrade coalitions in the future.”). *But see id.* at 328 (“[T]he political gains from a separate [TAA] program have clearly diminished. The 2002 reforms built Democratic support in the Senate, but (judging by the final tally) won exactly four converts to TPA out of 210 Democrats in the House of Representatives. For many, TAA is viewed as a backwater government program that gets attention only when an administration needs votes for trade legislation. This may be changing somewhat—several members of Congress have associated themselves with the new monitoring organization. But they are mainly legislators who support trade expansion to begin with. Liberal Democrats who have been voting ‘nay’ are more concerned with the broader erosion of the social safety net and the rise of economic insecurity among the less well-off generally. For such Democrats, the vision of a much stronger program for displaced workers should have real appeal. It would address the broad distributional costs of the market economy—as their party has sought to do since the Great Depression. It would, at the same time, leave that market economy free to flourish.”).

amend the Trade Act of 1974⁷ to make certification of production workers and—if the program is expanded to cover them—service workers easier. The central thesis of this paper is: *if Congress again wants to use the TAA program in a bargain for fast track authority, then DOL must fix its broken certification process and Congress should amend the TAA Act to reduce worker resistance to expanded free trade.*

The inadequacies of the program cast doubt on whether it truly assists workers, and hence, whether it is really adequate compensation to those hurt by expanded free trade. The Agency's certification process nevertheless needs repair so long as it remains the principal mechanism in place to help workers adjust to job loss caused by expanded free trade. This paper demonstrates how and why the certification process is defective and suggests how to fix it. Moreover, the broken certification process is compounded by an inapt scheme for judicial review of the Agency's negative determinations by the U.S. Court of International Trade (CIT)⁸ and the U.S. Court of Appeals for the Federal Circuit (Federal Circuit).⁹ Therefore, this paper also explains how and why the scheme of judicial review is unsuitable for TAA cases. More importantly, this paper advocates changes to that scheme.

7. 19 U.S.C. §§ 2101–2495 (2000). The TAA program for workers is codified at 19 U.S.C. §§ 2271–2331 (2000).

8. The Court of International Trade (CIT) is a nine member federal trial court with exclusive nationwide jurisdiction over matters involving U.S. international trade and customs laws. United States Court of International Trade, About the Court, <http://www.cit.uscourts.gov/informational/about.htm> (last visited Dec. 22, 2007).

9. The U.S. Court of Appeals for the Federal Circuit (Federal Circuit) has exclusive appellate jurisdiction over the CIT's judgments. 28 U.S.C. § 1295(a) (2000) ("The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—. . . (5) of an appeal from a final decision of the United States Court of International Trade . . ."). See also Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1, 4–5 (1989) (viewing the Federal Circuit's "primary claim to technical expertise to be in the patent area" and assessing its effect on the evolution of patent law as well as administrative aspects of specialization).

Since fast track negotiating authority expired on June 30, 2007,¹⁰ and the current authorization of the TAA program ended on September 30, 2007,¹¹ now is the right time for DOL to fix its broken certification process. Now is also an opportune time for Congress to amend the Trade Act of 1974 to make it easier for workers displaced by trade to access TAA benefits.¹² If DOL improved its administration of the TAA certification process and Congress amended the statute as suggested here to reduce worker resistance to expanded free trade, Congress could once again use the TAA program as the quid pro quo for renewal of fast track authority.¹³

Part II of the paper outlines the politics of U.S. trade liberalization since the mid-1930s and shows that, at times over the past three decades, TAA has been the quid pro quo for fast track authority. Part III then explains how and why DOL's certification process is defective, and how and why that broken

10. *Long Overdue, Fast Track Finally Passes Into History*, PUBLIC CITIZEN, <http://www.citizen.org/trade/fasttrack> (last visited Dec. 22, 2007).

11. Mason M. Bishop, Deputy Ass't Sec'y of Labor, Statement on Employment and Training for the U.S. House of Representatives Committee on Ways and Means 3 (June 14, 2007).

12. See *Proposed Labor Department Rules Address Trade Adjustment Assistance Benefit Changes*, 23 INT'L TRADE REP. 1284, 1284 (2006) ("The [2002 Trade Act] reauthorized the TAA program through fiscal year 2007, which starts on Oct. 1, 2006."); Rossella Brevetti, *Sen. Baucus Urges TPA Renewal With Labor, Enforcement Improvements*, 24 INT'L TRADE REP. 37, 37 (2007) ("Senate Finance Committee Chairman Max Baucus (D-Mont.) Jan. 4 called for an extension of [TPA] . . . [which] is slated to expire on June 30, 2007[.]" urging that Trade Adjustment Assistance (TAA) be available to "all workers displaced by trade—not just those displaced by free trade agreements Baucus and Sen. Norm Coleman (R-Minn.) Jan. 4 introduced a bill to expand and reauthorize the TAA program until 2012.").

13. See generally Gary G. Yerkey, *New Democrat-Controlled Congress Will Be Only 'Slightly' More Anti-trade, Study Finds*, 23 INT'L TRADE REP. 1659, 1659-60 (2006) ("[I]n the Senate, therefore, there will be only a 'net loss' for pro-business interests on trade and other foreign policy issues of three seats . . . [while] the 'net loss' for pro-trade interests in the House, in fact, was only four seats . . ."). See also Press Release, Emergency Committee for American Trade, ECAT Trade and Investment Report for the 109th Congress, available at <http://www.ecattrade.com/keytrade/content.asp?ID=658> (showing voting records on trade and investment legislation taken during the 109th Congress). ECAT is a trade lobbyist for major multinational firms. *Id.*; DESTLER, *supra* note 1, at 188 ("[T]his organization . . . kept a relatively low profile but cultivated congressional power centers skillfully, supplying needed analysis and argumentation and staying alert to the timing of trade action . . .").

process is compounded by an unsuitable scheme of judicial review. Part IV recommends what the Agency can and should do to repair the defects, and suggests how Congress could amend the Trade Act of 1974 to make it easier for workers displaced by expanded free trade to get TAA benefits. Part V concludes the discussion with a brief reminder of what is at stake if the TAA program is not made usable as the quid pro quo for the renewal of fast track benefits and gives a short summary of the less attractive alternatives advocated by others.

II. THE POLITICS OF U.S. TRADE LIBERALIZATION

As used interchangeably in this paper, the term “trade liberalization” or “expanded free trade” means: the reduction of barriers to trade in goods and services accomplished through voluntary commitments made by sovereign countries in multilateral, regional, and bilateral trade agreements—the international law mechanisms that have facilitated the integration of the world’s economies and the globalization of commercial relations.¹⁴ Broadly speaking, trade liberalization or expanded free trade involves making global commerce in goods and services free of trade barriers, trade-distorting restrictions, protectionism, and, indeed, any regulation or commercial tax that burdens international commercial activity.¹⁵

14. See Jonathan M. Cooper, *NAFTA’s Rule of Origin and its Effect on the North American Automotive Industry*, 14 NW. J. INT’L L. & BUS. 442, 445 (1994) (defining and articulating the purpose of Free Trade Agreements). The focus of this paper is on free trade in goods and services, even though the free flow of capital and the liberalization of foreign direct investment have also contributed to the integration of the world’s economies and the globalization of commercial relations. It makes no attempt to tackle such empirical topics as whether expanded free trade *always* increases net economic welfare or whether it matters if trade liberalization occurs through unilateral, bilateral, regional, or multilateral agreements.

15. See, e.g., Arcelia Quitana-Adriano, *Legal Mercantile Evolution from the Twentieth Century to the Dawning of the Twenty-First Century*, 42 TEX. INT’L L.J. 831, 834 (2007) (listing the “four main aspects for trade liberalization” included in the Havana Charter). See also David Driesen, *What is Free Trade? The Real Issue Lurking Behind the Trade and Environment Debate*, 41 VA. J. INT’L L. 279, 281 (2001) (addressing the question of “what precisely must trade be free of in order to be ‘free’ rather than inappropriately shackled?”).

A. U.S. Trade Liberalization After Smoot-Hawley

Since the mid-1930s, the United States has pursued a consistent and deliberate policy of expanded free trade.¹⁶ Before World War II, the United States began reducing the high tariff rates that Congress had imposed on imports under the Smoot-Hawley Act of 1930¹⁷ through bilateral trade agreements.¹⁸ In 1947, the United States and twenty-two other countries formed the General Agreement on Tariffs and Trade (GATT),¹⁹ which was designed to propel free trade and prevent backsliding through the voluntary reduction of trade-distorting tariffs and export subsidies on nonagricultural goods.²⁰ Since 1947, eight

16. See, e.g., PAUL R. KRUGMAN & MAURICE OBSTFELD, INTERNATIONAL ECONOMICS: THEORY AND POLICY 237–40 (6th ed. 2002) (giving a brief history of international trade agreements).

17. Tariff Act of 1930, 19 U.S.C. § 1654 (2007). The initial aim of the Smoot-Hawley Act was protection of U.S. farmers from falling agricultural prices due to overproduction in Europe following World War I, but it quickly became a free for all for other producers' protectionist interests. U.S. DEPT OF STATE, SMOOT-HAWLEY TARIFF, 1930, <http://www.state.gov/r/pa/ho/time/id/17606.htm> (last visited Dec. 22, 2007). See also DESTLER, *supra* note 1, at 5–6 (describing the political imbalance between “those who benefit from trade protection and those who pay the costs” and detailing how the 1934 system provided “antiprotectionist counterweights [and] devices for diverting and managing trade-restrictive pressures”).

18. KRUGMAN & OBSTFELD, *supra* note 16, at 237 (“Such bilateral negotiations helped reduce the average duty on U.S. imports from 59% in 1932 to 25% shortly after World War II.”). See also Sung-joon Cho, *GATT Non-Violation Issues in the WTO Framework: Are They the Achilles' Heel of the Dispute Settlement Process?*, 39 HARV. INT'L L.J. 311, 314 (1998) (observing that U.S. trade agreements after 1935 emphasized bilateral tariff reductions).

19. World Trade Organization, The 128 Countries That Had Signed GATT by 1994, http://www.wto.org/english/thewto_e/gattmem_e.htm (last visited Dec. 22, 2007).

20. KRUGMAN & OBSTFELD, *supra* note 16, at 237–38 (analogizing the GATT approach to a mechanical device designed to push a heavy object gradually up a slope using levers and ratchets). See also Robert Howse, *From Politics to Technocracy—and Back Again: The Fate of the Multilateral Trading Regime*, 96 AM. J. INT'L L. 94, 95 (2002) (“The postwar trade and financial order was therefore mainly designed to enable states to manage their domestic economies, in a manner consistent with political and social stability and justice, without . . . setting off a protectionist race to the bottom.”). See generally John H. Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 MICH. L. REV. 249, 250–51 (1967) (“With the recent completion of five agonizing years of ‘Kennedy Round’ tariff negotiations under GATT auspices, tariffs for many goods will be reduced to a point where they will no longer be effective barriers to world trade. For this reason, nontariff trade barriers of wide variety and ingenuity are now becoming relatively more significant.”) (footnotes omitted).

rounds of GATT negotiations have been completed.²¹ The first five rounds substantially reduced tariffs on industrial goods through parallel, bilateral trade agreements.²² The last three GATT rounds resulted in multilateral agreements to further reduce tariffs and subsidies on industrial and agricultural goods, as well as nontariff barriers to trade:

- the Kennedy Round, completed in 1967, reduced average, world-wide tariffs by roughly 35% through an across-the-board 50% reduction in tariffs on most industrial goods by developed countries;²³
- the Tokyo Round, completed in 1979, further reduced tariffs on industrial goods through a more complex formula, and established new codes to address nontariff barriers to trade;²⁴
- the Uruguay Round, completed in 1994, cut the average tariff imposed on goods by developed countries yet another 40%—from 6.3% to 3.9%—and established a framework for reducing quotas, tariffs, and subsidies on agricultural goods, while phasing out quotas on textiles and clothing previously protected under the Multi-Fiber Arrangement.²⁵

21. KRUGMAN & OBSTFELD, *supra* note 16, at 238–39.

22. *Id.* at 238.

23. *Id.*

24. *Id.* See also *Understanding the WTO*, WORLD TRADE ORGANIZATION, Feb. 2007, at 16, available at http://www.wto.org/english/tratop_e/tpr_e/tp261_e.pdf (“The Tokyo Round during the seventies was the first major attempt to tackle trade barriers that do not take the form of tariffs, and to improve the system.”); DESTLER, *supra* note 1, at 353 (“The Tokyo Round, also called the multilateral trade negotiations (MTN), differed from previous GATT rounds in its primary focus, which was on reducing and regulating nontariff barriers. It yielded a number of multilateral codes covering, among other areas, subsidies and countervailing measures, antidumping, customs valuation, government procurement, and technical barriers to trade. Participating nations also agreed to substantial further reductions in tariff rates.”).

25. KRUGMAN & OBSTFELD, *supra* note 16, at 238–39.

The Uruguay Round was the most far-reaching of all GATT negotiations.²⁶ The World Trade Organization (WTO) was created during the Uruguay Round, in part, to settle trade disputes among member countries.²⁷

Since the Trade Act of 1974, the United States has also pursued a policy of trade liberalization through nonreciprocal, preferential trading arrangements, such as the Generalized System of Preferences.²⁸ More recently, the U.S. has expanded free trade through reciprocal, bilateral, and regional preferential free trade agreements, such as the Canada-U.S. Free Trade Agreement of 1988 and, most notably, the 1993 North American Free Trade Agreement (NAFTA).²⁹

26. See *Understanding the WTO*, *supra* note 24, at 18–21 (“It was quite simply the largest trade negotiation ever, and most probably the largest negotiation of any kind in history. At times it seemed doomed to fail. But in the end, the Uruguay Round brought about the biggest reform of the world’s trading system since GATT was created at the end of the Second World War.”); DESTLER, *supra* note 1, at 210 (highlighting the importance of “the sheer sweep of the Uruguay Round agreement”). The Uruguay Round agreement included “a comprehensive agreement on trade safeguards, including outlawing of [Voluntary Export Restrictions]; language restraining domestic subsidies, but with a green light for certain government support of research and development; a new General Agreement on Trade in Services (GATS), coupled with modest liberalization commitments in specific service sectors; a substantial new agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS); a major strengthening of dispute settlement procedures, which removed the ability of the party found ‘guilty’ to block a decision; and the formal establishment of a new, umbrella institution—the World Trade Organization(WTO)—to succeed the GATT.” *Id.* at 209.

27. See *Understanding the WTO*, *supra* note 24, at 9–13 (“There are a number of ways of looking at the WTO. It’s an organization for liberalizing trade. It’s a forum for governments to negotiate trade agreements. It’s a place for them to settle trade disputes. It operates a system of trade rules . . . [It’s] a place where member governments go, to try to sort out the trade problems they face with each other.”).

28. See DESTLER, *supra* note 1, at 347 (“Generalized System of Preferences (GSP) [is a] system under which industrial nations give preferential rates of duty on imports from less developed countries without receiving trade concessions in return.”).

29. See William P. Avery, *Domestic Interests in NAFTA Bargaining*, 113 POL. SCI. Q. 281, 282 (1998) (“The United States had previously negotiated a free trade agreement with Canada in 1988 that generated comparatively much less controversy [than NAFTA].”). Since 1974, the United States has implemented bilateral and regional free trade agreements with the following other countries: Israel, Chile, Singapore, Australia, Morocco, Dominican Republic, Costa Rica, El Salvador, Honduras, Guatemala, and Nicaragua, Bahrain, Oman, and Jordan. CAROLYN C. SMITH, TRADE PROMOTION AUTHORITY AND FAST-TRACK NEGOTIATING AUTHORITY FOR TRADE AGREEMENTS: MAJOR VOTES, CONG. RESEARCH SERV. 4–6 (2006), available at <http://fpc.state.gov/documents/>

B. The Quid Pro Quo of Trade Adjustment Assistance for Fast Track Authority

Fast track authority has been “the central domestic political prerequisite” for the leadership role the United States has assumed on global trade liberalization since Smoot-Hawley. “By delegating responsibility to the executive and by helping fashion a system that protected legislators from one-sided restrictive pressures, Congress made it possible for successive presidents to maintain and expand the liberal trade order.”³⁰

And, as demonstrated below, Congress has often appeased workers’ interests, at least in part, by improving the TAA program in exchange for support of major trade legislation, which has included fast track authority.³¹

Until NAFTA and the Uruguay Round, U.S. trade liberalization generally rested on a broad consensus, based on the unambiguous economic theory that the gains from trade outweighed the costs and, therefore, the net welfare effect of expanded free trade was generally positive for consumers and exporters, even though it produced “losers” in import-competing sectors:

The central notion that governed the conception of the relationship of trade policy to domestic policy generally was that wherever trade barriers such as tariffs had direct price-distorting effects in the market of the

organization/75260.pdf; WTO Secretariat, TRADE POLICY REVIEW: UNITED STATES, 16–23, WT/TPR/S/160 (Feb. 15, 2006), available at http://www.wto.org/english/tratop_e/tpr_e/s160-2_e.doc.

30. DESTLER, *supra* note 1, at 65.

From the Reciprocal Trade Agreements Act of 1934 through the Trade Expansion Act of 1962, the means by which Congress delegated authority for trade negotiations remained basically the same. Successive statutes authorized executive officials to negotiate . . . reductions in US tariffs, in exchange for reductions by US trading partners. When a deal was finally struck, it could be implemented by presidential proclamation, without further recourse to Capitol Hill. For American trade negotiators, this arrangement had enormous advantages. It gave them maximum credibility abroad, since their power to deliver on their commitments was not in doubt. It also increased their leverage with affected industries at home.

Id. at 71.

31. See *infra* note 34 and accompanying text.

importing country, removal of those barriers enhanced aggregate domestic welfare in that the total gains to consumers could be shown always to exceed the total losses to producers/workers. Put in this crude way, the case for trade liberalization appeared to be totally indifferent to any notion of a just distribution of benefits and burdens from the removal of trade restrictions.³²

The implied domestic political bargain embedded in the liberalism of the GATT trading regime was that the losers of expanded free trade would be compensated by the winners and, hence, the losers would not block trade liberalization due to questions of distributive justice:

How then, was the [GATT] insider network able to turn a blind eye to these issues of distributive justice? Above all, through the notion that gains to the winners should allow us to fully compensate the losers from removal of trade restrictions, while still netting an aggregate welfare gain. According to this conception, based on what is known in the economics and related literatures as Kaldor-Hicks efficiency, in the end no one need be worse off as a result of trade liberalization. What was presumed, or taken for granted here, was the existence of a regulatory and social welfare state to take care of the interests of the losers (however legitimate) through the use of nontrade policy instruments (worker retraining, etc.) that are less costly to domestic welfare than trade restrictions.³³

32. Howse, *supra* note 20, at 99 (footnote omitted). *See also* DESTLER, *supra* note 1, at 41–63 (explaining the political imbalance between free trade winners and losers, discussing how the 1970s and 80s exposed the U.S. economy to greater foreign competition, due mostly to the breakdown of the Bretton Woods system of fixed exchange rates, and how it left the U.S. economy “more exposed to world trade [but] also comparatively less well off,” and explaining why the “erosion of the [GATT’s] bedrock principle of nondiscrimination . . . weakened one important postwar source of leverage in domestic trade bargaining: the argument that a particular restrictive action would undercut the international trading system from which the United States derived great benefits[;]” consequently, “as successive presidents found themselves embattled with economic woes, they had less leeway to press market-opening measures at home, and felt more pressure to restrict imports or to demand that US trading partners buy US exports”).

33. Howse, *supra* note 20, at 99.

So long as the economic benefits of expanded free trade were clear and the losers appeared to be roughly compensated for their losses, the politics of U.S. trade liberalization was fairly straightforward: Congress would grant the Executive branch fast track authority and workers displaced by expanded free trade would be entitled to receive TAA.³⁴

But, the political economy of trade in the United States has shifted since the mid-1990s.³⁵ Following the extension of fast track authority in mid-1993, passage of the NAFTA implementing statute in late 1993, and the re-extension of fast track authority in early 1994, Congress refused to grant President Clinton fast track authority after it expired in late 1994.³⁶ Since the mid-1990s the economic benefits of further U.S. trade liberalization have gotten murkier, and the opposition to it has become more pronounced.³⁷ Then, after an

34. See DESTLER, *supra* note 1, at 65–66 (“By delegating responsibility to the executive and by helping fashion a system that protected legislators from one-sided restrictive pressures, Congress made it possible for successive presidents to maintain and expand the liberal trade order.”). See also *id.* at 23 (explaining that the TAA allowed “[w]orkers or firms hurt by imports [to] apply for government . . . assistance”).

35. See, e.g., *id.* at 233–52 (discussing the decline of traditional protectionism, and noting that “the major new challenges to trade liberalization were the rising concerns over the impact of trade on labor and the environment, and the deepening of partisanship in Washington”). See also *id.* at 253–77 (explaining new issues and policies on American trade undertaken during the Clinton era).

36. *Id.* at 262–71.

37. See Howse, *supra* note 20, at 101–16 (“It was not until the 1970s that the embedded liberalism bargain came under sustained stress. . . . The multilateral rules of the game had enabled Germany and Japan, America’s wartime enemies, to compete successfully in the U.S. market for industrial products; they had also enabled the newly industrializing developing countries to compete successfully in highly labor-intensive industries such as textiles. On the other hand, many barriers worldwide hampered America in exploiting its apparent contemporary comparative advantage in knowledge-intensive industries and services. In some, intellectual property was largely unprotected; in most, competition in network services, such as telecommunications and finance, was severely restricted or limited, while many others still imposed byzantine and archaic regulatory requirements on products, both imported and domestic. In many cases, a business presence in the other country was necessary for the full exploitation of comparative advantage, and here American firms faced severe foreign investment restrictions. This new agenda, of course, was to become the core of the Uruguay Round agreements, which established the World Trade Organization. Eventually, it would prove to be the greatest threat so far to the sustainability of embedded liberalism. In contrast to the traditional GATT rules constraining tariffs, quotas, and discriminatory

eight-year hiatus, fast track negotiating authority was renewed on August 6, 2002, but not without a bruising political battle in the U.S. House of Representatives.³⁸

domestic regulations, the new WTO rules, while clearly enhancing market access, had much more ambiguous welfare effects, both domestic and global. These rules could not be justified through the idea of Kaldor-Hicks efficiency—there is no particular reason to believe on the basis of economics that increasing intellectual property protection will increase aggregate domestic welfare. Some countries gain from increased patent protection and some lose; aggregate welfare may increase or decrease. And the issue of who gains and who loses *within* a given society rears its head and cannot be avoided or suppressed by any idea tractable to technocratic management of the trading system.”). Destler also ties the shift in U.S. trade politics to increased foreign competition starting in the 1970s and 1980s, the collapse of fixed U.S. exchange rates, and the erosion of GATT (ironically by “its enormous success at what it did best: multilateral tariff-cutting negotiations”) and its bedrock principle of nondiscrimination. DESTLER, *supra* note 1, at 41–63. He also recognizes that the globalization of U.S. business is part of the reason producer interests are no longer protectionist, but adds, “this does not necessarily make them proactive forces for additional reductions in trade barriers [because] [f]or one thing, they may already have won, in prior negotiations, most of the gains that trade liberalization can offer them.” *Id.* at 249–51. So, in other words, Destler essentially agrees with Howse that the risk of further trade liberalization is rooted in globalization’s threat to the social contract, which Howse says was implicit in the embedded liberalism of the now politicized post-war multilateral trading system. *Id.* at 253–55 (“An important feature of American trade politics [since] 1995 was the rise of issues involving the relationship between trade and other prominent policy concerns. Driven by the same globalization process that made producers less protectionist, the ‘trade and . . .’ issues involved not the balance to be struck among economic interests and goals, but rather the proper balance between economic concerns and other societal values. Chief among these ‘new’ issues were those concerning labor standards and the environment. The new issues posed a challenge that long-standing trade policy institutions were ill-equipped to meet, or even to understand. And they undercut the bipartisan consensus upon which prior trade-liberalizing legislation had been based. . . . [F]or trade politics, globalization proved to be a double-edged sword. Even as it weakened traditional, business-based resistance to trade, it fueled broader, social concerns. . . . The expansion of the agenda was foreshadowed by the Tokyo Round[,] . . . the first [GATT] negotiation[,] whose priority was nontariff impediments to trade. . . . Throughout the 20th century, liberals and reformers in the United States fought to regulate capitalism in the name of important societal values. The labor movement sought to protect workers from exploitation and increase their share of the growing economic pie, and . . . [environmentalists sought] to protect air and water quality. For both, an emerging ‘social contract’ reflected a policy and political balance: private enterprise was the best formula for economic growth, but it needed to be constrained lest it maldistribute income, brutalize working conditions, and despoil the natural landscape. This contract now seems threatened by globalization.”).

38. See generally Shapiro & Brainard, *supra* note 4, at 1, 5–32 (providing a thorough review of fast track trade-promotion authority and describing the renewal of

1. *The Necessary Grant of Fast Track Authority*

It would be difficult, if not impossible, for the United States to expand free trade without the Congressional delegation of fast track authority to the Executive branch, because trading partners would be reluctant to enter into trade agreements with the United States unless they were confident that the agreement reached through negotiations would not be materially changed in Congress; and, unless Congress insulated itself from protectionist self-interests, and restrained itself from encumbering trade-agreement implementing legislation with excessive amendments and debate, trade agreements reached by the Executive branch would rarely, if ever, be voted on by Congress as negotiated. Indeed, they might never be voted on at all. Accordingly, all major U.S. trade legislation since the Trade Act of 1974 has been enacted using the fast track approach.³⁹

Although Section 8 of the U.S. Constitution authorizes Congress to “lay and collect Taxes, Duties, Imposts and Excises” and to “regulate Commerce with foreign Nations,”⁴⁰ in the past, Congress has proven itself incapable of resisting protectionist self-interests when exercising direct control of U.S. trade policy. The disastrous Smoot-Hawley Act of 1930—a legacy of direct control by Congress—“represents the high-water mark of U.S. protectionism in the twentieth century.”⁴¹

TPA in 2002 in particular). *See also* DESTLER, *supra* note 1, at 331–42 (describing the politics of “[t]he [b]argain [t]hat [w]asn’t”).

39. *See* Smith, *supra* note 29, at 1–6 (describing how Congress authorized and extended fast track negotiating authority several different times). *See also* DESTLER, *supra* note 1, at 346–47 (“Fast-track procedures [are] [l]egislative procedures set forth in Section 151 of the Trade Act of 1974, stipulating that once the president formally submits to Congress a bill implementing an agreement (negotiated under the act’s authority) concerning nontariff barriers to trade, both houses must vote on the bill within 90 days. No amendments are permitted. The purpose of these procedures is to assure foreign governments that Congress will act expeditiously on an agreement that they negotiate with the US government. The procedures were generally in effect from 1975 through 1994. At that time, President Clinton failed to win renewal for these procedures and they lapsed. They were renewed in 2002 under President Bush and renamed trade promotion authority (TPA) procedures.”).

40. U.S. CONST. art. I, § 8.

41. Smoot-Hawley Tariff, 1930, *supra* note 17. “The Smoot-Hawley Tariff . . . provoked a storm of foreign retaliatory measures and came to stand as a symbol of the ‘beggar-thy-neighbor’ policies . . . [that] contributed to a drastic decline in international

Since the Reciprocal Trade Agreements Act of 1934,⁴² Congress generally has delegated the power to shape U.S. trade policy to the Executive branch.⁴³ Under that statute, the United States negotiated parallel, bilateral agreements that substantially reduced tariffs with trading partners before World War II, and, through successive extensions of it, the United States further reduced tariffs in the first five rounds of multilateral trade negotiations following the formation of GATT in 1947.⁴⁴

Before the start of the Kennedy Round of GATT negotiations, Congress passed the Trade Expansion Act of 1962, granting the Executive branch the authority to negotiate the further reduction in and elimination of tariffs, while planting the institutional seeds of the fast track approach to U.S. trade liberalization that remain in place today by:

- establishing the Office of the Special Representative for Trade Negotiations, the predecessor of the current office of the U.S. Trade Representative (U.S.T.R.);
- requiring the transmittal to Congress by the Executive branch of any concluded trade agreement, along with a statement explaining the reasons for entering into it; and
- mandating the involvement of members of the Senate Finance, and House Ways and Means Committees in multilateral trade negotiations.⁴⁵

trade. For example, U.S. imports from Europe declined from a 1929 high of \$1,334 million to just \$390 million in 1932, while U.S. exports to Europe fell from \$2,341 million in 1929 to \$784 million in 1932. Overall, world trade declined by some 66% between 1929 and 1934.” *Id.*

42. 19 U.S.C. §§ 1351–1354 (2000).

43. See Jackson, *supra* note 20, at 254–55 (explaining that trade regulation in the past thirty years has shifted from Congress to the President). Of course, the President has the power, “with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.” U.S. CONST. art. II, § 2, cl. 2.

44. See generally Jackson, *supra* note 20, at 253–74.

45. 19 U.S.C. §§ 1871, 1846, 1873 (2000), *repealed by* Pub. L. No. 93–618, § 602(d), 88 Stat. 2072 (1975) (current versions at 19 U.S.C. §§ 2171, 2212, 2211 (2000 & Supp. IV 2004)).

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FAIR TRACK TO EXPANDED FREE TRADE

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The U.S.T.R. and members of Congress from those “gatekeeper” committees remain key players in the politics of U.S. trade liberalization.⁴⁶ But the Executive branch overreached the authority Congress had delegated to it under the Trade Act of 1962 by negotiating commitments on nontariff barriers,⁴⁷ and when that delegation of authority expired in 1967, it took Congress seven years before it again delegated authority to the Executive branch, under the Trade Act of 1974, to negotiate the removal of nontariff barriers and other trade-distorting restrictions in the GATT Tokyo Round.⁴⁸ This delegation came to be known as “fast track” authority because of the six express procedural requirements/restrictions it established for expedited legislative consideration of trade agreements negotiated by the Executive branch:

- (1) notice to Congress by the Executive branch ninety days before entering into such a trade agreement;
- (2) consultations between the Executive branch and, among others, members of the Senate Finance, and House Ways and Means Committees;
- (3) transmittal of a copy of the agreement to Congress by the Executive branch, plus a draft implementing bill with a statement of any administrative action proposed to implement the agreement and an explanation of how the implementing bill or statement changes existing law;
- (4) time limits of forty-five days for discharge out of committee to the full House or Senate, and fifteen days for a vote on the implementing bill in each chamber;
- (5) prohibition of any amendments to the implementing bill; and

46. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-1198, INTELLECTUAL PROPERTY: U.S. TRADE POLICY GUIDANCE ON WTO DECLARATION ON ACCESS TO MEDICINES MAY NEED CLARIFICATION 58 (2007) (explaining the shared responsibility between the U.S.T.R. and Congress for developing trade policy).

47. Shapiro & Brainard, *supra* note 4, at 8.

48. JEANNE J. GRIMMETT, CONG. RESEARCH SERV., WHY CERTAIN TRADE AGREEMENTS ARE APPROVED AS CONGRESSIONAL-EXECUTIVE AGREEMENTS RATHER THAN AS TREATIES 3-4 (2005).

(6) limited debate of no more than twenty hours in each chamber, divided equally between members in favor of and opposed to the implementing bill.⁴⁹

The Tokyo Round agreement was implemented by the Trade Agreements Act of 1979, which extended fast track authority for nine more years and was widely viewed as a success for achieving the dual purposes of enabling the Executive branch to successfully conclude an important round of GATT negotiations and facilitating congressional approval of the agreement reached. But nine years later, Congress took back some of the power it had ceded to the Executive branch, through previous fast track legislation, when it passed the Omnibus Trade and Competitiveness Act of 1988.⁵⁰ The two most important curtailments on the prior delegation of negotiating authority were: (1) requiring more extensive consultations with the gatekeeper committees in Congress, and (2) creating “a two-house derailment procedure that has since come to be known as the ‘reverse fast track.’”⁵¹ By the time the 1988 grant of fast track authority was scheduled to expire on June 1, 1991, Congress had multiple mechanisms at its disposal for derailing fast track authority.⁵²

The political battles over NAFTA in the early 1990s, and the subsequent eight-year hiatus before Congress renewed fast track authority in 2002, demonstrate not only the growing opposition to further U.S. trade liberalization, but also the rising “price” in the quid pro quo of TAA for the grant of fast track authority.⁵³ The first major battle over NAFTA took place just

49. RICHARD S. BETH, CONG. RES. SERV., TRADE AGREEMENT IMPLEMENTATION: EXPEDITED PROCEDURES AND CONGRESSIONAL CONTROL IN EXISTING LAW (2001), <http://fpc.state.gov/documents/organization/7653.pdf>. These fast track procedural requirements/restrictions were fundamentally rules of Congressional procedure and, therefore, they could be modified by Congress with relative ease. 19 U.S.C. §§ 2191–2232 (2002).

50. Omnibus Trade and Competitiveness Act of 1988, 102 Stat. 1107 (1988) (current version at 19 U.S.C. §§ 2901–2906).

51. Carrier, *supra* note 4, at 709–10.

52. *Id.* at 710–11.

53. See DESTLER, *supra* note 1, at 296–99 (analyzing the give and take between the Democrats and the Republicans in 2001 and 2002). For an interesting discussion of political economy theory and its application to U.S. trade policy related to NAFTA, see

as the 1992 presidential election campaign was getting under way.⁵⁴ On March 1, 1991, ninety days before the 1988 delegation of authority was scheduled to expire, President George H. W. Bush requested a two-year extension from Congress, as permitted by the 1988 grant, to implement NAFTA and the GATT multilateral trade talks.⁵⁵ In response to strong opposition to the President's request and resolutions disapproving the extension introduced by Representative Byron Dorgan (D-N.D.) and Senator Ernest Hollings (D-S.C.), the Chairmen of the Senate Finance and House Ways and Means Committees—Lloyd Bentsen (D-Tex.) and Dan Rostenkowski (D-Ill.)—urged the President to submit an “Action Plan” addressing several of the most contentious issues surrounding NAFTA, including its impact on labor and the environment.⁵⁶ The resolutions were ultimately rejected by the full Congress, and fast track authority was extended until June 1, 1993.⁵⁷ Then, in accordance with his fast track obligations, President Bush notified Congress on September 18, 1992, of his intent to sign NAFTA.⁵⁸ Following Bill Clinton's election on November 3, 1992, the United States reached agreement with Mexico and Canada on NAFTA.⁵⁹ Then, after the three countries entered into “side agreements” on labor and environmental issues, Congress passed the NAFTA implementing legislation—using the fast track procedures—in the U.S. House of Representatives on November 17, 1993, by a vote of 234 to 200, and in the U.S. Senate on November 20, 1993, by a vote of 61 to 38.⁶⁰

Anne O. Krueger, *Government, Trade, and Economic Integration*, 82 AMER. ECON. REV. 109, 109–14 (1992). For a revealing analysis of the domestic political interests that shaped the NAFTA negotiations, using Robert Putnam's “two-level bargaining games” concept, see Avery, *supra* note 29, at 283–99.

54. NAT'L ASS'N OF MFRS., NAFTA-BACKGROUND REPORT (1998), http://www.nam.org/s_nam/doc1.asp?CID=201740&DID=223558.

55. *Id.*

56. *Id.*

57. *Oversight Plans of the House Rules Committee*, 105th Cong. (1997), available at http://usinfo.org/house/rule/oversight_plan.htm.

58. NAFTA—BACKGROUND REPORT, *supra* note 54.

59. *Id.*

60. *Id.*; CAROLYN C. SMITH, CONG. RESEARCH SERV., CRS REPORT FOR CONGRESS: FAST-TRACK NEGOTIATING AUTHORITY FOR TRADE AGREEMENTS AND TRADE PROMOTION

The GATT Uruguay Round Agreement was implemented with somewhat less controversy through amendments to the Omnibus Trade and Competitiveness Act of 1988.⁶¹ One amendment, extended fast track authority, from June 1, 1993, until April 16, 1994, but only for the Uruguay Round Agreement.⁶² Another amendment, also specifically applicable only to implementation of the Uruguay Round Agreement, mandated the Executive branch to give Congress 120 days notice prior to reaching agreement instead of the normal 90 days notice.⁶³ Accordingly, after giving adequate notice to Congress, the U.S.T.R. concluded the GATT Uruguay Round negotiations on April 15, 1994, and Congress passed the implementing legislation—using the fast track procedures—in the U.S. House of Representatives on November 29, 1994, by a vote of 288 to 146 and in the U.S. Senate on December 1, 1994, by a vote of 76 to 24.⁶⁴

In part because of the political battles over NAFTA, U.S. trade politics changed after the mid-1990s, especially in the U.S. House of Representatives where “the major new challenges to trade liberalization were the rising concerns over the impact of trade on labor and the environment, and the deepening of partisanship in Washington.”⁶⁵ House Democrats in particular were under pressure to oppose further U.S. trade liberalization following NAFTA and the Uruguay Round⁶⁶ and—coupled with increasingly partisan politics and further polarization between opponents and proponents of expanded free trade—Congress

AUTHORITY: CHRONOLOGY OF MAJOR VOTES (2001) [hereinafter CRS Report], available at <http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-2031:1>.

61. DESTLER, *supra* note 1, at 227.

62. 19 U.S.C. § 2902(e)(1) (2000).

63. *Id.* § 2902(e)(3)(A).

64. CRS Report, *supra* note 60.

65. DESTLER, *supra* note 1, at 234.

66. See Kedron Bardwell, *The Puzzling Decline in House Support for Free Trade: Was Fast Track a Referendum on NAFTA?*, 25 LEG. STUD. Q. 591, 606 (2000) (“With the political muscle of a Democratic president and Republican Congress behind it, fast track shouldn’t have stalled in the 1997 House of Representatives. It failed, nevertheless, when it became a referendum on the economics and politics of NAFTA. For many of fast track’s potential supporters in the House, this posed a serious electoral dilemma. Faced with district job losses that their constituents and even the government blamed on NAFTA, they felt intense pressure to oppose fast track.”).

refused to renew President Clinton's fast track authority in 1997, by a vote of 180-243 in the U.S. House of Representatives.⁶⁷ "No president had lost a high-profile trade policy vote in Congress since Franklin Roosevelt and Cordell Hull initiated the reciprocal trade agreements program in 1934!"⁶⁸ Despite its shrinking size, organized labor proved that, when it flexed, it still had enough muscle to influence U.S. trade politics:

U.S. production workers continued to suffer losses from trade competition, and the AFL-CIO remained a foe of new trade liberalization. Its resistance helped limit further reduction of US trade barriers, notwithstanding structural shifts within the business community. . . .

. . . .

There remains one strong institutional opponent to further trade liberalization as currently practiced, and that is organized labor. Decades ago, unions' trade stances tended to be aligned with their industries—apparel workers were antitrade, while Walter Reuther's [UAW] backed the Kennedy Round. Now capital is increasingly mobile but labor is generally not. Thus workers find their trade interests less and less in line with those of their employers. . . . Workers tend to see trade as a threat; union leaders see it as an issue for mobilizing support. Partly for this reason, when faced with comprehensive trade bills like fast track . . . labor has sought to defeat legislation rather than to bargain and shape its details.⁶⁹

And organized labor has been flexing its muscle with some success since the mid-1990s, because "Americans with average skills, women, blue-collar union members . . . seem to be on the periphery of globalization's gains [since] [t]hey suffer from both

67. See DESTLER, *supra* note 1, at 267–68 (observing how several factors contributed to Clinton's fast track defeat by Congress, effectively ending action on fast track in the 20th century).

68. *Id.* at 267.

69. *Id.* at 234, 251.

competitive pressure on wage levels and a greater possibility of job displacement.”⁷⁰

After an eight-year gap, fast track authority was renewed again with the Trade Act of 2002, following “bruising debate” and “unprecedented razor-thin voting margins” in the U.S. House of Representatives.⁷¹ The longest previous gap had been eight months in 1988.⁷² Under this newly phrased grant of the “trade promotion” authority (TPA), the Executive branch during George W. Bush’s presidency has engaged in the WTO Doha Round multilateral negotiations, as well as negotiations for a Free Trade Area of the Americas, and has concluded several bilateral free trade agreements that Congress has implemented in accordance with fast track procedures.⁷³ However, the political battle over TPA further polarized proponents and opponents of expanded free trade.⁷⁴ “The process has left many participants embittered and did further damage to the fragile bipartisan consensus that guided U.S. trade policy from World War II until the ratification of the North American Free Trade Agreement”⁷⁵ The grant of fast track in 2002 probably would not have happened without bipartisan compromise in the Senate, led by Senators Max Baucus (D-Mont.) and Charles Grassley (R-Iowa), centered on improving the TAA program:

Baucus had long given priority to trade policy, but his record was mixed—he had voted against the Uruguay Round/WTO agreement, for example, [and] a trade bill could pass only with significant support in both parties. So Baucus and Grassley walked compatible paths. They looked for a workable compromise package, including on labor-environment issues [and] Democrats [were] determin[ed] to include in the bill a major expansion and reform of trade adjustment assistance (TAA). The House had passed a separate bill extending that assistance, but the issue had not been prominent in the

70. *Id.* at 236 (citation omitted).

71. Shapiro & Brainard, *supra* note 4, at 1.

72. DESTLER, *supra* note 1, at 262.

73. *Id.* at 279–80, 299–300.

74. Shapiro & Brainard, *supra* note 4, at 19–20.

75. *Id.* at 19.

TPA debate, in large part because House Democrats did not give it priority. Baucus, however, decided that major TAA reform was substantively desirable and a means to legitimize his support of the overall TPA measure. . . .

. . . .

. . . The House would buy into expanded TAA. . . .

. . . .

. . . The trade adjustment assistance provisions brought the number of House Democrats voting in favor to 25, leaving room for 27 Republicans to vote no. Consensus on trade policy has become difficult to attain. . . . Of necessity, the Senate process was bipartisan—with expanded trade adjustment assistance at its center. . . . [But] bipartisanship there could well be harder to come by the next time around. Nevertheless, the 2002 combination of TPA and TAA epitomizes the sort of balanced approach that, sufficiently enhanced, could build stronger protrade coalitions in the future.⁷⁶

Indeed, the most bruising fight yet over fast track authority would also produce the most significant expansion of the TAA program since its inception forty years earlier. “President Bush and USTR Zoellick had their negotiating authority, without major prohibitions or limitations. Trade-displaced workers had a program more commensurate with the scope of their needs.”⁷⁷

2. *Production Workers’ Entitlement to Trade Adjustment Assistance*

Since Congress passed the Trade Expansion Act of 1962, it has repeatedly expressed its intent that American production workers hurt by expanded free trade are entitled to receive assistance to adjust to job loss and transition to new livelihoods.⁷⁸ Congress created the TAA program when it passed

76. DESTLER, *supra* note 1, at 295–98, 305.

77. *Id.* at 298.

78. GAO 2000 REPORT, *supra* note 1, at 6–7 (providing background information and helpful timelines of the TAA’s evolution through congressional amendments).

the Trade Expansion Act of 1962⁷⁹ and, before 2002, it had amended the original Trade Adjustment Assistance Act five times.⁸⁰ With the exception of changes made under the 1981 Omnibus Budget Reconciliation Act,⁸¹ with each amendment, Congress made it easier for workers to access TAA benefits and/or broadened its coverage by: easing eligibility criteria in 1974,⁸² adding coverage of agricultural workers in 1986 and

79. See DESTLER, *supra* note 1, at 23–24 (“The [Trade Expansion Act of 1962] added an innovative approach to injury from imports—that of ‘trade adjustment assistance’ (TAA). . . [P]resident Kennedy favored its adoption on both substantive and political grounds, since it was something to offer AFL-CIO leaders to help secure labor support of his Trade Expansion Act. TAA was, moreover, consistent with his administration’s emphasis on worker retraining as a response to unemployment.”).

80. See GAO 2000 REPORT, *supra* note 1, at 7 (providing helpful timelines of the TAA’s evolution through congressional amendments).

81. Omnibus Budget Reconciliation Act of 1981, 95 Stat. 483 (1981). See DESTLER, *supra* note 1, at 150 (“When such a program was originally proposed, the most sophisticated postwar study of trade policymaking lauded it as an approach that ‘could destroy the political basis of protectionism by giving the injured an alternative way out.’ But because the injury threshold was originally set so high, it yielded little trade relief in the decade after its enactment in 1962. In the late 1970s, however, following the 1974 act’s expansion of benefits and easing of eligibility criteria, this program began at last to be seriously tested. The explosion of TAA claims (mainly from laid-off auto workers), combined with the very generous financial benefits provided, drove the cost to \$1.6 billion in fiscal year 1980, six times the previous peak. Jimmy Carter pointed to this expansion as a humane response to the workers’ plight and a constructive alternative to protection. But Ronald Reagan came to power looking for programs to cut and predisposed against the economic interventionism that TAA exemplified. Since analytic studies indicated that TAA was not in practice fulfilling the goal of adjustment—helping workers move to other, more competitive industries—it was a vulnerable target for Reagan’s new budget director, David A. Stockman, who was opposed to entitlement programs available only to certain groups of workers. Nor did the Reagan administration make this program a chosen instrument when it shifted to trade activism in the fall of 1985. So beginning with the Omnibus Budget Reconciliation Act of 1981, the level and duration of benefits were cut and total program funds were slashed. Stipends were limited to the level of regular unemployment insurance, whereas previously they had supplemented such benefits. Moreover, they were now available only after a worker’s eligibility for unemployment benefits had been exhausted”) (footnotes omitted); see also GAO 2000 REPORT, *supra* note 1, at 7 (providing helpful timelines and details of the TAA’s evolution through congressional amendments).

82. See GAO 2000 REPORT, *supra* note 1, at 7 (providing helpful details of the TAA’s evolution through congressional amendments). See also DESTLER, *supra* note 1, at 140–41 (“[N]ot a single petition for trade adjustment assistance for workers won favorable action in that program’s first seven years. . . . Congress insisted that the program be expanded and made easier to qualify for, notwithstanding organized labor’s

workers in the oil and gas industry in 1988,⁸³ and adding NAFTA transitional assistance benefits for shifts in production to Canada and Mexico in 1993.⁸⁴

But Congress significantly reformed and expanded the TAA program under the Trade Reform Act of 2002, and the current Trade Adjustment Assistance Act (TAA Act)⁸⁵ generally mandates that workers involved in the “production of an article” are entitled to receive an array of benefits through their state unemployment (re-employment) agency *if* DOL determines that they that are eligible to apply for TAA benefits.⁸⁶ These benefits are designed to help workers adjust to job loss caused by expanded free trade and to transition to new employment and provide:

disillusionment with it and the Nixon administration’s skepticism about the appropriateness of a special program for workers displaced by trade. One reason few workers had previously been eligible was that the criterion was essentially the same as those for tariffs or quotas: Imports had to be the ‘major cause’ of unemployment [but] House Ways and Means Committee members thought trade adjustment assistance should be the easiest form of relief to obtain. So the law was changed to open it to workers for whom ‘increases of imports . . . contributed importantly to the loss of jobs.’ The magnitude and duration of the benefits were also increased.”).

83. See Trade Adjustment Assistance Reform and Extension Act of 1986, 19 U.S.C. § 2272 (2000) (extending assistance to agricultural workers); GAO 2000 REPORT, *supra* note 1, at 7 (providing helpful timelines of the TAA’s evolution through congressional amendments).

84. *Id.* The NAFTA Transitional Adjustment Assistance Program was added to the TAA program to provide TAA benefits for workers hurt by shifts in production to Mexico or Canada. See Jerry Haar & Antonio Garrastazu, The North South Center, University of Miami North South Agenda, no. 43, at 5 (Feb. 2001), *available at* <http://www.ciaonet.org/wps/haj03/hajo3.pdf> (“While NAFTA was expected to provide immense benefits to all three countries, ‘fallout’ in the form of job losses and plant relocations was also expected. As a result, the NAFTA Implementation Act was passed to expand the TAA further by creating . . . NAFTA-TAAP . . .”). It is doubtful that the NAFTA implementing legislation would have been enacted without enhancing the TAA Act, even with the labor and environmental side agreements insisted upon by President Clinton. See *id.* at 5 (noting the large number of projected job losses and plant relocations after NAFTA’s enactment); see also H.R. REP. No. 103–361, at 2731 (1993), *reprinted in* 1993 U.S.C.C.A.N. 2731 (“President Clinton stated that he could not support the NAFTA negotiated by former President Bush without additional side agreements. Upon taking office, President Clinton, therefore, initiated negotiations with Mexico and Canada to add provisions to NAFTA that deal with the environment, worker rights, and import surges.”).

85. 19 U.S.C.S. §§ 2271–2331 (LexisNexis 2006).

86. See *id.* §§ 2272–2273.

- up to 130 weeks of training, including 104 weeks of vocational training, and 26 weeks of remedial training (e.g., English as a second language or literacy)⁸⁷
- up to 104 weeks of extended income support—beyond the state unemployment (re-employment) insurance benefits under state law (typically 26 weeks)—while in training, unless the training condition is waived⁸⁸
- up to \$1,250 to conduct a job search, and up to \$1,250, plus up to 90% reimbursement of certain relocation expenses, to relocate for a job in a different geography⁸⁹
- wage supplements of \$10,000 for two years for workers over age 50 who lack easily transferable skills and are re-employed within 26 weeks⁹⁰
- a tax credit worth 65% of the health care premiums paid by certain workers over age 50 for up to two years⁹¹

Thus, the promise of TAA has been a regular and, sometimes, crucial aspect of the political bargain struck on behalf of U.S. production workers with proponents of U.S. trade liberalization. How well the Agency fulfills its administrative role in certifying workers' eligibility to apply for TAA benefits determines, in part, whether workers hurt by expanded free trade are adequately compensated for their losses.⁹² Moreover,

87. *Id.* § 2293; U.S. Dep't of Labor, Trade Adjustment Assistance Reform Act of 2002: Summary, http://www.doleta.gov/tradeact/2002act_summary.cfm (last visited Dec. 22, 2007).

88. 19 U.S.C.S. § 2293 (LexisNexis 2006).

89. *Id.* §§ 2297–2298.

90. *Id.* § 2318.

91. See U.S. Dep't of Labor, *supra* note 87.

92. See James A. Dorn, *Trade Adjustment Assistance: A Case of Government Failure*, 2 CATO J. 865, 872–73 (1982) (explaining that “[t]he incentive of displaced workers to petition for TAA and apply for TRA will depend on the net benefits they expect to capture . . . [t]he probability of actually receiving TRA, of course, will depend on the *effective* legal constraints facing workers and administrators”).

inadequate coverage and poor administrative performance by the Agency could increase worker resistance to expanded free trade.⁹³

3. *The Next Bargain for Fast Track Authority*

The political machinery for the next bargain between opponents and proponents of expanded free trade has been activated, and the TAA program again appears to be the likely quid pro quo for renewal of fast track (trade promotion) authority. On Thursday, October 26, 2006, the Bureau of National Affairs (BNA) reported on the dim prospects for further U.S. trade liberalization, stating that “[i]t is highly unlikely that Congress will vote to approve legislation to renew the president’s authority to negotiate trade agreements when it expires next year, particularly if the Democrats take control of the House”⁹⁴

The BNA also reported, that same day, that DOL would be proposing regulations “dealing with certification questions arising under [the trade adjustment assistance program] at a later date.”⁹⁵ On January 4, 2007, Senate Finance Committee

93. See *id.* at 865 (noting that although the Trade Assistance Program was “[i]ntended to provide workers with an incentive to adjust to import competition and to gain the support of organized labor for trade liberalization, it has failed on both counts”).

94. Gary G. Yerkey, *Renewal of TPA Seen as Highly Unlikely Next Year, Particularly if Democrats Triumph*, 23 INT’L TRADE REP. 1528, 1528 (2006). See also Gary G. Yerkey, *109th Congress Seen Largely Favoring Pro-Trade Agenda, but Support Often Thin*, 23 INT’L TRADE REP. 1589, 1589 (2006) (“[T]he closeness of many of the votes and the strong opposition to key trade-liberalizing measures, along with the plethora of bills that would limit rather than expand U.S. participation in the global economy, underscore the need for U.S. companies to redouble their efforts to tout the benefits of open trade.”). But see Gary G. Yerkey, *New Democrat-Controlled Congress Will Be Only ‘Slightly’ More Anti-Trade, Study Finds*, 23 INT’L TRADE REP. 1659, 1660 (2006) (“[T]he ‘net loss’ for pro-trade interests in the House . . . was only four seats . . . [so] [w]hile we have lost a few key champions of trade . . . [there is optimism] that there will be opportunities for Congress to support a positive international economic agenda that will benefit American companies and workers.”).

95. Michael R. Triplett, *Proposed Labor Department Rules Address Alternative TAA Program for Older Workers*, 23 INT’L TRADE REP. 1530, 1531 (2006).

Chairman, Senator Max Baucus (D-Mont.) introduced a bill (S. 122)⁹⁶—co-sponsored by Senators Norm Coleman (R-Minn.), Maria Cantwell (D-Wash.), and Ken Salazar (D-Colo.)—to “reauthorize the federal government’s trade adjustment assistance program until 2012 and expand its coverage to include workers in service jobs.”⁹⁷ And, in a speech on January 31, 2007, President George W. Bush “called on Congress to renew his authority to negotiate trade agreements” and said that he would “work with Congress to reauthorize and to improve the Trade Adjustment Assistance [sic] this year.”⁹⁸

The fast track authority (TPA) granted to President George W. Bush expired on June 30, 2007,⁹⁹ before successful completion of the WTO Doha Round and without the creation of a Free Trade Area of the Americas.¹⁰⁰ So, before free trade can be further expanded, a new grant of fast track authority must be made to the Executive branch. But the political price for the grant of fast track authority from a Democratically-controlled Congress to an unpopular, lame duck Republican President is likely to be high. Considering the alternatives, proponents of

96. Trade Adjustment Assistance Improvement Act of 2007, S. 122, 110th Cong. (2007), available at <http://www.theorator.com/bills110/text/s122.html> (amending the Trade Act of 1974 to “extend benefits to service sector workers and firms, enhance certain trade adjustment assistance authorities, and for other purposes”).

97. *Bipartisan Bill Would Extend TAA to 2012, Add Coverage for Displaced Service Workers*, 24 INT’L TRADE REP. 38, 38 (2007) [hereinafter *Bipartisan Bill*].

98. Rossella Brevetti & Gary G. Yerkey, *President Bush Calls on Congress to Renew Trade Promotion Authority*, 24 INT’L TRADE REP. 159, 159 (2007).

99. See U.S. Dep’t of Agriculture Int’l Egg and Poultry Review (2007), <http://www.ams.usda.gov/poultry/mncs/InternationalPoultryandEgg/2007Reports/PY20070925IntlPoultryandEgg.pdf> (last visited Dec. 22, 2007) (recognizing that trade promotion authority expired on June 30, 2006); Rossella Brevetti, *Trade Promotion Authority Set to Expire in 2007, and Extension Is Up in the Air*, 24 INT’L TRADE REP. 95, 95 (2007) (“[T]he United States will require a good package on market access for agriculture, industrial goods, and services in the Doha Round . . . in order to convince Congress to grant President Bush TPA.”).

100. Brevetti & Yerkey, *supra* note 94, at 159. See World Trade Organization, The Fourth WTO Ministerial Conference, http://www.wto.org/english/thewto_e/minist_e/min01_e/min01_e.htm (last visited Dec. 22, 2007) (providing information on the WTO Doha Round program); United States Trade Representative, Free Trade Area of the Americas, http://www.ustr.gov/Trade_Agreements/Regional/FTAA/Section_Index.html (last visited Dec. 22, 2007) (providing information on the Free Trade Area of the Americas program).

free trade should seek to improve the TAA program so that it functions more effectively as the principal mechanism for assisting workers hurt by expanded free trade and more adequately compensates workers for their losses. At the very least, the administrative defects in DOL's certification process should be fixed. And, if Congress once again chooses to use the TAA program as the quid pro quo for renewal of fast track authority, it should consider amending the TAA Act to reduce worker resistance to further U.S. trade liberalization.¹⁰¹

III. THE DEFECTIVE CERTIFICATION PROCESS AND UNSUITABLE SCHEME FOR JUDICIAL REVIEW

For workers, TAA is a phantom entitlement unless DOL certifies that they are eligible to apply for it.¹⁰² Under the TAA

101. The simple chart below summarizes the occasions when Congress has used improvements in the TAA program as the quid pro quo between workers' interests and proponents of expanded free trade:

<u>Fast Track Authority</u>	<u>TAA Program</u>
<ul style="list-style-type: none"> • Trade Expansion Act of 1962 (Kennedy Round negotiating authority), Pub. L. No. 87-794 (1962). • Trade Act of 1974 (Tokyo Round negotiating authority), Pub. L. No. 93-618, 87-794 (1975). • Omnibus Trade and Competitiveness Act of 1988 (Uruguay Round negotiating authority), Pub. L. No. 100-418 (1988). • North American Free Trade Agreement Implementation Act of 1993 (NAFTA implementation) Pub. L. No. 103-182 (1993). • Trade Act of 2002 (Doha Round negotiating authority) Pub. L. No. 107-210 (2002). 	<ul style="list-style-type: none"> • TAA program created • Eased TAA eligibility criteria • Added TAA coverage for oil and gas workers • Covered workers hurt by shifts in production to Mexico and Canada • Major reform and expansion of TAA program

GAO 2000 REPORT, *supra* note 1, at 7, fig.1; U.S. Department of Labor, Trade Adjustment Assistance Reform Act of 2002, http://www.doleta.gov/tradeact/2002act_index.cfm (last visited Sept. 13, 2007).

102. According to statistics published on DOL's website, in 2005 the Agency issued determinations on 2,586 petitions for TAA benefits, certifying 1,545 of them (60%), covering an estimated 117,904 workers; the average time to process each petition was 30

Act, a group of workers, or their employer or duly authorized representative, may petition the Agency, or their state unemployment office, for certification of eligibility to apply for TAA benefits.¹⁰³ By statute, DOL is supposed to “determine whether the petitioning group meets the [eligibility] requirements of section [2272]” of the TAA Act within forty days after the petition is filed.¹⁰⁴ Once certified, an eligible worker may then apply for and receive TAA benefits from his or her state unemployment (reemployment) office—if he or she was certified and applies within two years of the date of his or her layoff—provided the worker: had sufficient (minimal) earnings from employment for at least 26 weeks of the 52 weeks before the layoff; was entitled to state unemployment insurance and was not otherwise disqualified for extended unemployment compensation; and was enrolled in an approved training program unless the training requirement is waived by DOL.¹⁰⁵ The petition form itself, however, typically does not provide DOL with substantial enough evidence to make an eligibility

days. Quarterly Highlight: Trade Adjustment Act, http://www.doleta.gov/Performance/results/Quarterly_report/TAA%20Performance%20Highlights%20v2.pdf (last visited Dec. 22, 2007); Trade Adjustment Assistance Estimated Number of Workers Covered By Certification, http://doleta.gov/tradeact/taa_certs.cfm (last visited Dec. 22, 2007). Assuming the average number of workers covered by the petitions that were denied was the same as the petitions that were certified, 78,603 workers who sought TAA benefits in 2005 were denied eligibility certification. *Id.* Surely, some were not eligible. But perhaps some were. One problem addressed in this paper is that the scheme for judicial review of DOL determinations is unsuitable for TAA cases. The fact that only a tiny fraction of Agency denials are appealed to the CIT, is probably not because DOL’s determinations are beyond reproach but, rather, because the stakes involved are not lucrative enough for a plaintiffs’ bar to emerge—even though TAA benefits are valuable to individual workers. See GAO 2000 REPORT, *supra* note 1 at 53, tbl.6 (showing that from 1999 to 2004 only twentysix TAA cases had been decided by the CIT, and only three of those cases affirmed DOL’s negative determination without remand). See also Trade Adjustment Assistance Coalition, <http://www.taacoalition.com> (last visited Dec. 22, 2007) (“The TAA Coalition’s primary initiatives include . . . serv[ing] as a clearing house to connect those seeking pro bono legal help to pursue TAA petitions with lawyers and law firms that provide such assistance . . .”).

103. 19 U.S.C.S. § 2271 (LexisNexis 2006).

104. *Id.* § 2273.

105. *Id.* § 2291.

determination.¹⁰⁶ And, as demonstrated below, DOL frequently uses requests for voluntary remand to comply with the forty-day statutory period to investigate workers' eligibility, without actually gathering any additional determinative evidence.¹⁰⁷

DOL's investigative shortcomings, though, are *not* related to its existing *written* guidelines for investigating TAA petitions.¹⁰⁸ Actually, the Agency's written guidelines for conducting TAA investigations seem to guarantee workers procedural due process.¹⁰⁹ In subpart B of the guidelines, the Agency appropriately articulates the kind of investigation required:

The investigation may include one or more field visits to confirm information furnished by the petitioner(s) and to elicit other relevant information. In the course of the investigation, representatives of the Department shall be authorized to contact and meet with responsible officials of firms, union officials, employees, and any other persons, or organizations, both private and public, *as may be necessary to marshal all relevant facts* to make a determination on the petition.¹¹⁰

The Agency has also properly equipped itself in subpart B with all of the necessary administrative apparatus for conducting a thorough fact-finding investigation, including providing for a public hearing—replete with testimony,

106. See Trade Adjustment Assistance and Alternative Adjustment Assistance Application Process, <http://www.doleta.gov/tradeact/petitions.cfm> (last visited Dec. 22, 2007) (explaining TAA benefits and providing instructions on completing the petition).

For other resources for completing the TAA petition, see Trade Adjustment Assistance Coalition, <http://www.taacoalition.com/attorneys.asp> (last visited Dec. 22, 2007) (including a helpful primer on the TAA petition process prepared by the Customs & International Trade Bar Association's ad hoc Committee on TAA).

107. Globalize This!, <http://plec.blogspot.com/2004/03/free-trade-without-net.html> (Mar. 31, 2004, 2:52 EST) (citing the high number of requests for voluntary remands in the trade adjustment assistance cases, and noting that "Chief Judge Gregory W. Carman awarded attorneys' fees . . . for the Labor Department failing to conduct an investigation while a remand order was in place").

108. See 29 C.F.R. §§ 90.1–90.16 (2006) (providing the background of certification of eligibility, and describing the process of determinations of eligibility).

109. See *id.* § 90.1 (declaring the regulation's purpose to be "provid[ing] for the prompt and effective disposition of workers' petitions for certification of eligibility to apply for adjustment assistance").

110. *Id.* § 90.12 (emphasis added).

evidence, briefs, oral argument, authentication, transcripts, and appearances—and subpoena power.¹¹¹ And, again in subpart B, DOL correctly sets forth the required contents of the Agency record upon which it is obligated to make an eligibility determination, based on these findings of fact:

- (1) A significant number or proportion of the workers in such workers' firm (or appropriate subdivision of the firm) have become, or are threatened to become, totally or partially separated;
- (2) Sales or production, or both, of such firm or subdivision have decreased absolutely; and
- (3) Increases (absolute or relative) of imports of articles like or directly competitive with articles produced by such workers' firm or an appropriate subdivision thereof contributed importantly to such total or partial separation, or threat thereof, and to such decline in sales or production¹¹²

The TAA Act mandates the Agency certify workers' eligibility, but, of course, not all workers are eligible.¹¹³ DOL must certify a group of primary *production* workers' eligibility in both of the following job loss situations, if it determines that the workers' layoff or threat of layoff was due to:

- increased imports like or directly competitive with articles produced by the workers' firm or subdivision, that "contributed importantly" to an absolute decrease in sales or production and to the workers' layoff or threat of layoff; or
- a shift in production of articles like or directly competitive with articles produced by the workers' firm or subdivision, to a foreign country, if that country is (1) a party to a free trade agreement with the U.S., or (2) a beneficiary country under the Andean Trade Preference Act, African Growth and Opportunity Act, or the Caribbean Basin Economic Recovery Act, or if there has

111. *Id.* §§ 90.13–90.14.

112. *Id.* § 90.16.

113. 19 U.S.C.S. § 2273(a)–(b) (LexisNexis 2006).

been or is likely to be an increase in imports of articles like or directly competitive with articles produced by the workers' firm.¹¹⁴

DOL must also certify a group of secondary *production* workers' eligibility to apply for TAA benefits in two other job loss situations, if it determines that:

- a significant number or proportion of workers have been laid-off or are threatened to be laid-off from an upstream "supplier" of a related article, if that supplier supplied component parts—that accounted for at least 20% of its production or sales—to a firm that employed a group of primary workers certified to apply for TAA benefits; or
- a significant number or proportion of workers have been laid-off or are threatened to be laid-off from a "downstream producer" of a related article, if a loss of business by the secondary workers' firm with the primary workers' firm "contributed importantly" to the secondary workers' layoff or threat of layoff.¹¹⁵

So workers' certification depends, in part, on DOL's administrative performance. And the Agency's performance in carrying out its statutory duty has been the target of scathing criticism, not only by organized labor,¹¹⁶ but also in published

114. *Id.* § 2272 (a)–(c) (LexisNexis 2006) (noting requirements for a group of workers to apply for adjustment assistance).

115. *Id.* § 2272(b)–(c) (noting the requirements for a group of workers to apply for trade adjustment assistance).

116. *Breaking the Faith with Workers: The Bush Labor Department's Improper Denials of Trade Adjustment Assistance*, AFL-CIO (Issue Brief, Wash. D.C.), July 2004, at 1–2.

Consensus around the expansion of TAA smoothed the passage of additional trade negotiating authority for President Bush in 2002—authority he already has used to negotiate several new trade agreements. But the other half of this quid pro quo arrangement, the part meant to aid workers, is being betrayed by the Bush Labor Department's repeated erroneous denials of assistance.

In the cases examined in this report, workers had to go to court—in some cases two or three times—to force the Department of Labor to certify them for the benefits to which they were entitled under the law. In some cases, the court had to send back, or remand, the certification decision several times before the Labor department finally got it right. In many instances, faulty

opinions by members of the CIT.¹¹⁷ DOL has struggled to fulfill the congressional mandate to certify eligible workers—and thereby help them adjust to job loss caused by expanded free trade and transition to new livelihoods—even when Democrats have occupied the White House.¹¹⁸ Consequently, TAA benefits have not been as accessible for some workers as Congress intended. This inaccessibility stems from two root causes: first, DOL’s own investigative process is flawed, with workers bearing the burden of producing evidence—and proving—that they lost

decisions resulted because the Labor Department simply failed to consider any evidence beyond that provided in cursory inquiries to employers. Workers’ submissions often were ignored.

Id.

117. *See, e.g.,* *Former Employees of Ameriphone, Inc. v. United States*, 288 F. Supp. 2d 1353, 1358–59 (Ct. Int’l Trade 2003).

Here, the entirety of the Labor Department’s initial investigation consisted of forwarding the standard [request for data form] to Plantronic’s Vice President for Human Resources. The record reveals that the agency failed to follow up with company officials (via telephone or otherwise), even though the company’s responses to the Labor Department questionnaire were, in a number of instances, ambiguous or inconsistent, and called for clarification. . . .

. . . .

Moreover, the agency’s investigation conducted in response to the Workers’ request for reconsideration was little more than a rubber stamp of its initial Negative Determination. The Labor Department’s “reconsideration” consisted—in toto—of two phone conversations with company officials on a single day, which were in turn documented in two memoranda that, together, constituted a mere three sentences.

. . . .

While this case is troubling enough when viewed in isolation, it is even more troubling if it is viewed in context of other TAA and NAFTA-TAA cases appealed to this Court. The relatively high number of requests for voluntary remands in such cases suggests that the Labor Department may be routinely failing to “conduct [its] investigation with the utmost regard for the interests of the petitioning workers” and to “marshal all relevant facts” before making its determinations. There is something fundamentally wrong with the administration of the nation’s [TAA] programs if, as a practical matter, workers often must appeal their cases to the courts to secure the thorough investigation that the Labor Department is obligated to conduct by law.

Id. (internal citation omitted).

118. *See, e.g., id.* at 1355 n.3 (citing three cases decided during the Clinton administration).

their jobs due to expanded free trade; and second, the scheme for judicial review of DOL determinations is unsuitable for TAA cases.¹¹⁹

A. DOL's Flawed Investigative Process

The criticism of DOL's certification process is warranted.¹²⁰ *Tyco Electronics v. Dep't of Labor* (Tyco IV) is an illustrative case in point.¹²¹ In that case, the CIT ordered DOL to pay almost \$76,000 in attorney's fees to the workers' counsel¹²² on grounds that the Agency's conduct during litigation was not substantially justified.¹²³ DOL's hard-edged litigation stance and overzealous

119. *Breaking the Faith with Workers*, *supra* note 116, at 1–3.

120. *See id.* at 2 (detailing both the flaws in the TAA certification decisions and the CIT's scathing assessment of the TAA under the Bush Administration). For a more constructive assessment of DOL's administrative performance, including several worthwhile suggestions for improving the Agency's certification process, *see* Brad Brooks-Rubin, *The Certification Process for Trade Adjustment Assistance: Certifiably Broken*, 7 U. PA. J. LAB. & EMP. L. 797 (2005).

121. *Former Employees of Tyco Elecs., Fiber Optics Div. v. U.S. Dep't of Labor*, 350 F. Supp. 2d 1075, 1089 [hereinafter *Tyco IV*](Ct. Int'l Trade 2004). A brief synopsis of the *Tyco Electronics* litigation is provided in Appendix 1.

122. *Id.* at 1100. The Agency is represented in TAA cases before the CIT and the Federal Circuit by attorneys from the Commercial Litigation Branch within the Civil Division of the U.S. Department of Justice and attorneys from the Division of Employment and Training Legal Services within the U.S. Labor Department's Office of the Solicitor. *See* Dep't of Justice Brochure, *Role of the Civil Division and its Attorneys* 2, 9–18 (May 2007) (touting the career opportunities for lawyers seeking diverse litigation experience); U.S. Dep't of Labor, Div. of Employment and Training Legal Services (ETLS), <http://www.dol.gov/sol/organizations/divisions/etls.htm> (last visited Dec. 22, 2007) ("The Division provides legal advice, rulemaking and litigation services to the Employment and Training Administration on a wide variety of . . . programs.")

123. *Tyco IV*, 350 F. Supp. 2d at 1087–89.

The Court holds that [the workers'] application for fees and expenses under the [Equal Access to Justice Act] meets the necessary requirements and should be granted because [DOL's] position in this litigation was not substantially justified and no other reasons make an award unjust . . .

. . . .

. . . During this litigation, Labor repeatedly disregarded evidence of critical facts necessary to determine if Plaintiffs were eligible to receive TAA benefits. Specifically, Labor refused to accept information submitted by Plaintiffs, which allegedly contradicted statements made by Tyco Electronics officials. Additionally, Labor failed to comply with the orders of this Court asking Labor to substantiate its determinations with additional legal and factual analysis on remand; and did not abide by its own assertions that it

opposition to the workers in that case were particularly misplaced but, unfortunately, not isolated.¹²⁴ While the award of attorney's fees in *Tyco IV* was not meaningless, it fell far short of the \$119,993.70 requested, and it was probably not sufficient punishment to deter the Agency from repeating its conduct in future TAA cases.¹²⁵ It also did nothing to compensate the workers for the long delay in getting the benefits they were entitled to under the statute. Nevertheless, the award memorializes DOL's indolent administration of the TAA Act and the unjustified position that it took throughout the *Tyco Electronics* litigation.¹²⁶ And it signals to prospective pro bono

would gather information from Plaintiffs either in support of or in contradiction to their petition for certification. During this litigation, Labor continued to rely on incomplete and allegedly contradictory information to support its position. Finally, this Court finds that Labor failed to provide any analysis regarding the change in its position to certify Plaintiffs as eligible to receive benefits in the *Second Remand Results* that might have aided the Court in determining the reasonableness of its position during this litigation.

Id.

124. See, e.g., *Former Employees of Chevron Prods. Co. v. U.S. Sec'y of Labor*, 298 F. Supp. 2d 1338, 1348–49 (Ct. Int'l Trade 2003).

In sum, the record in this action evidences not only the Labor Department's dereliction of duty . . . but—even more fundamentally—its failure to fulfill its overarching obligations to “marshal all relevant facts to make a determination” in trade adjustment assistance cases, and “to conduct [its] investigation with the utmost regard for the interests of the petitioning workers. . . .”

. . . .

In a word, 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—for, while it may be an extreme case, it is regrettably not an isolated one Only time will tell whether the Labor Department, and Congress, are listening. . . .

. . . .

. . . Needless to say, a proper and thorough initial investigation would have spared all parties—including the Labor Department, as well as the Justice Department, the Workers, their counsel, and the Court—untold hours of work.

Id. (internal citations omitted).

125. *Tyco IV*, 350 F. Supp. 2d at 1081.

126. See *Former Employees of Tyco Elecs., Fiber Optics Div. v. U.S. Dep't of Labor*, 259 F. Supp. 2d 1246, 1248 (Ct. Int'l Trade 2003) [hereinafter *Tyco I*] (awarding \$7,457.50 in attorney's fees to workers' pro bono counsel for hours expended in response to DOL's out of time requests for extensions to file its determination on voluntary

worker-advocates that attorney's fees might be awarded in TAA cases when DOL's administrative behavior is egregious and its conduct during litigation is unjustified.¹²⁷

Nothing in the TAA Act requires the Agency to adopt such an adversarial position against workers.¹²⁸ Instead, DOL's stance in opposition to workers hurt by expanded free trade is largely the product of the Agency's flawed investigations and broken certification process.¹²⁹ Consequently, at times, DOL has failed to adequately carry out the congressional intent of providing assistance to workers negatively impacted by expanded free trade.¹³⁰ That failure has contributed, in part, to the current lack of political support for expanded free trade, and will continue to impede further U.S. trade liberalization unless and until the Agency does a better job certifying workers' eligibility for TAA benefits.¹³¹

remand); *Former Employees of Tyco Elecs., Fiber Optics Div. v. U.S. Dep't of Labor*, 264 F. Supp. 2d 1322, 1330 (Ct. Int'l Trade 2003) [hereinafter *Tyco II*] ("Although Labor has had four bites at this apple . . . the Court finds that an additional remand is necessary and directs Labor to conduct further investigation and analysis concerning [the workers'] request for certification . . ."); *Former Employees of Tyco Elecs., Fiber Optics Div. v. U.S. Dep't of Labor*, 318 F. Supp. 2d 1354, 1356–58 (Ct. Int'l Trade 2004) [hereinafter *Tyco III*] (affirming DOL's second remand determination that the workers were eligible for TAA benefits, after taking the extraordinary step of supervising efforts to undo Pennsylvania Department of Trade and Labor's decision that workers "would not receive basic trade readjustment allowances ("TRA") because the 104-week eligibility period for those allowances had expired during the pendency of this litigation . . . [even though] the Department of Labor failed to follow [the] Court's specific instructions on remand . . . because [the workers were] satisfied").

127. For a helpful primer on the recovery of attorney's fees under the Equal Access to Justice Act, see Gregory C. Sisk, *A Primer on Awards of Attorney's Fees Against the Federal Government*, 25 ARIZ. ST. L. J. 733, 735 (1993) ("[T]he Equal Access to Justice Act . . . puts the government on equal footing with private defendants in terms of fee-shifting and further makes the government liable in fees whenever its position is not substantially justified.").

128. See Trade Adjustment Assistance Reform Act of 2002, 19 U.S.C.S. §§ 3801–3813 (LexisNexis 2002) (referencing nothing on how diligently DOL should pursue resisting claims by workers).

129. *Breaking the Faith with Workers*, *supra* note 116, at 1–3.

130. See *id.* at 4 (referencing a CIT judge's warning that it would be inconsistent with Congressional intent if the TAA programs were to become little more than "claims mills" at the agency level).

131. See News Release, United States Senate Committee on Finance, Max Baucus, Ranking Member, *Baucus Says Inadequate TAA Commitment May Erode Support for*

B. *The Inapt Scheme for Judicial Review*

DOL's defective certification process is compounded by the unsuitable scheme for judicial review of Agency decisions that Congress created by its concurrent grant of jurisdiction to the CIT and the Federal Circuit.¹³² This inapt scheme has led to an

Trade: GAO Report Cites Insufficient Outreach to Workers (Feb. 15, 2006), available at <http://finance.senate.gov/press/Bpress/2005press/prb021506.pdf>.

U.S. Senator Max Baucus (D–Mont.), Ranking Member of the Senate Finance Committee, today warned that poor implementation of Trade Adjustment Assistance (TAA) benefits created by the Trade Act of 2002 could erode support for continuing trade liberalization. . . .

. . . .

[P]opular support for trade liberalization depends upon helping those whose jobs are affected by trade.

. . . .

Baucus spearheaded TAA reforms as Chairman of the Senate Finance Committee in 2002. TAA is due for reauthorization next year, and in his keynote address at today's Trade Adjustment Assistance Coalition luncheon, Baucus plans to highlight his legislative agenda to build on the Trade Act's TAA reforms. Baucus has introduced four TAA-related bills the [sic] 109th Congress, including an extension of TAA coverage to service workers and a wage insurance alternative for younger workers.

Workers must know that they won't be left behind on the losing side of global competition[.] Popular resistance to trade liberalization will grow unless there is a safety net to support and retrain workers affected by the changing global market.

. . . .

Baucus is a co-chair of the Trade Adjustment Assistance Coalition, along with Sen. Norm Coleman (R–Minn.) and Rep. Adam Smith (R–Wash.).

Id. (internal quotations marks omitted).

132. 19 U.S.C. § 2395 (2000).

Judicial review

(a) Petition for review; time and place of filing

A worker, group of workers, certified or recognized union, or authorized representative of such worker or group aggrieved by a final determination of the Secretary of Labor under section 223 of this title . . . may, within sixty days after notice of such determination, commence a civil action in the United States Court of International Trade for review of such determination. The clerk of such court shall send a copy of the summons and the complaint in such action to the Secretary of Labor. . . . Upon receiving a copy of such summons and complaint, such Secretary shall promptly certify and file in such court the record on which he based such determination.

(b) Findings of fact by Secretary; conclusiveness; new or modified findings

The findings of fact by the Secretary of Labor . . . if supported by substantial

unsuitable allocation of power among DOL, the CIT, and the Federal Circuit. The *Marathon v. Chao* (*Marathon I*) litigation¹³³ demonstrates how DOL's broken certification process is compounded by that unsuitable allocation of power.

In *Marathon v. Chao* (*Marathon II*),¹³⁴ the Federal Circuit reversed the CIT's holding that "gaugers" who performed quality control tests—and whose firm the gaugers claimed was engaged in "producing an article" (crude oil)—were entitled to TAA benefits.¹³⁵ The Federal Circuit's decision rested on its interpretation of a particular statutory phrase—"otherwise produces oil."¹³⁶ DOL had interpreted that phrase in a manner

evidence, shall be conclusive; but the court, for good cause shown, may remand the case to such Secretary to take further evidence, and such Secretary may thereupon make new or modified findings of fact and may modify his previous action, and shall certify to the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(c) Determination; review by Supreme Court

The Court of International Trade shall have jurisdiction to affirm the action of the Secretary of Labor . . . or to set such action aside, in whole or in part. The judgment of the Court of International Trade shall be subject to review by the United States Court of Appeals for the Federal Circuit as prescribed by the rules of such court. The judgment of the Court of Appeals for the Federal Circuit shall be subject to review by the Supreme Court of the United States upon certiorari as provided in section 1256 of title 28.

Id.

133. *Marathon Ashland Pipeline, LLC v. Chao*, 277 F. Supp. 2d 1298 (Ct. Int'l Trade 2003), *rev'd*, 370 F.3d 1375 (Fed. Cir. 2004), *cert. denied*, 543 U.S. 1049 (2005) [hereinafter *Marathon I*].

134. *Marathon Ashland Pipeline LLC v. Chao*, 370 F.3d 1375 (Fed. Cir. 2004), *cert. denied*, 543 U.S. 1049 (2005) [hereinafter *Marathon II*].

135. *See id.* at 1376 ("Because we conclude that substantial evidence supports the Secretary's determination that the former employees were not engaged in the production of crude oil, we reverse the *trial court's ruling* to the contrary.") (emphasis added).

136. *Id.* at 1380–84.

We conclude the *trial court* erred in its approach to the "production issue." While the definition of the statutory term "production" is a question of law, the question of whether particular employees are engaged in "production" within that definition is factual. . . .

. . . .

In sum, we do not agree with the *trial court* that the Secretary committed legal error in defining the statutory term "production" and applying that term to the facts of this case. Based on the evidence in the administrative record, we agree with the government that there was substantial evidence to

that excluded the gaugers from coverage under the TAA because, it concluded, their firm was not engaged in producing crude oil but, rather, merely transported it *after* it had been “produced.”¹³⁷ But the CIT rejected (1) DOL’s interpretation of the statutory phrase—“otherwise produces oil”—and (2) DOL’s conclusion that the gaugers were not covered under the statute, because DOL had failed to adequately explain its reasoning.¹³⁸ The CIT also rejected DOL’s determination that the gaugers were not eligible for TAA benefits because the Agency had failed—after four chances—to adequately investigate the cause of their layoff.¹³⁹ Since DOL already had four chances to conduct

support the Secretary’s *fact-intensive* determination that the [gaugers], who worked for a transportation company and who tested crude oil produced by independent producers incident to its sale and transportation, were not engaged in “production” within the meaning of the adjustment assistance statute, and that their firm therefore did not “produce” crude oil.

Id. (emphasis added).

137. *See Marathon I*, 277 F. Supp. 2d at 1303–04.

In order to qualify for TAA, the gaugers at issue in this case must have been employed by a “firm, or appropriate subdivision of a firm, that engages in exploration or drilling for oil or natural gas, or otherwise produces oil or natural gas.” [U.S.C.] § 2272(B)(2)(B). In this case, the gaugers perform their function after the exploration and drilling stage, *so the only issue is whether they otherwise produce oil*. The court must then determine what constitutes the production of crude oil for purposes of the statute, and whether the work of the gaugers falls within that production process. . . .

. . . .

Labor essentially describes the gaugers as performing their job prior to the point at which oil is transported and doing “quality control” unrelated to transportation, yet concludes the gaugers’ role was one primarily related to “transportation.” This conclusion has no relationship to the description above, and there is nothing in the record to support it, except, perhaps, the fact that the gaugers were employees of a company with the word “pipeline” in its name. Moreover, this conclusion contains nothing with regard to the critical *legal* determination that *must* be made, whether the gaugers are employed by a subdivision of a firm that produces oil.

Id. (emphasis added) (internal citation omitted).

138. *Id.* at 1304–05 (listing eight specific reasons for holding that DOL’s explanation for its conclusion “that the gaugers do not engage in production” was *legally* deficient).

139. *Id.* at 1310–12.

Despite the[] clear instructions, Labor’s current determination falls short. . . . The record of the investigation pursuant to remand contains two exchanges of letters with company officials and two press releases

an adequate investigation when the case came before him for a third time, Judge Barzilay granted the workers' motion for judgment on the Agency's record and ordered DOL to certify the workers' eligibility because he thought that another remand to DOL would be futile:

The court finds that [DOL] denial of [the gaugers'] petition for certification is not supported by substantial evidence and not in accordance with law, and, therefore, the Secretary of Labor shall certify [them] for trade adjustment assistance.¹⁴⁰

announcing the sale. Labor did inquire specifically in its letter: . . . 3) [w]ere the layoffs at the Bridgeport, Illinois (Illinois Basin) related to a decision by Marathon Oil to import crude oil? Explain in detail[;] 4) [d]escribe in detail the reasons for the sale of Marathon's oil assets at Illinois Basin Lease.

. . . .

The company human resource representative responded by essentially giving the same answer . . . stat[ing] that the assets were sold because they were no longer of strategic value to the company. . . . [The response] also does not state that the asset sale was unrelated to any decision to import crude oil [and] does not answer, and indeed, does not even dispute, [the gaugers] contention that the Robinson, Illinois plant was converted to refine foreign oil

Labor's and the company's inability or unwillingness to answer with any specificity the questions necessary for this court to evaluate the legitimacy of the [workers'] claim place this court in a difficult position. . . .

Labor has had four chances to determine . . . if increased imports contributed to the decision to sell the assets in question. [The gaugers] have placed serious, specific and relevant questions in the record that Labor did not adequately address, even after being directed by this court to do so. Therefore, *no evidence exists in the record to support Labor's conclusion that the gaugers' termination was not the result of . . . Marathon to import crude oil.* . . .

. . . During the last remand Labor directly asked [Marathon Ashland Pipe Line LLC] to "describe in detail" the business reason for the sale of the assets. In response [it] essentially said it had business related reasons. This is not an adequate answer. Nothing in the record indicates that [it] will be more forthcoming if the court were to remand again. Nothing in the record indicates that Labor has the resources or willingness to conduct an investigation beyond making inquiries of MAPL. The court sees little benefit to be gained by an additional remand.

Id. at 1311–12 (emphasis added) (citation omitted).

140. *Id.* at 1313.

This court retains the ability to remand again, "for good cause shown," 19 U.S.C. § 2395(b), or it can order the Secretary to certify [the gaugers] for

But the Agency appealed the CIT's decision to the Federal Circuit.¹⁴¹

The Federal Circuit's handling of the CIT's holding is both troubling and, potentially, quite confusing for workers, DOL, and the CIT. DOL, in particular, should not be heartened by its "victory" in *Marathon II*. The argument here is not that the Federal Circuit's interpretation of what "otherwise produces oil" was wrong, or that it improperly conducted *de novo* review of the CIT's interpretation of that term.¹⁴² There is nothing wrong with the Federal Circuit's reversing the CIT on a pure question

eligibility. *See* United Elec., Radio and Mach. Workers of Am. v. Martin, 15 CIT 299, 308 (1991) (citing 19 U.S.C. § 1395(c) (which confers on this Court "jurisdiction to affirm the action of the Secretary . . . or to set such action aside, in whole or in part.")). . . . As a general rule, the court will refrain from ordering certification until an additional remand would be "futile." . . .

TAA is a remedial program. . . . Its purpose is to assist those workers and communities harmed by the impact of international trade to recover from the losses they incur. Congress has recognized that the loss of jobs in specific communities is the price paid for the overall public benefit of a liberalized international trading system. The court is mindful that TAA cases are different from most litigation before this court. This is not a situation, such as in customs or antidumping duty cases, where a bond can be posted to cover anticipated cost and reduce liability. The workers at issue here suffered a loss. To perpetually delay remedying that loss would inflict additional hardship contrary to the purpose of the statute. In weighing the decision to remand the court must consider the purpose of the statute and factor the welfare of the workers into its decision to bring the litigation to a conclusion. The gaugers at issue filed for TAA benefits . . . three and a half years ago. Past experience compels the court to conclude that the likely result of any remand will be only a marginally more supported investigation which will not significantly assist the court in determining whether crude oil imports directly led to the gaugers' termination. For this small benefit, the court sees no reason to delay extending real benefits to [the gaugers].

Id. at 1312–13 (selected citations removed).

141. *Marathon II*, 370 F.3d at 1375.

142. For a look into the Federal Circuit's reasoning, *see id.* at 1383.

We disagree with the court's conclusion that the 1988 amendments indicate that Congress intended to extend the definition of "production" in the context of the crude oil and natural gas industry to include activities such as gauging. In fact, we draw the opposite conclusion

. . . .

. . . [T]he legislative history shows that the 1988 amendments were intended only to effect a limited expansion of the definition of production.

Id.

of law.¹⁴³ That was, no doubt, a clear and proper (and most likely correct) exercise of its exclusive appellate power to review a final judgment by the CIT under 28 U.S.C. § 1295. But the Federal Circuit's confusion¹⁴⁴ regarding the type of review that it and the CIT should have conducted on the Agency's statutory interpretation under U.S. Supreme Court case law is

143. See CHARLES H. KOCH, JR., 2 ADMIN. L. & PRAC. § 8.13 (2d ed. 2006) at 436 (stating that “[d]e novo review is particularly appropriate for questions of law. The higher court will make its own judgment as to interpretations of statute”).

Some courts, however, treat district court factual review differently. They review district court determinations under the clearly erroneous standard. That is, they test for clear error rather than making their own judgment

Most appellate courts, however, conduct de novo review of district court's conclusions [sic] about the agency findings of fact. Even though district courts generally make factual [findings] to which the appellate court must defer, when the lower court reviews an agency's conclusions as to facts its own factual conclusions are entitled to no particular weight. “[T]he district court's decision must be reviewed without deference because the findings of fact were made by the agency.” Where the district court upholds the agency, after taking evidence itself, the conclusion may have particular weight.

Id. at 437 (emphasis added).

144. *Marathon II*, 370 F.3d at 1382 n.2.

The government argues that we should defer to the Secretary's position in this case pursuant to *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* *Chevron* deference, however, is applicable only when it appears “that Congress delegated authority to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.” Where that standard is not satisfied, only the lesser deference is accorded under *Skidmore v. Swift & Co.* As an initial matter, the government has not addressed the criteria for applying full *Chevron* deference and whether the application of those criteria suggest giving *Chevron* deference to the Secretary's investigative determinations. Moreover, it is not entirely clear what it is that the government wishes us to defer to. The Secretary did not explicitly construe the term “production” in the adjustment assistance statute, but instead merely concluded that the [gaugers], and thus their firm, were not involved in the production of crude oil. In any event, regardless of whether it is appropriate to accord *Chevron* or *Skidmore* deference to an unarticulated, implicit construction of the term “production,” that issue has no effect on the disposition of this case, because we would reach the same result in this case with or without deference.

Id. (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) and quoting *United States v. Mead Corp.*, 533 U.S. 218 (2001)) (citations omitted).

troubling.¹⁴⁵ The CIT had clearly analyzed DOL's decision under the *Chevron* standard,¹⁴⁶ and so too, at least implicitly, did the Federal Circuit.¹⁴⁷ As the Federal Circuit made clear, however, the issue of what level of deference DOL's legal interpretation warranted was moot in *Marathon II*, because "with or without [*Chevron*] deference," it would have reached the same result.¹⁴⁸ Suffice to say, the Federal Circuit's fumbling of this issue in *Marathon II*, is likely to cause confusion for TAA litigants that will only be worked out in future litigation, unless Congress steps in to clarify and delineate the appropriate roles among DOL, the CIT, and the Federal Circuit.

The Federal Circuit's treatment of the CIT's judgment on the mixed question of fact and law, on the other hand, is less clear and even more troubling. When facts are *not* in dispute, it is clear—from the Federal Circuit's decision in *Former Employees of Barry Callebaut v. Chao*¹⁴⁹—that the Federal

145. Under the U.S. Supreme Court's *Chevron* case, a federal court is *required* to defer to a federal agency's construction of a statute if Congress has spoken directly to the precise question at issue. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1994) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the Agency, must give effect to the unambiguously expressed intent of Congress."). When conducting a *Chevron* analysis to determine whether the administrative agency's construction of the statute is permissible, the federal court begins by analyzing the statutory language and proceeds to consideration of the statute's legislative history only if Congress' intent is not clear from a plain reading of the text. *Id.* at 837, 843.

146. *See Marathon II*, 277 F. Supp. 2d at 1305–10 ("In the absence of any attempt by the responsible agency to discern the statutory meaning of the phrase 'otherwise produces oil,' the court must look to other sources. The court begins with the language of the statute However, it is also appropriate to consider the legislative history to confirm congressional intent.").

147. *See Marathon II*, 370 F.3d at 1382–84, ("We disagree with the court's conclusion [on] the 1988 amendments . . . we draw the opposite inference [T]he legislative history shows that the 1988 amendments were intended only to effect a limited expansion of the definition of production Another section of the 1988 Act provides further support").

148. *Id.* at 1382 n.2. Because, in my view, *Chevron* deference is inappropriate for questions of fact and mixed questions of fact and law in TAA cases, the Federal Circuit should conduct de novo review of the CIT's judgments under the *Chevron* standard on matters of law only, but—at least in some cases—not on questions of fact or mixed questions of fact and law. *See infra* note 145 (discussing the issue of how much power the CIT has to directly order the certification of workers).

149. *Former Employees of Barry Callebaut v. Chao*, 357 F.3d 1377 (Fed. Cir. 2004).

Circuit conducts de novo appellate review of the CIT's judicial review of DOL's factual findings: "In reviewing decisions of the Court of International Trade on questions of substantial evidence, this court 'step[s] into the shoes of the Court of International Trade and duplicates it review."¹⁵⁰ But when facts are in dispute, the Federal Circuit's appellate role is not well-defined. Although its review of questions of law is always de novo—disputed facts or not—in *Former Employees of Sonoco Products v. Chao*,¹⁵¹ the Federal Circuit seems to have established a three-category spectrum for the nature of the appellate review it would conduct on questions of mixed fact and law, depending on whether or not the facts are in dispute and whether the standard chosen determines the outcome of the case:

[1] at one end of the spectrum where the facts are not in dispute and the selection of the appropriate standard resolves the case[;] . . . [2] the other end of the spectrum where the application of the standard to disputed facts is necessary to determine whether [a certain] requirement is met[;] and . . . [3] in the middle of the spectrum are cases where the facts are undisputed, but the application of the appropriate standard to the undisputed facts is required . . . but does not automatically dictate the outcome.¹⁵²

If nothing else, the Federal Circuit's somewhat careless handling of the factual findings at issue in the *Marathon* litigation¹⁵³ was a missed opportunity to clarify the respective

150. *Id.* at 1381 (quoting *Taiwan Semiconductor Indus. Ass'n v. Micron Tech., Inc.*, 266 F.3d 1339, 1343 (Fed. Cir. 2001)).

151. 372 F.3d 1291 (Fed. Cir. 2004), *reh'g en banc denied* (Fed. Cir. 2004).

152. *Id.* at 1295.

153. In seeking to overturn the CIT's holding—that the gaugers were "engaged in the production of crude oil [because] they were employed by a firm, or appropriate subdivision of a firm, that . . . otherwise produces oil" and, therefore, were entitled to certification—DOL made two arguments to the Federal Circuit on appeal: "First, the government argue[d] that the court improperly overturned the Secretary's finding that the employees provided a service and did not 'produce' crude oil. Second, the government argue[d] that the court exceeded its reviewing authority under 19 U.S.C. § 2395 by directing the Secretary to certify the employees for adjustment assistance." *Marathon II*, 370 F.3d 1375, 1380 (Fed. Cir. 2004). The Federal Circuit noted that "[t]he government has not challenged the portion of the court's ruling rejecting the Secretary's finding that

roles DOL, the CIT, and the Federal Circuit should play in TAA cases when there is a mixed question of fact and law and the CIT accepts DOL's factual findings on purely factual issues, but rejects its statutory interpretation and, hence, its legal conclusion. That, precisely, *was* the situation that existed before the Federal Circuit in *Marathon v. Chao*, but the Federal Circuit missed the opportunity to clarify the appropriate roles among DOL, the CIT, and the Federal Circuit, and to articulate the proper standard of review that it would undertake in such cases. Thus, *Marathon II* is troubling because it highlights that Congress has not clearly delineated the roles among DOL, the CIT, and the Federal Circuit in TAA litigation.

Moreover, the Federal Circuit's sloppiness in handling DOL's factual findings, which the CIT *accepted*—i.e., the nature of the gaugers' duties and when and for whom they performed them (a pure question of fact)—and *rejected*—i.e., that the workers' firm was not engaged in producing an article within the meaning of the TAA statute (a mixed question of fact and

the imports of crude oil *did not* contribute significantly to the employees' loss of their jobs." *Id.* at 1380 n.1 (emphasis added). Consequently, the CIT's reversal of DOL's factual finding stands: imports of crude oil *did* contribute significantly to the employees' loss of their jobs, because DOL did not challenge the CIT's factual finding. *Id.* So the ultimate question on appeal to the Federal Circuit was whether the particular gaugers who filed a petition for TAA benefits were "production workers" under the statute because their firm was engaged in "otherwise producing oil." *Id.* at 1381; *see also id.* at 1381–82 ("We conclude that the trial court erred in its approach to the 'production' issue. While the definition of the statutory term 'production' is a question of law, the question whether particular employees are engaged in 'production' within that definition is factual Contrary to the view of the trial court, the fact that part of the gauger's responsibility involved quality control does not necessarily render them production workers."). Elsewhere I thoroughly review the *Marathon* litigation to show that the CIT had accepted the pure factual findings made by DOL, but rejected DOL's legal conclusion because it disagreed with the effect of DOL's implicit interpretation of the statutory phrase "otherwise produces oil" and because it failed to explain its reasoning and failed to conduct an adequate investigation on factual assertions in the agency record that contradicted DOL's factual finding on the cause of the gaugers' layoff. *See supra* notes 143–49 and accompanying text. Suffice to say here, though, the Federal Circuit's handling of the factual questions underlying the CIT's judicial review of DOL's determination was a bit sloppy and did not permit the type of analysis that could have clarified the appropriate, respective fact finding, lawmaking, and appellate roles among DOL, the CIT, and the Federal Circuit.

law)¹⁵⁴—masks the troubling reality that the Federal Circuit either missed or dodged an opportunity to articulate why de novo review is the appropriate standard of appellate review in a case—”at one end of the spectrum where the facts are not in dispute and the selection of the appropriate standard resolves the case”—even though it is on “the other end of the spectrum” from a case “where application of the standard to disputed facts is necessary to determine” the outcome of the case.¹⁵⁵ Because *Marathon v. Chao* was *not* in the middle of the spectrum, the appropriate standard of appellate review in those cases also remains unclear. It appears from *Marathon II* that the Federal Circuit plans to exercise de novo appellate review on questions of law, questions of fact, and questions of mixed fact and law, when facts are in dispute and when facts are not in dispute, whenever that standard of review resolves the case (i.e., *always?*).

In *Marathon II*, the underlying facts were undisputed; it was the mixed question of fact and law that was in dispute, and the Federal Circuit sided with DOL instead of with the CIT.¹⁵⁶ *Marathon II*, therefore, is most troubling because, under the current scheme for judicial review of DOL determinations, the CIT is *required* to treat DOL’s findings of fact with the same deference that an appellate court would typically treat a trial

154. Compare *Marathon II*, 370 F.3d at 1381–82 (“In this case, [DOL] found that the gaugers were employed by the transportation company, *which was not affiliated with the producers*, and that the gaugers’ role was to test the stored crude oil on behalf of the purchasers to determine its quantity and quality. Under those circumstances, it was reasonable for [DOL] to conclude that the gaugers were not involved in the production process but instead were serving as buyers’ agents ensuring that the quantity and quality of the produced product were consistent with the terms of the proposed sale.”) (emphasis added), with *Marathon I*, 277 F. Supp. 2d at 1310 (“The court finds that the [gaugers] in this case engaged in the production of crude oil, by definition of their job *as described by [DOL’s remand determination]. As either independent contractors or as employees of Marathon Ashland Pipe Line, they were employed by a ‘firm, or appropriate subdivision of a firm, that engages in exploration or drilling for oil or natural gas, or otherwise produces oil or natural gas.’*”) (emphasis added).

155. *Former Employees of Sonoco Prods. Co. v. Chao*, 372 F.3d 1291, 1295 (Fed. Cir. 2004).

156. See *Marathon II*, 370 F.3d at 1381 (noting, while siding with DOL, that the definition of “production” was a question of law, while whether particular employees were engaged in “production” was factual).

court's findings of fact, even though DOL's findings of fact are not the product of a trial, and even if the CIT rejects them either because they are not based on substantial evidence in the Agency record or they are the product of an inadequate investigation.¹⁵⁷ In essence, by conducting de novo appellate

157. Concern about the proper level of deference to agencies' actions is not new. See, e.g., David Currie and Frank Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1, 1-2 (1975) (presenting "a comprehensive analysis of the variables that must be isolated and weighed in determining the optimum forum for judicial review of administrative action" by trifurcating agency action into formal agency determinations, informal rule making, and informal adjudication); see also Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1113-15 (1990) (identifying four issues raised by the specialized review of administrative action, distinct from those presented by specialized adjudication in nonadministrative contexts "that the academic literature has not adequately explored"). But in TAA cases, DOL engages in *informal adjudication*, so the high level of deference to its factual findings required under *Marathon II*—no matter what—is troubling. See generally CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE 417-40 (2d ed. 1997) ("Some have urged that the formality of the administrative process should determine the proper court [for reviewing agency decisions]. For example, formal adjudications, being more like trials, would be reviewed by an appellate court. Whereas informal adjudication and rulemaking would be reviewed at the trial level court. The crucial question, however, is not the formality of the administrative process but the adequacy of the record for judicial consideration. . . . In general, the choice affects the allocation of functions between the Agency and the courts. The choice of an appellate court grants greater status and finality to the administrative decisions. . . . Moreover, appellate tribunals, since they do not find facts, necessarily give greater deference to the agency decision. . . . The choice of trial court consideration results in less deference to the agency decision. Moreover, trial courts find facts and hence, even though the review is to be made on the administrative record, trial courts give agency findings of fact more scrutiny as a practical matter. Thus the choice of a review system which starts at the trial level courts has some practical impact on the nature of the review. In short, the choice between a court of first instance or an appellate court often becomes important. The choice has considerable practical impact on the scope of the administrative program as well as the nature of judicial review."); Currie & Goodman, *supra* note 157, at 5-6 (The rationale for skipping trial court review of agency orders and proceeding directly to appellate court review is "plain enough. The key point is that the [trial] court is unnecessary here because the functions it ordinarily performs in the judicial system are either performed by the administrative agency itself or are relatively unimportant. First and foremost, a court trial need not be held because the record has already been developed at the administrative level in trial-type hearings conducted . . . in accordance with the Administrative Procedure Act []. Second, a [trial] court opinion defining and focusing the issues, frequently useful to the appellate court in other types of litigation, is superfluous because opinions by . . . the Agency itself will already have served that purpose. Third, the availability of a convenient and relatively local point of entry into the judicial system, valuable to litigants of modest means in

review of the CIT's legal interpretation and de novo appellate review on an undisputed factual question, as well as on a disputed question of mixed fact and law in *Marathon II*, the Federal Circuit effectively eviscerated the workers' statutory right to judicial review by the CIT. Again, the quarrel here is not with the Federal Circuit's de novo appellate review of the CIT's *mis*interpretation of the law but, rather, that the Federal Circuit missed an opportunity to clarify respective roles by not articulating the proper deference DOL's legal conclusions merit in TAA cases.

Some of what is wrong with the current scheme for judicial review requires congressional action.¹⁵⁸ But much can be corrected, or at least made less significant for workers hurt by expanded free trade, if the Agency effectively deals with the certification questions arising under the TAA program.¹⁵⁹

IV. MAKING TAA BENEFITS MORE ACCESSIBLE TO ELIGIBLE WORKERS

What, then, can and should DOL do to fix its broken certification process, and how could Congress amend the TAA Act to reduce worker opposition to further U.S. trade liberalization? DOL would better fulfill its duty of certifying workers' eligibility for TAA benefits by: (1) improving the

other civil cases, is of much less importance in many areas of administrative review where the economic stakes are typically high and the litigants well able to bear the costs. Finally, the vital screening role which courts of first instance play in holding down the volume of appellate litigation is, once again, played here by the administrative process. Only a small fraction of the cases processed by most agencies wind up in court, and a high proportion of those that do could be expected to reach courts of appeal even if required to pass en route through [trial] courts."); Revesz, *supra* note 157, at 1114 ("[W]here Congress has delegated authority to administrative agencies, Article III review of administrative action is only one component of a complex set of relationships among Congress, administrative agencies . . . Article III courts, as well as among the different levels and jurisdictions of the Article III judiciary [and] [t]he sum of these relationships defines what might be called the administrative lawmaking system.").

158. See Revesz, *supra* note 157, at 1141–43 (suggesting several possible Congressional actions, such as overruling regulations by amending the controlling statutes, and/or using power over budget and appointments to influence administrative decision making).

159. See *Proposed Labor Department Rules*, *supra* note 95, at 1530 (detailing the proposed DOL rules for trade adjustment assistance).

process of petitioning for TAA benefits; (2) conducting more effective investigations of workers' eligibility, while adhering to its primary role of assisting workers adjust to job loss and transition to new livelihoods; and (3) shifting the burden of producing evidence to workers' firms and subdivisions through the adoption of a formal, evidentiary burden-shifting rule. But fixing DOL's broken certification process will not, by itself, eliminate worker resistance to expanded free trade. Therefore, Congress should consider amending the TAA Act to: (1) correct the inapt scheme for judicial review of DOL's negative eligibility determinations; (2) create an incentive for employers to cooperate in DOL's TAA investigations, if DOL does not adopt a formal, evidentiary burden-shifting rule; and (3) extend coverage to service workers.

A. *Administrative Improvements*

When DOL publishes its notice for comments on certification questions arising under the TAA program,¹⁶⁰ it should emphasize that it is looking for ideas to fix the certification process by improving the petition process and its general investigative approach. DOL should also propose a rule that formally places on employers the burden of producing evidence of the reason for the petitioners' job loss—and other evidence that DOL needs to make eligibility determinations—by adopting an evidentiary burden-shifting scheme. When coupled with an improved petition process, such a scheme would effectively flip the current presumption that workers are *not* eligible to apply for TAA benefits, to a presumption that they *are* eligible, unless their employer produces substantial evidence that the workers' job loss was not due to expanded free trade, or that their firm is not engaged in the production of an article, or is not an upstream supplier or downstream producer.¹⁶¹

160. *Id.*

161. Apart from the notice and comment process, DOL should seek increased appropriations during the annual budget process to fix its certification process. The Employment and Training Administration's Fiscal Year 2008 Budget for "Federal Unemployment Benefits and Allowances and trade-impacted workers" is almost \$889M. DEP'T. OF LABOR, EMPLOYMENT AND TRAINING ADMINISTRATION FY 2008 BUDGET 3 (2007), http://www.doleta.gov/Budget/FY08_ETA_Budget_ppt.pdf. The Agency should

1. *Improve the Petition Process*

Brad Brooks-Rubin¹⁶² offers several viable suggestions for improving the TAA petition process:

Development of an expanded petition form/process would likely improve dramatically DOL's ability to conduct a proper investigation. DOL should first issue more detailed guidance (in both English and Spanish) on the petition process, particularly by providing examples and other assistance for workers to understand the type of information necessary for the agency to review their claim. Workers completing the initial petition may not understand the full implications of the questions, or have access to the accurate information, yet may still feel obligated to complete the document, or ask their former employer to complete it, even if it means providing bad information. With a petition process that either provides detailed instructions and examples for workers, or even access to legal assistance in the preparation of their petition, so that the information and assertions workers provide are worthy of detailed review, the investigation would likely be based on more usable data and lead to more credible results.¹⁶³

also allocate less of its overall budget to litigating against workers, and more to conducting effective investigations on workers' behalf. The Employment and Training Administration's website does not indicate how much is spent on administering the TAA Act or what the budget allocation is for litigating against workers. *See id.*

162. Brooks-Rubin was a founding member of the Customs & International Trade Bar Association's *ad hoc* Committee on TAA, and the former Coordinator of the TAA Legal Appeals Center for the TAA Coalition. Brooks-Rubin, *supra* note 120, at 797, 797 n.†.

163. *Id.* at 819–20 (footnote omitted). Brooks-Rubin calls for greater access to and involvement of lawyers in the TAA certification process. *Id.* at 820. I argue for making TAA cases less, not more, adversarial. However, if DOL and Congress refuse to fix the broken administrative scheme—that currently makes it far too difficult for workers to get the TAA benefits that Congress has mandated—then I would join his call for more lawyers to be involved, and would attempt to obtain for workers more aggressive representation, including litigation on behalf of workers, by personally seeking to establish TAA clinics at my alma maters: New York University School of Law; The John Marshall School of Law, Center for International Business and Trade Law; and Tufts University's, Fletcher School of Law and Diplomacy.

DOL should conduct focus groups with workers who have been certified for TAA benefits and workers who have been denied them,¹⁶⁴ as well as with counsel who have experience representing workers in TAA cases, to gather more good ideas.

2. *Conduct More Effective Investigations*

To better fulfill its statutory duty of certifying workers' eligibility, DOL should do a better job of conducting its investigations in four ways. First, it should improve its fact-finding capacity for making eligibility determinations. Second, it should articulate more clearly the determinative facts upon which it bases its eligibility determinations. Third, it should ensure that a sufficient agency record exists to enable adequate judicial review of those determinations. Fourth, it should be less zealous in its advocacy *against* workers' certification in the CIT and the Federal Circuit.

To improve its administrative performance, DOL should adhere more closely to its proper role in the certification process.¹⁶⁵ DOL's first and foremost congressionally-mandated role in TAA cases is to help workers adjust to job loss and *assist* them in transitioning to new livelihoods. With that principal mindset front and center, DOL should then remain narrowly focused on its two primary statutory duties in TAA cases: (1) finding determinative facts upon which to base its eligibility determination; and (2) ensuring that a sufficient agency record exists to enable adequate judicial review of that determination. DOL should not assume, or at least should not go out of its way to assume, a law-making role, especially when the CIT's

164. Perhaps this group could even be paid for their service.

165. Although the CIT has been highly critical of the investigative quality underlying some of DOL's negative eligibility determinations, as discussed above, the Agency's investigative shortcomings do not seem to be related to its existing *written* guidelines for investigating TAA petitions. See Brooks-Rubin, *supra* note 120, at 803-06 (listing written guidelines for DOL petitions, and noting CIT judges' harsh criticism of DOL). When DOL publishes its notice for comments, it should *not* focus on revising its existing, written guidelines for conducting TAA investigations. But as demonstrated by the cases referenced above, in practice DOL's written regulations are not always followed. See, e.g., *supra* note 117 and accompanying text (referencing the 2003 *Ameriphone* case).

interpretation of the TAA Act's statutory language differs from the Agency's interpretation.

The biggest practical problem with DOL's investigations arises when the investigation results in an inadequate agency record. Brooks-Rubin suggests relying on third-party evidence to ensure that an adequate agency record exists in TAA cases:

DOL should be required to generate a record that goes beyond exclusive reliance on statements from the workers and company officials. No record should be deemed complete unless objective, third party evidence is gathered on the issues relevant to the case, particularly, as explained above, when the company itself has completed the petition on behalf of the workers. Such third party evidence could include, depending on the issues at hand, the sources consulted by the CIT in *Former Employees of Marathon Ashland Pipeline, Inc.*, trade-specific publications, trade data for an industry, consultations with industry experts, etc. The failure to develop a record inclusive of such sources should be deemed *prima facie* evidence that DOL did not conduct a reasonable investigation. Although this, as well as the recommendation [below] regarding company counsel, may require a 60-day, or even a 90-day, investigation period, even these somewhat longer time frames are preferable to the time it takes to conduct litigation, or to a complete denial resulting from a poor investigation that is never appealed.¹⁶⁶

While Brooks-Rubin's suggestion is a good starting point, it does not go far enough to solve the underlying cause of DOL's flawed investigative process, and it might unnecessarily complicate the certification process, especially when employers have substantial evidence to establish whether or not the workers' job loss was caused by increased imports or shifts in production. The root problem with the Agency's investigative approach is that it places too much of the burden of producing evidence on workers.

166. Brooks-Rubin, *supra* note 120, at 822–23 (footnote omitted).

3. *Adopt an Evidentiary Burden-Shifting Scheme*

Employers should be the *primary* source of the evidence that DOL needs to make a valid determination on workers' eligibility for TAA benefits.¹⁶⁷ Of course, it is *DOL's* duty—not the workers'—to “marshal all relevant facts” to make a reasonable determination on the workers' petition, and to ensure that an adequate agency record exists for judicial review.¹⁶⁸ And while there is no defensible reason for employers not to cooperate in TAA investigations, firms often have a knee-jerk reaction to government requests related to employment matters, particularly those involving job loss due to outsourcing of work and offshoring of jobs.¹⁶⁹ Therefore, DOL should do a better job of educating employers on how it is in their best interest to cooperate in TAA investigations. After all, TAA benefits are, in essence, “free severance benefits” that the firm can help obtain

167. *See id.* at 820 n.105 (noting that a company had succeeded in getting its workers certified for TAA benefits) (citing Sharon Smith, *30 Will Get Aid After Layoff; Turbon International Will Move Manufacturing Jobs to Germany*, YORK DAILY REC., Dec. 3, 2004, at 10). Brooks-Rubin thinks that “it is not necessary to eliminate the practice of employer completion of the petitions, as these are sometimes successful efforts,” yet suggests that petitions completed by firms on behalf of workers' be treated with skepticism: “DOL should be required to subject petitions completed by the petitioners' former employer to an even higher level of scrutiny and investigation . . . by providing for an immediate and automatic remand of a negative DOL finding to a second investigator.” *Id.* at 820. *See also* GAO 2006 Report, *supra* note 1, at 73, 76 (observing that of five plant closures studied, two companies submitted TAA petitions on behalf of the laidoff workers).

168. 29 C.F.R. § 90.12 (2007).

169. *See, e.g.*, Brooks-Rubin, *supra* note 120, at 798 nn.7–8, 822 n.110 and corresponding text. Multinational employers, in particular, also seem to have an obsession with the illusion of keeping secret the fact that they offshore jobs, even though discovering that fact is easy and their off-shoring of work is not a secret to anyone capable of conducting even modest research into their global supply chains. *See* Dean Calbreath, *Outsourcing Still Growing, Study Finds; Public Pressure Does Little to Stem Job Losses*, SAN DIEGO UNION TRIB., May 23, 2004, at H1 (noting Forrester Research analyst John McCarthy's statement that, as outsourcing becomes increasingly common, “bad public relations will force many companies to hide their off-shoring”). It is now common knowledge that globally competitive firms have had to outsource at least some work to foreign companies to remain competitive, yet some multinational firms are still reluctant (irrationally in my opinion) to admit when their workers are displaced due to increased imports or shifts in production, for fear of negative public relations. *See, e.g., id.* (stating that companies go as far as to prohibit words like “offshoring” and “outsourcing” from appearing on company related publications).

for its laid-off workers. At the very least, it is not justifiably *against* the firm's interests to help laid-off workers obtain TAA benefits. Aside from being a symbol of good corporate citizenship, employees who remain employed by the firm might take notice of how the firm treated the laid-off workers and, consequently, the remaining employees might be more highly motivated to contribute to achieving the firm's objectives. A good place to start de-conditioning employers, with respect to TAA investigations, is at the largest annual conference of human resource professionals sponsored by the Society for Human Resource Management.¹⁷⁰ Another venue for reducing employer resistance to cooperating in TAA investigations is at continuing legal education seminars sponsored by the Customs and International Trade Bar Association,¹⁷¹ as well as at section meetings of the American Bar Association, such as the Labor and Employment Law,¹⁷² Corporate General Counsel,¹⁷³ and International Law sections.¹⁷⁴

The ultimate issue, though, is how to create the right incentive to encourage employer cooperation in TAA investigations. Clearly, firms *must* be involved in TAA investigations; and they should be the *primary* source of evidence upon which DOL bases its eligibility determinations. Brooks-Rubin suggests "standardiz[ing] who within the company completes the DOL questionnaire" to increase the credibility of employer responses to DOL's investigative inquiries:

[His] suggestion would be to direct all questionnaires to in-house counsel, or if there are none, to the company's

170. The next annual Society for Human Resource Management conference is scheduled for June 22–25, 2008 in Chicago. Society for Human Resource Management, SHRM 2008 Annual Conference and Exposition, <http://www.shrm.org/conferences/annual/> (last visited Dec. 22, 2007).

171. Customs and International Trade Bar Association, <http://www.citba.org/> (last visited Dec. 22, 2007).

172. American Bar Association, Section of Labor and Employment Law, <http://www.abanet.org/labor/home.html> (last visited Dec. 22, 2007).

173. American Bar Association, Section of Business Law: Corporate General Counsel, <http://www.abanet.org/dch/committee.cfm?com=CL250000> (last visited Dec. 22, 2007).

174. American Bar Association, Section of International Law, <http://www.abanet.org/intlaw/> (last visited Dec. 22, 2007).

outside legal counsel. . . . [R]eliability depends not only on an individual's credibility, but on her knowledge. . . .

. . . .

By directing the questionnaires to the company's counsel, with instructions to the attorney to consult with all relevant company departments, DOL can rely on the standards of legal professional ethics in demanding that information be provided in a complete and accurate manner. It is also reasonable to assume that, in most cases, attorneys will research the relevant standards and issues in order to provide DOL with usable answers, rather than guess or provide perfunctory answers. DOL should develop a model cover letter to accompany the questionnaire to the lawyer, directing her to the relevant statutory and regulatory provisions, as well as reference to a compendium of recent CIT and Federal Circuit cases. . . .

. . . .

. . . Placing the questionnaire with in-house or outside counsel, and requiring transparency as to how the company reached its conclusions, will provide DOL with more usable data and analysis. And might enable the company to appreciate the positive public relations that may ensue when workers are certified for TAA. Structuring the process in this manner will also provide the reviewing courts with a clearer sense of what actually happened in the investigation, and whether the investigation was reasonable.¹⁷⁵

175. Brooks-Rubin, *supra* note 120, at 820–22.

In responding, the company's counsel should be asked to identify whom within the firm she consulted with in generating the response. At a minimum, this should include job titles such as a Plant Manager, Operations Manager, or a comparable individual who has specific responsibility for oversight of what the firm produces. In addition, the lawyer should consult with the Traffic, Logistics, or Import/Export Department to review specific data, generated from the firm's customs brokers and/or freight forwarders, on the firm's level of importing. DOL should also be provided with a detailed organizational chart, setting forth names, titles, primary responsibilities and direct contact information. This chart would then be used by DOL to review and identify additional individuals capable of discussing the pertinent issues throughout its investigation.

The problem, though, is deeper than just who within the firm is obligated to produce evidence. The problem is: while workers have an incentive to produce evidence of their eligibility, they do not possess it; on the other hand, employers possess the evidence to establish eligibility or ineligibility, but do not have an incentive to produce it.¹⁷⁶ Therefore, part of fixing DOL's broken certification process must involve using appropriate "carrots" and "sticks" to create an incentive for employers to produce the evidence they have that the Agency needs to make eligibility determinations. Some ideas for increasing employer cooperation require legislative changes to the TAA Act.

One thing DOL could do on its own, without any congressional action, is adopt an evidentiary burden-shifting rule akin to the scheme applied by the Equal Employment Opportunity Commission (EEOC) in employment discrimination cases under *McDonnell Douglas Corp. v. Green*.¹⁷⁷ When coupled with an improved petition process, by which workers could establish prima facie eligibility for TAA benefits, employers

Requiring this level of detail in the questionnaire response is necessary for DOL to be assured that the answers being provided are not tinged with concern for the company's public image. Despite the fact that the payouts for TAA, unlike other worker relief programs, do not cost the company, some companies have been wary to be seen as contributing to the 'outsourcing' trend.

Id. at 821–22 (footnotes omitted).

176. This situation is somewhat analogous to the lack of incentive that firms have to seek trade remedies that underlies the logic of the Byrd Amendment or the case for a private right of action in WTO litigation. See generally Xuesong A. Yu, *Note: The Byrd's View Might Not Give You a Whole Picture—the Battle in the World Trade Organization on the Continued Dumping and Subsidy Offset Act of 2000*, 17 FLA. J. INT'L L. 417 (2005). This insight was pointed out to me by my thesis advisor at the Fletcher School, Professor Joel Trachtman.

177. 411 U.S. 792 (1973). Under *McDonnell Douglas*, a party claiming intentional employment discrimination in hiring establishes a prima facie case before the Equal Employment Opportunity Commission by producing evidence that shows: he or she is a member of a protected class; he or she applied for and met the basic qualifications of the job; despite his or her qualifications, he or she was not hired; and the employer continued seeking applicants. *Id.* at 802. Once established, the burden of producing evidence then shifts to the employer to articulate a nondiscriminatory reason for not hiring the claimant. *Id.* If the employer satisfies this burden, it is up to the claimant to produce evidence to establish that the employer's articulated, nondiscriminatory reason for not hiring him or her was a pretext for discrimination. *Id.* at 804–05.

would then be allowed to produce evidence showing that the petitioning workers were *not* eligible because they lost their jobs for reasons other than increased imports or shifts in production, or because the firm was not engaged in production or was not an “upstream supplier” or “downstream producer.” Accordingly, when DOL publishes its notice for comments on certification questions arising under the TAA program, it should announce its intention to adopt an evidentiary burden-shifting scheme similar to the *McDonnell Douglas* framework.

An investigative scheme that puts the burden on the workers’ firm to produce rebuttal evidence—coupled with an improved petition process that assists workers to more easily establish a *prima facie* case that they are eligible for certification—would go a long way in helping DOL carry out its congressional mandate of certifying workers’ eligibility for TAA benefits. Such a burden-shifting scheme, in essence, would flip the presumption in *favor* of workers’ eligibility, and away from the current presumption *against* workers’ eligibility, pending employer-produced evidence to the contrary. Most competent HR professionals and in-house counsel should already be familiar with the *McDonnell Douglas* framework. And taking the burden of production off of workers and putting it on the firm that lays them off makes more sense than DOL’s current, haphazard investigative approach, because the workers’ firm is in a better position than the workers to know the key facts underlying the bases for DOL’s eligibility determination, whether:

- increased imports or a shift in production caused the workers’ layoffs; and
- the firm was engaged in the production of an article; or
- the firm was an upstream “supplier” or “downstream producer” under the statute; and it supplied 20% or more of its sales or production to a firm whose workers were certified eligible for TAA benefits; or the loss of business with such a firm contributed importantly to the secondary workers’ layoff or threat of layoff.¹⁷⁸

178. See 19 U.S.C.A. § 2272 (West 2007).

DOL's current investigative approach is also too antagonistic toward workers.¹⁷⁹ It is simply in everyone's best interest to make DOL's investigative process a more dispassionate collection of evidence by the Agency to substantiate if and when workers are *not* entitled to TAA benefits.¹⁸⁰ Of course, workers can and should produce evidence in support of their eligibility, regardless of whether they are presumed to be entitled to certification or not. But it should be up to the firm that lays workers off to produce sufficient evidence to establish whether or not its former employees are entitled to TAA benefits. If neither the workers nor their firm are able to produce sufficient evidence for DOL to determine their eligibility, a presumption in favor of workers' eligibility would make the Agency's job less difficult, and the certification process would be less adversarial and oppositional to workers' interests. As a result, the Agency would be more likely to carry out the congressional mandate to help workers adjust to job loss and transition to new livelihoods.

While there is some risk that such a presumption in favor of workers' eligibility could open the floodgates to TAA applications by *ineligible* workers, given the reality of today's global marketplace, it is more equitable to presume that workers' job loss *is* due to expanded free trade than not. Moreover, DOL's

179. In my former capacity as an HR executive, I facilitated the certification of workers who lost their jobs due to a shift in production to Mexico not only because it was the right thing to do, but also because I recognized that it was in the mutual interest of both the laidoff employees, and the company, even though it was not consistent with the historically adversarial relationship between the company and its employees and their union at that particular operating facility.

180. When I litigated labor and employment disputes, one of my favorite cases was representing an employer in a labor arbitration that involved a "dispute" over where the grievant's hire date put him on the plant's seniority list in relation to other employees in the bargaining unit. The plant seniority list was used to determine the order of layoffs. While the union had a duty to represent the grievant, both the union and the company actually were disinterested in where on the list the grievant fell. The "hearing" was orderly, and both parties cooperatively introduced into the arbitral record all of the evidence necessary for the arbitrator to make a binding ruling. In the end, the arbitrator placed the grievant lower on the plant seniority list than he initially thought he belonged and where he had been placed before he filed his grievance. The grievant lost his case. But the union did its duty, and the company produced most of the evidence the arbitrator needed to decide the case. Most importantly, though, the grievant accepted the decision, not just because he had no other recourse, but because he felt it was fair, even though he knew the result would cause his layoff from the plant.

eligibility determination would still be based on substantial evidence in the Agency record, and a *McDonnell Douglas* scheme would likely ensure more and better evidence upon which the Agency bases its determination.¹⁸¹

B. Legislative Changes

Congress should consider amending the TAA Act to correct a structural problem that workers face in TAA cases: a statute that with one hand mandates worker certification for TAA benefits by DOL,¹⁸² and with the other hand eviscerates their right to judicial review of the Agency's decision that denies them certification.¹⁸³ Much of DOL's difficulty in carrying out the congressional mandate to certify workers' eligibility stems from its apparent working assumption that petitioners bear the burdens of production and persuasion that they are entitled to benefits under the TAA Act.¹⁸⁴ The changes discussed in the section above are aimed at addressing the root cause of the burden of production problem. But if DOL does not fix its broken certification process as recommended above, Congress should consider amending the TAA Act to create an incentive for employers to cooperate in the Agency's certification process. Both of these legislative changes would require a fundamental overhaul of the TAA Act. Therefore, Congress is more likely to consider less fundamental changes, like those proposed in

181. See *supra* note 177 and accompanying text (explaining how the *McDonnell Douglas* framework can create a more complete evidentiary record by starting with an assertion of injustice, and then shifting the burden to the employer to prove the injustice did not occur). The evidentiary and legal difficulties that DOL has encountered related to whether the employer was engaged in the production of an article would largely disappear if the TAA Act is amended to cover service workers.

182. 19 U.S.C. § 2291(a) (2000).

183. See discussion *supra* Part III.B (explaining how case law in *Chevron* and *Marathon* interpreted Congress's judicial review structure in the statute to effectively deny workers the effect of their right to review by the CIT).

184. See U.S. Dept. of Labor, Employment & Training Administration, Trade Adjustment Assistance (TAA) and Alternative Adjustment Assistance (ATAA) Application Process-Detailed Petition Filing Instructions, <http://www.doleta.gov/tradeact/petitions.cfm> (last visited Dec. 22, 2007) (listing the filing requirements that must be met for a petition to pass muster, and stating that certified petitions will be issued only "[i]f the eligibility requirements have been met," requirements that are exclusively determined by the DOJ).

Senate Bill 122.¹⁸⁵ The 110th Congress will, no doubt, consider that bill, which would amend the TAA Act to extend coverage to service workers and address, superficially, some, though not all, of the TAA Act's shortcomings.¹⁸⁶

1. *Correcting the Inapt Scheme for Judicial Review*

In each of the cases discussed above and those referenced in the AFL-CIO's Issue Brief,¹⁸⁷ the CIT has expressed great frustration with the Agency's administrative performance, but it has also failed to address *why* DOL assumes an unnecessarily adversarial stance against workers seeking TAA benefits. Those cases illustrate a seemingly intractable problem: a lack of evidence in the agency record for DOL to determine workers' eligibility, because of the workers' willingness but inability—and their employer's unwillingness or inability—to produce evidence of job loss due to increased imports or shifts in production and other evidence DOL needs to make its eligibility determinations.¹⁸⁸ Consequently, the workers in those cases (the losers) might well have been denied compensation that Congress intended them to have as their end of the quid pro quo bargain for expanded free trade.

185. S. 122, 110th Cong. (2007). On July 23, 2007, Senators Max Baucus (D–Mont.) and Olympia Snowe (R–Maine) introduced a new bill (S. 1848), the Trade and Globalization Adjustment Assistance Act, which would extend authorization of the TAA program for five years and expand upon S. 122 by: doubling funds available for training under the TAA for Workers program to \$440 million and provide funding for an Ombudsman to, among other duties, inform workers of TAA benefits and report on common difficulties encountered by workers seeking them. Michael R. Triplett, *Senators Propose Overhaul of TAA Program Including More Money, Expanded Coverage*, 24 INT'L TRADE REP. 1056, 1056 (2007). Senate Bill 1848 would also triple funds available under the TAA for Firms program up to \$50 million, and create a \$300 million TAA for Communities program modeled after the existing TAA for Firms program, as well as streamline eligibility criteria under the TAA for Farmers and Fishermen program. *Id.*

186. S. 122, 110th Cong. (2007).

187. See AFL-CIO, *supra* note 116.

188. *Id.* at 1–3.

Before concluding her opinion in the *Chevron Products* case, Judge Ridgway¹⁸⁹ referenced the politics of a well-administered TAA program—which she said is “touted as the *quid pro quo* for policies of free trade”—by quoting Senator Max Baucus (D-Mont.) on the importance of TAA for expanded free trade: “[a]n honest, responsible program to address the needs of workers . . . who lose their jobs because of trade is perhaps the most important element of a politically viable program to expand trade. If it is ignored, efforts at trade liberalization will ultimately fail.”¹⁹⁰

Judge Ridgway also pointed out, in *Chevron Products*, the potentially severe human cost of uncompensated-for job loss, and cited a U.S. Court of Appeals case that had noted the equitable purpose of the TAA program:

[T]he enactment of the trade adjustment assistance provisions . . . reflected Congress’ recognition “that fairness demanded some mechanism whereby the national public, which realizes an overall gain through trade readjustments, can compensate the particular . . . workers who suffer a loss. . . . Otherwise the costs of a federal policy [of free trade] that conferred benefits on the nation as a whole would be imposed on a minority of American workers. . . .”¹⁹¹

189. Judge Ridgway became a member of the CIT in May 1998. United States Court of International Trade, Biography of Judge Delissa A. Ridgway, http://www.cit.uscourts.gov/Judges/ridgway_bio.htm. (last visited Dec. 22, 2007). “She is a recognized authority in the areas of international commercial law, international transactions and international commercial arbitration/litigation, and has published and lectured widely.” *Id.* She is also an “Adjunct Professor of Law on the international law faculty of Cornell Law School, and has previously taught International Business Transactions and International Commercial Arbitration in the LL.M. program at American University in Washington, D.C.” *Id.* “Judge Ridgway is a member of the American Law Institute and a Fellow of the American Bar Foundation. . . .” *Id.*

190. *Former Employees of Chevron Products Co. v. U.S. Sec’y of Labor*, 298 F. Supp. 2d 1338, 1350 (Ct. Int’l Trade 2003) (quoting Sen. Max Baucus, Chairman, Senate Finance Comm., Keynote Address, Trade Policy in 2002, Inst. for Int’l Econ., (Feb. 26, 2002)) (internal quotation marks omitted).

191. *Id.* at 1349 (quoting *Int’l Union v. Marshall*, 584 F.2d 390, 395 (D.C. Cir. 1978)).

There is a very human face on these cases. Workers who are entitled to trade adjustment assistance benefits but fail to receive them may lose months, or even years, of their lives. And the devastating personal toll of unemployment

Brooks-Rubin suggests some legislative action to fix DOL's broken TAA certification process:

In order to preserve adequate safeguards for workers, the number of remands, whether voluntary or court-ordered, should be limited to three, and extend no more than eighteen months from the date of the initial petition. Should DOL be unable to complete an investigation deemed reasonable within these limitations, the CIT should be empowered to conduct its own investigation and issue a decision.¹⁹²

Brooks-Rubin is right; Congress should address the CIT's power when exercising its authority to conduct judicial review in TAA cases.¹⁹³ But the CIT seems to already have the authority to refuse to remand TAA cases—and order certification itself—when a remand would be futile.¹⁹⁴ On two occasions when it has exercised that power,¹⁹⁵ the Federal Circuit has refused to

is well-documented. Anxiety and depression may set in, with the loss of self-esteem, and the stress and strain of financial pressures. Some may seek refuge in drugs or alcohol; and domestic violence is, unfortunately, all too common. The health of family members is compromised with the cancellation of health insurance; prescriptions go unfilled, and medical and dental tests and treatments must be deferred (sometimes with life-altering consequences). And college funds are drained, then homes are lost, as mortgages go unpaid. Often, marriages founder.

Former Employees of Chevron Products Co., 298 F. Supp. at 1347, 1349 (footnote omitted).

192. Brooks-Rubin, *supra* note 120, at 823. In a footnote to the just-quoted passage, Brooks-Rubin writes: "Although it is beyond the scope of this Article, it is worth noting that one of the other issues with TAA in need of a legislative fix is the need to 'stop the clock' during the appeals process." *Id.* at 823 n.116 (citing *Tyco IV*, 350 F. Supp. 2d at 1075).

193. This would involve amending the express language of 19 U.S.C. § 2395, and perhaps, the statutory language granting the CIT and the Federal Circuit their jurisdictional power under 28 U.S.C. § 1581, and 28 U.S.C. §§ 1291 and 1295, respectively, as well as the CIT's civil procedures under 28 U.S.C. §§ 2631–2647.

194. See 28 U.S.C. § 2643(c)(1) (2000). It seems clear that the CIT does not have the power to order DOL to certify workers' eligibility, because it lacks the power to issue a writ of mandamus in TAA cases. See 28 U.S.C. § 2643(c)(2) (2000) ("The Court of International Trade may not grant an injunction or issue a writ of mandamus in any civil action commenced to review any final determination of the Secretary of Labor under section 223 of the Trade Act of 1974 . . .").

195. See, e.g., *Chevron Products*, 298 F. Supp. 2d at 1348, 1348 n.15 ("Similarly telling is the growing line of precedent involving court-ordered certifications of workers,

reverse the CIT on grounds that it exceeded its authority by refusing to remand a TAA case to DOL and instead taking matters into its own hands.¹⁹⁶ Congress should, nonetheless, consider re-allocating power among DOL, the CIT, and the Federal Circuit because, as demonstrated above, the apparent confusion over what are the appropriate roles for DOL, the CIT, and the Federal Circuit in TAA cases has made accessing TAA benefits by otherwise eligible workers more difficult for some and impossible for others.¹⁹⁷ By clarifying the appropriate administrative, fact-finding, and law-making roles among DOL, the CIT, and the Federal Circuit, Congress would establish a more suitable scheme for judicial review of agency determinations in TAA cases.¹⁹⁸

But it all starts with the role that DOL assumes. Under a more suitable scheme for judicial review, DOL would be responsible for: (1) effectively investigating workers' petitions; (2) finding determinative facts based on substantial evidence; (3) creating an adequate agency record to permit effective judicial review by the CIT; and (4) making eligibility determinations, and clearly articulating its reasoning, in accordance with law as

evidencing the bench's mounting frustration with [DOL's] handling of these cases.") (citing four case examples of court-ordered certification).

196. See e.g., *Marathon II*, 370 F.3d at 1386 ("Because we reverse the trial court's ruling that the Secretary's negative determination was not supported by substantial evidence, we have no occasion to address the government's argument that the remedy ordered by the trial court was outside the authority granted to the court under 19 U.S.C. § 2395 and contrary to the restriction on the court's authority found in 28 U.S.C. § 2643(c)(2).") (citing *Former Employees of Barry Callebaut v. Chao*, 357 F.3d 1377, 1383 (Fed. Cir. 2004)). "In view of our holding that Labor's *Fourth Negative Determination* was supported by substantial evidence, we consider the question of the Court of International Trade's authority to order Labor to certify the Former Employees for the requested benefits to be moot, and we will not discuss it further." *Former Employees of Barry Callebaut*, 357 F.3d at 1883. Because it is not certain that the CIT has the power to order certification of workers' eligibility for TAA benefits, Congress should amend 28 U.S.C. § 2643(c)(2) to expressly authorize the CIT to order certification when a remand to DOL would be futile.

197. See discussion *supra* note 187. Of course workers are not eligible unless certified as such by DOL; hence, the use of the word *otherwise*.

198. As explained above, the litigation in *Marathon I* and *Marathon II* reveals confusion over the appropriate administrative, judicial, and appellate division of roles among DOL, the CIT, and the Federal Circuit in TAA cases. See discussion *supra* note 196.

interpreted by the CIT. If the Agency performed its administrative function reasonably well, then the CIT would properly conduct its judicial review by: (1) upholding the Agency's findings of fact, if they were supported by substantial evidence in the agency record; and (2) upholding DOL's conclusions of law, provided they were clearly articulated and in accordance with law as interpreted by the CIT. In those rare instances when the Agency fails to adequately perform its administrative role, the CIT would remand the case to DOL if its findings of fact were not supported by substantial evidence in the agency record, or, when appropriate, reverse DOL's conclusions of law if in the CIT's judgment: (1) they were arbitrary and capricious; (2) they were not in accordance with law; or (3) a remand to DOL would be futile.

Cases would rarely, if ever, make their way to the Federal Circuit if DOL performed its administrative role properly and the CIT was able to conduct a proper review of DOL's negative determinations on an adequate administrative record. Furthermore, the paucity of cases before the Federal Circuit would not be because workers cannot afford to litigate them that far, but rather, only cases in which the CIT got the law wrong would go to the Federal Circuit—if DOL or the workers took them there on appeal. In the extraordinary instance of an appeal to the Federal Circuit, that court would effectively conduct de novo appellate review of the CIT's holdings on matters of statutory interpretation, but would defer to the CIT's judgments on matters of fact and mixed questions of fact and law in accordance with the U.S. Supreme Court's *Skidmore* and *Mead* cases, *without* conducting de novo appellate review.¹⁹⁹

199. See discussion *supra* note 144 (addressing the *Chevron*, *Skidmore*, and *Mead* opinions in the *Marathon II* case discussion). The limits of when *Chevron* deference is required and when it is permitted are not tidy. See *United States v. Mead Corp.*, 533 U.S. 218, 230–31 (2001) (“[Although] the overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication . . . we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded.”). *But see id.* at 239 (Scalia dissenting) (“We will be sorting out the consequences of the *Mead* doctrine, which has today replaced the *Chevron* doctrine, for years to come.”) (internal citation omitted). Certainly, under *Chevron*, a reviewing court is required to defer to an agency's construction of a statute if Congress has spoken directly to the precise question at issue

Accordingly, Congress should consider amending the TAA Act to make the scheme for judicial review of DOL determinations more suitable by better allocating power and, hence, clarifying and better delineating the proper roles among DOL, the CIT, and the Federal Circuit in TAA cases.

because “[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Chevron U.S.A., Inc. v. National Resources Defense Council*, 467 U.S. 837, 842–43 (1984) (citation omitted). And sometimes *Chevron* deference is required even though Congress has not directly addressed the precise question at issue. *Id.* at 843. But *Chevron* deference is only *required* if “it appears that Congress delegated authority to the agency generally to make rules carrying the force of law.” *Mead Corp.*, 533 U.S. at 226–27. *See also* *United States v. Hagggar Apparel Co.*, 526 U.S. 380, 394 (1999) (holding that despite the peculiar scheme of judicial review and appellate review of Customs regulations by the CIT and the Federal Circuit, *Chevron* deference to Customs regulations was required). Nonetheless, in *Mead* the Supreme Court held that a Customs classification ruling was entitled to respect according only to the degree of its persuasive power under the *Skidmore*, not *Chevron*, deference. *Mead Corp.*, 533 U.S. at 221. There the Supreme Court said:

[A] reviewing court . . . is obliged to accept the agency’s position if Congress has not previously spoken to the point at issue and the agency’s interpretation is reasonable . . . [but] a reviewing court shall set aside agency action, findings, and conclusions found to be ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’

Id. at 229 (internal citations omitted). A good indicator, though not a prerequisite, of when *Chevron* deference is warranted is “when [Congress] provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of” administrative action carrying the force of law. *Id.* at 229–30. But when the authorization for making administrative determinations and the Agency’s practice in making them are “far removed not only from notice-and-comment process, but from any other circumstances reasonably suggesting that Congress ever thought [they deserve *Chevron* deference],” the reviewing courts should apply *Skidmore* deference. *Id.* at 231. Under *Skidmore*, “[t]he fair measure of deference to an agency administering its own statute has been understood to vary with circumstance, and courts have looked to the [1] degree of the agency’s care, [2] its consistency, [3] formality, [4] relative expertness, [5] and to the persuasiveness of the agency’s position.” *Id.* at 228 (citation omitted). A reviewing court may give deference under *Skidmore* along a spectrum of “great respect” to “near indifference” to an agency’s judgment in a particular case “depend[ing] upon [1] the thoroughness evident in its consideration, [2] the validity of its reasoning, [3] its consistency with earlier and later pronouncements, and [4] all those factors which give it *power to persuade*, if lacking power to control.” *Id.* (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (emphasis added)). Arguably then, DOL determinations should only be entitled to *Skidmore* deference under *Mead*, not *Chevron* deference under *Hagggar*.

2. *Creating an Incentive for Employer Cooperation*

Congress should consider creating an incentive for employers to produce evidence of workers' eligibility or ineligibility, especially if the Agency does not adopt an evidentiary burden-shifting rule as suggested above.²⁰⁰ Congress should consider both carrots and sticks to encourage employer cooperation.

One positive approach would be to build onto the trade adjustment assistance for firms (TAA for Firms) program that already exists under the TAA Act.²⁰¹ Under the TAA for Firms program, trade-impacted firms—that the U.S. Department of Commerce, Economic Development Agency (EDA) certify as eligible—may receive technical assistance from private consultants through one of eleven Trade Adjustment Assistance Centers (TAACs):

TAACs help develop business recovery strategies specific to the needs of each firm, which typically faces adjustments in many areas to compete with lower-priced imports. First, since firms must be experiencing falling sales or declining production to participate, TAACs often focus on marketing or sales strategies to identify new markets, new products, promotional initiatives, and export opportunities. Second, production inefficiencies are corrected to reduce firm costs and improve price competitiveness. Third, TAACs can develop debt restructuring strategies and frequently act as intermediaries in finding new sources of business financing through either government agencies (U.S. Small Business Administration) or private financial institutions.²⁰²

The EDA must certify firms' eligibility if it determines:

(A) that a significant number or proportion of the workers in such firm have become totally or partially

200. See discussion *supra* note 177.

201. See 19 U.S.C. §§ 2341–2355 (2000).

202. J.F. HORNBECK, CONGRESSIONAL RESEARCH SERVICE, TRADE ADJUSTMENT ASSISTANCE FOR FIRMS: ECONOMIC, PROGRAM, AND POLICY ISSUES CRS-3 (2007), available at <http://fpc.state.gov/documents/organization/91861.pdf>.

separated, or are threatened to become totally or partially separated . . .

(B) that (i) sales or production, or both, of such firm have decreased absolutely, or (ii) sales or production, or both, of an article that accounted for not less than 25 percent of the total production or sales of the firm during the [preceding year] decreased absolutely; and

(C) increases of imports of articles like or directly competitive with articles which are produced by such firm contributed importantly to such total or partial separation, or threat thereof, and to such decline in sales or production.²⁰³

But since Congress only reauthorized the TAA for Firms program in 2002 at an annual funding level of \$16 million, relatively few firms are selected by the TAACs to actually receive assistance, despite the program's seemingly outstanding record of performance.²⁰⁴ In fact, a 1998 study of the TAA for Firms program by the Urban Institute—that “compared changes in employment and sales levels of TAAC-assisted companies before and after certification to changes in these levels . . . that were certified as eligible for TAAC assistance but which declined to seek aid under the program”—reported the following successful results:

five years after certification, TAAC-assisted companies had survived at higher rates than unassisted companies—83.8 percent of assisted companies compared with 70.7 percent of unassisted companies; had added employees (4.2 percent more, on average), whereas unassisted companies registered average employment losses of 5.3 percent; and had shown stronger sales growth—33.9 percent average total growth in sales for assisted companies compared with 16.2 percent for unassisted firms.²⁰⁵

203. 19 U.S.C. § 2341(e) (2000).

204. ECONOMIC DEVELOPMENT ADMINISTRATION, U.S. DEPT. OF COMMERCE, AN EVALUATION OF THE TRADE ADJUSTMENT ASSISTANCE PROGRAM, i, 8–14. (Washington, D.C.: The Urban Institute, 1998).

205. *Id.* at ii.

The Urban Institute also concluded that the TAA for Firms program: “supported one job for every \$3,451 invested, generated \$87 in sales for every TAA dollar invested, and yielded an estimated return on investment of 261 to 348 percent.”²⁰⁶

Not surprisingly, among the seven issues raised by the Urban Institute was that few firms that are eligible for assistance actually receive it:

Because of the small size of the Congressional appropriation, fewer than 200 firms nationwide are brought into the TAA program annually, a small portion of the firms eligible for assistance. TAAC directors acknowledge that they manage their outreach process so that the number of firms certified is equivalent to the resources available to provide them with technical assistance.²⁰⁷

Moreover, improving or eliminating the certification process was among the six recommendations the Urban Institute offered to make the TAA for Firms program more responsive to the needs of trade-impacted firms:

The certification process ensures that assistance is provided to trade-impacted firms, only, but it extends the time taken to deliver assistance, diverts limited resources, and excludes firms that arguably should receive consideration. The certification process is substantial and exceeds what is required in other [Department of Commerce] programs. Moreover, the legislative requirement that certifications be approved by the Department of Commerce runs counter to the ‘reinventing government’ trend to devolve authorities and responsibilities to the local level. Fundamental changes will require legislative change. We recommend that [t]he International Trade Commission (ITC) should identify trade-impacted industries, and EDA could accept this identification when they certify firms. Foreign domination of a market, in addition to increase

206. *Id.*

207. *Id.* at v.

in imports, should trigger program eligibility. The ITC should be responsible for notifying firms of the trade-impacted status of their industry.²⁰⁸

Although the question of whether or not firms *should* receive trade adjustment assistance is beyond the scope of this paper, somehow linking firm certification with worker certification could be one avenue for encouraging employer cooperation in DOL investigations. For example, if Congress were to expand the TAA for Firms program, it could also condition firms' eligibility certification on employer cooperation, including requiring employers to file petitions for TAA benefits on behalf of their former employees. Conversely, Congress could use employer cooperation in TAA investigations to trigger eligibility certification under the TAA for Firms program. In essence, Congress could create linkages between the TAA programs for workers and firms so that when firms got certified under the TAA for Firms program, their workers would automatically get certified for TAA benefits; and when workers got certified for TAA benefits, with help from their former employers, the workers' firms would automatically get certified under the TAA for Firms program. Such a win-win approach by the losers of expanded free trade is the type of carrot that Congress should consider creating to encourage employer cooperation in TAA investigations.²⁰⁹

Alternatively, Congress should consider flipping the presumption of eligibility *in favor* of workers—from presuming that workers are *not* eligible to presuming that they *are* eligible—to apply for TAA benefits and assessing a financial penalty on employers who fail to produce evidence establishing workers' ineligibility for TAA benefits.²¹⁰ Presuming that workers *are entitled* to TAA benefits unless and until DOL determines that they are not eligible for them—based on

208. *Id.* at viii.

209. This approach would make the most sense in cases in which the employer has been hurt by increased imports.

210. This would most easily apply to cases in which the employer shifted production to a foreign country. The penalty could be in the form of some percentage of the cost of TAA benefits, which would essentially amount to a tax on firms that shift production offshore.

substantial evidence in the agency record produced by employers—makes sense as a matter of administrative and judicial efficiency.

This is *not* such a strange or unusual idea, especially when it comes to unemployment (reemployment) benefits. For example, claimants for state unemployment (reemployment) insurance benefits in Minnesota are normally presumed qualified to receive them, unless they are disqualified by having committed some kind of intentional act of “employment misconduct.”²¹¹ On the contrary, what is strange is making workers prove that they are entitled to TAA benefits, when they lose their jobs through no fault of their own. So flipping the presumption in favor of workers also makes sense as a matter of fairness.

Why not flip the underlying presumption? The main argument against flipping the presumption in favor of workers is that there might be a flood of TAA applicants that the Agency could not stem and, consequently, workers not eligible for TAA benefits would be erroneously certified as eligible. But it might be easier to fix that problem than it is to fix the converse of it (i.e., otherwise eligible workers not being certified), particularly if the burden of producing evidence is effectively shifted to employers and they have an incentive to produce evidence establishing the workers’ ineligibility.

211. See, e.g., MINN. STAT. § 268.095 Subd. 6 (2006) (stating that employment misconduct means: (1) any intentional conduct that disregards the “standards of behavior that an employer has the right to reasonably expect of the employee” or disregards the employees duties and obligations to the employer, or (2) negligent or indifferent conduct that demonstrates “a substantial lack of concern for the employment. Inefficiency, inadvertence, simple unsatisfactory conduct, . . . poor performance because of inability or incapacity, . . . or absence because of illness or injury with proper notice to the employer, are not employment misconduct.”). See also *Houston v. Int’l Data Transfer Corp.*, 645 N.W.2d 144, 150 (Minn. 2002) (“[T]here must be sufficient showing in the record that the employee not only engaged in intentional conduct, but also intended to, or engaged in conduct that evinced an intent to, ignore or pay no attention to his or her duties and obligation or the standards of behavior the employer has a right to expect.”). Cf. *Cunningham v. Family & Children’s Serv.*, No. A04–280 (Minn. Ct. App. Nov. 9, 2004) (holding that an employee’s threatening, verbally abusive, physically intimidating behavior towards at an employer is sufficient to disqualify the employee from receiving unemployment benefits).

Accordingly, Congress should consider amending the TAA Act to flip the presumption in favor of workers—from presuming that workers *are not* entitled to TAA benefits unless and until they prove that they are, to presuming that workers *are* entitled to TAA benefits unless and until the evidence produced by employers proves that they are not—and impose a financial penalty on employers for failing to produce the contrary evidence.

3. *The Trade Adjustment Assistance Improvement Act of 2007*

Congress will likely give serious consideration to Senate Bill 122, The Trade Adjustment Assistance Improvement Act of 2007 (“The TAA Improvement Act”),²¹² and Senate Bill 1848, The Trade and Globalization Adjustment Assistance Act.²¹³ The TAA Improvement Act would amend the TAA Act to, *inter alia*, “provide TAA benefits to three categories of service workers affected by trade . . . and would allow for certification of an entire industry for TAA assistance, if the secretary of labor receives a congressional resolution or three or more petitions from the industry.”²¹⁴ It would also require “that employers certify for accuracy any petition-related information that they submit to the Department of Labor. . . .”²¹⁵ Most importantly, by amending 19 U.S.C. §§ 2271(a)(1)(A)²¹⁶ and 2272²¹⁷ of the TAA

212. S. 122, 110th Cong. (2007).

213. S. 1848, 110th Cong. (2007).

214. Bipartisan Bill, *supra* note 97, at 38.

215. *Id.*

216. 19 U.S.C. § 2271(a)(1)(A) (2002). The amended 19 U.S.C. § 2271 would read as follows:

Petitions

(a)(1) A petition for certification of eligibility to apply for adjustment assistance for a group of workers under this chapter may be filed simultaneously with the Secretary and with the Governor of the State in which such workers’ firm or subdivision is located by any of the following:

(A) The group of workers (including workers in an agricultural firm or subdivision of any agricultural firm, and workers in a service sector firm or subdivision of a service sector firm, or public agency). (B) The certified or recognized union or other duly authorized representative of such workers.

(C) Employers of such workers, one-stop operators or one-stop partners (as defined in section 101 of the Workforce Investment Act of 1998 (29 U.S.C. 2801)), including State employment security agencies, or the State dislocated

worker unit established under title I of such Act, on behalf of such workers. (2) Upon receipt of a petition filed under paragraph (1), the Governor shall— (A) ensure that rapid response assistance, and appropriate core and intensive services (as described in section 134 of the Workforce Investment Act of 1998 (29 U.S.C. 2864)) authorized under other Federal laws are made available to the workers covered by the petition to the extent authorized under such laws; and (B) assist the Secretary in the review of the petition by verifying such information and providing such other assistance as the Secretary may request.

(3) Upon receipt of the petition, the Secretary shall promptly publish notice in the Federal Register that the Secretary has received the petition and initiated an investigation.

Id.; S. 122 (proposed changes noted by italics).

217. 19 U.S.C. § 2272 (2002). The amended 19 U.S.C. § 2272 would read as follows:

(a) In general:

A group of workers (including workers in any agricultural firm or subdivision of an *agricultural firm, and workers in a service sector firm or subdivision of a service sector, or public agency*) shall be certified by the Secretary as eligible to apply for adjustment assistance under this part pursuant to a petition filed under section 2271 of this title if the Secretary determines that – (1) a significant number or proportion of the workers in such workers' firm, or an appropriate subdivision of the firm *or public agency*, have become totally or partially separated, or are threatened to become totally or partially separated; and (2)(A)(i) the sales or production, or both, of such firm or subdivision have decreased absolutely; (ii) imports of articles *or services like or directly competitive with articles produced or services provided* 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 the sales or production of such firm or subdivision; or (B)(i) *there has been a shift by such workers' firm or subdivision, or public agency to a foreign country, of production articles, or in provision of services like or directly competitive with articles which are produced, or services which are provided by such firm, subdivision or public agency; and (ii) such workers' firm, subdivision, or public agency has obtained or is likely to obtain such services from a foreign country.*

(b) Adversely affected secondary workers

A group of workers (including workers in any agricultural firm or subdivision of an *agricultural firm, and workers in a service sector firm or subdivision of a service sector, or public agency*)) shall be certified by the Secretary as eligible to apply for trade adjustment assistance benefits under this part pursuant to a petition filed under section 2271 of this title if the Secretary determines that – (1) a significant number or proportion of the workers in the workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated; (2) the workers' firm (or subdivision) is a supplier or downstream producer to a firm (or subdivision) that employed a group of workers who received a certification of eligibility under subsection (a) of this section, and

Act, the TAA Improvement Act would permit service workers to petition DOL for certification of eligibility to apply for TAA benefits, and would also mandate that DOL certify service workers' eligibility *if* the Agency determined they lost their jobs: (1) "as a result of competition from imported services, such as a lab technician who might lose an X-ray reading job to a technician at a company in India";²¹⁸ (2) "when a service facility relocates overseas; for example a call center or software designer, and—unlike the current program—even in cases where the overseas operation is not located in a country with a

such supply or production is related to the article *or service* that was the basis for such certification (as defined in subsection (c)(3) and (4) of this section); and (3) either—(A) the workers' firm is a supplier and the component parts *or services* it supplied to the firm (or subdivision) described in paragraph (2) accounted for at least 20 percent of the production or sales of the workers' firm; or (B) a loss of business by the workers' firm with the firm (or subdivision) described in paragraph (2) contributed importantly to the workers' separation or threat of separation determined under paragraph (1).

(c) Definitions

For purposes of this section – (1) The term 'contributed importantly' means a cause which is important but not necessarily more important than any other cause. (2)(A) Any firm, or appropriate subdivision of a firm, that engages in exploration or drilling for oil or natural gas shall be considered to be a firm producing oil or natural gas. (B) Any firm, or appropriate subdivision of a firm, that engages in exploration or drilling for oil or natural gas, or otherwise produces oil or natural gas, shall be considered to be producing articles directly competitive with imports of oil and with imports of natural gas." (3) Downstream producer.—The term "downstream producer" means a firm that performs additional, value-added production processes for a firm or subdivision, including a firm that performs final assembly or finishing, directly for another firm (or subdivision), for articles that were the basis for a certification of eligibility under subsection (a) of this section of a group of workers employed by such other firm, if the certification of eligibility under subsection (a) of this section is based on an increase in imports from, or a shift in production to, Canada or Mexico. (4) Supplier.—The term "supplier" means a firm that produces and supplies directly to another firm (or subdivision) component parts for articles that were the basis for a certification of eligibility under subsection (a) of this section of a group of workers employed by such other firm.

Id.; S. 1848 (proposed changes noted by italics).

218. Bipartisan Bill, *supra* note 97, at 38.

free trade agreement with the United States”;²¹⁹ or (3) as “secondary service workers who provide input to a primary firm where workers are eligible for TAA.”²²⁰

So far, this paper has not called for expanding the TAA Act to cover service workers²²¹ but, instead, has offered ideas on how to improve the administration of the existing TAA Act by making certification easier for *production* workers who lose their jobs due to expanded free trade. Nonetheless, if the TAA Act is broadened to cover service workers in the future (but still not *all* workers who are laid-off), however the statute is fixed now, it ought to be fixed in such a way that it accommodates future workers who we can reasonably anticipate will some day be

219. *Id.* As highlighted above, shifts in production would no longer need to be to a country that has a free trade agreement with the United States.

220. *Id.*

221. Of course some “service workers” are already covered under the existing TAA Act if they have a sufficient “nexus” to the production process. *See* Former Employees of Stanley Smith, Inc. v. U.S. Sec’y of Labor, 967 F. Supp. 512, 516 (1996) (noting DOL’s interpreting the Trade Act to certify service workers only when “an important causal nexus between increased imports and the layoff of service workers” exists). The classic example of this nexus is a maintenance worker who spends at least 25% of his or her time in support of a production operation. *See id.* (observing that a sufficient nexus exists if “at least 25% of the service workers’ activity [is] expended in service to the subdivision which produces the import-impacted article”). *But cf.* Former Employees of Gateway Country Stores LLC v. Chao, Slip Op. 06–32 (Ct. Int’l Trade 2006) (referencing a DOL negative determination that service workers who installed, repaired, and upgraded post-assembly computers at manufacturer’s retail stores were not eligible for TAA benefits). *See also* Michael Triplett, *New DOL Policy Allows Software Workers to Qualify for TAA, Recent Rulings Reveal*, 23 INT’L TRADE REP. 578, 578 (2006) (“The new policy represents a departure from how the labor Department has dealt with software workers, who previously have been denied TAA benefits because DOL found they did not produce an ‘article.’ DOL’s previous policy came in for harsh criticism . . . in rulings from the [CIT] . . . Judge Nicholas Tsoucalas remanded the case brought by Computer Sciences Corp. employees for a *fifth review* by DOL, called DOL’s ruling ‘arbitrary and capricious’ and asked DOL for an explanation of why its findings—that software code needed to be on a physical medium to be considered trade—were contrary to positions held by the Bureau of Customs and Border Protection and the International Trade Commission.”) (emphasis added).

covered by a new and expanded TAA Act.²²² In other words, we should fix the TAA Act now so that it is also improved then.

Brooks-Rubin's most novel idea for overhauling the statute is to remove the courts from the business of defining "production" in TAA cases by segmenting industries most impacted by trade and introducing what he calls "working group reviews" to define what production means in each segmented sector.²²³ Brooks-Rubin is on to something. But his suggested

222. No doubt a vibrant, robust U.S. economy will continue to create and destroy production and service jobs as its evolution from an agricultural, industrial, and post-industrial economy continues. *See, e.g.*, JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 82–85 (New York: Harper, 1975) (1942) ("Capitalism, then, is by nature a form or method of economic change and not only never is but never can be stationary. And this evolutionary character of the capitalist process is not merely due to the fact that economic life goes on in a social and natural environment which changes and by its change alters the data of economic action; this fact is important and these changes (wars, revolutions and so on) often condition industrial change, but they are not its prime movers. Nor is this evolutionary character due to a quasi-automatic increase in population and capital or to the vagaries of monetary systems, of which exactly the same thing holds true. The fundamental impulse that sets and keeps the capitalist engine in motion comes from the new consumers, goods, the new methods of production or transportation, the new markets, the new forms of industrial organization that capitalist enterprise creates. The opening up of new markets, foreign or domestic, and the organizational development from the craft shop and factory to such concerns as U.S. Steel illustrate the same process of industrial mutation—if I may use that biological term—that incessantly revolutionizes the economic structure *from within*, incessantly destroying the old one, incessantly creating a new one. This process of Creative Destruction is the essential fact about capitalism. It is what capitalism consists in and what every capitalist concern has got to live in."). *See generally* Raymond Vernon, *International Investment and International Trade in the Product Cycle*, 80 Q. J. ECON. 190 (1966) (presenting three-stage production life cycle hypothesis).

223. Brooks-Rubin, *supra* note 120, at 824–26 ("The most direct fix would be to 'segment' TAA and begin the establishment of clear standards for what 'production' means in as many industries as possible. Statistics show that approximately 35% of workers applying for TAA in the past several years have been from the textile industry. It would therefore be desirable, at least in the textile sector, to have working definitions of what the production process means in the textile context As one commentator has argued, why not certify all workers who lose their jobs for TAA? [I]f the policy is to prefer a more limited TAA coverage scope, shouldn't workers, let alone the courts, at least know what the scope is from the outset? How to do this? A program that sets out definitions and general standards for complex economic issues in all facets of the American economy simply cannot work. Yet while it may not be possible or desirable to establish a single standard for the entire domestic economy, it may well be possible to do so for the dominant industries impacted by trade. . . . While it would be costly in terms of time and money initially, the needed fix is for DOL to convene, or be legislatively ordered

solution is too narrow²²⁴ and too burdensome on the Agency.²²⁵ Industry-wide certification, based on congressional resolution or receipt by DOL of three or more petitions from the industry,²²⁶ however, is a good idea that warrants consideration, because it would increase the Agency's efficiency in certifying eligible workers. Nonetheless, DOL would still need to determine the workers' eligibility using essentially the same broken process that exists now.²²⁷ And while requiring "the accuracy and completeness of any evidence or information submitted by the employer [to] be certified by the employer's legal counsel or by an officer of the employer" might help to fix the Agency's flawed investigative process, it does not go far enough.²²⁸

to create, working groups from the industries and sectors from which the highest numbers of workers applying for TAA come from. Working groups should consist of Congressional staff, DOL officials, facility owners/management, workers and/or associated unions, attorneys experienced in TAA, and industry experts. Such broad based working groups would account for all TAA-related interests and likely result in the most comprehensive definitions of production. The job of the working groups would be to provide clear guidance on what production means in given industries to both DOL and Congress, to enable subsequent informed legislative and regulatory decision making in codifying definitions of production. The funding spent on generating standards of whom within these industries is eligible for TAA would likely pay for itself in terms of more efficient administration of petition, reduced appeals, etc. . . . The working groups would also provide an informal source of guidance on the current legislative and regulatory framework, as applied to a given industry. . . . By segmenting the generalized aspects of an investigation, and leaving DOL to review specific facts, rather than redefine the overall standards for a given industry, DOL is more likely to produce investigations that provide displaced workers with fair procedures and fair results." (footnotes omitted).

224. In fairness, Brooks-Rubin confined the scope of his article to DOL's lack of clear guidelines "both in undertaking its investigation and identifying/evaluating the information it receives, *especially with respect to the definition of 'production'* in a given case." *Id.* at 800 (emphasis added).

225. As argued above, DOL should get out of the business of statutory interpretation, leaving that to the CIT and the Federal Circuit. *See* discussion *supra* Part III.B.

226. *See* S. 122, 110th Cong. § 203 (2007) (proposing an amendment to the TAA which allows for industrywide certification by the Secretary upon receipt of three or more petitions from the members of a given industry).

227. *See* S. 122, 110th Cong. (2007). Despite the many proposed changes put forth in this bill, not one addressed upgrading the process by which DOL currently determines a worker's eligibility.

228. *Id.* § 304(f).

Accordingly, Congress should amend the TAA Act to cover service workers, and at the same time, Congress should also amend the TAA Act to correct the inapt scheme for judicial review of negative Agency determinations. Moreover, if DOL does not fix its broken certification process on its own, Congress should amend the TAA Act to create an incentive for employers to produce evidence of workers eligibility or ineligibility.

V. CONCLUSION

The economic rationale for expanded free trade is still the primary justification for the globalization of commercial relations.²²⁹ And even with a blurring of the net economic gains from trade and the increased opposition to further trade liberalization, especially from those hurt by expanded free trade, Americans have vastly benefited from globalization: “[a] careful recent analysis estimates that Americans are a trillion dollars better off, every year, due to the gains from international trade.”²³⁰

Another study published by the U.S. Federal Reserve Bank estimates that successfully completing the WTO Doha Round would result in one-time, global welfare gains of \$349 billion.²³¹ But according to I. M. Destler, a renowned expert on American trade politics, while the basic rationale for expanded free trade has not changed, what matters most is how Americans are affected:

[T]he argument for further trade liberalization must rest mainly on the additional welfare gains it will bring.

229. *Id.* The geopolitical rationale for integrating the world’s economies has been to prevent the recurrence of “beggar-thy-neighbor” trade policies that, in part, led to World War II. See DESTLER, *supra* note 1, at 6 (“[C]ongressional use of trade barriers to aid Depression-hit American producers backfired, postwar leaders believed . . . other nations had retaliated, exports had plummeted even more than imports, and the world economic catastrophe helped to spawn both Adolf Hitler’s Nazi regime in Germany and aggressive militarism in Japan. Only by building a more open world could we prevent the sort of mutually destructive, beggar-thy-neighbor competition that had produced national economic disaster and international bloodshed.”).

230. See DESTLER, *supra* note 1, at 311 (footnote omitted).

231. Thomas B. Hertel, *Potential Gains from Reducing Trade Barriers in Manufacturing, Services and Agriculture*, FED. RES. BANK ST. LOUIS REV., July–Aug. 2000, at 77, 88.

These include, of course, gains for people around the world, particularly those in poor nations, and the gains in global stability that enhanced economic interdependence can bring. But the main argument, in US politics, must be the gains it brings Americans.

The gains could be substantial. Bradford, Greico, and Hufbauer, applying several methodologies, reach a “conservative” conclusion that “removing all remaining [global] barriers to trade would increase US production by approximately \$450 billion to \$600 billion annually.” Unlike their estimate of past gains of roughly \$1 trillion, this comes from trade policy change alone. Any induced technological change or other effects would be icing on the cake.²³²

He recognizes that while “[t]he explosion of international trade has been an enormous boon to Americans in general,” some American workers have not been adequately compensated for their losses.²³³ According to Destler, “[i]n theory, they could be made whole by reallocating one-twentieth of the trade gains.”²³⁴ But Destler says, that even with the reforms enacted in 2002 the current TAA program is deficient.²³⁵ “One reason is limitations in its mechanisms: Government-managed retraining courses have a mixed track record at best. A larger reason is that labor displacement directly attributable to trade is hard to isolate from the much larger overall job losses generated by economic and technological change.”²³⁶

This paper has recommended and suggested ways to make it easier to certify workers’ eligibility for TAA benefits, in part, to overcome the difficulty of isolating trade-related job loss from other causes.

232. DESTLER, *supra* note 1, at 318–19 (footnote omitted). Destler notes that the Bradford, Greico, and Hufbauer study estimates that “[g]ains in this range . . . would increase US per capita income between \$1,500 and \$2,000 annually and US household income between \$4,000 and \$5,300 annually.” *Id.* at 319 n.29.

233. *Id.* at 326. The same study estimates that U.S. workers displaced by trade in a given year lose a total of \$54 billion in lifetime earnings, while programs that explicitly address this loss total less than \$2 billion annually. *Id.*

234. *Id.*

235. *Id.*

236. *Id.* at 326–27.

Some other concerned Americans have called for stronger worker advocacy in the TAA certification process through legal assistance for workers during the petition process,²³⁷ and greater legal representation for workers to appeal DOL determinations.²³⁸ But injecting more lawyers (and law students) into the current certification process could create an even more adversarial atmosphere—and with it more acrimony, more formality, and longer, more protracted fights between DOL and workers. The TAA certification process needs to be less, not more adversarial. Then, DOL, the Justice Department, workers, their counsel, and the CIT will be spared untold hours of work and, more importantly, workers and their families will be spared the irreparable harm that accompanies prolonged unemployment, which Congress intended to avert through the TAA program. Destler suggests a far grander social compact—for all workers.²³⁹ And others have called for “second-best”

237. See Shiela M. Raftery, *Safety Net and Measuring Rod: The North American Free Trade Agreement Transitional Adjustment Assistance Program*, 12 TEMP. INT'L & COMP. L. J. 159, 187 (1998) (suggesting the need to provide workers with legal assistance to complete the petition).

238. Trade Adjustment Assistance Coalition, Legal Appeals Center, <http://www.taacoalition.com/legalindex.asp> (last visited Dec. 22, 2007) (“The Trade Adjustment Assistance Coalition’s Legal Appeals Center provides legal advice and facilitates representation for workers and farmers petitioning for eligibility to the various TAA programs. . . . Inquiries regarding the TAA Legal Appeals Center and possible legal representation can be made by telephone or email. Telephone inquiries should be made to Page Hall at (202) 265-8555. E-mail inquiries should be made to TAA Legal Appeals Center.”).

239. DESTLER, *supra* note 1, at 328–30 (“Such a program could be built, in part, on the trade-specific programs of the 2002 act, and on the long-standing unemployment insurance program. Extended unemployment insurance benefits and worker retraining now available under TAA could be available to all workers with similar plights. Wage insurance could be broadened as an alternative, with removal of the arbitrary age requirement and counterproductive procedural hurdles that limit participation. The health insurance benefit could be made available to all displaced workers and easier to obtain. Job search aid could be similarly expanded. But reform should not be limited by the TAA model. As J. David Richardson has suggested, the United States needs ‘creative innovation in *domestic* policies designed to empower large numbers of Americans . . . to prosper from global opportunity and technological dynamism.’ This should include not just government retraining but incentives for firms to provide on-the-job training, and for workers to seek out relevant educational, skill enhancement opportunities. Labor unions should be brought into the process, so they can help their current and potential members cope with change rather than railing against it. Such a program would not be

polices that would only indirectly, if at all, address the real needs of American workers hurt by further U.S. trade liberalization.²⁴⁰

My suggestions are tailored to improve the existing primary mechanism for assisting U.S. workers displaced by expanded free trade and to enhance the principal method of compensating them for their losses. DOL should: (1) improve the petition process; (2) conduct more effective investigations; and (3) adopt an evidentiary burden-shifting scheme—because it is the Agency’s statutory duty to help workers adjust to trade-related

free. Kletzer and Rosen estimate that the cost of extending current trade adjustment assistance benefits to all displaced workers would be \$12.1 billion. Lael Brainard and Richard G. Litan calculate the costs of a general two year wage insurance program at \$3.6 to \$7.52 billion a year. If one added on new business tax incentives, such as the ‘human capital investment tax credit’ proposed by Catherine L. Mann, one could easily reach an annual budgetary price tag of \$20 billion. Within the broad globalization and fiscal context, this does not seem excessive. . . . Trade advocates should embrace such a program. A broad social compact reaching all losers from economic change is a necessary and appropriate foundation for a policy that seeks full international openness in the 21st century. Extending adjustment aid beyond those specifically hurt by trade is a reflection of economic reality—as interdependence deepens, it becomes harder and harder to isolate the cause of specific economic misfortunes, and less and less reasonable to try. It is also the most plausible route to broadening public support for trade expansion, and for bridging the partisan divide.”). *See also In the Shadow of Prosperity: Hard truths about helping the losers from globalization*, ECONOMIST, Jan. 20, 2007, at 32–34 (discussing the U.S. TAA program but suggesting that “[t]he Danish system of ‘flexicurity’ appears to offer the best of both worlds: dynamic labour markets and low unemployment coupled with generous support for those who lose their jobs. . . . But Denmark’s approach has evolved over decades and cannot easily be copied. Besides, it is extremely expensive. Although Denmark has an unemployment rate of under 5%, it spends more than 5% of GDP on the unemployed, including almost 2% of GDP on its ‘active’ training and job-search programmes. It pays for it with one of the highest tax rates on labour income in the world . . . [so] [f]or America, which currently spends a mere 0.16% of GDP on such ‘active’ labour-market policies, the idea of Danish-style ‘flexicurity’ is more a slogan than a serious suggestion.”).

240. *See e.g.*, DESTLER, *supra* note 1, at 255–74. “The actual direct impact of any conceivable labor and environmental provisions on US labor and environmental interests, moreover, is likely to be quite small—far less than direct measures targeted at the situation here at home, such as enhanced trade adjustment assistance.” *Id.* at 271. *But see* KIMBERLY ANN ELLIOT & RICHARD B. FREEMAN, CAN LABOR STANDARDS IMPROVE UNDER GLOBLIZATION? 123–26 (2003) (arguing that globalization can improve labor standards). *See also* Rossella Brevetti, *Rep. Rangel to Seek Bipartisan Plan to Renew Trade Promotion Authority*, 24 INT’L TRADE REP. 158, 158 (2007) (stating that Rep. Sander Levin (D–Mich.), Chair of the Ways and Means Subcommittee on Trade, has reiterated his demand for enforceable international labor standards).

job loss and transition to new livelihoods. By fixing its broken certification process, DOL will more effectively carry out the Congressional mandate of certifying workers' eligibility with greater ease and less wasted resources. DOL should not waste this perfect opportunity. Congress should amend the TAA Act—to re-allocate power among DOL, the CIT, and the Federal Circuit and, if DOL fails to fix its broken certification process, Congress should also create an incentive for employers to cooperate in TAA investigations—because, if the promise of TAA benefits to production workers is kept, they and their representatives will likely be less mobilized against expanded free trade.²⁴¹

But the process of creative destruction inherent in capitalism suggests that addressing production workers' concerns is not the end of the story. Service workers are far from immune to job loss due to expanded free trade.²⁴² Therefore, Congress should also amend the TAA Act to cover service workers.

Accepting the notion that it is easier to mobilize political resistance to, and more difficult to mobilize political support for, expanded free trade,²⁴³ improving the primary mechanism for

241. The Doha Round negotiations and negotiations for a Free Trade Area of the Americas have stalled, in part, because of resistance from U.S. agricultural interests and opposition by their representatives. *See Europe Blames US for WTO Failure*, BBC NEWS, July 25, 2006, <http://news.bbc.co.uk/go/pr/fr/-/2/hi/business/5209010.stm> (last visited Dec. 22, 2007). But what can and should be done to reduce opposition to free trade in agriculture is beyond the scope of this paper. Nonetheless, reducing workers' opposition to expanded free trade should help preempt one obstacle to further U.S. trade liberalization.

242. *See* LINDA LEVINE, CONGRESSIONAL RESEARCH SERVICES, LIBRARY OF CONGRESS, OFFSHORING (A.K.A. OUTSOURCING) AND JOB INSECURITY AMONG U.S. WORKERS at CRS-7 (2007) (last visited Dec. 22, 2007), *available at* <http://www.house.gov/htbin/crsprodget?/RL32292/site=costello> (citing a 2004 study by John C. McCarthy for Forrester Research, Inc., showing the growth in offshoring of U.S. service sector jobs and estimating that a total of 3.4 million U.S. service sector jobs will have been offshored by 2015, many of them in white collar professions, including law and architecture).

243. *See, e.g.*, THOMAS FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* 358 (1999) ("In 1998, President Clinton could not get NAFTA expanded to Chile because a union-led minority, who believed that they were not benefiting from more free trade, were very active in opposing the expansion of NAFTA, while the majority that was benefiting from expanded free trade never understood who they were and therefore never got mobilized to defend their interests.").

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compensating workers for trade-related job loss is necessary for all Americans to realize the net average gains expected from further trade liberalization. Accordingly, the defects in DOL's certification process should be fixed when the TAA program is re-authorized, and the TAA Act should be amended when TPA is renewed. Making TAA benefits more easily accessible to production workers is an important step to take right now. As Judge Ridgway concluded in the *Chevron Products* case: "[o]nly time will tell whether the Labor Department, and Congress, are listening."²⁴⁴ Now is the time for the Agency and Congress to listen, and to act.

244. *Former Employees of Chevron Prods. Co. v. U.S. Sec'y of Labor*, 298 F. Supp. 2d 1338, 1348 (Ct. Int'l Trade 2003).

Much ink has been split on this case over the past four years. Needless to say, a proper and thorough initial investigation would have spared all parties—including the Labor Department, as well as the Justice Department, the Workers, their counsel, and the Court—untold hours of work. But, most significantly, the acts and omissions of the Labor Department deprived the Workers of the timely relief to which they were entitled

. . . .

. . . Whether as a result of overwork, incompetence, or indifference (or some combination of the three), the Labor Department—for almost four years—deprived the Workers here of the job training and other benefits to which they were entitled.

Id. at 1348–50.

APPENDIX 1

On July 27, 2001, the workers in *Tyco Electronics v. Dep't of Labor (Tyco II)* petitioned for certification of NAFTA-TAA benefits "based on their belief that their job loss was a result of . . . a shift in production of fiber optic components to Mexico."²⁴⁵ DOL initiated its initial investigation on September 4, 2001, after the Pennsylvania Department of Labor and Industry denied the workers' petition "based on insufficient import information regarding like products and Tyco Electronics' initial survey response."²⁴⁶ DOL denied the workers certification "on the grounds that imports from Mexico did not contribute importantly to the Former Employees' separation and there was no shift in production to Mexico [and it] found that the predominant cause of work separation was related to a shift in production to an affiliated Tyco Electronics facility in Harrisburg, Pennsylvania."²⁴⁷ DOL's investigation, before it denied the workers certification, "consisted of one form letter data request sent to Tyco Electronics."²⁴⁸ The workers reasserted that "their job separation was caused by a shift in production to Mexico" in a motion for reconsideration, but "[b]ased upon additional information provided during a conference call with Tyco Electronics company officials," DOL denied the workers' request.²⁴⁹ Without counsel, the workers then filed a pro se action with the CIT on January 30, 2002.²⁵⁰ After the CIT appointed the workers pro bono counsel, they filed a motion for judgment on the agency record, and DOL immediately sought the workers' consent to a voluntary remand "to conduct a further investigation and make a redetermination."²⁵¹

On August 7, 2002, the CIT ordered DOL to "conduct a

245. *Tyco II*, 264 F. Supp. 2d at 1324 ("According to the Former Employees, several other Tyco facilities in the Pennsylvania area had closed and all recent petitions for NAFTA-TAA had been granted.").

246. *Id.* at 1324–25.

247. *Id.* at 1325. DOL published its denial of certification on October 19, 2001. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

remand investigation and submit remand results by October 7, 2002.”²⁵² DOL missed the deadline set by the CIT.²⁵³ On October 17, 2002, the workers “submitted information to [DOL’s] counsel for use in the remand determination [and] [o]n November 12, 2002, [the workers] contacted [DOL] to inquire about the status of the remand investigation.”²⁵⁴ And DOL’s lawyer told the workers: “*the remand investigation had not started.*”²⁵⁵ On November 14, 2002, DOL then filed a motion for leave to submit the remand results late—by January 6, 2003—and, when it was about to miss that deadline, DOL asked the CIT in a second motion on, January 2, 2003, for leave to submit the remand results late—by January 21, 2003.²⁵⁶ DOL eventually filed the remand results with the CIT on January 17, 2003²⁵⁷ and the CIT accepted them, but awarded the workers’ court-appointed lawyer attorney’s fees of “\$7,457.50 for 48.1 hours worked in response to [DOL’s] out of time motions.”²⁵⁸

DOL had again denied the workers certification based on its surveys of “two reported major declining customers regarding their purchases of fiber optics during the relevant time period.”²⁵⁹ On February 24, 2003, the workers filed a second

252. *Id.* The CIT’s order specifically instructed DOL to “conduct further investigation . . . [and] collect further evidence, including evidence from the [workers].” *Id.*

253. *Id.*

254. *Id.*

255. *Id.* at 1326 (emphasis added).

256. *Id.*

257. *Id.* During the remand investigation, DOL “contacted a Tyco Electronics company official and requested companywide sales figures of the fiber optics components produced at the Glen Rock plant and a list of the major declining customers of the subject plant.” *Id.*

258. *Tyco I*, 259 F. Supp. at 1248. The court found that the request for \$310 per hour for 4.6 hours of partner’s work, \$140 per hour for 42.2 hours of associate’s work, and \$95 per hour for 1.3 hours of paralegal’s work were “reasonable and [were] in line with those rates for similar services by lawyers of reasonably comparable skill, experience, and reputation.” *Id.* at 1253.

259. *Tyco II*, 264 F. Supp. 2d at 1326. “According to [DOL], the surveys revealed that one customer did not increase its imports of like products or products competitive with the items produced at the Glen Rock plant. The other customer reported no direct import purchases during the relevant period and a ‘relatively low’ amount of purchases during the relevant period and a ‘relatively low’ amount of indirect imports during the latter part of the relevant period.” *Id.* (citation omitted).

motion for judgment on the agency record, asking the CIT to certify them itself or, alternatively, “order an additional remand ‘with specific instructions [to DOL] on how to conduct a fair and meaningful investigation.’”²⁶⁰ The CIT denied the workers’ request for certification,²⁶¹ but granted the workers’ request for a second remand—even though DOL already had taken “four bites at th[e] apple”—in part because DOL’s remand investigation was “arbitrary and capricious” due to the fact that *it had still failed to consider the information the workers had voluntarily submitted on October 17, 2002*, and, therefore, that information had not been made part of the agency record for the CIT to consider.²⁶² This time, the CIT specifically instructed DOL to address that information.²⁶³ And it also specifically instructed DOL to reassess the incomplete survey responses received from one of the two customers upon which DOL based its negative determination, because it found DOL’s “reliance on such incomplete customer surveys to be insufficient to support [DOL’s] conclusion.”²⁶⁴ The CIT further instructed DOL generally “to assist the Court in understanding the seemingly contradictory sales information provided by Tyco Electronics for the articles produced at the Glen Rock facility for January-September 2000 and 2001.”²⁶⁵ Finally, the CIT directed DOL not to rely solely on the “unverified statements from an untitled Tyco Electronics company official and the two customer surveys” to support its conclusion that there was only a domestic shift in production to an affiliated plant in Harrisburg, Pennsylvania,

260. *Id.*

261. *Id.* at 1332. Although the CIT acknowledged the merit of the workers’ arguments in favor of the CIT certifying them, it declined to address its authority to do so because it found that “an additional remand to Labor for further investigation [was] necessary to fully develop the administrative record before the Court.” *Id.* But it warned DOL that if DOL not perform a competent investigation upon remand, the Court would not remand the case again. *Id.*

262. *Id.* at 1330.

263. *See id.* (“On remand, Labor should detail its analysis and evaluation of the October 17 information.”).

264. *Id.* at 1331. Moreover, the CIT suggested that DOL should have undertaken an “independent import analysis which might have substantiated or contradicted the information reported by the customers.” *Id.*

265. *Id.*

but not a shift in production to Mexico.²⁶⁶ Without considering the contrary information submitted by the workers on October 17, 2002, the CIT warned, DOL's conclusion was "not supported by substantial evidence in the record or otherwise in accordance with law."²⁶⁷

On July 10, 2003, DOL published the results of its second remand investigation, this time concluding "that there was a shift of production to Mexico that contributed importantly to the worker separations and sales or production declines at the subject facility" and, therefore, it finally certified the workers' eligibility to apply for TAA benefits.²⁶⁸ But in late August of 2003, the workers were informed by a letter from the Pennsylvania Department of Trade and Labor that they would not receive certain TAA benefits because "the statutory 104-week eligibility period for [them] had expired during the pendency of [the] litigation."²⁶⁹ The CIT then took extraordinary steps, amounting essentially to supervising a cooperative effort between DOL and the workers to obtain assurances from Pennsylvania that the workers would receive the benefits they were due.²⁷⁰ Before dismissing the case, Judge Carman "observe[d] that the Department of Labor failed to follow [the] Court's specific instructions on remand," but the Court nevertheless affirmed DOL's certification because the workers were finally satisfied with DOL's determination.²⁷¹

266. *Id.* at 1331–32.

267. *Id.* at 1332.

268. *Former Employees of Tyco Elecs., Fiber Optics Div. v. U.S. Dept. of Labor*, 318 F. Supp. 2d 1354, 1356 (Ct. Int'l Trade 2004).

269. *Id.*

270. *See id.* at 1356–57 (detailing both the CIT's involvement via teleconference in September 2003 and its continued involvement in party negotiations).

271. *Id.* at 1358.