Primer on the Trade Adjustment Assistance Program - Executive Summary

Prepared by the Customs and International Trade Bar Association Sub-Committee on Trade Adjustment Assistance Cases

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This document is meant for discussion purposes only and should not be cited. It is part of an ongoing project by the Customs and International Trade Bar Association (CITBA) and its Ad Hoc Sub-Committee on Trade Adjustment Assistance (TAA) to improve the handling of TAA cases by attorneys, the government and the courts. The Sub-committee is particularly concerned with assisting workers entitled to relief under any of the TAA programs. The Sub-committee hopes that this document will spur discussion and cooperation and welcomes the constructive comments and criticisms from the all parties including government participants and the courts. All comments can be directed to the Sub-Committee, care of Professor Claire Kelly at claire.kelly@brooklaw.edu. Although this document is primarily addressed to attorneys involved in TAA cases, the Sub-committee hopes in the future to generate materials specifically directed at workers and state agencies dealing with TAA cases. Finally, although the Sub-committee recognizes that the Agricultural TAA program will be an important part of future discussions and efforts to assist workers, the Agriculture TAA program is beyond the scope of this document and is therefore not discussed in it.

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[1] Panel participants: Judge Judith Barzilay, U.S. Court of International Trade, Judge Evan Wallach, U.S. Court of International Trade, Leo Gordon, Clerk, U.S. Court of International Trade, Harry Shinefeld, U.S. Department of Labor, Patricia McCarthy, U.S. Department of Justice, Brad Brooks-Rubin, LeBoeuf, Lamb Greene & MacRae, LLP, Jerome Hanifin, Serko & Simon, Michael S. O'Rourke (Moderator), Rode & Qualey.

PART I: Introduction and Overview

Introduction

The Trade Adjustment Assistance (TAA) and Alternative Trade Adjustment Assistance (ATAA) programs are federal programs created to assist individuals who have become unemployed as a result of increased imports from, or shifts in production to, foreign countries. The programs are administered by the Employment and Training Administration (ETA) of the Department of Labor (Labor).

The TAA Petition

In general, when a group of workers lose, or expect to lose, their jobs because of competition from imports, they may petition for TAA certification. Workers whose jobs are lost to a shift in production to an overseas plant, or who are upstream or downstream suppliers to a qualifying firm may also apply.

In order to be certified, the following statutory standards must be met:
A group of three or more workers must file a petition for certification under section 2271 to show that:

> (1) a significant number or proportion of the workers in such workers' firm, or an appropriate subdivision of the firm, have become totally or partially separated, or are threatened to become totally or partially separated; and
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> (2)(A)(i) the sales or production, or both, of such firm or subdivision have decreased absolutely;
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> (ii) imports of articles like or directly competitive with articles produced by such firm or subdivision have increased; and
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> (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 in production by such workers' firm or subdivision to a foreign country of articles like or directly competitive with articles which are produced by such firm or subdivision; and
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> (ii)(I) the country to which the workers' firm has shifted production of the articles is a party to a free trade agreement with the United States;
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> (II) the country to which the workers' firm has shifted production of the articles is a beneficiary country under the Andean Trade Preference Act (19 U.S.C. 3201 et seq.), African Growth and Opportunity Act (19 U.S.C. 3701 et seq.), or the Caribbean Basin Economic Recovery Act (19 U.S.C. 2701 et seq.); or
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> (III) there has been or is likely to be an increase in imports of articles that are like or directly competitive with articles which are or were produced by such firm or subdivision.

Labor lists the basic information required from workers/petitioners in completing the petition on its website (http://www.dol.gov/).

What DOL Does With the Petition

After Labor receives the petition, it is required to investigate. 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 any investigation, representatives of the Department may 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 gather all relevant facts to make a determination on the petition. Once the investigation is completed, Labor chooses to certify or deny the petition.

If Labor certifies, then the workers hopefully begin to receive benefits through the appropriate state agency. Workers who are certified must apply for individual assistance seeking employment and other benefits. Each State has an agency that is responsible for providing TAA certified workers with TAA benefits. Soon after the State Department of Labor certifies a group of workers for TAA, that State agency will individually contact the eligible workers to set up meetings to determine on an individual basis what available benefits will work best for each worker.

If denied, the regulations provide for reconsideration by Labor (within 30 days of the publication of the determination in the Federal Register) or judicial review at the Court of International Trade of the original decision or the decision on reconsideration (within 60 days after the date of the contested Labor decision).

Notice of DOL's decision

If Labor determines that workers qualify for benefits, Labor will certify the petition and issue a "Certification Regarding Eligibility to Apply for Worker Adjustment Assistance." If the eligibility requirements are not met, Labor will deny the petition and issue a "Negative Determination Regarding Eligibility to Apply for Worker Adjustment Assistance." Labor should issue a decision 40 days after a petition is submitted but unfortunately, the process often takes much longer.

Appeal to the Court

The United States Court of International Trade (CIT) has jurisdiction to review any final determination of Labor with respect to the eligibility of workers for assistance under the TAA. Workers may request reconsideration of Labor's negative determination. Alternatively, workers may choose not to request reconsideration by Labor and may request judicial review immediately in the CIT by filing within 60 days of the publication of the initial negative determination in the Federal Register. If workers do seek

reconsideration at Labor, they may still sue in the CIT; however, they must do so within 60 days after the publication of the negative re-determination in the Federal Register. The CIT's web site has instructions on filing a complaint for workers who wish to represent themselves before the CIT. *See* CIT web site at www.cit.uscourts.gov. If the workers cannot afford counsel, they may ask the court to appoint counsel who will represent the worker without charge. Attorneys who wish to assist in TAA cases may find out more information from the Customs and International Trade Bar Association website at www.citba.org/announce.htm.

PART II: Potential Pitfalls and Hurdles to Mounting a Successful TAA Petition

1. Inadequate Investigation

A serious problem with TAA cases is the inadequacy of the initial investigation. Labor has cited lack of human power and revenue to conduct adequate and timely investigations (and remand investigations). The basic standards for who should qualify for TAA benefits were developed during the Kennedy Administration, and although some aspects of the program have evolved over time, the program has simply not kept pace with the dramatic changes to the American economy and the increasing global integration/migration of manufacturing and industry.

a) Provide Labor with detailed information

To address this problem, in their application, the workers should frame the industry within which they work, define specifically the work they perform as qualifying "production" or "production-related services," and set forth precisely how the company has been affected by imports or production transfers. Essentially, the workers must investigate and bring Labor up to speed on what the situation actually is in their industry and company.

b) Possible formats for presenting information

Possible formats for presentation of these descriptions would be: (i) affidavits from employees or other industry experts; (ii) information from secondary sources, such as textbooks, journals, Career Guides, websites, other opinions concerning the industry (anti-dumping, e.g.), etc.; (iii) letters or other charts prepared by attorneys or others that have been distilled from these sources.

If a case is at the appellate stage, attorneys should attempt to file a motion to supplement the administrative record with the additional information. Often, presentation of the information in a motion will cause Labor to seek a voluntary remand and look to the workers to help provide information for their consideration. If Labor is unwilling to voluntarily request a remand, use of the motion will identify the additional evidence to the

court, which could then use the existence of the information to justify a remand, as it would fulfill the "remedial nature" of TAA and serve the best interests of the workers.

c) Difficulties with relying upon firms to convey the information to Labor

Sometimes when gathering the information for a petition, workers may encounter an employer who is not happy with the publicity that a TAA case may bring (with all the lay offs, and plant closings) and there is a danger that a hostile employer will scuttle a TAA Investigation, as Labor usually gives high deference to information provided by employers. Labor has no power to sanction employers and employers may see no benefit to cooperating with the investigation. Also, relying on company officials to complete petitions may create problems (i.e. the company files the initial petition on behalf of the workers but later fails to support it with appropriate information during the investigation). Thus, workers should complete petitions on their own in order to have control over the information provided. However, workers should try, if possible, to work with friendly company employees who can help identify customers that will meet Labor's standards.

2. Showing Production or Production Related Services

It can be difficult to show that workers are involved in production or production related services. One CIT case provided a list of the questions it wanted to, but had yet to, see Labor answer:

> [Labor's] Remand Determination does not define the term production, nor does it provide any support for its conclusion that the gaugers do not engage in production. It does not attempt to define or describe the production process. It does not explain why gauging raw crude to determine if it can be sold for refining does not qualify as part of the production process. It does not say at what point the production process ends. It does not explain why oil already "in tanks" falls outside the production process. It does not explain why gaugers who monitor the quantity and quality of oil going directly into the pipeline (and not into tanks), are not part of the production process. It does not explain why quality control may be different for oil than for other products. It does not explain how a raw product like crude oil can be "produced" at all. It does not explain how workers employed by the pipeline company were able to work on oil tanks owned by the crude oil producers, but not be part of the production process.

3. Developing the Causal Connection between the Imports and the Harm

It is important for workers to spell out the causal connection between imports and the harm that they have suffered. This is a major problem, particularly in cases where there has been a two-step shift of production. Cases show that both workers and employers fail to produce evidence when the subject firm shifts production of the like-

product to another plant in the U.S., which in turn shifts the production of the same product abroad.

4. Arguments over "Like and Directly Competitive" Products

Workers must also show that they have been displaced by like or directly competitive products. Pursuant to TAA regulations, “like articles” are defined as “those which are substantially identical in inherent or intrinsic characteristics (i.e., materials from which the articles are made, appearance, quality, texture, etc.);” and “directly competitive articles” are “those which, although not substantially identical in their inherent or intrinsic characteristics, are substantially equivalent for commercial purposes (i.e., adapted to the same uses and essentially interchangeable therefore).” 29 C.F.R. § 90.2 (2002).

To help Labor understand the particular industry, petitioners must be as specific as possible on this issue and explain, to the extent practical, their industry and how the articles at the relevant facilities are produced and why they believe an imported product or why production shifted to an FTA country is like or identical (i.e., competes) with the product they used to make.

5. Statute of Limitations Problems/Eligibility Problems

Several cases have raised the issue of petitioners’ failure to comply with statutory deadlines in part due to their reliance upon statements made by the government.

6. Failure to Follow Procedure

At present, there is no clear model of what the Labor’s procedure for an investigation should or must be in order to pass judicial muster. The regulations concerning investigations are broad, and do not require that any specific process to be followed. Rather, they empower Labor to do what is “necessary and appropriate” to “marshal all relevant facts.” Steps enumerated in the regulations that might be “necessary and appropriate” include field visits, as well as contact with officials of firms, union officials, employees, and any other persons, or organizations, both private and public. Following the passage of the 2002 Act, the time permitted for an investigation fell from 60 to 40 days.

Failures in Labor’s procedure for conducting investigations that have been cited by the courts include: (i) over-reliance on statements, often e-mails, from the former employer; (ii) failure to consider statements or other evidence provided by the workers; (iii) failure to consult with, or request information/evidence from, non-party individuals who may have pertinent knowledge; (iv) failure to define key terms at issue in the petition; (v) failure to resolve contradictory evidence; and (vi) failure to consider or consult outside sources for necessary information. In addition, though not specifically related to

investigations, Labor is required to "promptly" publish in the Federal Register both the receipt of a petition and the decision; Labor has occasionally failed to do so. Also, Labor rarely used its subpoena power.

7. Initial Determinations Foreclosing Other Possible Beneficiaries

Under the provisions of the Act, workers may be eligible for TAA benefits as "secondary" workers when they do not qualify as "production" or "service" workers. Secondary workers are those whose firms are or were downstream producers or suppliers to firms whose employers were certified for TAA benefits.

8. Determining the Appropriate Subdivision of a Firm

To receive certification, workers must show that they either worked for an impacted firm or an "appropriate subdivision of a firm." In the past, Labor has interpreted an "appropriate subdivision" to disqualify employees that do not work for a facility that is either directly owned or controlled by substantially the same group of people. However, the CIT, in Former Employees of Pittsburgh Logistics Systems, Inc., rejected Labor's approach because it did not comport with the realities of business or the relevant statute. The court stated that the only appropriate standard to determine whether workers are part of an "appropriate subdivision" is whether the entity they work for also produces the relevant article.

9. Need for Guidance and Counsel

Workers appearing before the CIT may request the help of an attorney. The court maintains a list of attorneys willing to assist TAA petitioners free of charge as explained more fully on the Court's web page. It seems that it is possible for attorneys to also help workers prepare their claims at the administrative level. Indeed, it may be most helpful for attorneys to be involved at the administrative level because that is the point where the record (that will be reviewed by the CIT) is established.

10. Qualifying as Service Workers

Service workers can qualify for TAA benefits as well. Sometimes, however, workers have failed to qualify either because they were not found by Labor to be in the appropriate subdivision of the firm or Labor has found that the work was not sufficiently related to the production of merchandise. The CIT has articulated the service worker analysis as follows:

> The service worker analysis examines whether (1) the workers' separations were caused importantly by a reduced demand for their services from a

> parent firm, a firm otherwise related to the subject firm by ownership, or a firm related by control; (2) the reduction in the demand for their services originated at a production facility whose workers independently met the statutory criteria for certification; and (3) the reduction directly related to the product impacted by the imports.

Workers and lawyers should carefully examine to what extent possible workers activities can be labeled "production" and rather than "services." It may be helpful to refer to industry websites, manuals, etc. to show that the industry considers production to be X, and what is being done is clearly part of X.

Moreover, on January 23, 2004 Labor instituted a new policy which allows a certification of all leased workers, including service workers who are working at the same location as workers who have been previously certified eligible for TAA. According to this policy, in order to be eligible, leased workers must perform their duties onsite at the affected location on an established contractual basis. In order to be eligible for TAA as a leased worker the worker must be under the control of the TAA eligible firm. To assess control Labor will consider a variety of factors including whether the workers are subject to the terms and conditions of the eligible firm and whether the eligible firm has legal control over them such that the workers report to the eligible firm.