Testimony of Frank H. Morgan
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Committee on Science and Technology
Subcommittee on Investigations and Oversight
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Good afternoon Mr. Chairman and Members of the Committee. My name is Frank Morgan and I am an attorney at the law firm of White & Case LLP where I practice primarily in the area of international trade disputes. My remarks today are necessarily my own and do not reflect the views of my firm or our clients. I thank Michael O'Connor and Sara Sargeantson, two summer associates at my firm whose assistance made this testimony possible.

Thank you for inviting me to offer my experience and to convey the concerns of the many frustrated workers who have unsuccessfully petitioned the Employment and Training Administration ("ETA") of the Department of Labor for trade adjustment assistance ("TAA").[1] The primary mission of the Department of Labor is to protect and promote the American worker's interests. It should go without saying that in administering TAA, the ETA must act with the utmost regard for the American workers who seek assistance. But, all too often, the ETA fails to do so. And regardless of one's views about international trade, ensuring that workers who are adversely affected by trade get prompt retraining and transitional assistance is a no brainer. In preparing this testimony I came across a startling statistic: from 2002-2005, approximately 45 TAA cases were litigated, and in all but 4, Labor ultimately certified the workers. That is shocking and it shows that Labor is not fulfilling the responsibilities that Congress entrusted to it.

Before I joined White & Case, I served as a law clerk to the Honorable Judith M. Barzilay at the U.S. Court of International Trade ("CIT"). It was during my clerkship that I first encountered the difficulties unsuccessful TAA petitioners face. In addition to working for an

[1] Throughout my testimony, I refer interchangeably to the agency as "the ETA" or Labor.

outstanding jurist, I had the privilege of knowing many other judges on the court. A review of their decisions reflects just how frustrated and disturbed most (if not all) of the CIT judges are with ETA's handling of TAA cases. Among a frustrated bench, Judge Delissa A. Ridgway stands out for her efforts to call attention to the problem and to catalogue the breadth and enduring nature of it. **Attachment 1** of my written testimony contains Judge Ridgway's decision in *Former Employees of BMC Software, Inc. v. U.S. Sec'y of Labor*, 454 F. Supp.2d 1306 (Ct. Int'l Trade 2006) which is a must read for anyone that is concerned about this problem. My remarks today are mere footnotes to the expert treatment Judge Ridgway already has given to the topic.

I. DIFFICULTIES FACED BY THE UNSUCCESSFUL TAA PETITIONER

My testimony focuses on the unsuccessful TAA applicant both at the agency level and in the subsequent battles to use the judicial process to overturn an incorrect agency decision. Without question (as I am sure Labor would be quick to note), many workers are successful in petitioning for TAA. But – even if Labor reaches the correct result much of the time – the workers who succeed at the agency level are the *easy* cases, where little or no independent inquiry by the agency is necessary: the cases where it would be patently obvious to anyone that the workers satisfy the criteria for TAA certification; the cases where the workers have themselves compiled and neatly served up for Labor's convenience all the evidence required to support certification; and (perhaps) the cases where certification of the workers is the politically expedient thing to do.

The problem arises in all the other cases: the cases where it is not immediately obvious whether the workers are entitled to TAA, where all the evidence is not served up to the agency on a silver platter – the cases where a true investigation is required. These are the cases where

the agency fails the workers. Labor often reaches the wrong result because it has conducted an inadequate investigation. It is one thing to deal with the easy cases, and an entirely different one to resolve those that require a deeper investigation. But Congress did not intend for Labor to shirk the difficult investigations.

Of course, the statute does not entitle every petitioning worker to be certified for TAA. But, as the Court's opinion in *BMC* emphasized, "every worker *is* entitled to a thorough agency investigation of his or her claim – without being forced to resort to the courts. The law mandates no less."[2] It is for these reasons that I believe my focus on the unsuccessful TAA applicant is appropriate.

In order to understand the difficulties unsuccessful TAA applicants face, it is necessary to understand how a case starts, proceeds through the ETA, and how it may, eventually, end up in the judicial system. TAA initially is sought at the agency level, specifically, at the ETA. A petition for TAA generally is filed by three or more workers who have been laid off by a firm, a union representing workers that have been laid off, or the firm that has laid off workers. Eligibility for TAA is governed by statute. To grossly summarize the law, Labor is supposed to certify workers for TAA if one of the following three conditions is met: 1) there has been an increase in imports that caused job losses, or 2) the workers' firm shifted production to a country that has a free trade or other preferential trade agreement with the United States, or 3) the workers' firm shifted production to a foreign country and there have been subsequent imports of that product into the U.S. market.[3] If Labor does not certify, the workers have the right to appeal that decision to the CIT. I know that this Committee has been examining the effects of

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[2] *Former Employees of BMC Software, Inc. v. U.S. Sec'y of Labor*, 454 F. Supp.2d 1306, 1357 (Ct. Int'l Trade 2006) (*quoting* 29 C.F.R. § 90.12).

[3] Workers who are employed by a firm that supplies components to a firm that has been certified for TAA also may be eligible. *See* 19 U.S.C. § 2272(b). Please see **Attachment 2** for the full text of the statutory provision governing eligibility for TAA.

globalization, and I thought the Members might be interested to know that appeals involving a shift in production to a foreign country have accounted for approximately 22 of 40 appeals filed with the CIT since 2005.

A. Difficulties for TAA Petitioners at the Agency Level

At the agency level, TAA petitioners almost never have counsel representing them. As a consequence, individuals who often have little or no experience with Federal law and agency regulations are largely relying on the ETA to perform its functions with the utmost regard for protecting their interests. Indeed, as the *BMC* opinion pointedly observes, that is precisely the situation that Congress contemplated:

> Congress designed TAA as a *remedial* program, recognizing that petitioning workers would be (by definition) traumatized by the loss of their livelihood; that some might not be highly-educated; that virtually all would be *pro se*; that none would have any mastery of the complex statutory and regulatory scheme; and that the agency's process would be largely *ex parte*. Congress did not intend the TAA petition process to be adversarial. Nor did Congress intend to cast the Labor Department as a 'defender of the fund,' passively sitting in judgment, ruling 'thumbs up' or thumbs down' on whatever evidence petitioning workers might manage to present.
>
> Quite to the contrary, the Labor Department is charged with an *affirmative* obligation to *proactively* and thoroughly investigate all TAA claims filed with the agency – and, in the words of its own regulations, to 'marshal all relevant facts' to make its determinations.[4]

Because counsel does not become involved until much later in the process we typically only see the shortcomings in Labor's initial investigations after the case has been appealed to the CIT – and the shortcomings can be tremendous. For example, in the first TAA case that I litigated, the ETA determined based on inconclusive and inaccurate information that the workers

[4] *Former Employees of BMC Software, Inc. v. U.S. Sec'y of Labor*, 454 F. Supp.2d 1306, 1357 (Ct. Int'l Trade 2006) (*quoting* 29 C.F.R. § 90.12).

were service providers, and denied TAA on those grounds. It took almost four years and several court orders to get the ETA to correct that decision. Unfortunately, by that point, TAA was meaningless for my clients. For TAA to serve its intended purpose, the system has to function properly *at the agency level.* As I will discuss later, this will not occur until the ETA fully accepts the mandate that Congress has given it to conduct a full and thorough investigation – *in every case*.

Congress has not set forth specific instructions on how Labor is to conduct its proceedings, but Congress has clearly expressed its intent that Labor is to conduct an *investigation*.[5] By providing Labor with the power to subpoena witnesses and documents, Congress evinced a clear intent that the investigation should not be cursory.[6] Labor's investigations, however, are often *pro forma* at best, and fall far short of what Congress intended.

In addition to mandating that Labor conduct an investigation, Congress has recognized that the ETA must conduct its investigation swiftly, providing Labor with 40 days to determine whether the petitioners are eligible for TAA.[7] In fact, Congress shortened the period to 40 days from 60 days in 2002. Yet Labor, by regulation, has granted itself the authority to conduct reconsideration proceedings that can greatly extend the time for making its "final" determination beyond 40 days.[8] If a worker chooses to pursue this process, it can add up to 90 additional days to the process at the agency level.[9]

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[5] *See* 19 U.S.C. § 2271(a)(3) (requiring Labor to publish notice of the initiation of an *investigation*).
[6] *See* 19 U.S.C. § 2321(a).
[7] *See* 19 U.S.C. § 2273(a).
[8] *See* 29 C.F.R. § 90.18. While Labor claims that the authority to conduct an administrative reconsideration is provided for by the Trade Act of 1974, as amended, my colleagues and I have been unable to locate the relevant provision in the statute.
[9] *See* 29 C.F.R. §§ 90.18(c)&(g) (providing Labor with 15 days to decide whether reconsideration is warranted and, if so, 45 additional days to make the determination). In my view, the investigation that Labor performs on reconsideration is equally inadequate, so the additional time provides a TAA applicant with little benefit, and merely delays the time before an appeal is made.

It is deeply disturbing – and, likely, telling – that the standard form letter that Labor uses to inform workers that their TAA petition has been denied advises the workers only of the ability to seek administrative reconsideration before the agency, and conveniently fails to inform them of their right to seek immediate judicial review instead.[10] The vast majority of unsuccessful TAA petitioners simply end the process at this point, unaware of their right to appeal or too exhausted and frustrated to continue.

For the unsuccessful TAA petitioners with any fight left in them, there is one last hurdle, the 60 day deadline for filing an appeal at the CIT.[11] This deadline is extremely short especially when considering that most aggrieved persons are not represented by an attorney. Congress should consider extending the time for filing an appeal to reflect this reality.

B. Difficulties Faced After the Administrative Process Has Concluded and Litigation Begins

Once a TAA case gets to the CIT, it takes too long to litigate, and – even then – the ETA generally fails to carry out its responsibilities with the utmost regard for the workers. Fully litigated TAA cases from 2005 to present took an average of 354 days to resolve, with one case lasting 954 days, or a little over 2 ½ years. As I mentioned earlier in my testimony, the first case I litigated took four years to resolve. In my case and in at least 15 of the cases litigated since 2005, there was a change in Labor's decision. Instead of receiving TAA within 40 days, as Congress intended, these workers were unjustly denied TAA for far too long, and all because Labor's investigation was inadequate. During this time, those unsuccessful TAA petitioners suffered the full brunt of the adverse effects attendant to being laid off, and even though the court

[10] My understanding is that Labor used to inform petitioners of that right and its omission from current notifications can only be taken as an attempt to limit petitioners' right to avail themselves of the judicial system.
[11] *See* 19 U.S.C. § 2395(a).

action was successful, it can never remedy the harm that workers suffer due to delay in receiving the TAA benefits to which they were entitled.

As the CIT observed in the *Chevron* case, the consequences of agency delays in certification can be profound – sometimes, quite literally, life-or-death:

> There is a very human face on [TAA 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 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 treatment must be deferred (sometimes with life-altering consequences). And college funds are drained, then homes are lost, as mortgages go unpaid. Often, marriages founder.[12]

The bottom line is this: Where displaced American workers seeking TAA benefits are concerned, litigation will never be an adequate substitute for Labor doing its job. For this reason, it is imperative for Labor to conduct a proper investigation in the first instance.

In large measure, Labor creates the delays in the litigation process by: 1) seeking a voluntary remand in virtually every case that is appealed, 2) making excessive requests for extensions, 3) failing to conduct the type of investigation (in the first instance and in response to court ordered remands) that Congress contemplated, 4) failing to interpret the statute in a good faith manner, consistent with the remedial nature of the TAA statute, 5) failing to concede that cases with similar facts should be resolved in a similar manner, and 6) failing to respect the CIT's authority. These failings suggest to me, and I am not alone in this view, that Labor is defaulting on its obligations to fulfill the responsibilities that Congress entrusted to it.

[12] *Former Employees of Chevron Prods. Co. v. U.S. Sec'y of Labor*, 298 F. Supp. 2d 1338, 1349 (2003).

1. Labor Often Uses Voluntary Remand Proceedings to Support its Original Determination

In the cases I have litigated, the ETA has sought consent to conduct what is referred to as a voluntary remand proceeding. This means that Labor is asking the court for permission to conduct additional fact finding, clarify areas of confusion, and reconsider its decision. In other words, Labor is admitting that it did not do a proper investigation in the first instance. Moreover, in other cases that I have reviewed, it appears that Labor seeks a voluntary remand in almost every case. In contrast, other agencies that appear before the CIT rarely ask for voluntary remands. In short, the ETA's own actions at the CIT demonstrate that it is not conducting a proper investigation in the first instance.

Adding to this frustration is the fact that Labor often does not conduct a better investigation after asking for the remand. Often the ETA conducts the remand investigation with an aim towards "bullet proofing" its original decision.[13] For example, in the *Former Employees of Merrill Corporation* Labor asked for 90 days to reconsider its original determination, the plaintiffs consented and the CIT granted the request.[14] A fundamental issue was whether the workers produced an article. Labor had originally contended that the workers provided a service; and thus, were not eligible for TAA. Yet in the voluntary remand proceeding, and despite requests that it do so, Labor did not even examine whether the workers' firm produced printed materials which would have qualified as articles. As the CIT noted, "Labor failed to undertake even a minimal investigation of Merrill's production of printed matter. The record is devoid of any information concerning the percentage of [printed documents]."[15]

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[13] As I discuss below, even when the remand proceeding is ordered by the CIT, Labor sets out to justify its original determination.

[14] *See Former Employees of Merrill Corp. v. U.S. Sec'y of Labor*, Slip Op. 04-2, 2004 WL 34548 (Ct. Int'l Trade Jan. 4, 2004).

[15] *Former Employees of Merrill Corp. v. U.S. Sec'y of Labor*, 387 F. Supp. 2d 1336, 1346 (Ct. Int'l Trade 2005).

2. Labor's Requests for Extensions Are Excessive

As I have explained earlier in my testimony, the TAA statute reflects Congress' considered judgment that 40 days is ample time for Labor to complete a thorough investigation of even the most complex TAA petition. But not only is the agency failing to fulfill that mandate, it is routinely seeking periods far in excess of 40 days to conduct its remand investigation – precious time on top of the time the ETA already had to conduct the initial investigation. In short, the agency's dilatory conduct in the course of litigation greatly compounds and exacerbates the effects of its failures and omissions in the conduct of its initial investigation. For the unsuccessful TAA petitioner, the feeling of frustration and anger builds each time Labor seeks an extension.

I have been involved in litigation (either in private practice or as a law clerk) with almost every agency over which the CIT has jurisdiction. Parties (both private and government) often seek extensions of time to perform certain acts. But Labor stands out both in terms of the number of extensions requested and the apparent lack of need for them. In the *Former Employees of Merrill Corporation* litigation, Labor sought two extensions of time to file various remand results.[16] Like Charlie Brown hoping to finally kick the football, we consented in the belief that Labor needed the time and was acting in good faith. Yet this proved not to be the case, as Labor reached the same result over and over.

In the TAA case I am currently litigating, Labor sought a voluntary remand (which it originally had 60 days to complete) and then asked for two extensions of time to file the remand results. We consented to the first because a legitimate reason was provided. We objected to the second because it was requested in the afternoon on the very day the remand determination was

[16] Labor's counsel also sought extensions for various reasons. While the reasons given were understandable, the combined effect was to significantly delay the resolution of the case.

supposed to be filed with the CIT, and Labor did not even offer a reason for making the request. Labor eventually filed its remand determination with the CIT, again denying eligibility. We were disappointed with the result but not surprised given Labor's track record. What outraged us was what Labor did in those 70 days: seven email messages (four of which were non-substantive), a few voice mail messages, and a visit to a website. This did not require 7 days, much less 70.

Again, these are not isolated incidents. Labor typically has requested at least one extension in each fully litigated case since 2005, and has requested as many as 6 extensions in a single case. The requests averaged approximately 20 days each but some were as long as 90 days. This is troubling because the extension follows on what are almost always 60 or 90 day periods that already had been given to Labor. In my experience, other agencies do not request so many extensions for such lengths of time, and when they do, it is usually because the private parties also need additional time.

3. Labor Does Not Conduct Investigations in the Manner Congress Contemplated

As I discussed earlier, Labor does not conduct an adequate investigation in the first instance. In my experience, this does not change even after the case reaches the CIT. The ETA's failure to conduct an adequate investigation causes significant delays in the resolution of a CIT proceeding.

First, the amount of information that Labor obtains is insignificant and insufficient to resolve the issues that are presented in most cases. In the cases I have litigated, the investigation mainly consisted of a few email messages and a few phone conversations. The agency record, even after several remand investigations, often consists of fewer than fifty pages after accounting

for duplicative material. Moreover, when information supports a negative determination, Labor accepts it without question.

In contrast, other agencies with which I am intimately familiar (such as the International Trade Commission ("ITC") and Department of Commerce ("DOC")) obtain far more information in similar time frames, and critically assess it. I am convinced that Labor does not seek more information, and does not conduct the kind of investigation that Congress intended for fear that it will undercut the decision not to certify.

Second, Labor does not conduct its investigations in a manner that gives counsel for the workers a meaningful opportunity to participate. Labor does not provide information to counsel for the workers as it is obtained, but only after Labor has made and submitted its remand determination to the CIT. In contrast, the ITC and DOC release information that is submitted to the agency (or obtained by it) to parties on the same day or shortly thereafter. The *ex parte* nature of Labor's investigation, even within the context of an appeal, means that the workers' first opportunity to challenge the relevance, accuracy, and completeness of the information is after the case re-commences at the CIT. Not only does this cause further delay, but it suggests that Labor is not interested in arriving at the correct result. Counsel for employees of IBM referred to the manner in which Labor conducts its remand investigations as a "sham which lacked transparency and was conducted to reach a predetermined negative result."[17] Again, this suggests that Labor is not acting in accordance with the utmost regard for the workers, which is the mission that Congress entrusted to it. Indeed, when workers succeed in achieving TAA certification through litigation, it is only because the workers and their counsel have provided evidence to the ETA, which the ETA appears to be wholly unwilling to obtain on its own.

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[17] *Former Employees of IBM Corp. v. U.S. Sec'y of Labor*, 483 F. Supp. 2d 1284, 1287 (Ct. Int'l Trade 2007 (quoting Plaintiffs' brief).

Accordingly, Labor's standard practice of excluding the workers and counsel from playing an active role in the remand investigation in effect postpones an accurate determination on the workers' entitlement to TAA benefits, and is indefensible.

Third, Labor arbitrarily relies on information that supports its decision to deny TAA certification, and disregards that which does not. For example, the CIT has criticized Labor for overreliance on employer provided information that supported no certification for TAA when there was contradictory information submitted by the workers that contradicted it and supported certification.[18] If Labor uniformly relied on employer information at least there would be consistency, but even this is not the case. In the cases I have litigated, the employer generally was supportive of the workers' request for TAA, and in one instance, the employer even filed the TAA petition and continued to press for Labor to find that the employees were eligible. Labor chose to ignore the employers' statements and information favorable to TAA certification. Yet had the employers submitted information unfavorable to certification, I suspect Labor would have relied on the information. Again, Labor's pattern of seizing on any evidence that supports its decision to deny benefits – and its utter disregard for that evidence which supports certification – demonstrates a lack of good faith in resolving the dispute and adds to the delay in the resolution of the case.

4. Labor Arrives at Interpretations of the Statute that Do Not Reflect a Good Faith Effort to Resolve the Problem

The agencies that I primarily appear before (the ITC and DOC) almost always offer well-reasoned views in their interpretations of the statute. Even when I have occasion to challenge the reasonableness of an ITC or DOC interpretation, I have never faced one as absurd and unreasonable as the one Labor offered in *Former Employees of Merrill Corporation*.

[18] *See Former Employees of BMC Software, Inc. v. U.S. Sec'y of Labor*, 454 F. Supp. 2d 1306, 1328-36 (Ct. Int'l Trade 2006).

My clients in that case produced financial documents (SEC filings, annual reports, etc.) for many different customers. The firm shifted certain functions (typesetting, proof reading, formatting) to India, and the finished financial document was imported into the United States. After the firm shifted that aspect of production offshore, it laid off the workers who had performed those functions. Following several court ordered remands, and years into the case, Labor found a new and previously unarticulated reason for denying TAA to my clients. Labor reasoned that the articles my clients produced were not like or directly competitive with the imported articles.[19]

The ETA took the position that each financial document was unique. For example, an annual report for Microsoft was not like or directly competitive with an annual report for Apple, and even quarterly financial reports were not like or directly competitive with one another because they contained different financial data from different reporting periods. On the basis of this tortured reasoning, Labor argued that the workers who lost their jobs after the shift to India were not eligible because each and every article they produced was unique, and thus did not fall within the meaning of "like or directly competitive" as Labor interpreted the term. Nonsense, as the CIT astutely noted. Nowhere did Congress (or even Labor) restrict TAA eligibility "to workers engaged in mass-production to the exclusion of workers whose output may require skills, training, and expertise necessary to produce custom-made articles."[20] I believe that Labor's reliance on tortured interpretation of the statute to defend a negative decision shows how deep the problems are in the ETA's administration of the statute. Again, this is not a unique instance of Labor engaging in an absurd interpretation of the statute in order to reach Labor's

[19] It took several CIT orders just to get Labor to grudgingly accept that my clients produced an article.
[20] *Former Employees of Merrill Corp. v. U.S. Sec'y of Labor*, 483 F. Supp. 2d 1256, 1268 (Ct. Int'l Trade 2007).

desired result. The CIT chastised Labor in another case as follows: "To put it bluntly, the Labor Department's pinched, formalistic analysis verges on intellectual dishonesty."[21]

5. Labor Does Not Concede that Cases with Similar Facts Should Have Similar Outcomes

Another disturbing trend that adds to the unsuccessful TAA petitioners' plight is the unwillingness of the ETA to acknowledge that similarly situated applicants should receive the same treatment. Labor ignored this basic tenet of law in *Former Employees of Merrill Corporation*. During the course of that multi-year litigation, but in a different case, Labor announced a change in policy that recognized certain products could be considered articles even if the goods were intangible, and workers manufacturing them would thereby qualify for TAA. Labor, however, did not notify the CIT of this change – that burden fell on the workers. Upon learning of this policy change, the CIT ordered Labor to reconsider its decision.[22] Incredibly, Labor again denied certification (as noted above, on the grounds that the articles were unique). But this time, Labor ignored its practice in still a different case in which it had certified workers who produced custom logos, which – by definition – were unique.[23] In other words, Labor twice in the same proceeding failed to accord a similar outcome to similarly situated individuals. Labor's failure in this regard is not unique, as the CIT has expressed a similar concern in three recent cases.

6. Labor Appears to Lack Respect for the CIT's Authority

In the cases in which I have been involved, and in analyzing many CIT decisions, it is evident to me that Labor has little respect for the CIT's authority. Short of holding Labor officials in contempt, there is little the CIT can do to remedy this situation. In my view, this is

[21] *See Former Employees of IBM v. U.S. Sec'y of Labor*, 483 F. Supp. 2d 1284, 1326 (Ct. Int'l Trade 2007).
[22] *See Former Employees of Merrill Corp. v. U.S. Sec'y of Labor*, Slip Op. 06-72, 2006 WL 1491616 (Ct. Int'l Trade May 17, 2006).
[23] *Former Employees of Merrill Corp. v. U.S. Sec'y of Labor*, 483 F. Supp. 2d 1256, 1268-69 (Ct. Int'l Trade 2007).

partly responsible for the untenable situation that exists today, where Labor strives to maintain its original determination without regard to the duty prescribed by Congress to conduct TAA cases with the utmost regard for the workers.

Labor, itself, has argued that the CIT has no authority to order the certification of workers, and that Labor, alone, can do so. For support, Labor cites two statutory provisions. The first states that Labor's factual findings are conclusive if they are supported by substantial evidence.[24] The second states that the CIT may not grant an injunction or issue a writ of mandamus in an appeal of Labor's denial of TAA.[25] Taken together, Labor reads these provisions to mean that there can only be an endless back and forth between the agency and the court until one side surrenders. At no point, in Labor's view, does the CIT have authority to order certification. The consequence of this battle of wills is delay in the final resolution of the case and issues that already had been settled during a prior segment of the same proceeding often are reargued.[26]

Common sense dictates that Labor's view is incorrect. Congress must have intended for meaningful judicial review and for the courts to have the authority to ensure that their rulings were implemented. This is evident from the fact that Congress created three levels of judicial review of Labor decisions including the CIT, the Court of Appeals for the Federal Circuit, and, ultimately, the Supreme Court.[27] Yet Labor's position is that if Labor decides not to change its decision, not one of the three reviewing courts can do anything about it.

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[24] *See* 19 U.S.C. § 2395(b).
[25] *See* 28 U.S.C. § 2643(c)(2).
[26] *See Former Employees of Merrill Corp. v. U.S. Sec'y of Labor*, 483 F. Supp. 2d at 1266 n.7 (stating "This Court does not appreciate Labor's attempt to reargue this point in the third remand results.").
[27] *See* 19 U.S.C. § 2395(c).

III. THE PROBLEMS WITH LABOR ARE WIDESPREAD

My testimony thus far has focused primarily on my own experience. The following quotes are intended to show the Committee the breadth of the problem. In my experience, some CIT judges direct occasional harsh words towards the government agencies that appear before it. But I am unaware of an agency that has received more uniform criticism from so many different judges. To me, this is further evidence of the severity of the problem with the ETA's investigations.

The following quotations are taken from two opinions by Judge Ridgway in which she catalogued the court's various criticisms of Labor's investigations.

A. Former Employees of BMC Software, Inc. v. U.S. Sec'y of Labor, 454 F. Supp. 2d 1306, 1313 N.10 (Ct. Int'l Trade 2006).

- agency's investigation was "merely perfunctory," and petition was denied based on only "scant evidence"; action remanded to agency with instructions to supplement "shockingly thin" record of investigation[28] (Judge Barzilay)

- agency's determination both "betrays…[any] understanding of the industry it is investigating and the requirements of the [TAA statute]" and "failed to make reference to relevant law…, including Labor's own regulations on the matter"; and, although agency was granted three extensions of time to file results of second remand, remand results nevertheless still failed to comply with court's remand instructions[29] (Judge Pogue)

- "Labor repeatedly disregarded evidence of critical facts," "refused to accept information submitted by [the petitioning workers], which allegedly contradicted statements made by [company] officials," "rel[ied] on incomplete and allegedly contradictory information to support its position," and ultimately "failed to provide any analysis regarding the change in its position to certify [the workers] as eligible"[30] (Judge Carman)

- agency's finding "is not only unsupported by substantial evidence, but is contradicted by the scant evidence" that exists[31] (Judge Eaton)

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[28] *Former Employees of IBM Corp., Global Servs. Div. v. U.S. Sec'y of Labor*, 387 F. Supp. 2d 1346, 1350-51, 1353 (Ct. Int'l Trade 2005).
[29] *Former Employees of Murray Engineering, Inc. v. Chao*, 358 F. Supp. 2d 1269, 1274, 1275 n. 10 (Ct. Int'l Trade 2004).
[30] *Former Employees of Tyco Electronics v. U.S. Dep't of Labor*, 350 F. Supp. 2d 1075, 1089 (Ct. Int'l Trade 2004).
[31] *Former Employees of Ericsson, Inc. v. U.S. Sec'y of Labor*, Slip Op. 04-130, 2004 WL 2491651 at *5 (Ct. Int'l Trade Oct. 13, 2004).

- because “Labor never acknowledged its receipt of [the workers’] petition and wholly failed to initiate an investigation thereof,” “the displaced workers’ claims were ignored for over three months;”’ once initiated, “[t]he entire investigation consisted of two communications with only one individual, [the company’s] HR manager”; and even “the investigation upon [the workers’ request for] reconsideration was perfunctory at best”[32] (Chief Judge Restani)

- “the entirety of the Labor Department's initial investigation consisted of forwarding the standard [form questionnaire]” to company official, with no follow-up by the agency, “even though the company's responses... 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 rubberstamp of its initial Negative Determination,” “consist[ing]-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”[33] (Judge Ridgway)

B. ***Former Employees of Ameriphone, Inc. v. U.S.***, 288 F. Supp. 2d 1353, 1355 N.3 (Ct. Int’l Trade 2003).

- castigating agency for “a sloppy and inadequate investigation” which was “the product of laziness,” and holding that a fourth remand would be “futile”[34] (Judge Tsoucalas)

- characterizing agency's actions as “unreasonable” and its investigation as “misguided and inadequate at best” where agency, *inter alia,* failed to clarify important aspects of information provided by company, relied on company's unsubstantiated statements on critical point, and ignored other relevant information[35] (Judge Goldberg)

- “conclud[ing] that Labor ... conducted an inadequate investigation and analysis of the plaintiffs as ‘production’ workers” and, similarly, that “Labor's service worker [analysis was] inadequate”[36] (Judge Musgrave)

With so many well-respected jurists of the same mind on this issue, there is no question in my mind that my clients’ painful experiences are not unique – they are suffered by all unsuccessful TAA applicants.

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[32] *Former Employees of Sun Apparel of Texas v. U.S. Sec’y of Labor*, Slip Op. 04-106, 2004 WL 1875062 at *6-7 (Ct. Int’l Trade Aug. 20, 2004).
[33] *Former Employees of Ameriphone, Inc. v. U.S.*, 288 F. Supp. 2d 1353, 1358-59 (Ct. Int’l Trade 2003).
[34] *Former Employees of Hawkins Oil and Gas*, Inc. v. *U.S. Sec’y of Labor*, 814 F. Supp. 1111, 1115 (Ct. Int’l Trade 1993).
[35] *Former Employees of Swiss Indus. Abrasives v. U.S.,* 830 F. Supp. 637, 641-42 (Ct. Int’l Trade 1993).
[36] *Former Employees of Pittsburgh Logistics Sys., Inc. v. U.S. Sec’y of Labor*, SLIP OP. 03-111, 2003 WL 22020510 at *11 (Ct. Int’l Trade 2003).

IV. COMMON MISUNDERSTANDINGS ABOUT PROBLEMS WITH LABOR'S ADMINISTRATION OF TAA

In discussions that I have had with my colleagues over the years, it occurs to me that there are a number of misunderstandings that attempt to explain (or even justify) the inadequacy of Labor's investigations (both at the agency level and in subsequent litigation). Generally, the misconceptions fall into one of the following three categories: 1) Labor receives inadequate funding for the TAA program, 2) Labor follows the wishes of the company that has laid off the workers, and 3) Labor has the same track record as the other agencies that appear before the CIT. My reason for addressing these misconceptions is that I believe each, in its own way, suggests that some factor, other than sheer unwillingness explains the ETA's action. In my view, there is no valid excuse for the appallingly low quality of Labor's investigations.

A. Inadequate Funding or Lack of Resources Cannot Explain Labor's Stance

There is little question that Labor has limited resources in terms of staff, funds, and even the time it is given to conduct its investigations. At first glance, these would appear as a reasonable basis for excusing Labor's shortcomings. On closer inspection, the above factors cannot explain or justify Labor's failure to investigate TAA cases in the manner Congress intended.

First, Congress has directed Labor to evaluate a worker's eligibility for TAA through an investigation that should consist of gathering all relevant evidence and applying the law to the facts found. Labor, surely, does not have the time or resources to compile the same extensive records as do other agencies such as the ITC and DOC. If Labor needs more than just the handful of investigators that it has, it should ask for them. To my knowledge, Labor has not done so. But even with the resources Labor does have, surely the agency could do far more than sending a few email messages and making a few phone calls, especially in the context of a

remand proceeding. Not allowing parties to meaningfully participate in the remand investigation, which would greatly improve the information gathering, also is not a question of resources. As I have previously discussed, Labor's failure to conduct the kind of investigation Congress intended is because the agency has lost sight of the need to hold the interests of the workers in the utmost regard.

Second, Congress did not intend for funding concerns to drive Labor's determinations on TAA eligibility. Instead, Congress spelled out the conditions for eligibility and specified that if those conditions were satisfied, Labor was to certify the workers for TAA. To the extent Labor is making determinations on eligibility based on funding concerns, it is at complete odds with Congressional will.

Third, my view is that Labor's overall approach to the unsuccessful TAA applicant demonstrates a lack of concern for the workers – not a lack of resources. Last minute requests for extensions of time, absurd interpretations of the statute, and a general unwillingness to accept the CIT's authority cannot be explained by resource constraints. In fact, by not following the statute and the CIT's instructions in good faith, Labor creates more work for itself – not less.

B. Labor Follows the Will of the Company that Laid Off the Workers

The CIT has expressed concern that Labor unquestioningly relies on employer-provided information to the exclusion of that provided by employees or other sources.[37] In particular, the CIT was concerned that some companies might want to avoid the negative publicity that might be associated with laying off workers for trade-related reasons.[38] As a result, such companies might have an incentive to see the petition fail, and would provide information to influence the decision in that direction. Consequently, if those circumstances were present and Labor accepted

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[37] *See Former Employees of BMC Software, Inc. v. Sec'y of Labor*, 454 F. Supp. 2d 1306, 1328-37 (Ct. Int'l Trade 2006).

[38] *See Former Employees of BMC Software, Inc. v. Sec'y of Labor*, 454 F. Supp. 2d 1333 (Ct. Int'l Trade 2006).

the information provided by company officials in the face of contradictory information provided by the employees, Labor clearly would not be fulfilling its responsibilities.

While I do not doubt that the court's concerns were justified in the case before it and are present in others, my concern is that Labor seizes on whatever information supports its decision not to certify – irrespective of the source. In the cases I have litigated, Labor ignored information provided by company officials, which if taken at face value, should have resulted in a certification of the workers for TAA. In one case, the company's human resources department was even responsible for filing the petition with Labor. A review of the cases filed at the CIT since 2005 shows that the company filed the TAA petition with Labor in at least 6 instances. So I do not believe that Labor tends to take the position favored by the firm laying off the workers. Rather, Labor relies on information that supports its decision not to certify.

C. Labor Has the Same Track Record as Other Agencies that Appear Before the CIT

A number of agencies who enforce and administer the U.S. customs and trade laws are frequent litigants at the CIT. While I have not performed an objective assessment to compare the agencies' track records, I am able to offer my views based on the cases in which I have participated. In most trade and customs cases, the dispute between the private parties and the government agencies focuses on several discrete issues. Rarely (in my own experience, never) are challenges made to the overall adequacy of the investigation, and rarely does an agency ask for a voluntary remand, thereby conceding a flawed investigation. Even when Labor does not seek a voluntary remand, the record is so poorly developed that there is little to do but ask the CIT to remand to the agency.

The large number of remands in TAA cases also makes Labor stand out from the other agencies administering the customs and trade laws. In my experience, and in all but the most

unusual cases, if an ITC or DOC determination is not upheld by the CIT without remand proceedings it often is upheld after the remand proceedings. But in a TAA case, one must expect that multiple remands are going to be necessary just to settle the basic facts, which the CIT has described as the "ping pong phenomenon."

Finally, there is no question that the CIT has expressed concern with agencies besides Labor. But if one looks earlier in my testimony at the excerpts from the opinions of a wide range of judges that contain scathing criticisms of the ETA, it is clear that Labor is in a class by itself.

V. SOLVING THE PROBLEMS FACED BY UNSUCCESSFUL TAA PETITIONERS

In my view, fixing the existing system will require one significant non-statutory change and several statutory ones. Sadly, the biggest obstacle to unsuccessful TAA petitioners is the Employment and Training Administration of the Department of Labor. Possibly no other change could have as beneficial an effect as holding the ETA responsible for conducting a meaningful investigation. The CIT has been trying to do this, yet the problem persists. As I mentioned earlier in my testimony, for TAA to be effective, Labor has to get it right the first time. Once the court steps in to force Labor to do a proper investigation it already is too late. By that time, most workers will have suffered the brunt of the adverse economic consequences associated with the job loss. While I can diagnose the problem, I cannot prescribe an exact cure for a problem that is deeply entrenched and long standing. I do think it will require active involvement by the legislature because in my view, the problem has persisted irrespective of which political party occupies the White House. In other words, I do not believe that a new occupant in the White House, irrespective of party, is going to solve the problem without active pressure from the legislative branch.

In terms of legislative changes, I believe the following statutory amendments would improve unsuccessful TAA petitioners' chances of obtaining meaningful relief: 1) mandatory and swift time frames for judicial resolution of TAA cases, 2) mandatory changes to the manner in which the ETA conducts its investigations, and 3) clarifying that the CIT has the authority to order Labor to certify workers for TAA.

Although it is not common for Congress to impose mandatory time frames on Article III courts, it is not without precedent. Congress has established express and speedy time frames under which the courts must act in laws ranging from the Crime Victims' Rights Act and the Antiterrorism and Effective Death Penalty Act to procedures dealing with the disclosure of classified information.[39] I do not mean to convey the impression that TAA cases rise to the level of severity present in these other situations, but Congress created the program because it felt these individuals needed help, and if lengthy judicial proceedings are preventing that intent from being realized, Congress can impose time limits if it so chooses.

Another improvement for unsuccessful TAA petitioners would be to require Labor to change the manner in which it conducts its investigations. As I have indicated throughout my testimony, I do not believe that the manner in which the ETA currently conducts investigations is consistent with what Congress intended. Two modifications would go a long way towards improving the quality of the investigation the ETA conducts. First, counsel for the workers should have the right to participate and ask questions in any fact-finding missions by Labor, whether conducted telephonically or otherwise. Second, Labor must provide counsel for the workers with the information it obtains on the day it receives the information, or shortly thereafter. These two changes are needed to ensure that the workers, through counsel, have a meaningful opportunity to participate in the remand proceedings.

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[39] *See* 18 U.S.C. 3771(d)(3); 18 U.S.C. 2339B(f)(5)(B); 28 U.S.C. § 2261 et seq.

Finally, Congress needs to clarify the statute to protect the CIT's authority. As I noted earlier, Labor construes 19 U.S.C. § 2395(b) and 28 U.S.C. § 2643(c)(2) to preclude the CIT from having the authority to order Labor to certify workers for TAA. As a consequence, litigations drags on endlessly, and getting to a final resolution becomes a war of wills. This cannot be what Congress intended when it enacted these provisions, and a clear statement to that effect is needed to end this absurd impasse.

Thank you Mr. Chairman and Members of the Committee for affording me the honor of voicing these concerns on behalf of the countless hardworking men and women of America who have been failed by the very agency that Congress designated to protect their interests.

Attachment 1

Former Employees of BMC Software, Inc. v. U.S. Sec'y of Labor, 454 F. Supp.2d 1306 (Ct. Int'l Trade 2006)

Attachment 2

19 U.S.C. § 2272

(a) In general
A group of workers (including workers in any agricultural firm or subdivision of an agricultural firm) 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, 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 like or directly competitive with articles produced by such firm or subdivision have increased; and
(iii) the increase in imports described in clause (ii) contributed importantly to such workers' separation or threat of separation and to the decline in 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
(ii)(I) the country to which the workers' firm has shifted production of the articles is a party to a free trade agreement with the United States;
(II) the country to which the workers' firm has shifted production of the articles is a beneficiary country under the Andean Trade 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
(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.
(b) Adversely affected secondary workers
A group of workers (including workers in any agricultural firm or subdivision of an agricultural firm) shall be certified by the Secretary as eligible to apply for trade adjustment assistance benefits under this part 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 such supply or production is related to the article 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 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.[40]

[40] 19 U.S.C. § 2272.

Attachment 3

Example of Letter from Employment and Training Administration Notifying TAA Applicant that Eligibility Has Been Denied

Biography

Frank H. Morgan is an associate with White & Case LLP's International Trade Group with an active practice in injury investigations before the US International Trade Commission (ITC), antidumping and countervailing duty investigations before the US Department of Commerce and in related trade litigation and appeals before the US Court of International Trade and the US Court of Appeals for the Federal Circuit.

Mr. Morgan has represented manufacturers from numerous countries in a wide and diverse array of industries, including paper, lumber, steel, fertilizers, and agricultural goods. Mr. Morgan has served as a member of the Court of International Trade's planning committee for the 13th and 14th Judicial Conferences and has spoken on trade law issues to industry groups and professional organizations.

Prior to joining White & Case LLP, Mr. Morgan served as a law clerk to the Honorable Judith M. Barzilay, Judge, US Court of International Trade from 1998-2000. From 1997-1998, Mr. Morgan worked in the Office of the General Counsel of the ITC.

Publications

"Tips for the New Practitioner at the US Court of International Trade," Georgetown University Law Center Continuing Legal Education Seminar Materials, *Trade and Customs Law Refresher*, January 2007

Bars and Courts

District of Columbia Bar, 2000
Virginia State Bar, 1998
US Court of Appeals for the Federal Circuit
US Court of Appeals for the Fourth Circuit
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Education

B.A., Villanova University, 1995
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