THE MARGINAL FIRM: A PROPOSAL TO MODIFY THE CAUSAL STANDARD IN TRADE ADJUSTMENT ASSISTANCE CERTIFICATION

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ABSTRACT

Trade Adjustment Assistance ("TAA") seeks to compensate workers who have lost their jobs due to an influx of imports that resulted from a regulatory liberalization of U.S. trade policy. Either the Department of Labor or Agriculture must, in part, find that an increase of imports contributed importantly to the workers' separation. However, the method these agencies use, and the appellate standard upon which such a determination is scrutinized, is not successful in achieving the original statutory purpose. More accurately understanding how purchasing patterns change as a result of an increase in imports yields more precise, and responsive, certification requirements. By increasing the economic realism of the causal standard, workers that ought to be certified, but nevertheless are denied, will responsibly—and likely more expeditiously—be deemed eligible to receive TAA benefits.

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I. INTRODUCTION

It has become increasingly clear that negotiating a free trade agreement with one or more countries is perhaps as arduous a task as getting that agreement passed in Congress.[1] A consistent worry levied domestically against these agreements is that foreign competition will adversely effect U.S. businesses and, in particular, individuals employed by these businesses. Trade Adjustment Assistance ("TAA") is the favored political carrot offered in response.[2] The intended purpose of this program is to responsibly compensate some of the "losers" of international trade.[3] Through an application to the Departments of Labor or Agriculture, a worker may be certified eligible for state-administered benefits like cash assistance and vocational training.[4] Even though the current TAA program goes a long way towards accomplishing these remedial goals, its effectiveness is limited by the statutory certification requirements. In specific, it codifies an overly simplistic conception of how international trade effects domestic industries to the detriment of workers who have a rightful claim for certification but are nevertheless denied.

This Note proposes a standard of certification that is more responsive to the impact of trade and, as a result, better achieves the remedial goals of TAA. To accomplish this task, Part II sketches the statutory development of standards certifying workers. Importantly, this section discusses the "contributed importantly" standard and focuses on salient features of a court's review when a denied applicant appeals an administrative determination. Part III offers a more precise economic description of how companies may be affected by import competition. Part IV proposes an addendum to the statutory certification standards that would widen certification to include employees who have lost their jobs due to trade but fall through the cracks of the current statutory certification requirements.

II. THE ORIGINS AND DEVELOPMENT OF TRADE ADJUSTMENT ASSISTANCE

A. Development of Trade Adjustment Assistance

After the General Agreement on Tariffs and Trade ("GATT") in 1948, countries party to this agreement began to derogate from their trade obligations via its Article XIX Escape Clause.[5] Article XIX allows a country to temporarily "suspend the obligation" previously agreed to in order to avoid "serious injury to domestic producers."[6] Opting out of obligations in this

1. *See* RAJ BHALA, DICTIONARY OF INTERNATIONAL TRADE LAW 636-40 (2008).
2. *See* Erika Kinetz, *Trading Down*, HARPER'S MAG., July 1, 2005, at 62.
3. *See* UAW v. Marshall, 584 F.2d 390, 395 (D.C. Cir. 1978).
4. 19 U.S.C. § 2271(a) (2004).
5. Eleanor Roberts Lewis & Harry J. Connolly, Jr., *Trade Adjustment Assistance for Firms and Industries*, 10 U. PA. J. INT'L BUS. L. 579, 581-82 (1988).
6. General Agreement on Tariffs and Trade, art. XIX, Oct. 30, 1947, 61 Stat. A-2051, 55

manner created three problems. First, there was a growing consensus that it was not in the best interest of the countries' short- or long-term economic well-being to enact high tariffs and other trade barriers to protect domestic industries.[7] Second, in the *Hatters' Fur* case,[8] the GATT dispute resolution body developed the elements of an Escape Clause action and required that "the increased imports must be the result of *unforeseen* developments and of the effect of the tariff concession."[9] But assuredly, a drop in price as a result of lowering trade barriers should come as no surprise to the U.S. government or businesspeople when a concession is granted to a country that produces something U.S. consumers' demand. Finally, reflexively increasing previously lowered trade barriers did not address the root of the problem—workers were getting laid off. Even if an Escape Clause action were successful and legal, the damage had already been done. While the U.S., for instance, may impose the pre-agreement tariff barriers to recover the loss, there is no guarantee that such barrier will revitalize the domestic industries and allow the separated workers to regain their previous employment.

Instead of utilizing the Escape Clause, U.S. policymakers began to explore other opportunities for protecting domestic workers.[10] As a result, the Randall Commission was established in 1954.[11] The Commission's final report contained an unusual dissenting proposal authored by David J. McDonald of the Steelworkers' Union.[12] McDonald's proposal was the birthplace of TAA.[13] But it was not until 1962, when Congress, at the urging of President Kennedy, passed the Trade Expansion Act.[14] In stating the intended purpose of this act, President Kennedy clarified that "[w]hen considerations of national policy make it desirable to avoid higher tariffs, those injured by that competition should not be required to bear the full brunt of the impact. Rather, the burden of economic adjustment should be borne in part by the Federal Government."[15] In order for a worker to be eligible for TAA, the Department of Labor had to find that imports were a major cause of the worker's separation.[16] "Major cause" was legislatively defined as a cause that is greater than all of the other causes combined.[17] Partially as a result of this

U.N.T.S. 308 [hereinafter GATT].

7. *See* Lewis, *supra* note 5.

8. *See* Report of the Intersessional Working Party on the Complaint of Czechoslovakia Concerning the Withdrawal by the United States of a Tariff Concession under the Terms of Article XIX of the General Agreement, II GATT B.I.S.D. 36 (1952) [hereinafter Hatters' Fur Report].'

9. RAJ BHALA, MODERN GATT LAW: A TREATISE ON THE GENERAL AGREEMENT ON TARIFFS AND TRADE 954 (2005) (quoting Hatters' Fur Report, *supra* note 8 (emphasis added)).

10. Lewis, *supra* note 5, at 581-82.

11. *Id.*

12. *Id.*

13. *Id.*

14. *See* Trade Expansion Act of 1962, Pub. L. No. 87-794, 76 Stat. 872.

15. Lewis, *supra* note 5, at 583.

16. Trade Expansion Act § 301(c)(3), 76 Stat. at 884.

17. United Glass & Ceramic Workers of N. Am. v. Marshall, 584 F.2d 398, 400 (D.C. Cir.

high causal threshold, no workers were certified as eligible in the first seven years of its existence.[18]

B. The **Trade Act of 1974***: Refining the Causal Standard*

The second iteration of TAA in the Trade Act of 1974 attempted to remedy, and thereby lessen, this causal standard.[19] It only required increased imports to "contribute importantly to [such] workers' separation or threat of separation and to the decline in the sales or production of such firm or subdivision."[20] An import contributes importantly when it is "a cause which is important but not necessarily more important than any other cause."[21] Additionally, after receiving a petition for certification from a group of workers or firm, the Department of Labor ("DOL") must find the following:

> (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;[22]
>
> (2) the sales or production, or both, of such firm or subdivision have decreased absolutely;[23] and
>
> (3) imports or articles like or directly competitive with articles produced by such firm or subdivision have increased.[24]

C. Interpreting "Contributed Importantly" and the Marginal Firm

The first major appellate case to consider whether the "contributed importantly" element had been satisfied was *United Glass & Ceramic Workers v. Marshall*.[25] In this case, workers from a Mount Vernon sheet glass manufacturing plant submitted a petition for TAA certification. After an initial investigation, the DOL denied the petition, concluding that the "contributed importantly" element had not been satisfied.[26] The workers then petitioned the DOL for reconsideration.[27] The Department acquiesced, but, after concluding its second investigation, it again denied the workers.[28] At that point, the

1978) (citing H.R. REP. NO. 93-751, at 46 (1973)).

18. UAW v. Marshall, 584 F.2d 390, 395 (D.C. Cir. 1978).
19. *See* Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (1975).
20. 19 U.S.C. § 2272(a)(2)(A)(iii) (2004).
21. *Id.* at § 2272(c)(1).
22. *Id.* at § 2272(a)(1).
23. *Id.* at § 2272(a)(2)(A)(i).
24. *Id.* at § 2272(a)(2)(A)(ii).
25. 584 F.2d 398 (D.C. Cir. 1978).
26. *Id.* at 399.
27. *Id.*
28. *Id.*

workers appealed the denial of certification. Ultimately, the D.C. Circuit—the Court of International Trade ("CIT") was yet to be created[29]—upheld the DOL's denial.

The *United Glass* decision is important in two respects. This opinion offers the first significant interpretation of the newly added "contributed importantly" standard. Even though it was the first interpretation, the court established a test and grappled with issues in a way that informs the present appellate review of this issue. Furthermore, appellants argued that the causal standard should be interpreted in a way that certifies the marginal firm.[30] The marginal firm is a firm typically with the highest production costs.[31] Because of higher costs, marginal firms are competitively disadvantaged vis-à-vis international firms but only if the world market for the good it produces is cheaper internationally. A discussion of the DOL's investigation and the court's opinion will provide insight into what a marginal firm is, how it presents a unique problem for TAA certification, and why the DOL's denial of certification was upheld.

Mount Vernon was part of the flat glass industry.[32] In its first investigation, the DOL focused on the current state of this industry. The DOL found that the flat glass industry was composed of the manufacture of three sorts of glass: sheet glass, float glass and plate glass.[33] As a result of recent technological progress allowing higher quality float glass to be manufactured cheaper, the U.S. rate of sheet glass production in 1975 was 8.1% less than in the previous year.[34] Compounding the shift based on technological progress, from 1973 to 1975 there had been a drop in U.S. automobile production and building construction—industries that both procured significant quantities of flat glass.[35] As a result, the Mount Vernon plant found itself between an economic rock and a hard place. Not only had technological progress made their firm less competitive, but the quantity of purchases was also decreasing due to a slowdown in key economic sectors.

The DOL's first investigation also surveyed some of Mount Vernon' s clients to better ascertain the impact of imports. The DOL was able to obtain information from twelve customers, representing 36.2% of Mount Vernon's sales in 1974.[36] Seven of the customers did not import, imported very little, or were decreasing their level of imports in the following year.[37] Additionally in 1975, four other customers surveyed did not indicate whether they increased imports.[38] The final customer increased purchases from both foreign sources

29. *See* Customs Courts Act of 1980, 28 U.S.C. § 251 (2004).
30. *United Glass*, 584 F.2d at 403-04.
31. *Id.* at 404.
32. *Id.* at 402.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*

and Pittsburgh Plate Glass Industries, Mount Vernon's parent corporation.[39] Given the decreased demand of plate glass, technological obsolescence, and the lack of current customers shifting to imports, the DOL concluded that the "contributed importantly" standard had not been satisfied.[40]

The DOL's second investigation focused more squarely on the impact of imports on the Mount Vernon plant. The purchasing patterns of 45 domestic users of sheet glass were scrutinized, 21 of which were customers of the Mount Vernon plant accounting for 21.5% of its sales in 1974 and 38.3% of sales in 1975.[41] Out of the 21 Mount Vernon customers, 13% had increased purchases in 1975, but only 1.6% had purchased more imported glass.[42] A similar picture is found when analyzing all 45 purchasers. Over 90% of this group had either switched to other domestic competitors, reduced purchases from all sources, or increased purchases from the Mount Vernon plant.[43] Less than 8% of the sample had decreased purchases from Pittsburgh Plate Glass and increased purchases of imports.[44] The DOL again denied the certification based on failing to meet the "contributed importantly" element.[45]

Mount Vernon's appeal criticized the method used in the DOL's investigations and the application of that method. The test formulated on appeal to scrutinize Labor's investigation was the dual test.[46] The dual test requires a "decrease [in] purchases from the affected firm and [an] increase [in] purchases of imported articles" in order for the imports to have contributed importantly to workers' separation.[47] Appellant's criticism of the dual test was three-fold: the dual test had no statutory basis, and, therefore, was not intended by Congress;[48] it obscured the true effect of import competition;[49] and it totally ignored the effects of price suppression.[50] Regarding the first argument, appellant argued that, given the statutory eligibility requirements for certification, the dual test is too simplistic to determine if import competition caused the workers' separation. Factors abound within almost all economies, especially a large, open economy like that of the United States, that influence the purchasing patterns in more subtle ways than a mere survey of a company's customers can measure.

39. *Id.*

40. Negative Determination Regarding Eligibility to Apply for Worker Adjustment Assistance, 41 Fed. Reg. 41,985 (Sept. 24, 1976).

41. *United Glass*, 584 F.2d at 403.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* Appellants also argued that imports only must have increased relatively, not absolutely, and they also argued a 5% quantum to interpret importantly. However, these arguments, although briefly considered in the opinion, were of no consequence to the outcome. *See id.* at 401.

The court did not find this line of reasoning compelling, but not void of all merit. Even though the Trade Act of 1972 did not define "contributed importantly" very precisely, if at all, the legislative history revealed insight into the drafters' intent. The Senate committee report regarding the change in the causal standard stated that "contributed importantly" clarifies that "[a] cause must be significantly more than de minimis."[51] Although this description is no hallmark of clarity, the report also stated that separation resulting from domestic competition, seasonal, cyclical, or technological factors do not warrant certification.[52] Applied to this case, the DOL's investigations, particularly the first, revealed a picture of a firm struggling to compete in a declining market selling a product that, in virtue of its outdated manufacturing technology, was prohibitively expensive to produce. None of these factors were scenarios that the drafters sought to certify.

The court also defended the DOL's denial on the grounds that methodological flexibility is necessary to fulfill its statutory obligations to administer TAA.[53] In order to fulfill such a goal, the reviewing court must not proscribe the manner in which an agency must certify an applicant. Rather, the court's only job is to determine if the agency's determination has a rational basis.[54] Only in the extraordinary case that a determination is not based on substantial evidence may a reviewing court remand for further consideration.[55] Market movement in the plate glass industry strongly indicates that regardless of import competition, the Mount Vernon workers would have likely been separated. Moreover, the survey of plate glass purchasers from Mount Vernon and throughout the U.S. did not suggest a dramatic shift to imported glass in 1975. Even though not all of Mount Vernon's customers had been surveyed, a significant enough portion upon which a reasoned conclusion could be based was conducted. Absent any argument to the contrary—like a reason that the purchasers who had shifted to imports decided in concert not to respond to the DOL's survey—it was reasonable to assume that the group surveyed is representative of the customers as a whole.

Given the text of the statute, in combination with its drafting history and the considerable deference given to an agency's determination, the court found the dual test to be "a reasonable means of ascertaining a causal link between imports and separation at the Mount Vernon plant."[56] The court acknowledged appellant's argument that imports have a subtler impact on purchasing patterns than may be possible to identify with the dual test,[57] but refused to reject the dual test, citing the lack of a better alternative.[58] Although

51. *Id.* at 400 (quoting S. REP. NO. 93-1298, at 133 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7186, 7275).
52. *Id.*
53. *Id.* at 404-05.
54. *See id.*
55. *Id.* (citing 19 U.S.C. § 2322(b) (1976)).
56. *Id.* at 406.
57. *Id.* at 405.
58. *Id*. at 406.

flaws may be identified in the DOL's methodology, the flaws indicated here did not lead the court to conclude that there is no rational basis for this decision.[59] The major causes of the workers' separation were a rapidly diminishing demand for their product and an outdated manufacturing process. The only remaining question was whether an increase in imports also contributed importantly to the workers' separation. However, the survey of customers' purchasing patterns provided a sufficient basis upon which the DOL can deny certification. The availability of more rigorous statistical and economic techniques that more comprehensively identify purchasing patterns does not mean that the DOL's denial was based on arbitrary reasons.[60]

Appellants' second and third arguments can be evaluated together. They argued that import competition does not only impact firms whose customers shift to imports but all firms throughout an industry.[61] Specifically, those firms teetering on the margins of profitability will be hurt. Why? Because these firms are already stretched thin capital-wise. Any number of factors like, for instance, poor management, an inefficient production process, or lackluster sales due to shoddy marketing strategies, can bankrupt a company. While these problems clearly do not warrant certification, a marginal firm will be the first one unable to compete against cheaper imports if previous problems, like those mentioned above, exist. A company may be able to survive while employing the same workers until they reform their inefficient production process, for instance, but not if they are also competing against an influx of cheaper imports.

Furthermore, appellants argued that increasing imports suppresses the price of a good, thereby hurting the marginal firm.[62] In the opinion, this objection to the dual test was not fully fleshed out. There are two possible ways to interpret it. Appellants could have been merely reiterating the previous point. If the good a manufacturer produces is sold for less on the international market, then when there is an increase of imports, consumers will purchase from the cheaper imports. The availability of cheaper imports will suppress the domestic price until trade is restricted or the world price increases. However, appellants seem craftier, and less redundant than that. The more likely argument concerns the effect on the marginal firm when there is an increase of imports sold lower than the world market price. Perhaps the most common strategy for a company entering a market to gain customers is to offer its goods or services at a below-market price. Since the marginal firm is already stretched thin capital-wise, it cannot both retain its current clients by lowering its price and continue to operate for any period of time, if at all. A domestic firm who is not on the precipice of profitability is better situated to recover if it temporarily lowers its prices because it hopefully has a capital reserve it can exploit.

59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*

Unfortunately for the Mount Vernon workers, the facts do not seem to suggest either of these problems. The court quickly dismissed the price suppression argument. Assuming that this is a valid criticism of the dual test, it was not compelling given the facts of this situation because the price of flat glass rose in 1975.[63] In fact, "in 1975-76 [the price of window glass] rose almost twice as fast as the wholesale price index for all industrial commodities."[64] Obviously, price suppression is not occurring when the price of the good in question actually increases.

But what was the court's response to the purchasing pattern argument? The court seemed to share the appellant's worry that imports could have a "more subtle impact on purchasing patterns."[65] However, in this circumstance the depth of the DOL's investigation leaves little room for doubt. Assuming *arguendo* that the dual test may be deficient, the DOL conducted a much broader query than focusing solely on the purchasing patterns of existing customers. In its second investigation, the DOL polled a survey of flat glass purchasers more extensive than just those that bought from Mount Vernon. If there were a subtler shift of imports, it would have been indicated in data obtained from these purchasers. However, this was not the survey's result. It found no greater shift to imports from other domestic purchasers.

This court, however, did not merely rely on the wider scope of the second investigation to base its conclusion. Receding demand coupled with a rise in directly competitive products of superior quality, at least some of which are produced domestically, makes purchasing patterns "extremely hard to trace."[66] These two other factors were most likely the main determinants for customers seeking other sources for glass. The motivations for changing sources could be a combination of these two reasons and lower priced imports. However, filtering out the final two of these two factors seems quite difficult and beyond the scope of appellate review. Moreover, the court here indicated that, even if it could suggest a better test, its only function was to review the method the DOL actually employed, not to recommend a superior alternative.[67]

D. The Dual Test and Agency Determinations: Current Law and Method

The impact of *United Glass* endures to this day.[68] When the CIT reviews an agency denial because appellants deny that imports had contributed importantly to the workers' separation, it always uses the dual test to determine if the DOL has a reasonable basis upon which to deny certification.[69] Not only

63. *Id.* at 406.
64. *Id.* at n.27.
65. *Id.* at 405.
66. *Id.* at 405-06.
67. *Id.* at 406.
68. *See* Former Employees of Spinnaker Coating Me., Inc. v. Chao, 246 F. Supp. 2d 1352, 1358 (Ct. Int'l Trade 2003); Anderson v. United States, Sec'y of Agric., 429 F. Supp. 2d 1352, 1355 (Ct. Int'l Trade 2006); Former Employees of BMC Software, Inc. v. United States Sec'y of Labor, 454 F. Supp. 2d 1306 (Ct. Int'l Trade 2006).
69. *Spinnaker Coating*, 246 F. Supp. 2d at 1358.

does the CIT use this standard, it seems as if, over time, the DOL has tailored its investigations to comport with the dual test. The DOL employs what has been dubbed the "Customer Survey Method."[70] After a petition has been filed, the DOL contacts the owners of a firm to solicit information about how the firm has been affected by imports and the identity of its customers. Typically, customers of this firm receive queries asking if they had decreased purchases from the firm in question and increased import purchases. This information is incredibly accurate in determining whether the dual test has been satisfied, provided that a significant portion of the firm's customers are willing to provide the DOL with this information.[71]

However, there are circumstances when the CIT has found that information provided by the head of a company or its customers unreliable. For instance, "the customer survey method does not form an adequate basis for determining whether a company's production has declined due to outsourcing."[72] *Former Employees. of BMC Software, Inc. v. United States Sec'y of Labor* forcefully suggests why such information may not reliable.[73] To save itself from vilification as an evil outsourcer on "Lou Dobbs Tonight" or be branded as a "Benedict Arnold CEO" by a presidential candidate, owners and executives of a company whose workers have filed a petition have motivation to be far less than forthright.[74] In circumstances where it is likely that adequate and accurate information cannot be obtained by conducting an investigation in light of the dual test, the DOL must investigate further to determine if imports have contributed importantly to the workers' separation. However, poor response, whether by low response percentage or lack of forthrightness, is just one situation in which the CIT may find the record insufficient to uphold an agency determination.

Labor is not the only agency certifying workers who have been separated from employment by the "contributed importantly" standard. Despite explicit inclusion of workers of agricultural firms, or a subdivision thereof, within § 2272,[75] farmers have a separate provision for obtaining TAA.[76] In order for a group of agricultural commodity producers to be certified, the Department of Agriculture's Foreign Agricultural Service must certify that:

> (1) the national average price for the agricultural commodity, or a class of goods within the agricultural commodity, produced by the group for the most recent marketing year for which the national average price is available is less that 80 percent of the average of the national average price for such agricultural

70. *See* Former Employees of Swiss Indus. Abrasives v. United States, 830 F. Supp. 637, 641 (Ct. Int'l Trade 1993).

71. *Id.*

72. *Id.*

73. *Former Employees of BMC Software*, 454 F. Supp. 2d at 1331-32.

74. *Id.* at 1332.

75. *See* 19 U.S.C. § 2272(a) (2004).

76. *See id.* at §§ 2401–2401c.

> commodity, or such class of goods, for the marketing years preceding the most recent marketing year;[77] and
>
> (2) increases in imports of articles like or directly competitive with the agricultural commodity, or class of goods within the agricultural commodity, produced by the group contributed importantly to the decline in price described in (1).[78]

The Department of Agriculture conducts a similar investigatory process for certifying a firm, relying on the dual test as a guide.

III. RE-CASTING THE FACTS IN UNITED GLASS: A CRITICISM OF THE DUAL TEST

Given the statute, the outcome in *United Glass* and the current reliance on the dual test seems reasonable. But given different facts and modified certification requirements, the story would be different. Suppose that Mount Vernon sold its plate glass for $50 per unit, but the going international rate for glass was $45 per unit. Additionally, a domestic competitor can also produce like glass for $45 per unit. A Mount Vernon customer in search of cheaper glass per unit has a choice between the foreign competitor and the domestic competitor. Perhaps the domestic competitor is located nearby and, as a result, is a more convenient supplier. If domestic firms that produce glass at $45 per unit cannot supply enough glass to meet demand, then some of those customers will satisfy their needs internationally. Does the customer choose the imported good or decide to purchase from the more expensive Mount Vernon? As long as there is no external constraint, like an excessively bureaucratic importing process, all businesses concerned with competing and, hence, remaining profitable will choose the cheaper imports.

This example illustrates the quandary of the marginal firm, and how the dual test, relying upon a cursory survey of then-existing customers, cannot account for even these simplified situations. Assuming that the domestic competitor has extra, but limited, capacity and flexible contracts on that surplus, purchasers from Mount Vernon may likely begin to fulfill their plate glass needs from the domestic competitor. However, since the domestic competitor cannot fulfill the entire domestic demand for goods, it will not be able to accommodate all customers that may want to buy from it. As a result, those purchasers will then begin buying from foreign manufacturers, assuming that all plate glass is of the same quality and purchasers will prefer to buy the cheapest glass. In effect, choosing to buy from the cheaper domestic competitor with the internationally competitive price is choosing to buy from foreign producers.

Appellants also argued that the marginal firm would be the first firm

77. *Id.* at § 2401a(c)(1).
78. *Id.* at § 2401a(c)(2).

harmed by imports priced at artificially low prices.[79] Once again consider the aforementioned scenario but now suppose that the importer's price is at $40 per unit. Why might the importer charge an artificially low price? Most likely, to gain access to the U.S. flat glass market. Any company trying to break into a competitive market, whether a domestic start-up or a new international venture, must compete to gain customers. One of the most successful ways to do that is to provide the same product at a better price. What happens in this case? Initially there may be a domestic exodus from both Mount Vernon and the internationally competitive domestic firm to the artificially low import firm. The initial shift though is not the problem for the dual test. It should be able to identify such a linear movement in purchasing patterns. However, difficulties emerge regarding what happens next.

Both Mount Vernon and the domestic competitor will have to decrease their price in order to be competitive. However, the marginal firm will have less room to maneuver. It is already doing everything it can to keep its head above water, so to speak. Both companies would attempt to guard their market share by decreasing their price until either the foreign venture raises prices or exits the market. In so doing, they would offer glass at $40 per unit. However, when this happens Mount Vernon is at a competitive disadvantage. Because it was only marginally profitable before at $50 per unit, it is less likely to have the capital resources to absorb the losses incurred for charging $40 per unit. Alternatively, the other domestic firm is better situated to recover from charging a lower price for a brief time.

But why is this price shift only momentary? If the world price for flat glass per unit is $45, then no company, provided that it is not a monopoly, can charge a rate that is not profitable over a long period. But upon moving into a competitive market, there would be no reason for current customers to shift to a like product if it was not cheaper. Such a company is only doing this in the short term to gain a market share. After such share is obtained, it will raise its prices and hope that the temporarily low price will have been successful in carving out a space in the U.S. flat glass market.

These two illustrations suggest that there may be more to determine if imports have had a negative causal impact on a firm rather than the mere application of the dual test can provide. It is possible—and dare to say, highly probable—that customers will increase import purchases but not immediately after they leave the firm in question. Increasing the economic realism of the statutory certification requirements, and thus the standard of review, is necessary for TAA to finally fulfill its remedial goal.

IV. A PROPOSAL TO MODIFY THE CAUSAL STANDARD

Justice Brandeis once opined "[that] experience teaches that it is much easier to reject formulas presented as being misleading than to find one

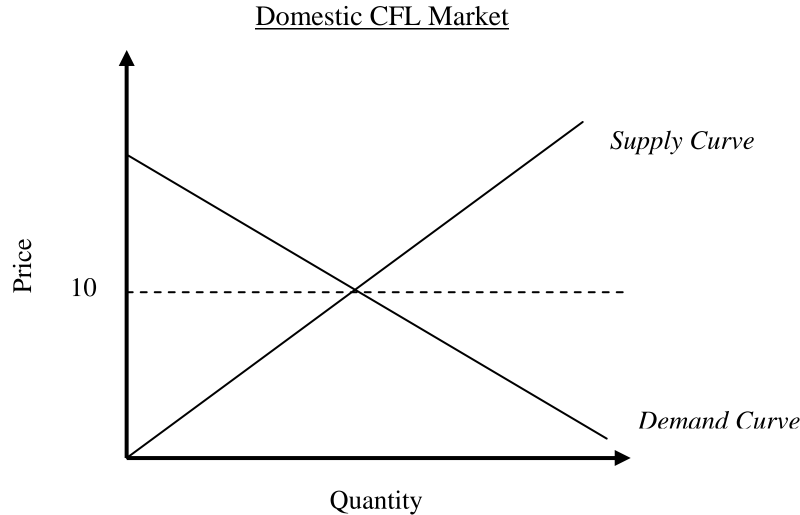
79. United Glass & Ceramic Workers of Am. v. Marshall, 584 F.2d 398, 404 (D.C. Cir. 1978).

apparently adequate."[80] Although most tests—especially a non-technical legal one like the dual test that is intended to identify precise economic events—can be criticized without recommending an alternative, this is not one of those circumstances. A precise economic conception of a marginal firm can be formulated and translated into a workable standard of certification that the Departments of Labor and Agriculture are presently equipped to apply. This standard will not only likely increase the number of certifications and decrease the amount of time necessary to determine worker eligibility, but it also better reflects how import competition affects purchasing patterns. As a result, incorporating this new standard will more successfully accomplish the remedial purpose of TAA—that is, to protect workers who, by no fault of their own, are dislocated because of an increase of imports.[81]

A. An Economic Description of the Marginal Firm

United Glass defines a "marginal firm" as the firm within an industry with the highest production costs.[82] This definition, although not incorrect, can be articulated with greater detail. Consider this graph that hypothetically maps U.S. supply and demand curves of compact fluorescent lamps ("CFLs").

The vertical axis in this graph represents the price of CFLs. The horizontal axis represents the quantity of CFLs.



The domestic demand curve represents the buying preferences of individual purchasers. Theoretically, this line is populated with individuals at

80. *Id.* at 406 (quoting Groesbeck v. Duluth, S. Shore & Atl. Ry. Co., 250 U.S. 607, 614-15 (1919)).

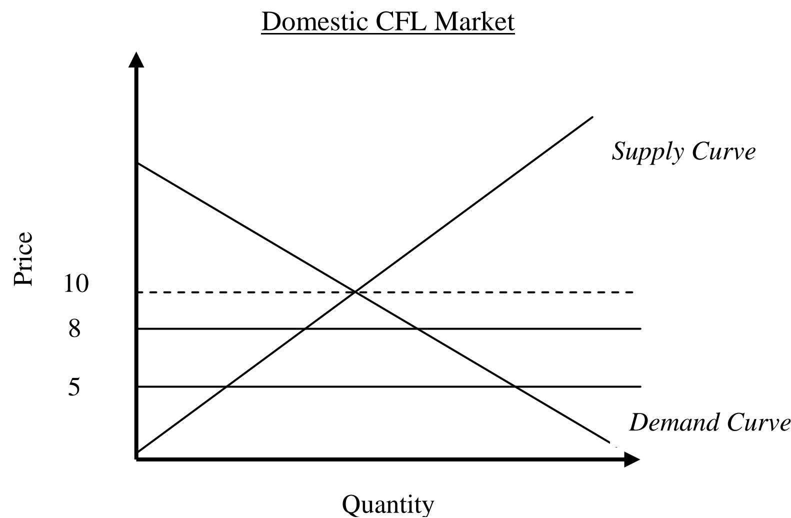
81. *See* UAW v. Marshall, 584 F.2d 390, 395 (D.C. Cir. 1978).

82. *United Glass*, 584 F.2d at 404.

each point on the graph who are willing to pay for CFLs at a certain price. Some individuals may prefer CFLs to incandescent light bulbs for energy conservation purposes and are able and willing to buy them at a high price. These individuals are located at the points higher on the vertical axis. Further down the demand curve there are individuals who prefer to buy lamps for conservation purposes but, due to budgetary constraints, are only willing to pay a certain amount more for a CFL. There are also individuals that buy their light bulbs based on whichever has the cheapest purchase price.

The amount manufacturers are able to supply is measured on the domestic supply curve. Similar to the demand curve, the supply curve is populated with CFL manufacturers. If the retail price of CFLs is 10 then only the domestic manufacturers that can produce lamps for 10 or less is able to supply consumers' needs. Why? A company is not a company for very long if it does not make a profit. Those manufacturers populating the line above 10 lack the efficiency, whether in terms of manufacturing, poor management or some other factor, to produce at a profit. At this price, there may only be a handful of American producers who can survive. However, the higher the price of a unit, the more likely it is that more manufacturers can compete and succeed in the domestic CFL market.

Now consider this graph with two more inputs: the domestic price line and the world price line. The domestic price line represents the going rate of a CFL within the protected U.S. market. The world price line represents the cost of a CFL on the international market.



Why is the domestic price line lower than the autarkic price located at the intersection of the supply and demand curves? The Harmonized Tariff Schedule of the United States, for instance, requires that the tariff rate of a CFL to World Trade Organization ("WTO") Members that are not a party to a

Free Trade Agreement ("FTA") with the U.S. is 2.4%.[83] If the country is a member of an FTA, there is no tariff liability upon importation, provided that the good originated in that member country.[84] An importer from a country that is neither a member of the WTO nor a member of an FTA will have to pay a 20% tariff.[85] If a CFL is cheaper internationally, it will be imported given that the added price via tariff liability, shipping costs, and any other incidental costs are not greater than its domestic counterpart. In this example, I assume that this tariff is effective at protecting some, but not all, domestic CFL manufacturers by marginally, but not prohibitively, raising the domestic price per unit.

Why is the world price line lower than the domestic price? In this example, this fact is assumed. Only an investigation of U.S. manufacturers versus foreign manufacturers can reveal this data. However, this factor must not be overlooked. A marginal firm can only be created by an influx of trade if the U.S. price of a good is higher than the international price. If the U.S. price is lower than the world price, domestic producers have a competitive advantage over their international analog as long as it is not prohibitively expensive to export CFLs, and the importing countries do not block their importation. If the world price line for a good is higher than the domestic price, then a policy liberalizing the trade of that good is most likely beneficial to those manufacturers. Typically, tariff negotiations are based on reciprocity. Thus, if there is greater U.S. market access because of a reduction in tariffs, the U.S. manufacturer likely has acquired greater access to another country which it can take advantage of by exporting its surplus. In this circumstance no firm is marginal, and U.S. firms capable of producing an excess quantity will be able to profit by exporting to countries with a higher price.

The story is different when the world price line is lower than the domestic price line. Assuming that there is an international surplus of like or directly competitive products that can be imported, the domestic price line now becomes the world price line. Why? Individuals in the country now have the opportunity to buy the same good at a cheaper price. Although some individuals may prefer to buy American CFLs, it is assumed—and empirical studies bear out this assumption—that consumers will prefer the cheaper good. While this benefits consumers by decreasing the price, some domestic manufacturers will be unable to compete with the cheaper imports.

This story has long been told to demonstrate why TAA is necessary. However, appellant's criticism of the DOL's denial in *United Glass* questions the process by which the transferal from domestically produced to imports occurs. The customers of domestic firms whose products are more expensive than imported products do not neatly switch to buying imports. A hardware store in Tennessee may buy from a domestic producer who is just barely in the

83. U.S. INT'L TRADE COMM'N, HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES (2007 Rev. 1), *available at* http://hotdocs.usitc.gov/docs/tata/hts/bychapter/0701c85.pdf at p. 60.

84. *Id.*

85. *Id.*

black at the higher domestic price line. After an influx of imports the price that this hardware store can obtain CFLs is less, i.e. the world price. When looking for a cheaper CFL supplier, though, the hardware store does not have to purchase imports. It can satisfy its demand through other domestic manufacturers that have the capacity to remain profitable selling its wares at the world price. But if internationally competitive domestic producers do not have the capacity to fulfill domestic demand, inevitably some purchasers will buy from foreign sources. The domestic firms who can only be profitable at a rate higher than the world price will perish. These firms are the marginal firms who will be certified under this proposal. More precisely, these firms are located on the supply curve at points above the world price but below the domestic price.

B. Statutory Certification Requirements of the Marginal Firm

An advantage of this proposal is that it only requires inserting one requirement to its statutory certification requirements. Adding a subsection, disjunctive to the "contributed importantly" subsection, is sufficient to incorporate this change. In fact, the economic conditions creating a circumstance when there may be a marginal firm are coextensive with all but one of the statutory requirements. First, requiring that a significant number of workers have become or threatened to be separated is not a necessary assumption.[86] Rather, it is a result of being a marginal firm. This requirement could be deleted from the requirements on the grounds of redundancy, but its inclusion would not prevent workers from a marginal firm from being certified, nor would it certify workers who are not from a marginal firm.

Second, the sales or production of the firm or subdivision have decreased absolutely.[87] If a firm or subdivision has not decreased its firm or subdivision absolutely, it would not be marginal. By its very definition, the company is not profitable enough to carry on as before the influx of imports.

Third, there must be an increase of imports like or directly competitive with the articles produced from that firm or subdivision.[88] In order for the economic conditions to exist—namely, a decreased price that excludes less profitable firms or subdivisions—that create a marginal firm there must be an increase in imports. In the previous example regarding CFLs, a like product was assumed. However, the same analysis also applies to the wider class of directly competitive products. Importantly, if the products are directly competitive, the domestic price of the product may be altered. *United Glass* is a circumstance in which the price was affected by a directly competitive product; namely, float glass.[89]

The final eligibility requirement is the "contributed importantly"

86. 19 U.S.C. § 2272(c)(1) (2004).
87. *Id.* § 2272(a)(2)(A)(i).
88. *Id.* § 2272(a)(2)(A)(ii).
89. United Glass & Ceramic Workers of Am. v. Marshall, 584 F.2d 398, 404 (D.C. Cir. 1978).

standard.[90] This requirement could be kept as well, but it need not be. Legislative inertia suggests that in order to responsibly increase the number of certifications, individuals ought to have the capability to seek certification by satisfying either the "contributed importantly" or marginal firm standards. Theoretically, a company that satisfies the requirements for the "contributed importantly" standard should almost always be a marginal firm. It would seem strange that a percentage greater than *de minimis* of company's customers would potentially all cease, or decrease, purchases and buy imports, unless there was a sudden flood of imports that were significantly cheaper than the world price. Although it may be redundant, the main reason that the "contributed importantly" standard should be kept is that it may provide a quicker route to certification. If the DOL, for instance, has the capacity to quickly and reliably certify a firm based on the Customer Survey Method, the worker ought to be able to receive the quicker certification in her time of unemployment. However, in the long term, it seems that this proposal allows for the speediest analysis of petitions. An agency will have already constructed a supply curve, world price and domestic price for an industry. All it must do is locate the firm on the supply curve to satisfy the causal requirement. Surely this will be much quicker than obtaining the names of the firm's customers, contacting those customers, and compiling the responses to ensure that the imports have "contributed importantly."

In order to obtain the information necessary to make such a change, it is important that the TAA petitions of the Departments of Labor and Agriculture be modified to include more pointed question revealing the economic situation of the firm. So long as the agency shapes the questions so that it can determine the precise location of petitioner's firm on the supply curve, the petition could be promptly certified.

C. Potential Statutory Changes in Certification

The Trade and Globalization Act of 2007 passed the House of Representative on October 31, 2007.[91] This bill reauthorizes the TAA program, increases the types of and amounts of assistance available for certified workers, and slightly alters the certification. Significantly, it extends certification to service workers, as well as workers in the manufacturing industry. While this is a welcome addendum to TAA, it will not be adequately implemented if the certification requirements are not also modified. Marginal firm certification can be applied to service workers at least as aptly as it is to goods.

The companion bill in the Senate is yet to be passed, remaining in the Committee on Finance.[92] Regarding certification requirements, this bill also

90. *See* § 2272(a)(2)(A)(iii).

91. H.R. Res. 781, 110th Cong. (2007). *See also* Charles B. Rangel, *Moving Forward: A New, Bipartisan Trade Policy That Reflects American Values*, 45 HARV. J. ON LEGIS. 377, 415 (2008).

92. Trade and Globalization Adjustment Assistance Act of 2007, S. 1848, 110th Cong.

extends TAA to service workers. Additionally, it also allows for industry certification in two circumstances. First, if the International Trade Commission finds that an industry has suffered injury as defined in a safeguard, antidumping, or countervailing duty action, the Secretary shall determine the eligibility of all workers in the affected industry.[93] Alternatively, the Secretary can determine that only an industry in a particular region or state has been injured, thereby limiting industry certification to the corresponding geographical boundary.[94] The other way that workers within an industry may be certified is if three petitions from one industry have been certified within 180 days.[95]

A problem with both of these requirements is that the Senate's current version does not specify upon what basis the Secretary will determine the eligibility of all workers within an industry. "[T]he number of workers eligible for TAA could more than double if no additional criteria were used, but would expand by less than ten percent if industries had to meet more restrictive criteria, such as demonstrated increases in the import share of the domestic market over a three-year period."[96] Moreover, determining industry certification based upon a finding whether there has been a successful trade remedy action against the importer is on, at best, shaky grounds as per the WTO ruling on the *Byrd Amendment*.[97] Both the WTO Panel and Appellate Body deemed the *Byrd Amendment* inconsistent with previously negotiated and codified agreements, including the *Antidumping Agreement* and the *Agreement on Subsidies and Countervailing Measures*.[98] The current Senate bill is indistinguishable from this previous legislation. Finally, certifying an industry based upon three successful petitions runs into the same criticisms previously discussed with the "contributed importantly" standard and the dual test; namely, it assumes a simplistic, unrealistic account of how an influx of imports affects domestic purchasing patterns.

V. CONCLUSION

Workers who lose their jobs as a result of import competition should not be denied adjustment assistance due to a statutory provision incapable of achieving its stated purpose. Amending the statute to include workers from marginal firms will responsibly increase the quantum of certifications and

(2007).

93. *Id.* at § 113(e)(1)(A).

94. *Id.* at § 113(e)(1)(B).

95. *Id.* at § 113(e)(1).

96. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-919, TRADE ADJUSTMENT ASSISTANCE: INDUSTRY CERTIFICATION WOULD LIKELY MAKE MORE WORKERS ELIGIBLE, BUT DESIGN AND IMPLEMENTATION CHALLENGES EXIST (2007).

97. *See Update of WTO Dispute Settlement Cases*, WT/DS/OV/16 (Oct. 17, 2003), *available at* www.wto.org. *See also* Appellate Body Report, *United States-Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R (Jan. 16, 2003) (*adopted* Jan. 27, 2003).

98. *Id.*

finally achieve the original, enduring intent of TAA. Congress ought to amend its current attempts to modify TAA to incorporate this proposal. Dislocated workers deserve a more realistic and reliable certification process.