AFRICAN COALITION FOR TRADE, INC.

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Ms. Marilyn Abbott
Secretary
U.S. International Trade Commission
500 E Street, S.W.
Room 112
Washington, D.C. 20436

Re: Docket No. MISC-023

Dear Ms. Abbott:

The African Coalition for Trade (ACT) respectfully submits the following comments on the interim rules promulgated by the U.S. International Trade Commission (ITC) on February 27, 2007, 72 Fed. Reg. 8624, to govern investigations, determinations and reports pursuant to Section 112(c)(2) of the African Growth and Opportunity Act (AGOA), as amended by Congress in the African Investment Incentive Act of 2006 (AIIA) in December 2006, 19 U.S.C. 3721(c)(2), regarding the commercial availability of yarns and/or fabrics made in sub-Saharan Africa.

BACKGROUND AND POLICY CONSIDERATIONS

ACT is a non-profit trade association of African private sector companies and African trade associations that are involved in trade with the United States under AGOA. ACT has been involved in the development, implementation and amendment of AGOA as one of the main spokespersons for the African private sector. ACT's members are located in Botswana, Kenya, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe. Most of the leading African textile and apparel producers doing business under AGOA are members of ACT, either directly as individual companies or indirectly through their membership in local African trade associations that are in turn members of ACT.

ACT worked closely with its members in the African textile and apparel industries in the development of what became the new commercial availability provision that was added to AGOA by the AAIA. The concept behind this new commercial availability provision originated with the African Cotton and Textile Industries Federation (ACTIF), a non-profit regional trade association based in Nairobi, Kenya. Although ACTIF and ACT are separate organizations, there is a significant overlap between their memberships. ACT collaborated closely with ACTIF in developing the concept behind the new commercial availability provision. Because it is based in Washington, D.C., ACT took the lead role in working with Congressional and Administration officials, ultimately leading to the enactment of the new provision.

ACTIF/ACT's proposed commercial availability provision was part of an integrated package of proposed AGOA amendments that were intended to staunch the loss of orders, factory closings and job losses in the African textile and apparel sector that flowed from the tremendous increase in competition from Asian

textile and apparel producers with the end of the Multi-Fiber Arrangement (MFA) system of quotas on January 1, 2005.

Prior to the end of the MFA, AGOA's duty-free preferences had been tremendously successful in spurring increased apparel trade. During 2000-2004, U.S. apparel imports from Africa increased by more than 130%, leading to the creation of an estimated 200,000 jobs in Africa. Following the end of the MFA, however, U.S. apparel imports from Africa had fallen by a shocking 26% by the end of 2006, leading to the closing of dozens of apparel factories and the loss of an estimated 100,000 jobs. Today Africa's share of the U.S. apparel import market has fallen back to the same level before AGOA was enacted.

To prevent further erosion of the economic development progress created by AGOA, ACTIF/ACT developed the proposed amendments to the AGOA apparel program. The core concept behind the AGOA amendments proposed by ACTIF/ACT was that the African textile and apparel industries had the best chance of surviving in the post-MFA world if they could improve their competitiveness through enhanced vertical integration, thereby reducing the cost of materials, lead times and increased transportation costs that are inherent in relying on imported or "third-country" yarns and fabrics. Through 2006, the vast majority of the apparel imported under AGOA's duty-free preferences was made in lesser developed country (LDC) AGOA beneficiaries from third-country yarn or fabric. By providing duty-free incentives for the use of those locally-made yarns/fabrics that are readily available in Africa, the new commercial availability provision – known at that time as the "abundant supply" provision – was a key element to promote greater vertical integration in the African textile and apparel sectors.

But at the same time, ACTIF/ACT recognized that it was essential to maintain critical mass in the downstream apparel sector. Obviously, textile manufacturers require a stable customer base before they will make the investment necessary to increase their production of yarns/fabrics. Accordingly, the ACTIF/ACT package of AGOA amendments also included a proposed extension of AGOA's third-country fabric provision in order to maintain a viable downstream apparel sector while investment in upstream yarn/fabric production is being encouraged by the commercial availability provision. As a further incentive to upstream investment, the ACTIF/ACT proposal also called for extending duty-free eligibility to textile products.

These three critical provisions of the ACTIF/ACT proposals for AGOA were all incorporated in the AIIA amendments enacted in December 2006. It is important to view all three components, therefore, as a whole with the common policy goal of increasing the competitiveness of the integrated textile-apparel sector in Africa to help it survive in the post-MFA environment. In particular, the new commercial availability provision should be implemented and administered in light of the policy goal of encouraging vertical integration while at the same time maintaining a healthy downstream apparel sector. There is a risk that too aggressive application of the commercial availability provision could put African apparel producers at a disadvantage vis-à-vis Asian competitors, thereby endangering the survival of the African apparel sector. On the other hand, setting the standard too high so that few if any yarns/fabrics are found to be commercially available, will fail to achieve any increase in vertical integration, which is necessary to the long-term survival of the African textile and apparel sectors. Rather, the needs of both the textile and apparel sectors must be considered and balanced in implementing and administering the new commercial availability provision. In this regard, it is important that the US Government should continue to emphasize the importance of incorporating regional yarns and fabrics in AGOA exports and U.S. assistance programs should be designed to improve efficiency and productivity in African cotton and textile production.

PROCEDURAL ISSUES

1. Standing To File Petitions: Section 208.3(a) of the ITC's interim rules provides that petitions seeking a determination of commercial availability may be filed by an interested party, including producers of yarn, fabric or apparel in AGOA countries, "or any other person who demonstrates to the satisfaction of the Commission a proper interest in filing a petition." ACT recommends that the ITC should define "proper interest" narrowly so that the policy goals of the provision are not undermined. For example, it would seem that an association of African textile producers or even an African government agency would have a proper interest to submit such a petition. But it would be inconsistent with the policy goals of the commercial availability provision if competitors in another region were able to file petitions for the purpose of restricting the sources of yarn/fabric supply that could be used by African apparel producers and, thereby, placing them at a competitive disadvantage.

2. Product Description: Section 208.3(b)(1) requires that the yarn or fabric covered by a commercial availability petition must be described by fiber content, yarn size, fabric construction, and finishing process, specifying the 8-digit U.S. Harmonized Tariff Schedule (HTS) item if possible. It is critically important to the success of the commercial availability provision that products covered by petitions must be described in as much detail as possible, preferably in the kind of detail that is common for short supply petitions under AGOA and other U.S. trade preference programs and FTAs. In particular, while it is essential to include the applicable HTS item, the 8-digit HTS item is by itself not sufficiently specific.

This is best illustrated by the AIIA provision determining that denim fabric classified in HTS subheading 5209.42.00 is available in abundant supply in the amount of 30 million square meter equivalents (sme). *See* AGOA Section 112(c)(2)(C), 19 U.S.C. 3721(c)(2)(C). In fact, HTS subheading 5209.42.00 encompasses various commercial grades of denim, including different yarn sizes, fabric constructions, etc. While various types of denim covered by HTS 5209.42.00 are indeed made in Africa in significant volumes, several of the types of denim included within HTS 5209.42.00 are in fact not made in Africa at all. The fact that Congress chose to describe denim only by the 8-digit HTS item has caused confusion and controversy among U.S. importers and African manufacturers, and may risk undermining the policy goal of the commercial availability provision by precluding LDC jean makers from access to third-country sources of various types of denim that are not produced in Africa.

To avoid similar problems in evaluating future commercial availability petitions for other yarns/fabrics, the ITC should require as much detail as possible concerning yarn size, fabric construction and finishing process, and in all cases more detail than just the 8-digit HTS subheading

3. Time for Determinations: Section 208.7(b) provides that determinations will be made by August 1 of each year for petitions filed by January 15 of that year. In other words, determinations will be made not less than six months after the filing of the petition, but a determination could take as much as 17 months if the petition were not filed before the annual January 15 deadline.

The pendency of a commercial availability petition will create uncertainty as to whether LDC apparel producers will be able to continue to utilize third-country fabric in the future. This uncertainty will serve as a disincentive for U.S. apparel importers to place orders with African producers during the pendency of the petition. The longer the time for determinations on petitions, the greater the potential loss of business by African LDC apparel producers.

The possibility that a petition could be pending for up to 17 months before ruling would be issued will have intolerable negative consequences for producers of apparel that utilize the subject yarn/fabric. ACT strongly recommends that Section 208.7(b) should be modified to provide that determinations will be made within a specified period of time following the filing of the petition, rather than the January 15-August 1 schedule currently contained in the interim rules.

Moreover, even the minimum period of six months contemplated by Section 208.7(b) is too long to prevent negative consequences for African apparel producers due to uncertainty while the petition is pending. ACT recommends that three months following the acceptance of the petition should be adequate for the ITC to assess the information submitted in support of the petition and make its determination. If necessary, the ITC could require more detailed and comprehensive supporting information before petitions are accepted in order to make it possible for determinations to be issued within three months. An alternative means to avoid excessive uncertainly would be to limit the filing of new petitions to a specific period each year. For example, the rules could be amended to provide that new petitions may only be filed during January 1 - April 1 of each year, to be ruled upon by July 1 of that year.

4. Terminations of Determinations: President Bush issued Proclamation 8114 on March 19, 2007, *inter alia*, to implement the AGOA amendments contained in the AIIA. 72 Fed. Reg. 13655 (March 22, 2007). Annex II to Proclamation 8114 contains the modifications to the HTS necessary to implement the AIIA amendments, including the new commercial availability provision. New U.S. Note 5(d) and (e) to HTS Chapter 98 contemplates that, following an initial determination by the ITC that a yarn/fabric is commercially available in Africa, the ITC will thereafter conduct an annual review to determine the volume of such yarn/fabric that is commercially available in each subsequent year, as well as the amount of such yarn/fabric actually used during the preceding year.

New U.S. Note 5(d) and (e) seems to contemplate implicitly the possibility that the ITC may determine that a yarn/fabric previously found to be commercially available in Africa is no longer commercially available. But the Note does not seem to excuse the ITC from thereafter conducting the annual determination of availability and use.

ACT suggests that the ITC should incorporate in its interim rules a provision that would authorize the ITC to terminate a prior determination of commercial availability if its annual review (or perhaps two consecutive annual reviews) has/have concluded that the yarn/fabric is no longer commercially available in Africa.

SUBSTANTIVE CONSIDERATIONS

1. Policy Goals Must Be Taken into Account: Neither the AIIA, Proclamation 8114, nor the ITC's interim rules defines the term "commercial availability" or even identifies the factors to be taken into account in ruling on petitions. In the absence of any statutory guidance as to the meaning of this critical term, ACT suggests that the ITC should be guided by the policy considerations that underlie the new AGOA commercial availability provision. In particular, such determinations should take into account the goals of encouraging vertical integration while at the same time maintaining critical mass in the apparel industry, thereby balancing the interests of African apparel and textile sectors.

2. Commercial Factors Affect Availability: The very name of the new commercial availability provision, especially when considered in light of the underlying policy, confirms that commercial

considerations should be taken into account in ruling on petitions. Commercial considerations such as price and quality will affect the ability of African apparel producers to sell garments made with locally-manufactured yarns or fabrics. ACT does not suggest that petitioners should be required to meet or beat the price and quality of long-established and frequently state-subsidized Chinese textile companies as a precondition to granting a commercial availability petition, but the local yarn/fabric must be reasonably competitive with the price and quality of competing third-country yarn/fabric. Otherwise, granting a commercial availability petition will only force U.S. apparel to move their orders elsewhere, which would benefit neither the African textile nor apparel industry.

Similarly, regional availability in the real-world commercial sense should also be taken into account. Given the lack of adequate intra-African shipping connections, it frequently takes longer and is more expensive to ship goods from West Africa to East Africa (or vice versa) than to bring the same goods to East Africa from Asia, with which there are much more frequent shipping connections. If production of a specific yarn/fabric is widely distributed across Africa, it would be appropriate to determine that it is commercially available throughout the continent. Likewise, if a yarn/fabric is produced only in one sub-region, but that sub-region is well-connected by transportation links to other sub-regions, it may be appropriate to be considered commercially available throughout the continent. But if a yarn/fabric is produced only in one sub-region, and that sub-region lacks adequate transportation links with the rest of the continent, it may be appropriate to limit the determination of commercial availability only to the sub-region in which the yarn/fabric is produced. There are no easy or hard-and-fast rules for making such determinations, but these factors should be taken into account on a case-by-case basis.

3. **Commercial Availability Is Not the Mirror Image of Short Supply:** On the surface, it may seem reasonable to interpret the new commercial availability provision as simply the mirror image of the existing AGOA short supply provision, pursuant to which duty-free status is extended to apparel made from third-country yarns/fabrics that are "not available in the United States in commercial quantities." 19 U.S.C. 3721(b)(5). But notwithstanding the similarity of the terminology, the policy underpinnings of the commercial availability and short supply provisions are in fact quite different.

The short supply provision is intended to protect the U.S. textile industry by allowing use of unlimited quantities of third-country yarn/fabric only if the particular yarn/fabric is not produced in the United States in commercial quantities. By contrast, as noted above, the new commercial availability provision is intended to encourage use of yarn/fabric that is produced in Africa. The different policy goals dictate that the commercial availability provision should not be interpreted in the same manner as the short supply provision.

In particular, the U.S. Committee for the Implementation of Textile Agreements (CITA), which administers the short supply program under AGOA and other trade preference programs, as well as FTAs, has tended to deny short supply petitions if any U.S. textile producer is capable of manufacturing the yarn/fabric in question even if it does not actually produce it. Likewise, CITA has tended to deny short supply petitions if a U.S. textile producer makes a similar or competing yarn/fabric even if it does not produce the specific yarn/fabric covered by the petition.

ACT recommends that the ITC should take essentially the opposite approach to CITA's traditional interpretation of short supply in applying the new commercial availability provision under AGOA. In other words, it seems clear that the AIIA, Proclamation 8114, and the ITC's interim rules contemplate that the yarn/fabric that is the subject of a petition must actually be produced in Africa in order for it to be found to be commercially available. This can be seen, for example, in (1) the provision of Proclamation 8114 requiring an

annual determination of the volume of the yarn/fabric produced and the corresponding volume used in making apparel for export to the United States (*see* Annex II, HTS Chapter 98, U.S. Note 5(d) and (e)); and (2) ITC interim rule Section 208.3(3), which requires proof of the volume of yarn/fabric produced and consumed for the prior three years. The fact that a textile company is capable of producing a yarn/fabric, but does not actually produce it, should not be sufficient grounds for granting a commercial availability petition.[1]

Likewise, ACT recommends that production of the specific yarn/fabric in question should be required as a condition of granting a commercial availability petition. Production of a similar or competing yarn/fabric should not be sufficient. This factor is obviously closely related to the requirement that yarns/fabrics must be described with great specificity in petitions seeking determinations of commercial availability, as discussed above.

4. Determining the Volume of Yarn/Fabric that Is Available: The new commercial availability provision requires the ITC to make an annual determination of (i) the volume of the yarn/fabric in question that is available in AGOA LDCs for manufacturing garments for export to the United States, and (ii) the volume of garments made in AGOA LDCs for export to the United States using the yarn/fabric in question. Obviously, only those volumes of yarn/fabric that are in fact available in the AGOA LDCs should be included in making these determinations. For example, some African textile manufacturers produce yarn/fabric that are utilized in whole or in part in manufacturing garments for export to Europe or for consumption in the local market, rather than for export to the United States. Yarn/fabric production that is destined for other markets should not be included in determining the volume that is available in LDCs for making garments for export to the United States. Likewise, yarn/fabric that is consumed by producing garments in non-LDCs (regardless of the market for the apparel) should by definition not be included in determining the volume of yarn/fabric that is available in LDCs.

5. Determining the Volume of Apparel Made from Regional Yarn/Fabric: In the process of developing the commercial availability provision, ACT discovered that there is a flaw in the records of apparel imports under AGOA that are maintained by CITA, which flaw limits the utility of the CITA import records in quantifying the volume of garments imported from LDCs that were made with regional fabric. CITA's import records are intended to report the volume of garments imported from each AGOA beneficiary under each of the nine AGOA visa categories, including garments made from African-origin yarn/fabric (visa category 4) and garments made in LDCs (visa category 5). In fact, category 5 applies to all garments made in LDCs "regardless" of the origin of the yarn/fabric. Consequently, category 5 in the CITA import records is not limited to garments made in LDCs from third-country fabric. Rather, category 5 includes some – sometimes significant – volume of garments made in LDCs using regional yarn/fabric. Accordingly, care should be exercised in relying on the CITA import records to attempt to quantify the volume of garments produced in LDC from regional yarn/fabric.

6. The Need To Clarify Enforcement of the Commercial Availability Provision: When a commercial availability petition is granted, the volume of the yarn/fabric found to be commercially available in AGOA LDCs must be used in making garments in the LDCs for export to the United States. If the required volume is not actually imported for two consecutive years, the AGOA LDCs risk losing future duty-free eligibility for garments made from the same yarn/fabric imported from third-countries.

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[1] On the other hand, if the subject yarn/fabric is actually produced by one or more textile manufacturers, the fact that other companies are also capable of producing the yarn/fabric should be taken into account in determining the volume of the yarn/fabric that is available.

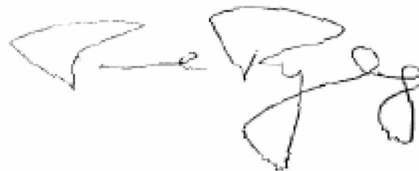
The flaw in this enforcement mechanism is that it is applied on an "all or nothing" basis at the regional level, but decisions on what yarn/fabric to purchase and use in manufacturing garments are made at the company level on a case-by-case basis. There is a serious risk that the incentive for using African yarn/fabric will break down because no individual company can be assured that its decision to use African yarn/fabric found to be commercially available will be rewarded with continued duty-free access to third-country yarns/fabrics. Rather, even those companies that use African yarn/fabric are at risk of losing access to third-country yarn/fabric if enough other companies do not follow suit.

Accordingly, ACT recommends that the commercial availability enforcement mechanism should be clarified to reward those companies that actually use those African yarns/fabrics determined to be commercially available. This could be done, for example, by allowing apparel companies that have actually used the local yarns/fabrics to petition the ITC for exemption from the loss of duty-free eligibility in the event the required volume of yarn/fabric has not been used in exporting apparel to the United States. Upon submission of proof demonstrating that the company has used a reasonable volume (e.g., 20% of its use of the specific yarn/fabric) of the African yarn/fabric found to be commercially available, the individual company could be granted continued duty-free treatment for garments made from the same yarn/fabric imported from third countries.

In addition, Proclamation 8114 does not directly address the mechanism for enforcing the commercial availability provision in the event the required volume of regional yarn/fabric has not been utilized in exports to the United States. The lack of transparency regarding enforcement of the commercial availability provision could act as a disincentive for U.S. apparel buyers to place orders with LDC apparel producers. To avoid any such unintended impact on AGOA apparel trade, ACT recommends that the commercial availability enforcement mechanism should be clarified.

ACT and its members in the textile and apparel industries in Africa appreciate the ITC's consideration of these suggestions. We are ready to provide any additional information that may be required and to discuss any of these issues further at your convenience.

Respectfully submitted,



Paul Ryberg
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