

Before the
U.S. INTERNATIONAL TRADE COMMISSION
Washington, D.C.

**Investigation No. AGOA-07:
Commercial Availability of Fabric and Yarns in AGOA
Countries**

**Pre-Hearing Brief
Submitted By
The African Coalition for Trade, Inc.**

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This pre-hearing brief is respectfully submitted by the African Coalition for Trade (ACT) in connection with the June 5, 2007 hearing before the U.S. International Trade Commission (ITC) in Investigation No. AGOA-07: Commercial Availability of Fabric and Yarns in AGOA Countries.

ACT is a non-profit trade association of African private sector companies and trade associations that are involved in trade with the United States under AGOA. ACT has been involved in the development, implementation and amendment of the African Growth and Opportunity Act (AGOA) as one of the main spokespersons for the African private sector. 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.

In particular, most of the major denim producers of Africa are members of ACT, including: Nien Hsing of Lesotho, Frame Textiles of South Africa, China Garment Manufacturers (CGM), with operations in both South Africa and Lesotho, and Denim de Ile (DDI) of Mauritius. In addition, a number of the leading African manufacturers of denim garments are also members of ACT. Thus, the views expressed in this brief reflect the positions of many of the leading denim and garment producers of Africa.

I. BACKGROUND AND POLICY CONSIDERATIONS.

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 Section 112(c)(2) of AGOA by Congress in the African Investment Incentive Act of 2006 (AIIA) in December 2006, 19 U.S.C. 3721(c)(2). 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 175%, while the growth in apparel imports from the AGOA lesser developed country beneficiaries (LDCs) was an even

more impressive 350%, 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 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.

Country	2000	2004	2006	% Growth	% Growth	% Growth
	Imports (msme)	Imports (msme)	Imports (msme)	2000-2004	2000-2006	2004-2006
Swaziland	7.166	61.466	41.478	757.80%	478.85%	-32.52%
Kenya	12.556	73.313	65.461	483.91%	421.37%	-10.71%
Madagascar	20.495	69.408	55.200	238.66%	169.33%	-20.47%
Lesotho	34.365	111.163	95.164	223.47%	176.92%	-14.39%
Botswana	2.167	5.834	7.290	169.27%	236.45%	24.95%
Malawi	3.311	7.795	5.458	135.41%	64.83%	-29.98%
Namibia	-0-	18.344	10.301	>100%	>100%	-43.84%
Ghana	-0-	9.281	7.267	>100%	>100%	-21.70%
Cape Verde	-0-	1.146	-0-	>100%	0%	-100.00%
Ethiopia	-0-	2.602	3.140	>100%	>100%	20.68%
Uganda	-0-	1.477	0.527	>100%	>100%	-64.34%
Mozambique	-0-	0.314	0.212	>100%	>100%	-32.54%
Tanzania	-0-	0.803	0.668	>100%	>100%	-16.76%
Zambia	-0-	0.025	-0-	>100%	0%	-100.00%
South Africa	37.925	38.853	11.148	2.45%	-70.61%	-71.31%
Mauritius	39.771	37.322	21.892	-6.16%	-44.95%	-41.34%
LDC Subtotal	80.059	362.972	292.165	353.38%	264.93%	-19.51%
Africa Total	157.756	439.147	325.205	178.37%	106.14%	-25.95%

(Source: U.S. Department of Commerce, Office of Textiles and Apparel.)

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 LDC 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 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 competitiveness 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.

II. SUBSTANTIVE CONSIDERATIONS.

In the AIIA, Congress amended AGOA Section 112(c)(2) to add the new commercial availability provision. In addition, Congress also made the statutory determination that denim fabric classified under Harmonized Tariff Schedule (HTS) subheading 5209.42.00 (hereinafter referred to as the "subject denim") is commercially available in the AGOA LDCs during October 1, 2006 – September 30, 2007, in the amount of 30 million square meter equivalents (sme). In this investigation, the ITC is charged with determining the volume of the subject denim that is available in the AGOA LDCs for 2007-08. In the future, the ITC will also determine the volume of the subject denim used in making garments for export to the United States in the AGOA LDCs during 2006-07. In making those determinations, the ITC should take the following factors into account.

A. 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.

B. 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 denim. ACT does not suggest that African denim producers 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 their product being considered to be commercially available, but the price and quality of the subject denim is a relevant, but not necessarily controlling, factor that must be taken into consideration if the policy goals of the commercial availability provisions are to be achieved. Otherwise, the finding that the subject denim is commercially available will only force U.S. apparel buyers/importers to move their orders elsewhere, which would undermine the policy goals of AGOA.

C. 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 type of 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; Presidential Proclamation 8114, 72 Fed. Reg. 13655 (March 22, 2007), which implemented the AIIA amendments; and the ITC's interim rules contemplate that the subject denim must actually be produced in Africa in order for it to be found to be commercially available. In other words, capacity to produce is irrelevant unless accompanied by actual production. 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. Accordingly, the theoretical capacity of a textile company to produce the subject denim should be relevant to the determination of the volume of such denim that is available to LDCs only if that company actually does produce the subject denim.

Likewise, ACT recommends that production of a similar or competing denim should not be relevant. This factor is closely related to the requirement of the ITC interim rules that yarns/fabrics must be described with great specificity in new petitions seeking determinations of commercial availability. Section 208.3(b)(1) of the ITC's interim rules 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.

D. Determining the Volume of Subject Denim that Is Available.

The commercial availability provision requires the ITC to make an annual determination of (i) the volume of the subject denim 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 such denim. Obviously, only those volumes of subject denim that are in fact available in the AGOA LDCs should be included in making these determinations. For example, some African textile manufacturers produce subject denim that is 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. Denim 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, denim 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 subject denim that is available in LDCs.

E. 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.

F. 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 in order for the LDCs to maintain access to the same type of yarn/fabric from third countries. 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.

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 garment producer 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%-40% 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.

In conclusion, ACT and its members in the textile and apparel industries in Africa believe that the AGOA commercial availability provision and the denim provision in particular need to be interpreted and applied by the ITC in a fair and balanced way that takes into account the complementary goals of encouraging greater vertical integration and maintaining critical mass in the apparel sector. ACT and its members appreciate the ITC's consideration of these suggestions.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Paul Ryberg". The signature is written in a cursive style with a horizontal line extending to the left.

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