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December 27, 2006

Hon. David Spooner
Assistant Secretary for Import Administration
U.S. Department of Commerce
14th Street & Pennsylvania Ave., NW
Washington, Dc 20230

Re: Import Monitoring -- Textile/Apparel Products from Vietnam

Dear Assistant Secretary Spooner:

This letter is submitted in response to the request by the U.S. Department of Commerce ("Commerce") for Public Comment on a proposed Import Monitoring Program on Textile and Apparel Products from Vietnam ("Import Monitoring Program"). 71 Fed. Reg. 70,364 (Dep't Comm. 2006).

RILA represents the nation's most successful and innovative retailer and supplier companies -- the leaders of the retail industry. Retail is the second largest sector in the U.S. economy, employing 12% of the nation's workforce and conducting $3.8 trillion in annual sales. RILA's retail and supplier companies operate 100,000 stores, manufacturing facilities and distribution centers in every congressional district in every state, as well as internationally. They pay billions of dollars in federal, state and local taxes and collect and remit billions more in sales taxes. They are also leading corporate citizens with some of the nation's most far-reaching community outreach and corporate social responsibility initiatives.

RILA's members have a significant interest in the balanced administration of U.S. import laws, as they depend on imports both of finished consumer products and of production inputs for merchandise that will eventually be sold at retail. RILA's members pride themselves on strict compliance with all import-related laws, and by the same token are keen to ensure that those laws are fairly and efficiently applied.

I. INTRODUCTION

The stated purpose of the Import Monitoring Program is to facilitate the self-initiation of antidumping investigations. We have serious concerns about this initiative, which is outside the normal operation of the antidumping law, addresses as-yet-unspecified trading practices of Vietnamese exporters, and is likely to create significant marketplace uncertainty and chill trade in Vietnamese textile and apparel products. We

are troubled that Commerce would adopt the Import Monitoring Program just as Vietnam is acceding to the WTO, and therefore entitled to U.S. adherence to WTO obligations including non-discriminatory application of U.S. trade measures.

Because the mere threat of initiating an antidumping investigation can have serious trade-chilling effects, Commerce's desire to give interested parties a full opportunity to provide input into all aspects of the contemplated monitoring process is appropriate, and may help Commerce ameliorate the practical problems the proposed monitoring system presents. Our comments on the details of the proposed monitoring program follow. We also urge Commerce, in its next public communication on this subject, to set out the legal basis under U.S. law for the Import Monitoring Program.

II. THE CONSULTATIVE PROCESS SHOULD COVER ALL ASPECTS OF THE MONITORING PROGRAM AND INCLUDE ELECTRONIC NOTICE AND ACCESS TO INFORMATION

A. Implementation of an Import Monitoring Program on an Interim Basis Would Preempt the Consultative Process

Commerce should take the steps described below before implementing any monitoring program. Establishing even an interim program prior to completion of a full notice and comment process, including an opportunity for rebuttal comment and public hearings, unnecessarily risks implementing a misdirected monitoring program, prejudging the outcome of the consultation process, and prejudicing sourcing decisions with an inevitable result of unfairly impeding trade.

At a minimum the consultation process should include the following elements:

- First, in addition to the initial solicitation of comments, as contained in the December 4, 2006 Federal Register notice, there should be an opportunity for the presentation of rebuttal comments.

- Second, only following the initial round of comments and rebuttal comments, as well as the hearing or hearings suggested by Commerce, should Commerce issue a proposed rulemaking setting forth the terms of the monitoring program. Further comment should be solicited prior to issuance of a final rulemaking.

- Third, only following the issuance of a final rulemaking should a monitoring program actually be implemented. No interim monitoring program should be established.

- Fourth, to ensure full transparency, all proceedings both in advance of establishment of a monitoring process and on an on-going basis once any monitoring process is in place must be on the record, including any *ex parte* discussions or meetings. To accomplish this, Commerce should open a docket for any monitoring program, to be maintained for public inspection at Import

Administration's Central Records Unit, Room B-099, with all communications and contacts required to be placed on the record within 48 hours of such activities.

- Fifth, any hearings related to the monitoring process must be on the record and fully transcribed, with copies of the transcript promptly made readily available to the public. Public access should be via the internet in addition to Import Administration's Central Records Unit. Maximum transparency could be achieved if the hearings also were simulcast live via the World Wide Web. Given the likely interest of manufacturers with facilities in Vietnam, with arguably limited resources to participate in proceedings in the United States, access via the internet and the availability of transcripts are essential to ensure both fair access and transparency.

We also recommend accepting comments submitted solely via electronic mail, in order to accommodate interested persons not located in the United States, for whom meeting tight deadlines would be more difficult if they were to have to send original hard copies via international mail. Commerce also should consider establishing an "email notification system," in addition to Federal Register notifications, to ensure maximum distribution of information and opportunity for input by interested persons. Such an email notification system could be used to disseminate any data made publicly available on a monthly basis and/or to notify interested persons that data have been posted on Commerce's website and are available for review and comment.

Commerce also should make submitted comments available for review on line via the World Wide Web, in addition to the Central Records facility. Precedents for both the email notification process and online access to public comments exist at Commerce. The Office of Textiles and Apparel established an email notification system to implement the "CAFTA commercial availability" petition process and online access to comments are in place both for the CAFTA program and under the Import Administration's "Public Comments Files."

B. Interested Parties Should Be Defined Broadly

Subject to the two caveats discussed below, the participants in the consultation process should be any interested parties. The full range of interested parties includes domestic producers of products like those imported from Vietnam, any associations representing those producers, workers in domestic facilities producing like products, U.S. importers and retailers of the subject imports, manufacturers, vendors and/or exporters of the subject imports and their associations, and the Government of the Socialist Republic of Vietnam.

The first caveat is that because many different types of products comprise the textile and apparel industry, interested parties will vary by product. Thus, interested parties with respect to one product may not be interested parties with respect to another product. For example, an interested party for a downstream product, like a shirt, would not include producers of the upstream products, like yarn or fabric. This distinction is

critical for purposes of the mechanics of the monitoring system, as discussed in more detail below.[1]

The second caveat is that other than Vietnamese producers of textile and apparel, Commerce should not consider as interested parties foreign producers of garments sold in the U.S. market. This limitation would apply to foreign producers who make garments from U.S. fabrics or yarns or from parts cut-to-shape in the United States, i.e., "outward processing producers."[2] As provided in Section 771(7)(b)(III) of the Act, the relevant injury issue in an antidumping investigation is "the impact of (subject) imports . . . on domestic producers of like products, but only in the context of production operations within the United States." Accordingly, outward processing producers cannot possibly be considered interested parties within the context of the consultative process because their production is located outside of the United States.

C. Hearings Are Appropriately Conducted in Washington, but Should Be Simulcast Via The Internet

Commerce suggests the possibility of conducting hearings on the monitoring process outside Washington, D.C. We recommend against that proposal, because such field hearings would likely be primarily media events, further politicizing an already highly political process that has singled out trade from one foreign source. Entities interested enough to participate in a hearing should be willing to travel to Washington rather than require Commerce to dedicate even more resources to arranging and staffing proceedings elsewhere. If, however, Commerce does determine to hold field hearings, it should hold such hearings in locations where retailers and other importers may participate, such as in New York or Los Angeles. As noted earlier, any hearings held on this matter should be simulcast via the internet.

III. PROPOSED MONITORING SYSTEM

We provide below recommendations for how Commerce should (i) identify products to monitor; (ii) biannually evaluate the gathered data; and (iii) only to the extent necessary, self-initiate antidumping proceedings.

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1 As discussed below, with respect to the products to be monitored, a domestic yarn or fabric producer would not be in a position to request monitoring or provide injury data with respect to a particular apparel product.

2 The fact that one office within Commerce may have perceived, in the context of a safeguard proceeding, that "the U.S. industry has become closely consolidated with outward processing operations located in certain trade preference countries" (see Footnote 1 to each of the U.S. Statements of the Reasons and Justifications for the U.S. Request for Consultations with China Pursuant to Paragraph 242 of the Report of the Working Party on the Accession of China to the World Trade Organization) does not mean that producers in those non-U.S. facilities are relevant for purposes of the contemplated monitoring process.

A. Commerce Must Carefully Identify the Imports It Will Monitor

Commerce has no reason to monitor imported products as to which there is no corresponding domestic industry. Therefore, in order to identify the imports that it will monitor, Commerce must first determine the products that the domestic industry itself produces for sale in the U.S. commercial market and the particular imported products that are of interest for monitoring. In this process, Commerce will need the domestic industry to step forward and provide information pertaining to what it produces, where it produces it, and whether it would be willing to supply data relevant to an injury assessment. As discussed below, the domestic industry and Commerce will need to "classify" domestic production under the appropriate 10-digit Harmonized Tariff Schedules of the United States ("HTSUS") subheadings. After identifying what domestic production exists in the United States, Commerce should then categorically exclude certain product groups, such as U.S. production already protected from import competition under U.S. Government procurement law. Finally, Commerce should identify where there is a genuine match between the U.S. production and Vietnamese imports and issue for public comment a proposed list of such imports to monitor.

1. Commerce Must First Identify Domestically Manufactured Products for Sale on the U.S. Commercial Market

At the outset, any import potentially subject to monitoring should be identical to a domestically produced product for sale on the U.S. commercial market. We recognize that when industry files a petition, the domestic like product need not be identical to the subject imports. In this extraordinary proposed monitoring system, however, given the chilling effects on trade, for purposes of monitoring, Commerce should require a very precise and narrow match between the domestically produced product and the import subject to monitoring.[3] Limiting the products monitored and ensuring monitoring of only imports also produced by domestic manufacturers will limit the chilling effect of this program.

By statute, in any antidumping proceeding, whether initiated through an industry-filed petition or self-initiated, there needs to be an "industry." The statute defines "industry" as the producers of the "domestic like product."[4] The term "domestic like product," in turn, is defined as "a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation...."[5] Thus, Commerce must determine which specific textile and apparel products are made in the United States and compete in the commercial market against imported Vietnamese garments. As discussed above, for purposes of the extraordinary measure of monitoring, the domestic product and monitored imports should be identical.

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[3] Even under rules applied to industry-filed petitions, a yarn or a fabric is not like, or even most similar to, a garment for purposes of the requisite like product analysis. Thus, a yarn or fabric cannot be identical to a garment.

[4] Id. § 1677(4)(A).

[5] Id. § 1677(10).

To make this determination, with respect to any product the domestic industry proposes for monitoring, Commerce must issue questionnaires to domestic producers, seeking the following information:[6]

- a detailed description of the proposed product's physical characteristics and uses – i.e., What is the product type? What is the fabric? Is the fabric 100% or is it a blend? Is it knit or woven? Is the product for men, women, boys, or girls? Does the product have any special features, like water-resistance? If a garment, is it a stand-alone garment or part of an ensemble?;

- the 10 digit HTSUS provision under which their domestic production would be classified if it were an import and other specifics that would be required in defining the scope of any investigation;

- the identity of all U.S. producer(s) and the location(s) of the U.S. manufacturing facilities in which they produce the product, and the percentage of domestic production of the product represented by each U.S. producer in the most recently completed four calendar quarters;

- whether the U.S. producer manufactures for both the commercial market and for U.S. Government procurement, and if a producer does both, identify the percentage of production sold in the most recent calendar year in both the public and private markets;

- whether the identified U.S. producers are willing to supply information relevant to a material injury assessment. In this regard, a certification will be required from each U.S. producer indicating its willingness to provide all information in an ITC domestic producer preliminary injury questionnaire, a sample copy of which should be posted on Commerce's website or published in the Federal Register; and

- an explanation of how the proposed product qualifies for monitoring, based on the requirement that the domestic producer produces the identical product as that imported under the identified 10 digit HTSUS classification.

It is beyond question that if there are no U.S. producers of a product proposed for monitoring, then Commerce has no basis to monitor the product. Furthermore, even if there is domestic production of a product proposed for monitoring, if domestic producers accounting for at least three-quarters of the value of U.S. production during the most recently completed four calendar quarters do not certify their agreement to supply data

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[6] This information, without question, is "available" to Commerce through the questionnaire process and, as such, Section 731 of the Act requires Commerce to seek it out in connection with its proposed monitoring system. See 19 U.S.C. § 1673a(a)(1).

related to an assessment of injury, then Commerce similarly has no basis to monitor the imported product.[7]

2. Domestic Production Must Be Identified By HTSUS Classification

Just as the imports in an antidumping investigation would be identified by their ten-digit classification under the HTSUS, the identification of the products that are manufactured in the United States and sold in the U.S. commercial market should be based upon specific HTSUS numbers as well. Identification of domestic production cannot effectively or reasonably be based upon broad product categories such as those created for the purposes of the U.S. Textile Quota Program. While the three-digit category system created decades ago to implement U.S. quantitative import restraints may be a familiar lexicon in the industry, these categories are overly broad and could not be used for purposes of either an antidumping investigation or Commerce's proposed monitoring program. For example, a review of the numerous tariff classifications included in a single U.S. quota category, "men's and boys' cotton trousers and shorts" (category 347), illustrates how wide-ranging that product category is. This category includes:

HTS CODE	DESCRIPTION
6103.19.2015	M/B TROUSERS ETC IMP AS PT OF SUIT OF COTTON, KNIT
6103.19.9020	M/B TRSRS AS SUIT PTS OF OT TEX SUBJ COT RES, KNIT
6103.22.0030	M/B ENSEMBLES OF TROUSERS AND BREECHES OF COT,KNIT
6103.22.0040	M/B ENSEMBLES OF SHORTS OF COTTON, KNIT
6103.42.1020	MEN'S TROUSERS AND BREECHES OF COTTON, KNIT
6103.42.1040	BOY'S TROUSERS & BREECHES, NESOI, OF COTTON, KNIT
6103.42.1050	MEN'S SHORTS OF COTTON, KNIT
6103.42.1070	BOYS' SHORTS, OTH THN IMPT PRTS PLYSTS, COT, KNIT
6103.49.8010	M/B TROUSERS ETC OF OT TEX MAT SUBJ COT RES, KNIT
6112.11.0050	M/B TROUSERS FOR TRACK SUITS OF COTTON, KNIT
6113.00.9038	M/B TROUSERS KNIT COT IMPREG RESIN EX RBR/PLASTIC
6203.19.1020	M/B SUITS OF OT COT TROUS BREECH & SHRTS IMP PT ST
6203.19.9020	M/B TRSRS AS SUIT PTS OF OT TEX SUBJ COT RES,NT KT
6203.22.3020	M/B ENSEMBLES OF TROUSERS AND BREECHES OF COT,N KT
6203.22.3030	M/B ENSEMBLES OF SHORTS OF COTTON, NOT KNIT
6203.42.4003	M/B TROUSR BREECHES SHORTS COTTON CMPCT YRN NT KNT
6203.42.4005	MEN'S TROUSERS & BREECHES COTTON CORDUROY, NT KNIT
6203.42.4006	MEN'S CORDUROY TROUSERS & BREECHES COTTON NOT KNIT
6203.42.4010	MEN'S TROUSER & BREECHES COTTON BLUE DENIM, NT KT
6203.42.4011	MEN'S BLUE DENM TROUSERS & BREECHES COTTON NT KNIT

[7] As a basic starting point, Commerce needs to know -- prior to monitoring -- whether the relevant segment of the domestic industry will cooperate in providing Commerce with the information it will need to analyze injury in the event that Commerce self-initiated an antidumping investigation on a certain import or imports. This commitment from the domestic industry to provide injury data at the outset of the monitoring process is a key component, for without that commitment Commerce has no assurance that the U.S. Government will be in a position to obtain the requisite injury information in connection with the biannual evaluation process, discussed below.

6203.42.4015	MEN'S TROUSERS & BREECHES OTHER COTTON, NOT KNIT
6203.42.4016	MEN'S TROUSERS & BREECHES OF COTTON, NT KNIT NESOI
6203.42.4025	BOYS' TROUSER ETC COT CORDRY NT PLAYSUIT PTS,NT KT
6203.42.4026	BOYS' CORDUROY TROUSERS ETC COTTON NOT KNIT NESOI
6203.42.4035	BOYS' TROUSER ETC COT BLUE DNIM N PLAYSUIT PT,N KT
6203.42.4036	BOYS' BLUE DENIM TROUSERS ETC COTTON NT KNIT NESOI
6203.42.4045	BOYS' TROUSER ETC OT COTTON NT PLAYSUIT PT, NT KT
6203.42.4046	BOYS' TROUSERS & BREECHES OF COTTON NOT KNIT NESOI
6203.42.4050	MEN'S SHORTS OF COTTON, NOT KNIT
6203.42.4051	MEN'S SHORTS OF COTTON, NOT KNIT, NESOI
6203.42.4060	BOYS' SHORTS COTTON NOT PLAYSUIT PARTS, NOT KNIT
6203.42.4061	BOYS' SHORTS OF COTTON, NOT KNIT, NESOI
6203.49.8020	M/B TROUSER ETC OT TEX MTRL SUBJ COT RSTRTS, NT KT
6210.40.9033	M/B TROUSERS RUBBERIZED TEX MTRL EX MMF, NOT KNIT
6211.20.1520	M/B WTR RES TRSER,BREECHES IMP PRT OF SKI-S NT KNT
6211.20.3810	M/B SKI-SUIT TROUSER & BREECHES COTTON NOT KNIT
6211.32.0040	M/B TRACK SUIT TROUSERS OF COTTON, NOT KNIT

As the above demonstrates, in this one category alone, products range from boys' knit cotton shorts to men's ski suit trousers. This wide range of the U.S. Textile Quota Program categories renders them unsuitable for purposes of Commerce's proposed monitoring system. Therefore, Commerce must require U.S. producers to identify their production in terms of its classification under the HTSUS, as if it were an import, so that Commerce may best identify which imports should be subject to its monitoring process.

3. Commerce Can Categorically Exclude Certain U.S. Production

After Commerce has identified the domestically produced products by ten-digit HTSUS number, Commerce should categorically exclude certain groups of products that, by their nature, cannot provide the basis for monitoring the identical import. There are three such groups.

First, any products that the domestic industry produces other than for sale on the U.S. commercial market should not be considered domestic products for purposes of Commerce's monitoring system. In particular, U.S. product sold under the Berry Amendment and for other "Buy America" procurement programs is already protected from import competition and, for that reason, cannot be identical to the import.[6] There is no basis for monitoring products where import competition is already limited by law.

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[6] According to the U.S. International Trade Commission like product criteria -- (i) physical characteristics and uses of the merchandise; (ii) interchangeability; (iii) channels of distribution; (iv) common manufacturing facilities, production processes, and employees; (v) customer and producers' perceptions; and (vi) price -- U.S. production for government procurement purposes, such as for the military under the Berry Amendment, are not identical to imports for the commercial market because the products do not compete against each other, have different uses, are not interchangeable, and move in different channels of distribution.

Second, production in the United States of garment components, including cut parts, which are assembled into garments outside the United States cannot be considered domestic production of the final garment. Such garments, under long standing origin rules, statutorily set under Section 333 of the Uruguay Round Agreements Act, are products of the country in which they are assembled and are not products of the United States.

Third, if a domestically produced product does not fall in one of the five product groups that have been identified as "being of special sensitivity"— i.e., trousers, shirts, underwear, swimwear and sweaters— then there is no basis to monitor the identical import. We note that Commerce sought comment on whether or not there are particular products that could act as bellwethers for groups of product as a whole. Given the wide variety of products within each of the groups (e.g., ski suit pants and jeans are both trousers) and, in addition, the seasonality within the groups (light cotton sweaters are a Spring item and wool sweaters are for Winter) it would make no sense for Commerce to monitor one particular product and apply data for that product to another product within the same, larger category. A careful analysis requires that Commerce separately monitor only those products that are identical to products that the domestic industry distinctly identifies as itself producing for sale on the U.S. commercial market.

4. Commerce Should Monitor Imports Identical to U.S. Production Only from State-Owned or –Controlled Enterprises

With this information in hand, Commerce should then identify which products imported from Vietnam, by 10-digit HTSUS number, are identical to those produced in the United States, and which otherwise qualify for monitoring by fulfilling all of the criteria set forth above. Using the HTSUS number is critical because a review of the import data indicates, for example, that the men's and boys' cotton trousers and shorts shipped from Vietnam do not cover all of the classifications included within the U.S. textile quota category 347.

When identifying the imports within the HTSUS numbers that will be subject to monitoring, Commerce should only include for monitoring those products from state-owned or -controlled enterprises. Such a limitation is in accordance with the intent behind the September 28 letters to Senators Dole and Graham, to address the concern that "Vietnam may continue to offer prohibited subsidies to the state run textile and apparel industry." We understand that the Government of Vietnam has an obligation, under the terms of its accession to the WTO, to identify state-controlled entities, and therefore it is feasible for Commerce to identify separately and monitor these imports.

Lastly, once Commerce has gone through the procedures set forth above, it should identify the list of imports proposed for monitoring in a Federal Register notice, in which it should explain its determination by identifying the particular import, the domestic producer(s) of the identical product, why Commerce has concluded that there is a domestic industry producing the product, and indicate that the requisite percentage of domestic producer(s) of the product have indicated a willingness to supply

information relevant to an injury assessment for that product. Commerce should seek public comment on this proposed list.

B. Biannual Evaluation Process

In its Federal Register notice, Commerce asked for comments regarding the process by which it should evaluate biannually the information collected under the contemplated monitoring program. Most fundamentally, the U.S. Government has no authority for, and should not place any special or additional burden on imports of textiles or apparel from Vietnam as part of the monitoring program or the biannual evaluation process. Moreover, the U.S. Government should not impose any additional requirements for the submission of new information, the completion of forms, the collection of additional data or other administrative or substantive requirement other than those presently imposed in connection with Customs entry. Not only would the collection of this information be unnecessary, but any such additional burden on imports or importers would itself be a trade barrier and possibly unlawful under U.S. international obligations with the WTO.

Commerce is, however, obligated to consider both dumping and injury information simultaneously prior to making an initiation determination[9] and must consider these elements to ensure that any self-initiation "is warranted" under the statute.[10] In addition, Commerce is required to consider industry support for the self-initiation. To the extent that Commerce's biannual review process leads to a self-initiation, Commerce should (i) calculate normal value consistent with the statutory scheme; (ii) ensure that there is sufficient injury and causation data on the record to support a self-initiation; and (iii) require a sufficient level of domestic support for the self-initiation. We discuss each of these issues below.

1. Commerce Should Calculate Normal Value Consistent with the Statute

We assume that Commerce is genuinely considering whether an alleged normal value is necessary for purposes of the proposed monitoring system. In that regard, the December 4 Request for Public Comment states that Commerce "may find it necessary to develop production templates to assist in its evaluation of textile and apparel imports from Vietnam."[11] Elsewhere, however, the notice states that Commerce "will develop, in close cooperation with interested parties, production templates to assist it in its biannual evaluation of imports" to determine whether sufficient evidence exists for self-initiation of an antidumping proceeding.[12] To the extent Commerce has already conclusively determined to develop "production templates," its actions are at odds with the stated intention not to prejudge aspects of its monitoring system.

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9 See WTO Antidumping Agreement, art. 5.7 ("The evidence of both dumping and injury shall be considered simultaneously ... in the decision whether or not to initiate an investigation ...").

10 19 U.S.C. § 1673a(a)(1).

11 71 Fed. Reg. 70365 (Dec. 4, 2006) (emphasis added).

12 Id. (emphasis added).

Furthermore, in its Request for Public Comment, Commerce uses the term "production templates." The term "production templates" is nowhere found in the statute. Without attempting to discern what Commerce means by production templates, suffice it to say that Commerce should only calculate a normal value for monitored subject imports in a manner consistent with both the statutory scheme and Commerce's standard methodologies for non-market economy proceedings.

In that regard, we note that the Request for Public Comments also sought input on market economy countries that have similar textile and apparel industries to Vietnam, ostensibly for the purpose of identifying possible surrogate countries for the normal value calculation. Commerce, which has yet to identify the merchandise it proposes to monitor, has put the cart before the horse. In order to determine an appropriate surrogate, Commerce first must identify the merchandise potentially subject to a self-initiation. The statute requires that Commerce value the Vietnamese imports using factors of production from one or more market economy countries that are "significant producers of comparable merchandise." Because we do not yet know the merchandise to be monitored, it is necessarily impossible to identify at this stage a market economy that produces comparable merchandise. As such, any discussion of appropriate surrogate countries is drastically premature. After Commerce identifies the Vietnamese products to be monitored, if any, it should at that point seek input on choice of surrogate country.

2. Commerce Is Required to Consider Injury and Causation Data Prior to Initiation

The statute contemplates that before taking the extraordinary step of self-initiating an antidumping investigation, Commerce will consider injury information because injury to a domestic industry is a necessary element for the imposition of an antidumping duty.[13] Put another way, without consideration of injury information, no self-initiation could ever be "warranted." For their part, Commerce's regulations also require consideration of injury information. In this regard, the regulations provide that Commerce will make available to the ITC the injury information Commerce considered prior to its initiation decision.[14] Moreover, applicable WTO law requires Commerce to consider injury information prior to any self-initiation.[15]

As part of its injury analysis, Commerce should consider quantity and value information for those imports that fall within the HTS numbers that domestic apparel

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13 Commerce may self-initiate an antidumping investigation only if it determines based on "information available to it" that a "formal investigation is warranted" into the question of whether the necessary elements for the imposition of an antidumping duty exist. See 19 U.S.C. § 1673a(a)(1). Injury and causation are necessary elements.

14 See 19 C.F.R. § 351.201.

15 See WTO Antidumping Agreement, art. 5.6 (in the context of self-initiation, authorities "shall proceed only if they have sufficient evidence of dumping, injury and a causal link, as described in paragraph 2, to justify the initiation of an investigation.").

manufacturers have self-identified as covering a product they produce in the United States for sale on the U.S. commercial market. Further, with respect to these HTS numbers, Commerce should focus on the information that the U.S. Government collects as part of the Customs entry process in the normal course and/or data that are otherwise readily available to the U.S. Government. Like the standards commonly applied to initiations based on industry-filed petitions, any self-initiation would need to be based on a substantial increase in the volume of properly monitored imports and a simultaneous decrease in the average value of such imports, as demonstrated by the available Customs data.

Commerce also sought comment on whether it should undertake intermittent, mid-term, or staged analyses of import data and market trends. We believe such analyses are ill advised. Here again, we note that the Administration's Letter to Senators Dole and Graham – which states that Commerce "will conclude a review every six months as to whether there is sufficient evidence to initiate an antidumping investigation" – directly contradicts Commerce's stated objective not to prejudge. Commerce's assumption of a review period every six months and its request for comment on additional intermittent reviews miss the point entirely. Even reviews of six months are too short a period of time from which to extract meaningful data or trends. Far from providing reliable information, any analysis in the midst of the six-month review period would be distortive in that it could overstate any increases or decreases in import volume or value. The garment industry is highly seasonal. Data for one fiscal quarter, or even a half-year, provide an incomplete picture of imports and market trends, not to mention the further risk of financial data anomalies.

In addition to quantity and value information, Commerce will need to collect and assess information from the domestic producers relating to the impact the monitored imports have had, if any, on domestic operations. In this regard, as a condition for self-initiation, Commerce should require that for each product domestic producers accounting for at least 75% of the value of U.S. production during the most recently completed four calendar quarters have provided all of the information concerning injury and causation that would be required in a petition and the Commission's Producer Questionnaire for a preliminary investigation, including data regarding "all relevant economic factors" that have a bearing on the domestic industry, such as (i) actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity; (ii) factors affecting domestic prices; (iii) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment; and (iv) actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product.[16] We note that the Commission itself would require submission of such information (subject to subpoena) shortly after any self-initiation, at which point failure to supply it in practice would lead to a negative Commission finding.

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[16] 19 U.S.C. § 1677(7).

Such data must form the basis of any decision to self-initiate. Commerce should assess such evidence using the same standards that it would bring to bear on an industry-filed petition, with one caveat. By the terms of the Administration's letter to Senators Dole and Graham, threat of material injury and material retardation are inapplicable to the proposed monitoring system and biannual review process. The letters state: "If this monitoring process indicates that dumping exists and the domestic textile industry fully cooperates in supplying data available to the domestic industry indicating the existence of material injury caused by such imports, Commerce will self-initiate antidumping investigations with respect to relevant products (emphasis added)." In the letters, the Secretary and the U.S. Trade Representative included only material injury, and by doing so, excluded threat of material injury and material retardation as relevant considerations.

3. Commerce Should Determine Whether A Requisite Level of Domestic Support Exists

As it does with industry-filed petitions, Commerce should also consider in its biannual evaluation process whether a self-initiation would have a requisite level of support from the domestic industry. The level of industry support is critical to the biannual evaluation process because it ensures that Commerce does not waste limited resources on taking action that domestic producers do not support. Accordingly, during each six-month review period, Commerce should poll the domestic industry to determine whether there is such sufficient support. Consistent with the statutory guidance for industry-filed petitions, support would be insufficient unless self-initiation was supported by domestic producers or workers accounting for (i) 25% of the total production of the product; and (ii) 50% of the production expressing a view in support of, or opposed to, the self-initiation.

C. Self-Initiations

Commerce should implement measures to ensure that the information upon which any self-initiation would be based is accurate. Similar to its duty to substantiate the information in industry-filed petitions prior to initiation, Commerce in the context of self-initiations should take analogous steps to ensure that the initiation of the investigation is lawful. To this end, Commerce should issue a preliminary notice of initiation and hold a hearing on that decision in advance of a final determination to initiate. If Commerce were to proceed with self-initiation, any such initiation determination, by law, could not address critical circumstances.

1. Commerce Should Substantiate its Initiation Determination Prior to Finalizing Initiation

As Commerce is well aware, in the context of industry-filed petitions, the "proceeding" begins on the date of the filing of the petition.[17] At that point Commerce can establish an Administrative Protective Order ("APO"), and interested parties can

[17] 19 C.F.R. § 102.

apply for and ultimately receive business proprietary information that the domestic industry provided. Furthermore, Commerce has a 20-day period to consult with the Commission regarding injury issues and to ensure that the petition is otherwise sufficient. Moreover, as a matter of practice, Commerce may meet with petitioners prior to their filing to provide informal guidance as to the sufficiency of the petition. Procedures such as these ensure that the initiation pursuant to an industry-filed petition is lawful.

The issuance of a preliminary determination of self-initiation would replicate the prudent measures firmly in place for industry-filed petitions. A preliminary determination of self-initiation would, in essence, be the equivalent of the filing of a petition by domestic industry. Following the publication of the preliminary determination in the Federal Register, Commerce could establish an APO (i.e., the preliminary determination would begin the proceeding) and afford interested parties the opportunity to apply for access to proprietary information under the APO. Once approved, Commerce should provide to parties under APO access to the calculations and information upon which Commerce's preliminary decision to initiate was based. Interested parties should have a 20-day period (or longer, if necessary) within which to submit comments and information relevant to "the accuracy and adequacy of the evidence" upon which the Administration has preliminarily decided to self-initiate the investigation, and whether there is adequate domestic industry support for the initiation.[18]

In addition, Commerce should hold a public hearing to consider whether the information upon which the preliminary determination to self-initiate was based was accurate and adequate with respect to the product itself, injury factors, and domestic industry support. Commerce's stated concern not to prejudge should obligate it to consider such comments and information and to rescind the preliminary self-initiation upon review of such comments and information, if appropriate.

Finally, in addition to consulting with private interested parties, Commerce should seek input from within the Administration. In this regard, self-initiation should only occur after recommendation by the TPSC and approval of the President. The monitoring system should explicitly incorporate this approval requirement.

2. Critical Circumstances

The Administration's September 28, 2006 Letter to Senators Dole and Graham states that, as part of the six-month review process under the Import Monitoring Program, Commerce will determine "whether there is sufficient evidence to initiate an antidumping investigation...and, if so, whether critical circumstances exist that would allow for preliminary duties to be applied retroactively." Commerce's December 4, 2006 Request for Comments is silent on this issue. Assuming that the September 28, 2006 Letter continues to correctly state Commerce's intentions, an approach which would have Commerce make a critical circumstances determination before initiation of an

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[18] See 19 U.S.C. § 1673a(c)(1)(A)-(B).

investigation and before the ITC preliminary determination is inconsistent with the statute and well-established Department practice.

Under Section 733(e) of the Act, as amended, 19 U.S.C. § 1673b, Commerce may only determine the existence of critical circumstances "after the initiation of the investigation." Consistent with the exceptional nature of retroactive application of duties and U.S. obligations under the WTO agreements, Congress provided no exception to the basic procedural rule that critical circumstances may not predate initiation of an investigation. The statute expressly prohibits Commerce's intended approach to make critical circumstances determinations when it decides whether initiation is warranted.

Further, as explained in Commerce's Policy Bulletin 98/4: Timing of Issuance of Critical Circumstances Determinations, a key factor in the determination of critical circumstances is the preliminary determination of the U.S. International Trade Commission concerning the reasonable indication of injury, or the threat thereof, to the domestic industry at issue.[19] As Commerce explained in this Policy Bulletin, in light of the importance of the Commission's preliminary injury analysis to a critical circumstances determination, "we anticipate that the earliest point at which a critical circumstances determination would be made is shortly after the ITC's preliminary injury determination, which normally occurs 45 days after the filing of the petition." Thus, Commerce's planned approach here appears to disregard not only the black letter of the statute, but also Commerce's own policy for conducting critical circumstances analyses.[20]

A more cautious approach to the issuance of critical circumstances determinations is particularly warranted where, as with Commerce's announced Import Monitoring Program, Commerce is contemplating self-initiation rather than initiation pursuant to an industry-filed petition. Where Commerce must gather such factual information on its own, it seems wholly irrational that it would seek to issue a critical circumstances finding at a date prior to even the earliest date utilized when Commerce receives from industry a complete and adequate petition.

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19 Policy Bulletin 98/4: Timing of Issuance of Critical Circumstances Determinations, *available at* http://ia.ita.doc.gov/policy/bull98-4.txt. In determining whether critical circumstances exist, the statute requires Commerce to analyze, inter alia, whether there is a history of material injury by reason of the dumped imports. See Section 733(e)(1)(A) of the Tariff Act, 19 U.S.C. § 1673b(e)(1)(A).

20 In addition to a reasonable indication of injury, the importer must have known, or should have known, that the imported products were dumped. See Section 733(e)(1)(A) of the Tariff Act, 19 U.S.C. § 1673b(e)(1)(A). Normally, the most reliable information is that gathered in the course of an investigation. By definition, such information is not available at the time of self-initiation. Using "production templates" -- a concept nowhere found in the statute -- as the test for whether importers knew or should have known that the Vietnamese garments were dumped cannot satisfy the statutory knowledge requirement, for any values established by production templates are mere approximations of fair value, and as such, cannot possibly form the basis of the required importer knowledge.

We therefore urge Commerce to clarify its intentions concerning the application of the critical circumstances analysis for purposes of the planned Import Monitoring Program, and to ensure that any critical circumstances determination will be made consistent with the statute and Commerce's own policies and practices. Given the chilling effect that the prospect of retroactive duty assessment has on trade, adhering to normal practice is important, especially where, as here, there is absolutely no evidence that Vietnamese garment exporters will, or plan to, abuse Vietnam's PNTR status with the United States.

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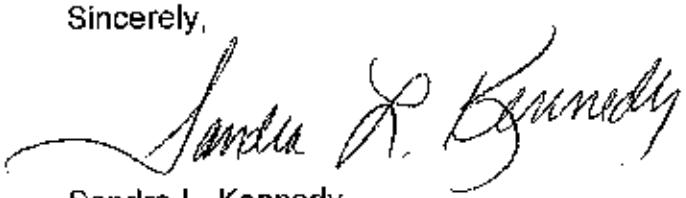
RILA appreciates this opportunity to comment on the proposed monitoring program. If you have any questions on the foregoing, please contact Lori Denham, Executive Vice President – Public Affairs or Allen Thompson, Vice President - Global Supply Chain Policy.

Sincerely,



Sandra L. Kennedy
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