Vinson&Elkins

December 27, 2006

David M. Spooner
Assistant Secretary for Import Administration
Room 1870
Department of Commerce
14th Street and Constitution Avenue, NW
Washington, DC 20230

Re: Textile and Apparel Products from Vietnam: Import Monitoring Program; Request for Comments (71 FR 70364, December 4, 2006)

Dear Mr. Spooner:

These comments are filed on behalf of the Korea International Trade Association ("KITA") and the Korean Apparel Industry Association ("KAIA") concerning the Commerce Department's intention to develop a monitoring program covering imports of textile and apparel products from Vietnam. The Korean apparel industry has a substantial interest in this monitoring program as it has invested substantial amounts in producing apparel in Vietnam in anticipation of Vietnam's accession to the World Trade Organization (WTO).

The enclosed comments are submitted in response to the Department's Request for Public Comments that was published in the *Federal Register* on December 4, 2006.

The comments are provided in the attached paper. In accordance with the Department's request, we also enclose a CD-ROM containing an electronic version of the enclosed comments.

Please do not hesitate to contact the undersigned should you have any questions concerning the enclosed comments.

Respectfully submitted,

William H. Barringer
Daniel L. Porter
Matthew R. Nicely

Before the United States Commerce Department
International Trade Administration

Comments of Korea International Trade Association (KITA) and Korean Apparel Industry Association (KAIA) *Concerning* A Suggested Import Monitoring Program for Textile and Apparel Products from Vietnam

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December 27, 2006

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INTRODUCTION AND SUMMARY

These comments are filed on behalf of the Korea International Trade Association ("KITA") and the Korean Apparel Industry Association ("KAIA") concerning the Commerce Department's intention to develop a monitoring program covering imports of textile and apparel products from Vietnam. The Korean apparel industry has a substantial interest in this monitoring program as it has invested substantial amounts in producing apparel in Vietnam in anticipation of Vietnam's accession to the World Trade Organization ("WTO"). KITA and KAIA appreciate the opportunity to submit comments on this important issue.

In our view, the Department's proposal of a monitoring program of this sort, accompanied by threatened self-initiated antidumping ("AD") cases against imports of textiles and apparel from Vietnam is entirely inappropriate, particularly given Vietnam's recent accession to the WTO. This program is inconsistent with the most basic principle of a rules-based trading system, specifically the principle of non-discrimination which has been the foundation of both the GATT and the WTO. The possibility of such discriminatory treatment is not provided for in Vietnam's accession protocol. Indeed, we are unaware – and would be interested to learn – where under U.S. law such a monitoring program is authorized.

More importantly, from a business perspective, a monitoring program combined with the prospect of self-initiated AD investigations in and of itself

will have an adverse effect both on Vietnam's trade and on foreign direct investment in the apparel and textile industries in Vietnam, thereby denying Vietnam, and other countries with companies producing and investing in textiles and apparel in Vietnam, the full benefits of WTO membership. It is the hope of KITA and KAIA that the harm to Vietnam and other WTO Members of this program will not be compounded by actions in implementing the program which further adversely affect Vietnam, its producers, and its investors.

We want the Bush Administration to realize the impact of its decision to implement a monitoring and AD self-initiation program, wholly apart from the effects of any actually initiated investigation. First, as our members can attest, it affects more industries than the homegrown Vietnamese companies for whom WTO membership promises potentially significant benefits. Some of the largest exporters, encouraged by the prospects of Vietnam receiving the benefits of WTO membership, are foreign invested companies such as our members. Indeed, there is substantial foreign investment in the textile and apparel sector by numerous WTO members. Thus, this action by the Administration is not only denying Vietnam the benefits of its WTO membership, but also denying companies in other WTO member countries from realizing those benefits. Second, the effect on trade and investment is likely broader than the Administration might expect. Some investment decisions were made precisely because Vietnam had successfully avoided

continuation of the quota system, which obviously would have placed limitations on any investment made in Vietnam and, in turn, reduced the appeal of any such investment. Furthermore, even before the monitoring system has been implemented, we are already hearing from buyers who say they will reduce their orders out of Vietnam in order to reduce the risk of AD duty exposure and possible interruption of supply at crucial times for their businesses. The mere announcement of a monitoring program is therefore already reducing the benefit of Vietnam's bargain in acceding to the WTO.

Against this background, KITA and KAIA believe that the Administration must exercise special care in implementing any textile and apparel monitoring program targeted at Vietnam. Our comments focus on the details of how a program can be implemented consistent with the following basic principles, which we believe should govern the program itself:

1. Scope of Monitoring: The scope of the monitoring (i.e. the products to be included in the program) should be as narrow as possible to avoid adversely affecting products that are unlikely to be a cause of injury to the domestic industry. Thus, meaningful thresholds must be established in terms of: (a) the existence of a domestic industry producing a product like – narrowly defined – the imported product subject to the monitoring program; (b) the volume of imports from Vietnam relative to other imports of the same product; and (c) demonstrated competition between the imported Vietnamese product and the like product produced by the domestic industry.

2. Procedural Safeguards: In order to ensure that the monitoring program itself does not have an overly adverse effect on trade and investment in textiles and apparel in Vietnam, there must be adequate procedural safeguards so that investors, producers, and buyers of products subject to the monitoring have adequate notice of any action, adequate opportunity to comment on the

basis of any action, and adequate protection against arbitrary action by the Import Administration. The proposal that the Import Administration self-initiate investigations essentially places the U.S. Government in the position of plaintiff, judge, and jury in any proceeding that is initiated. Procedural safeguards – including, critically, transparency -- are absolutely essential to avoid the program becoming nothing more than a process of politicizing the decision-making process.

3. Substantive Safeguards: In order to initiate an investigation -- whether petitioned by a domestic industry or undertaken by the Government -- both U.S. law and the WTO require a demonstration of the existence of dumping, injury, and causation. Changes in import volumes are simply one indicator among many of injury and causation. Dumping margins may be calculated based on imported inputs or surrogate values from any number of possible sources. Thus, the Import Administration must develop reliable evidence related to both dumping and injury; it cannot simply initiate an investigation because imports have increased. Indeed, one would expect imports from a new WTO member to increase simply because of the benefits of the membership.

With all of this as background, the comments we offer below are aimed at ensuring that if a system is implemented – against our better judgment – it should be implemented in a fair, non-discriminatory, and transparent manner so as to avoid as much as possible the further trade chilling effects such a system might easily create. We believe that each element of the import monitoring system should be evaluated in terms of the broader principles set forth above. We detail below some initial guidelines for how this can be accomplished.

I. SCOPE

A. Existence of a Domestic Industry Producing Products Like the Products Being Monitored

It is claimed that the reason self-initiation was important to certain members of the U.S. Congress is because there might not exist a domestic industry that produces a given textile or apparel product like that imported from Vietnam, or because there would be insufficient industry support for a petition if one was filed (as required by Article 5.4 of the AD Agreement). This is, indeed, why the Administration's promise of self-initiated cases is so troubling to our industry, as it places in the hands of the Department more power than exists in the hands of our private sector competitors. The question, however, is whether that power will be abused in such a way as to chill trade further than it is already chilled.

Fortunately, there are laws to prevent such abuse. Neither the U.S. AD law nor the WTO Antidumping Agreement extend the protection of AD measures to products other than those products produced by the domestic industry which are "like" the imported products, in this case the products subject to monitoring.[1] Thus, a threshold issue in deciding which products should be subject to monitoring is whether there is a domestic industry producing a product like the one being monitored. We also believe that the

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[1] We assume it is clear to the Department that if a U.S. fabric-producing industry has apparel operations in Latin American countries, which we understand they do, initiating an AD investigation to effectively protect that company's own foreign apparel supplier would be illegal under U.S. law and inconsistent with U.S. WTO obligations.

production volume should be non-negligible in order to justify inclusion on any monitoring list.

KITA and KAIA believe that there is no U.S. production or only negligible U.S. production of many, if not most, of the products its members produce in Vietnam. However, the appropriate source of such information is U.S. producers. Thus, as a first step in deciding the scope of the monitoring, and because the monitoring program benefits the U.S. textile and apparel industry, we believe that Import Administration should request from domestic producers a list of the specific products produced by the industry that compete with products imported from Vietnam, the names and numbers of producers, and whether aggregate production is above a certain threshold amount (e.g. $50 million). [2] This information should be made public and parties should be permitted to comment on the information.

We recommend, however, that the industry not be permitted to utilize the now outdated category system to define which products they make. These categories tend to be broader than what would be included in defining a product "like" the imported product under U.S. law or the WTO Antidumping Agreement. It makes no sense to monitor products on a basis

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[2] We recognize that some domestic producers of a particular "like" product may also import the product and, therefore, not support the monitoring system or the initiation of an AD investigation. Other domestic producers may not support the monitoring system and/or an AD investigation for other reasons. We would not expect these producers to supply information about their U.S. production and sales. On the other hand, if there is no U.S. production of a particular "like" product other than by companies that choose not to respond with the requested information, the Import Administration should assume that there is either no U.S. production or no U.S. industry support for the monitoring and self-initiation for the particular product. Under these circumstances, the product in question would not be included within the scope of the monitoring system.

other than the "like" product definition which defines the scope of any AD investigation. Since protection under the AD law and WTO Antidumping Agreement is not permissible unless dumping, injury and causation are determined on the basis of a like product, monitoring should be conducted on the same basis. The domestic industry should be required to define products on a "like" product basis and to define the product based on both the Harmonized Tariff System and a narrative description, similar to what is required in an AD petition. Other interested parties should then be provided the opportunity to comment on this definition and whether the product described is a "like" product produced by the U.S. industry.

B. Competition With Domestically Produced Like Product

In order for an imported product to cause injury to the producers of the "like" domestic product, the imported and domestic product must compete with each other. As such, in determining what products should be subject to monitoring there should be evidence that there is competition between the imported product and the domestic product "like" the imported product.

For example, trousers that sell at retail for $100 at a Saks Fifth Avenue or Bloomingdales do not compete with trousers selling for $25 at a big box store such as Walmart or Target. Once it is determined based on the existence of a domestic industry and non-negligible import volume which categories of imported products should be included in the universe of imported products to be monitored, the Import Administration should publish

a list of these products and request comments on whether the imported product from Vietnam is, in fact, competing with the domestically produced "like" product.

C. Import Volume

We also recommend that no monitoring be undertaken for any product from Vietnam that represents less than 3% of total U.S. imports of that product. This would avoid unnecessarily threatening AD cases against Vietnamese industries which represent too small a percentage of U.S. consumption to injure or threaten injury to the U.S. industry. This threshold is consistent with the negligibility standard of U.S. law (19 U.S.C. §1677(24)) and the WTO Antidumping Agreement (Article 5.8).

We would also suggest that some threshold of overall market share be established, since this is relevant to the broader allegation of injury to the domestic industry. Assuming that the inclusion of products for monitoring is based on the assumption of non-cumulation for injury purposes, we believe that a minimum 15% share of the U.S. market is an appropriate threshold.

II. PROCEDURAL SAFEGUARDS

Given that the decision by the United States to undertake an import monitoring and self-initiated AD program was part of a "political" deal, it is important to ensure that actual decisions on program implementation and, in particular, self-initiation are not part of the political process but based on

facts, objective analysis of the facts, and neutral deliberation and decision-making.

In particular, transparency, procedural fairness, objectivity and adequate notice are essential elements of avoiding arbitrary and politically based decision-making. We believe that several mechanisms must be built in to any monitoring program to ensure that unwarranted self-initiation does not take place and that parties have adequate notice of a possible investigation to take measures to mitigate the harm arising from any investigation.

A. Neutral Decision-Making

Given that self-initiation of an AD investigation puts Import Administration in the role of both petitioner and evaluator of the adequacy of a petition, safeguards against unwarranted initiation are essential to protect the interests of foreign producers, U.S. importers, and retailers. Unwarranted initiation can severely injure these parties and can also have a ripple effect in terms of trade in other textile and apparel products being monitored. The key is to ensure that the analysis of the facts supporting the initiation is thorough and objective and that the evidence of dumping, injury, and causation is sufficient to support an initiation.

One way to ensure neutral decision-making on initiation is to provide for a review by disinterested parties of the facts supporting the initiation of a petition prior to the initiation itself. One approach could be to draw from the existing roster of NAFTA panelists and create a panel or panels that would

review the sufficiency of the evidence and objectively determine whether the requirements of U.S. law are met and self-initiation is warranted. The panel would then make a non-binding recommendation to the Assistant Secretary for Import Administration. Whether the review panel would be drawn from the roster of NAFTA panelists or from academics or other sources, we believe that some form of disinterested review is the best way of ensuring that decisions are fact based and not politically motivated.

A second, though less effective, possible approach is to provide an opportunity for notice and comment on the evidence to all parties concerned prior to any decision to self-initiate an investigation. In essence, Import Administration would provide the public with the evidence it believes justifies initiation and allow interested parties to comment on both the accuracy of the information and its sufficiency. Based on the comments received, Import Administration staff could then prepare a recommendation for the Assistant Secretary for Import Administration and a decision could be taken.

As part of this process, we would recommend that the Department also ensure, again, the existence of a domestic industry producing a "like" product that actually supports initiation of an investigation.

B. Consultations

Given the extraordinary nature of a proposed monitoring/self-initiation program and the fact that the decision to even consider self-initiation is solely within the control of Import Administration, due care should be exercised in maintaining an open dialogue with the Government of Vietnam and providing the Government an opportunity to examine the basis of any decision to self-initiate an investigation.

To accomplish this purpose, we would propose that a consultation process be built into any monitoring/self-initiation system to ensure the transparency of the process, to allow the Government of Vietnam to address problem products before self-initiation, and to ensure that decisions to initiate are not made using a different standard than is applicable to all other WTO Members.

Due care should also be taken to ensure that sufficient information is made available to the exporting and importing community so that they can know the kinds of facts that would result in initiation of an investigation and, in turn, be prepared. Failure to adopt a transparent system will only serve to chill trade between Vietnam and the United States.

III. SUBSTANTIVE SAFEGUARDS

A. Injury

1. Access to Domestic Industry Data

In order to ensure transparency and predictability in the manner by which the Department conducts its monitoring program, it must announce in advance the sources it intends to rely upon for discerning whether a domestic industry (if one exists) is injured by reason of imports from Vietnam. Obviously, the best source for such information is the industry itself, which – if it supports an initiation of an investigation – the industry should be willing to share with the Department and make available to the public (in aggregate form).

The Department asks in its notice what specific information it needs to collect for purposes of the injury analysis. The first place to start is to refer to the U.S. antidumping statute (19 U.S.C. §1677(7)(C)(iii)) and the WTO Antidumping Agreement (Article 3.4), which set forth a detailed list of the information that must be examined in discerning whether an industry is injured by reason of imports. Specifically, and at the very least, the following factors should be examined:

- Actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity;
- Factors affecting domestic prices;
- The magnitude of the margin of dumping;
- Actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments.

2. Consideration of Effect of and Competition with Third Country Imports

Before initiating an investigation of imports from Vietnam, the Department must undertake an analysis of the effects of other causes,[3] including the effects of other imports.[4] It is not sufficient evidence to find that imports from Vietnam increased, their prices decreased, and the domestic industry (if there is one) is suffering. It may be the case that other factors are contributing to the industry's poor performance, notwithstanding the growth in lower priced imports from Vietnam. Not only might other countries be more to blame; Vietnamese product may be merely displacing product from other countries. Both such events will suggest that Vietnamese products are not the industry's problem and that any possible case against the Vietnamese product is merely the result of a political promise to two U.S. Senators rather than sufficient evidence of injurious dumping by Vietnam.

It is important in this context also to mention that any investigation initiated only with respect to Vietnam when other countries are also shipping the same product to the United States would smack of the sort of discrimination membership in the WTO is aimed at eliminating. Although

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[3] WTO Antidumping Agreement Article 3.5 (requiring that authorities ensure injuries caused by other factors are not attributed to subject imports). This issue has been at the heart of several findings by the WTO Appellate Body in both AD and safeguard cases. See, e.g., *United States – Anti-Dumping Measures on Certain hot-Rolled Steel Products from Japan,* Report of the Appellate Body (24 July 2001) WT/DS184/AB/R, paras. 222-236.

[4] A proper examination of the effects of non-subject imports has become a critical issue for the Court of Appeals for the Federal Circuit. See, e.g., *Bratsk Aluminium Smelter, et al, v. Untied States,* 444 F.3d 1369 (Fed. Cir. 2006)

we hesitate to raise this issue for fear of generating AD cases against multiple countries, it is important that Vietnam not be singled out if other countries' products are also present in the U.S. market.[5]

B. Dumping

Our most critical concern about the Department's monitoring program is that the calculation of AD duties must be transparent and predictable. There are complicated transactions that take place in this industry, which -- combined with the black-box NME methodology for calculating normal value -- can make discerning the level of dumping a complete mystery.

If companies are effectively being asked to avoid selling their product to the U.S. at less than fair value, they need to know how the Department will calculate both U.S. price and normal value. If they don't know this in advance, the Department's program is destined to be hopelessly non-transparent and unpredictable, which will drive businesses away from Vietnam and thereby obviate the reason Vietnam joined the WTO in the first place.

We offer some suggestions below for how the Department can prevent such a result.

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[5] We would also want to ensure that no discriminatory action be taken against Vietnam with respect to critical circumstances. Although not addressed in the Department's *Federal Register* notice, this was mentioned in the letter from Secretary Gutierrez and Ambassador Schwab to Senators Dole and Graham as an element intended to be included in any monitoring program. We find this odd, since such determinations, under the statute, are only to be made after an investigation is initiated, and that any retroactive application of duties may never stretch back prior to the date of initiation. 19 U.S.C. §1673b(e)(1). Hence, we fail to see the relevance of this to any monitoring program, unless it is applied in a blatantly illegal and discriminatory manner.

1. Export Price Considerations

Virtually all sales to the United States of apparel products produced by Korean-owned facilities in Vietnam are performed under tolling arrangements known in the trade as CMT arrangements (for "cut, make, and trim"). The Vietnamese operation does not own the fabric from which the apparel product is made. Rather, their Korean parent arranges for delivery of the product to the Vietnamese facility. The Vietnamese facility makes the apparel product and then ships the product wherever the parent instructs. Finally, the invoice to the U.S. customer comes from the Korean parent.

The Vietnamese companies therefore merely sell their service, not the product. They have no direct interaction with the final U.S. customer, at least in terms of setting price. And their costs are limited to their labor and overhead expenses. (As we understand it, this occurs as between non-affiliates as well, where the Vietnamese producer acts as a toller and is instructed by its customer where to obtain its raw material and where to ship it, with the actual U.S. sale occurring between a foreign trading company and the U.S. customer.)

In order to be fully transparent and predictable, the Department must announce how it will calculate the dumping margin in this kind of situation. With regard to U.S. price, it must decide which transaction will be used. The same must be decided for companies that perform the same task, but through non-affiliates rather than affiliates. If it will be the price at which the parent

or unaffiliated trading company sells to the United States, then the Department must announce this.

As between affiliated companies, this would make sense, but it needs to be clear. Meanwhile, if the company that sells the merchandise to the United States is unaffiliated with the Vietnamese company that produces the apparel product, the Department must decide which company is the respondent. Although the producer of the product is in Vietnam, this company plays no role in pricing the product; furthermore, in CMT situations, the Vietnamese producer has no control over the sourcing of the raw material. The respondent in this situation must be the unaffiliated trading company, regardless of where that company is situated.

2. Normal Value Considerations

The situation described above poses similarly complicated questions on the normal value side of the equation. With no purchases of raw materials and, in turn, no ownership of such materials, it is unclear what transactions and costs would be used for the normal value calculation. This is relevant to the production template the Department proposes to develop.

Furthermore, for companies who do own their raw materials, it is also unclear under the NME methodology how the Department would calculate normal value. This is true not merely because of the surrogate value methodology used in NME cases, but also because companies are using a combination of market economy and non-market economy inputs. Currently,

the Department's standard on market economy purchase inputs is not clear. While, for surrogate value purposes it rejects certain countries, it is unclear whether these same countries will be rejected for purposes of purchased textile inputs. Recent court decisions indicate that the specific industry providing the inputs from the market economy cannot be rejected unless there is clear evidence that those inputs have been subsidized.[6] The Department should follow the court decisions in this regard.

We recommend that the Department announce, in advance, how it will calculate normal value given the various scenarios under which Vietnamese operations conduct their businesses. Specifically:

- In CMT situations, where the Vietnamese facility has no knowledge of the cost or the factors of production for the raw material, what will be used to calculate normal value? We assume this information would need to be obtained from the owner of the raw material, but the Department must make this clear, in advance, rather than later penalizing the Vietnamese producer for not being able to report information to which is has no access.

- If a surrogate value will need to be used, the Department must announce (a) which country will be used and (b) what sources it will rely upon for surrogate values in deciding whether to initiate an investigation.

For each of these, it is important that the Department establish clear rules that it will use both in deciding whether to initiate an investigation, as well as in conducting the investigation if and when it is initiated. These rules cannot be adopted, however, before the Department decides which specific

[6] See, e.g., *Sichuan Changhong Electric Co., Ltd., et al. v. United States*, slip op. 06-141 (September 14, 2006), 26-28 (citing *Fuyao I* and *Fuyao II* decisions).

products will be monitored, at which point the Department should seek further comment on the most appropriate standards, countries, and sources to be used for calculating normal value.

CONCLUSION

The KITA/KAIA comments set forth above indicate that further comment and consideration is necessary before implementation of any monitoring program. These comments also suggest that the burden should be on the domestic industry to demonstrate that it is producing products "like" those that it is suggesting should be monitored. Finally, before implementing any monitoring program, the Department should obtain substantial information from the domestic producers regarding issues such as the existence of a potentially aggrieved U.S. industry and the existence of competition between products produced by that industry and the industry in Vietnam.