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December 20, 2006

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

Re: Comments on Import Monitoring Program on Textile and Apparel Products from Vietnam, 71 Fed. Reg. 70364 (December 4, 2006)

Dear Assistant Secretary Spooner:

The Vietnam Textile and Apparel Association, VITAS, hereby responds to the U.S. Department of Commerce's Request for Public Comment on the Import Monitoring Program on Textile and Apparel Products from Vietnam ("Import Monitoring Program"). The request follows the September 28, 2006 announcement by Commerce Secretary Carlos Gutierrez and U.S. Trade Representative Susan Schwab that the U.S. Government will commence an Import Monitoring Program upon Vietnam's accession to the World Trade Organization ("WTO").

VITAS objects strenuously to the contemplated Import Monitoring Program. The Program, which was described on September 28, in letters to two Senators, Elizabeth Dole and Lindsey Graham, as intended to address a baseless concern that "Vietnam may continue to offer prohibited subsidies to state-run textile and apparel industries" in Vietnam, is unjustified and discriminatory, and is threatening Vietnam's legitimate trade. With Vietnam to be a member of the WTO on January 11, 2007, its textile and apparel trade is fully entitled to U.S. adherence to the procedures prescribed in the WTO Antidumping Agreement, the WTO Dispute Settlement Understanding, and to non-discriminatory application of U.S. trade measures.

VITAS respectfully urges that the U.S. Administration seriously reconsider the terms of its September 28 letters and withdraw the unlawful proposed Import Monitoring Program.

To the extent the Department persists in an Import Monitoring Program, it must ensure that its scope is significantly and carefully narrowed to encompass only products for which there is actual marketplace competition between United States-made and Vietnam-made goods and for which there is a U.S. industry that truly believes it is harmed by Vietnam-made goods and prepared to fully support an investigation. VITAS firmly believes there are no such goods.

I. Vietnam's Textile Industry Is Overwhelmingly Privately Owned, Market-Oriented and Not A Threat to the United States

The Vietnam textile and garment industry consists of over 2,000 enterprises. Of these, only 50 are state-owned, while 1,400 are private and 450 are foreign direct investment (FDI) enterprises.[1] Moreover,

[1] 2006 Commercial Counsellors Report On Vietnam, European Union and Commercial Counsellors, at 43.

90% of the industry is composed of small and medium sized manufacturers, with more than 2 million people employed directly, and many other related suppliers and services beneficially affected. It is an essential component of Vietnam's economy and considerably contributes to jobs creation as well as hunger elimination and poverty reduction in rural areas.

Vietnam textile and garment products are mainly exported by the private and FDI companies. Most of state-owned enterprises have been equitized. In 2005, only 25 state-owned textile and garment enterprises exported their products to the United States, making up only 8.1% of total export turnover of textile and garment to the United States. Since then, the number of state-owned enterprises that export their products to the US has further declined and is now only 17 enterprises and is estimated to account for under five percent of the imports into the United States. In 2008, all remaining state-owned enterprises will be totally equitized.

Since Bilateral Trade Agreement between Vietnam and the U.S. came into effect in late 2001, normalizing trade between our two nations and making Vietnamese goods affordable, Vietnam's textile and garment exports to the United States have naturally risen. Much of this is due to FDI in the sector: from 100 such projects in 2001, there were more than 400 projects in 2003, and more investment had been expected in 2006 in response to Vietnam's commitments to the WTO. As a direct consequence, in 2005, 47.670 tons of cotton were imported into Vietnam from the United States, accounting for 71% of the total cotton imports by Vietnam. Our manufacturers also import a considerable amount of synthetic fiber and chemical and dyestuff.

On behalf of the apparel manufacturing industry in Vietnam, VITAS is honored that the U.S. textile and garment importing and retailing community, and our foreign investors, consider Vietnam as a reliable partner. The Vietnamese industry manufactures high quality textile and garment products at reasonable prices that are arrived at through arms length negotiations between vendors and buyers, bringing benefits for American consumers and families.

Vietnam is also viewed as an important market in its own right. Several U.S. textile producers – most notably International Textile Group, the parent company of Burlington Industries and Cone Mills -- have studied the Vietnam textile and garment market and export potential and have invested in the industry, establishing joint-ventures in Vietnam. Both Vietnam and the United States are beneficiaries of this bilateral cooperation.

So far in 2006, Vietnam textile and garment exports to the United States account for a moderate market share, just over two percent, making it only the 11th largest supplier, by quantity. Even when considering only garments, most recent data shows that Vietnam accounts for just over four percent of U.S. imports by quantity, ranking sixth, far behind China and also behind Mexico, Bangladesh, Honduras and Indonesia. Among total Vietnamese textile and garment export products to the US, garments account for up to 95% while they are produced at very low proportion in the US. Furthermore, garments exported to the US are mainly ordered for processing by the US firms with design, brands and material provided. The US firms therefore contribute a considerable value in the export products to the US.

Looking at the data by value, it is apparent that Vietnam is not a very low value supplier, because its share by value is greater than its share by quantity. Regard to average value/m^2 of Vietnamese textile and garment exported to the US in the first 6 months of 2006, this number reaches 2.33 USD/m^2 which is much higher than average apparel import of the US in the same period (1.75USD/m^2) and higher compared to that of other countries, for instance, China(1.34 USD/m^2), Mexico(1.84 USD/m^2), Bangladesh (1.93USD/m^2) and Indonesia (2.26USD/m^2).

Major raw material and accessories required for the industry rely on imports, including cotton (90%) is imported, polyester filament and fabric (100% imported), spun yarn (60% imported), fabric (70%) imported, machinery and chemical (100% imported), and as noted above, a high proportion of those imports are from the United States.

The Vietnam textile and apparel industries are overwhelmingly characterized by their significant foreign investment, like many other Vietnamese industries. Not surprisingly, therefore, Canada has expressly recognized, in the context of antidumping investigations, that some companies in Vietnam operate under market economy conditions.[2] These are not industries that threaten the United States. Nor are they industries that are in any way dependent upon prohibited subsidies to state-run enterprises. To the contrary, these are industries that are truly market-oriented and a reflection of both private enterprise and entrepreneurial spirit.

II. The Proposed Import Monitoring Program Lacks Proper Legal Authority and Violates the United States' Obligations Under the WTO

The determination of the U.S. Administration to proceed with an Import Monitoring Program against Vietnam's textile and apparel trade to the United States, including "biannual reviews" to determine whether data gathered in the monitoring process warrants self-initiation of an antidumping investigation, constitutes a substantial threat to Vietnam's textile and apparel trade. Yet, there is no indication of the legal basis for the contemplated monitoring plan.

VITAS understands that both U.S. law and the WTO provide for the possibility of self-initiation of antidumping investigations by governments. But that does not mean that the Commerce Department has unbridled discretion to determine how and when to monitor imports for purposes of possible self-initiation of antidumping investigations. Rather, a review of U.S. law and its legislative history demonstrates that the U.S. Congress actually limits the Department's monitoring authority. In particular, under Section 732(a)(2)(A) of the Tariff Act of 1930 ("Act"), as amended in 1984,[3] states that the Commerce Department is authorized to monitor imports for purposes of self-initiation of antidumping proceedings only where all of the following criteria are satisfied:

- The program is established with respect to a class or kind of merchandise from a particular supplier country because one or more antidumping orders are already in effect with respect to that class or kind of merchandise from one or more other countries;

- The Department believes there is an "extraordinary pattern" of persistent dumping from additional supplier countries (*i.e.*, U.S. importers move sourcing from country to country in order to continue dumping);

- The Department believes that this "extraordinary pattern" is causing a serious commercial problem for the domestic industry; and

- The monitoring program lasts for no more than one year.

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[2] obtain cite

[3] 19 U.S.C. § 1673a(a)(2)(A).

None of these conditions are satisfied with respect to the Import Monitoring Program as announced by the September 28 letters or the December 4 Federal Register notice. First, there are no antidumping orders in effect on any of the textile or apparel products referenced in the Department's December 4, 2006 Request for Comments. Second, there is no "extraordinary pattern" of persistent dumping for purposes of section 732(a)(2)(A) or evidence of a "serious commercial problem." Third, the Department is planning a monitoring program that will operate until January 19, 2008, which is two years, rather than one year permitted by the statute.

The only other instance in which monitoring is permitted by U.S. law is where there is a concern about "downstream dumping." Thus, under Section 780 of the Act, 19 U.S.C. § 1677i, if there is already an order covering an upstream product, the Department may monitor products "downstream" from those already subject to antidumping or countervailing duty orders. But there are no such orders in place. To the best knowledge of VITAS, the only antidumping or countervailing duty order on a textile-related product today involves polyester staple fiber from Korea and Taiwan (with an investigation pending on such imports from China), but that is not an input for consumer textiles and apparel and cannot provide a legal basis for the monitoring contemplated against imports from Vietnam.

The Import Monitoring Program, as announced, also constitutes violations of U.S. obligations under the WTO, and in particular runs afoul of the bilateral accession agreement reached between the United States and Vietnam and signed on May 31 in Hanoi.

Under the terms of the May 31 agreement, which was incorporated into the terms of Vietnam's accession to the WTO, Vietnam acquiesced to demands by the United States that Vietnam eliminate immediately prohibited subsidies to its textile and apparel industries. Moreover, Vietnam agreed to an enforcement mechanism to ensure its compliance with this commitment. Under that mechanism, for the first year after accession, if the United States believes that Vietnam is providing a prohibited subsidy, it may request consultations with Vietnam, with such consultations to be completed within 60 days. If the matter is not resolved in that period, the United States may request the appointment of an arbitrator, operating under the auspices of the WTO, pursuant to Article 25 of the Dispute Settlement Understanding. If the arbitrator finds that Vietnam has violated its commitment or fails to make a finding within the allotted period of 120 days, the United States may take the drastic action of reimposing for up to one year each of the quotas that are scheduled to be removed on January 11, 2007.[4] That remedy, at least for the first year after Vietnam's accession, constitutes the sole recourse available to the United States to address concerns about prohibited subsidies. Yet, the September 28 letters make clear that the U.S. Administration has decided to disregard the terms of the agreement and unilaterally implement another remedy, without even obtaining any determination that there is a violation.

The appropriate remedy for the United States is to seek consultations, and in the event there is no resolution, to request binding arbitration under Article 25 of the Dispute Settlement

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[4] The Government of Vietnam agreed to this draconian enforcement measure in large part to ensure that its textile and apparel trade, which accounts for almost half its exports to the United States, would not be subject to further import restrictions and with the full faith and belief that it could and would abide by the commitment to eliminate the prohibited subsidies. Indeed, the Vietnam Government on ____(date) formally eliminated the prohibited subsidies that had been available to the sector, fully honoring its commitments under the bilateral accession agreement.

Understanding ("DSU"), which could lead to the re-imposition of quotas. Normal WTO procedures would apply after the first year of Vietnam's WTO membership. Rather than follow these procedures, the United States has instead announced in its letters to Senators Dole and Graham that it "will begin a comprehensive program to monitor imports of textile and apparel products from Vietnam." The U.S. actions in this regard are outside of the WTO dispute resolution structure and, thus, are violations of Article 23 of the DSU.

Additionally, the monitoring program constitutes a violation under Article 18.1 of the WTO Agreement on the Implementation of Article VI ("WTO Antidumping Agreement"), which says no "specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994…" If the United States suspects dumping of Vietnamese-origin textiles and apparel, its recourse is only through application of the specific measures the WTO Antidumping Agreement authorizes. That Agreement nowhere sanctions the Import Monitoring Program, including the evaluation of import volume and value data, as well as the creation of "production templates." The Import Monitoring Program and biannual reviews are, effectively, an investigation of possible dumping outside the procedures set forth in the WTO Antidumping Agreement for such an activity.

Further, and most significantly, the Import Monitoring Program blatantly discriminates against imports from Vietnam, singling out Vietnam's trade and discouraging U.S. importers and retailers from doing business with Vietnam alone. Vietnam now faces the very real prospect that buyers will shift orders to elsewhere in Asia, solely because of the Import Monitoring Program and biannual review. Under the MFN rule of GATT Article I, the United States is obligated to accord to all Vietnam-origin imports treatment as favorable as that accorded to imports from any other WTO Member. The planned imposition of Vietnam-specific monitoring and biannual reviews contravenes the obligation of the United States to treat Vietnam-origin imports as favorably as imports from other WTO Members.[5]

For all of the reasons cited above, VITAS urgently requests that the U.S. Administration, and the Department of Commerce in particular, reconsider and withdraw the contemplated Import Monitoring Program.

III. The Consultative Process Must Ensure The Full Access And Participation of Vietnam's Industry

In the event that the Department proceeds with the Import Monitoring Program, notwithstanding the serious legal violations it creates, VITAS urges the establishment of procedures and rules that ensure the fullest possible participation of all appropriate interested parties, including Vietnam's textile and apparel manufacturing industry, workers, and related suppliers, as well as the Vietnam Government. While no type of consultative process can offset the considerable trade-chilling effects of the monitoring program, the lack of proper legal basis or the WTO violations created by it, VITAS seeks to ensure that it will be able to actively participate to bring forward and protect the interests of the Vietnamese industry as much as possible.

A. The Department Should Not Implement The Import Monitoring Program Until It Has Finally Established The Rules And Should Use The Internet To Maximize Access and Transparency

[5] The Government of Vietnam may determine that other violations of the WTO are also created by the Import Monitoring Program.

VITAS respectfully urges the Department not to rush to implement any Import Monitoring Program until it has conducted a full notice and comment process. To use the phrase VITAS often heard cited after Senators Feinstein and Smith objected, on November 3, to the September 28 letters to Senators Dole and Graham, it is essential that the Department not "prejudge the outcome" of the notice and comment process by prematurely implementing a Program through an interim rule.

VITAS urges the Department to go through a three-step process. That would mean that following receipt of these comments submitted in response to the December 4 Federal Register notice, the Department should 1) offer an opportunity for responses, or rebuttal comments, so that any disagreements among those commenting are fully identified and possibly resolved; 2) following the initial round of comments and rebuttal comments, as well as the hearing or hearings suggested by the Department, the Department should issue a proposed rulemaking setting forth the terms of the monitoring program, and solicit further comment before 3) issuance of a final rulemaking. Under no circumstances should the Department establish an interim monitoring program.

To ensure full transparency, and particularly to ensure that VITAS and other appropriate interested parties who are not present in the United States, all proceedings both in advance of establishment of a monitoring process and on an on-going basis once any monitoring process is in place should be "on the record." That includes any *ex parte* discussions or meetings. VITAS and others located outside the United States can only keep track of and respond to assertions and discussions if there is full access. The Department therefore should ensure that all discussions and comments are recorded and promptly accessible via the internet. Promptly should mean that the information is posted and available within 48 hours each time.

VITAS appreciates the suggestion of hearings, but to ensure fair and full access to entities located outside the United States, such hearings should be 1) accessible via the internet and 2) accessible via publicly available written transcripts. If hearings could be viewed via the internet on a real time basis, and subject to recording, that would maximize access. Again, timely access transcripts, particularly to accommodate responsive comments, is essential.

With respect to the Department's question about possibly holding hearings on the monitoring process outside Washington, D.C., VITAS has significant concerns. If the Department is contemplating hearings in places such as North or South Carolina, it would appear to be further subsidizing the U.S. textile industry, by not only doing all the work that would normally be done to prepare a petition, but also bringing the Department's full complement of resources to the industry, and arguably creating even greater pressure (and raising expectations) for the Department to take the next step and self-initiate. Arguably, if the Department is going to go to North Carolina, it should also hold hearings in locations that are convenient to U.S. importers and retailers, and in Vietnam, where the products that would be subject to monitoring and biannual reviews are being made. Yet, VITAS would not want such events to create even greater fear among manufacturers and buyers that there is any legitimate basis for self-initiation of an actual investigation. For these reasons, VITAS respectfully urges the Department not conduct more hearings outside Washington, D.C.

VITAS also notes its concern about the requirement, under the terms of the December 4 Federal Register notice, that original written comments be provided, with email versions optional. For entities operating outside the United States, email transmission constitutes the best means to file timely comments and should be recognized as an appropriate alternative to filing in

person or by mail. As noted above, to provide full access and transparency, the Department should make submitted comments promptly available for review on line via the internet.

B. The Entities Whose Views Are Integral To the Process Depends On the Products

The Department seeks comment on the entities whose views "are integral" to the consultative process. In VITAS' view, the full range of interested parties includes U.S. importers and retailers of the imports of textiles and apparel from Vietnam, Vietnam's manufacturers, vendors and/or exporters of these products, their workers and their associations, including VITAS, the investors in Vietnam's industry, the Government of the Socialist Republic of Vietnam, and U.S. producers of products that are like and compete directly with those imported from Vietnam, as well as any workers in those facilities and the associations representing those producers and workers.

That said, it is important to note that because many different types of products comprise the textile and apparel industries, the relevant interested parties will vary by product. An entity that is an interested party with respect to one product may not be an interested party with respect to another product. Most importantly, yarn and fabric producers are not interested parties when it comes to apparel products, but the analysis should be even more specific than that, as discussed below.

Also, it should be noted which entities should not be considered interested parties. These are other foreign producers of garments sold in the U.S. market and particularly the foreign producers who make garments from U.S. fabrics or yarns or from parts cut-to-shape in the United States,[6] via "outward processing" programs. There is no appropriate role for such entities in this process.

IV. Domestic Industry Information: The Products To Be Monitored Must Be Identified Based Upon What Is Produced In the United States For the Commercial Market and For Which There is Sufficient Support for An Actual Investigation

The Department requests comment on which products made in Vietnam should be subject to monitoring and what information on the U.S. domestic industry it should examine. The Department states that "five product groups—trousers, shirts, underwear, swimwear and sweaters—have been identified as being of special sensitivity." A key question is, special sensitivity to whom? All indications during the course of the U.S. Congressional debate over legislation to establish Permanent Normal Trade Relations for Vietnam are that two industry associations representing U.S. yarn and fabric manufacturers, the National Council of Textile Organizations, and the American Manufacturing Trade Action Coalition, were opposed to the bill and it was on their behalf that the two senators placed the hold on the legislation. Yet, there is no indication that the members of those two associations produce any of the garments described as having "special sensitivity."

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[6] VITAS notes that production in the United States of garment components, including cut parts, which are assembled into garments outside the United States also should not be considered domestic production of the final garment for purposes of identifying which products should be subject to monitoring, as discussed later in this letter. That is because such garments would be considered products of the country in which they are assembled and not products of the United States.

The criteria for monitoring cannot be based upon some abstract assertion that certain broad groups of articles are perceived by some parties as "sensitive." Rather, the scope of products subject to monitoring must be related to, and limited by, the legal susceptibility of those products to an antidumping investigation. That said, having identified products of supposed "special sensitivity," the potential scope of the Department's Import Monitoring Program should be limited to such products, with those products subject to monitoring only if they meet the requirements outlined below.

It is VITAS's strong view that the first question must be which specific products are actually made in the United States, and whether a U.S. producer requesting monitoring for a product it produces is producing that product for the commercial market in the United States. The second question must be whether the producers of that particular product are willing to provide essential data to determine whether they are suffering material injury and whether imports from Vietnam are the cause of that claimed injury. There is no basis to monitor imported products if there is no corresponding domestic industry or if the domestic producers are not prepared to provide necessary data to determine their condition. For purposes of the extraordinary actions of monitoring and conducting biannual reviews, the Department cannot and should not limit itself to "public information on the domestic textile and apparel industry."

By the terms of the U.S. statute, in any antidumping proceeding, whether initiated through an industry-filed petition or self-initiated, there must be a domestic "industry." The U.S. statute defines "industry" as the producers of the "domestic like product."[7] 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…."[8] Therefore, as a first step, the Department must determine which specific textile and apparel products are made in the United States and compete in the commercial market against imported Vietnamese garments. Given the extraordinary nature of the Import Monitoring Program, this analysis should be very precise, and the Department should seek to identify for monitoring only imports from Vietnam that are identical to domestically produced goods.

To identify domestic production that might justify monitoring, the Department should require the following information from U.S. producers, and only move to the next step if and when it receives sufficient and appropriate information. Thus, the Department should require domestic producers seeking monitoring to provide: 1) a detailed description of the product they produce and for which they seek monitoring, including physical characteristics and uses (including gender), fabric type (construction, knit versus woven, etc.), fiber composition, any special features (e.g., water-resistant); 2) the 10-digit Harmonized Tariff Schedules of the United States (HTSUS) classification under which the domestic product would be classified if it were an import;[9] 3) the identity of all U.S. producer(s) and the location(s) of the U.S. manufacturing

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7 Id. § 1677(4)(A).

8 Id. § 1677(10).

9 VITAS notes that the nomenclature for textile and apparel trade for purposes of quotas has been the three-digit category numbers. But those categories each encompass an extremely broad array of products, distinguishing by only the most general criteria. That is inappropriate and unacceptable in the context of an Import Monitoring Program aimed at identifying a basis for initiating an antidumping investigation. Since antidumping orders are always phrased in terms of specific HTSUS classifications, so too should requests for and any actual monitoring be

facilities in which the product is manufactured, and the percentage of domestic production of the product represented by each U.S. producer over the last 12 months; 4) whether the U.S. producer manufactures for both the commercial market and/or for U.S. Government procurement, and if the producer is manufacturing for other than the commercial market,[10] the percentage of production sold in the most recent 12 month period in the commercial market; and 5) whether the U.S. producers seeking monitoring are willing to supply information relevant to a material injury assessment.

With respect to the question of whether particular products might serve "as an indicator of bellwether for the category group as a whole," the answer is clearly no. Given the wide variety of products within each of the groups -- trousers includes men's, women's, girls, boys, shorts, cotton khakis, wool suit pants, silk and linen, and even ski suit pants, just to name a few -- it is absurd to believe that monitoring men's denim trousers would provide any indication of the trends – or impact – of imports of girls' sweat pants. Rather, reliance upon "bellwethers" would appear to be a pretense for avoiding requiring that the U.S. industry identify which products it actually manufactures for the commercial market and the specific imports from Vietnam with which it competes.

Once the Department has identified, by HTSUS classification, which products are made in the United States for the commercial market, for which monitoring is actually sought, with producers committing to provide the necessary data, the Department should then identify which of those products are imported from Vietnam, by 10-digit HTSUS classification. Those products should then be presented for public comment, as a proposed list of products. VITAS strongly suspects that the product list, if any, will be extremely limited, particularly if the Department properly requires domestic producers to actively state that they seek monitoring, actually produce a product and are prepared to provide data that would be necessary to identify material injury.

If any products are identified, the Department should ensure that there are no additional requirements imposed on such imports, such as 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 normal entry or withdrawal from warehouse, to prevent further aggravation of the discrimination against imports from Vietnam.

V. Production Templates Should Be Developed Only As Part of a Biannual Review, If Products Are Subject To Monitoring And If the U.S. Industry Provides Essential Data On Material Injury and Causation

The Department indicates, that as part of its monitoring process, it "may find it necessary to develop production templates." However, the Department also states that it "*will* develop, in close cooperation with interested parties, production templates to assist it in its biannual

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constructed strictly and tightly within that structure, especially where, as here, the process is extraordinary and highly discriminatory, with a significant threat to business confidence created by any monitoring.

[10] 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 the Department's Import Monitoring Program. Thus,, U.S. products sold under the Berry Amendment and for other "Buy America" procurement programs are already protected from import competition.

evaluation of imports," so the Department's intent is unclear. Assuming that production templates is a reference to the "factors of production" analysis undertaken in non-market economy antidumping investigations, VITAS respectfully urges the Department to defer any decisions or actions on this issue. The Department should only undertake to attempt such an analysis at the point of a biannual review, after it has identified that there is a domestic industry providing evidence of material injury[11] and that industry has demonstrated that it is prepared to submit the necessary economic data to support an investigation.

The Department also requested comment on which market economy countries have similar textile and apparel industries to Vietnam and therefore might serve as possible surrogate countries for the normal value calculation. VITAS respectfully declines to respond at this time because such an inquiry is premature. Until any products are identified for monitoring, it is impossible to identify similar industries in market economy countries. If and when the Department identifies any Vietnamese products to be monitored, only then should the Department seek comment on possible surrogate countries.

VI. The Biannual Evaluation Process

The Department requests comments regarding the process by which it should evaluate biannually the information collected under the Import Monitoring Program. Assuming that the product identification process results in any imports from Vietnam being subject to monitoring, by U.S. law, the Department must then consider both alleged dumping and injury information simultaneously prior to making an initiation determination[12] and must consider these elements to ensure that any self-initiation "is warranted" under the statute.[13] In addition, the Department is must consider and require industry support for the self-initiation. Each of these issues is equally important. The Department must not fixate on alleged dumping, identified through a "normal value" that is actually a contrived constructed value (despite the highly market-oriented nature of Vietnam's textile and apparel manufacturing industries), where there is no or insufficient evidence of material injury and insufficient proof of an appropriate level of domestic support for an investigation.[14]

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[11] The September 28 letters expressly made the full cooperation of the domestic industry "in supplying data available to the domestic industry indicating the existence of material injury caused by such imports" a condition for consideration of self-initiation. In so doing, the letters also apparently limited the issue to "material injury," excluding "threat of material injury" as a basis for the extraordinary action.

[12] See WTO AD 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 …").

[13] 19 U.S.C. § 1673a(a)(1).

[14] In this regard, with respect to which information should be publicly disseminated as part of the monitoring or biannual process, VITAS respectfully urges the Department to limit that information to the monthly data already publicly available. Data on normal values for monitored products should not be published for biannual reviews that do not result in a decision to self-initiate.

The Department should compare its monthly data gathered with data provided by Minister of Trade of Vietnam before making it publicly available.

As part of its required material injury analysis, in addition to company-specific data on production, capacity utilization, employment, turnover, etc. (outlined more fully below), the Department should consider quantity and value information for the imports entering under the specific HTSUS classification that were designated for monitoring (based upon the information provided by domestic manufacturers and following the comment process described previously). As with 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 substantial decrease in the average value of such imports, as demonstrated by the available Customs data.

However, the Department must ensure that with respect to average unit values, it does not misinterpret or provide undue weight to any initial declines in import values following the end of quotas. Some initial declines, due to the lifting of quotas, may be inevitable, but are also likely to be short-lived. Thus, data particularly for the first six months, or even one year, following the lifting of quotas may be of limited value. To that extent, the answer to the Department's question about the whether it should undertake intermittent, mid-term, or staged analyses of import data and market trends is clearly no. Further, reviews of six months are already 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, because it could easily overstate any increases or decreases in import volume or value. The fashion business is also seasonal, with some products sold only in certain months – such as wool or swimwear. Data for a single quarter, or even for six months, provides a limited perspective and should not be the basis for any decisions in an extraordinary context such as self-initiation of an antidumping investigation.

In further recognition of the extraordinary nature of the monitoring and biannual evaluation, as well as self-initiation, the Department also should set a minimum cooperation threshold that must be met by the relevant U.S. domestic industry to justify self-initiation. The Department should elaborate on the point made in the September 28 letters by requiring that for, each monitored product for which self-initiation is considered, domestic producers accounting for at least 75% of the value of U.S. production during the most recently completed four calendar quarters must have provided all of the information concerning injury and causation that would be required in a petition and in the Producer Questionnaire that would be required by the U.S. International Trade Commission in an actual 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.[15] This is only appropriate given that the Commission ultimately would require submission of such information following after any self-initiation.

[15] 19 U.S.C. § 1677(7).

In the event that the Department were to make the extraordinary decision to self-initiate an antidumping investigation against a particular product, the U.S. Administration should implement several measures to ensure that decision is appropriate. First, in addition to consulting with private interested parties, the Department should seek input from others within the Administration. Specifically, self-initiation should only occur in accordance with the recommendation by the Trade Policy Staff Committee and approval of the President. The monitoring system should explicitly incorporate this approval requirement.

Second, as noted above, the Department should include a further consultation process to ensure the information upon which any self-initiation would be based is accurate. Given that there are normally 20 days between the filing of a petition and the decision by the Department on whether to initiate an investigation, the Department should take 20 days from the date of an initial determination to self-initiate to notify the public and provide an opportunity for interested parties to identify issues of concern, including whether there is adequate domestic industry support, and likely flaws or limitations that would likely lead to a negative result.

Third, even though final decision made by US ITC states that no or insufficient evidence of material injured or threat of material injured to domestic industry have been found, or investigations confirms there is not any dumping case, the Vietnam textile and garment industry and the US importers would suffer loss and many Vietnamese enterprises may go into bankrupt. VITAS therefore respectfully requests DOC a consultation with Vietnamese government before making decision.

In essence, the Department should create an "initial determination" of self-initiation step that would replicate the review process that applies for industry-filed petitions. Further, following the publication of the initial determination in the Federal Register, the Department could establish an Administrative Protective Order to afford interested parties the opportunity to apply for access to proprietary information under that APO. Once approved, the Department should provide to parties under APO access to the calculations and information upon which the Department's initial decision 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.[16]

The Department also could and 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. The Department'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.

VII. Additional Comments

The Department's notice makes no reference to the issue of "critical circumstances," but this is a matter of great importance to VITAS because the apparent threat of "retroactive duties" is already undermining orders for the third quarter of 2007. The Department must clarify its intentions with respect to the statement contained in the September 28 letters and clarify in writing to the U.S. buyers exactly how the critical circumstances decision-making process

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

operates. Any less than that continues to inflict unjustified damage and discrimination to Vietnam's export industry.

The September 28 letters state that, as part of the six-month review process under the Import Monitoring Program, the Department 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." This would mean that the Department would make a critical circumstances determination before initiation of an investigation and before the Commission's preliminary determination. That is inconsistent with the statute and well-established Department practice.

Under Section 733(e) of the Act, as amended, 19 U.S.C. § 1673b, the Department 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, there is no exception to the basic procedural rule that critical circumstances may not predate initiation of an investigation.

Also, in accordance with the Department'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.[17] As the Department 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" (emphasis added).[18]

Further, a determination by the Department is just the beginning of a critical circumstances determination; the issue then must be considered by the Commission. That next step in the process should be fully identified by the Department, to allay the fears of buyers unknowledgeable about the process.

In short, a more cautious approach to the issuance of critical circumstances determinations is particularly warranted where, as with the Department's announced Import

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[17] 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 the Department 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).

[18] 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). VITAS is concerned that by establishing a monitoring process, the Department is essentially saying that the importer must have known or should have known that there was dumping, yet there is no basis for such an assumption. 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 value established by production templates are mere approximations of fair value, and as such, cannot possibly form the basis of the required importer knowledge.

Monitoring Program, the Department is contemplating self-initiation rather than initiation pursuant to an industry-filed petition. We therefore urge the Department 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 consistent with the statute and the Department's own policies and practices. Given the chilling effect that the prospect of retroactive duty assessment is already having on orders, adhering to normal practice, and presenting clearly and concisely the full decision-making process is essential.

Conclusion

For all these reasons, VITAS respectfully and urgently urges the U.S. Administration to reconsider its contemplated Import Monitoring Program. The plan should be promptly withdrawn. To the extent that the Department proceeds with this process, it must be constructed in accordance with these comments.

Respectfully submitted,

Le Quoc An
Chairman

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