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PUBLIC VERSION

Via Email and U.S. Mail

Mr. R. Matthew Priest
Chairman, Committee for the Implementation of
Textile Agreements - Room H3100
U.S. Department of Commerce
14th Street and Constitution Avenue, NW
Washington, DC 20230

Re: Comments of Alston & Bird on the Due Diligence Requirement Under the
Commercial Availability Procedures of the Dominican Republic-Central
America-United States Free Trade Agreement

Dear Mr. Priest:

We are responding to the Committee for the Implementation of Textile Agreements' ("CITA") request for public comments on the due diligence requirement under the Dominican Republic-Central America-United States Free Trade Agreement Commercial Availability Final Procedures ("Final Procedures"), published in the Federal Register on December 3, 2007 (72 Fed. Reg. 67,916).

We consider due diligence to be necessarily different from normal business practice, and we oppose specifying authorized employee contacts and confining communications only between them. We support the use of *Davison's Textile Bluebook* and contacts with trade associations to identify potential suppliers, and we support due diligence inquiries that are consistent with the Final Procedures. Substitutable products depend on the requester's circumstances, and should not be confused with similar products in CITA's determinations. We disagree that determinations as to so-called downstream products should be rejected in favor of determinations as to their inputs. We suggest that potential suppliers be held to the standards embodied in the Final Procedures, and we have concerns about the adequacy and claimed confidential treatment of potential suppliers' responses to requests. Finally, we offer additional guidelines for CITA's consideration in determining the adequacy of suppliers' responses.

Communications Between Requesters and Potential Suppliers

Noting a “lack of substantive dialogue between requesters and potential suppliers,” CITA requested public comments regarding how such dialogue should be conducted in order better to approximate normal business practice. In particular, CITA requested comments on the role of third party counsel and advisors. CITA also questioned whether only certain designated employees of requesters and potential suppliers should be deemed as the appropriate contacts in the due diligence process, and whether direct contact between those parties should be required prior to submissions of requests.

The due diligence required in the commercial availability process is necessarily different from normal business practice. It is not, for example, normal business practice to compile documentation to prove a negative – that is, to prove that a textile product is commercially unavailable. Normal business practice is more judgmental than due diligence allows. It is therefore appropriate for requesters to engage in formal, written solicitations among potential suppliers, so that requesters can effectively determine whether textile products are indeed available, even though normal business practice might not entail such a formal polling process.

Requesters might not engage counsel and advisors in their normal business practice, but it is sometimes advisable for them to do so to meet the due diligence requirements. “Due diligence” is a concept that is understood and applied by attorneys and other advisors in many compliance-oriented activities. A reasonable business person might reach the judgment that a textile product is commercially unavailable on the basis of his or her experience and knowledge of the industry. But he might reasonably engage counsel or other advisors to complete the due diligence necessary to make the case to CITA that his judgment is supportable. The complexity of CITA’s Final Procedures, as well as the due diligence standard itself, justify the involvement of attorneys and advisors.

Trade associations similarly supplement the due diligence process. NCTO, for example, has facilitated our due diligence efforts by informing us of additional mills that could potentially fulfill our clients’ requests. Trade associations additionally support the process by contacting member mills to alert them about due diligence inquiries. CITA should encourage contacts with trade associations in the due diligence process.

We strongly object to CITA’s requiring either requesters or potential suppliers to identify authorized employee contacts, or to require direct dialogue between such contacts prior to the submission of requests to CITA. The concept of due diligence already requires the requester to make reasonable efforts to ascertain reliable contacts with potential suppliers. Moreover, potential suppliers have ample opportunity, through trade associations and other conduits, to stay informed of commercial availability inquiries. Regarding direct communication between requesters and potential suppliers, we have observed that the due diligence process can be contentious. Sometimes the only

possible means of communication is through attorneys and other intermediaries. We fear the potential for abuse of these proposed requirements. By refusing to respond to inquiries, or by purposefully making themselves unavailable, designated employees or their employers could improperly frustrate the due diligence process.

The controlling influence over due diligence is CITA itself. CITA has the authority to question the sufficiency of a requester's due diligence before formally accepting a request. CITA can challenge the requester and question its efforts in communications. Formal designation of participants and lines of communication among requesters and potential suppliers is unnecessary.

Identification of Potential Suppliers

CITA expressed concern about the methods used to identify potential suppliers and the means used to contact them. It also expressed concern about the types of information that can be requested of potential suppliers.

Davison's Textile Bluebook is the most practical and effective resource for identifying potential suppliers of yarns and fabric. It purports to provide a list of all mills in the Dominican Republic-Central America-United States Free Trade Agreement ("DR-CAFTA") region and allows those mills to publish complete descriptions of their textile production capabilities. CITA should therefore embrace *Davison's* as an effective tool for identifying potential suppliers and should encourage all potential suppliers to update their *Davison's* profiles periodically. CITA should also encourage potential suppliers to subscribe to CITA's email server list in order to receive updates regarding any commercial availability request that could potentially affect their business.

Domestic and foreign trade associations are also valuable conduits between requesters and potential suppliers. CITA should encourage requesters to include communications to trade associations in their due diligence efforts. We have found that AMTAC, NCTO, AAFA, AAPN and NTA, and their counterparts in Central American states, have very effectively alerted their constituents to the commercial availability interests of our clients. In cases where our clients do not know individual employees at potential suppliers, trade associations provide communication channels that are otherwise unavailable.

We are somewhat surprised that CITA questions what types of information can be requested of potential suppliers, because appropriate guidelines for such requests are included in CITA's Final Procedures. Alston & Bird has in the past sent formal requests for information about availability of textile products, consisting of a letter to potential suppliers requesting that each supplier state whether it can supply the product in specified quantities in specified time frames. More recently, we have explicitly informed potential suppliers that we were considering a commercial availability request on behalf of a client, and we have found that potential suppliers are appreciative of this more open and direct

approach. It has further been our experience that manufacturers prefer being contacted via email as opposed to regular mail.

Reasonable due diligence materials can request suppliers to furnish requesters with information about number and types of machines, number of employees, manufacturing capacity, historical production of the requested or similar products, and other information that is consistent with the Final Procedures. In our experience, many respondents provide such information without reservation. Thorough responses can lead to narrowing the scope of the commercial availability request, or can lead the requester to reconsider making the request at all.

In response to CITA's comment that it has noted "concern regarding the detailed and confidential information requested of potential suppliers concerning their business plans," we suggest that potential suppliers should expect requesters to seek such information before considering substantial purchase commitments. It is consistent with "normal business practice" for potential purchasers to do so. While we have suggested that normal business practice is inconsistent with due diligence, we note that it is essential to the consideration of substantial purchase commitments.

Content of Communications Between Requesters and Potential Suppliers

CITA additionally expressed concern regarding the content of communications between requesters and potential suppliers. A detailed and transparent request for an offer including a reasonably detailed description of the requested product and addressing the elements already called for by CITA's Final Procedures is sufficient for the purposes of due diligence.

Alston & Bird generally includes in our due diligence materials prepared for our clients the information that we intend to include in our requests to CITA. Alston & Bird does not support a blanket requirement of ASTM or AATCC standards for commercially recognized performance criteria. Formal standards are not meaningful in assessing the ability or willingness of potential suppliers to make most textile products. In some situations, such as determining the water resistance of a fabric, or the necessity that a fabric meet a particular retailer's performance conditions, such standards may indeed be appropriate; but they should not be absolutely required. We note that, in some cases, retailers have developed their own performance standards, and CITA should encourage requesters, but not require them, to include such specifications where necessary fairly to allow the potential supplier to assess its ability to supply the requested product.

Regarding the apparent concern about the extent of detail in product specifications, we note that requesters often produce high volume programs for major U.S. retailers, who in turn impose their own detailed specifications for product performance. Requesters necessarily include these specifications in their commercial availability requests because, if the specifications cannot be met, the fabric is useless to them. For example, in a recent request that we submitted on behalf of a client, we

included specifications for shrinkage and torque. Our client did not ask us to include these specifications to make offers more difficult for potential suppliers. It did so because a major retailer would not accept its garments if they did not meet these specifications.

Substitutability of Products

CITA must recognize that substitutability depends on the requester's particular circumstances. Some requests are for products that meet the detailed specifications of major U.S. retailers, for whom there are no substitutable products. Other requests are for products that might complement a requester's speculative, branded line of merchandise, for which substitutable fabrics within a broad range of characteristics may be acceptable. CITA should consider substitutability on a case-by-case basis, depending on the requester's circumstances.

Substitutable products should be distinguished from similar products. Similar products may never be acceptable to the requester or its customers, and should not be considered substitutable. While they may have some relevance in demonstrating a potential supplier's capability of producing the requested fabric, they should not be the basis for rejecting a commercial availability request. We believe CITA has erroneously denied commercial availability requests by considering only the prospective producer's ability to produce similar products, without proper regard for whether such similar products were substitutable, or whether the potential supplier could in fact produce the requested product in commercial quantities in a timely manner, as the law requires.

Commercial Availability of a Production Input vs. Downstream Product

We recognize the concern about inputs versus downstream products from a discussion that took place at CITA's offices on September 19, 2007, when CITA assembled a group of interested persons to discuss the due diligence process. Specifically, a commenter at that meeting expressed concern that, where a yarn was unavailable in the United States, CITA should not allow short supply treatment of a fabric made with that yarn. We respectfully disagree with this point of view.

Many factors may affect a downstream product's availability. Singling out one factor – the availability of an input – as more important than others is unnecessary. Moreover, such an approach would be impractical. In the normal business context, purchasers of fabrics look to fabric mills as sources of supply. To require such purchasers to make due diligence inquiries of producers of yarns and fibers would make the process unmanageable. The better view is to require the requester to make inquiry of its potential direct suppliers. The commercial availability of the textile product from that universe of suppliers, for whatever cause, should be the only subject of CITA's decision.

Potential Suppliers' Responses to Requester's Inquiry

Finally, CITA expressed concerns regarding the information provided by potential suppliers in response to a request. Specifically, CITA indicated a concern that potential suppliers are not demonstrating a legitimate intent to do business by providing a clear, detailed response to a request. In our view, potential suppliers are required by the Final Procedures to make a legitimate firm offer to supply the requested fabric in the requested quantity and time frame. Such an offer should include the content required by CITA's Final Procedures as well as samples of the requested textile product, if available, and information regarding the potential supplier's existing capability, capacity and history of production sufficient to satisfy a reasonable purchaser that the supplier is capable of performing.

CITA should not disregard or underestimate the effectiveness of its existing Final Procedures. Alston & Bird's observation is that the Final Procedures are fair and potentially effective, but that potential suppliers do not adequately follow them, and CITA does not adequately apply them. Our greatest concern, in both the due diligence process and in CITA's consideration of requests, is that potential suppliers are not being held to the standards embodied in the Final Procedures. Typical offers published on CITA's website fail to include complete information responding to the requirements of the Final Procedures. For example, while mills sometimes give information about other fabrics that they have produced, they do not give information about the requested fabrics or those that they claim are substitutable.

Some potential suppliers are even less forthcoming. They claim to have the ability to produce fabrics without sharing information about machines, employees, capacity or experience. In some cases, potential suppliers refuse to share any information about capacity or experience during the due diligence phase and object to the requested determination without ever disclosing this information. It would be normal business practice for purchasers of fabric or yarn to gather this information before making a major purchase commitment, and they should be entitled to expect it in the commercial availability context.

Some potential suppliers refuse to provide samples of requested textile products without a firm commitment for the purchase of commercial quantities. They may have legitimate concerns about incurring the expense of producing samples without the promise of future business; but their refusal to provide samples should be treated as a factor indicating that the requested textile product is not commercially available. Their choice not to provide samples is inconsistent with the type of commercial availability envisioned by the legislature. The House of Representatives in House Report 109-182 indicated its desire that "[a]t the very least, when CITA determines that a good is available in commercial quantities, a sample of the good should be readily available for physical inspection by all parties as well as evidence of some effort to market the good in the United States."

Many potential suppliers do not respond to first, second or third due diligence requests. Of course, there is no requirement that they respond, and there is no reason to respond if they have no interest in opposing a commercial availability request. But if they subsequently oppose a request after choosing not to participate in the requester's due diligence, their opposition should be given lesser weight in CITA's deliberations.

Some potential suppliers cloak their offers, filed with CITA, with excessive claims of business confidentiality. The result is that requesters can neither rebut the potential supplier's claims nor make a commitment for the potential supplier's products due to the absence of necessary information.

CITA should level the playing field in the area of confidentiality and disclosure of information submitted in connection with commercial availability requests. Requesting companies are required to disclose the quantities of textile products for which they seek commercial availability determinations. CITA should similarly require suppliers to disclose information regarding capacity and current commitments, particularly in light of the possibility of approval of a request in restricted quantity. In many cases, ordinary information about a potential supplier's production, such as actual current capacity and history of production of requested products, is not exempt from disclosure under the Freedom of Information Act ("FOIA"), which authorizes the withholding of "commercial or financial information obtained from a person and privileged or confidential,"¹ and which has been interpreted to require the person seeking confidentiality to demonstrate that release of the information presents a "likelihood of substantial competitive injury."² CITA should consider requiring a showing of a likelihood of substantial competitive injury before granting business confidential treatment to potential suppliers' information. Such a showing could consist of evidence of the protection of the information from plant visitors, customers, vendors, and the use of confidentiality agreements for employees and others with access to the information.

Even with respect to the truly confidential commercial or financial information of a respondent, the reasons for protecting such information from the public do not extend to protecting the information from disclosure to a requesting company. The House of Representatives declared in House Report 109-182 that all parties should have "open access to the full evidence being considered by CITA as well as the opportunity to respond to the full evidence before a determination is made." The intent of the House of Representatives is clear; while business confidentiality may justify the confidential treatment of certain information with respect to the public at large, a party to a commercial availability request is entitled to "open access" to any information submitted by a potential supplier as well as the opportunity to respond to such information. If public disclosure of the information is problematic, CITA should consider the use of

¹ 5 U.S.C. § 552(b)(4).

² *National Parks & Conservation Association v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974); *Gulf & Western Industries, Inc. v. United States*, 615 F.2d 527, 530 (D.C. Cir. 1979).

administrative protective orders or similar protective devices to ensure that requesting companies and their counsel are granted the opportunity to inspect the evidence and respond.

Some potential suppliers require unreasonable lead times for the development and production of requested textile products. If it takes too long to develop and produce the product, a potential supplier's claimed abilities are useless to the requester. Moreover, excessive lead times demanded by potential suppliers beg the question whether the product is truly commercially available. The relevant inquiry is not whether the product may or may not be available someday in the future, after the inexperienced potential supplier engages in lengthy trial and error to see whether it can make a product that it has never made before. Rather, the relevant inquiry is whether the product is commercially available in a timely manner.

The lead time implied by the phrase "in a timely manner" and the inclusion in the DR-CAFTA of the process for removing items from the short supply list, as well as the provision for approval of short supply requests in restricted quantities, if only a portion of the required quantities can be supplied by DR-CAFTA producers, underscore that commercially available in a timely manner contemplates the scheduling of production; the procurement of materials; the production process; the conduct of routine in-process quality and performance approvals; delivery; and nothing more. Indeed, as Congress noted, the unique process for removing items from short supply list "was added with the express understanding that the threshold to approve items in short supply for DR-CAFTA is less arduous than other FTAs and trade preference programs." House Report 109-182.

Proposed Guidelines for CITA's Consideration of Suppliers' Responses

In view of the foregoing comments on the content of supplier's responses, we propose that CITA consider the following additional guidelines:

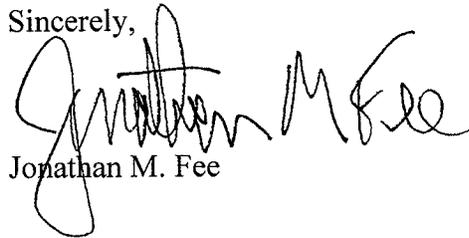
1. If a potential supplier claims to have the capability to manufacture the product, but has never manufactured the same or similar product in the past, there should be a presumption that the product is commercially unavailable, rebuttable by the supplier only with a compelling showing that it can live up to its claim.
2. If a potential supplier claims to have the capacity to manufacture the product, but has existing commitments to supply other products to other customers, such supplier should be required to provide information about its realistic capacity, net of capacity committed to other programs.
3. If a potential supplier seeks business confidential treatment of information and data required by the Final Procedures, its offer should be disregarded unless it shares the required information and data with the requester, subject to reasonable undertakings by the requester as to the confidential

treatment of such information and data. CITA might consider the use of enforceable administrative protective orders in appropriate circumstances.

4. If a potential supplier fails to provide samples of the requested product, or samples of similar products demonstrating the supplier's capabilities, there should be a presumption of commercial unavailability, rebuttable only with a showing of compelling reasons for the failure or inability to provide such samples.
5. If a potential supplier opposing a request is shown to have received a reasonable due diligence inquiry without furnishing any response, there should be a presumption that the product is commercially unavailable, rebuttable only with a showing that the supplier was unaware or did not understand the significance of the due diligence inquiry.
6. If the potential supplier cannot meet the lead time specified by the requester, there should be a presumption that the product is commercially unavailable, rebuttable only with a showing that the requester's lead time is unreasonable, either in comparison with lead times available from the requester's foreign (non-DR-CAFTA) suppliers, or as a matter of international commercial practice in the global textile industry.

Thank you for your solicitation and consideration of our comments. Please contact the undersigned at (202) 756-3387 or jon.fee@alston.com if CITA has questions about our comments or requires additional information.

Sincerely,

A handwritten signature in black ink, appearing to read "Jonathan M. Fee". The signature is fluid and cursive, with the first name being the most prominent.

Jonathan M. Fee