

**SANDLER, TRAVIS & ROSENBERG, P.A.**

ATTORNEYS AT LAW  
1300 PENNSYLVANIA AVENUE, NW – SUITE 400  
WASHINGTON, DC 20004

(202)216-9307  
FAX (202)842-2247

January 3, 2008

Mr. R. Matthew Priest, Chairman  
Committee for the Implementation of Textile Agreements  
U.S. Department of Commerce  
Room H3001A  
14<sup>th</sup> Street & Constitution Avenue, N.W.  
Washington, D.C. 20230

**PUBLIC VERSION**

**Re: Request for Public Comment on the Due Diligence Requirement Under the  
Commercial Availability Procedures of the Dominican Republic-Central  
American United States Free Trade Agreement**

Dear Mr. Chairman:

The following comments are being submitted pursuant to the above referenced request for public comments in connection with the operation of the due diligence requirements of the commercial availability procedures for the DR-CAFTA. We are making these comments on behalf of ADOZONA, the Dominican Association of Free Trade Zones, Inc. ADOZONA is a non-profit organization of Dominican free trade zones and the operators located in those zones.

We believe the operation of the current procedures is highly imbalanced between the disciplines that are required of submitters and potential suppliers. This imbalance, in our view, is leading to many of the issues that are raised in the Committee's request for comments. The process would operate far more efficiently if potential suppliers were subjected to greater discipline with respect to statements that are made in support of objections. A more efficient and transparent process would benefit all parties.

The imbalance is present at each step of the process. Both parties are required to perform appropriate due diligence to support their position and to provide details of their actions to CITA. However, CITA has on occasion denied petitions for specious and cosmetic reasons, while allowing wholesale omissions of required information on the part of objectors. In fact, of the eight written objections to short supply petitions made to date, NONE has complied with the requirements set forth by CITA. Nonetheless, CITA accepted each objection, and ruled that the product was not in short supply according to the claims made by the objectors.

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There have been instances when potential suppliers made certain claims regarding their capabilities to produce the products at issue. Statements made by the potential suppliers were accepted as fact, even though they contradicted marketing materials issued by the companies. Specifically, in some of the objectors' submissions, they referenced their website as a source for information regarding the products that company makes. After careful review of the website, one could see that the specifications requested in the short supply petition were NOT made by that company. However, CITA failed to even conduct a basic review of the websites to determine if the company actually made the products it claimed. Further, during a public hearing on the short supply petition, when the petitioners raised this particular fact, the company states "the website is not up to date" yet, it was the individual at the hearing who submitted the comments stating that the website is the source for information regarding what products are made.

Further, We have witnessed first hand such instances where claims made by potential suppliers were false, yet were accepted by CITA and the underlying requests were denied based in part on those statements. [\*\*\*\*\*]. However, again, there was no questioning by CITA of the alleged fabric maker if it could indeed make the fabrics.

We note that the House Ways and Means Committee, when reporting out the DR-CAFTA implementing legislation specifically envisioned greater discipline with respect to potential suppliers. The Report states, in part:

"At 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."

We believe a consistent requirement that potential suppliers provide samples of subject articles would add greatly to the operation of the process. Such a requirement is not unreasonable or onerous. The DR-CAFTA requires that an item be "available in commercial meaningful quantities". The term *available* does not mean that a potential producer is *capable* of producing the article. It means that the article is available for sale in commercially meaningful quantities – that the potential supplier is actually making the item. Any potential supplier that truly has the fabric "available" would not have any difficulty in providing a sample.

The issue of "normal business practices" has also surfaced as a concern for CITA. In the normal course of business, an apparel factory will ask a textile mill if it can make a fabric. If the mill can provide the fabric, it submits a sample to the apparel maker – at NO charge and at NO minimum order. The apparel maker tests the fabric, examines it to ensure it meets the

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specifications of the retailer, and if it does, will place an order. In the course of this short supply process, we have encountered mills that allege to make the fabrics, make false statements on their submissions to CITA, do not provide samples of the specified fabrics even after having the specifications for more than 7 months [\*\*\*\*]. This is not normal business practice and CITA should not accept that the apparel maker has to pay for the samples or make minimum orders. If the textile mill wants business, it is incumbent upon the textile mill to undertake the time and product development to make a sale. It begs the question as to whether or not these mills have the capacity or want the additional business since if they really can make these fabrics then they have a captive market.

Further, commercially available means available in the quantity requested by the buyer. If the buyer wants 100,000 square meters but the manufacturer states that it can only make this fabric if the buyer wants 250,000 square meters – that is not commercially available. The buyer should not be forced to purchase above and beyond what he is seeking to make it more cost efficient for the textile maker to produce. Thus, if the quantity can only be supplied at the higher level, it is NOT therefore, commercially available.

CITA's regulations rightfully take into account articles that are subject to seasonal and other factors and that potential suppliers may show that they have produced the article in question during the past 24 months. In such a case, and under normal business procedures, the potential supplier would have sample swatches available in its inventory and could thus easily make a sample available. In all the instances in which CITA has rejected the short supply petition, the textile mill has not provided a sample, despite the fact that they have alleged in their sworn affidavits that they have made that fabric in the past.

As you can see from the comments below, the requirement to produce a sample would solve most of the issues for which CITA is requesting input from the community. It would, with a single blow, remove much of the uncertainty, "gamesmanship" and unfairness that is currently perceived by all parties.

### **Communications between Requesters and Potential Suppliers**

The communications between Requesters and Potential Suppliers could and rightfully should be relatively minimal. Under normal business practices, a potential supplier is provided with the relevant specifications and requested to provide a sample and costing. If the potential supplier is not able to perform these minimal initial steps, they do not typically receive any orders.

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We note that there is nothing in the procedures that requires potential suppliers to engage in earnest in discussions with requesters. In truth, there is no requirement that they participate during the due diligence phase at all. There have been instances where potential suppliers provide only tacit and vague responses to inquiries or none at all. These parties are then allowed full rights during the objection phase without prejudice. CITA should not consider objections from parties that have not participated in earnest during the due diligence phase. Without any such corresponding discipline on the part of potential suppliers, the due diligence phase of the process is rendered moot. It causes delays and costs for requesters without providing any benefit.

CITA should consider abandoning the due diligence phase all together. Instead, any request could be posted on CITA's website and potential suppliers would have a set amount of time, say 30 days, to produce samples and costing.

### **Content of Communications between Requesters and Potential Suppliers**

As directed by the Ways and Means Committee, CITA should require potential suppliers to provide samples as proof that the merchandise at issue is truly "available". This is a normal business practice. In fact, it is highly unusual, if not unheard of, for a potential purchaser to enter into a business contract with a mill without that mill having first produced a sample that meets the specifications at issue. In keeping with CITA's attempt to make the Procedures mimic normal business practices, the requirement of a sample is an utmost necessity.

### **Potential Suppliers' Responses to Requester's Inquiry**

Again, all confusion regarding the legitimacy of a potential supplier's comments would be utterly diffused when the potential suppliers produces a sample that meets the requisite specifications. Failure to do so would similarly show that the potential supplier does not have the product at issue "available".

In summary, we believe there is an imbalance between the rights and responsibilities of the Requesters and the Potential Suppliers. Much of this imbalance, as well as many of the issues for which CITA is requesting comments, would be eliminated if potential suppliers were required to provide samples of the items at issue. This requirement would provide for greater efficiency and transparency and would benefit all parties. Moreover, it is required by the statute, as evidenced by its legislative history.

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Thank you for the opportunity to express our views on this important issue. If there are any questions regarding the information contained in this letter, please contact Mark Haney at [mhaney@strtrade.com](mailto:mhaney@strtrade.com).

Sincerely,

**SANDLER, TRAVIS & ROSENBERG, P.A.**

By:   
Beth C. Ring  
Senior Partner