

## **Frequently Asked Questions About the Commercial Availability Process for NAFTA and U.S. FTAs with Australia, Bahrain, Chile, Korea, Morocco, Oman, and Singapore**

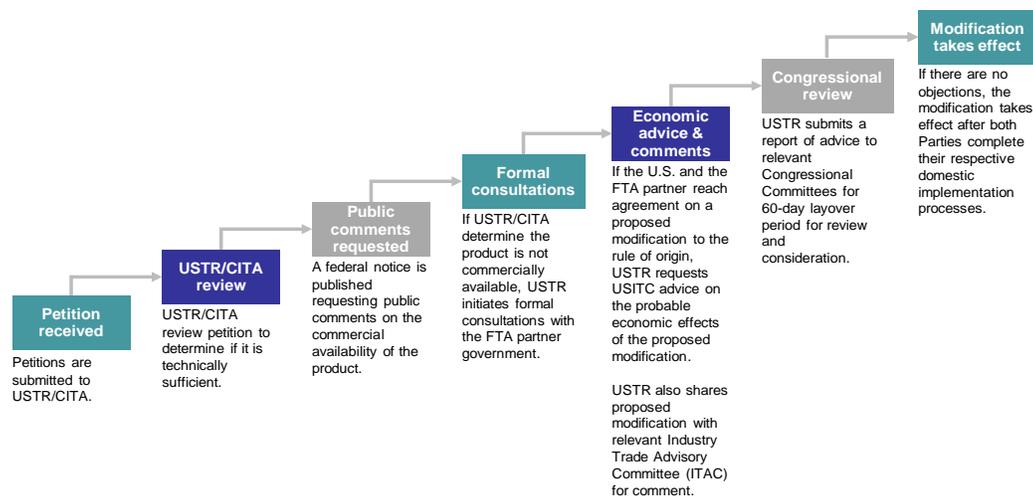
(Note: For information about the commercial availability process for the CAFTA-DR, Colombia, Peru and Panama FTAs, see the [OTEXA webpages](#) for those specific agreements).

While these FAQs are intended to provide general guidance to parties interested in using the commercial availability provision under these FTAs, please note that the relevant texts in the FTAs, the FTA Implementation Act, and the accompanying Statement of Administrative Action are dispositive. Furthermore, U.S. Customs and Border Protection is the final arbiter whether entries of textiles and apparel from the FTA region qualify for duty-free treatment under the commercial availability provision, in accordance with U.S. Customs law, regulations and procedures

### **What is the commercial availability process for the above mentioned U.S. FTAs?**

The U.S. free trade agreements (FTAs) with **Australia, Bahrain, Chile, Korea, Morocco, Oman, and Singapore**, as well as **NAFTA**, include provisions that provide for consultations between the FTA partner governments to consider whether product-specific rules of origin in the agreement should be revised to address issues of availability of supply of fibers, yarns, or fabrics in the territories of the Parties.

The Office of the U.S. Trade Representative (USTR), in coordination with the Committee for the Implementation of Textile Agreements ([CITA](#)) and with support from the Department of Commerce's Office of Textiles and Apparel (OTEXA), evaluates whether a modification to product-specific rules of origin is appropriate based on the commercial availability of a particular fiber, yarn, or fabric in the region. If a subject product is not commercially available in the FTA region, USTR may engage with the FTA partner government to initiate consultations on a proposed modification of the rule of origin. If consultations conclude with an agreed upon proposed modification, U.S. law next provides for an economic impact review by the U.S. International Trade Commission, input from the relevant industry trade advisory committee, and review of the proposed modification by Congressional committees as part of the consultation and layover process. The review process generally proceeds as outlined below, provided there are no objections to the claim that the subject product is not commercially available. This process may vary in the case of contested petitions where a U.S. producer claims that the subject product is commercially available in a timely manner in the United States.



### **How is this process initiated?**

An interested party, including the governments of FTA partners, trade associations, or a private entity, may submit a petition requesting a change in FTA rules of origin, as specified, based on a claim that a fiber, yarn, or fabric is not available in the FTA region in commercial quantities in a timely manner. It is generally helpful, though not required, for the petitioner to provide information regarding efforts it has made to source the subject product in the United States. To be considered to be technically sufficient, a petition should contain all the information necessary to evaluate the petition, including an accurate technical description of the subject product and designated end-use restrictions, and the correct Harmonized Tariff Schedule classification for the subject product and end-use products.

### **What are some of the reasons a petition might not be accepted by CITA?**

CITA reviews petitions to determine whether the product descriptions are technically accurate and whether the identified HTS numbers are correct for the described products. For example, if the fiber content percentages provided in the product description exceed 100% or do not fall within the classification of the identified HTS number, or where non-generic fiber names are used in the product description, the petition may be considered not technically sufficient. Likewise, where the identified input might not be appropriate for the identified end-use product, e.g., knit fabric for a woven garment, CITA may conclude the petition is not technically

sufficient. If CITA identifies errors or if product descriptions are not clear, CITA will notify the petitioner of the concerns and will allow the petitioner to submit a revised petition.

### **How do you solicit public comments on the petitions?**

Once a petition is received and it is determined that the petition is technically sufficient, CITA publishes a notice in the Federal Register establishing a public comment period on the petition (typically 30-60 days). The petition and any public comments are posted to the [OTEXA website page](#) for commercial availability cases. OTEXA also provides email notifications when a new commercial availability petition has been accepted. To receive email notifications, go to the OTEXA FTA Commercial Availability News website [here](#).

If no public comments are received from U.S. entities indicating that the subject product is commercially available in a timely manner in the United States, then CITA will provide a recommendation to USTR regarding the subject product's commercial availability, and USTR will consider whether to initiate formal consultations under the FTA provisions.

### **What happens if a potential supplier responds to the Federal Register Notice, claiming it can supply the product?**

If a public comment is received from a supplier claiming that it is capable of producing the subject product in commercial quantities in a timely manner, either on its own or in collaboration with other potential suppliers, OTEXA typically encourages the petitioner and the potential supplier(s) to communicate directly and engage in reasonable efforts to source the subject product from those suppliers. This process, known as "due diligence," carries with it an understanding that petitioners should make reasonable efforts to source the subject product from the potential suppliers identified in this process, and those suppliers should make reasonable efforts to demonstrate their capability to supply the subject product or a substitutable product. In the context of commercial availability proceedings, due diligence continues its course as long as both parties are engaged in a dialogue with reasonable efforts to source the subject product. OTEXA may follow up with the petitioner and/or potential supplier(s) to clarify certain issues or questions that may arise and to track the progress of the discussions. The duration of the period for the petitioner and potential supplier(s) to engage in reasonable efforts to supply the subject product depends on the particulars of each case.

If reasonable efforts between the petitioner and potential supplier(s) yield an acceptable offer to supply, this typically confirms the commercial availability of the subject product, formal consultations are not initiated, and the product will remain subject to the existing rules of origin.

If reasonable efforts between the petitioner and potential supplier(s) do not lead to an acceptable offer to supply, OTEXA may evaluate the supplier's assertion that it is capable of supplying the subject product (or substitutable product) to assess whether sufficient relevant information substantiates that claim. Drawing on that assessment by OTEXA and the advice of CITA, USTR will typically then determine whether to proceed to formal consultations with the FTA partner to discuss the requested modification to the rule of origin.

### **What is considered to be a “timely manner”?**

In some instances, the exact subject product is not currently offered by potential suppliers. The standard industry practice is to allow potential suppliers time to develop the product before it can proceed with production. The length of development time will vary depending on a variety of factors, including the complexity of the subject product and the degree of testing required before a sample is approved for production. For example, in past commercial availability proceedings, as long as three to four months has been necessary for development in some instances.

### **What factors does OTEXA consider when evaluating claims of capability to supply the subject product?**

In evaluating claims by a potential supplier that it is capable of supplying the subject product (or substitutable product), OTEXA may look to such information as:

- The quantity produced of the same or similar products in the last 24 months, and/or an explanation why the product is not currently offered;
- The current production capacity, loom availability, and standard timetables to produce, or other information related to a potential supplier’s experience and expertise in producing the subject product or similar products; and
- The names, addresses, and other information of any subcontractors or collaborating potential suppliers that would be utilized in production.

Potential suppliers are not required to disclose business confidential information to petitioners in the course of due diligence, but may choose to disclose such information to OTEXA for its consideration.

A petitioner may submit information in rebuttal of a potential supplier’s claim of capability to supply the subject product.

### **Can a supplier propose a substitute for a product(s) listed in the petition?**

If a potential supplier proposes a substitutable product, then it should generally explain to the petitioner why its product is substitutable for the subject product. The petitioner may challenge the supplier’s argument, provided that it can adequately explain why the product is not substitutable, including a description of the unique characteristics of the subject product that distinguish it from other similar or potentially substitutable products. In addition, the petitioner generally must provide the supplier with information indicating why such characteristics are required for the purposes of the end-use of the product and cannot be substituted by another product, supported by measurable criteria. In turn, the petitioner must give potential suppliers the opportunity to address the petitioner’s assertions. OTEXA may draw on all of this information and its own knowledge of the industry in assessing whether the evidence supports a claim of substitutability.

**How long does it take for OTEXA to evaluate a claim of capability to supply?**

The time it takes to evaluate a claim will vary depending on the complexity of the issues involved, but is often driven by the degree to which the petitioner and potential suppliers are responsive to inquiries from each other and from OTEXA.

**Are suppliers required to produce samples in order to demonstrate they are capable of supplying the subject product?**

Potential suppliers are not required to produce samples to demonstrate their capability. A potential supplier may offer a sample, but may also require payment or a purchase order for a minimum quantity if that is the potential supplier's general business practice. If a potential supplier does choose to offer a sample, the petitioner may test that sample. If it finds that the sample does not meet specifications identified in the original petition, then the petitioner generally must inform the potential supplier, who in turn should address the sample's deficiencies and explain how it could improve the product or, as appropriate, explain why its product is substitutable.