

Report of the Committee for the Implementation of Textile Agreements

Denial of three Commercial Availability Requests under the Dominican Republic-Central America-U.S. Free Trade Agreement for Certain Woven, Yarn-Dyed Lyocell Fabrics

On July 8, 2010, the Chairman of CITA received three Requests for a Commercial Availability Determination (“Requests”) from Sorini, Samet & Associates for BWA, Inc. (“BWA”) for certain woven yarn-dyed fabrics containing lyocell.

On July 12, 2010, in accordance with *Modifications to Procedures for Considering Requests Under the Commercial Availability Provision of the Dominican Republic-Central America-United States Free Trade Agreement* (73 FR 53200, September 15, 2008) (“CITA’s procedures”), CITA notified interested parties of the Requests, which were posted on the dedicated website for DR-CAFTA Commercial Availability proceedings. In its notifications, CITA advised that any Response with an Offer to Supply (“Response”) to any of the Requests must be submitted by July 22, 2010, and any rebuttal to a Response (“Rebuttal”) must be submitted by July 28, 2010.

On July 22, Burlington WorldWide (“Burlington”), on behalf of itself and its joint venture partner, Insinca, S.A. (“Insinca”), submitted Responses to all three Requests. On July 28, BWA submitted Rebuttal comments to each of the three Responses.

In accordance with Section 203(o)(4) of the DR-CAFTA Implementation Act, Article 3.25 of the DR-CAFTA, and section 8(c)(4) of CITA’s procedures, because there was insufficient information to make a determination within 30 days, CITA extended the deadline to make its determinations by 14 U.S. business days. Furthermore, in accordance with section 8(c)(4)(i) of CITA’s procedures, CITA called for a public meeting on August 18, 2010, to collect additional information from representatives of BWA and Burlington, and provide the interested entities with an opportunity to submit additional evidence to support their claims regarding the capability of Burlington to supply the subject fabrics.

The records for each of the three proceedings may be found at:
<http://web.ita.doc.gov/tacgi/CaftaReqTrack.nsf> under “Pending Requests,” with the following reference numbers:

144.2010.07.08.Fabric.SoriniSametforBWA
146.2010.07.08.Fabric.SoriniSametforBWA
147.2010.07.08.Fabric.SoriniSametforBWA

Collective Treatment of Proceedings:

The subject fabrics of the three pending Requests are essentially identical but for differences in fiber content. Although all three fabrics had a chief weight (at least 55%) of standard lyocell fiber, the remaining fiber content was different. The three subject fabrics are: 100% standard lyocell, standard lyocell with synthetic and/or other artificial staple fiber, and standard lyocell with man-made filament. The due diligence conducted to source the subject fabrics and issues relating to production processes involved in producing the subject fabrics are identical. As a result, CITA conducted its analysis in the three proceedings collectively.

Requests by BWA:

In its Requests, BWA asked CITA to determine that certain woven, yarn-dyed fabrics containing lyocell were not available from DR-CAFTA suppliers in commercial quantities in a timely manner. In describing the subject fabrics, BWA provided specifications on fiber content, yarn size, warp and weft thread counts, weave types, weight, width, coloration and finishing processes.

Due Diligence – BWA stated that it had contacted potential suppliers in the DR-CAFTA region to source the subject fabrics, and in its inquiries provided a broader range of specifications than that subsequently described in the Requests. In its summaries of contacts with DR-CAFTA suppliers, BWA described its exchanges with several regional suppliers, including Milliken, Swift Galey and Copland Industries. BWA included Burlington Industries (also known as Burlington WorldWide) and Industrias Sinteticas de Centro America (also known as Insinca) in its due diligence inquiries. BWA reported that it had contacted Burlington Industries' sales representative, Hal Baner, who, in response to BWA's inquiries whether it could supply the subject fabrics, stated that the company "does not produce any lyocell (Tencel) products." BWA made two attempts to contact Industrias Sinteticas de Centro American in El Salvador via email, but received no reply.

Product Description – In the product descriptions of the subject fabrics, several of the specifications involved broad ranges. For example, the specification for yarn size for the three subject fabrics was 29.6/1 to 84.7/1 (metric), while the specified weight range was 101.7 to 298.3 grams per square meter. With respect to the use of lyocell in the subject fabrics, BWA stated that "the production of standard lyocell fabric requires special handling and processes in order to achieve the commercially desirable effects," and that to its knowledge no mill in the DR-CAFTA region had "the capability or equipment" to produce yarn-dyed fabrics with standard lyocell.

Responses with Offers to Supply:

On July 22, 2010, Burlington, responding on behalf of itself and its joint venture partner, Insinca, advised CITA of its objection to the Requests and their ability to supply the subject fabrics in commercial quantities in a timely manner.

Due Diligence: With respect to BWA's due diligence inquiries to Burlington, the company explained that its sales representative did not understand that BWA's inquiry was not whether Burlington had the subject fabrics in its current inventory, but whether Burlington was capable of supplying the subject fabrics. As for BWA's attempts to contact Insinca, Burlington stated that Insinca's representative had not received BWA's emails, but noted that he had been having technical difficulties with his email account and that as Vice President of Manufacturing, he is

not responsible for external communications, and therefore not necessarily the best contact to respond to a production inquiry.

Production Capability/Demonstration of Ability to Supply the Subject Fabrics - Burlington provided information regarding Insinca's production capabilities, including past production of fabrics made with types of rayon other than lyocell, and a description of the equipment that would be used to produce the subject fabrics. The company reported that Insinca is a vertically integrated producer, and has the ability to spin lyocell yarn, package dye the yarns, and weave fabrics with lyocell. The company described the equipment Insinca would use to produce the subject fabrics, including ring spinners for yarns, rapier looms to weave the fabrics, and "standard piece dye and package dye equipment" to dye and finish the fabrics. Burlington also reported that Insinca's current capacity for poly/rayon or poly/lyocell fabrics was 10 million square meter equivalents (SMEs) per year. Burlington specifically noted that the yarn spinning, weaving, dyeing and finishing process for fabrics containing lyocell were exactly the same as those for fabrics containing other types of rayon. The company further stated that Insinca's standard development lead time was 12 to 14 weeks, with a production lead time of 12 to 14 weeks for commercial products.

Rebuttals by BWA:

On July 28, 2010, BWA submitted Rebuttals to each of Burlington's three Responses.

Sufficiency of Responses - In its Rebuttals, BWA asserted that Burlington's Responses did not meet CITA's requirements for a Response, and therefore, the submissions should be rejected. BWA claimed that Burlington never made an "offer to supply" in its Responses, and did not include the quantity of product it was capable of supplying. BWA also argued that Burlington had not provided a sufficient explanation as to why neither it nor Insinca had responded affirmatively to BWA's inquiries in the course of due diligence. Therefore, BWA argued that CITA should not consider the submissions in these proceedings because the Responses did not meet the requirements set forth in CITA's procedures.

Production Capability/Demonstration of Ability to Supply the Subject Fabrics - BWA further argued that Burlington had not demonstrated that it was capable of making the subject fabrics. BWA stated that neither Burlington nor Insinca have ever produced the subject products, and have not offered products that are substitutable. Moreover, BWA asserted that Burlington's assumption that it could produce the fabrics containing lyocell because it has produced woven, yarn-dyed fabrics made with other kinds of rayon was invalid, contending that production of fabrics of chief weight lyocell is substantially different from production of fabrics containing other types of rayon.

Insufficient Information regarding Suppliers and Equipment - In its Rebuttals, BWA argued that Burlington had not identified the suppliers of inputs or subcontractors it would use to produce the subject fabrics. BWA further asserted that the information Burlington provided about the equipment it would use to produce the subject fabrics was not sufficiently relevant. BWA claimed that while Burlington did note that it would use rapier looms to weave the fabrics, the supplier did not include what attachments and/or harnesses it would use on those looms to produce various weave types. BWA argued that Burlington's statement that it would use "...all standard piece dye and package dye equipment" is also insufficient information, claiming that the dyeing and finishing of yarns and fabrics of standard lyocell staple fiber "is not considered to

be 'standard' by any definition.”

Differences between Production of Standard Lyocell Fabrics and other Rayon Fabrics - BWA also argued that there are “numerous differences between the production processes for rayon apparel fabrics and the production processes for apparel fabrics of standard lyocell” and that lyocell “requires special handling and processes.” The requestor states that standard lyocell yarns have a higher dye affinity than rayon yarns, that apparel fabrics of standard lyocell require fibrillation (whereas rayon fabrics cannot be fibrillated), and that standard lyocell yarns and fabrics tend to swell more when wet and have a greater modulus (stiffness) than comparable rayon products.” As a result, BWA argues that because production of fabrics with standard lyocell is different from production of fabrics with other types of rayon, Burlington (and Insinca) does not have the necessary expertise or equipment to develop, produce, and supply the subject products in a timely manner.

Insufficient Information and Extension of Period for Determinations:

In accordance with Section 203(o)(4)(C)(iv) of the CAFTA-DR Implementation Act and section 8(c)(4) of CITA’s procedures, because there was insufficient information to make a determination after 30 days, CITA extended the period for making a determination by 14 U.S. business days. In accordance with section 8(c)(4)(i) of CITA’s procedures, on August 18, 2010, CITA held a public meeting (“the meeting”) with representatives of BWA, Sorini Samet & Associates LLC (on behalf of BWA), and Burlington.

Public Meeting:

On August 18, 2010, CITA held a public meeting to allow BWA and Burlington to present evidence supporting their claims regarding the availability of the subject products. The interested entities focused on a discussion of the sufficiency of the information Burlington provided to demonstrate its ability to supply the subject fabrics. In its opening statement, BWA contended that fabrics containing lyocell are technically difficult to produce and that nothing Burlington had presented in its Responses demonstrated it was capable of producing the subject fabrics. Burlington argued that while it is not currently making fabrics containing lyocell, it has the equipment, expertise and available capacity, as does its joint venture partner, Insinca, to supply the subject fabrics as specified.

Burlington noted that while most of its current production is piece-dyed “bottom weight” (heavier) fabric, it has woven fabrics with lyocell fibers in the past, and it does have the experience with yarn-dyed fabrics of various weights and weave types. In addition, Burlington asserted that it had letters from several U.S. yarn spinners and/or yarn dyers confirming their ability to supply Burlington with the standard lyocell yarns as specified in BWA’s Requests. Burlington presented several samples of fabrics to demonstrate that it has produced various types of woven fabrics, both yarn- and piece-dyed, containing lyocell, in various blends, weights, and finishes. While Burlington acknowledged that the samples did not include fabrics with a fiber content of 55 to 100% lyocell, at least one of those samples contained lyocell, and other samples were of fabrics within the range of the subject fabrics’ other specifications, including yarn size, weight, weave type, and colorization. Burlington stated that the reason they do not currently produce lyocell fabrics is because of cost, not because Burlington does not have the necessary equipment, capacity or expertise.

BWA argued that Insinca, which Burlington claimed could supply the subject fabrics, did not have any experience producing fabrics with lyocell. In response, Burlington stated that it works with Insinca as its commercial joint venture partner, had a firm understanding of its equipment and capabilities, and that it has worked with Insinca over the last 5 years to develop new products, providing all necessary expertise and technical assistance. Burlington stated that while it had identified Insinca as the producer in its Responses, Burlington is also capable of producing the subject fabrics in its U.S. facilities. Burlington asserted that both Burlington and Insinca have the necessary equipment to produce fabrics containing lyocell as specified in the Requests. Furthermore, Burlington added that Insinca had spoken with the manufacturer and supplier of lyocell/tencel fibers, Lenzing Fibers (“Lenzing”), which confirmed that Insinca had the capability of producing yarn-dyed lyocell fabrics, and offered Insinca its technical assistance in making a trial run weaving a fabric blended with lyocell. Burlington provided a copy of emails between Lenzing and Insinca to support this statement.

BWA asked Burlington several technical questions regarding the weaving and finishing of fabrics using “standard” lyocell. BWA argued that because of the differences between standard lyocell, other types of lyocell (i.e. “A100”) and other types of rayon, requirements for fibrillation and dye affinity were critical in the production of lyocell fabrics. Burlington responded that it could process all types of lyocell in its weaving processes, and provided detailed information regarding its quality control and testing procedures to ensure that the fibrillation and colorization specifications required had been met. BWA stated that the subject fabrics were not produced in “continuous runs,” but rather individual runs on handlooms, to accommodate the small quantities it required. Burlington responded that it could do those individual runs since both Burlington and Insinca had handlooms. CITA asked BWA whether a weaver would use different equipment to produce lyocell fabrics versus fabrics containing other types of rayon. BWA responded that while lyocell fabrics are woven using exactly the same equipment used to weave fabrics containing other types of rayon, it contended that Burlington did not have the greater expertise needed to weave fabrics with lyocell. BWA asked Burlington to describe its entire production cycle for fabrics containing lyocell. In response, Burlington outlined its production process, from acquiring the required fibers to collaborating with its yarn spinner to have the yarns meet their client’s specifications. Burlington described its weaving and dyeing/finishing facilities in general terms, but presented CITA with two business confidential documents for the record that provided more detailed information on those facilities. In response to additional technical questions from BWA, Burlington stated that many of those questions could only be answered in the course of development of a particular fabric, and because the range of specifications included in the Requests was so broad, there would be different answers to those questions depending on the exact specifications required.

BWA stated that it had information that Insinca did not have the technical capability to produce lyocell fabrics. Burlington said that it had transferred technical expertise to Insinca in previous product development projects, and would do so with any new projects involving lyocell. BWA stated that it had orders from its client with a delivery date of December, and that Insinca could not come “online” in time to meet that deadline. BWA argued that it would take a new mill at least 6 months to gain the technical capability to produce lyocell fabrics, and asked Burlington how long it would take Insinca to be able to produce and deliver lyocell fabrics. Burlington stated that it could not provide an exact timeframe, as it depended on the exact specifications of the fabric to be produced, but its product development process would involve Burlington’s assessment of the specified fabric to determine whether Burlington or Insinca would produce the fabric. When pressed by BWA as to whether that process would take more or less than 6

months, Burlington responded that 6 months might be a good estimate, but it was difficult to tell without knowing more about the specifications of the fabric to be developed.

BWA claimed that Insinca's production schedule had no availability until 2011, and asked how Insinca could supply the subject fabrics in a timely manner. Burlington responded that because it was a commercial joint venture partner with Insinca, the companies had an arrangement that Insinca would hold 1/6th of its available capacity in reserve for Burlington's use. Burlington further stated that if for some reason Insinca did not have available production capacity, Burlington could produce the fabric at its U.S. facilities.

In closing, BWA asserted that the subject fabrics were not commercially available in the region at the present time, that Burlington has not made and currently does not make the specified subject fabrics, and that nothing Burlington had presented in its samples reflected an ability to produce the subject fabrics as specified in a timely manner. Burlington responded that it was fully capable of producing the subject fabrics, as it had made and currently produced similar fabrics, and that it has the technical expertise, necessary equipment and available capacity to produce the subject fabrics either in its U.S. facilities or with Insinca in El Salvador.

Analysis:

In accordance with Section 1 of CITA's procedures, CITA must carefully scrutinize information provided on the record in making a determination whether the subject product is available in commercial quantities in a timely manner in the DR-CAFTA countries.

Sufficiency of Responses by Burlington – BWA's Rebuttals claimed that Burlington's Responses did not meet the requirements set forth by section 6 of CITA's procedures, and therefore CITA should not accept the Responses as sufficient for the purposes of the instant proceedings. Specifically, BWA claimed that Burlington had neither made an offer to supply in its Responses, nor indicated the quantity of the subject product it could supply. However, nothing in CITA's procedures requires a Response to use the exact term "offer to supply." In its Responses, Burlington states it is "capable of manufacturing" the subject fabrics. CITA finds that this is sufficient to establish that Burlington is making an offer to supply the subject products. With respect to the quantity to be supplied, CITA notes that BWA kept the quantity of the subject fabrics to be supplied as business confidential, so that Burlington was unaware of the actual quantity requested. As such, it was reasonable for Burlington to report Insinca's annual capacity rather than an actual quantity it could supply. Therefore, CITA finds that the information provided by Burlington in its Responses is sufficient to meet CITA's requirements.

Due Diligence – CITA's procedures require that a requester conduct reasonable due diligence to source the subject product (see section 4(b)(3)). In its reviews of BWA's Requests, CITA determined that the requestor had conducted sufficient due diligence for the purposes of accepting the Requests. With regard to Burlington, BWA made a reasonable effort by contacting its sales representative. In the event that a DR-CAFTA supplier did not respond to a requester in the course of due diligence, section 6(b)(3)(vi) mandates that the supplier should provide a reasonable explanation in its Response. In its inquiry to Burlington, BWA did not specifically ask whether Burlington was *capable of producing* the subject product. According to information on the record, Burlington's sales representative assumed BWA was only asking what Burlington had in its current inventory. CITA finds that this explanation is reasonable, and therefore, CITA did not reject Burlington's Responses. With respect to BWA's attempts to contact Insinca,

because the contact was listed in a recognized industry catalog (Davison's Blue Book) and there was no indication that the email address used to contact Insinca was non-operational, it was reasonable for BWA to assume that Insinca had received the emails but chose not to respond. However, Burlington explained that the contact identified by BWA had been having difficulty in retrieving his emails, and that as the Vice President of Manufacturing (who could be assumed to work primarily on the factory floor), he would not be an appropriate contact for production inquiries. Given that manufacturing/operations personnel would not necessarily focus on responding to sales inquiries, and it is conceivable that the company did experience technical difficulties, Burlington's explanation for Insinca's lack of response is also within reason. Therefore, CITA finds that Burlington's explanations as to why neither it nor Insinca had responded affirmatively to BWA's inquiries are reasonable, such that Burlington's due diligence was sufficient.

Production Capability/Demonstration of Ability to Supply – Section 6(b)(3) of CITA's procedures mandates that a responding DR-CAFTA supplier must provide "information supporting the claim" to be able to supply the subject product. While the procedures do not require that a supplier have produced or currently produce a product meeting exactly the specifications of the subject product, in such instances, CITA requires that a Response contain "detailed information on its current ability" to produce the subject product. *See* section 6(b)(3)(iii) of CITA's procedures. In the instant proceedings, Burlington acknowledges that while it has not made fabrics exactly meeting the specifications of the subject fabrics, or fabrics of chief weight standard lyocell, it has produced similar fabrics using lyocell, and continues to produce yarn-dyed fabrics using other types of rayon. Burlington also confirmed that it has access to lyocell yarns of different colors, as demonstrated by letters from several yarn-spinners and/or package dyers.

While BWA argued that the samples provided by Burlington at the public meeting would not be sufficient for BWA to demonstrate to its client that Burlington had the capability to produce the subject fabrics, this is not a requirement under CITA's procedures. With the exception of having a fiber content of chief weight lyocell, Burlington's samples did include at least one fabric containing lyocell, and others which represented a wide variety of rayon blend fabrics falling within the range of all other specifications, including weave type, weight and colorization.

In its Requests, BWA claims that the production of fabrics with a chief weight of standard lyocell requires "special handling and processes" versus production of fabrics using other types of rayon. However, in the course of the public meeting, BWA conceded that no special equipment was necessary to produce fabrics containing lyocell versus other rayon fabrics, which Burlington currently produces. BWA claimed that weaving fabrics with a chief weight of standard lyocell requires a high level of expertise, and that nothing Burlington presented on the record was sufficient to demonstrate that it had such expertise. However, Burlington's product development expert answered all of BWA's technical questions during the public meeting, including questions regarding Burlington's production and testing procedures, and demonstrated to CITA's satisfaction that Burlington does have the requisite expertise to produce the subject fabrics, which it could in turn transfer to its joint venture partner, Insinca. Moreover, the sole manufacturer of lyocell fibers, Lenzing, confirmed in an email presented on the record that Insinca had the necessary equipment to weave fabrics using lyocell, and offered to provide the company technical assistance. With respect to Burlington's and Insinca's available capacity, information provided in Burlington's Responses and in the public meeting indicate that both companies have sufficient capacity to meet BWA's requirements.

Therefore, CITA finds that Burlington has demonstrated that both it, and its joint venture partner, Insinca, have the production capability to supply the subject fabrics in commercial quantities.

Ability to Supply the Subject Product in a Timely Manner – Section 6(b)(3) of CITA’s procedures requires that a Response contain information supporting the ability to supply fabrics within “a timely manner.” In its Responses, Burlington stated that it would take 12 to 14 weeks to develop a new product, and 12 to 14 weeks to deliver that product once the development stage was completed. Combined, the lead time for development and production is 24-28 weeks, which is 6 to 7 months. BWA did not argue in its Rebuttals that these timelines were unreasonable, nor did it state that they were untimely. However, in the public meeting, BWA argued that Insinca’s inexperience with lyocell fabrics would require 6 months for the supplier to develop the expertise to produce the subject fabrics, and that because it required a delivery of the subject products in December 2010, a delivery timetable of 6 months was not “timely.” CITA notes that a requester’s deadline does not dictate what constitutes a “timely manner” under CITA’s procedures. Moreover, Burlington’s response during the public meeting indicated that the client’s required specifications for a particular fabric is the defining factor in determining the amount of time necessary to deliver the final product. While BWA had argued that the subject fabrics weren’t commercially available “now,” that is not a determining factor under CITA’s procedures. CITA reviews the record evidence to determine if the subject fabrics are available in a “timely manner.” *See* Section 6(b)(3) of CITA’s procedures. Although it is unclear whether Insinca may or may not be able to deliver the subject fabrics within 6 months, given Burlington’s level of expertise and the availability of equipment and capacity, it would be reasonable to assume that Burlington would not require as much time, and could supply the subject fabrics in less than 6 months. However, because the range of specifications included in the subject fabrics’ descriptions is so broad, it is also reasonable to assume that what constitutes a “timely” delivery will vary, depending on the exact specifications required, such that a 6 month timeline would be considered timely for a particular product in the normal course of business. Therefore, CITA finds that Burlington has demonstrated that at least Burlington, if not also Insinca, is able to supply the subject fabrics in a timely manner.

Determination:

CITA finds that the information on the record demonstrates that Burlington and/or Insinca have the requisite production capability, in terms of equipment, experience and capacity, to supply fabrics that meet the required specifications set forth in the Requests, in commercial quantities in a timely manner.

In accordance with Section 203(o) of the DR-CAFTA Implementing Legislation, Article 3.25 of the DR-CAFTA, and CITA’s procedures, if CITA determines that the subject product of a Request is available in commercial quantities in a timely manner in the territory of any Party to the DR-CAFTA, CITA will deny the Request, and will issue its determination within 30 business days (or 44 business days, if extended) after receipt of the Request. As CITA has determined that the information on the record does not support BWA’s assertion that the subject fabrics are not available in the DR-CAFTA countries in commercial quantities in a timely manner, CITA hereby denies the Requests.

Public Meeting, August 18, 2010
List of Attendees:

Committee for the Implementation of Textile Agreements (CITA):

Kim Glas (Chairman)

Department of Commerce, Office of Textiles and Apparel (OTEXA): Janet Heinzen,

Sergio Botero, Richard Stetson, Maria Dybczak, Laurie Mease

Department of Commerce, Office of Chief Counsel for Import Administration:

Jonathan Zielinski, Brian Soiset

Office of the United States Trade Representative: Andrea Boron

Department of State: Damon DuBord

INTERESTED ENTITIES:

BWA, Inc.

Andrew Lerner, President

Mark Heard, Exec. Vice President for Sales

Sorini, Samet & Associates, LLC (counsel to BWA)

Ron Sorini, Principal

Mark Haney, Trade Advisor

Burlington Worldwide:

Patrick Palmer, Executive Vice President

Dale Arnold, Executive Vice President for Product Development

INTERESTED PARTIES:

Diane Bayatafshar, American Fiber Manufacturers Association

Mark Tallo, Sandler, Travis & Rosenberg, PA