

Report of the Committee for the Implementation of Textile Agreements

Denial of a Commercial Availability Request for Certain Cotton Twill Fabric treated with Liquid Ammonia under the Dominican Republic-Central America-United States Free Trade Agreement

On October 23, 2008, the Chairman of the Committee for the Implementation of Textile Agreements (“CITA”) received a request for a commercial availability determination (“Request”) from AM&S Trade Services, LLC, on behalf of Swift Galey, under the Dominican Republic-Central America-United States Free Trade Agreement (“CAFTA-DR”) for certain cotton twill fabric treated with liquid ammonia, as specified below. On October 27, 2008, 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, published on September 15, 2008) (“Procedures”), CITA notified interested parties of the Request, and posted the Request on the website dedicated for CAFTA-DR commercial availability proceedings. In its notification, CITA advised that any Response with an Offer to Supply (“Response”) must be submitted by November 6, 2008, and any Rebuttal be submitted by November 13, 2008.

On November 5, 2008, Mount Vernon Mills, Inc. (“Mount Vernon”) submitted a Response to the Request. On November 6, 2008, Hamrick Mills (“Hamrick”) and Milliken & Company (“Milliken”) each submitted Responses to the Request. On November 13, 2008, Swift Galey submitted a Rebuttal to each of the Responses.

The record of the proceeding may be found at: <http://web.ita.doc.gov/tacgi/CaftaReqTrack.nsf> under the following reference number: **96.2008.10.23.Fabric.AM&SforSwiftGaley**

Request by Swift Galey:

In its Request, Swift Galey asked that CITA determine that certain cotton twill fabric was not available from CAFTA-DR suppliers in commercial quantities in a timely manner. In describing the subject fabric, Swift Galey provided specifications on fiber content, warp and filling yarn thread counts, weight, width and finish. The specifications included: “Finish: Desized, scoured, bleached and treated with liquid ammonia.” Swift Galey also provided the performance specifications it required of the liquid ammonia treated fabric prior to resin application.

Substitutability – Swift Galey argued that the liquid ammonia treatment provided “improved properties over mercerizing.” Swift Galey also stated that it would perform further processing, including dyeing and finishing, that would provide the fabrics with “performance properties that are not achievable with conventional caustic mercerizing.” Swift Galey contended that because liquid ammonia treatment permits the use of less resin than other mercerization techniques, it could achieve better performance with respect to strength. In support of this argument, Swift Galey claimed that it had spent several years developing fabrics with various mills using caustic mercerization, but found that only liquid ammonia treated fabrics resulted in the performance criteria it required to combine with its intended subsequent chemical process. In the Request,

Swift Galey cited to a document authored by Lafer, S.P.A, which stated that liquid ammonia “allows particular effects that are greatly superior as compared to conventional caustic mercerizing.”¹ Swift Galey stated that it had “worked in its own research facilities to evaluate the possibilities of utilizing various types of mercerization to obtain results comparable to liquid ammonia treatment...(but) (n)one of these trials was successful in attaining the performance parameters obtained with liquid ammonia.” The requestor further argued that it had “confirmed these advantages in extensive research carried out on cotton fabrics.” To support this claim, Swift Galey provided two tables, Exhibit A and Exhibit B (held as business confidential), based on the company’s own research, and stated that the results presented in those Exhibits demonstrated that: (1) liquid ammonia treatment exceeded industry standards for wash and wear, shrinkage, and crease maintenance; (2) “liquid ammonia treatment alone produced higher dimensional stability than did two widely used types of mercerization;” and (3) liquid ammonia results in “superior retention of strength...in comparison with conventional caustic mercerized fabrics.” Swift Galey also referred to a 1982 textile journal article on liquid ammonia as a treatment for durable press finish. The article noted that “liquid ammonia improved the tensile strength...and dimensional stability of cotton broad cloth.”² Lastly, Swift Galey cited an independent 2004 report published by Cotton Incorporated, which quantitatively measured the effects of mercerizing and liquid ammonia treatments on bottom weight twill fabrics. Based on its findings and documentation, Swift Galey argued that the “advantages of liquid ammonia treatments are significant.”³ For these reasons, Swift Galey concludes that caustic mercerization is not substitutable for liquid ammonia treatment, and therefore, only fabrics treated with liquid ammonia were acceptable.

Due Diligence - Swift Galey stated that it had contacted potential suppliers in the CAFTA-DR region to seek liquid ammonia treated fabrics, and provided specifications as stated in the description provided in the Request. Swift Galey had contacted several CAFTA-DR suppliers, including Mount Vernon, Hamrick and Milliken. In its summary of contacts with CAFTA-DR suppliers, Swift Galey reported that Mount Vernon stated that it “cannot finish (the fabric) to the requested specifications” and that Hamrick responded that it had no “finishing capacity.” The requestor also contacted Milliken, but stated that Milliken did not “offer a quote for the requested fabric.” However, one CAFTA-DR supplier, Monte Textil S.A (“Monte”) did respond to the inquiry. Monte stated that it did not use liquid ammonia finishing, but offered to try to meet specifications using other treatments. Swift Galey provided the minimum performance criteria, including two tests as specified by the American Association of Textile Chemists and Colorists (“AATCC”). These tests were AATCC 124 for durable press and AATCC 128 for wrinkle resistance. Swift Galey’s other requirements were certain minimum ratings for flex abrasion for warp yarns, tear ratings for fill yarns (as an indication of the strength of the fabric) and shrinkage of fill yarns. Monte subsequently provided a sample, but Swift Galey rejected the sample because it did not meet its specifications for AATCC 124 and AATCC 128. Monte asserted that because Swift Galey required that no resins be used in its finishing treatment, it would be not be able to meet those performance specifications. Swift Galey responded that it had been unable to

¹ *Introduction to the Liquid Ammonia Process* (A Technical Paper delivered at ITMA ASIA 2008, Shanghai, China by Lafer, S.P.A, Schio, Italy)

² *Modifying Wear Life of All-Cotton Fabrics: Liquid Ammonia Treatment and Durable Press Finish*, by Matura Raheel and Maureen Devel Lien, Department of Textiles and Interior Design, University of Illinois, Urbana-Champaign, *Textile Research Journal*, Vol. 52, No. 8, 492-503 (1982).

³ *Plant and Laboratory Mercerized Versus Liquid Ammonia Pretreatments for Durable Press*, Cotton Incorporated, Technical Report TCRO-12 (June 2004).

meet the specifications with traditional mercerization and that was why it required liquid ammonia treatment.

CITA Determinations based on Finishing Processes - In its Request, Swift Galey argued that, in the past, CITA has approved requests for commercial availability designations “based on the finishing process specified in the request.” In support of its argument, the requestor cited to several past determinations under CAFTA-DR, including those on certain cotton flannels, certain circular knit fleece, certain wool blend coating fabrics, and certain composite woven face/knit-back fabric. Swift Galey further argued that while in some instances there was no response to requests made for certain fabrics, the requestor claimed that potential suppliers did not respond because they could not finish the fabric to specification.

Responses with Offers to Supply:

Response from Mount Vernon Mills, Inc. – In its Response, Mount Vernon stated that it could supply a substitute for the subject fabric. In accordance with CITA’s Procedures, the company provided the quantity of cotton twill fabrics produced in the last 24 months as well as its current production capacity. Mount Vernon claimed that it could produce a fabric meeting the same performance specifications provided by Swift Galey in its Request by using caustic mercerization. In support of its claim, Mount Vernon cited to results of its own research (held as business confidential), stating that while it had run many trials using liquid ammonia, it had “never come up with better performance than it can achieve with mercerization.” Mount Vernon also cited to a text authored by Cotton Incorporated, published in 1996, that states “...liquid ammonia has a similar effect (to mercerization) on cotton fabrics.”⁴ Mount Vernon argued that the text indicates that “properties improved by liquid ammonia treatment are essentially the same as those listed for mercerization.” The company also argued that the report by Lafer S.P.A. (cited in the Request) cannot be considered an unbiased source, as Lafer S.P.A. is a manufacturer of liquid ammonia treatment equipment.

Mount Vernon noted that while it had used liquid ammonia treatments itself in the 1970s and 1980s, it no longer does so, in large part due to the environmental and safety issues involved with liquid ammonia storage. Moreover, Mount Vernon contended that fabrics treated with liquid ammonia and imported into the United States would be difficult to identify because the liquid ammonia treatment would disintegrate by the time it was imported into the United States, and that the classifications under the Harmonized Tariff Schedule make no distinction between fabrics treated with liquid ammonia versus those treated with caustic mercerization.

Mount Vernon stated that, contrary to Swift Galey’s assertion, not only does liquid ammonia treatment provide no discernable advantage over mercerization, the two processes are comparable and provide essentially the same fabric performance. Therefore, Mount Vernon concluded that it can supply a fabric that is substitutable for the subject product, and that the Request should be denied.

⁴ *Cotton Dyeing and Finishing: A Technical Guide*, Cotton Incorporated (1996)

Response from Milliken & Company - Milliken submitted a Response to the Request, stating that it could supply a fabric substitutable for the subject product. In its Response, Milliken stated that it had produced cotton fabrics similar to the subject product, provided a quantity produced in the last 24 months, stated its current production capacity, and stated that it was capable of a totally vertical production, including spinning the yarn, weaving the fabric, and finishing the fabric to meet Swift Galey's specifications. Milliken also stated that it works with customers to develop fabrics and could produce prototype samples upon receipt of a purchase order.

With respect to the question of substitutability, Milliken contended that "caustic mercerization is a direct substitute for liquid ammonia treatment." Milliken stated that its own test results on caustic mercerized fabrics meet or exceed the performance criteria provided in the Request. Milliken reported the performance characteristics it could achieve using caustic mercerization (held as business confidential), which indicated that the fabric Milliken offered could meet or exceed Swift Galey's requirements.

Milliken also argued that the requestor's claim that liquid ammonia treatment produced superior characteristics had never been proven in the United States. In its Response, Milliken argued that several of the claims made by Swift Galey were incorrect, specifically with respect to the amount of resin needed in liquid ammonia treatment versus caustic mercerization, the degree of loss of strength by using such resins, and the ability to achieve certain performance characteristics with liquid ammonia without the use of resin. Based on Milliken's own experience, it challenged Swift Galey's assertion that liquid ammonia treatment alone, without the use of resin, could meet the required performance specifications. Milliken stated that the report by Lafer S.P.A. referred to in the Request was "essentially a biased equipment sales promotion, as opposed to a scientific journal," and that the 1982 study on liquid ammonia cited by Swift Galey did not involve a comparison with caustic mercerization. Finally Milliken argued that the 2004 Cotton Incorporated report did not support Swift Galey's argument that liquid ammonia treatment was superior to caustic mercerization. Pointing to the report's findings on fabrics treated with liquid ammonia and fabrics treated with caustic mercerization with no subsequent treatment ("untreated", Finish #4), Milliken noted that these independent results indicate that the liquid ammonia treated fabric did not meet 3 of the 5 performance criteria specified in the Request: AATCC 124 (durable press), fill tear rating, and AATCC 128 (wrinkle release).

Milliken also contended that Swift Galey violated CITA's Procedures with respect to due diligence. Milliken acknowledged that Swift Galey did contact the company in July of 2008, providing certain specifications in its inquiry. However, Milliken stated that Swift Galey did not provide any performance characteristics and only specified that the fabric be treated with liquid ammonia. Milliken responded to the inquiry with a question as to whether Swift Galey was pursuing a commercial availability determination, but Swift Galey did not answer the question. Milliken argued that had Swift Galey either provided its required performance characteristics or confirmed that it was considering a request for a commercial availability determination in the course of due diligence, Milliken would have responded with an offer to supply a substitutable product that met Swift Galey's requirements. Milliken argued that because the requestor did not indicate why the fabric needed to be treated with liquid ammonia processing, Swift Galey "did not give potential suppliers with an appropriate basis for responding and no guidance with respect to the company's needs."

With respect to the issue of determinations based on finishing processes, Milliken argued that, should the Request be approved, future Requests based on finishing would place an “unwarranted emphasis on preparation and finishing techniques rather than whether a subject fabric can be woven or knit” in the CAFTA-DR countries.

Milliken also stated that should CITA make an affirmative determination regarding the commercial availability of the subject product, such a determination would be unenforceable, as “liquid ammonia treated fabrics leave no easily distinguishable footprint that would allow for conspicuous identification...versus conventional caustic mercerized fabrics.” Milliken also argued that, given the extensive range of fabrics specified in the Request, any finding that such fabrics were not commercial available would dramatically undermine existing benefits to U.S. yarn and fabric producers.

Response from Hamrick Mills - In its Response, Hamrick stated that it could supply a product substitutable for the subject fabric. Hamrick stated that it would supply the fabric by weaving it to specifications and that it would work with Milliken to finish the fabric so that it would be “better than or at least equal to the liquid ammonia finish requested.” Hamrick further noted that it had produced fabrics similar to the subject product, and had the ability to weave several million yards per month. Hamrick stated that it had contacted Milliken to determine whether Milliken could treat fabrics produced by Hamrick with a substitutable finish for liquid ammonia. Hamrick stated that Milliken claimed it had the technical capability to finish the fabrics to meet Swift Galey’s specifications.

Rebuttals by Swift Galey:

On November 13, 2008, Swift Galey submitted Rebuttal comments to the Responses submitted by Mount Vernon, Milliken and Hamrick.

Rebuttal to Mount Vernon – Swift Galey argued that Mount Vernon failed to produce any test results or samples that would offer evidence to support its argument that liquid ammonia offered no discernable advantage over mercerization. Swift Galey also stated that the 1996 text by Cotton Incorporated cited by Mount Vernon, wherein liquid ammonia treatment and caustic mercerization purportedly provide comparable performance criteria, is superseded by the 2004 Cotton Incorporated report cited in its Request. The requestor defended its use of a report by the manufacturer of liquid ammonia treatment equipment, Lafer S.P.A., as a reliable source, stating that “(i)f Lafer were to be exaggerating its claims, customers would hardly be using its equipment.”

In its Rebuttal, Swift Galey stated that it had contacted Mount Vernon on November 6, 2008, one day after Mount Vernon had submitted a Response to Swift Galey’s Request, to respond to Mount Vernon’s claim that it could meet the subject product’s performance specifications using caustic mercerization. In its email, Swift Galey provided the specifications for the “greige twill fabric and with performance specifications.” Swift Galey asked that Mount Vernon supply a sample fabric with test results within 72 hours, noting that its customer had a tight deadline, and that Swift Galey had to “respond to the Mount Vernon letter by close of business on November

13.” Mount Vernon replied that it would advise Swift Galey when samples were available, but Swift Galey stated that, as of the close of business on November 12, 2008, Mount Vernon had not responded. Swift Galey contends that, because the supplier did not provide a sample or analysis that it can meet Swift Galey’s performance specifications, Mount Vernon has not demonstrated that it is able to supply the subject product.

Swift Galey also argued that caustic soda, which is used in caustic mercerization, is subject to environmental safety requirements as is liquid ammonia. Finally, the requestor contended that issues regarding enforcement are unwarranted, whether it be based on the lack of differentiation between classifications under the Harmonized Tariff Schedule or whether the imported fabric may be identified as having been treated with liquid ammonia.

Rebuttal to Milliken – Swift Galey argued that all other statements made by Milliken in its Response with regard to the comparability of caustic mercerization with liquid ammonia treatment were solely the opinion of Milliken and were not supported by quantifiable data. With respect to Milliken’s argument that the 2004 Cotton Incorporated report does not support a finding that liquid ammonia treatment can meet the specifications required in the request, Swift Galey stated that its own research and testing on liquid ammonia treated fabric indicates that it can meet or exceed the required performance specifications.

In response to Milliken’s argument that Swift Galey’s due diligence efforts did not include specifications with measurable criteria, the requestor argued that it had provided measurable criteria in its Request, with pictures, diagrams, a list of performance requirements, and results of various studies on liquid ammonia treated fabrics. Swift Galey also contended that, while it had not provided performance specifications in its initial due diligence inquiries, it had provided them at the request of a potential supplier, Monte. Swift Galey asserted that Milliken had the opportunity to request additional information about the subject product, including any required performance criteria, but did not do so.

In its Rebuttal, Swift Galey stated that it had contacted Milliken by phone on November 7, 2008, one day after it had submitted a Response to Swift Galey’s Request. Swift Galey followed this phone call with an email providing the required performance specifications. Swift Galey asked that Milliken supply a sample fabric with test results within 72 hours, noting that its customer had a tight deadline, and that Swift Galey had to submit a rebuttal to Milliken’s Response by November 13. The requestor noted that Milliken responded that it could meet the physical and performance specifications with conventional mercerizing, but that Milliken required a purchase order of 4,000 yards in order to develop the fabric and provide samples. Swift Galey advised that it would not agree to Milliken’s terms.

With respect to Milliken’s enforceability arguments, Swift Galey argued that the enforceability of a determination regarding liquid ammonia treated fabrics is not an issue, as such fabrics may be identified through various test results that may be conducted by U.S. Customs and Border Protection (“CBP”).

Swift Galey asserted that because Milliken had failed to produce a sample that met the Request’s specifications, Milliken was “not in a position at this time to produce (a fabric) that can meet the

performance specifications,” and therefore, CITA should determine that the subject fabric is not commercially available from Milliken.

Rebuttal to Hamrick – Swift Galey stated that Hamrick conceded it could not finish the fabric as specified, but that it would work with Milliken to provide a substitutable fabric finished with conventional mercerization. The requestor states that it addressed the issue of Milliken’s ability to finish the fabric to meet performance specifications in its Rebuttal to Milliken’s Response, and that the same arguments apply to rebut Hamrick’s Response.

However, Swift Galey noted that it exchanged emails with Hamrick again to confirm that Hamrick could not finish the fabric as specified. As such, Swift Galey argued that the fabric was not available from Hamrick.

Analysis:

Under CITA’s Procedures, CITA will consider the information on the record of a proceeding to whether the subject product is available in commercial quantities in a timely manner in the CAFTA-DR countries. See section 8(c)(2).

Substitutability of the Subject Product – Pursuant to section 4(b)(3)(vi) of CITA’s Procedures, “a requestor must clearly describe the unique characteristics of the subject product that distinguishes it from other similar or potentially substitutable products. In addition, the requestor must provide CAFTA-DR suppliers with information why such characteristics are required for the purposes of the end-use of the product and cannot be substituted by another product.” In its Request, Swift Galey stated that it specified liquid ammonia treatment because of the unique characteristics such fabrics had vis-à-vis caustic mercerized fabrics. Swift Galey contended that these unique characteristics enabled the fabrics to use less resin in subsequent finishing processes. Under CITA’s Procedures, the question of substitutability is considered with respect to the end-use of the product. Swift Galey’s Request implies that CITA should base its consideration on whether caustic mercerized fabrics would perform as well with subsequent processes as liquid ammonia treated fabrics. However, the end-use of the liquid ammonia treated fabric is not the subsequent finishing of the fabric; the end-use of the fabric is the production of apparel. Therefore, in considering whether a product is substitutable for the subject fabric, it is not relevant whether liquid ammonia treatment works better with a particular finishing process, but rather whether the product is substitutable for the purposes of apparel production. As a result, the only question that CITA will consider with respect to substitutability is whether caustic mercerized fabrics are substitutable for liquid ammonia treated fabrics for use in apparel.

The submissions of the interested parties provide information regarding both liquid ammonia and conventional caustic mercerization techniques. In order to make a determination as to the commercial availability of the subject product, or one substitutable, CITA must consider the information submitted on the record. This consideration includes an analysis of the respective weight and relevance of the evidence on the record. While Swift Galey stated that it had conducted trials “utilizing various types of mercerization to obtain results comparable to liquid ammonia treatment” and that none of those trials were successful, the requestor did not provide any results of those trials that would support its claim. Swift Galey only included quantitative data that compared cotton fabrics treated only with resin to cotton fabrics treated with liquid

ammonia. Referring to Exhibit A, Swift Galey purported that the data demonstrated that liquid ammonia treated alone produced “significantly higher dimensional stability...than did two widely used types of mercerizing.” However, the data in Exhibit A did not include a comparison of the results of liquid ammonia treatment with these two types of mercerizing. In Exhibit B, which Swift Galey stated demonstrated that liquid ammonia treated fabrics had a number of advantages over traditional mercerizing, again, there was no comparison of liquid ammonia treated fabrics and caustic mercerized fabrics. Exhibit B only included a comparison of liquid ammonia treated fabrics that were subsequently treated with 3 different levels of resin.

In its Request, Swift Galey cited to several other reports and findings in support of its claim that liquid ammonia treatments provide superior performance characteristics vis-à-vis caustic mercerization. However, CITA notes that, with the exception of the 2004 Cotton Incorporated report, the sources referred to by the requestor are either not independent studies or do not make a quantitative comparison of the two techniques at issue. The 1982 journal article cited in the Request reports only on results of using a liquid ammonia treatment on cotton fabric. The report by Lafer S.P.A. cannot be viewed as objective, given that it was authored by a manufacturer of liquid ammonia treatment equipment, and, moreover, did not provide any quantitative data to support its claims. In their Responses, Mount Vernon and Milliken cited their own findings and experts to support their arguments that caustic mercerization techniques provide performance characteristics equivalent to liquid ammonia, but did not include any quantitative data comparing the results of the two techniques. Mount Vernon cited to a 1996 textbook by Cotton Incorporated that purportedly found the two techniques to produce comparable results, but Mount Vernon did not indicate whether the text provided any supporting quantitative data.

In reviewing the evidence on the record, the 2004 report by Cotton Incorporated represents the only independent and quantitative analysis that compared results achieved by the two techniques at issue. In examining the results of the report, CITA did not find that it supported Swift Galey’s claim that liquid ammonia treatment provided superior performance characteristics as compared with caustic mercerization. In its comparison of fabrics treated with liquid ammonia and those treated with mercerization, which were further “untreated” (Finish #4), the results indicate that liquid ammonia treated fabric did not meet 3 of the 5 performance criteria set forth by Swift Galey (i.e. AATCC 124 for durable press, fill tear, and AATCC 128 for wrinkle release). In addition, for fabrics using Finish #4, the performance of plant mercerized fabric was essentially equivalent to that of the liquid ammonia treated fabric in all five of Swift Galey’s required performance criteria. Moreover, the results indicate that the use of different levels of various chemicals in additional treatments (Finish #1, #2, and #3), made a significant effect on the performance characteristics of both fabrics. Ultimately, it was clear that both liquid ammonia treated fabrics and caustic mercerized fabrics could meet or come close to achieving Swift Galey’s required performance characteristics, depending on the combination of chemicals used subsequent to either liquid ammonia treatment or caustic mercerization.

The Responses provided by Mount Vernon, Milliken and Hamrick (which reported it would use Milliken’s finishing treatment) asserted that each could produce a finished fabric that would meet Swift Galey’s required specifications and performance criteria. Both Mount Vernon and Milliken referred to their own experience using liquid ammonia and caustic mercerization, and cited their own internal testing and research to support their claim that Swift Galey’s criteria could be met with techniques other than liquid ammonia, though no quantitative data was provided for such testing. However, Milliken reported that it could meet or exceed the required

performance requirements, and supported its claim by providing quantitative measures for each of the five criteria (held as business confidential). Swift Galey's Rebuttals to these Responses did not present any quantitative evidence that countered Mount Vernon's and Milliken's claims, and restated that only fabrics treated with liquid ammonia could meet its required specifications. Swift Galey based this conclusion on its own testing results on caustic mercerized and liquid ammonia treated fabrics. However, Swift Galey's Request did not include any quantitative data from its tests comparing fabrics using the two techniques. Both Monte and Milliken claimed that Swift Galey's requirement that any substitutable treatment exclude resin would result in a fabric that would never be able to meet Swift Galey's performance requirements for AATCC 124 and AATCC 128. The independent study presented in the 2004 Cotton Incorporated report substantiates this claim. Swift Galey also noted that it would subsequently treat the subject fabric with resin in its own finishing process. In addition, while Swift Galey stated that it had worked for "several years with various mills to develop fabrics that would meet certain performance criteria," there was no evidence on the record that demonstrated that the requestor had tried to work with CAFTA-DR suppliers in the recent past. Therefore, nothing in Swift Galey's or Rebuttals demonstrated that none of the three responders were capable of meeting the required specifications.

Due Diligence – In its Request, Swift Galey asserted that it had made reasonable efforts to source the subject fabric in the CAFTA-DR countries. While it had not included performance characteristics in its initial inquiries, it did provide these specifications at the request of a potential supplier (Monte). In its review of the submitted Request, CITA determined that, based on the record provided by Swift Galey, the requestor had conducted sufficient due diligence for the purposes of accepting the Request.

However, in the course of Swift Galey's due diligence efforts, Milliken had specifically asked whether the company was basing its inquiry in an effort to conduct due diligence prior to filing a Request. Swift Galey did not confirm that it was pursuing due diligence toward filing a Request. In its Response, Milliken asserted that had it known that Swift Galey considering filing a Request, or had been advised of the required performance criteria, it would have responded differently to the inquiry, and would have offered to supply a fabric that would have met the required specifications using techniques other than liquid ammonia.

One of the goals of the CAFTA-DR, the commercial availability provision and CITA's Procedures is to foster business relationships between CAFTA-DR importers, manufacturers, and suppliers. CITA's Procedures require that requestors undertake "reasonable efforts to obtain the subject product from CAFTA-DR suppliers." See section 4(b)(3). Under section 4(b)(3)(i), CITA requires that a requestor provide the "exact response given for the supplier's inability to supply the subject product under the same conditions as contained in the Request submitted to CITA." However, the conditions presented to all potential suppliers in the course of due diligence did not include the performance criteria contained in the Request. CITA's Procedures require interested entities to provide certain information with respect to their specifications and requirements, standard business practices, and production capabilities. See section 4(b)(1), section 4(b)(3), and section 6(b)(4). In establishing its Procedures, CITA sought to encourage interested parties to engage in normal business practices in good faith by requiring a significant amount of information to be exchanged between the parties. We are mindful that, given CITA's requirements that certain information must be supplied in the course of due diligence,

particularly on the part of potential suppliers with respect to their production capability and the offer of potential substitutes, the content of a requestor's initial inquiry could impact the manner in which a potential supplier would respond. As such, Milliken's argument that Swift Gale's inquiries were not sufficiently forthcoming represents a valid concern for CITA. Swift Gale's decision not to provide performance criteria in its initial inquiries and its refusal to acknowledge to Milliken the reason for its inquiries raise questions as to whether the requestor conducted a reasonable effort to source the subject product from CAFTA-DR suppliers. We note that other Requests that specified certain performance criteria always included these requirements in inquiries made in the course of due diligence. In addition, in an exchange with Monte in the course of due diligence, Swift Gale's insistence that any substitutable finishing technique exclude the use of resins is questionable, particularly when independent evidence from the 2004 Cotton Incorporated report indicates that without the use of resins, even liquid ammonia treated fabrics would not meet Swift Gale's requirements, and Swift Gale's own admission that it would apply resin itself after obtaining the imported liquid ammonia treated fabric.

In its Rebuttals to the three Responses, Swift Gale stated that immediately after the Responses had been filed, it contacted the three responders and asked that each provide a 5 yard sample meeting the required specifications and performance criteria within 72 hours. The requestor reported that Hamrick had not responded to its request, and that Mount Vernon stated it would contact Swift Gale with respect to samples (although it had not done so by November 12, 2008). The requestor acknowledged that Milliken had responded to assert that it could supply the subject fabric, and explained its standard business practice with regard to the provision of samples for new fabrics. Swift Gale stated that it would not agree to its terms for samples, and would not engage further with Milliken to develop or source the subject fabric from the company.

Swift Gale argued that because none of the responders provided a sample that met its specifications, CITA should find that the subject product could not be supplied by CAFTA-DR suppliers in commercial quantities in a timely manner. However, Swift Gale's assertion contradicts CITA's Procedures. With respect to the provision of samples, the Procedures specifically state that suppliers are not required to produce samples to support a claim to supply a subject product. See Section 6(b)(3) and Section 6(b)(4). Moreover, Swift Gale's requirement that such samples be produced within 72 hours is unreasonable. Swift Gale's conduct in the course of due diligence and in the course of the instant proceeding raises concerns whether the requestor made reasonable efforts to source the subject fabric in accordance with CITA's Procedures.

Requests based Solely on the Commercial Availability of a Finishing Process – In its Request, Swift Gale noted that there was “special scrutiny” with respect to Requests in which fabrics could be supplied in the CAFTA-DR countries but for certain finishing processes. Swift Gale asserted that CITA has made previous determinations “based on the finishing process specified in the request.” CITA has carefully reviewed the determinations cited by the requestor. Of the 17 determinations reported in the Request, eight of the subject products were added to Annex 3.25 of the CAFTA-DR (a list of products determined to be not commercially available), not based on determinations made under CAFTA-DR's commercial availability provision, but because of an agreement by the CAFTA-DR parties to “grandfather” products that had been deemed not commercially unavailable under other trade preference programs. The determinations for these products were conducted under procedures that are different from those

under CAFTA-DR. As a result, the fact that these products had been added to the CAFTA-DR Annex 3.25 is not instructive for the purposes of a determination of commercial availability under CAFTA-DR.

In eight of the remaining nine determinations, there were no Responses by a CAFTA-DR supplier to the Requests under consideration. In those proceedings, there was no review by CITA whether a CAFTA-DR supplier could provide the subject product in its entirety, much less the finishing process specified. Moreover, in each of those proceedings, where potential suppliers did respond to inquiries in the course of due diligence, at least one supplier indicated that it could not supply the fabric, not because of the finishing process, but because it could not meet other specifications (e.g. gauge, yarn count, and/or quantity). The only factor in CITA's determinations in those proceedings was whether a CAFTA-DR supplier demonstrated that it could supply the subject product in commercial quantities in a timely manner. In all of these cases, CITA's determinations were based on a lack of Response from CAFTA-DR suppliers. Therefore, Swift Galey's assertion that CITA made those determinations based solely on the lack of commercial availability of a finishing process is inaccurate.

Only one determination cited by Swift Galey was made after conducting a review of a CAFTA-DR supplier's Response. In that proceeding (38.2007.12.25.Fabric.ColumbiaSportswearCo), CITA considered whether certain composite fabrics were commercially available under the CAFTA-DR. The subject product's specifications required that the component face and backing fabrics undergo certain finishing processes, including lamination and embossing. The record evidence of that proceeding indicated that one U.S. supplier was interested in supplying the subject fabric and submitted a Response to the Request. However, a review of the requestor's due diligence efforts and the information presented in the course of the proceeding indicated that, over the course of six months, the responder could not demonstrate its capability to produce the final product. One of the issues raised in the case was the fact that the responder could not identify a sub-contractor that would perform the required embossing. However, another determining factor was the fact that the responder could not confirm it could supply the face fabric meeting yarn count specifications in a timely manner. CITA's determination in that proceeding was based on the responder's inability to demonstrate it could supply the fabric in its entirety, but was not based solely on whether the responder could meet the required finishing specification. In light of the foregoing, we find that Swift Galey's assertion that CITA has previously made determinations under CAFTA-DR based solely on the availability of a finishing process is unfounded.

Accordingly, this proceeding is the first under CAFTA-DR's commercial availability provision that raises the narrow issue of how to treat Requests for fabrics that are available from CAFTA-DR suppliers but for certain finishing processes. CITA is mindful of the concerns expressed by Milliken in its Response regarding the ramifications of such Requests, as they may place unwarranted emphasis on the finishing of a fabric rather than its construction. We note that previous Requests for various fabrics have included specifications on finishing. However, CITA also recognizes that there is a distinction in the textile industry (as defined in a recognized industry reference source) and in the text of the CAFTA-DR itself between the production/formation of a fabric and the subsequent finishing of a fabric.⁵ Given the

⁵ See *Fairchild's Dictionary of Textiles, 7th Edition* (1996), definitions for "greige" – "fabric that has received no preparation, dyeing, or finishing treatment after having been produced..." and "finishes, basic/regular" – "finishing processes, not including colorization, carried out on most kinds of fabrics." See also CAFTA-DR, Article 3.26,

complicated nature of this issue, CITA will further review and consider the question of how to treat such Requests under CAFTA-DR and CITA's Procedures. CITA will solicit and examine public comment before making any decision.

Issues regarding Enforceability – In their Responses, Mount Vernon and Milliken both raise the question whether fabrics treated with liquid ammonia are indistinguishable from fabrics that are treated with other finishes. As a result, Mount Vernon and Milliken claim, a commercial availability determination with respect to fabrics treated with liquid ammonia cannot be enforced by CBP as it would not be able to identify, visually or through laboratory tests, that the fabrics were treated with liquid ammonia as opposed to other treatments.

CITA notes that enforceability is not an issue. CBP employs many methods to enforce designations under CAFTA-DR as well as various other free trade agreements and trade preference programs. CBP does not rely solely on visual inspection and laboratory tests, but uses affidavits, purchase orders, and other documents to substantiate claims for preferential treatment. Through such documents, CBP can obtain a detailed paper trail that identifies the source of the fabric that make up the imported apparel products and identifies the manufacturer of components at each stage of product formation, and may request such documentation at the time of entry or during post-entry audits. In addition, CBP has a specific unit, the Strategic Trade Center in New York City, assigned to analyze textile trade data and other information sources for the purpose of targeting imports to identify fraud. Therefore, CITA finds that the enforceability concerns expressed by Mount Vernon and Milliken are not a basis for CITA's consideration in the instant case.

Conclusion and Recommendation:

The information on the record demonstrates that U.S. suppliers have the requisite experience, production capability and capacity to supply a substitutable fabric that meets the required physical and performance specifications using a treatment other than liquid ammonia. While Swift Galey, Mount Vernon and Milliken claim their own research and testing support their claims regarding the superiority of one technique versus another, these claims cannot be viewed as either unbiased or uniformly affirmed by the textile and apparel industry. However, the 2004 Cotton Incorporated report cited by both Swift Galey and Milliken provides an independent and quantitative analysis, of caustic mercerization vis-à-vis liquid ammonia treatment, and appears to support Mount Vernon's, Milliken's and Hamrick's assertions that caustic mercerization techniques, in conjunction with other finishing processes, offer performance characteristics that are comparable with liquid ammonia treatments. Therefore, based on the record evidence, CITA finds that the fabrics offered by Mount Vernon, Milliken and Hamrick are substitutable for the subject product.

The record evidence also raises certain concerns with respect to Swift Galey's conduct in the course of due diligence efforts and in the subsequent proceeding. While CITA will not base its determination in this case on Swift Galey's efforts to source the subject fabric, CITA will more

footnote 7: (...“wholly formed” when used in reference to fabrics, means that all the production processes and finishing operations...”); see CAFTA-DR, Annex 4.1, Chapter 61 and Chapter 62, Chapter Rule 1: (“...the fabrics identified...must be both formed...and finished...”).

carefully review future Requests and a requestor's actions to consider whether the requestor has made reasonable efforts to source the subject product. Potential requestors should be mindful that CITA will examine the record evidence accordingly.

With respect to the question of Requests based solely on finishing operations, CITA acknowledges the questions that have arisen in the instant proceeding, and the ramifications that determinations based on such Requests could have on CAFTA-DR suppliers. As a result, CITA will raise this issue for public consideration as to whether such Requests should be accepted under CITA's Procedures, and whether CITA's Procedures should be modified accordingly. Toward this end, CITA will issue a request for public comment in the Federal Register so that CITA may consider the views of interested parties. In addition, because the question of how CITA will view such Requests is as yet undecided, CITA will not accept any Requests that appear to be based solely on the commercial availability of a finishing treatment or process, as determined by CITA, submitted on or after the date of this determination, until such time as CITA has had the opportunity to review and consider public comments and announce its decision on this issue.

In accordance with Section 203(o) of the CAFTA-DR Implementing Legislation, Article 3.25 of the CAFTA-DR, 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 CAFTA-DR, CITA will deny the Request, and will issue its determination within 30 business days after receipt of the Request. As CITA has determined that the information on the record does not support Swift Galey's assertion that the subject fabric is not available in the CAFTA-DR countries in commercial quantities in a timely manner, CITA denies the Request.