



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

REPORT TO THE MINISTER OF FINANCE

**REQUEST FOR TARIFF RELIEF BY
BALLIN INC.
REGARDING
CERTAIN WOVEN VISCOSE RAYON FABRICS**

JANUARY 15, 2004

BALLIN INC.

REQUEST NO. TR-2002-010

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INTRODUCTION

On July 14, 1994, the Canadian International Trade Tribunal (the Tribunal) received terms of reference¹ from the Minister of Finance (the Minister) pursuant to section 19 of the *Canadian International Trade Tribunal Act*.² The Minister directed the Tribunal to investigate requests from domestic producers for tariff relief on imported textile inputs for use in their manufacturing operations and to make recommendations in respect of those requests to the Minister.

On February 13, 2003, pursuant to the Minister's reference, the Tribunal received a request from Ballin Inc. (Ballin), of Ville Saint-Laurent, Quebec, for the removal, for an indeterminate period of time, of the customs duty on importations, from all countries, of certain woven fabrics of viscose rayon/polyester/elastomeric monofilaments, for use in the manufacture of trousers, shorts and jackets. Ballin also sought relief retroactive to the date of the Tribunal's notice of commencement of investigation.

On May 15, 2003, being satisfied that the request was properly documented, the Tribunal issued a notice of commencement of investigation,³ which was distributed to known interested parties. The fabrics under investigation were described in the notice as "woven fabrics of viscose rayon staple fibres mixed mainly or solely with polyester filaments, polyester staple fibres and elastomeric monofilaments, dyed or of yarns of different colours, of subheading No. 5516.22 or 5516.23, for use in the manufacture of trousers, shorts and jackets" (the subject fabrics).

As part of the investigation, the Tribunal's research staff sent questionnaires to potential producers of fabrics identical to or substitutable for the subject fabrics. A request for information was also sent to potential users and importers of the subject fabrics. A letter was sent to the Canada Customs and Revenue Agency (CCRA) requesting a complete description of the physical characteristics of the samples submitted by Ballin, an opinion on whether the requested tariff relief would be administrable and suggested wording to describe the subject fabrics, should tariff relief be recommended. Letters were also sent to the Department of Foreign Affairs and International Trade (DFAIT) and the Department of Industry (Industry Canada) requesting information that could assist the Tribunal in its investigation.

A staff investigation report summarizing the information received from the CCRA, DFAIT, Ballin, questionnaire respondents and other interested parties was provided to those that had become parties to the proceedings by filing notices of appearance in the investigation. Following distribution of the staff investigation report, Ballin filed a submission with the Tribunal.

The Tribunal reviewed the information on file and, on October 23, 2003, before making its recommendation to the Minister, sought the views of parties on the following potential product description:

Woven fabrics of viscose rayon staple fibres mixed mainly or solely with polyester filaments, polyester staple fibres and elastomeric monofilaments, dyed or of yarns of different colours, of a weight of 200 g/m² or more, with a value for duty of \$10/m² or more, indexed annually to compensate for inflation, of subheading No. 5516.22 or 5516.23, for use in the manufacture of trousers, shorts and jackets.

Ballin and Consoltex Inc. (Consoltex) provided comments on this potential product description. Given that there was sufficient information on the record, the Tribunal decided that a public hearing was not required for this investigation.

1. The terms of reference were last modified on July 4, 2002.
2. R.S.C. 1985 (4th Supp.), c. 47.
3. C. Gaz. 2003.I.1553.

PRODUCT INFORMATION

Although the request for tariff relief covers fabrics imported from all countries, Ballin currently imports the subject fabrics from Spain. Ballin submitted two fabric samples with its request for tariff relief. The first sample consisted of a 4-thread broken twill,⁴ woven fabric, of yarns of different colours, made of 51 percent viscose rayon staple fibres, 34 percent polyester filaments, 13 percent polyester staple fibres and 2 percent elastomeric yarn. The second sample consisted of a 3-thread twill, woven fabric, of yarns of different colours, made of 55 percent viscose rayon staple fibres, 30 percent polyester filaments, 13 percent polyester staple fibres and 2 percent elastomeric yarn. Both fabrics weighed 221 g/m².

As of January 1, 2004, the subject fabrics, classified for customs purposes under classification No. 5516.22.00.11 or 5516.23.90.11 of the schedule to the *Customs Tariff*,⁵ are dutiable at 14 percent *ad valorem* under the most-favoured-nation (MFN) Tariff and the Costa Rica Tariff and are duty free under the United States Tariff, the Least Developed Country Tariff, the Mexico Tariff, the Canada-Israel Agreement Tariff and the Chile Tariff.

REPRESENTATIONS

Clothing Industry

Ballin

Ballin was founded in 1946 and manufactures men's trousers and shorts, as well as women's sportswear (jackets, pants, shorts and skirts). The company is privately owned and employs in excess of 450 people in Canada. Since the early 1990s, Ballin has established itself as a producer of high-end trousers and shorts with a significant presence in the U.S. market and has signed licence agreements to manufacture and market well-known brands, such as Pierre Cardin, Van Heusen, Bill Blass, Harve Benard and Emmanuel Ungaro.

Ballin claimed that there are no identical or substitutable fabrics manufactured by Canadian textile producers and that the subject fabrics are unique to it, in that its supplier has agreed not to market these fabrics or offer them for sale to any of its competitors.

Ballin stated that the composition of the subject fabrics and the process involved in producing these fabrics set them apart from anything available domestically. In this regard, Ballin indicated that the viscose rayon fibres give the fabric a soft and silky hand, a "peach skin" finish, and the appearance and feel of a fabric made of a natural fibre such as silk. Ballin stated that, when combined with polyester, viscose rayon fibres result in fabrics with superior dimensional stability. It also stated that the subject fabrics retain their shape, are easy to care for and are very durable in terms of both wash and care. Ballin indicated that the subject fabrics undergo a special fibrillation process⁶ that involves the application of a severe enzyme treatment, dyeing and tumbling. According to Ballin, the enzyme treatment eats away at the viscose rayon fibres and causes them to burst into many smaller fibres. The fabrics are then dyed and tumbled in an AIRO machine in order to open the fibres further. Ballin indicated that this process gives the fabrics their "peach skin" hand and that the addition of spandex gives them their stretch properties. Ballin alleged that no domestic fabrics are manufactured by this unique production process.

4. "Twill weave" is a weave characterized by a diagonal rib, or twill line, generally running upward from left to right. A "broken twill" covers a broad range of twill weaves, such as herringbone twill, in which the twill line changes its direction.

5. S.C. 1997, c. 36.

6. The act of breaking up a fibre into minute fibrous elements.

Ballin stated that, in terms of composition and production process, the subject fabrics are very similar to the fabrics at issue in Request Nos. TR-97-012⁷ and TR-2000-004,⁸ with the added distinguishing feature that the subject fabrics have been given stretch properties. It submitted that, given these similarities, the reasons in support of the positive recommendation in these requests continue to be applicable in the case at hand.

Ballin stated that the subject fabrics enjoy a certain exclusivity and allure, which appeal to retailers of high-quality garments. Therefore, apparel made with the subject fabrics commands a higher price in the marketplace. Ballin stated that it intends to sell garments made with the subject fabrics to high-end retailers such as Saks Fifth Avenue, Nordstroms, Henry Vezina, Holt Renfrew, Les Ailes de la Mode, Simons and Neiman Marcus. It also indicated that, given the optimal wearability, durability and comfort of the subject fabrics, it intends to use them in the manufacture of golf apparel.

Ballin stated that the fabrics used in the manufacture of pants and shorts that it has found to be available from domestic producers, such as Consoltex, are not suitable for its sales to high-end retailers. Ballin stated that they are not substitutable for the subject fabrics because they do not have the allure, physical characteristics or composition of the subject fabrics.

With regard to price, Ballin stated that the fabrics available from domestic production are generally less expensive than the subject fabrics. On this issue, Ballin pointed out that the cost of the subject fabrics, after duty removal, would still be higher than the cost of fabrics sold by domestic producers.

Ballin indicated that it has reviewed Consoltex's line of fabrics and determined that they are not identical to or substitutable for the subject fabrics. It indicated that Consoltex's fabrics are not subjected to any special finishing processes and, therefore, are not suitable for sale to its high-end retail customers. Ballin stated that it currently purchases certain viscose rayon/polyester fabrics from Consoltex for use in the manufacture of ladies' apparel, but that these fabrics are not substitutable for the subject fabrics in terms of construction, finishing process, composition, hand and quality. It indicated that the items made with Consoltex's fabrics are targeted at the lower-end market niche. In this connection, Ballin pointed out that the ladies' pants that it manufactures with Consoltex's fabrics retail for approximately \$60 to \$70, whereas the ladies' trousers made with the subject fabrics would retail for \$165.

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7. *Re Request for Tariff Relief by Ballin Inc.* (27 October 1999) (CITT): "(1) woven fabrics, of yarns of different colours, of polyester filaments mixed solely with rayon staple fibres, the 2-ply warp yarns and the single weft yarns measuring not less than 190 decitex but not more than 250 decitex per single yarn, the staple fibres measuring not more than 2.4 decitex per single staple fibre, of a weight exceeding 170 g/m², of tariff item No. 5407.93.90; and (2) woven fabrics, of yarns of different colours, of rayon staple fibres mixed mainly with polyester filaments or polyester staple fibres, measuring not less than 85 decitex but not more than 250 decitex per single yarn, the staple fibres measuring not more than 3.4 decitex per single staple fibre, weighing at least 120 g/m² but not more than 210 g/m², of tariff item No. 5516.23.90, both for use in the manufacture of men's trousers and shorts".
 8. *Re Request for Tariff Relief by Ballin Inc.* (9 March 2001) (CITT): "woven fabrics of rayon staple fibres other than viscose rayon staple fibres, containing less than 85 percent by weight of rayon staple fibres other than viscose rayon staple fibres, mixed mainly or solely with man-made polyester filaments, of yarns of different colours, measuring 125 decitex or more but not exceeding 280 decitex per single yarn, the staple fibres measuring not more than 3.0 decitex per single staple fibre, weighing 185 g/m² or more but not exceeding 230 g/m², of tariff item No. 5516.23.90; and woven fabrics of rayon staple fibres other than viscose rayon staple fibres, mixed mainly with polyester, of yarns of different colours, measuring 105 decitex or more but not exceeding 210 decitex per single yarn, the staple fibres measuring not more than 2.0 decitex per single staple fibre, weighing 190 g/m² or more but not exceeding 230 g/m², of tariff item No. 5516.93.90, for use in the manufacture of shorts and trousers".

Ballin stated that it had also found Doubletex's collection of fabrics unsuitable for its needs. Ballin indicated that the polyester/viscose rayon fabric offered by Doubletex is not substitutable for the subject fabrics and is more suitable for lower-end apparel items. It stated that it has purchased Doubletex's cotton/Tencel⁹ Dakota fabric for some of its men's trousers, but that this fabric is not substitutable for the subject fabrics.

With respect to anticipated benefits, Ballin stated that the duty rate is a significant factor in the cost of the textile inputs and that, therefore, tariff relief would enable it to sell products manufactured with the subject fabrics at competitive prices in the Canadian and U.S. markets. According to Ballin, this would help it maintain or increase its market share. Ballin also stated that high-quality apparel items command a higher price in the U.S. market. In this regard, Ballin indicated that trousers manufactured with the subject fabrics, which wholesale for approximately \$65 in Canada, would wholesale for approximately \$91 in the United States.

Ballin stated that tariff relief would enable it to increase its sales volume by approximately 45,000 units, which represents \$2.5 million in additional revenues. It stated that tariff relief would not result in any "cost" to the domestic textile industry because the fabrics offered for sale by domestic producers meet the needs of only a lower-end market niche. Ballin indicated that it would not receive any competitive advantage in the lower-end market niche at the expense of the domestic industry, should tariff relief be granted, because apparel made with the subject fabrics would not compete at this level.

Ballin also stated that tariff relief is necessary to overcome the effects of the modifications to the duty drawback program, which have put it at a competitive disadvantage relative to U.S. manufacturers. It also stated that tariff relief would be of significant benefit to the company, due to the historically high utilization rate of Canadian tariff preference levels (TPLs)¹⁰ in recent years for cotton and man-made fibre apparel. Ballin indicated that it cannot be assured that it will have the option to purchase extra TPLs in the future above and beyond its traditional allocation.

Peerless Clothing Inc. (Peerless)

Peerless, of Montréal, Quebec, has been manufacturing men's apparel since 1919. The company is privately owned and employs in excess of 2,000 people. Following the coming into force of the *Canada-United States Free Trade Agreement*,¹¹ Peerless established itself as an international manufacturing and marketing company with a significant presence in the U.S. market. In this respect, it has signed exclusive licence agreements to manufacture and market well-known brand names such as Chaps by Ralph Lauren, Ralph by Ralph Lauren and DKNY (Donna Karan New York).

Peerless supported Ballin's request for tariff relief because it intends to start a new program, next season, that would incorporate the subject fabrics in its trouser line. It indicated that stretch in a fabric is the

9. Tencel® is the trademark of Courtaulds for a high-performance, solvent-spun cellulosic fibre.

10. The *North American Free Trade Agreement*—32 I.L.M. 289 (entered into force 1 January 1994) [*NAFTA*] provides preferential tariff treatment for certain quantities of apparel despite their incorporation of non-North-American fabric (i.e. fabric not originating in *NAFTA* countries). This preferential tariff treatment takes the form of Canadian TPLs. TPLs permit the importation of a fixed quantity of certain apparel into Canada, the United States and Mexico at the *NAFTA* rate of duty. Goods entering a *NAFTA* country in quantities above the TPLs are subject to the higher MFN rate of duty. A new method of determining duty drawback called the "lesser-of concept" was introduced in *NAFTA*. Under this new scheme, the duty drawback, or refund, is equal to one of the following amounts, whichever is less:

(a) the duties paid on the goods imported into Canada; or
(b) the duties paid on the finished goods when exported to the United States.

11. Can. T.S. 1989 No. 3 (entered into force 1 January 1989).

latest in menswear fashion because it provides comfort and enables the trouser to retain its original shape after being worn.

Peerless stated that there are no identical or substitutable fabrics available in Canada. It indicated that tariff relief is required because the subject fabrics are needed to produce competitively priced garments that meet the needs of the market. Peerless stated that competition in the men's apparel industry is fierce and that the removal of the customs duty on the subject fabrics would allow it to stay competitive in the market and, possibly, increase its market share in domestic and foreign markets. It stated that any cost savings would be passed on to the consumer.

Peerless indicated that the market drives its business decisions. Peerless stated that, if the market demands garments that have the features created by the subject fabrics, it must produce such garments or face a decline in sales. It stated that it has certain cost and mark-up parameters that must be obtained to allow it to remain at its ultimate price point. Peerless also stated that, if it were unable to satisfy the market's demand for such apparel, this demand would be supplied by foreign importations of finished goods.

Peerless stated that, because of *NAFTA*, it no longer gets a drawback for the imported inputs that it uses for its apparel exported, under Canadian TPLs, to the United States and that, for that reason, the provisions seriously damage its export trade. According to Peerless, tariff relief would assist it in overcoming the elimination of duty drawback.

Riviera Inc. (Riviera)

Riviera, of Montréal, is a manufacturer and importer of quality men's apparel. Riviera supported Ballin's request for tariff relief and stated that, although it has not imported the subject fabrics, it has imported similar fabrics for which it has experienced similar problems with respect to domestic availability and customer requirements from the high-end sector of the market.

Concerning the domestic sourcing problem, Riviera stated that it is unaware of any textile fabrics similar to the subject fabrics in terms of look, touch and quality. Riviera submitted that it has worked with various domestic suppliers but that, from its experience, the woven fabrics available from these sources do not offer the same characteristics as fabrics from Europe and Japan.

Riviera stated that, in addition to their unique physical characteristics, the subject fabrics have a "silk touch" feel and drape that are demanded by high-end retailers such as Harry Rosen, Holt Renfrew, Saks Fifth Avenue and Nieman Marcus.

Tribal Sportswear Inc. (Tribal)

Tribal, of Montréal, is a manufacturer and importer of women's sportswear, such as pants, jackets, dresses, capris, shorts, sweaters, blouses and suits. It employs 120 people directly and estimates that it employs 500 people indirectly through a network of subcontractors located in Quebec and New Brunswick.

Tribal supported the request for tariff relief because importations of finished garments compete fiercely with domestic production. It stated that, in order to be competitive, it needs tariff relief because, in several instances, importations of finished goods have a favourable rate of duty or no duty. Tribal stated that the difficulty in sourcing stretch materials of the right quality at the right price, and on a just-in-time basis, supports the request for tariff relief.

Tribal indicated that it does not use fabrics identical to the subject fabrics but that, in general, it has not been able to find domestic stretch fabrics with the proper feel and weight, at competitive prices. Tribal stated that it does not compete with Ballin, as the two companies sell to different market segments.

Positions of the Textile Industry

Consoltex

Consoltex, of Ville Saint-Laurent, is a major producer of fabrics of man-made fibres and the largest producer of 100 percent nylon fabrics in Canada. The company is vertically integrated from the weaving to the dyeing, printing, coating and finishing of a fabric, and it employs some 1,000 people in its manufacturing facilities.

Consoltex stated that it produces stretch fabrics that are sold through its fashion and outerwear divisions for use in fashion, sportswear, active wear and street wear markets. Trousers, shorts, jackets and other articles of apparel, for both men and women, are made with these stretch fabrics.

Consoltex indicated that, in order to protect its business of stretch fabrics, both domestic and export, a more precise definition of the subject fabrics and a narrower end use provision specific to apparel markets (i.e. excluding garments made for the sportswear, active wear and street wear markets) should be established. In this regard, Consoltex proposed that, if tariff relief were granted, it should be provided on the basis of the following product description:

Woven fabrics, containing more than 50% of viscose rayon staple fibres mixed solely with polyester filaments, polyester staple fibres and elastomeric monofilament, constructed in the warp of 2-ply yarns of viscose rayon and polyester staple fibres and in the weft of polyester filaments and elastomeric monofilament, weighing more than 200 g/m², of subheading 5516.22 or 5516.23, for use in the manufacture of dressy and fine trousers, shorts and jackets.

Doubletex

Doubletex, of Montréal, is Canada's largest fabric-converting mill and employs over 350 people. It imports a wide range of greige fabrics from around the world for conversion at its three plants in Montréal, Toronto, Ontario, and Winnipeg, Manitoba. Doubletex produces a wide range of products, often customized to the specific needs of apparel and home furnishing customers across Canada and the United States. Its main business involves the use of greige fabrics made of nylon, polyester, polyester/rayon, polyester/viscose rayon, polyester/cotton and cotton. Doubletex indicated that an increasing part of its business is the conversion of more technical fabrics, including man-made and blended fabrics of high-twist yarns, stretch fabrics, etc. Doubletex stated that it is often asked to develop specialized fabrics or finishes for its customers.

Doubletex opposed the request for tariff relief on the basis that the description of the subject fabrics is too broad and could include all types of fabrics made of polyester/viscose rayon, whether or not they have been processed as described by Ballin's supplier. Doubletex stated that the presence of spandex in the blend does not, in and of itself, guarantee a minimum of stretch performance. Doubletex indicated that the subject fabrics have very little stretch and that Tencel®, in the absence of any spandex, has shown more stretch. Furthermore, it indicated that stretch polyester fabrics can be used to provide more elasticity than the subject fabrics, but they enter with duties and, therefore, are penalized.

Doubletex indicated that, for the last 12 months, it has been experimenting with various blends of polyester/viscose rayon stretch fabrics. It stated that, so far, its Tango fabric¹² is the only one that has worked. According to Doubletex, this fabric has a description of yarns and fibres similar to that of the subject fabrics. Doubletex stated that it is trying to achieve a hand similar to that of the subject fabrics and is

12. This fabric was sent to the CCRA for laboratory analysis.

working with Acordis¹³ and two offshore suppliers to this end. It also stated that it owns and currently operates the same equipment as Ballin's Spanish supplier.

Doubletex stated that its Dakota fabric (4-thread twill Lyocell/cotton fabric),¹⁴ which Ballin purchases for its expensive line of Lacoste products, is processed with the same equipment as the subject fabrics, i.e. dyed and tumbled in an AIRO machine. It indicated that it has all the required equipment, worth more than \$1 million, to process Lyocell and cuprammonium viscose rayon, which feel identical to the subject fabrics after finishing. Doubletex also indicated that, at this time, it has only chosen to use Lyocell, since it has been advised that it is impossible to tell the difference in hand, once the same construction is used.

Doubletex also indicated that the depreciation of the U.S. dollar is adversely affecting the profitability of its export sales. It submitted that some of its business could be at risk and that it would lose another possibility of producing unique fabrics in Canada, should tariff relief be granted.

Sunshine Mills Inc. (Sunshine)

Sunshine, of Toronto, has been producing greige fabrics of 100 percent cotton and polyester/cotton blends for over one year at its plant located in Tracadie-Sheila, New Brunswick. Initially, Sunshine opposed Ballin's request for tariff relief, but later withdrew its opposition. It stated that, although it has the capacity to manufacture the greige fabrics of subheading No. 5516.22 or 5516.23, the subject fabrics undergo a special fibrillation process, which it does not currently have the capability to use.

REPLY SUBMISSIONS

Ballin

In its reply submission of August 6, 2003, Ballin submitted that the fabrics filed by Consoltex and Doubletex are not identical to or substitutable for the subject fabrics in terms of composition, production process, look, hand and quality. It submitted that the composition and construction of the majority of Consoltex's fabrics are not similar to the subject fabrics and that some of them are too flimsy, light and weak to be suitable for the high-end uses for which the subject fabrics are destined. With respect to Consoltex's rayon/polyester/lycra fabric, Ballin submitted that it is composed of yarns that are too coarse. According to Ballin, the feel of this fabric reveals that Consoltex does not have the ability to carry out the unique fibrillation process performed on the subject fabrics. Ballin submitted that Doubletex's Dakota fabric is made of Lyocell/cotton and does not have the same hand as the subject fabrics. Ballin submitted that Doubletex's Tango fabric, which is made of viscose rayon, polyester and elastomeric monofilament, lacks the hand, finish, character and uniqueness that its customers in the high-end niche expect.

Ballin submitted that it has purchased fabrics from Consoltex (viscose rayon/polyester blends) and Doubletex (the Dakota fabric)¹⁵ for a lower-end market niche and that, therefore, these fabrics are not acceptable substitutes in the high-end market. It submitted that the price premium that it has paid in the past on the subject fabrics without tariff relief and the premium that it is willing to pay, even if tariff relief were granted, illustrate that the subject fabrics are without substitute in the Canadian market.

13. According to its Web site (www.acordis.com), Acordis is a multinational group of businesses, supplying customers throughout the world with man-made fibres and speciality materials for industrial, textile, medical and hygiene applications.

14. Lyocell, a subclass of rayon, is the generic classification for solvent-spun cellulosic fibre produced from renewable sources of wood pulp cellulose. Tencel® is the first commercially available fibre of the generic class Lyocell marketed by Courtaulds.

15. According to Ballin, because of quality problems, it no longer purchases this fabric.

Ballin reiterated that tariff relief would not cause economic loss to Canadian interests because no information was provided to the Tribunal of any commercial costs to be incurred by Canadian textile producers should tariff relief be granted. With respect to Consoltex's proposal to exclude fabrics used in garments made for the sportswear, active wear and street wear markets, Ballin submitted that, given the advantages of purchasing domestically (cheaper sourcing fees, shorter lead times, lower transportation and insurance costs, no customs issues, ease of quality control, etc.), it failed to understand why purchasers of Consoltex's sportswear, active wear or street wear fabrics would suddenly source such fabrics offshore because of the implementation of a duty free tariff item.

On October 30, 2003, in response to the Tribunal's request for comments on potential revisions to the product description, Ballin advised the Tribunal that it did not take issue with a minimum weight parameter and a minimum value-for-duty parameter. However, Ballin proposed that the weight parameter be reduced from 200 g/m² to 180 g/m² in order to accommodate some of its spring fabrics for men's pants and that the minimum value for duty be established at no more than \$6.50/m², given the average selling prices of the allegedly substitutable fabrics and the fact that these fabrics do not have the same technical characteristics as the subject fabrics.

Consoltex

On October 28, 2003, Consoltex advised the Tribunal that it did not object to the potential alternative product description contained in the Tribunal's letter of October 23, 2003.

OTHER INFORMATION

DFAIT informed the Tribunal that Canada currently maintains quota restraints on woven fabrics of polyester filament (category 35.0), including woven fabrics mixed mainly or solely with polyester filament, imported from the Republic of Korea, Poland and Chinese Taipei. Accordingly, this coverage includes part of the subject fabrics of subheading Nos. 5516.22 and 5516.23. However, Canada does not maintain quota restraints on woven fabrics of viscose rayon staple fibres, mixed mainly or solely with polyester staple fibres classified in subheading Nos. 5516.22 and 5516.23. Therefore, this material is not subject to any quantitative import restrictions.

In addition, DFAIT indicated that it would consider requests for ex-quota entry on textile inputs where a recommendation has been made by the Tribunal to remove customs duties on the basis of non-availability of domestic supply. Ex-quota treatment will only be granted in cases where it can be demonstrated that there is an extra charge for using products under quota or where goods are not otherwise available in Canada.

No information was received from Industry Canada. The CCRA indicated that there would be no additional costs, over and above those normally incurred by it, to administer the tariff relief should it be granted.

ANALYSIS

The Minister's terms of reference direct the Tribunal to assess the economic impact on domestic textile and downstream producers of reducing or removing a tariff and, in so doing, to take into account all relevant factors, including the substitutability of an imported fabric for a domestic fabric and the ability of domestic producers to serve the Canadian downstream industries. Consequently, the Tribunal's decision on whether to recommend tariff relief is based on the extent to which it considers that such tariff relief would provide net economic gains for Canada.

Ballin and Peerless claimed that there are no identical or substitutable fabrics available from Canadian textile producers. Riviera stated that it is unaware of any fabrics in Canada similar to the subject fabrics in terms of look, touch and quality. Tribal indicated that it has not been able to find domestic stretch

fabrics with the proper feel and weight, at competitive prices. Consoltex contested the foregoing, arguing that it produces and sells stretch fabrics for use in the fashion, sportswear, active wear and street wear markets. In this regard, Consoltex suggested that the description of the subject fabrics should be narrowed in order to protect this business. Doubletex submitted that, should tariff relief be granted, it would lose another possibility of producing unique fabrics in Canada.

In determining whether Consoltex and Doubletex produce identical or substitutable fabrics, the Tribunal examined the fabric samples provided by these companies and by Ballin. In its examination, it was guided by factors such as the technical description as determined by the CCRA laboratory, quality, market acceptance, price and ability to supply the market.

Based on its own examination of the subject fabrics, the Tribunal agrees with Ballin that these fabrics have a hand and finish (that Ballin describes as “peach skin”) that are not readily apparent in the sample fabrics provided by Consoltex and Doubletex. Although some of Consoltex’s fabrics, i.e. the rayon/polyester/lycra blends, have a technical description similar to that of the subject fabrics, it is evident that they have not undergone the finishing processes similar to those performed on the subject fabrics. Neither Doubletex nor Consoltex uses the unique fibrillation process that produces the hand and finish particular to the subject fabrics. As for Consoltex’s other sample fabrics, the Tribunal notes that they are composed of nylon, nylon blends or 100 percent polyester. Therefore, these fabrics do not conform to the definition of the subject fabrics. The same can be said for Doubletex’s Dakota fabric, a Lyocell/cotton blend. In the past, the Tribunal has stated that, in order for fabrics to be considered fully substitutable, the technical composition and description must generally be in the same category. With respect to its Tango fabric, Doubletex readily admitted that this fabric does not yet have the same hand as the subject fabrics, which leads the Tribunal to believe that it is not appropriate for Ballin’s high-end market niche.

The Tribunal notes that Ballin purchases certain viscose rayon/polyester fabrics from Consoltex for women’s apparel that, compared to apparel made of the subject fabrics, is targeted at a lower-end market niche. During a seven-year period, it also purchased Doubletex’s Dakota fabric for some of its men’s trousers, but recently ceased to do so because of quality issues. As noted above, Ballin indicated that apparel made with the subject fabrics is intended for sale to high-end retailers. In this regard, Riviera stated that, in addition to having unique physical characteristics, the subject fabrics have a “silk touch” feel and drape that are demanded by high-end retailers such as Harry Rosen, Holt Renfrew, Saks Fifth Avenue and Nieman Marcus. The Tribunal also notes that Ballin is willing to pay a significant premium for the subject fabrics, even with duties, in order to cater to this market.¹⁶ This reinforces the Tribunal’s view that the fabric samples provided by Consoltex and Doubletex are not substitutable for the subject fabrics.

In a number of cases, the Tribunal has held that it is the responsibility of the domestic producers to provide evidence, not just assertions or allegations, of their ability to produce identical or substitutable fabrics. In the present case, the Tribunal finds that Consoltex has not demonstrated that it is, or will become, active in supplying identical or substitutable fabrics to the high-end market targeted by Ballin. Although Doubletex stated that it has invested over \$1 million in equipment to produce an identical fabric, the Tribunal is not convinced that the allegedly identical or substitutable fabric currently under development will be available to the marketplace in commercial quantities in the near future. In the Tribunal’s view, Doubletex failed to provide convincing evidence to support a conclusion of imminent production or of potential to supply a fabric according to Ballin’s requirements, in adequate commercial quantities.

However, the Tribunal is of the view that both Consoltex and Doubletex raised valid concerns in regards to a recommendation of tariff relief as originally requested by Ballin. As stated earlier, Consoltex submitted that, in order to protect its business of stretch fabrics, both domestic and export, the description of the subject fabrics should be more precise in terms of (1) the percentage content of viscose rayon (i.e. more than 50 percent); (2) a weight parameter of more than 200 g/m²; and (3) a narrowing of the end use to dressy

16. Tribunal Exhibit TR-2002-010-19 (protected), Administrative Record, Vol. 2 at 26.

and fine trousers, shorts and jackets. For its part, Doubletex stated that the description of the subject fabrics is too broad and that some of its business could be at risk.

After reviewing the evidence on file, the Tribunal sought comments on the following potential alternative product description, with a view to granting some tariff relief while addressing the concerns of textile producers:

Woven fabrics of viscose rayon staple fibres mixed mainly or solely with polyester filaments, polyester staple fibres and elastomeric monofilaments, dyed or of yarns of different colours, of a weight of 200 g/m² or more, with a value for duty of \$10/m² or more, indexed annually to compensate for inflation, of subheading No. 5516.22 or 5516.23, for use in the manufacture of trousers, shorts and jackets.

The weight and value-for-duty parameters in this potential description were set at levels that accommodated the samples of the subject fabrics provided by Ballin, with a reasonable margin for fabric variation.

Consoltex agreed to this potential product description, whereas Doubletex did not provide any comments. Ballin proposed that the weight parameter be reduced from 200 g/m² to 180 g/m² in order to accommodate some of its spring fabrics and that the minimum value for duty be established at no more than \$6.50/m², primarily because of the average selling prices of the allegedly substitutable fabrics. However, the Tribunal is of the view that tariff relief should be provided on the basis of the foregoing description, in order to provide some measure of protection against apparel manufacturers' obtaining lower-priced fabrics offshore that may become available from Canadian textile producers in the future. In addition, in the Tribunal's view, Ballin's proposed change to the weight parameter would involve a significant change in the coverage of the tariff relief requested by Ballin.

As discussed above, the Tribunal is of the view that there are no domestic fabrics identical to or substitutable for the subject fabrics. Therefore, other than the corresponding duty revenues forgone by the government, the Tribunal does not believe that, with a specified floor price of \$10/m² and a minimum weight parameter of 200 g/m², there will be any direct commercial costs associated with the removal of the customs duty on the importation of the subject fabrics. On the basis of the information provided to the Tribunal, tariff relief would provide yearly benefits of over \$300,000 to users of the subject fabrics. This would provide benefits to users of the subject fabrics in the form of reduced costs, which could translate into an improvement of their competitive position in the Canadian and U.S. markets as well as benefits to the consumer in terms of lower prices. In summary, the Tribunal finds that the tariff relief requested by Ballin would provide net economic gains to Canada.

With respect to Ballin's request that tariff relief be retroactive to the date of the Tribunal's notice of commencement of investigation, the Tribunal has stated in previous cases that it would not consider recommending such relief other than in exceptional circumstances. Ballin's evidence does not justify such a request. Therefore, the Tribunal is not persuaded that the current circumstances are so exceptional¹⁷ as to warrant a recommendation for retroactive tariff relief.

17. See, for example, *Re Request for Tariff Relief by Tribal Sportswear Inc.* (20 October 2003), TR-2002-008 at 8 (CITT); *Re Request for Tariff Relief by Doubletex* (3 July 2002), TR-2000-006 at 8 (CITT); *Re Request for Tariff Relief by Ballin Inc.* (9 March 2001), TR-2000-004 at 6 (CITT); *Re Request for Tariff Relief by Tantalum Mining Corporation of Canada Limited* (21 March 2001), TR-2000-003 at 4 (CITT); *Re Request for Tariff Relief by Majestic Industries (Canada) Ltd.* (12 January 2001), TR-2000-002 at 4 (CITT).

RECOMMENDATION

In light of the foregoing, the Tribunal hereby recommends to the Minister that tariff relief be granted, for an indeterminate period of time, on importations, from all countries, of woven fabrics of viscose rayon staple fibres mixed mainly or solely with polyester filaments, polyester staple fibres and elastomeric monofilaments, dyed or of yarns of different colours, of a weight of 200 g/m² or more, with a value for duty of \$10/m² or more, indexed annually to compensate for inflation, of subheading No. 5516.22 or 5516.23, for use in the manufacture of trousers, shorts and jackets.

James A. Ogilvy
James A. Ogilvy
Presiding Member

Ellen Fry
Ellen Fry
Member

Meriel V.M. Bradford
Meriel V.M. Bradford
Member