
Textiles Monitoring Body

REPORT OF THE SIXTY-FIRST MEETING

1. The Textiles Monitoring Body held its sixty-first meeting on 13 and 14 December 1999.
2. Present at this meeting were the following members and/or alternates: Messrs. Ahn/Chung; Grané; Hastjarjo; Kobayashi; Kumar; Radu; Richards; Tagliani; Wentzel/Moroz.
3. The TMB adopted the report of its sixtieth meeting (G/TMB/R/59).

Notification under Article 8.10 of the Agreement on Textiles and Clothing

Argentina/Brazil: imports of products of categories 218, 219/220, 224, 313/317 and 613/617/627

4. On 29 November 1999, the TMB received a communication from Argentina under Article 8.10, following the examination by the TMB, on 18 to 22 October 1999, of the provisional safeguard measure consisting of five quotas, introduced by Argentina on imports from Brazil of woven fabrics of cotton and cotton mixtures of products of categories 218 (woven cotton and cotton mixtures fabrics of yarns of different colours), 219/220 (duck/special-weave cotton and cotton mixtures fabrics), 224 (pile tufted cotton and cotton mixtures fabrics), 313/317 (sheeting/twill cotton and cotton mixtures fabric) and 613/617/627 (sheeting fabrics/twill and satin/staple-filament fibre combinations of cotton and cotton mixtures). The measure had been introduced with effect from 31 July 1999 and for a duration of three years.

5. In this communication, Argentina conveyed its inability to conform with the recommendations the TMB had made¹ that the safeguard measures introduced by Argentina on imports from Brazil of products of categories 218, 219/220, 224, 313/317 and 613/617/627 should be rescinded. Argentina considered that it was not in a position to accept fully the TMB recommendations and considered it impossible to rescind the safeguard measures for the following reasons:

- Argentina considered that it had complied with the provisions of Article 6 of the ATC and that the elements demonstrating the existence of serious damage caused by an increase in imports were contained in the presentation made at the time Argentina had requested consultation with Brazil;
- the analysis made by the TMB of the grounds put forward by Argentina to justify the application of a transitional safeguard measure did not satisfy the provisions of Article 8.5 of the ATC concerning the need to give the matter thorough consideration. According to Argentina, the TMB's analysis could be summarized to mean that the TMB rejected the measure on the basis of "non-fulfilment of the requirements laid down in Article 6, but without disputing the essence of the problem facing [the relevant] industry in Argentina as a result of the increase in imports of like and directly competitive products from [...] Brazil and Pakistan";

¹ For the TMB's review of the transitional safeguard measures, pursuant to Article 6.11, see G/TMB/R/58, paragraphs 4 to 45.

- the TMB, *inter alia*, by suggesting that statistical information should have been made available by Argentina in order to compare the data provided for the most recent period available (i.e. May 1998-April 1999) to a similar preceding period, appeared to impose a standard of requirement far beyond what was prescribed in Article 6 of the ATC;
- the TMB's recommendation seemed to entail an increase of the Member's obligations under the ATC, as it inferred that an absolute increase in imports had to occur during the period referred to in Article 6.8 in order to be in a position to apply a safeguard measure pursuant to Article 6. As a consequence, the TMB had concluded that there was no increase in imports and had not, consequently, undertaken a determination of the attribution of damage as caused by specific Members, or an analysis of the causal relationship between increased quantities in total imports of the products of categories 218, 219/220, 224, 313/317 and 613/617/627 and the serious damage or actual threat thereof caused to the domestic industry producing like and/or directly competitive products. According to Argentina, the period specified in Article 6.8 was defined solely for the purposes of calculating the quantitative restriction should the Member conclude that it was necessary to apply a transitional safeguard measure;
- in addition, in categories 313/317 and 613/617/627 where its analysis had been a little more extensive, the TMB had preferred to attribute the damage caused to the domestic industry to factors other than imports without giving Argentina the opportunity to challenge this line of argument;
- Argentina's recourse to the provisions of Article 6.11, which demand the existence of "highly unusual and critical circumstances, where delay would cause damage which would be difficult to repair" had been questioned by the TMB. Argentina believed that such a recourse had been justified by the circumstances, as it had been substantiated by the information Argentina had provided.

6. The TMB invited both Argentina and Brazil, pursuant to Article 8.7, to participate in the review of this matter.

7. The representative of Argentina stated, *inter alia*, the following reasons why Argentina considered it impossible to rescind the measures:

- Argentina was of the view that the TMB had based its analysis of the safeguard measures on an interpretation of Article 6.2 that imposed standards of requirements much higher than those of the ATC. In the view of Argentina, the increase in imports set out in Article 6.2 did not have to be based on the level of imports during the period set out in Article 6.8 as compared to the imports in a corresponding previous period. Moreover, such imports could not be considered without taking into account the magnitude of the increase over the period considered, and also in relation to the factors enumerated in Article 6.3. Argentina also noted that, in the past, the TMB had not always used such strict criteria in its consideration of safeguard measures;
- with respect to categories 313/317 and 613/617/627, the analysis of the TMB had also taken into account, *inter alia*, the effects of a general economic recession taking place in Argentina. In the view of Argentina, such a recession affected both domestic production and imports, and was not a factor to be considered. The duty to show that the damage to the domestic industry was not caused by, among other factors, the effects of an economic recession was an almost impossible task that the TMB seemed to impose on Argentina;
- with respect to category 613/617/627, the TMB recognised the existence of increased imports and of a situation of serious damage experienced by the branch of the

industry. The TMB had come to the preliminary conclusion that the cause of the damage "could arise from multiple reasons having a mutually reinforcing effect", without taking a definitive view on this matter. In the view of Argentina, this did not constitute a "thorough ... consideration of the matter", as required by Article 8.5;

- also, with respect to the attribution of the damage to imports from Brazil, Argentina had taken into account the existence of a "sharp and substantial increase in imports ... from such a Member or Members individually", as well as other factors such as "the level of imports as compared with imports from other sources, market share, and import and domestic prices at a comparable stage of commercial transaction". In any event, it had been assumed, in accordance with Article 6.4, that "none of these factors, either alone or combined with other factors, can necessarily give decisive guidance";
- finally, with respect to the existence of "highly unusual and critical circumstances" as referred to in Article 6.11, Argentina believed that account had to be taken of the prudent attitude it had adopted, as could be seen by the high level of market penetration reached by imports at the time the measures had been introduced. The fact that such a level had been reached at a time when the sector experienced a worldwide price deflation enabled Argentina to characterise the situation experienced as "highly unusual and critical circumstances, where delay would cause damage which would be difficult to repair".

8. The representative of Brazil stated, *inter alia*, that:

- the contention made by Argentina that the TMB had not, in accordance with Article 8.5, made a "thorough and prompt consideration of the matter" before making its recommendations completely bypassed the logical structure of Article 6. That Article, in essence, contained in its paragraphs 2, 3 and 4 four basic conditions which followed a logical sequence and which each had to be met in order to allow for the introduction of safeguard measures. In its review, the TMB had correctly followed this logical sequence in considering the safeguards applied by Argentina on imports of the five categories originating in Brazil, ceasing its consideration of each specific case at the appropriate point in the sequence. Under the principle of judicial economy, the lack of compliance with any of these basic conditions was enough to allow the TMB to make its conclusions without going through the entire process;
- the procedures followed by the TMB were not only fully consistent with the letter and spirit of Article 6 but also with the procedures followed by the TMB over the first five years of its work, and did not represent an interpretation of the ATC with higher standards of requirement than those of the ATC;
- Brazil disagreed with the statement made by Argentina that it had been denied the opportunity to present its view in full during the examination made by the TMB under Article 6.11;
- with respect to the period when the increase in imports had to be taking place, Brazil was of the view that Article 6.2 clearly established that the level of imports to be considered was the level referred to in Articles 6.7 and 6.8, not that of the two previous years;
- the interpretation by Argentina according to which the level of imports should not be seen in absolute terms but in relation to the economic variables outlined in Article 6.3 would allow the introduction of safeguards in a situation of declining imports, a situation envisaged in the MFA, not in the ATC. Article 6.2 was very clear in this respect;

- Article 6 provided for safeguard only if damage to the domestic industry was attributable to an increasing level of imports. Imports should not bear the cost of adjustment to a recession that was affecting the entire economy;
- Brazil believed that the consideration given by the TMB on 18-22 October 1999 to the safeguard measures introduced by Argentina had been thorough and consistent with both the provisions of Article 6 and with past TMB practice. The arguments put forward by Argentina raised concerns since they would significantly undermine the letter and the spirit of the ATC, as well as the very core of the Agreement's purpose, which was to "... facilitate the integration of the textiles and clothing sector into GATT 1994" (Article 1.5). Brazil was furthermore concerned with the fact that Argentina's interpretation and application of certain provisions of the ATC had permitted the maintenance in effect of transitional safeguards under the highly unusual and critical circumstances clause of Article 6.11 for over four months, despite the recommendations made by the TMB. Brazil, therefore, requested that the TMB confirm these recommendations.

9. In starting its examination of the matter referred to it, the TMB noted that the communication of Argentina providing the reasons for its inability to conform with the recommendations of the TMB had been submitted pursuant to Article 8.10. The TMB recalled that, in accordance with Article 8.10, it was required to give thorough consideration to the reasons given by the Member which considered itself unable to conform with the TMB's recommendation and issue any further recommendations it considered appropriate forthwith.

10. The TMB noted that according to Argentina, "the TMB's interpretation is based on the requirement laid down in Article 6.2 concerning the existence of an absolute increase in imports and the fact that such an increase must be observed in a recent period (paragraphs 7 and 8 of Article 6)". In the view of Argentina, the period specified in Article 6.8 was not defined for the purposes of analysing the increase in imports referred to in the first part of Article 6.2, but solely for the purposes of calculating the quantitative restriction should the Member conclude that it was necessary to apply a transitional safeguard measure. Therefore, also in line with Article 6.8, the most recent period did not necessarily have to be fixed in comparison with the corresponding previous period, as was compulsory for the information for the analysis thereof required under the Agreement. Second, the increase in imports cannot be considered without taking account of the magnitude and trend of the variation in the whole period under analysis. Third, the increase in imports may not be considered solely in an absolute form, but also in relation to the parameters for determining the damage set out in Article 6.3. Furthermore, "[t]he TMB has also inferred that, in view of the foregoing, it should not continue the analysis provided for in Article 6.2 and more specifically in paragraph 3 [of Article 6] concerning the existence of serious damage and the factors reflected in the set of economic variables described in the above-mentioned Article 6.3".

11. The TMB observed that in its examination of the safeguard measures it had noted that whilst imports of products of categories 218, 219/220, 224 and 313/317 taken individually had increased from 1995 to 1997 (from 1995 to 1996 for category 219/220), such imports had decreased in the subsequent corresponding period(s), i.e. in the period closest to the time at which Argentina had decided to introduce the safeguard measures provisionally and requested consultations with Brazil. The TMB recalled in this regard that Article 6.2 of the ATC states that "[s]afeguard action may be taken under this Article when, on the basis of a determination by a Member, it is demonstrated that a particular product is being imported into its territory in such increased quantities as to cause serious damage, or actual threat thereof, to the domestic industry producing like and/or directly competitive products" (emphasis added). It followed from this language that this condition had to be met at the time which was close to the one when a Member was requesting consultations pursuant to Article 6.7 with a view to introducing a safeguard action (or when it decided to take the safeguard measures provisionally pursuant to Article 6.11). This appeared not to be the case for categories 218, 219/220, 224 and 313/317. In emphasising, in its report (G/TMB/R/58), that a determination of serious damage in the sense of Article 6 could not be based on developments that had affected the domestic industry

years before the actual determination was being made, the TMB had stated that in examining such a determination, "... decisive guidance had to be provided by the developments which had occurred in the most recent period". In support of this statement, the TMB had referred to several provisions of Article 6 as well as to the object and nature of the ATC itself. The TMB continued to be of the view that the position taken by it, reflected in paragraph 14 of G/TMB/R/58, had been the correct one, as supported by the relevant provisions of the ATC. The first basic precondition for applying a transitional safeguard measure as defined in Article 6.2 implied, in the view of the TMB, that imports (that may have started to increase in the past) should have increased in the period which is close to the time when the safeguard measure is being provisionally imposed or the request for consultations is being made. This also means that an absolute increase in imports is a necessary condition to be met. As to whether such an increase has to be observed in the period referred to in Articles 6.7 and 6.8, the TMB was of the view that it had not taken such a firm position as claimed by Argentina. In establishing whether imports had increased, or not, in a recent period, the TMB had essentially relied on data relating to the calendar year 1998, which was different from the time-period defined in Articles 6.7 and 6.8. The TMB observed, however, that the best practical way to ascertain that the products were being imported in increased quantities was to observe whether imports had increased during the period referred to in Article 6.8. To sum up, following its finding that total imports had not increased in the recent period, the TMB could only conclude that these particular products were not being imported into Argentina in increased quantities close to the time when Argentina had requested consultations and introduced safeguard measures pursuant to Article 6.11. It had, therefore, not been demonstrated that products of those categories were being imported into Argentina in such increased quantities as to cause serious damage to the domestic industry producing like and/or directly competitive products. In light of the explanations above the TMB could not agree with Argentina that the standards applied by it entailed an increase of Argentina's obligations under the ATC. In addition, these standards corresponded to the ones adopted by the TMB in its previous examinations of measures referred to it under Article 6.

12. As to the trend over a longer time-period, the TMB did not disagree with Argentina that the ATC does not define the length of the period of investigation to be taken into account. This had been recognized by the TMB during the examination of the measures pursuant to Article 6.11, when it had stated that "... providing data for a relatively longer time-period ... could be useful for having a better understanding of the trends characterising developments that occurred to the domestic industry. Such an approach was particularly helpful in identifying whether certain developments had reflected lasting phenomena or rather had been of a temporary nature" (G/TMB/R/58, paragraph 14). Therefore, looking at the trends over a longer time-period was considered to be useful, provided that the basic condition (i.e. that the particular product was being imported in such increased quantities in the recent period) had been met.

13. Regarding the need to consider the increase in imports not only in absolute terms, but "also in relation to the parameters for determining the damage mentioned in Article 6.3", as claimed by Argentina, the TMB observed that the conditions defined in Article 6.2 did not allow for the application of transitional safeguard measures in cases where imports were declining, even though their share in the apparent market were increasing.

14. As to whether the TMB was required, or not, to continue the analysis provided for in Article 6.3 when it had established that imports had not been increasing in the recent period, the TMB noted that a determination of serious damage caused by increased quantities of imports was a staged process comprised of the following parts:

- verification of whether the product in question was being imported in increased quantities;
- determination of serious damage caused to the domestic industry;
- establishment of the causal link between the increased quantities of imports and the serious damage.

If any of the three conditions above had not been met, the safeguard measures could not be found to be justified in accordance with the provisions of Article 6 and, in such a case, the TMB, therefore, was not required to make findings and conclusions on all the three parts. This was in accordance with the practice established by the TMB.

15. Notwithstanding the above, the TMB had gone beyond a "mere verification that during the most recent period there was an increase or reduction in imported quantities", as stated by Argentina, in its examination of several categories. In the case of categories 218 and 224 the TMB had observed, *inter alia*, the parallel evolution of imports and output. With respect to category 313/317, the TMB had briefly gone through the variables set out in Article 6.3, against a background where the imports of the products of category 313/317 had decreased in 1998 as compared to 1997, the period for which directly comparable data were available, closest to that when Argentina had decided to introduce a safeguard measure on imports of the products of category 313/317 from Brazil. The TMB had stated that overall, in its view, "though some variables, in particular output, domestic sales, inventories and domestic prices, reflected unfavourable developments and could point to a direction of an industry being seriously damaged, others seemed to indicate the possibility of the existence of structural problems or of the impact of a recession". The TMB had concluded, in view of these considerations, and in particular against the background of decreasing imports, that "it had not been demonstrated that products of category 313/317 were being imported into Argentina at the time Argentina had decided to introduce a safeguard measure pursuant to Article 6.11 in such increased quantities as to cause serious damage to the domestic industry producing like and/or directly competitive products".

16. As regards category 613/617/627, after having observed that "there was an increase in the quantity of total imports during the period for which comparable data had been provided and this trend had been continuous since 1995", the TMB had examined in details the economic variables set out in Article 6.3 and, on that basis, "recognized that the industry producing products of category 613/617/627 had been affected by unfavourable developments, and that the difficulties experienced did not seem to be over". In reflecting on the possible explanation of the causes of the problems identified as affecting the domestic producers of products of category 613/617/627, the TMB had reached the preliminary conclusion that such difficulties could arise from multiple reasons having a mutually reinforcing effect, as described in paragraphs 36 to 39 of G/TMB/R/58. Concerns had been expressed about the lack of possible evidence and information at the Body's disposal that would enable it to reach a definitive conclusion on whether imports were the primary reason for the industry's difficulties. The TMB did not make a final determination as to whether increased imports of products of category 613/617/627 had caused serious damage to the domestic industry producing like and/or directly competitive products. Notwithstanding that fact, keeping also in mind that the transitional safeguard measure had been implemented as from 31 July 1999 and that the TMB had to make appropriate recommendations to the Members concerned, the Body, whilst not formally examining the attribution of the serious damage to imports from Brazil made by Argentina pursuant to Article 6.4, had noted that imports by Argentina of products of category 613/617/627 originating in Brazil had not increased "sharply and substantially" during the period referred to in Article 6.8 (on the contrary, imports from Brazil had actually decreased by 20.8 per cent in 1998 compared to 1997, and this declining trend seemed to continue during the period January-April 1999). On that basis the TMB had recommended that Argentina rescind the safeguard measure introduced against imports of products of this category originating in Brazil.

17. Argentina referred to the statement the TMB had made in its Preliminary Observations² according to which although Argentina had provided data for the period referred to in Article 6.8, it had been impossible to compare the information with the corresponding previous period (in this case, May 1997 – April 1998) since this information had not been provided. Argentina argued that "even though this does not follow the letter of the Agreement, for each category or group of categories information is attached in the Annex which enables this insubstantial omission from the original presentation to be overcome". The TMB observed that it had explained in detail, in paragraph 13 of

² See G/TMB/R/58, paragraph 13.

G/TMB/R/58, why it considered that reliable indications could not be obtained but by comparing data for identical time-periods.

18. The TMB noted that, in the view of Argentina, for categories 313/317 and 613/617/627 where its examination had been more extensive, the TMB "adds elements into its analysis which refer to a general economic recession in the Argentine economy". In particular, with respect to the latter category, the TMB, while stating that a number of data presented by Argentina pointed to the direction of serious damage caused by increased quantities in imports, resorted to using "arguments to attribute the serious damage to multiple factors, neither proven nor analysed in depth, such as concepts of recession and international crisis". In so doing, according to Argentina, the TMB had not given Argentina the opportunity to challenge this line of argument. Argentina held the view that in case of a recession, apparent consumption continued to be the same for both domestic and imported goods and there was no a priori reason why the negative impact of the economic cycle should affect the domestic market exclusively or primarily. Therefore, in each period the actual apparent market had to be taken into account in order to calculate the impact of imports on it.

19. The TMB observed that in the detailed factual information provided by Argentina pursuant to Article 6.7, references were made to the existence of an economic depression. Also, in its communication made under Article 8.10 Argentina itself stated that "the current convergence of marked penetration of imports in comparison with the apparent market and recession, combined with global deflation of sectoral prices [...impeded] the access of [Argentina's] exports to the rest of the world". Thus, Argentina also recognized that concepts such as recession (affecting also the economic performance of the Argentine industry) and marked penetration of imports did co-exist and were elements to be considered.

20. The TMB recalled that in its detailed examination of category 613/617/627 it had stated, in essence, that the difficulties facing the Argentinian industry "could arise from multiple reasons having a mutually reinforcing effect", these possible reasons being:

- (a) a potential serious damage caused by increased quantities of imports;
- (b) difficulties of a structural nature;
- (c) possible business decisions taken by the integrated industry, such as shifting the production to other lines, reduced demand of further processed products, for which the products of category 613/617/627 were an input;
- (d) a general contraction of the economy resulting from a recession.

21. In light of the above, the TMB noted that a general contraction of the economy had been identified by the TMB as only one of the possible elements that could have affected the domestic industry. The TMB also observed that in its communication, made pursuant to Article 8.10, Argentina had not provided arguments that would have refuted the possible role and effect of difficulties of a structural nature and of possible business decisions. Noting that Argentina recognized that the due process had been observed during the TMB's examination of the matter pursuant to Article 6.11, the TMB expressed the view that, under Article 6, it was for the Member introducing a provisional safeguard measure to demonstrate that the serious damage claimed had been caused by increased quantities in total imports. In the view of the TMB, this statement also answered the contention of Argentina that it had not been given the opportunity to challenge certain lines of arguments adopted by the TMB.

22. The TMB noted the statement of Argentina that it had adopted a prudent position, and that developments in total imports "would have fully justified taking action earlier according to [Article 6]". The TMB understood that this statement was meant to justify the recourse to the provisions of Article 6.11 which requires the existence of "highly unusual and critical circumstances, where delay would cause damage which would be difficult to repair". The TMB observed that

Argentina's contention that the changes in the economic variables had taken place over several years was difficult to reconcile with the provisions requiring "highly unusual and critical circumstances". In this connection, the TMB continued to be of the view that in cases where the provision of Article 6.11 were to be invoked, the expectation was that the elements envisaged in Articles 6.2, 6.3 and 6.4 would indicate as unambiguously as possible the highly unusual and critical nature of the circumstances. The TMB was of the view that unless such circumstances were met, any action taken under Article 6 should be preceded by consultations between the parties.

23. Argentina stated that it considered that it had complied with the provisions of Article 6 of the ATC and that the elements demonstrating the existence of serious damage caused by an increase in imports were contained in the information submitted in August 1999. In particular, Argentina noted that it had taken recourse to Article 6 action "as sparingly as possible", and that it had also taken into account "the interests of exporting Members" as referred to in Article 6.6. The TMB stated that in its examination of the measures, as contained in G/TMB/R/58, it had not challenged the compliance by Argentina with the provisions of Articles 6.1 and 6.6, nor with the procedural requirements of Article 6, but had examined the determination made by Argentina as to whether particular products were being imported into its territory in such increased quantities as to cause serious damage to its domestic industry producing like and/or directly competitive products.

24. The TMB noted the statement of Argentina that it considered that the analysis made by the TMB of the grounds put forward by Argentina to justify the application of a transitional safeguard measure did not satisfy the provisions of Article 8.5 of the ATC concerning the need to give the matter thorough consideration. The TMB observed in this respect that Argentina had notified the safeguard measures under Article 6.11. The TMB also observed that Article 8.5 referred to situations where there was an "absence of any mutually agreed solution in the bilateral consultations provided for in this Agreement". Such situations were of a more general nature than those specifically envisaged in Article 6.11 where, in cases when the consultations envisaged in that same Article did not produce agreement, the TMB shall "promptly conduct an examination of the matter, and make appropriate recommendations to the Members concerned within 30 days". The TMB was of the view, however, that in its prompt examination of the matter it had given thorough consideration to it, as witnessed, *inter alia*, by the time it took to conduct and to conclude the examination and by the detailed elements contained in the Body's report of that examination. Moreover, Argentina seemed to attribute the perceived lack of thorough examination to the TMB's decision not to continue the detailed analysis pursuant to Article 6.3 in those categories where it had found that imports had not been increasing. In this regard the TMB referred to the observations made in paragraph 14 above.

25. Having given thorough consideration to the reasons presented by Argentina for its inability to conform to the TMB's recommendation, the TMB concluded that these reasons did not lead it to change the conclusions and recommendations arrived at by it during its examination of the measures pursuant to Article 6.11. The TMB recommended, therefore, that Argentina reconsider its position and that the transitional safeguard measures introduced provisionally by Argentina on the imports from Brazil of products of categories 218, 219/220, 224, 313/317 and 613/617/627 be rescinded forthwith.

Communications received by the TMB

United States/Turkey: Introduction of a New Restriction

26. At its 55th meeting (19 May 1999) the TMB had a discussion in relation to the points raised in a statement made on behalf of a number of WTO Members at the Informal Intersessional Meeting of the General Council on 26 October 1998. The TMB recalled that in the view of those Members "concerns ... remain[ed] in respect of measures adopted by an importing Member that [were] not formally notified to the TMB, although these [were] published under the importing Member's domestic procedures and [were], thus, widely known". In the TMB's discussion, it was identified that this observation referred to the introduction by the United States of a new restriction on Turkey's

exports of certain textile products, as part of a broader understanding reached between the two Members. The TMB decided to seek clarification from both Turkey and the United States as to whether or not this measure was being applied pursuant to the Agreement on Textiles and Clothing and, if this was the case, under which provision of the ATC this restriction had been introduced.³

27. Following interim replies received from the United States in July and September 1999⁴, the latter indicating that the measure concerned Turkey's exports of cotton and man-made fibre underwear (US category 352/652), in a joint communication received on 29 September 1999, Turkey and the United States stated, *inter alia*, that "this measure [affecting Turkey's exports of products of US category 352/652], which was part of a broader agreement contributing to the objective of further liberalizing trade, was mutually agreed between our [two] governments, was consistent with our rights under the ATC, and was taken pursuant to a provision of the ATC which does not require notification to the TMB". The TMB decided to seek further information from Turkey and the United States on the measure itself, as well as on the particular provision of the ATC under which the measure had been agreed. The TMB also decided, pursuant to Article 8.1, to examine the measure in question at a further meeting and agreed to proceed with this examination as soon as possible.⁵

28. As of 13 December 1999 no further information had been received from Turkey and/or from the United States. Against this background, and also since there was no indication that a further communication from the two Members would be forthcoming, the TMB had to examine the measure in question, pursuant to Article 8.1, on the basis of the limited information available to it.

29. The TMB recalled that Article 8.1 requires the Body, *inter alia*, "... to examine all measures taken under [the ATC] and their conformity therewith..." In starting its examination the TMB also recalled that in the joint communication referred to in paragraph 27 above, Turkey and the United States had indicated that the measure "was taken pursuant to a provision of the ATC which does not require notification to the TMB". In view of the fact that no information had been provided as to the particular provision of the ATC under which the measure had been agreed, the Body undertook to examine briefly all the provisions of the ATC with a view to identifying under which provision such a measure could have been agreed without requiring its notification to the TMB.

30. The TMB observed in this respect that Articles 1, 7, 8 and 9 do not provide the possibility of introducing restraint measures on imports from other WTO Members. Consequently, the measure in question could not have been introduced in accordance with the provisions of these Articles. Furthermore, restrictions maintained under Article 2 had to be notified, in detail, within 60 days following the entry into force of the WTO Agreement. A measure that had not been notified at all, obviously could not fall under the provisions of Article 2. Article 2.4 for its part states, *inter alia*, that "[n]o new restrictions in terms of products or Members shall be introduced except under the provisions of this Agreement or relevant GATT 1994 provisions", but no provision under Article 2 provides the possibility of introducing new restrictions. The TMB noted, therefore, that the particular measure subject to its examination could not have been taken pursuant to Article 2. Since restrictions other than those covered by the provisions of Article 2 also had to be notified within 60 days following the date of entry into force of the WTO Agreement, the TMB observed that the restraint could not have been agreed between Turkey and the United States under the provisions of Article 3.1 either. Article 3.3 does not exclude the possibility, *inter alia*, of introducing new restrictions on textile and clothing products. However, it contains not only the requirement of "double" notification (i.e. to the appropriate WTO body and also to the TMB, for its information), but also limits the possibility of applying, *inter alia*, new restrictions to those cases where the measures were taken under any GATT 1994 provision. As to the restraint agreed between Turkey and the United States, the TMB noted that, according to the joint communication submitted by the two Members concerned, this measure had not been introduced under a GATT 1994 provision, but that it had been taken pursuant to a provision of the ATC. On this basis the TMB observed that the new restraint in question

³ See G/TMB/R/54, paragraph 4.

⁴ See G/TMB/R/57, paragraph 8.

⁵ See G/TMB/R/58, paragraph 47.

could not have been introduced pursuant to the provisions of Article 3. Article 6 specifically provides in its paragraph 1 the possibility of introducing "transitional safeguard" which, as stipulated in other provisions of the same Article, takes the form of restraint measures. However, the restraint measure or measures taken under this Article have to be notified to the TMB, whether agreed or applied unilaterally, as clearly set out in Articles 6.9, 6.10 and 6.11, so as to enable the TMB to examine the measure(s) in question, as required by the provisions of Article 6. Therefore, the measure agreed between Turkey and the United States could not have been taken under Article 6 since that Article requires notification and since both Members had stated to the TMB that the measure had been taken "pursuant to a provision of the ATC which does not require notification to the TMB".⁶ With respect to Article 5, the TMB observed that it provides, *inter alia*, the possibility of taking certain actions, after consultations had been held between the Members concerned with a view to arriving at a mutually satisfactory solution between them. Article 5.4 stipulates, *inter alia*, that "... where there is evidence of the involvement of territories of the Members through which the goods have been transshipped, such action may include the introduction of restraints with respect to such Members. Article 5.4 also states that "[t]he Members concerned may agree on other remedies in consultation". However, any action taken pursuant to Article 5.4 has to be notified to the TMB. In case of evidence that the ATC is being circumvented by false declaration concerning fibre content, quantities, description or classification of merchandise, Article 5.6 allows the Members concerned to consult with a view to seeking a mutually satisfactory solution and the same Article does not require the notification of such mutually agreed solutions to the TMB. At the same time, the TMB observed that Article 5 refers to situations of "circumvention by transshipment, re-routing, false declaration concerning country or place of origin, and falsification of official documents", and that neither Turkey nor the United States had invoked or reported such a situation. Without prejudice as to whether in particular circumstances a new restriction can be introduced, or not, pursuant to the provisions of Article 5, the TMB, on the basis of the information available to it, concluded that the provision of the ATC referred to by both Turkey and the United States could not be Article 5.

31. Finally, turning to Article 4, the TMB observed that Article 4.1 deals with the administration of "restrictions referred to in Article 2, and those applied under Article 6". Article 4.2 states that "Members agree that the introduction of changes, such as changes in practices, rules, procedures and categorization of textile and clothing products including those changes relating to the Harmonized System, in the implementation or administration of those restrictions notified or applied under this Agreement should not: upset the balance of rights and obligations between Members concerned under this Agreement; adversely affect the access available to a Member; impede the full utilization of such access; or disrupt trade under this Agreement." Article 4.4 provides, *inter alia*, the possibility to reach a "mutually acceptable solution regarding appropriate and equitable adjustment" between Members when necessary changes, in the sense of Article 4.2, are introduced in the implementation or administration of existing restrictions. The TMB noted that, according to Article 4.4, such mutually acceptable solutions did not have to be notified to the TMB. The TMB recalled its findings that the new restriction could not have been agreed pursuant to the provisions of Articles 2 and 6. It was also observed that Article 4.4 does not provide explicit guidance regarding the scope of the adjustment that can be agreed between the Members concerned in the framework of the mutually acceptable solution. A reading according to which the introduction of a new restriction, in the sense of Article 2.4, can be agreed upon pursuant to Article 4.4 as an adjustment to balance possible improvements in the implementation or administration of restrictions maintained pursuant to Article 2 was, however, in the view of the TMB not consistent with the intention of the drafters of the ATC, since Article 4 relates to the implementation or administration of the restrictions referred to in Article 2, or applied under Article 6. Also, the construction of Article 4 and its language seem to suggest that when changes, in the sense of Article 4.2 are introduced, the appropriate and equitable

⁶ The TMB was aware, however, that a restraint concerning US imports of cotton and man-made fibre underwear (category 352/652) for the period 27 March 1995 – 26 March 1998 had been agreed upon between Turkey and the United States and had been notified to it pursuant to Article 6.9. This transitional measure had expired on 26 March 1998. The new restriction had been introduced somewhat later. The fact that imports of the same products had already been subject to a transitional safeguard measure pursuant Article 6.9, made it even more important to examine the conformity of the new restriction with the provisions of the ATC.

adjustment referred to in Article 4.4 can only involve and affect the restrictions that have already been in place and notified pursuant to Article 2 or Article 6.

32. The TMB regretted that, despite its repeated requests and given that almost seven months had lapsed since it had first requested information on the measure, the parties had not provided the information the Body had sought from them on the measure itself, as well as on the particular provision of the ATC under which it had been agreed. The TMB recalled in this regard that full cooperation from the Members is indispensable for facilitating the Body's task of examining, in accordance with Article 8.1, the measures taken under the Agreement and their conformity therewith and that failure to provide information by Members hampers the TMB's ability to discharge its functions in accordance with the requirements of the ATC.

33. In concluding its examination of the measure mutually agreed between Turkey and the United States, the TMB recalled that Article 2.4 of the ATC states that "[n]o new restrictions in terms of products or Members shall be introduced except under the provisions of this Agreement or relevant GATT 1994 provisions". After having considered the new measure against the different provisions of the ATC on the basis of the information available to it (as detailed in paragraphs 30 and 31 above), the TMB concluded that the measure agreed upon by Turkey and the United States, affecting imports by the United States of category 352/652 products, had not been demonstrated to be in conformity with the provisions of the ATC.

Pakistan/Argentina

34. The TMB took note of a communication by Pakistan informing the TMB that the consultations held between Pakistan and Argentina on the transitional safeguard measures introduced by Argentina on imports of woven fabrics of cotton and cotton mixtures from Pakistan had not produced agreement. While stating that under normal circumstances the review of the measures should take place at the TMB's December 1999 meeting, Pakistan, due to certain difficulties concerning its delegation's availability at that meeting, requested that this item be placed on the agenda of the TMB's meeting scheduled for 17-19 January 2000.
