

Textiles Monitoring Body

FIFTY-SECOND MEETING OF THE TMB

Note by the Chairman

1. The Textiles Monitoring Body met on 18 to 20 January 1999.
2. The TMB authorized its Chairman to provide WTO Members with the following information.

Notification under Article 8.10 of the Agreement on Textiles and Clothing

Colombia/Korea and Colombia/Thailand: imports of plain polyester filaments (tariff heading 54.02.43)

3. The TMB received, on 22 December 1998, a communication from Colombia under Article 8.10, following the examination by the TMB from 16 to 19 November 1998 of the transitional safeguard measures introduced by Colombia on imports of plain polyester filaments (tariff heading 54.02.43) from Korea and Thailand. The transitional safeguard measures had been introduced with effect as from 26 October 1998, for a period of one year.

4. In this communication, Colombia conveyed its inability to conform with the recommendation the TMB had made¹, that the measures introduced by Colombia should be rescinded. Colombia considered that the measures adopted were compatible with the requirements of Article 6 of the ATC, and that the interpretations and conclusions of the TMB were not in keeping with the legal requirements of the ATC.

5. The communication of Colombia set out in detail the reasons why the Colombian authorities were unable to conform with the TMB's recommendation. The main reasons identified in this communication can be summarized as follows:

- Colombia considered that the measures adopted were in conformity with the relevant provisions of Article 6, particularly paragraphs 1, 2, 3, 4, 7, 8, 12 and 16 thereof. Details were provided on the substantial increase in imports, the serious damage suffered by the domestic industry (based on the decline in output, productivity, utilization of installed capacity, employment, prices and profit margin, the increase in inventories and the suspension of investment), the causal link between the two elements (no technological change was identified that might explain serious damage, and there had also been nothing to suggest that the decline in output was due to changes in consumer preference, the product concerned being a uniform product not subject to changes in consumer preference), and the attribution of damage to imports from Korea and Thailand. Furthermore, in the interest of not restricting trade beyond the extent necessary, the measures had been adopted for only one year and for a single product, as defined by the tariff classification and by the development of competition in that market segment;

¹ For the TMB's review pursuant to Article 6.10, see G/TMB/R/49, paragraphs 8 to 27.

- the TMB's recommendation lacked any supporting legal basis. Although the TMB had found that there had been a substantial increase in imports and that the trends in eight of the 11 economic variables dealt with in Article 6.3 of the ATC pointed to damage, it had concluded that "it was not possible to assess whether or not serious damage had been caused to Colombia's industry producing like and/or directly competitive products by increased imports of plain polyester filaments". Colombia stated that according to the TMB, there were three reasons for this: (i) the information submitted in respect of damage did not cover 100 per cent of the Colombian producers of plain polyester filaments; (ii) the product subject to the measures did not represent all like and/or directly competitive products under HS Chapter 54; and (iii) the information on damage did not concern an elapsed year;
- none of the above points constituted a legal requirement under Article 6 of the ATC. Consequently, an interpretation such as in (i) above was contrary to the rules of interpretation of international treaties set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, setting up interpretations which would make the transitional safeguard of the ATC inoperative. In addition, and without prejudice to the above, in accordance with Articles 6.10 and 8.3 of the ATC, information was presented by Colombia on the domestic industry and on the performance of damage indicators over a 12-month period, for consideration by the TMB.

6. In light of the above, the Colombian Government could not conform with the recommendation adopted by the TMB and requested the TMB to reconsider the decision adopted at its meeting of 16 to 19 November 1998.

7. At the invitation of the TMB, pursuant to Article 8.7, Colombia, Korea and Thailand sent delegations to participate in the TMB's review of the matter.

8. The representative of Colombia, while providing explanations of the submission presented to the TMB, stated, *inter alia*, that:

- with respect to the data presented by Colombia and available for the TMB's examination in November 1998, the ATC gave no clear indication as to how the data referred to in Article 6 should be analysed but only indicated the variables to be analysed. Moreover, the TMB had neither created precedents nor developed guidelines indicating a preference. Therefore, the Colombian Government had presented the data in three different forms, all of which confirmed the existence of serious damage. The data provided at the present meeting on a 12-month rolling year basis showed serious damage through a drop in output, productivity, capacity utilization, market share, employment, prices and profits, and through an increase in inventories and a suspension of investment programme;
- with respect to the findings made by the TMB at its November 1998 meeting, Colombia stated that it had explained in November 1998 that three enterprises used to produce plain polyester filaments, out of which one had filed for bankruptcy. Out of the remaining two, the company that had filed a petition with a view to having safeguard measures introduced represented 62 per cent of the total production, and the remaining 38 per cent was produced by one other company. Therefore, it was a false statement to say that Colombia had not presented information on 38 per cent of the domestic industry. Moreover, as indicated in the present communication, the petitioner also represented 100 per cent of the domestic production for the domestic market, since the 38 per cent produced by the other company was for its own internal consumption. Colombia questioned the legal basis for the TMB to consider that 62 per cent of the industry was not representative of the state of the domestic industry

producing the product under investigation. Colombia also asked whether the TMB considered that the term "domestic industry producing like and/or directly competitive products" in Article 6.2 referred to that industry which produced 100 per cent of the product in question;

- with reference to paragraph 19 of G/TMB/R/49, Colombia questioned the legal basis for considering that when a measure can be applied only to those imported products that are similar to those produced by the domestic industry it should, in fact, be applied to a wider range of products, including all those that are similar; and, if this were to be the case, what were the products to be covered in order to apply the safeguard measures to plain polyester filaments (HS 54.02.43). In determining the product coverage for the safeguard measures, Colombia had verified that two types of polyester filament yarns were produced in Colombia: textured yarn of polyester filaments (HS 54.02.33) and plain polyester filaments (HS 54.02.43). It had been determined that these were two different products. Yarn of HS 54.02.33 had been altered by a physical process of twisting, compression, ruffling or the like, in order to make a curled fibre which had some physical properties that made it desirable for certain uses, in particular elastic fabrics and fabrics where volume, not uniformity, was important. Yarn of HS 54.02.43 was not twisted, and used for other types of fabrics where elasticity was not required and uniformity of the fabric was a key element. Consequently, the investigating authorities had conducted two separate investigations and concluded that the safeguard measures should be applied only to untwisted yarn of polyester filaments. Colombia also explained that products under these two HS lines (54.02.33 and 54.02.43) were different from those falling under 54.02.42, which were the input material for both;
- with reference to paragraph 21 of G/TMB/R/49, Colombia questioned what was the legal basis to determine that the information on the state of the industry should be presented on a 12-month rolling year basis in accordance with the 12-month period referred to in Article 6.8. In the view of Colombia, this Article was not related to the information on the state of the industry, as was recognized in Article 6.7 which indicated that "the information shall be related, as closely as possible, to identifiable segments of production and to the reference period set out in [Article 6.8]."

9. The representative of Korea stated, *inter alia*, that the additional information provided by Colombia in its communication contained nothing new in substance. The legal arguments advanced by Colombia were unwarranted. Therefore, Korea saw no reason why the TMB should reconsider its recommendation.

- Colombia had contended that the TMB had considered that the information on the domestic industry should cover 100 per cent of the domestic producers of the particular product. This had been stated nowhere in the TMB's report. With respect to the question of like and/or directly competitive products, when referring to Article 4.1(c) of the Agreement on Safeguards and to Article 4.1 of the Agreement on the Implementation of Article VI of GATT 1994, Colombia had deliberately neglected a reference to the "like and/or directly competitive products". If all segments of the industry producing the like and/or directly competitive products were covered, the one enterprise for which data had been provided would represent much less than 62 per cent of the domestic production and could not, therefore, be considered as constituting a "major" proportion of the total domestic production. Moreover, even if the other company still in operation produced that yarn only for its own consumption, it still represented a significant portion of the domestic industry and should have been subject to an investigation.

- Contrary to what Colombia had said, the TMB had not stated that the ATC required the Member taking the safeguard action to accumulate tariff headings. Therefore, Colombia's arguments based on Articles 1.7, 6.1, 6.14 and 6.16 of the ATC were irrelevant in a re-examination of the safeguard measures.
- With respect to the assessment of serious damage and the causal link between increased imports and the damage, the additional information provided by Colombia (which was an *ex post* justification) did not provide a solution to the difficulties experienced by the TMB in determining serious damage during the previous examination. As regards the causal link, Korea had found no substantive evidence to substantiate Colombia's statement that it had found nothing to suggest that the damage had been caused by technological changes or changes in consumer preferences. Colombia had shifted the burden of proof to importers, which constituted a violation of Colombia's obligations under Article 6.2. Korea had argued that the damage might have been caused by the decline in Colombia's domestic industry and deteriorating competitiveness, to which Colombia had responded that there had been no contraction in demand or any reduction in national consumption. However, the company allegedly constituting 62 per cent of the industry had experienced a sharp decline in its exports in 1998. This decline could be attributed to its loss of competitiveness in price and quality.

10. The representative of Thailand stated, *inter alia*, that:

- the fact that Colombia had requested reconsideration of this matter by the TMB using new, adjusted information, could be considered as an attempt to initiate a new case. Thailand was of the view that the TMB's reconsideration should be based on the information used at the time the request for consultations had been made. It was essential that Colombia should first comply with the TMB's recommendation before requesting a new hearing on the same case, since the continuation of the restraint unfairly harmed the Thai yarn manufacturers;
- the TMB had not required that the data used by Colombia in the request for consultations represent all domestic producers, but merely that the information provided by Colombia should reflect the state of the entire industry;
- the fact that one company accounted for 100 per cent of the domestic production for the domestic market did not mean that the Colombian industry was composed of one manufacturer which accounted for 100 per cent of the domestic production for consumption in the Colombian market;
- as the company producing 62 per cent of the domestic production was vertically integrated, it could have shifted production within the company;
- Colombia had stated that it was impossible to conform with the recommendation of the TMB because its report gave no indication as to how the TMB thought the measure should be applied. Thailand was of the view that it was not the TMB's responsibility to tell Members how they should implement the ATC.

11. In starting its examination of the matter referred to it, the TMB noted that the communication of Colombia providing the reasons for its inability to conform with the recommendation 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 of 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.

12. Based on the communication of Colombia, as well as on the presentation made by it at the meeting, the TMB noted that Colombia considered itself unable to conform with the recommendation of the TMB for the following main reasons:

- Colombia considered that the safeguard measures adopted had been in conformity with the relevant provisions of Article 6, in particular paragraphs 1, 2, 3, 4, 7, 8, 12 and 16 thereof;
- in the view of Colombia, the conclusions of the TMB were based on interpretations of the ATC that had no legal foundation under the provisions of Article 6;
- the report adopted by the TMB did not provide any indication of how, in the view of the TMB, the safeguard measures should be applied in the particular case.

13. The TMB also noted that in explaining in detail the above reasons, Colombia had provided:

- a summary of the factual information it had already provided pursuant to Article 6.7, including import trends, the serious damage claimed to the plain polyester filaments industry, the causal link between increased imports and serious damage, and the attribution of serious damage, on the basis of a substantial increase in imports at prices lower than the national sales prices, to Korea and Thailand;
- detailed legal arguments regarding those conclusions and interpretations of the TMB which, in the view of Colombia, had no legal foundation in the context of Article 6, and without prejudice to these arguments, some additional information relating to certain particular elements of the factual information referred to in Article 6.7.

TMB's observations with respect to the legal arguments raised by Colombia

14. Having carefully considered all the arguments presented to it, the TMB made the following observations with respect to the legal arguments given by Colombia for its inability to conform with the TMB's recommendation.

15. The TMB recalled that the communication of Colombia stated that the "TMB found that there had been a substantial increase in imports and that trends in eight of the eleven variables referred to in Article 6.3 appeared to indicate serious damage." However, "[a]ccording to the TMB, there were three reasons" for concluding that it was not possible to assess whether or not serious damage had been caused to Colombia's industry, namely:

- (i) the information submitted in respect of damage did not cover 100 per cent of the Colombian producers of plain polyester filaments;
- (ii) the product subject to the measures did not represent all like and/or directly competitive products under HS Chapter 54; and
- (iii) the information on damage did not concern an elapsed year.

In the view of Colombia, none of the three reasons had legal foundation under the provisions of Article 6 (see also paragraph 5 above).

The TMB addressed these issues one by one.

(i) Definition of the term "domestic industry" producing plain polyester filaments

16. The TMB recalled that paragraph 18 of G/TMB/R/49 reads as follows:

"The TMB noted that the Colombian investigating authorities had determined that one company, which had requested the application of the safeguard measure on imports, represented on average 62 per cent of the total domestic production of plain polyester filaments and, therefore, could be considered to represent the domestic industry. It followed from this determination that Colombia had provided information regarding the economic variables referred to in Article 6.3 which reflected data pertaining to that one company. The TMB observed in this respect that the ATC does not provide a definition of what constitutes the domestic industry. The TMB noted, however, that Colombia had failed to provide information on a significant part of its domestic industry producing plain polyester filaments. This lack of information brought about important uncertainties and, therefore, hampered the TMB's ability to assess the situation of the Colombian industry producing plain polyester filaments" (emphasis added).

17. In this regard Colombia explained *inter alia* that:

- during the examination of the measure, the Colombian delegation had provided information to the effect that the domestic industry was traditionally composed of three companies, one of which had filed for bankruptcy. It was also pointed out that one of the two other companies, the applicant company, accounted on average for 62 per cent of the total output, and that the remaining 38 per cent was produced by a single company which had expressed no interest in the case;
- it was clear from the statement of the TMB, referred to in paragraph 16 above, that the Body considered that information on the domestic industry producing like and/or directly competitive products should cover 100 per cent of the domestic producers of such products;
- unlike the ATC, the Agreement on Safeguards and the Agreement on the Implementation of Article VI of GATT 1994 defined the term "domestic industry", making it clear that the term covered the domestic producers as well as those of them whose collective output of the products "constitutes a major proportion of the total domestic production of those products". Therefore, while the evidence of damage had to relate to the domestic industry, this did not necessarily mean the total number of producers, but a major proportion of them;
- in light of the principles for the interpretation of treaties set out in the Vienna Convention on the Law of Treaties and bearing in mind that the ATC does not define the term "domestic industry", Colombia requested the TMB to reconsider its interpretation of the term, since a literal definition would lead to an interpretation which was manifestly absurd and unreasonable, making Article 6 of the ATC inoperative;
- without prejudice to the foregoing, Colombia had requested information from the only other company concerned and, according to the indications received, the entire output of plain polyester filaments of this company was for its own internal consumption; that also meant that the applicant accounted for 100 per cent of the domestic output of that product produced for the domestic market.

18. In considering the legal arguments put forward by Colombia, the TMB made the following observations:

- Colombia had rightly pointed out that during the examination of the measures pursuant to Article 6.10 it had provided the factual information as indicated in the first indent of paragraph 17 above. Colombia had explained that the company producing on average 38 per cent of the total domestic output had not expressed an interest in the investigation carried out by the Colombian authorities. As a result no information had been provided by Colombia in addition to that relating to the applicant company whose output represented, on average, 62 per cent of the domestic output. This fact was reflected in the TMB's observations that "...the ATC does not provide a definition of what constitutes the domestic industry. The TMB noted, however that Colombia had failed to provide information on a significant part of its domestic industry producing plain polyester filaments", bringing about important uncertainties and, therefore, hampering the TMB's ability to assess the situation of that Colombian industry G/TMB/R/49, paragraph 18). The TMB, bearing in mind in particular the information that had been made available by Colombia pursuant to Article 6.7, continued to be of the view that in the absence of any information on a significant part of the domestic industry, it had not been possible to assess the state of the industry producing plain polyester filaments, in particular the effect of increased imports on the companies constituting the domestic industry producing the particular product. Therefore, it had been impossible to determine whether the difficulties encountered by the company requesting the investigation could be attributed to a possible damage caused by the increased volume of total imports or to other factors such as, for example, an important increase in the production of the other domestic company producing plain polyester filaments, resulting in an increased competition between the domestic producers;
- the TMB could not agree with the contention of Colombia according to which it was clear from the statement of the TMB, referred to in paragraph 16 above, that the Body had considered that information on the domestic industry producing like and/or directly competitive products should cover 100 per cent of the domestic producers of such products;
- the TMB observed that it had not provided any interpretation of the definition of the term "domestic industry", as claimed by Colombia. Similarly, the TMB had not suggested that the information on the domestic industry should cover 100 per cent of the domestic producers of such products. It was merely a factual statement applying to the particular case that "Colombia had failed to provide information on a significant part of its domestic industry producing plain polyester filaments". With respect to this statement, the TMB was of the view that it could not be questioned in the particular case that 38 per cent of the overall domestic production constituted a significant part of the domestic industry, whether this was the output of one single company or of a number of producers. The lack of interest in participating in the investigation by one company could not be a justification for not providing any information at all on that portion of the industry. The TMB considered that it was the responsibility of the authorities of a Member invoking the provisions of Article 6 to demonstrate to the Member(s) affected and to the TMB that increased imports caused serious damage to the domestic industry. Moreover, there was a range of possibilities between providing no information at all and offering all the specific and relevant information required by the relevant provisions of Article 6. In the particular case, the TMB was of the view that the Colombian authorities should have provided more information on the rest of the domestic industry. At least, it could have been

explained convincingly to the TMB², on the basis of the information that could have been collected even if the company in question was not interested in participating in the investigation, as to why Colombia considered that information on 38 per cent of the domestic production could be completely, or for the most part, dismissed, or why Colombia believed that bringing the production of the given company into the scope of the examination would not alter its conclusions based solely on the data provided by the applicant company representing on average 62 per cent of the domestic production;

- in light of the above, the TMB reiterated that it had not provided any interpretation of the definition of the term domestic industry. It could not, therefore, reconsider an interpretation it had not made.

(ii) Definition of the product to which the safeguard measure applies – Information on the domestic industry producing like and/or directly competitive products.

19. The TMB recalled that, according to Colombia, another reason as to why the TMB had concluded that it had not been possible to assess whether or not serious damage had been caused to the domestic industry was that "the product subject to the measure [did] not represent all like and/or directly competitive products under Chapter 54". To refute such a statement attributed to the TMB, Colombia provided a detailed analysis in its communication, referring to a number of ATC provisions, namely Articles 1.6, 1.7, 6.1, 6.14 and 6.16.

20. The TMB agreed with Colombia that the particular product (yarn of polyester filaments, single, untwisted; tariff heading 54.02.43) was covered by the ATC and could be identified as the product to which the proposed safeguard measure applied. The TMB observed, however, that the statement attributed to it, as indicated in paragraph 19 above, likely stemmed from a misunderstanding of what the TMB had stated during the examination of the measure pursuant to Article 6.10. The relevant part of G/TMB/R/49, paragraph 19, reads as follows:

"The TMB noted Colombia's efforts to provide information related to plain polyester filaments. It observed, however, as was confirmed by Colombia, that the company regarding which data had been provided, produced a number of products falling under HS 54.02, including plain polyester filaments. The TMB observed in this respect that the ATC does not provide a definition of what constitutes like and/or directly competitive products. The TMB noted, however, that in the case of plain polyester filaments, HS lines having descriptions quite similar could be like and/or directly competitive products. This created difficulties for the TMB in assessing the matter."

Nothing in this statement suggested that the TMB had formulated any view on the selection by the Colombian authorities of the product subject to the safeguard measures. The observation made by the TMB had focused on the information, or lack thereof, regarding what constituted the domestic industry producing like and/or directly competitive products in the particular case. This was also reflected in paragraph 25 of G/TMB/R/49, which stated, *inter alia*, that "information to be provided with respect to the Colombian industry would have to be related to the industry producing like and/or directly competitive products." The TMB was of the view that these statements were in full conformity with the essential requirements as defined by Article 6, in particular its paragraph 2, which puts the burden on Colombia to demonstrate the existence of serious damage, or actual threat thereof, caused to the domestic industry producing like and/or directly competitive products. Therefore, contrary to what had been suggested by Colombia, the TMB had expressed no view on the selection of the product subject to the safeguard measures, but had made observations on the lack of appropriate information regarding what constituted the domestic industry producing like and/or directly

² This was not found to be the case in November 1998.

competitive products in the particular case. The information provided by Colombia pursuant to Article 6.7 remained silent in this regard. If Colombia considered that the only like products, and/or the products directly competitive with plain polyester filaments (tariff heading 54.02.43) were those falling under the same 6-digit tariff heading, it was up to Colombia to explain convincingly why HS lines having descriptions quite similar to the product subject to the safeguard measures should not be considered as constituting like and/or directly competitive products (for the purpose of defining the industry affected by imports). But without any information or in the absence of a convincing explanation it is not possible to determine whether, to give an example, the decline of the domestic production of yarn of polyester filaments, single, untwisted (tariff heading 54.02.43) was attributable to the damage caused by increased quantities of total imports, or to other factors which could be part of a normal business decision, such as the shifting of the production of this product to another which could constitute a like and/or directly competitive product to the plain polyester filaments.

21. In concluding the consideration of the particular reason raised by Colombia, the TMB reiterated that nothing in G/TMB/R/49 had suggested that the safeguard measures should be applied to a range of products which would be wider than the product (plain polyester filaments) identified by Colombia as subject to its measures taken pursuant to Article 6.

(iii) Methodology of presenting information concerning serious damage

22. The TMB recalled that, in the view of Colombia, Article 6 does not lay down a single methodology for the presentation of information regarding imports or the variables which determine serious damage to the domestic industry. On this basis, Colombia argued that "the TMB omitted to observe that [...] the Colombian authorities presented information in three mutually supportive forms" and that the TMB "concluded that the only valid method for assessing damage was 'comparison either on a January/May basis or on a year-ending May basis'". According to Colombia, "the first TMB interpretation not only has no legal foundation but is also contrary to the rule laid down in Article 6.8 to the effect that the information should refer to comparisons of a minimum of 12 months. Bearing in mind the indicative nature of Article 6, paragraph 7, Colombia [requested] the TMB to explain the legal basis of this interpretation."

23. In considering these arguments the TMB agreed with Colombia that Article 6 does not lay down a single methodology for the presentation of the information in question. The TMB had recalled what were the time periods covered by the information presented by Colombia pursuant to Article 6.7. "[T]he technical report prepared by INCOMEX contained data regarding the performance of total imports for the 12-month periods June to May of 1995-1996, 1996-1997 and 1997-1998, the reference period referred to in Article 6.8. The data and information incorporated into the report regarding the economic variables set out in Article 6.3 referred to calendar years; for 1998, it incorporated actual data for the period January to May and provided estimates for the full calendar year. In addition, the report provided monthly averages regarding each variable for 1995, 1996, 1997 and January to May 1998" (G/TMB/R/49, paragraph 11). The TMB could not agree with the contention of Colombia that the TMB had omitted to observe that information had been presented in three different forms. The TMB had not qualified whether these forms were mutually supportive, as claimed by Colombia, since the Body had not found that certain such forms were convincing. This had been reflected in the report adopted by the TMB: " [t]he TMB noted [...] that it could not base its assessment on estimates provided by Colombia for the year 1998; and that the monthly averages provided by Colombia could not be considered in most cases as providing reliable indications." (G/TMB/R/49, paragraph 21, emphasis added). Therefore, the TMB had added that "[f]or data to be meaningful Colombia would have had in the present case to have provided comparisons either on a January/May basis or on a year-ending May basis" (same paragraph, emphasis added). In the view of the TMB, the above excerpts of its report made it clear that (i) the report faithfully reflected the forms of information provided, including the respective time-frames; (ii) the TMB had not provided any interpretation, but had expressed the view that in the present case the presentation was such that it did not allow a reliable comparison of the developments or changes in the relevant economic variables

referred to in Article 6.3. The reference of the TMB to the January/May comparisons was not an interpretation and was not contrary to any provision of Article 6, since the Body had not suggested that this information should have been provided in lieu of the information submitted, but in addition to what had been made available. Without such additional information it was not possible for the TMB to assess whether developments during the first five months of 1998 could be an indication of serious damage caused by imports or whether they constituted a seasonal phenomenon which had characterised the domestic industry in the same period of the preceding years as well. The TMB recognized that Colombia had explained that the product subject to safeguard measures was not subject to seasonal factors. This statement, however, had not been substantiated by the information presented pursuant to Article 6.7.

24. The TMB reiterated that it had not provided any interpretation regarding how information regarding imports or the variables used for determining serious damage to the domestic industry should be presented under Article 6. Instead, it had expressed a view on the difficulties it was facing because of the problems in comparing certain data provided by Colombia in the present case.

Additional information provided by Colombia in its communication under Article 8.10

25. The TMB noted that with reference to Article 6.10 and 8.3, certain elements of the detailed factual information provided by Colombia pursuant to Article 6.7 had been revised and supplemented.

26. In particular, and without prejudice to the detailed legal arguments provided in this regard, indications were given according to which the entire output of plain polyester filaments of the company producing on average 38 per cent of the domestic production was used for its own consumption. As explained by Colombia, this meant that the applicant company accounted for 100 per cent of the domestic output for the domestic market. Noting this information, the TMB also noted that the information had not been made available by Colombia neither at the time it had requested consultations pursuant to Article 6.7, nor during the examination of the measures by the TMB pursuant to Article 6.10.

27. Furthermore, the TMB noted that in its communication Colombia stated that in the case under consideration, the investigation concerned a product as defined by the tariff classification and by the development of competition in that market segment. In addition, in her presentation during the meeting³, the representative of Colombia provided additional technical explanation as to why the products to be covered in order to apply the safeguard measures were to be limited to yarn of polyester filaments (HS 54.02.43).

28. The TMB also noted that, as explained, in reply to the TMB's observations and notwithstanding the legal arguments made, Colombia had provided information on the domestic industry and trends in damage indicators for 12-month periods.

29. The TMB observed that the communication subject to its consideration had been submitted pursuant to Article 8.10, whereby the reasons for a Member's inability to conform with the recommendation of the TMB had to be provided to the TMB. Also in light of the consideration it had given to the legal reasons and arguments raised by Colombia, the TMB was of the view that it could not be expected to conduct a *de novo* examination of the determination of the serious damage caused to the domestic producers of the like and/or directly competitive products. The TMB reiterated its earlier statement that "its review of the measures introduced by Colombia had to be based essentially on the information made available by Colombia in accordance with Article 6.7 at the time the request for consultations had been made" (G/TMB/R/49, paragraph 25).

³ See paragraph 8 above.

Other observations

30. The TMB recalled that in addition to the reasons stated in paragraph 5 above, Colombia had also stated that "it is impossible to conform with the recommendation of the TMB because the report gives no indication of how the TMB thinks the measure should be applied. For the Colombian Government to know how it can comply with the TMB's recommendation, the latter must reply to the two questions asked by Colombia at the meeting on this issue (definition of the term "domestic industry" and tariff headings to be accumulated in order for a safeguard to cover heading 54.02.43), which were omitted from the report."

31. With respect to this statement, the TMB made the following points:

- under Article 6.10, the TMB was expected to "promptly conduct an examination of the matter, including the determination of serious damage, or actual threat thereof, and its causes, and make appropriate recommendations to the Members concerned within 30 days;"
- in the view of the TMB, when it found during its review of a safeguard measure that it had not been demonstrated successfully that a product subject to an Article 6 action was being imported into the concerned Member's territory in such increased quantities as to cause serious damage, or actual threat thereof, to its domestic industry producing like and/or directly competitive products, the only possible recommendation the TMB could make was that the safeguard measure should be rescinded;
- as to the issues related to "the definition of the term domestic industry and the tariff headings to be accumulated in order for a safeguard to cover heading 54.02.43", the TMB referred to the discussions it had had and the respective conclusions it had reached, as reflected in previous parts of this report.

Conclusions

32. The TMB noted the statement of Colombia that it had been unable to conform with the recommendation of the TMB for the reasons detailed in its communication as well as in its oral presentation. Following thorough consideration of the reasons given by Colombia, the TMB recommended that Colombia reconsider its position and that the measures introduced by Colombia on the imports of plain polyester filaments from Korea and Thailand should be rescinded forthwith.

33. The fifty-third meeting of the TMB is scheduled for 8 to 10 February 1999.

34. The full report of the fifty-second meeting will be circulated at a later stage.
