



CUFTA - (Customs Unions or Free Trade Areas) Moot Dispute Settlement Competition

Corrections and Clarifications¹

1. Corrections

The following information in the text of the case ("Factual and Procedural Background") should be corrected as follows:

- a) On **page 5, footnote 5** should read, "Rechargeable batteries are not within the scope of Decree 21/2004."
- b) On **page 10**, the *first sentence* of **paragraph 22** should read, "On 30 November 2007, Vetustia's Trade Ministry issued Decree 29/2007, revoking Decrees 21/2004 and 02/2005 and providing, in its Article 1, that 'imports of batteries classified under HS Code 85.06 originating in any country, except CUSM member states that adhered to the Common Battery Recycling and Disposal Scheme, shall be prohibited as from 01 December 2007.'"
- c) On **page 11, item c** of **paragraph 24** should read, "Decree 29/2007 is not justifiable under paragraphs (b), (d) or (g) of Article 20."

2. Clarifications

- a) Question (in reference to **paragraph 18**):

Why has the Appellate Body found that the non-application of the ban to CUSM countries resulted in arbitrary discrimination?

Answer: The reasoning of the Appellate Body was very detailed and it will not be fully reproduced here. However, it may be relevant to note that the Appellate Body specifically stated the following: '*In our view, the ruling issued by the CUSM Ad Hoc Arbitration Court is not an acceptable rationale for the discrimination, because it bears no relationship to the legitimate objective pursued by the import ban that falls within the purview of Article XX(b), and even goes against this objective, to however small a degree. Accordingly, we are of the view that the non-application of the ban to CUSM parties has resulted in such ban being applied in a manner that constitutes arbitrary discrimination.*'

In addition to this specific view in relation to *arbitrary* discrimination and to the specific view in relation to *unjustifiable* discrimination (see footnote 13 of the Factual and Procedural Background), the Appellate Body's overall approach towards GATT Article XX was generally in line with WTO jurisprudence. Participating legal teams might find some of the indicative references included in the case useful.

¹ The organizers of the CUFTA Moot Dispute Settlement Competition and the author of the case are thankful to all participating legal teams for having presented their requests for corrections and clarifications.

b) Question (in reference to **paragraph 19**):

How did the Vetustian government intend to cure the violation of the chapeau of GATT Article XX: by legitimating the ban imposing it on products from all WTO Members (including CUSM parties), or by extinguishing the ban?

Answer: As stated in paragraph 19 of the Factual and Procedural Background, the press reported that the government intended to create a regional battery waste management scheme. According to Vetustia's statements before the WTO Dispute Settlement Body in relation to its dispute with Richilia, one can assume that the former's intention was indeed to establish a CUSM regional scheme along the lines of the *Common Battery Recycling and Disposal Scheme*, even though such statements were not very detailed. The Vetustian government clearly considers that a regional scheme (or a regional common policy) concerning the importation and disposal of batteries would be sufficient to comply with the DSB decision of 12 February 2007 adopting the Panel Report as modified by the Appellate Body, and it appears to believe that the "Common Scheme" as implemented is in compliance with the WTO Agreements. But it is still uncertain whether Richilia (or even other WTO Members) will agree with that view. Richilia is currently discussing the issue bilaterally with Vetustia. So far, Richilia has not officially indicated whether it is satisfied with the Common Scheme as implemented or whether it intends to request the establishment of a compliance review panel (DSU Article 21.5).

The answer to the question, therefore, is neither of the two alternatives. Apparently, Vetustia's intention reported by the press was to maintain the ban on primary batteries from non-CUSM members and to allow imports from CUSM members, provided that they entered into a regional common scheme related to battery imports and waste management.

c) Question (in reference to **paragraphs 24 and 25**):

Paragraphs 24 and 25 of the case refer to Vetustia's and Laviña's claims. Should teams be bound by such arguments or are they allowed to present new ones?

Answer: Participating legal teams are advised not to confound "claim", "defence", and "legal argument". *Claims* are typically allegations of violation of substantive provisions of treaties or other norms. *Arguments*, by contrast, are the means whereby a complainant progressively develops and supports its claims, or whereby a defendant develops and supports its defence. To be more specific, in this year's case Laviña *claims* that Article 1 of Decree 29/2007 violates one article of the Treaty of Gedis and two articles of Annex 2 thereof. In its defence, Vetustia seeks not only to show that Laviña's claims are without merit, but also affirmatively relies on three different paragraphs of Article 20 as justification for its measures. Participating legal teams are bound to observe these claims and defences, i.e. they should not ignore any of these treaty provisions² and should not present any claim or defence on the basis of treaty provisions other than those expressly mentioned in paragraphs 24 and 25 of the Factual and Procedural Background. However, teams are free (and are required) to present their *legal arguments* to develop and support (or to rebut, as applicable) each claim and defence.

As indicative references for teams wishing to clarify these concepts, the following WTO cases may be useful:

- EC – Bananas III (Report of the Appellate Body, WT/DS27/AB/R);
- Korea – Dairy (Report of the Appellate Body, WT/DS98/AB/R).

² This is not to say that teams need to put the same amount of effort into developing each claim. Legal ability involves identifying the stronger claims, defences and arguments and allocating effort (time and space) accordingly.