

## **SUSTAINABLE DEVELOPMENT AND THE PROTECTION OF ENVIRONMENTAL FACTORS – FUNDAMENTAL OBJECTIVES OF THE MARRAKECH AGREEMENT CONCERNING THE CREATION OF THE WORLD TRADE ORGANIZATION**

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**Abstract.** One of the objectives of the multilateral international trade system created within the World Trade Organization is the sustainable economic development, taking into account the need to protect the environment. For this purpose, the lawful rules created through the Marrakech Agreement and its annex agreements allow WTO member states, in certain situations, to derogate from the general obligations referring to trade, to which they have to adhere, by adopting measures meant to protect the exhaustible natural resources. This article analyzes the conditions in which such measures can be adopted, through derogation from the general obligations concerning international trade.

### **1. Creation and Objectives of the World Trade Organization**

The World Trade Organization was created by the Marrakech Agreement, which came into effect on January 1, 1995 (Macovei, 2010; Sută, 2002). Romania is an original member of the World Trade Organization, and the agreement was confirmed by Law no. 133/1994, for the ratification of the Marrakech Agreement concerning the creation of the World Trade Organization, of the international Agreement concerning beef, and of the international Agreement concerning dairy, all signed in Marrakech, on April 15, 1994. WTO is a relatively young international organization, but it has a considerable influence in the sphere of international relations (Carreau and Juillard, 2005).

WTO is practically the continuator of the institutional structure created in order to apply the General Agreement on Tariffs and Trade – GATT 1947. WTO insures the institutional frame for the application of the main multilateral agreements that govern international goods trade, international services trade, and

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commercial aspects concerning intellectual property rights, the system for solving international trade disputes, and the evaluation system for commercial policies. All these agreements and procedures are annexes to the Marrakech Agreement regarding the creation of the WTO (Narlikar, 2005).

The reason for creating the World Trade Organization and the policy of this organization are established through the Preamble to the Marrakech Agreement, according to which the parties agree on its provisions and decide to create the WTO, aiming at the following main objectives:

- raising standards of living;
- ensuring full employment;
- increasing real income and demand;
- expanding the production of and trade in goods and services.

Therefore, the Preamble to the Marrakech Agreement states: “*Recognizing* that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.

*Recognizing* further that there is a need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth of international trade commensurate with the needs of their economic development”.

However, meeting these objectives must take into account the need to protect the environment as well as the special needs of the developing countries. The Preamble also stresses the importance of a sustainable economic development, respectively of a development that takes into account the natural and social environment (Charnovitz, 2007) and the integration of the developing countries, especially those that are less advanced in the world economic system (P. Sampson, 2005). The values promoted through the preamble to the WTO Agreement come therefore to contradict a series of critical opinions concerning the fact that the WTO exclusively promotes the liberalization of trade, without taking into account the dangers on the environment or the poverty level existing in certain parts of the world (Jones, 2004).

The Preamble also establishes the manner in which the objectives presented above can be reached. For this, The Preamble to the WTO Agreement states: “*Being desirous* of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs

and other barriers to trade and to the eliminations of discriminatory treatment in international trade relations,

*Resolved*, therefore, to develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade, the results of past liberalization efforts, and all of the results of the Uruguay Round of Multilateral Trade Negotiations,

*Determined* to preserve the basic principles and to further the objectives underlying this multilateral trading system”.

The main two instruments for reaching the objectives stated in the preamble are the reduction of the tariff and non-tariff barriers in trade and the elimination of the discriminatory treatment from international commercial relations. At the same time, these were two of the main instruments provisioned by GATT 1947, but, unlike them, the WTO aims to set the bases of an integrated system of international trade, more viable and sustainable.

In the Ministerial Declaration of Doha, of November 14, 2001, the WTO member states established, in relation to the objectives of the Organization and to the instruments for attaining these objectives: “We therefore strongly reaffirm the principles and objectives set out in the Marrakech Agreement Establishing the World Trade Organization, and pledge to reject the use of protectionism. International trade can play a major role in the promotion of economic development and the alleviation of poverty. We recognize the need for all our peoples to benefit from the increased opportunities and welfare gains that the multilateral trading system generates. The majority of WTO members are developing countries. We seek to place their needs and interests at the heart of the Work Programme adopted in this Declaration. Recalling the Preamble to the Marrakech Agreement, we shall continue to make positive efforts designed to ensure that developing countries, and especially the least-developed among them, secure a share in the growth of world trade commensurate with the needs of their economic development. (...) We strongly reaffirm our commitment to the objective of sustainable development, as stated in the Preamble to the Marrakech Agreement. We are convinced that the aims of upholding and safeguarding an open and non-discriminatory multilateral trading system, and acting for the protection of the environment and the promotion of sustainable development can and must be mutually supportive.”

## **2. Legal Measures Concerning the Preservation of Exhaustible Natural Resources**

Concretely, the general objectives referring to protecting the environmental factors and sustainable duration are met through a series of measures that, although

infringing other general obligations that result from the status of WTO member, are justified by the need to protect values or interests considered primary.

Therefore, Art. XX of GATT 1994 regulates the general exceptions from the principles applicable to international trade in goods. They refer, among others, to protecting important non-economic values, such as public health or the environment.

Generally, Art. XX is relevant and can be invoked by a WTO member only if it is considered that a measure adopted by the respective member infringes an obligation regulated by GATT 1994, in order to justify that measure (the GATT panel in the lawsuit *US – Section 337 of the Tariff Act of 1930*). However, the general exceptions to the rules applied to international trade are, on the one hand, limited, their listing in Art. XX of GATT 1994 being exhaustive, and on the other hand, they are conditioned, being able to operate only to the extent in which the situations and circumstances to which the text of the agreement refers can be found in reality. Giving member states the possibility to adopt measures that promote or protect other important values or social interests, Art. XX practically allows states to derogate from the engagements they had taken as WTO members, which has led to numerous disputes concerning the interpretation and application of this article, both under the auspices of GATT 1947 and after the adoption and application of the Marrakech Agreement (Petros C. Mavroidis, 2007).

Although the general exceptions provisioned in Art. XX of GATT 1994 are limitative and conditioned, and according to the general interpretation regulations, exceptions are strictly related to interpretation, in practice it was considered that such an interpretation would still be inappropriate in what concerns the exceptions referring to the application of restrictive measures to protect public health and the environment, and that an interpretation that considers a balance between the liberalization of trade and other social values is more appropriate (The Report of the Appellate Body in the lawsuit *US – Gasoline*).

Art. XX let. g) of GATT 1994 regulates the measures referring to the preservation of exhaustible natural resources. This exception allows the WTO member states to adopt measures that contravene to the general rules concerning trade in goods and that aim to protect the environment (C. Mavroidis, 2007).

In order to be under the incidence of this exception, a measure adopted by a member state must fulfill two conditions: refer to the preservation of exhaustible natural resources and be applied with restrictions on internal production or consumption.

In what concerns the former condition, in order to determine if a measure is under the incidence of the exception stated in Art. XX let. g) of GATT 1994, it is necessary to establish the meaning of the term “preservation of exhaustible natural

resources”, and then to establish whether the respective measure refers, reports, or is related to this purpose.

Exhaustible natural resources are not necessarily non-regenerative, so that this phrase should be interpreted in a broad sense, as including not only mineral natural resources, but also living resources. While most natural resources are non-regenerative, although plants or animals are able to reproduce, this does not necessarily mean that the measures mentioned in Art. XX let. g) of GATT 1994 cannot be taken into account, especially in the case of endangered species. This interpretation is all the more grounded that, as mentioned above, one of the objectives stated in the Preamble to the Marrakech Agreement concerning the creation of the World Trade Organization refers to sustainable development, an objective that necessarily includes environmental protection. As a result, for a correct interpretation, which would be close to the current needs and expectations of the international community, we must take into account the dynamics of the international regulations, both in what concerns trade and in what concerns environmental protection (Constantin, 2010). Although Art. XX has not been modified in the Uruguay Round, the preamble to the WTO Agreement proves that the signing parties of these agreement were, in 1994, perfectly aware of the consequences and legitimacy of environmental protection as an objective of their national and international policy. The preamble to the WTO Agreement – which applies not only to GATT 1994, but also to the other multilateral agreements – explicitly mentions the objective of sustainable development (...). From the perspective included in the preamble to the WTO Agreement, we consider that the general term of “natural resources” mentioned in Art. XX let. g) is not static, but rather evolutionary by definition. It is therefore pertinent to acknowledge that the modern international agreements and declarations frequently refer to natural resources as including both living and mineral resources (The Report of the Appellate Body in the lawsuit *US – Shrimp*).

In what concerns the condition for the measure to “refer to” the preservation of exhaustible natural resources, Art. XX let. g) does not mention the extent to which the measure must be relative to the purpose aimed. In comparison to the dispositions comprised in the other paragraphs of Art. XX, which refer to the need or essential nature of the measure, there results that in the case mentioned in let. g), the relation between the adopted measure and the purpose aimed can be less tight than in other cases. However, a too broad interpretation may contravene to the purpose to which the general exceptions from the rules concerning the international trade in goods have been expressly regulated, respectively that to establish limits within which the member states may derogate from the obligations they must comply with, as WTO members, in order to defend important social values. Considering these aspects, although, in order to be under the incidence of Art. XX

let. g), a measure must not be necessary or essential for the preservation of exhaustible natural resources, it must be however directed, first of all, to meeting this objective (The Report of the GATT Panel in the lawsuit *Canada – Herring and Salmon*). In other words, there must be a tight and real relation between the measure and the objective, that is, the measure should be reasonably connected to the objective (The Report of the Appellate Body in the lawsuit *US – Shrimp*).

The second condition that a measure must fulfill in order to be under the incidence of Art. XX let. g) of GATT 1994 refers to its being adopted together with restrictions concerning internal production or consumption (Van Den Bossche, 2008). This condition states that the measures adopted on imported products to the purpose of protecting exhaustible natural resources must be appropriately imposed on domestic products or production as well. This does not mean, however, that imported and national products must necessarily benefit from equal treatment, but an equitable way of applying these measures, both on imported and on internal products, should be taken into account, and which would serve the same common purpose. In case that the treatment applicable to imported products is actually equal to that applied to national products, then the problem of applying a general exception would no longer be posed, as the rules concerning the application of the national treatment according to art. III par. 4 of GATT 1994 are met (The Report of the Appellate Body in the lawsuit *US – Gasoline*). Nevertheless, in case no restriction applies on national products, either, not only would the second requirement of Art. XX let. g) of GATT 1994 not be complied with, but it would also be impossible to state that the measure is mainly directed towards protecting the exhaustible natural resources, and it would be nothing more than a case of discrimination of the imported products, to the purpose of protecting the national industry (Luff, 2004).

### **Conclusions**

In the end, we consider that there must be an equitable relation between the restrictive measures imposed on imported products and those imposed on domestic products, so that both sets of rules mainly lead to achieving the purpose of the environmental protection policy, and especially of exhaustible resources. An equal treatment would make the need to invoke an exception become useless, while the lack of a measure applied to national products, although less restrictive, but mainly imposed in order to meet the same objective, would lead to the inapplicability of this exception.

**List of cases:**

The Report of the GATT Panel in the lawsuit *US – Section 337 of the Tariff Act of 1930*, par. 5.9., available on the site

[http://www.wto.org/english/tratop\\_e/dispu\\_e/87tar337.pdf](http://www.wto.org/english/tratop_e/dispu_e/87tar337.pdf).

The Report of the Appellate Body in the lawsuit *US – Gasoline (Appellate Body - United States - Standards for Reformulated and Conventional Gasoline)*, p. 16 – 17, available on the site

[http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds4\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds4_e.htm).

The Report of the Appellate Body in the lawsuit *US – Shrimp (United States - Import Prohibition of Certain Shrimp and Shrimp Products)*, par. 121, available on the site

[http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds58\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm).

The Report of the GATT Panel in the lawsuit *Canada – Herring and Salmon (Canada – Measures Affecting Exports of Unprocessed Herring and Salmon)*, par. 4.5 – 4.6, available on the site [http://www.wto.org/english/tratop\\_e/dispu\\_e/87hersal.pdf](http://www.wto.org/english/tratop_e/dispu_e/87hersal.pdf).

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**Van Den Bossche, Peter (2008)**, *The Law and Policy of World Trade Organization, Text, Cases and Materials*, Second Edition, Cambridge University Press, Cambridge, p. 637.

