TRADE LIBERALISATION, HEALTH PROTECTION, AND THE BURDEN OF PROOF IN WTO LAW

Akademisk avhandling

som för avläggande av juris doktorsexamen vid Göteborgs universitet
offentligt framläggs och försvaras fredagen den 17 juni 2011, kl. 10.00
i SEB-salen, Handelshögskolan vid Göteborgs universitet,
Vasagatan 1, Göteborg

av

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Abstract
Åhman, Joachim. 2011. Trade Liberalisation, Health Protection, and the Burden of Proof in WTO Law. Engelska. Juridiska institutionens skriftserie 008. 368 pp. Göteborg 2011. ISBN 978-91-978328-4-7.

When a Member of the World Trade Organization (WTO) adopts a measure which it considers is necessary to protect against a health risk, but which constitutes a barrier to international trade in goods, there is a conflict of interests. If the measure is removed, the health protection interest is affected negatively. If the measure is kept in place, the trade liberalisation interest is affected negatively. Both interests are considered important within the WTO regulatory framework, and must therefore be balanced. One part of this balancing act occurs when panels answer burden of proof questions in WTO disputes concerning health protection measures. The core questions are: What facts must be proved by the parties under the relevant provisions (what are the 'legal facts')? What party shall carry the heaviest burden of persuading the panel about these facts (what party shall carry the 'persuasive burden')? And to what extent must the party persuade the panel about the facts (what 'standard of proof' shall be applied)? In WTO law, there are a number of provisions specifically regulating the adoption of health protection measures. The most important are: Article XX(b) of the General Agreement on Tariffs and Trade 1994 (the GATT 1994), and Articles 2, 3, and 5 of the Agreement on the Application of Sanitary and Phytosanitary Measures (the SPS Agreement). The aim of this study is to analyse these provisions from a burden of proof perspective.

The analysis is carried out in Chapters 2-5 of the study. Chapter 2 contains an analysis of the general burden of proof concept. The main conclusions reached are that a court cannot normally avoid allocating the persuasive burden to one of the parties, and applying a certain standard of proof. When deciding how the burden should be allocated, and what standard to apply, the court should primarily rely on arguments related to the desire to reduce the risk of an erroneous outcome. Chapter 3 contains a general analysis of how the burden of proof has been handled in WTO dispute settlement. The main conclusions from this Chapter are that, even though the adjudicating bodies have often addressed the burden of proof in their reports, they have not discussed why the burden should be allocated to a certain party, or why a certain standard should be applied. General burden of proof principles have been applied with very little discussion. Moreover, they have also relied on the '*prima facie* case' concept when allocating the burden. This concept seems to have little practical relevance, and it is argued that the adjudicating bodies should not continue to rely on it in future cases. Chapter 4 contains an analysis of how the legal facts in Article XX(b) of the GATT 1994 (and the chapeau of Article XX) have been interpreted, and how the burden of proof has been handled under the provision. The main conclusions here are that the adjudicating bodies have not provided much guidance in respect of how the existence of a health risk, and the relationship between the measure and the risk, should be demonstrated under the provision. The provision has consistently been treated as an exception for burden of proof purposes, and the burden has been allocated to the defendant. This entails that the trade interest has been favoured, and the health interest disfavoured. Chapter 5 contains an analysis of how the legal facts in the relevant paragraphs of Articles 2, 3, and 5 of the SPS Agreement have been interpreted, and how the burden of proof has been handled under the provisions. The main conclusions reached are that, even though the provisions contain detailed requirements, and even though the adjudicating bodies have provided rather detailed interpretations in different disputes, many of the most important legal facts are still unclear. It is for example not clear when the scientific evidence should be considered sufficient to perform a risk assessment within the meaning of Article 5.1, and what is required from such an assessment. This makes it difficult for the parties to know what to prove. More or less all provisions in the SPS Agreement have been treated as general rules for burden of proof purposes, and the burden has been allocated to the claimant. This entails that the health interest has been favoured, and the trade interest disfavoured. The conclusions of the study are summarised in Chapter 6. The most important general conclusion is that the WTO adjudicating bodies should not apply general burden of proof principles. Instead, they should examine how the burden of proof should be handled under individual provisions, in light of arguments related to the desire to reduce the risk of errors. It is proposed that the default option under the above provisions should be to allocate the burden to the claimant, and to apply the balance of probability standard.

Keywords: Burden of proof, trade liberalisation, health protection, scientific evidence, risk, WTO, SPS Agreement, GATT 1994.

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