

REACH Registration of Imported Substances – Compatibility with WTO Rules

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July 2005

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A. Introduction¹

The European Commission's proposal of 29 October 2003 for a Regulation on Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) **2 poses include various legal problems facing the Legal system of the World Trade Organization (WTO) on.3** Let us first generally, the question is whether the draft REACH Registry obligations for substances and substances in preparations (Art. 3, No. 1 and No. 2 REACH) under Article 5 of REACH possibly with the WTO legal provisions, inter alia, the Agreement on Technical Barriers to Trade (TBT Agreement), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the General Agreement on Tariffs and Trade (GATT) collide.

¹ Basis of their contribution is a document created by the authors report.

² Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency and amending of Directive 1999/45/EC and Regulation (EC) {on Persistent Organic Pollutants} Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Council Directive 67/548/EEC in order to adapt them to the Ver Regulation (EC) of the European Parliament and of the Council concerning the registration, evaluation, Authorisation and Restriction of Chemicals, COM (2003) 644 final, v. 29.10.2003, available on the Internet: <http://europa.eu.int/eur-lex/de/com/pdf/2003/com2003_0644de.html> (be-examined on 30 June 2005), for this purpose instead of many Calliess / Lais, Nature and Law 2005, 290 et seq; Fischer, Consumer protection in the chemicals legislation, passim; Warhurst, Journal for European Environmental & Planning Law 2005, 164 et seq; see also: European Commission, White Paper on Strategy for a Future Chemicals Policy, COM (2001) 88 final, v. 27.2.2001, available on the Internet: <http://europa.eu.int/comm/environment/chemicals/pdf/0188_de.pdf> (visited on 30 June 2005); detail, see: Hendler / Marburg / Reinhardt / Schröder (ed.), The European White Paper on Chemicals Policy.

³ See in particular: WTO Committee on Technical Barriers to Trade: Minutes of the Meeting Held on 20 March 2003, G/TBT/M/29, para. 36 ff; Minutes of the Meeting Held on 2 July 2003 G/TBT/M/30, para. 49 ff; Minutes of the Meeting Held on 7 November 2003, G/TBT/M/31, para. 23 ff; Minutes of the Meeting Held on 23 March 2004, G/TBT/M/32, para 29 ff; Minutes of the meeting held on 1 July 2004, G/TBT/M/33, para. 33 ff; Minutes of the Meeting held on 4 November 2004, G/TBT/M/34, 14 ff; well: Presentation given Name by Commission (DGs Enterprise and Environment) at the WTO Technical Barriers to Trade (TBT) Committee on REACH on 4.11.2004, available on the Internet: <<http://europa.eu.int/comm/enter>

prise/reach/docs/reach/reach_presentation_tbt_meeting_041104.pdf> (visited on 30 June 2005), Response from the European Communities to comments submitted by WTO Members under G/TBT/N/EEC/52 available on Internet: <http://europa.eu.int/comm/enterprise/reach/docs/reach/eu_wto_response_041028.pdf> (visited on 30 June 2005); Palmer, REACH and Proportionality under WTO Rules, available on the Internet: <http://www.wwf.org.uk/filelibrary/pdf/reach_prop_0604.pdf> (visited on 30 June 2005); FECC - AMCHAM EU - CEFIC, Discussion Paper on the Trade Impact of REACH, Available on the Internet: <<http://www.fecc.org/en/docs/Trade%20Impact%20of%20REACH%20Final.pdf>> (accessed on 30 June 2005), **see also: National Foreign Trade Council (NFTC), Looking Behind the Curtain: The Growth of Trade Barriers did Ignore Sound Science, 2003; NFTC, EU regulation, Standardization and the Precautionary Principle: The Art of Crafting a Three-Dimensional Trade Strategy That Ignores Sound Science, 2003; NFTC, 'Enlightened' Environmentalism or Disguised Protectionism? - Assessing the Impact of EU Precaution-Based Standards on Developing Countries, 2004, both available on the Internet: <<http://nftc.org/default.asp?Mode=Directory Display & id = 190>> (accessed on 30 June 2005).**

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...2 Proportionality test as a concretization of Article 2.2. TBT Agreement

As already indicated, Article 2.2. Sentence 2 TBT Agreement for under indiscriminately applicable technical regulations at ensuring that they "not be more trade restrictive than Necessary to Fulfill a legitimate objective, taking into account of the "Risks must be non-fulfillment would create (" shall "). This formulation is Connection with the statement in the preamble of the TBT Agreement to lessen to be followed to ensure that, inter alia, technical regulations "do not create unnecessary obstacles to international trade "(paragraph 5) and that they accordingly are not used in a way "which would Constitute a Means of arbitrary or unjustifiable discrimination where the same conditions in between countries prevail or a disguised restriction on international trade "(para. 6). The Latter requirement can be traced back to the chapeau of Article XX GATT, and can be found in similar form in other of commission of the legal regime of the WTO. 38 In essence, all of the synthesis of commission aim at striking at adequate balance in between WTO Members' legitimate interests, and the principle of free trade. 39

In addition, the classification of Article 2.2. Sentence 2 TBT Agreement as embodying the Proportionality bid also corresponds to the DSB ruling of the concretization or unjustifiable discrimination "or" disguised restriction on international trade " – features found in the chapeau of Article XX GATT. In this context it is now recognized that: 1) these standards do not differentiate Significantly in scope, and 2) did a balance must be struck in between competing interests where the relevance of the commission is at issue.⁴⁰ Malthus the interpretation of the chapeau of Art XX GATT within the meaning of a proportionality test deterministic mines so the interpretation of the TBT Agreement by reason of the identical wording found in its preamble.

In Consequence, the fundamental principle of proportionality of the ratio found in WTO / GATT Law Applies so with regard to Article 2.2. sentence 2 TBT Agreement.⁴¹

Here, too, it is important to strike on Appropriate Balance Between The interests of WTO Members - eg in the field of health and environmental protection - on the one hand, and the safeguarding of free international trade on the other. Accordingly, a general obligation to register under REACH is subject to overall proportionality to tested.

⁴¹ Appleton , Environmental Labelling Program, 113 *et seq* ; Bronckers / Charro , Journal for Euro-

pean Environmental & Planning Law, 2005 184 (191); *Fischer* , Technical barriers in world trade law, 195; *Marceau / Trachtman* , in: Ortino / Peter Mann (eds.), *The WTO Dispute settlement system*, 275 (294 *et seq* , 319); *Schick* , TBT Agreement, 94 *et seq* ; *Tietje* , in: Prieß / Berrisch (eds.), *WTO manual* BI5 para. 80 *et seq* ; *Wiemer* , product safety, 235 *et seq* ; see also: *Palmer* , Proportionality under WTO Rules, 18, available on the Internet: <http://www.wwf.org.uk/filelibrary/pdf/reach_prop_0604.pdf> (visited on 30 June 2005); **assenting in this regard thus: National Foreign Trade Council (NFTC) , Looking Behind the Curtain: The Growth of Trade Barriers did Ignore Sound Science, 92, available on the Internet: <<http://nftc.org/default.asp?Mode=DirectoryDisplay&id=190>> (visited on 30 June 2005).**

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...(2) *Risk*

(A) *Risk assessment and burden of proof*

In assessing whether a threat to the legitimate protection of health goals and Environment is, according to Article 2.2. Sentence 4 TBT Agreement, among other things ("inter alia") on "available scientific and technical information, related processing technology or Intended end-uses of products "remedy.

With this rather general wording, the TBT Agreement derogates from the conditions for risk assessment set out in Article 5 of SPS Agreement. While According to the wording of the various paragraphs of Article 5 of SPS Agreement, and the relevant DSB jurisprudence in the area of sanitary and phytosanitary measures, high Demands are made on the scientific proof Necessary to establish_link the Risks emanating from products,43 Article 2.2. TBT Agreement requires Merely gene rally available scientific and technical information. In addition, According to the in this regard unambiguous Art 2.2. sentence 4 TBT Agreement, it is not imperative did search information is considered, as it is Merely one of several possible "relevant elements of consideration".44

The rather general reference to the relevant elements of consideration for the purpose of the assessment of possible Risks to the in Article 2.2. sentence 3 TBT Agreement flawlessly listed objectives does not, HOWEVER, release WTO Members from the compulsion to Provide evidence of the risk-preventative effect of a technical regulation. According to the general procedural rules Regarding the distribution of the burden of proof under WTO Law, a WTO Member seeking to invoke exception to thus carries the burden of proving the requirements of search did on exception are met. 45

However, de requirements Resulting from this distribution of the burden of proof are restricted by the margin of appreciation available to the WTO Members with regard to the autonomous determination of the Necessary scope of protection. In this regard, the Appellate Body Noted "that it is undisputed did WTO Members have the right to deterministic mine the level of protection of health thatthey Consider Appropriate in a given Name situation ".46 This declaration coincides with the preamble to the TBT Agreement, Which in its fifth consideration Recognizes did no country Should Be Prevented from taking measures Necessary to Ensure the quality of its exports, or for the protection of human, animal or plant life or health, or of the environment. In this respect, WTO Members are granted a comparatively wide margin of appreciation for deterministic mining Their level of protection under the TBT Agreement. 47

As a result of the interaction in between the distribution of the burden of proof and Recognised the margin of appreciation, **WTO Members must for the time being provide only prima facie proof for**

the assertion did a Particular technical regulation is necessary for the prevention of Risks to legitimate objectives. Over and above this requirement it is not Necessary to furnish additional technical or scientific proof of the asserted risk factors.⁴⁸ This might also be the case only if there were pertinent international standards for the purpose of risk management and registration.⁴⁹

47 Fischer , Technical barriers in world trade law, 178, 199

48 Tietje , in: Prieß / Berrisch (eds.), WTO manual BI5 para. 81

49 For a comparison with other regulatory systems see: Institute for European Environmental Policy, Ad Hoc Report on Chemicals: Comparative Analysis of REACH and Other International Approaches, Policy Brief for the European Parliament Environment Committee, EP/IV/A2003/09/01, 2003, available on the Internet: <<http://www.europarl.eu.int/comparl/envi/>

pdf / external expertise / IEEP / chemicals_brief.pdf> (visited on 30 June 2005) **for criticism: National Foreign Trade Council (NFTC) , Looking Behind the Curtain: The Growth of Trade Barriers did Ignore Sound Science, 96 et seq , available on the Internet: <<http://nftc.org/default.asp?Mode =Directory display & id = 190>> (visited on 30 June 2005).**

... In this case, Arts. 2.4. and 2.5. TBT Agreement would apply, leading to a Significantly Greater burden of proof.⁵⁰ Otherwise HOWEVER, The Demands on risk assessment Regarding potential hazards emanating from products are low. Looking at the Significance of precautionary aspects under the TBT Agreement, this finding is corroborated with regard to the outlined systematic comparison with the SPS Agreement.

(B) *Precautionary Aspects*

As in all areas Relating to the defense against Risks to human health or the environment, the questions Arises so in relation to the TBT Agreement Whether only actual, present risk is relevant for the purpose of the measure, or if it Applies in addition to future Risks Which have yet to materialize. The questions of law pertaining to this issue are Discussed in international environmental law and World Trade Law under the heading "precautionary principle".⁵¹

The Applicability of the precautionary principle is of Particular Significance to the admissibility of the REACH Registering obligations, since the AIMS - of protecting human health and the environment - Pursued by REACH are meant to be Realised based on the principle of precaution.⁵²

50 In detail on Arts. 2.4. and 2.5. TBT Agreement: Tietje , in: Prieß / Berrisch (eds.), WTO Manual, BI5 para. 93 et seq ; Marceau / Trachtman , in: Ortino / Peter Mann (eds.), The WTO Dispute Settlement System, 275 (304).

51 In detail: heirs , The precautionary principle in international law, passim ; Epiney / Sheyli , structural principles in International Environmental Law, passim ; Cameron / Abouchar , in: Feestone / Hey (eds.), The Precautionary Principle and International Law, 29 et seq ; Eggers , The Precautionary Principle in WTO Law, passim; Trouwborst , Evolution and Status of the Precautionary Principle in International Law, passim; Landwehr , Trade and Health, 69 et seq .

52 See Article 1 (3) under REACH reference to the Commission notice on the precautionary principle, COM (2000) 1 final, of 02/02/2000, and in detail on the notice of the Commission: Appel , New Journal of Administrative Law 2001, 295 ff; into detail on the precautionary principle as the guiding principle of REACH: Appel , Journal of Environmental Law 2003, 167 et seq ; Callies , adminis performance archiving 94 (2003), 389 et seq ; Fischer , consumer protection in chemicals regulation, 17 et seq; Freytag / Jakl / Loibl / Wittmann (eds.), The Role of Precaution in Chemicals Policy, passim; **for strong criticism: *National Foreign Trade Council (NFTC) , Looking Behind the Curtain: The Growth of Trade Barriers did Ignore Sound Science, 101 et seq ; NFTC , EU regulation, Standardization and the Precautionary Principle: The Art of Crafting a Three-Dimensional Trade Strategy That Ignores Sound Science, 27 et seq ; NFTC , 'Enlightened' Environmentalism or Disguised Protection - Assessing the Impact of EU Precaution-Based Standards on Developing Countries, 66 et seq , each available on the Internet: <<http://nftc.org/default.asp?Mode =Directory display & id = 190>> (visited on 30 June 2005).***

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...3 *Conclusions on Article 2.2. TBT Agreement*

In conclusion, there are arguments in favor of holding Numerous did a general obligation to register the product-related substances Which are used in the manufacture of articles, as well as the CORRESPONDING manufacturing and import prohibition, is consistent with Article 2.2. TBT Agreement. The introduction of a general obligation to register cannot be Said to create to "unnecessary restriction of trade" per se .

IV Conclusions on the TBT Agreement

The Preceding legal analysis Has shown did a REACH obligation to register the product-related substances Which are used in the manufacture of articles must be categorised as a technical regulation within the meaning of the TBT Agreement. **There is much to suggest did a technical regulation of this kind would be in compliance with Arts. 2.1. and 2.2. TBT Agreement.66**

66 **Of different opinion: *National Foreign Trade Council , Looking Behind the Curtain: The Growth of Trade Barriers did Ignore Sound Science, 92, available on the Internet: <<http://nftc.org/default.asp mode = display & id = 190 Directory>> (visited on 30 June 2005);?*** different of opinion in So this regard: Bronckers / Charro , Journal for European Environmental & Planning Law, 2005 184 (191): "In our view, seeking to overall registration requirement for substances contained in articles would be difficult to defend.

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...III. Conclusions on GATT 1994

As a result, there are valid Reasons To assume did a general obligation to REACH register articles Containing non-product-related substances, and the CORRESPONDING manufacturing and import prohibition, is compatible with the of commission of the GATT. **Even though a violation of Article III: 4 GATT is conceivable, It could be under Certain conditions be justified under the general exceptions contained in Article XX GATT.111**

111 Aces Ting in this regard thus: The Council of Environmental Advisors , Environmental reports 2004 BT printing. 15/3600, para. 1045 et. seq , available on the Internet: <http://www.umweltrat.de/02gutach/download02/umweltg/UG_2004_1f.pdf> (visited on 11 July 2005) **of different opinion Regarding the REACH system: *National Foreign Trade Council* , Looking Behind the Curtain: The Growth of Trade Barriers did Ignore Sound Science, 94, available on the Internet: <<http://nftc.org/default.asp?Mode=DirectoryDisplay&id=190>> (visited on 30 June 2005).**
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