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# Is REACH a trade barrier?

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On 17 October the EU and the US announced that formal negotiations were once again underway to reach a transatlantic free trade and investment agreement. This announcement, however, did not mention the lower-profile, but no less significant, ongoing industry-level initiatives aimed at achieving mutual recognition of product-related technical standards. Extra-regional regulatory/standards cooperation could increase market access and reduce regulatory uncertainty and transaction costs. The EU and US chemicals sectors are one of several industries participating in these efforts amid growing concerns about the rapid rise in non-tariff trade barriers (NTBs).

Global chemicals supply chains, in particular, have experienced cross-border market distortions since the introduction of the REACH Regulation. And 34 World Trade Organization (WTO) members, including developing countries, have raised 27 specific trade concerns about REACH, mostly pertaining to its registration/data gathering and notification obligations.

Whether REACH is an actionable NTB remains an open question, but the answer has become clearer in light of recent WTO jurisprudence and evidence. WTO tribunals have delivered clarifying decisions in three recent cases of first impression (cases in which a question of interpretation of law is presented which has not arisen before in any reported case) which interpreted several of the key provisions of the WTO Agreement on Technical Barriers to Trade (TBT): US –Clove Cigarettes; US – Tuna II (Mexico); and US – certain country of origin labelling (COOL). The TBT Agreement establishes general rules and procedures for the development, adoption and application of mandatory technical regulations and voluntary standards for products. These decisions reaffirm that while WTO member governments retain the sovereign right to regulate at the levels they consider appropriate for the protection of the environment and human, animal or plant life health, they may not use regulations to discriminate between otherwise “like” domestic and foreign products, or with the effect of creating unnecessary trade barriers.

## REACH as a potential NTB

As I have outlined in a recent article (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2149756) for the American University International Law Review, new evidence contained in several of the studies for the European Commission’s REACH review strongly suggests that REACH’s registration/ and data gathering and notification rules could be discriminatory. Such evidence also suggests that a discrimination claim brought against REACH under TBT article 2.1 would have the least chance of succeeding where articles contain chemicals deemed substances of very high concern (SVHCs). SVHCs could credibly be found to possess intrinsic physical properties that pose high-level risks capable of triggering distinct consumer and wholesaler perceptions, preferences, expectations and buying tastes and habits. Consequently, one could possibly conclude that REACH-registered SVHC-containing domestic articles are not “like” imported non-REACH-registered SVHC-containing articles or non-SVHCs of which ECHA or EU member state competent authorities remain unaware.

However, new evidence also suggests that a TBT article 2.1 discrimination claim would have a greater chance of succeeding if it focused on groups of imported substances that are not SVHCs, not incorporated within articles, and not shown to pose empirical health or environmental risks. These substances must be registered if they are merely sold or used on their own or in mixtures in annual volumes of one tonne or more, as REACH employs an across-the-board proxy for exposure as a presumption of harmfulness. Granted, ECHA, EU national authorities and registrants must undertake an exposure-based risk assessment or preliminary risk screening of substances at REACH's subsequent evaluation and authorisation stages. But, until then, the physical characteristics, end-uses and tariff classifications of such imported and domestic substances are neither easily distinguishable by regulators, nor likely to adversely influence consumer and business user buying preferences, tastes and habits. Thus, due to their perceived "likeness" at the earlier registration stage, the relatively greater burden and expense REACH effectively imposes on such imported substances would be more difficult to justify.

Indeed, available evidence shows that EU regional and member state implementation of REACH's registration/data gathering and notification requirements imposes a higher cost structure upon, and thus impairs the competitiveness of, "like" chemical substance-based product imports in EU markets. It does so by subjecting groups of imported non-REACH-registered SVHC-containing articles and non-REACH-registered non-SVHCs to treatment "less favorable than" that accorded to "like" groups of REACH-registered domestic articles and substances.

Some EU member states have interpreted the term "article" in a different way to that set out in ECHA guidance, and require the presence of SVHCs in article components to be registered. They have also imposed non-uniform, nontransparent, and costly REACH-related inspection procedures, REACH-plus data generation and presentation evidentiary standards, and high penalties for registration noncompliance. The agency has mandated that non-EU chemical substance-based product exporters hire expensive EU-based only representatives to protect their intellectual property from appropriation by EU-based competitors. ECHA and member states have failed to oversee Sief governance, data-sharing and letter of access negotiation protocols and procedures, and the resulting additional costs have fallen mostly upon non-EU exporters, especially SMEs.

REACH's registration/ data gathering and notification requirements could impose unnecessary obstacles to trade, and that a successful claim could potentially be brought against REACH under TBT Agreement article 2.2. It may be shown that REACH's provisions fail to fulfill REACH's legitimate objectives, or that they are more trade-restrictive than is needed to achieve them. Alternatively, it may be shown that there exists an available, less trade-restrictive alternative to these provisions which can achieve the objectives at the same level of protection, considering the risks their nonfulfillment would create. REACH's principal objective of ensuring a high level of health and environmental protection, and its tertiary objective of reducing vertebrate animal testing, qualify as "legitimate" objectives for purposes of this examination.

Recently cited evidence calls into question the extent to which REACH's provisions can fulfill the Regulation's legitimate objectives. It strongly suggests that much of the massive amount of hazard information gathered from the registration process is irrelevant to addressing health and environmental risks, which undermines REACH's ability to convey useful information to industry supply-chains and consumers. It also suggests that EU regional and member state governmental authorities have experienced rather serious technology and human resource capacity limitations that curtail their ability to efficiently process and employ such information. Furthermore, such evidence makes a powerful case that the complexity of the hazard information contained in the pre-registration dossiers and chemical safety reports, submitted through the REACH-IT system and the poorly structured and difficult-to-use ECHA website database, could prevent ECHA's effective communication and dissemination of meaningful new substance exposure-related

information to key REACH stakeholders; (the CLP Regulation, by comparison, communicates hazard information to these groups in a relatively simple and more comprehensible manner).

Recently adduced evidence, moreover, could demonstrate that REACH's processes make it more trade-restrictive than it needs to be by imposing on global industry an excessively high cost structure to ensure extensive continuous supply-chain information generation and exchange which reduces company profitability in EU markets. EU and non-EU chemical manufacturers and importers incurred approximately €2.1bn in costs for the first REACH registration period – nearly double the EU Commission's initial estimates. These costs include sizeable internal human resource-related REACH compliance expenditure and external consultancy fees; high ECHA registration costs; and considerable supply-chain information and exchange-related expenditures from IT applications, hidden transportation costs, and costs of Sief letters of access, driven by the need for animal testing.

This substantially higher cost structure has already begun to negatively impact international trade flows in chemical substance-based products. Many chemical companies have begun to reduce substance production volumes to a lower and less expensive tonnage band, effectively shrinking their EU market share. Some non-EU SME chemical companies have begun to withdraw SVHCs from EU markets or to abandon those markets altogether. Some EU downstream users have begun to shift chemical substance procurement to EU sources to reduce REACH registration non-compliance risks. This suggests that these government-induced behaviours could lead to fewer available substances, higher prices and a more concentrated and less competitive EU chemicals market.

Moreover, there are other reasonably available chemical regulatory frameworks that are potentially less trade-restrictive than REACH, and which can ensure a commensurate high level of health and environmental protection. Like REACH, the Canadian Chemical Management Plan and the Japanese Chemical Substance Control Law, as amended, rely on dated national chemicals inventories to assess the harm posed by high priority substances and reflect government efforts to implement international chemicals-related initiatives and treaty obligations. But unlike REACH, they feature a less costly and burdensome multiple level iterative screening approach that focuses on a substance's potential for risk rather than hazard. This approach has allowed regulators to set aside a vast array of substances/uses at the outset once they were deemed unlikely to cause unacceptable risks.

The EU may have failed, pursuant to TBT article 12.3, to adequately consider the special development, financial, and trade needs of WTO developing country members before proposing, adopting, and implementing REACH's registration, data gathering and notification provisions. Such a claim could be substantiated by confirming whether the EU had prepared or convened special bilateral meetings, briefings, initiatives and correspondences with individual developing country governments.

**Beyond REACH**

While the detailed analysis upon which this discussion is premised draws no definitive conclusions in the absence of much-needed additional information, readers may fairly conclude that it does not reflect both sides of the REACH trade debate. Readers should acknowledge, however, that REACH's WTO-consistency has long been presumed, notwithstanding the Regulation's extra-territorial impact on third country industry supply-chains and government chemicals management policies.

Unfortunately, even the freshest assessment of REACH's indirect benefits – how its registration/data gathering, notification and information-sharing requirements have contributed to a general increase in awareness of hazardous chemicals, the withdrawal of certain SVHCs from the marketplace, and consequently, to potentially improved health and environmental protection –

fails to seriously consider such interests. Most conspicuously, it doesn't identify the previous benefits secured through the use of to-be substituted chemicals, or the risks and benefits of using potential new substitutes.

Arguably, my analysis' highest value lies in its broad applicability to comparable complex regulatory framework and their impacts on third-country behaviours. Chemicals regulations more burdensome and costly than REACH, such as China's REACH-like Measures for Environmental Management of New Chemical Substances, have begun to proliferate and distort international chemicals and manufacturing trade; and, concerted EU-US governmental and industry efforts to reduce NTBs via enhanced regulatory cooperation or mutual standards recognition have resumed. Perhaps, the possibility of deterring third-country regulatory opportunism and achieving a transatlantic chemicals regulatory understanding that bridges differences between the EU REACH and the US Toxic Substances Control Act is not that far out of reach after all?

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