Strengthening REACH Provisions Concerning (Imported) Articles

ON BEHALF OF THE GERMAN FEDERAL ENVIRONMENT AGENCY

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3. WTO conformity of a REACH extension concerning authorisation of SVHC present in imported articles

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I. Subject matter

- Current legal situation
  - REACH authorisation (Art. 56 et seq.) only applies to SVHC used in EEA
  - Use in third countries (e.g. incorporation of SVHC in product) not covered
  - REACH treats European articles more strictly

- Consequences
  - SVHC entering the EEA as part of imported articles (subject to Art. 7 REACH)
  - (Potential) burden for human health and the environment
II. Authorisation and precaution

- Aims of the extended authorisation
  - High level of protection of human health + environment; control of risks posed by SVHC in imported articles (Art. 1, 55 REACH)
  - Contribution to international environmental law goals (sustainable development, SAICM)

- Aims of WTO: Reduce trade restrictions

- Area of conflict
  - Starting question: How much “precaution” is in REACH authorisation requirement?
II. Authorisation and precaution

- Authorisation requirement (inclusion in Annex XIV) based on hazard potential
- Exposure of SVHC checked implicitly through prioritisation (wide dispersive use, high volumes → „general“ risks)
- Actual (product specific) risk considered when authorisation application is assessed – before final decision

Instrumental configuration
- Authorization requirement – precaution
- Globally common approach
- not illegitimate per se
- unproblematic from a WTO law perspective
II. Authorisation and precaution

- Precaution also from a *substantive* perspective?
  - Principle 15 Rio Declaration: „Where there are threats of serious or irreversible damage, *lack of full scientific certainty* shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.“

= „Risk potential“: triggered by uncertainty ≠ SVHC:
  - Scientific evidence of hazard potential
  - Often GHS–criteria; selection meets transparency standards
  - Legislation on SVHC can be classified (given exposure)
    - CMRs, most PBTs, most Art. 57(f) substances: danger prevention
    - Cat. 2 reprotox. PBT, vPvB, some Art. 57(f) substances: precaution, but: a lot more substantiated than mere „risk potential“
II. Authorisation and precaution

Conclusion

- Attribution → prevention or precaution depends on the individual case
- In any case: mere hypothetical „risk potential“ not relevant
- Not far from danger prevention

- Starting point for WTO-legal assessment
III. Applicable law

- TBT [Technical Barriers to Trade]–Agreement
  - authorisation = „technical regulation“
  - Prohibition and the lifting of the ban constitute **one measure** (subject matter of assessment)
  - GATT assessment implicitly included
III. Applicable law

- Scope of TBT assessment
  - Focus on Art. 2.1, 2.2 TBT
    - National treatment and most-favoured nation treatment
    - Prohibition of unnecessary obstacles to international trade
      - Separate requirements to be assessed individually
  - Recourse to GATT decisions + other Agreements (e.g. SPS) where appropriate
IV. Art. 2.1 TBT assessment

- National treatment and most-favoured nation treatment
- Violation if
  - Extended authorisation is technical regulation; ✓
  - Products from third countries are „like“ domestic (EEA) products or products from other third countries;
  - Products from third countries enjoy less favourable treatment than “like” domestic products or products imported from other third countries
IV. Art. 2.1: „likeness“ analysis

- Pairing to be compared:
  - Domestic product without SVHC
  - Imported product with SVHC
- Check competitive relationship
- Appellate Body (AB) in *EC–Asbestos*:
  Risk is an important factor in determination
IV. Art. 2.1: „likeness“ analysis

(1) Properties, nature and quality of the products
- Hazard potential of SVHC is „defining aspect“ compared to other substance
- Actual risks have to be assessed thoroughly
- But: AB confirms *general risk* due to ubiquitous burden (here caused by e.g. unintended „slip“ of phthalates from plastics)
- Often no effect thresholds → indicates *relevant risk* (AB)
  - Risks of at least some/many products significantly affect the competitive situation (compared to SVHC-free product)
  - AB: If properties are not „like“, a higher burden is placed on States in order to overcome this indication
IV. Art. 2.1: „likeness“ analysis

- (2) Consumer tastes and habits
  - Increasing demand for inherently „safe“ products
  - Global trend: Detox; Walmart (triggered by SVHC criteria)
  - AB: risks relevant for consumer preferences
  - Priv. consumers: dismiss SVHC in products
  - Prof. consumers: dismiss to reduce work protection risk management obligations and risks of civil liability claims
  - Consumer‘s view: products with/without SVHC not interchangeable → no competitive relationship

- Conclusion: compared articles are generally not like products in terms of Art. 2.1 TBT, however, this might not be true for all individual cases
IV. Supplementary opinion

If one assumes likeness: are imported products treated less favourably?

- Text of regulation: **no de jure** discrimination
- **De facto** discrimination to be assessed
  - Modification of conditions of competition to the detriment of imported products?
    - Problem area 1: markets of concerned SVHC?
    - Problem area 2: necessity of establishment in the Community?
  - No modification to the detriment of imported products
  - Even if one assumes detrimental impact this would not be discriminatory but based on legitimate distinction criteria → **no de facto discrimination**
IV. Art 2.1: conclusion

- In general: not "like" – counterexamples not excluded
- Supplementary note:
  - No de iure discrimination
  - Extended authorisation might in single cases detrimentally impact the market conditions of imported articles, but this is based on legitimate distinction criteria
- No violation of Art. 2.1 TBT
V. Art. 2.2 TBT Agreement

“Members shall ensure that technical regulations are not (...) creating unnecessary obstacles to international trade. For this purpose,

technical regulations shall not be more trade-restrictive than necessary

to fulfil a legitimate objective. (...)”
I. Is the extended authorisation trade restrictive?
   - ✔ → technical standard the non-compliance with which causes a barrier to market access

II. More trade-restrictive than necessary?

   1. Legitimate objective(s)? ✔
   2. Contribution to fulfil the objective(s)? ✔
   3. More trade-restrictive than necessary for the achieved degree of fulfilment?
IV. Art. 2.2: necessity

- „Relational analysis“ of
  1. actual trade restrictions ✓
  2. degree of contribution to legitimate objective ✓
  3. the risks non-fulfilment would create

- Additionally
  4. comparison with possible alternative measures
V. Art. 2.2: necessity

- Risks non-fulfilment would create
  - Art. 2.2: „In assessing such risks, relevant elements of consideration are inter alia available scientific and technical information, (...) or intended end-uses of products.”
  - AB: „nature of the risks at issue and the gravity of the consequences that would arise from non-fulfilment of the legitimate objective”
  - (1) Procedural und (2) substantive implications
V. Art. 2.2: necessity – procedural

- Risks non-fulfilment would create

  1. Design of the risk assessment (RA):
     CSR by applicant + RAC + third party consultation
     - TBT (+ dispute settlement): no further requirements
     - Recourse to SPS according to which RA requires:
       - Ident. of hazard potential + evaluation of occurrence possibility
       - Evidence of direct causal relationship may be omitted
       - Quantitative and qualitative analyses possible (= GATT)
       - No minimum size of a detected risk
     - RA of authorisation requirement (prohibition with permit reservation) complies with SPS

   ➢ Even in cases where meth. challenges impede to clearly assign causalities (PBTs/vPvBs): AB “ever occur?”
V. Art. 2.2: necessity – substantive

- Risks non-fulfilment would create
  (2) nature of risks/gravity of consequences
  ◦ AB: Carcinogenicity of asbestos (+ legitimate objective) justify strict regulatory measures
  ◦ Asbestos = “hazardous” substance in accordance with GHS
  ◦ SVHC: CMRs, most PBTs, most 57(f) substances also based on GHS classification as “hazardous” substance
  ➢ Science-based proof of hazard potential
  ➢ Given exposure: often danger prevention
  ➢ Consideration of legitimate objectives

- „Nature of the risks“ is significant; extended authorisation requirement of these SVHC categories is prima facie necessary
V. Art. 2.2: necessity – substantive

- Risks non-fulfilment would create

  (2) nature of risks/gravity of consequences

  - **Other** SVHC criteria: cat. 2 reprotox. PBTs, vPvBs, some substances Art. 57(f)
  - Science-based hazard potential with uncertainty
  - In case of exposure:
    - regulatory action → precaution
  → Significance of risks?
  → Precaution justified in terms of Art. 2.2 TBT?
V. Art. 2.2: necessity – substantive

- Risks non-fulfilment would create (2) assessment of precautionary elements
  - No indications in TBT / SPS acknowledges precaution
  - Interpretation of Art. 2.2 + Preamble TBT
    - No country be prevented from taking measures necessary to ensure protection of human, the environment
  - Scope to be assessed by recourse to international law the requirements of which “shall be taken into account” when interpreting an international treaty such as the TBT (Art. 31(3)(c) VCLT)
- \(\rightarrow\) International law: relevance of precaution?
Risks non-fulfilment would create (2) assessment of precautionary elements

- Various international treaties based on precaution
  - Rio Declaration: 15th env. policy principle
  - POP/OSPAR–Convention concerning substances with P and B properties → binding law
- Increasing indications: customary international law binding status (ICJ + ITLOS)
- Normative content of precaution informs interpretation
- AB in *US–Shrimp*: “evolutionary” interpretation of GATT in light of international law (e.g. Agenda 21)
- Justification: structurally comparable
V. Art. 2.2: necessity – substantive

- Risks non-fulfilment would create

  (2) assessment of precautionary elements

  ◦ Possible damage caused by SVHC „precaution categories“ vPvB, [PBT] „irreversible“ and „serious“ (Rio)
    - PBs: int‘l. law context (POP/OSPAR–Conventions)
    - Hazard potential – not just mere „risk potential“
  ◦ Legitimate objective: high level of protection
  ➢ Risk not insignificant, no de minimis threshold!!
  ◦ Extended authorisation requirement of SVHC „precaution categories“ is by evolutionary interpretation of Art. 2.2 TBT prima facie necessary
V. Art. 2.2: interim result

- Extended authorisation requirement serves a legitimate objective in terms of 2.2 TBT
- Regulation is appropriate to contribute to its objectives
- Risks non-fulfilment would create are not acceptable (for all SVHC categories)
V. Art. 2.2: necessity – alternatives

Possible alternative measures

1. REACH Restriction
   - Not equal contribution since only available if knowledge of „unacceptable risk“; no less intrusive means if triggered by hazard potential

2. Extension of Information- and communication duties (Art. 7, 33 REACH) – or –

3. Labelling of (imported) SVHC articles
   - Not equal contribution (articles remain on market), but possible additional measures

Conclusion: no equally effective but less intrusive alternative measure available

Extended authorisation is not more trade-restrictive than necessary, 2.2 TBT
V. Art. 2.2: conclusion

- The relational analysis shows that the extended autorisation requirement does not constitute an unnecessary obstacle to trade
- Extended autorisation requirement does not violate Art. 2.2 TBT
VI. Results of TBT assessment

- Extended authorisation requirement (prohibition with permit reservation) violates neither Art. 2.1 nor Art. 2.2 TBT
- Additional requirements concern the implementation and application of technical regulations (e.g. Art. 3, 12 TBT) and should be considered (ex ante assessment not possible)
3. WTO conformity of a REACH expansion concerning authorisation of SVHC present in imported articles

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