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Does REACH have a 'chilling effect' on trade and investment?

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In 2006, the EU adopted the 'REACH' ('Registration, Evaluation and Authorization of Chemical Substances') Regulation. REACH establishes a system of restrictions on the design, manufacture and use of chemicals, and imposes information, registration and disclosure requirements including supply chain communication, all to protect the environment and human health. As was widely feared, it has recently become clear that this regime is not good news for trade and investment.

The idea behind REACH was novel and unprecedented: comprehensive life-cycle regulation of all chemical-related risks, with industry bearing the duty and burden of ensuring and, in some cases, demonstrating chemical safety. REACH also encourages and requires manufacturers to substitute dangerous chemicals with safer ones and to avoid vertebrate animal testing of substances. The REACH framework is implemented and overseen by a newly established European Chemicals Agency (ECHA), the European Commission, and national authorities from all 27 Member States. REACH's extra-territorial coverage of both chemicals-in-bulk and chemical-based-products (ranging from clothing to electronics) is effectively reshaping global industry supply chains.

Industry's response to REACH and REACH compliance has been observed to distort capital flows to and within Europe. With REACH's registration program currently in full swing, EU chemical producers and importers have already submitted thousands of lengthy substance dossiers to ECHA, and are required to submit many more by prescribed June 2013 and June 2018 deadlines. REACH's authorization program for substances of very high concern ('SVHCs') is also now underway and will soon begin to impose significant new restrictions on chemicals. Arguably, REACH provides disincentives for investment in the European chemical industry, and, in fact, investments have dropped off. One recent European Commission-sponsored study reflects that REACH compliance has thus far cost industry at least €2.1 billion, while another study has shown that REACH obligations are having a 'chilling effect' on chemical substance and product innovation.

Furthermore, REACH has had widespread effects on international trade in bulk chemicals and other products containing chemicals, notwithstanding EU commitments to ensure REACH's consistency with international trade rules overseen by the World Trade Organization (WTO), to which the EU member states are parties. Indeed, REACH has triggered concerns from EU trading partners ever since it was first introduced, and uncertainties remain concerning whether REACH, as implemented, meets the demands of international trade law. Three recently issued WTO tribunal decisions interpreting the Technical Barriers to Trade (TBT) Agreement have reaffirmed WTO Members' sovereign right to regulate for the protection of human health and the environment at their chosen level of protection. But governments may not freely employ technical regulations in a discriminatory manner or as unnecessary obstacles to trade.

First, technical regulations cannot be designed or applied in a manner that accords imported products less favourable treatment than 'like' domestic or third country products. While not overtly discriminatory, REACH could potentially be applied in an 'uneven-handed' manner to impose a disproportionate impact on non-EU products that is sufficiently detrimental to affect the fundamental conditions of competition for 'like' chemical-based products in EU markets. The diverging interpretations of REACH, such as the ongoing disagreement regarding the application of the communication requirements for substances in articles, could possibly subject imported products to more extensive and costly restrictions relative to EU products, which could render them less profitable, and thus, less competitive in EU markets. A recent EU Commission-sponsored study found that REACH's allocation of compliance and enforcement responsibilities to EU Member States has yielded non-uniform, uneven results, including with respect to customs agency inspections. Such variations could potentially impose relatively greater administrative burdens and costs on non-EU manufacturers that place their products at a competitive disadvantage vis-à-vis local companies. Non-EU small-and-medium-sized-enterprises (SMEs) without European presence or negotiating leverage are likely to be most affected.

Second, technical regulations may not impose unnecessary obstacles on trade that are more trade-restrictive than necessary to fulfil a legitimate objective, considering the risks non-fulfilment would create. REACH's aim of protecting human health and the environment would qualify as a legitimate objective. A series of problems, however, including ineffective risk communication, the lack of substance prioritization, budgetary limitations and ECHA's perfunctory compliance checks and infrequent dossier evaluations indicating relatively few harmful substances will be adequately examined, collectively raise questions about the extent to

which REACH, in fact, contributes to the fulfilment of that objective. Moreover, a recent EU Commission-sponsored report detailing the considerable costs and administrative burdens imposed by REACH's registration and data gathering requirements, and another study analyzing reasonably available less trade restrictive alternative chemicals regulatory systems strongly suggest that such requirements are more trade-restrictive than necessary to achieve REACH's objective. Other programmes, such as Canada's and Japan's chemicals management regulatory processes, arguably provide less trade-restrictive alternatives. These regimes feature less expensive and more efficient iterative screening approaches that permit regulators to set aside many substances and uses from the beginning on the grounds that they are unlikely to cause unacceptable risk.

In sum, REACH was designed with ambitious goals in mind, but its implementation may ultimately prove market-distorting and non-compliant with international trade rules. And even if REACH is ultimately found to be WTO compliant, it would not appear to be the most appropriate instrument for reducing chemical risk in a cost-effective and balanced way.

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