The Commission proposal of 29 October 2003 for a regulation concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) provides for various obligations to register substances and preparations on the one hand, and articles on the other. According to the current REACH proposal, the obligation to register substances in articles (Art. 6 REACH) will permit manufacturers of articles within the EU to use in the production only substances registered under REACH. In contrast, producers of articles from third countries are free to use all substances, including those not registered under REACH. This results in a competitive disadvantage for manufacturers from the EU.

This distortion of competition could be remedied by the introduction of a general obligation to register substances used in the production of articles. However it is questionable whether such a general obligation to register would be compatible with the EC’s statutory duties under the legal regime of the World Trade Organisation (WTO). This is principally dependant on the Agreement on Technical Barriers to Trade (TBT Agreement).

The TBT Agreement applies to a general obligation to register insofar as the obligation refers to those substances the use of which is reflected in the characteristics of the end product. With good reason it can be argued that substances registered under REACH, and those which are not, cannot be considered “like” products within the meaning of Art. 2.1. of the TBT Agreement. This would exclude a violation of Art. 2.1. of the TBT Agreement per se Whether alternatively, under the assumption that such substances are “like” substances, there arises a conflict with the TBT Agreement, can be judged only by reference to Art. 2.2. TBT Agreement.

According to Art. 2.2. TBT Agreement, technical regulations – of which the REACH obligation to register is one – may not create an unnecessary obstacle to trade. This must be determined in light of the importance of the goods protected by the technical regulation, and under consideration of the principle of proportionality. In this balancing exercise, precautionary aspects may also be considered. Based on these balancing parameters, there are good reasons in favour of the assumption that a general obligation to register under REACH would not cause an unnecessary obstacle to trade.

A REACH obligation to register substances not reflected in the characteristics of the end product, and a corresponding manufacturing and import prohibition, are to be judged exclusively on the basis of GATT 1994. As a yardstick, Art. III:4 GATT must be applied as distinguished from Art. XI:1 GATT. Thereby it can initially not be ruled out that articles manufactured from REACH-registered, and those from unregistered substances, are to be considered as being like. To the extent that an unfavourable treatment of imported articles by reason of their origin in a third country can be demonstrated, there may be a violation of Art. III:4 GATT. However there are good reasons to assume that a violation of Art. III:4 GATT can be justified under Art. XX GATT as a measure for the protection of human health and the environment.

In conclusion, there are varying indications that from a WTO perspective, the introduction of a general REACH obligation to register substances used in the production of articles, and the corresponding manufacturing and import prohibition, is permissible.