



Examples of Trade and Federalism Conflicts: **Technical Barriers to Trade (TBT)**

Vermont & Maryland: state regulation of toxic toys and e-waste

Summary. The World Trade Organization TBT agreement contains various rules governing “technical regulations” that may constitute a barrier to international trade. On the basis of this TBT agreement, the Peoples’ Republic of China in recent months has demanded that bills related to toxic toys and e-waste disposal introduced respectively in the Maryland and Vermont legislatures must be “cancelled” or “revised.” The sponsors of the bills have denounced the PRC actions as an inappropriate intrusion on the state legislative process. The Office of the U.S. Trade Representative recently announced that it would no longer alert the WTO of possible TBT problems with state legislation, although that policy is hard to square with the plain language of the TBT agreement.

Concerns about the World Trade Organization (WTO) Agreement on Technical Barriers to Trade (TBT). The WTO TBT agreement governs “technical regulations.” The term “technical regulation” is defined as a “document which lays down product characteristics or their related processes and production methods....” Under the TBT Agreement, WTO member nations, including the United States, are required to notify other members whenever a state or provincial government such as Vermont or Maryland proposes to enact a “technical regulation” that is not based on international standards and that will have a “significant effect on trade of other [WTO] Members.” The notification is required to be made “at an early appropriate stage, when amendments can still be introduced, and comments taken into account.”

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The Peoples’ Republic of China sent a fax transmission to the Maryland General Assembly on January 30, 2008, in which it objected to Maryland House Bill Number 8 (HB 8), a bill introduced in 2007 by Delegate Jim Hubbard. HB 8 would restrict the sale of lead-adulterated consumer products and toys in order to protect the public health and the health of children in Maryland in particular

Vermont State Senator Virginia Lyons received a letter in the spring of 2008 from the Peoples Republic of China (PRC) demanding that she "cancel" or "revise" her bill related to control and

disposal of electronic waste (S. 256). Electronic products, such as computers and televisions, contain lead, mercury, cadmium, and similar hazardous materials. Senator Lyons says. "My bill simply provides a system for the recycling of electronic products as a means of limiting the release of these dangerous heavy metals from landfills and thereby protecting the environment and public health in Vermont."

Delegate Hubbard and Senator Virginia Lyons have denounced the PRCs actions. Lyons says, "This is part of a disturbing trend toward undermining state's rights. It's simply not OK for other governments to feel that they have a right to intervene in our state legislative process in this way."

The Vermont story. Vermont State Senator Virginia Lyons received a letter from the Peoples Republic of China (PRC) demanding that she "cancel" or "revise" her bill related to control and disposal of electronic waste (S. 256). This official PRC communication was sent to Senator Lyons' home address. The PRC alleged in the letter that S. 256 is a potential obstacle to international trade.

Based on a notification document issued by the WTO Committee on Technical Barriers to Trade, it appears that the PRC allegations are a response to a U.S. notification filed with the WTO related to Senator Lyons' bill.

Without much explanation, the PRC declares that Senator Lyons' bill is inconsistent with Article 2.2 of the TBT Agreement, which states that "Members should ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade." Under this strict "necessity test," trade values arguably trump other public policy values unless there is no conceivable alternative policy that is less burdensome on trade.

According to Senator Lyons, "The People's Republic of China questions the authority of the Vermont legislature to enact legislation to protect human life and the environment. This attempted interference by the People's Republic of China in the democratic process in Vermont is alarming and threatens basic principles of our system of government. Common sense solutions to health issues at the state and local level should not be subject to international pressure."

The Maryland story. The Peoples' Republic of China sent a fax transmission to the Maryland General Assembly on January 30, 2008, in which it objected to Maryland House Bill Number 8 (HB 8), a bill introduced in 2007 by Delegate Jim Hubbard. HB 8 would restrict the sale of lead-adulterated consumer products and toys in order to protect the public health and the health of children in Maryland in particular. (Del. Hubbard introduced a similar bill, HB 62, in the ongoing 2008 session of the Maryland General Assembly. That bill is not referenced in the PRC comments).

The Chinese allege that HB 8 would violate World Trade Organization (WTO) standards under the Agreement on Technical Barriers to Trade (TBT). The Maryland bill would constitutes a

“technical regulation” covered by the TBT because it is related to product characteristics, i.e. whether products contain lead and similar toxic materials.

The WTO notification on Maryland HB 8 cites the “protection of human life and health” as the ‘objective and rationale’ of HB 8. Unlike several other WTO agreements, the TBT does *not* have a “general exception” regarding the “protection of human life and health.” A country might attempt to challenge such a legislative measure by claiming that the regulation will not be implemented in the “least trade restrictive” way possible; is discriminatory against foreign commerce; does not follow international standards; gives too much discretion to regulators; etc. These are the kinds of complaints about HB8 made by the Peoples Republic of China.

The People’s Republic of China (PRC) alleges that Delegate Hubbard’s bill is inconsistent with a provision of the TBT Agreement, which states that “[t]echnical regulations shall not be maintained if the circumstances or objectives giving rise to their adoption no longer exist or if the changed circumstances or objectives can be addressed in a less trade-restrictive manner.”

The PRC concludes that the United States should take action “canceling the notified regulation,” i.e. HB 8, or otherwise “provide relevant scientific basis for above-mentioned conditions of the technical regulation