



Preliminary Analysis of Allegations by the Peoples Republic of China (PRC) Regarding S.256 (2008) Introduced by Senator Virginia Lyons

Introduction

International trade agreements are negotiated by the United States Trade Representatives (USTR). Individual states are not involved in the negotiations, although trade agreements are presented to Congress. The 1974 Trade Act gives states very little policy input on trade, despite the fact that economic decisions regarding trade have powerful consequences for cities and states. There is only one advisory group to USTR that includes representatives from states. States have not found this limited input to be sufficient to protect state interests. As a result, several states, including Vermont, Maine and New Hampshire, have created special Commissions to explore the impacts of international trade agreements on state sovereignty and to communicate state interests with USTR, other states, and Congress.

Analysis of Objections

The United States sent a notice to the World Trade Organization (WTO) about Senator Lyons bill, S.256. 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.

The WTO Agreement on Technical Barriers to Trade contains various rules governing "technical regulations." The term "technical regulation" is defined as a "document which lays down product characteristics or their related processes and production methods...." (TBT Agreement, Annex 1). The proposed Vermont legislation, it might be argued, constitutes a "technical regulation" because it is related to product characteristics – i.e. specified types of electronic products containing heavy metals and other dangerous substances. At the same time, it might be argued that the essential thrust of the bill, to establish and finance a system of electronic product recycling, is not "technical regulation." Furthermore, it is not even clear that Chinese manufacturers are covered by the definition of "manufacturers" in S256, although any additional regulatory and financial burdens carried by their U.S. distributors as a result of the legislation might have some impact on the volume of sales in Vermont that could indirectly reduce the profits of Chinese firms. Nonetheless, the PRC, the U.S. federal government, and the WTO are treating it as a technical regulation subject to WTO jurisdiction.

Under Article 3.2 of 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 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." See Articles 3.2 and 2.9.2. The notification is required to be made "at an early appropriate stage, when amendments can still be introduced, and comments taken

into account.” It seems that the U.S. federal government notified the WTO of the Lyons legislation pursuant to Article 3.2 of the TBT.

The WTO notification on S256 cites the “protection of human life and health” as the ‘objective and rationale’ of the legislation. 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 that might be made by the PRC.

The PRC alleges that the Lyons bill violates WTO law. Without much explanation, the Peoples Republic 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. The PRC asserts, also without much factual or legal explanation:

- That registration fees and recycling fees paid by manufacturers under S256 are unfair and not determined on a scientific basis;
- That similar regulatory proposals in Missouri and Virginia do not require payment of a registration fee by manufacturers (perhaps suggesting that a registration fee is an “unnecessary obstacle” to international trade?);
- That the variable recycling fee may increase the cost of video display devices by 10 to 30 percent;
- That the annual administrative process for calculating the pounds of electronic devices recycled by a manufacturer from households has no scientific basis, is unfair to small manufacturers entering the Vermont market, and relies on statistics and feedback from recyclers who are under no obligation to furnish reliable data ; and
- That revisions are needed in the bill related to the effective date for registration by manufacturers, a more clearly defined time schedule for agency acceptance and approval of a registration, and greater specification of the responsibilities of collectors and recyclers.

Conclusion

As illustrated by this event, other countries could and are beginning to use the trade system to apply pressure to state legislatures and to impact the state legislative process. Since trade promotion authority has expired, states see an opportunity to evaluate the process for providing input on trade issues and to improve federal-state communication. A new system for improving communication between states, USTR, and Congress should be a strong priority for the next Congress and President to ensure that our democratic system of government is protected.