



**Allegations by the Peoples Republic of China that a Bill,
Introduced by Del. Jim Hubbard in the Maryland House of
Delegates to Protect Children from Lead Poisoning, Could Violate
World Trade Organization Rules**

(DRAFT PRELIMINARY ANALYSIS)

The staff of the Forum on Democracy & Trade was asked to analyze comments filed by the People's Republic of China (PRC) with the World Trade Organization (WTO) alleging that a bill introduced by Delegate Jim Hubbard in the Maryland House of Delegates to protect children from poisoning by lead in consumer products could violate WTO rules under the Agreement on Technical Barriers to Trade (TBT Agreement). The official PRC comments on Del. Hubbard's bill, of January 30, contain allegations (1) that are not always clear or specific, in part perhaps because of an awkward translation of the comments from Chinese into English, and (2) that are not fully explained either in terms of the facts or in terms of WTO law. This analysis, thus, is a preliminary one based on a first attempt to parse the language of the PRC comments.

(1) The United States apparently sent a notice to the WTO about the Hubbard bill. The allegations by the PRC's WTO/TBT National Notification and Enquiry Center are made in a fax transmission to the U.S. National Center for Standards and Technology and the Maryland General Assembly on January 30, 2008. 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 Delegate Hubbard's House Bill Number 8 (HB 8), a bill introduced in 2007 that would restrict the sale of lead-adulterated products 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 WTO TBT agreement 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 Maryland proposed legislation constitutes a "technical regulation" because it is related to product characteristics – i.e. whether products contain lead.

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 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." 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 Hubbard legislation pursuant to Article 3.2 of the TBT. It is not clear how often, or how routinely, the federal government notifies the WTO of pending state legislation; and whether such notification comes from the Commerce Department, the Office of the United States Trade Representative (USTR), or some other branch of the government.

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 made by the PRC in its submission.

(2) *The PRC alleges that the Hubbard bill could violate WTO law.* The People’s Republic suggests that Del. Hubbard’s bill is inconsistent with Article 2.3 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 asserts, without much explanation:

- that the circumstances that led to the proposal to limit lead content in products no longer exist, and that the proposed legislation is therefore not necessary.
- that standards have only been laid down for soluble lead, and it has corrected problems associated with soluble lead;
- that leaded components of products “that are impossible for a child to touch” present no health hazard;
- that the definition of “products” in the Hubbard bill by including “clothes and ornament” is overbroad, without scientific information demonstrating a risk to children’s health and without consideration of the intended use of the clothes and ornament; and
- that excessive discretion is given to Maryland officials under HB 8 to determine the limits on total lead content of a product without specifying how that determination would be made, what scientific standard would be applied, and what testing method would be used.

The PRC comments are unclear as to:

- which standards it references with respect to soluble lead;
- what specific problem related to soluble lead was corrected;
- why Maryland cannot regulate insoluble lead, and total lead content in a consumer product (for example based on a life-cycle analysis, focusing not on product use but rather on ultimate disposal and entry into the solid waste stream); and

- why clothes and ornament should be exempted from coverage.

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.” It gives special emphasis to ‘cancelling the regulation’ or establishing a scientific basis for regulation of “clothes and ornament.”

(3) The PRC asks for consultations with the U.S. federal government. Perhaps of most concern, the PRC requests consultations with the U.S. federal government pursuant to Article 6.3 of the Agreement, which encourages WTO member nations to negotiate regarding “mutual recognition of results of each other’s conformity assessment procedures.” The term “conformity assessment procedures” refers to the procedures that a government uses to determine whether a product complies with a “technical regulation,” such as the procedures that the Maryland Department of Health and Mental Hygiene would use to determine whether products complied with the requirements of the proposed law. Interestingly, Article 6.3 applies to conformity assessment by “central government bodies” – i.e. federal agencies. It is not clear whether the PRC referred to this provision because it misread the TBT Agreement, or because it is seeking some sort of preemptive federal action.

(4) Three issues related to the PRC’s comments merit further inquiry:

- Did the U.S. federal government, in fact and without advance consultation with Maryland legislators, notify the WTO of possible future violations of WTO law by the Maryland General Assembly? If so, what prompted the federal government to notify the WTO concerning this specific piece of proposed legislation, among the thousands of bills introduced annually in U.S. state legislatures? And, how frequently are similar notifications submitted to the WTO? Which agency is responsible for this action?
- Does the United States Trade Representative (USTR) intend to grant China’s request to negotiate concerning “conformity assessment procedures”? What role, if any, would Maryland legislators have in that process?
- What is USTR’s position regarding the conformity of the proposed legislation with the TBT Agreement? For example, how does USTR interpret the requirement that the proposed legislation be “no more trade restrictive than necessary”?