

Testimony
of
James Bacchus
to the
Subcommittee on Energy and Power
of the
Energy and Commerce Committee
of the
United States House of Representatives

Washington, DC

March 25, 2014

Summary – Bacchus Testimony

- Losing a WTO because US restrictions on exports of natural gas are inconsistent with WTO rules could result in expensive economic sanctions against the US in other sectors of international trade.
- WTO rules apply to trade in natural gas and other energy products.
- WTO rules prohibit quantitative restrictions on exports others than export taxes.
- The current US process for licensing NG exports raises a legal concern under WTO rules by favoring exports to countries with an FTA with the United States.
- HR 6 eliminates this legal concern under WTO rules – but does not eliminate several others.
- Lengthy delays in granting export licenses raise WTO legal issues.
- So do any efforts made in the licensing process to protect the competitive interests of US producers.
- So too do any aspects of the licensing process that grant subsidies to certain industries that have an adverse effect in the marketplace.
- The United States should comply with our treaty obligations, avoid the possibility of costly economic sanctions, and continue in the forefront in the WTO in fighting export restrictions, as in current US WTO cases against China.

As always, I am grateful for the opportunity to assist my former colleagues in the U.S. House of Representatives. Today, I am here because of some of what I have done since I chose to leave this House and became a former Member of Congress.

After deciding not to seek reelection to the House in 1994, I became, the following year, one of the seven founding Members of the Appellate Body of the then newly-established World Trade Organization. For nearly a decade, I served the United States and the other member countries of the WTO by judging the final appeals in their international trade disputes as part of WTO dispute settlement.

Twice I was elected Chairman of the Appellate Body – the chief judge for the WTO – by my six colleagues in Geneva. Together with them, I wrote many of the first and foundational legal rulings clarifying the meaning of the mutual international trade obligations of the Members of the WTO under the WTO treaty. This is why I have been asked to appear to assist you here today.

Largely overlooked so far in the emerging Congressional debate about restricting exports of natural gas is the possibility that such restrictions are inconsistent with the obligations of the

United States to other WTO Members under the WTO treaty. If our restrictive energy measures are inconsistent with our treaty obligations, the United States risks losing a case in the WTO. Such a loss could cause the WTO to authorize expensive economic sanctions against us through the loss of previously granted concessions in other sectors of our international trade.

I am no longer the chief judge for the WTO, but I hope to be helpful to you in suggesting how WTO rules relate to restrictions on natural gas exports. Although my law partner Rosa Jeong and I have done some work on some aspects of this issue for the National Association of Manufacturers, I am here today in my personal capacity, and I speak today solely for myself.

WTO rules apply to trade in natural gas and other energy products in the same way they apply to other traded products. Some have suggested that energy products are somehow separate and apart from other traded products in how WTO rules apply to them. There is no legal basis for this view. The United States has taken no reservations from our obligations under WTO rules for exports of natural gas or other energy products.

WTO rules prohibit bans, quotas, and other forms of quantitative restrictions on exports unless those restrictions take the form of export taxes. Taxes on exports are prohibited by our Constitution, so energy export taxes are not an option for the United States. WTO rules also permit temporary restrictions on exports to prevent or relieve critical shortages of essential products, but that can hardly be said to apply to our current situation with supplies of natural gas.

A number of legal concerns occur when considering the consistency of the current US process for licensing exports of natural gas with WTO rules.

First of all, the current US process gives special treatment in licensing exports of natural gas to countries with which we have a free trade agreement. Natural gas exports to these countries are deemed to be in the “public interest” and permitted without delay. In contrast, the Department of Energy has elected to subject licensing requests for LNG exports to non-FTA countries to a thorough and lengthy assessment intended to determine whether exports of natural gas to those countries serve our “public interest.” In this way, applicants that will ship LNG to FTA countries are, preferentially, given expedited review in the licensing process as compared to those applicants that will ship LNG to non-FTA countries.

When seen through the prism of WTO law, these are measures affecting trade that result in discrimination between like traded products. The legal question under WTO law is whether this discrimination can be excused by an exception in WTO law that allows trade discrimination as part of a “free trade agreement.” But it is not at all clear that all of the FTA’s of the United States fit within the definition in the WTO treaty of a “free trade agreement.”

Fortunately, HR 6, introduced by Congressman Cory Gardner of Colorado, and currently under consideration by this Committee, would eliminate this potential legal concern by providing that natural gas exports to all other Members of the WTO would be deemed to be in the “public interest.” Unfortunately, HR 6 does not, in its present form, remedy several other legal concerns arising from the current US licensing process under WTO rules.

One remaining legal concern is the question of the lengthy delays in granting export licenses. Under WTO rules, a license can clearly be a restriction on exports, and case law has defined the notion of a “restriction” broadly to include licensing procedures that pose limitations on actions or have a limiting effect, such as by creating uncertainties or by affecting investment plans. In one case, delays of up to three months in issuing export licenses were found to be inconsistent with the rules.

To be sure, liquefied natural gas is, practically speaking, not just another widget. Before it can be shipped by sea, natural gas must be transformed in a careful way that requires special facilities. Some period of deliberation in siting and evaluating LNG facilities seems reasonable. But what would WTO judges be likely to say about delays in issuing export licenses that last for several years?

A second remaining legal concern is the lack of clarity in how the Department of Energy defines the “public interest.” Conceivably, even lengthy delays in the licensing process could be excused under WTO rules if it could be proven by the United States that such delays are necessary to protect life or health, or are related to the conservation of exhaustible natural resources, so long as the process is not applied in a way that results in arbitrary or unjustifiable discrimination or a disguised restriction on international trade. If, however, in determining the “public interest,” the DOE considers as a factor the effect the proposed exports will have on domestic producers that use natural gas when producing their products in their competition with

like foreign products, then these exceptions to WTO rules will not be available, and will not excuse a WTO violation caused by lengthy licensing delays.

A third legal remaining legal concern may arise under the WTO rules on governmental subsidies. Under WTO rules, subsidies are illegal if they are specific to certain industries and cause adverse effects in the marketplace. The questions in a WTO case would be: by restricting exports so as to reduce the domestic price of natural gas, is the United States granting a subsidy to the manufacturing firms that are the downstream users of natural gas, and, if so, does that subsidy have illegal trade effects? Here, the general exception for measures protecting life, health, and exhaustible natural resources may very well not be available to excuse such a violation of the WTO subsidy rules, even if a determination of the “public interest” excludes competitive trade concerns.

Why should you care about any of these legal concerns under the WTO treaty when crafting legislation and guiding executive agencies in the proper pursuit of their administrative processes?

I will conclude by giving you three reasons.

First, and foremost, of course, the United States of America should always comply with our international treaty obligations. If we don't, then who will?

Second, we could choose to ignore our treaty obligations as a Member of the WTO, but that could prove costly. If, in an exercise of our sovereignty, we chose not to comply with a ruling against us in the WTO, the resulting economic sanctions could cost us billions of dollars in lost trade – annually.

And lastly, and significantly, the United States has for decades, as a matter of bipartisan trade policy, opposed restrictions on exports because of the many ways such restrictions distort world trade and deny economic opportunities to the American people. In furtherance of this policy, the United States has been in the forefront in the WTO in fighting rising restrictions on exports worldwide, and is, even as we meet today, aggressively pursuing, with the bipartisan support of the Congress, not one but two major WTO cases against Chinese export restrictions, on raw materials and on rare earth elements.

The United States is rightly winning these two cases by citing many of the same WTO rules and WTO rulings I have cited today.

#####

James Bacchus is a former Member of Congress, from Florida, and a former Chairman of the Appellate Body of the World Trade Organization. He chairs the global practice of the Greenberg Traurig law firm.