



LNG AND COAL:

**UNREASONABLE DELAYS IN APPROVING EXPORTS
LIKELY VIOLATE INTERNATIONAL TREATY OBLIGATIONS**

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Overview

Recent technological breakthroughs in natural gas production, combined with growing worldwide demand for fossil fuels, have caused major shifts in domestic energy markets and spurred U.S. producers of both natural gas and coal to sell their products overseas, particularly in Asia. However, before natural gas and coal companies can serve these overseas markets, exports must be approved and new export facilities must be constructed in the United States—facilities that require both federal and state permits. For a variety of reasons, companies have encountered long delays in acquiring the export licenses and permits necessary to construct these facilities in the United States. This paper focuses on the implications of these delays in light of the international obligations of the United States under the World Trade Organization (WTO) agreements.

As a member of the WTO, the United States is bound to comply with the trade rules contained in the WTO agreements. A key provision of those agreements, Article XI:1 of the General Agreement on Tariffs and Trade 1994 (GATT) forbids export restrictions, including those made effective through licenses or other measures. The United States has always been a strong advocate of these rules and has been forceful in challenging export restrictions imposed by other countries, as highlighted recently when the United States successfully challenged China's imposition of export duties, quotas and licenses on a variety of raw materials at the WTO. Consequently, China must now eliminate its export restrictions or be subject to economic sanctions.

As policymakers examine these processes from a domestic standpoint, it is also important to consider the potential international implications of the U.S. approach. In particular, ongoing delays and licensing requirements and processes are starting to raise questions about the United States' own commitment to key principles of the WTO that bind not only the United States, but also 158 other countries. U.S. action—or inaction as the current situation appears—raises important questions about the United States' implementation of these WTO rules and raises the specter that other WTO members may follow suit in ways that would undermine U.S. competitiveness globally. Particularly in light of the United States' successful WTO challenge to China's imposition of export duties, quotas and licenses on raw materials and the ongoing U.S. challenge to China's restraints on rare earth exports, there may be substantial costs to the United States' own delays and limits on its export of natural resources.

In short, the tables may be turned on the United States directly in the WTO, but also through other countries walking away from core principles that have long been critical to U.S. success in the global economy.

North American Energy Revolution Causes Major Market Shifts

The United States holds the largest estimated recoverable coal reserves in the world and has for years depended on coal to fire a substantial portion of electric generation fleet; the United States has also exported coal (roughly 4 to 10 percent of domestic production) through ports in more than 20 states. However, in recent years, technological advancements in horizontal drilling and hydraulic fracturing have unlocked major new deposits of shale gas in North America. As a result of this new supply abundance, U.S. natural gas prices have fallen dramatically. The combination of low natural gas prices and strict new regulations from the

Environmental Protection Agency on coal-fired electricity is spurring U.S. power generators to increase their dependence on natural gas.

At the same time, global demand for both coal and gas is rising. Today, U.S. natural gas prices are less than half those of Europe and as little as one-fourth those of Asia. The price differential among these markets has made the prospect of exporting liquefied natural gas (LNG) attractive to U.S. producers. In addition, decreased dependence on coal for domestic power generation has pushed U.S. coal companies to export greater volumes of coal to Asian markets, where demand remains high and growing. Coal is the source of about 70 percent of the energy consumed in China; by 2016, more than 395 gigawatts of new coal-fired generation are expected worldwide.

U.S. Laws Are Impeding Exports of Coal and Natural Gas

The United States has, since its creation, recognized the importance of exports to growing the domestic economy. From the beginning, the United States enacted its own prohibition on export tariffs in Art. I, clause 5 of the U.S. Constitution. As the lead architect of the GATT in 1947, the United States promoted and readily agreed to a multilateral prohibition on quantitative export restraints.

The strong U.S. preference for exports and its clear rejection of export limits and restraints comes from both a recognition of the importance of exports to growth and the negative consequences that would ensue if other countries could block the export of valuable natural resources, commodities or even technologies. That recognition deserves equal weight today as export restraints on a variety of raw materials and resources are cropping up worldwide in ways that limit competitive U.S. access to valuable inputs and supplies. Full implementation of core WTO principles—particularly the prohibition of export restraints—is very strongly in the United States' interest. Action by the United States that would undermine or bring into question the U.S. commitment to that obligation raises very important issues.

Historically, the United States has never exported significant quantities of LNG but has long exported coal to overseas markets. Today, however, government policies are imposing long delays on a variety of export projects for both commodities. In the case of LNG, the chief obstacle confronting export projects is a federal determination of whether the export of gas is consistent with the “public interest”—an ambiguous and discretionary threshold. In the case of coal, federal law imposes no significant restrictions on the export of coal itself; however, coal export projects are confronting delays related to analysis of their potential environmental impacts. In both instances, the implementation of U.S. laws and related delays in licensing and permitting are impeding these projects and risk running afoul of our international obligations under the WTO.

U.S. Law Regulating LNG Exports

U.S. law requires LNG export projects to undergo two separate phases of federal government approval: one administered by the Department of Energy (DOE) and one administered by the Federal Energy Regulatory Commission (FERC). The Natural Gas Act requires that companies secure an export license from the DOE that permits the licensee to

export a limited volume of LNG over a set time frame. In addition, the Natural Gas Act grants the FERC the authority to regulate the siting, construction and operation of LNG export facilities.

The FERC process appears to be a relatively straightforward evaluation of the facility's direct local impacts to human health and the environment. The FERC is required to consult with the public and other federal and state agencies, but the agency grants approvals based on well-understood principles of safety and immediate local environmental impacts. The DOE process, by contrast, is substantially more ambiguous. The Natural Gas Act creates a rebuttable presumption that LNG exports are in the "public interest"; however, the DOE has interpreted this language instead to require individual determinations by the agency whether the export of LNG in the requested volumes will be consistent with the public interest. By law, export licenses to countries with a free trade agreement (FTA) with the United States are subject to a different standard; such export licenses are deemed consistent with the public interest and must be approved without delay.¹ For export licenses to countries without an FTA, the public interest consideration purportedly includes factors such as economic, energy security and domestic supply considerations, but there has been very little clarity on how these factors are analyzed.

To date, the U.S. government has conditionally granted export licenses to just five applications to export LNG. The application for the first project was pending for several months prior to approval, while the second, third, fourth and fifth applications were pending for more than two years prior to approval. The U.S. government is expected to grant more licenses and appears to be shortening the time between decisions, but many anticipate that it may take several more years to process the remaining license applications. In addition to the five approved applications, the DOE is considering 19 more LNG export licenses. Three of the remaining applications have been awaiting approval since 2011, while several others have been pending for many months.

Given that each project can take five years or more from the DOE's approval to export, the current backlog of LNG export applications and the delay in approval translate to real economic costs. Many industry observers fear that certain projects may be delayed beyond the window of economic opportunity. The concern is heightened by new and planned export terminals in Canada, Australia and Africa, all of which will compete with the United States for Asian markets.

U.S. Laws Regulating Coal Exports

Federal law does not restrict the export of coal to overseas markets. However, to export coal mined in the Powder River Basin area of Montana and Wyoming to Asian markets, additional port facilities must be constructed. The siting and construction of these facilities must be reviewed and permitted by the Army Corps of Engineers under the authority provided in the Rivers and Harbors Act, the Clean Water Act and the National Environmental Policy Act (NEPA). Furthermore, under various state laws, state and local agencies also have the authority

¹ Countries with an FTA with the United States include Australia, Bahrain, Canada, Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Israel, Jordan, Mexico, Morocco, Nicaragua, Oman, Panama, Peru, Singapore and South Korea.

to review and evaluate port facilities. Currently, three marine terminal projects are under various stages of permitting and review in the Pacific Northwest.

Federal, state and local governments will perform environmental reviews of each project's potential impact as a condition of siting and constructing the marine terminals. Based on these reviews, the agencies will decide whether to approve the proposed export terminal facilities. The agencies have the authority to (1) approve the proposal; (2) condition the approval of the proposal based on mitigating specific adverse environmental impacts; or (3) in some cases, deny the proposal if reviews show that the proposal is likely to have significant adverse environmental impacts that cannot be mitigated to an acceptable level.

Various environmental advocacy groups, which oppose the marine terminal projects specifically and coal exports generally, have pushed for regulators to study the cumulative effect of all pending projects, looking at factors such as increased train traffic and health and environmental concerns. In particular, opponents argue that the impact of burning coal in other parts of the world must be considered as part of environmental impact reviews. Supporters of the projects say that each project should be considered separately and the review should be limited to local environmental impacts.

The scope of the environmental review has been determined for two of the three coal export projects. For both the Morrow Pacific Terminal in Oregon and the Gateway Pacific Terminal in Washington State, the Army Corps of Engineers indicated that its review will be limited to the local impact of the terminals and will not include the impact of burning coal or of interstate rail transport. Due to its small size, the Morrow Pacific project will receive a streamlined "Environmental Assessment," while the larger Gateway Pacific Terminal will receive a more involved "Environmental Impact Statement" (EIS) from the Corps. By contrast, the Washington Department of Ecology and Whatcom County announced that the scope of their reviews for the Gateway Pacific Terminal will be more expansive and will encompass the global impacts of the transportation and the ultimate use of coal. The scoping process for the third and final project, Millennium Bulk Terminals in Washington State, is ongoing but will likely result in a split federal and state review much like the Gateway project.

It is expected that the draft EIS will take approximately two years to complete, and the preparation of the final EIS will take an unknown amount of additional time. The projects must also secure various other state and local permits prior to construction. However, the vastly expanded scope of the Washington State environmental review appears poised to cause significant additional delays or restrictions to the projects—delays that could stretch well beyond what is customary or reasonable. Prolonged delay, according to supporters of the projects, will have detrimental impacts on the economy without considerable environmental benefits. Already, the potential delays have contributed to at least three terminal projects being scrapped.

WTO Trade Rules

Article XI:1 of the GATT prohibits import and export restrictions, “other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures.” Certain exceptions are allowed—for example, to temporarily relieve critical shortages of essential products, or if the restrictions are necessary to protect human, animal or plant life or health, or to conserve exhaustible natural resources.

The breadth and absolute nature of this language has been applied to actions by China to restrict exports of raw materials and rare earths and could equally apply to the U.S. treatment of our exports, including LNG and coal. Thus, if the LNG and coal issues are challenged before the WTO, there are two main questions to be answered: (1) does the government action at issue constitute “restrictions” on exports prohibited by Article XI:1 of the GATT; and (2) if so, are the restrictions excused under any exceptions provided under the GATT? As discussed below, we believe that a WTO panel will likely find the government actions at issue to constitute export restrictions, and for the most part, the restrictions will not be excused under any of the exceptions.

Export Restrictions Prohibited by Article XI:1 of the GATT

At issue here are the U.S. government’s approval processes for exporting LNG and coal. For LNG, the DOE must grant licenses before it can be exported. For coal, the building of new export terminal facilities is subject to federal, state and local review and approval.² We believe that both LNG export licenses and unduly broad coal terminal reviews would likely constitute export restrictions prohibited by Article XI:1 of the GATT.

Export Licensing

Licenses are specifically mentioned in Article XI:1 of the GATT as one of the forms of prohibited export restrictions. That said, requiring export licenses, in and of itself, does not constitute a violation of Article XI:1 of the GATT. Export licenses constitute “restrictions” if they pose a limitation on action, a limiting condition or regulation. In particular, if export licenses are granted or denied based on discretionary criteria, such that the possibility to deny the license is always present, then the system by nature has a restrictive or limiting effect. Restrictions also refer to “measures that create uncertainties and affect investment plans, restrict market access for imports or make importation prohibitively costly.” Restrictions cover situations where goods are allowed into the market, but are “only allowed under certain conditions, which make the importation more onerous than if the condition had not existed, thus generating a disincentive to import.”

² With respect to coal, the review of export terminals is performed by authorities at the federal, state and local levels. To the extent that state and local governments are not signatories to the WTO, a question arises whether state or local actions may be challenged under the GATT. The answer is yes. Under Article XXIV:12 of the GATT, and as reiterated by Paragraph 13 of the Understanding on the Interpretation of Article XXIV of the GATT, actions by state and local governments are challengeable before the WTO because each WTO member country is responsible for ensuring compliance with GATT provisions by all regional and local governments within its territories.

Coal Export Terminal Reviews

Article XI:1 does not specifically mention the review and approval of terminal facilities. Thus, the question is whether the terminal review and approval process constitutes an export restriction in the form of “other measures.” We believe that it does.

As noted above, the term “restriction” of Article XI:1 has been interpreted to mean a limitation on action, a limiting condition or regulation as well as measures that create uncertainties and affect investment plans, restrict market access for imports or make importation prohibitively costly.

Federal, state and local governments are involved in reviewing marine terminal projects and issuing the final environmental review documents. Each government level has the authority to conduct environmental reviews and the independent discretion to determine the scope of its review. As noted, for the Gateway Pacific Terminal project, the federal government decided to limit the scope of its review only to the local environmental impacts, while state/local governments decided on a more expanded scope that includes the impact of burning coal outside the United States. These divergent decisions indicate that the criteria for reviewing coal export terminals have been determined on a discretionary basis. Furthermore, the outcome from the reviews is uncertain, and approval is not assured. This uncertainty and the delay affect investment plans, create a disincentive to export and limit competitive opportunities to export. Thus, we believe the review processes for coal export terminals are likely to constitute export restrictions prohibited by Article XI:1 of the GATT.

Delays in Issuing Export Approvals May Constitute an Export Restriction

Furthermore, lengthy delays in issuing licenses or export approvals may constitute export restrictions under Article XI:1 of the GATT. In a prior case involving Japan’s export restrictions on semiconductors, a GATT panel found that delays of up to three months in issuing licenses to export semiconductors constituted restrictions inconsistent with Article XI:1.³ In the case of LNG, license applications have been pending for many months, some more than two years. For coal, the environmental review process is expected to take two years or more. Given that a delay of three months in issuing an export license was found to be a restriction, a WTO panel may find that the current delay of two years or more in reviewing and approving LNG and coal exports to constitute a restriction on exportation that violates Article XI:1 of the GATT.

Exceptions Under the GATT Are Unlikely to Apply to Most Aspects of LNG and Coal Export Restrictions

Measures that are inconsistent with Article XI:1 may be permissible nevertheless under several exceptions provided under the GATT. Under Article XI:2(a) of the GATT, restrictions may be allowed temporarily to relieve critical shortages of essential products. Other exceptions are allowed under Article XX of the GATT—for example, if the restrictions are necessary to protect human, animal or plant life or health (Article XX(b)), or to conserve exhaustible natural

³ GATT Panel Report, *Japan—Trade in Semi-Conductors*, L/6309-35S/116 (4 May 1988).

resources (Article XX(g)). For most aspects of LNG and coal export restrictions, we believe that it will be difficult for the United States to satisfy these exceptions.⁴

Article XI:2(a): Exception for Temporary Restriction to Relieve Critical Shortages

Article XI:2(a) allows an exception for “export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party.” It appears unlikely that the United States will be able to invoke Article XI:2(a) to justify its restrictions on LNG and coal exports. First, there is no indication that the current review and approval procedures for LNG and coal exports are “temporarily applied.” Rather, the laws under which the reviews are conducted—for example, the Natural Gas Act, the Rivers and Harbors Act, the Clean Water Act and NEPA—are not temporary provisions and have been in effect for many years. Nothing in these laws or in government practice indicates that the restrictions are intended to be temporary. Second, there is no indication of any shortage of either natural gas or coal. Rather, exports of LNG and coal are being proposed due to the recent abundance of natural gas and lower demand for coal in the United States. For these reasons, we believe that the exception under Article XI:2(a) of GATT would not be applicable.

Article XX(b): Exception for Measures Necessary to Protect Human, Animal or Plant Life or Health

Article XX(b) of the GATT allows an exception for restrictions “necessary to protect human, animal or plant life or health.” We believe that this exception would not apply to LNG export restrictions, but may apply in part to coal export restrictions.

1. An Article XX(b) Defense Is Unlikely to Apply to LNG Export Restrictions

An export restriction on LNG is unlikely to satisfy Article XX(b) because it does not appear to be related to protecting human, animal or plant life or health nor contribute to such goals.

As noted above, the DOE reviews applications to determine whether the LNG exports associated with each application are in the public interest. Although the DOE’s standard of review is unclear, a Federal Register notice related to one of the export applications states that the public interest factors will include:

...the impact of LNG exports associated with this Application on domestic need for the gas proposed for export, adequacy of domestic natural gas supply, U.S. energy security and the cumulative impact of the requested authorization and any other LNG export application(s) previously approved on domestic natural gas supply and demand fundamentals. DOE will also consider any other relevant issues, including the impact on the U.S. economy (GDP), consumers and industry, job creation, U.S. balance of trade, international considerations and

⁴ We focus on these exceptions because they appear to be the ones the United States is most likely to invoke based on the facts available to us. Because the WTO dispute settlement is driven decidedly by the facts presented and found in evidence in any particular dispute, there may be additional exceptions that the United States may invoke.

whether the arrangement is consistent with DOE's policy of promoting competition in the marketplace by allowing commercial parties to freely negotiate their own trade arrangements.⁵

The factors listed in the Federal Register notice indicate that the initial review of LNG export applications is focused generally on energy security and economic concerns, rather than on environmental or human health concerns. Thus, based on these facts, a WTO panel is unlikely to find that export restrictions on LNG fall within the range of policies designed to protect human, animal or plant life or health mentioned in Article XX(b). Furthermore, given that the primary objective pursued by restrictions on exports of LNG exports does not appear to be related to human, animal or plant life or health, a WTO panel is unlikely to find that the restriction contributes materially to the protection of human, animal or plant life or health.

Accordingly, we believe that a WTO panel is unlikely to find LNG export restrictions to be justified under Article XX(b) of the GATT.

2. An Article XX(b) Defense Is Unlikely to Apply to Coal Export Restrictions Imposed by State Governments

With respect to coal, the outcome is likely to differ for the federal review and for the state/local review. As discussed above, coal exports are currently limited due to the lengthy review process to build new marine terminals. The restrictions are in the form of environmental review requirements and the processing of various permits that may take more than two years to complete. The federal government is planning a review, which is limited to the local environmental impacts of the marine facilities, while state and local governments are planning to expand their review to include the impact of burning coal outside the United States. We believe that the federal environmental review, which is limited to local environmental impacts of marine facilities, may be allowed under Article XX(b), but the state/local EIS review, which covers the impact of coal emissions outside the United States, is unlikely to satisfy Article XX(b).

Federal Review: The stated objective of the EIS is to consider the impact on the environment and human health. The laws that authorize the review (i.e., Rivers and Harbors Act, the Clean Water Act and NEPA) clearly reference environmental protection as the reason for the reviews. Thus, export restrictions on coal fall within the range of policies designed to protect human, animal or plant life or health mentioned in Article XX(b). To the extent that the federal review is limited to the local and direct impact of the marine terminals, its objective is to protect the local environment where the terminals will be built. Because there is a direct link between the objective and the restriction, a WTO panel may find that the environmental review is apt to contribute materially to the goal of protecting the local environment.

Once a WTO panel finds that the restriction is justified under Article XX(b), the restriction must next be analyzed under the introductory clause—the so-called “chapeau”—of Article XX, which requires that “such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade....” With respect to the

⁵ <https://www.federalregister.gov/articles/2013/07/25/2013-17885/sabine-pass-liquefaction-llc-application-for-long-term-authorization-to-export-liquefied-natural-gas>.

federal review of marine export terminals, there is no indication that the review is conducted in an arbitrary or discriminatory manner. To our understanding, the review by the Army Corps of Engineers would be required under NEPA for any marine terminals with a significant federal nexus, whether the primary export product was coal or any other product. We also understand that the scope of the recently announced marine terminal review, which is limited to local environmental impacts, is consistent with other projects reviewed under NEPA by the government. Moreover, we have no reason to believe that the federal review is a disguised restriction on international trade. Based on these assumptions, a WTO panel may find the federal review of the coal export terminals to satisfy the chapeau of Article XX and, therefore, justified under Article XX(b).

State and Local Review: State and local governments have proposed a review that is much expanded in scope, including the impact of burning coal in other parts of the world, such as China. As an initial matter, it is unclear whether the United States could argue that the restriction is necessary to protect human, animal or plant life or health *outside* the jurisdictional territory of the United States. The United States may argue that the pollution caused by coal emissions in other parts of the world, such as China, can negatively impact the United States.⁶ For example, there has been some evidence that air pollution from China is being carried by the jet stream to the West Coast of the United States. Furthermore, it has been argued that carbon emissions from any part of the world contribute to worldwide climate change. Thus, it is plausible that a WTO panel would find a sufficient nexus between coal emissions in China (or other parts of the world) and the United States for purposes of Article XX(b).

However, even if the United States can argue that the export restriction protects human, animal or plant life or health within its territories, a WTO panel may be unconvinced that restricting coal exports from the United States has any material impact on reducing coal emissions in China. China is a large producer of coal itself and is not dependent on coal from the United States. Given this, it may be difficult to show that coal exports from the United States will have a material impact on the coal consumption or emissions from China. In fact, it has been argued that the coal exported from the United States is “cleaner” than coal produced in China, and that switching from Chinese coal to U.S. coal will reduce coal emissions from China. Accordingly, and based on these facts, we believe that a WTO panel is unlikely to find export restrictions on coal result in a material contribution to reducing coal emissions in China.

In sum, and based on our current assumptions, we believe that a WTO panel may find that the EIS under the federal review that is limited to local environmental impacts to be justified under Article XX(b). However, we believe that a panel is less likely to find coal export restrictions under the expanded state and local review that encompass the impact of coal emissions in other parts of the world to be justified under Article XX(b).

⁶ By way of analogy, in a case involving U.S. import restrictions on shrimp that were harvested in other countries’ territorial waters using methods that harmed sea turtles, the WTO Appellate Body declined to opine on whether there is an implied jurisdictional limitation to Article XX(g). However, in specific circumstances of that case, there was evidence that sea turtles from other parts of the world migrated through U.S. waters. Thus, the Appellate Body found that there was a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g).

Article XX(g): Exception for Measures Relating to the Conservation of Exhaustible Natural Resources

Article XX(g) of the GATT provides an exception for restrictions “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.” We believe that an Article XX(g) defense is unlikely to apply to LNG and coal export restrictions.

1. An Article XX(g) Defense Is Unlikely to Apply to LNG Export Restrictions

For a restriction to be justified under Article XX(g), three elements must be analyzed: (1) is the restriction concerned with the conservation of exhaustible natural resources; (2) does the restriction relate to the conservation of exhaustible natural resources; and (3) is the export restriction made effective in conjunction with restrictions on domestic production or consumption? An Article XX(g) defense is unlikely to apply to LNG export restrictions because the export restriction is not made in conjunction with restrictions on domestic production or consumption of LNG.

A WTO panel will first consider whether the export restriction is related to *the conservation of exhaustible natural resources*. In recent years, natural gas has become abundant in the United States, bringing prices down to record levels. Despite this recent abundance, a panel would likely find natural gas to be an exhaustible natural resource. What is abundant today can be exhausted tomorrow.

Turning to the issue of whether the restriction is *related* to conservation, the panel would review “the text of the measure itself, its design and architecture and its context.” The text of the Natural Gas Act, which provides the DOE’s authority over LNG exports, does not refer to conservation goals. Rather, legislative history indicates that the law was passed to regulate monopolistic practices in the natural gas market. Arguably, the public interest factors listed in the DOE’s Federal Register notice, as well as public statements by DOE officials, make indirect references to conservation-related goals (“adequacy of domestic natural gas supply,” “U.S. energy security”) as part of the factors relevant to the public interest analysis.⁷ However, a WTO panel is not likely to find, based on such indirect references, that the measure is “*primarily* aimed at the conservation of natural resources.” Thus, based on currently available information, the United States may find it difficult to convince a WTO panel that its export restrictions on LNG relate to the conservation of exhaustible natural resources.

Next, a WTO panel must consider whether the measures are “*made effective in conjunction with restrictions on domestic production or consumption*.” In the United States, the production and sale of LNG or natural gas are subject to various government regulations and oversight. For example, producers are required to obtain authorization and permitting before beginning to drill, particularly on federally-owned land. Pipelines are directly regulated by FERC. Local distribution companies are regulated by state regulatory utility commissions, which oversee rates, deal with construction issues and ensure proper procedures exist for maintaining adequate supply to their customers. All of these regulations, however, do not appear to limit the production and consumption of natural gas and are not related to the conservation of natural gas. Rather, the regulations are focused on the transportation and

⁷ <http://energy.gov/fe/articles/departments-role-liquefied-natural-gas-export>.

distribution of natural gas in order to ensure smooth and efficient functioning of natural gas markets.⁸ Given the nature of the domestic regulatory framework, it seems unlikely that a WTO panel would find that the export restrictions are made effective in conjunction with restrictions on domestic production or consumption.

For these reasons, we believe that the United States will be unlikely to justify its export restrictions on LNG under Article XX(g) of the GATT.

2. An Article XX(g) Defense Is Unlikely to Apply to Coal Export Restrictions

Similarly, an Article XX(g) defense is unlikely to apply to coal export restrictions because the export restriction is not made in conjunction with restrictions on domestic production or consumption.

First, a WTO panel is likely to find that coal is an exhaustible natural resource. Furthermore, the United States may argue that the exhaustible natural resources that it is trying to conserve are clean air and clean water, rather than coal.

Second, as to whether the export restriction is *related to* the conservation of exhaustible natural resources, we note that nothing in the measures restricting coal export terminals refers to the goal of conserving coal. Instead, the focus of the government review is almost entirely on environmental and health concerns. On the other hand, the government reviews do address the impact on air and water. Thus, if the United States argues that the restrictions are related to the conservation of clean air and clean water, a panel may agree and find that the export restriction is *related to* the conservation of exhaustible natural resources.

Third, as to whether the measures are *made effective in conjunction with restrictions on domestic production or consumption*, the government does regulate various aspects of mining. For example, the Surface Mining Control and Reclamation Act ensures that coal mining operations are conducted in an environmentally responsible manner and that the land is adequately reclaimed during and following the mining process. However, it is unclear whether domestic regulations related to coal may be considered “in conjunction” with export restrictions on coal. Moreover, domestic regulations do not impose the same type of limitation on domestic users of the resources in that there is no requirement to consider issues such as the impact of coal emissions. Thus, domestic regulations, even if they can be considered restrictions, are not even-handed because they are not comparable to export restrictions. Furthermore, foreign users would be subject to both export and domestic restrictions.

For these reasons, we conclude that an Article XX(g) defense is not likely to apply to coal export restrictions.

⁸ <http://www.naturalgas.org/regulation/market.asp>.

Conclusion

In sum, for the reasons discussed above and based on information currently available to us, we conclude that the implementation of U.S. rules in ways that unnecessarily impede exports of LNG and coal are likely to violate WTO rules forbidding export restrictions.⁹ The delay in the granting of LNG export licenses constitutes export restrictions, which are not excused by any of the exceptions available for the protection of the environment or human health or for the conservation of natural resources. Similarly, we believe that federal, state and local reviews of coal export terminals are likely to constitute export restrictions. To the extent that the federal review is limited to the local and direct environmental impact of the coal export terminals, it may be excused under the exception available for the protection of the environment or human health. However, state and local reviews that are attempting to assess the expanded impact of coal production and use in other parts of the world are unlikely to satisfy any of the exceptions.

⁹ We emphasize that WTO dispute settlement is driven decidedly by the facts presented and found in evidence in any particular dispute, and that the outcome of WTO disputes is often determined by the nexus between the facts presented and found and the specific claims made about those facts. Moreover, claims can be made in WTO dispute settlement not only about measures on their face, but also, and significantly, about measures as they are applied. These would all be critical factors in shaping a ruling by WTO jurists on whether there is fulfillment here of the WTO obligations. Our conclusions must be read with this caveat in mind.



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