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Master’s Thesis

U.S. LNG Export Regulation and Potential Conflicts with Commitments to the WTO

August 2015

Racheal Tatum
Seoul National University
Graduate School of International Studies
International Commerce Major
U.S. LNG Export Regulation and Potential Conflicts with Commitments to the WTO

Thesis Advisor: Professor Ahn, Dukgeun

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Racheal Tatum
Graduate School of International Studies
Seoul National University

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Chair: Professor Bark, Taeho
Vice Chair: Professor Lee, Yeongsup
Examiner: Professor Ahn, Dukgeun
ABSTRACT

The United States Natural Gas Act (NGA) requires exports of liquefied natural gas (LNG) be approved by the Department of Energy (DOE). The DOE must conduct a thorough ‘public interest’ review. There are different standards of review for applications to export LNG. Applications made by countries that have a free trade agreement (FTA) with the U.S. requiring national treatment in trade of natural gas are deemed consistent and granted ‘without modification or delay.’ Whereas, non-FTA countries are required to undergo a full review including: need for the export, adequacy of domestic supply, energy security implications, impact on the economy, international considerations, and environmental concerns. This law in practice implies additional delays, uncertainties, and costs incurred by non-FTA applicants. The potential conflict of this legislation with U.S. commitments to the WTO has until now received little attention. However, there has been a significant boom in U.S. shale gas due to new extraction techniques including horizontal drilling and hydraulic fracturing. The domestic supply of natural gas is expected to continue to grow significantly such that the Energy Information Administration (EIA) projects the U.S. could become a net exporter of natural gas as early as 2020. This paper questions whether the differential treatment and potential restrictive effect of the public interest review conducted for LNG export license applications to FTA versus non-FTA countries violates U.S. obligations to the WTO. Specifically, the paper will look at WTO disciplines governing most-favored nation treatment and export restrictions. The paper finds the DOE’s dual standard of approval for LNG exports to FTA versus non-FTA countries appears to violate GATT Article I:1 and the discretionary nature of the public interest review for applicants to export LNG to non-FTA countries likely has a limiting effect prohibited by Article XI:1. Further, the U.S. is unlikely to find exception under Article XXIV, XI:2, XX, or XXI. Therefore, it will be important for the U.S. to bring the NGA and DOE procedures into compliance with obligations to the WTO, particularly in light of recent cases the U.S. has brought to the WTO concerning China’s export restrictions on raw materials and rare earths.

Keywords: NGA, FTA, WTO, LNG
Student I.D.: 2012-24086
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1. Introduction

The United States Natural Gas Act (NGA) requires exports of liquefied natural gas (LNG) be approved by the Department of Energy (DOE). The DOE must conduct a thorough ‘public interest’ review. There are different standards of review for applications to export LNG. Applications made by countries that have a free trade agreement (FTA) with the U.S. requiring national treatment in trade of natural gas are deemed consistent and granted ‘without modification or delay.’ Whereas, non-FTA countries are required to undergo a full review including: need for the export, adequacy of domestic supply, energy security implications, impact on the economy, international considerations, and environmental concerns.

This law in practice implies additional delays, uncertainties, and costs incurred by non-FTA applicants. The potential conflict of this legislation with U.S. commitments to the WTO has until now received little attention. However, there has been a significant boom in U.S. shale gas due to new extraction techniques including horizontal drilling and hydraulic fracturing. The domestic supply of natural gas is expected to continue to grow significantly such that the Energy Information Administration (EIA) projects the U.S. could become a net exporter of natural gas as early as 2020.

This paper questions whether the differential treatment and potential restrictive effect of the public interest review conducted for LNG export license applications to FTA versus non-FTA countries violates U.S. obligations to the WTO. Specifically, the paper will look at WTO disciplines governing most-favored nation treatment and export restrictions.
The paper finds the DOE’s dual standard of approval for LNG exports to FTA versus non-FTA countries appears to violate GATT Article I:1 and the discretionary nature of the public interest review for applicants to export LNG to non-FTA countries likely has a limiting effect prohibited by Article XI:1. Further, the U.S. is unlikely to find exception under Article XXIV, XI:2, XX, or XXI. Therefore, it will be important for the U.S. to bring the NGA and DOE procedures into compliance with obligations to the WTO, particularly in light of recent cases the U.S. has brought to the WTO concerning China’s export restrictions on raw materials and rare earths.

2. Literature Review

There are few relevant research articles considering the potential conflicts of the NGA with commitments to the WTO under GATT as the natural gas boom in the United States is nascent. Harmon (2013) is one of the few articles that directly considers potential inconsistencies with GATT. Harmon argues U.S. natural gas export controls do not necessarily violate international trade law.\(^1\) The Article focuses only on potential violation under Article XI and relies primarily on the findings of the China-Raw Materials case. Harmon finds the DOE’s expedited public interest review for applications to export LNG to countries with FTAs does not restrict or limit exports and thus likely do not violate GATT Article XI:1 regarding the prohibition of export restrictions.\(^2\) Harmon finds the DOE’s public interest review of natural gas


\(^{2}\) *Id.*
exports to non-FTA countries may violate GATT Article XI:1 because it provides the DOE with ‘discretion’ in approving applications.  

Kennedy (2013) noted the DOE’s interpretation of the “public interest” standard within the Natural Gas Act of 1938 is likely inconsistent with US obligations to GATT by violating the most-favored nation (MFN) principle. However, the author’s research centered upon the constitutionality of the NGA rather than the potential conflicts with GATT.

Vann et al. (2013) a Congressional Research Report and Bacchus and Jeong (2013) provide a general overview of potential violations with GATT but do not offer detailed analysis of such claims. There are a number of other articles that have considered LNG export regulation more generally such as Salo, Hwang and Cullotta (2013) who offer a detailed summary of relevant laws governing LNG exports. This paper aims to build upon existing research by providing a detailed analysis of potential violations of both GATT Article I and XI, and potential defenses under GATT Articles XXIV, XI:2, XX, and XXI using relevant WTO dispute settlement cases.

3 Id.  
3. Developments in the U.S. Natural Gas Market

3.1 Technological Advances

The American natural gas market has witnessed rapid change in recent time. The novel technique of hydraulic fracturing has revolutionized the natural gas market. The process involves first drilling a well horizontally in underground shale formations thousands of feet below the earth’s surface. Then, a combination of water, sand, salt, and other chemicals are pumped into the well creating pressure. The pressure causes the shale layer of rock to fracture creating fissures. The fissures, held open with sand particles, allow the natural gas to flow more easily and efficiently from the rock out of the well (see Figure 1). The preparation of the site until production takes only four to eight weeks and a well can be in production for about 20 to 40 years. The technique has reduced the cost of production to an average of $2 to $3 per thousand cubic feet (Tcf) of gas, which is one-half to one-third of the production cost of traditional extraction techniques.

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Additionally, the ability to liquefy natural gas allows it to be easily transported globally. After natural gas is extracted it is transferred via pipeline to a liquefaction terminal. At the terminal, natural gas is converted into a liquid by cooling it to -162°C. This reduces the gas to 1/600th of its original volume allowing it to be transported more efficiently. LNG is then loaded onto double-hull tankers and shipped to overseas destinations where the recipient can re-gasify the LNG and distribute it to final customers.

3.2 America’s Shale Gas Boom

Developments in extraction techniques have led to a boom in natural gas production in the United States. In one year, shale gas production increased from five
percent of total natural gas production domestically to ten percent in 2008. By 2010 the U.S. surpassed Russia to become the largest natural gas producer globally. In 2013, shale gas production made up about 40% of natural gas production in the lower-48 states.

The rapid production of natural gas caused its price to collapse in the United States reaching a low of 2.67 USD per million British thermal units (MMBtu) in 2012. Traditionally, the price of natural gas and crude oil have moved very closely together as shown from 1997 to 2006 in Figure 2. However, the two prices appear to have decoupled since 2006. Then, most recently, oil prices dropped dramatically.

Figure 2: Crude Oil versus Natural Gas Spot Prices, Monthly, 1997-2015

Source: United States Energy Information Administration

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10 Id. at 85.
Furthermore, the U.S. Henry Hub natural gas price appears to have also decoupled from natural gas prices in Europe and Japan as shown in Figure 3. U.S. and UK spot prices decoupled from Japan in 2009. U.S. prices fell further from that point while UK prices rebounded. The differences in prices have continued to widen and appear to be lasting.\footnote{United States Energy Information Administration, “Global Natural Gas Prices Vary Considerably,” Last modified September 30, 2011, http://www.eia.gov/todayinenergy/detail.cfm?id=3310.} Many energy companies in the United States have taken note of the price differential and have started to invest in LNG exports with some even converting existing LNG import terminals into export terminals or bi-directional terminals.

**Figure 3: Divergence in Natural Gas Spot Prices, Japan, UK, U.S., 1996-2013**

![Graph showing divergence in natural gas prices](image)

\[a\] Japan average prices of cost + insurance + freight (cif)

\[b\] UK National Balancing Point (NBP)

\[c\] U.S. Henry Hub

*Source: British Petroleum Statistical Review of World Energy, 2014*

### 3.3 Shift from Net Importer to Net Exporter

Traditionally, the U.S. has imported LNG to make up for its lack of domestic supply. However, the natural gas boom and fall in the price of natural gas domestically has caused imports of LNG to decline such that the use of LNG...
Regasification terminals in the United States has fallen from more than 50% of capacity in 2005 to 11% in 2009. The U.S. is slowly shifting to become a significant exporter of natural gas and is expected to become a net exporter by 2018 as shown in Figure 4.

**Figure 4: U.S. Natural Gas Production, Consumption, and Trade 2008-2040**

![Figure 4: U.S. Natural Gas Production, Consumption, and Trade 2008-2040](image)

*Forecast is based on EIA reference scenario*

**Source:** United States Energy Information Administration

Currently, U.S. natural gas exports are primarily via pipeline to Canada and Mexico as DOE approved LNG export terminals become operational. The share of LNG exports is expected to rise substantially as shown in Figure 5. LNG exports are expected to grow 18.8% from 2012-2040 compared with 6% for pipeline exports to Mexico and 1.2% for pipeline exports to Canada.

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16 Id.
Figure 5: Composition of U.S. Natural Gas Exports, 2011-2040

Source: United States Energy Information Administration

As shown in Figure 6, the two largest importers of LNG, Japan and South Korea make up 54% of the global total. The countries are also important allies of the United States and are expected to become major destinations for U.S. LNG exports. However, South Korea has an FTA with the United States requiring national treatment in natural gas while Japan does not.

Figure 6: Global Share of LNG Imports, 2013
[Total= 325.3 bcm]

In sum, the recent developments in the natural gas market are likely to have significant political and economic ramifications. As such, it is important to consider the potential conflicts U.S. regulation of LNG exports poses for the multilateral trade regime. At the time U.S. regulations of trade in natural gas where amended in 1992 creating a dual standard of treatment for natural gas exports to FTA and non-FTA countries, the U.S. did not need to consider the implications of such legislation beyond its pipeline exports to Mexico and Canada. However, due to recent, unexpected changes in the natural gas market the U.S. must now consider the potential discriminatory and restrictive nature of the law.

4. U.S. Regulation of LNG Exports

4.1 Historical Development of LNG Export Regulation

The NGA was enacted in 1938 during the height of the Great Depression and represented the first time the United States government regulated the natural gas industry. The NGA is the primary source of regulation of trade in natural gas. The NGA arose out of concern about market power exercised by interstate pipeline companies. Particularly, policy makers were concerned about the heavy concentration of the natural gas industry and the monopolistic character of interstate pipelines, which used their market power to charge above competitive market

prices.\textsuperscript{18} The NGA gave the Federal Power Commission (FPC) the ability to set “just and reasonable rates” for the transmission or sale of natural gas.

Later, in 1977, the Department of Energy Organization Act eliminated and transferred powers from the FPC to the DOE and the Federal Energy Regulatory Commission (FERC). Section 401(a) of the DOE Organization Act established FERC as an independent organization within the DOE.\textsuperscript{19} Further, Section 402(a)(1)(A) gave FERC jurisdiction over, “the investigation, issuance, transfer, renewal, revocation, and enforcement of licenses and permits for the construction, operation, and maintenance of dams, […] or other works for the development and improvement of navigation and for the development and utilization of power across, along, from, or in navigable waters.”\textsuperscript{20}

However, Section 402(f) states, “[n]o function described in this section which regulates the exports or imports of natural gas or electricity shall be within the jurisdiction of the Commission [FERC] unless the Secretary assigns such a function to the Commission [FERC].”\textsuperscript{21} This means the jurisdiction over imports and exports of the commodity natural gas is given to the DOE not FERC. Yet, the DOE delegated its authority to FERC concerning the approval or disapproval of, “the construction and operation of particular facilities, the site at which such facilities shall be located, and, with respect to natural gas that involves the construction of new domestic facilities,

\textsuperscript{19} Department of Energy Organization Act, P.L. 95-91.
\textsuperscript{20} Id.
\textsuperscript{21} Id.
the place of entry for imports or exit for exports." This distinction was further codified in the Energy Policy Act (EPAct) of 2005.

In 1992, the Energy Policy Act amended the NGA adding Section 3(b), to not treat imported natural gas in a discriminatory manner, and Section 3(c), the expedited approval of the import or export of natural gas from/to countries that have in effect a FTA. The reason for distinguishing between FTA and non-FTA countries was to meet the requirements of the U.S.-Canada FTA requiring national treatment in natural gas. Title II Section 202 of the Act, Fewer Restrictions on Certain Natural Gas Imports and Exports, stated the sense of Congress “that natural gas consumers and producers, and the national economy, are best served by a competitive natural gas wellhead market.” Also, at the time, natural gas exports accounted for only 10% of all U.S. trade in natural gas. Of this, 76% went to Canada and Mexico, predominantly via natural gas pipelines.

The EPAct of 2005, Section 311, added Section 3(e) to the NGA, which specifically concerns LNG terminal approval. The approval of LNG terminals conducted by FERC, as established by the DOE Organization Act, was more clearly delineated implying FERC alone has “the exclusive authority to approve or deny an application for the sitting, construction, expansion, or operation of an LNG terminal.” Also, the scope of the NGA was amended inserting “and to the importation and

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22 49 F.R. 6684, (Delegation Order No. 0204-112).
26 Id.
28 Id.
exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation” to transactions in which the Act applies.  

Additionally, the definition of LNG terminal was clarified to include “all natural gas facilities located onshore or in State waters that are used to [...] process natural gas that is [...] exported to a foreign country from the United States, or transported [...] by water borne vessel.” The definition excludes “waterborne vessels used to deliver natural gas to or from any such facility” and “any pipeline or storage facility.”  

4.2 The Natural Gas Act

The Natural Gas Act, 15 U.S.C. §717b, governs the exportation or importation of natural gas and LNG terminals. Subsection (a) Mandatory Authorization Order requires:

“no person shall export any natural gas from the United States to a foreign country or import any natural gas from a foreign country without having first secured an order of the Commission authorizing it to do so. The Commission shall issue such order upon application, unless, after opportunity for hearing, it finds that the proposed exportation or importation will not be consistent with the public interest.”

Such wording creates a rebuttable presumption where natural gas exports are seen to be in the public interest unless contested and proven inconsistent during hearings. As such, the DOE conducts public interest reviews to assess whether an application “will not be consistent with public interest.” Further, the Commission may grant the authorization in whole or in part, may require modification, or issue supplemental

\[29 Id.\]
\[30 Id.\]
\[31 Id.\]
\[32 Natural Gas Act, 15 U.S.C. §717b(a).\]
orders. \(^{33}\) “Commission” in the NGA currently refers to the DOE and FERC pursuant to the 1977 Department of Energy Organization Act and the Energy Policy Act of 2005. \(^{34}\) FERC has jurisdiction over the construction and operation of LNG terminals while the DOE has jurisdiction over the approval of the export of natural gas itself, as a commodity.

NGA Section 3(b) Free Trade Agreements, concerns only imports stating:

“[w]ith respect to natural gas which is imported into the United States from a nation with which there is in effect a free trade agreement requiring national treatment for trade in natural gas, and with respect to liquefied natural gas—

(1) the importation of such natural gas shall be treated as a ‘first sale’ within the meaning of section 3301(21) of this title; and

(2) the Commission shall not, on the basis of national origin, treat any such imported natural gas on an unject, unreasonable, unduly discriminatory, or preferential basis.” \(^{35}\)

Here, natural gas exports are not mentioned at all in relation to discrimination or preference. Rather, natural gas exports to a country with which there is a free trade agreement receive expedited application and approval in the following subsection.

NGA Section 3(c), Expedited Application and Approval Process, creates a separate process for the approval of LNG exports to FTA and non-FTA countries. It states:

“the exportation of natural gas to a nation with which there is in effect a free trade agreement requiring national treatment for trade in natural gas, shall be deemed to be consistent with the public interest, and applications for such importation or exportation shall be granted without modification or delay.” \(^{36}\)

\(^{33}\) Id.
\(^{34}\) Department of Energy Organization Act, P.L. 95-91.
\(^{36}\) Id. at §717b(c).
The different standard of approval for FTA and non-FTA countries was introduced only after the Energy Policy Act of 1992. Prior, both LNG exports to FTA and non-FTA countries underwent the same DOE public interest review.\textsuperscript{37} Additionally, the subsection further allows the same benefit for imports from countries with which the U.S. has a free trade agreement.

Specifically regarding LNG terminals, NGA Section 3(e) gives the Commission, in this case FERC, the “exclusive authority to approve or deny an application for the sitting, construction, expansion, or operation of an LNG terminal.”\textsuperscript{38} After an application is filed, FERC is responsible for setting the matter for hearing, giving notice of the hearing, deciding the matter, and issue or deny an appropriate order.\textsuperscript{39} FERC may approve an application “in whole or part, with such modifications and upon such terms and conditions as the Commission find[s] necessary or appropriate.”\textsuperscript{40}

4.3 LNG Export Licensing Process

Based on U.S. natural gas regulation, in order to export LNG, the relevant party must obtain two federal authorizations. The party must first be authorized by the DOE’s Office of Fossil Energy (DOE/FE) to export LNG itself. Second, authorization for the construction and operation of the LNG export facility must also be obtained. For LNG export terminals located onshore or within state waters, FERC is the granting authority pursuant to Section 3(e) of the NGA.\textsuperscript{41} For LNG facilities located offshore beyond state waters, the granting authority is the Department of

\textsuperscript{37} P.L. 102-486, §201.
\textsuperscript{38} 15 U.S.C. §717b(e).
\textsuperscript{39} Id.
\textsuperscript{40} Id.
\textsuperscript{41} Id.
Transportation’s Maritime Administration pursuant to Section 3(9) of the Deepwater Ports Act, as amended by Section 312 of the Coast Guard and Maritime Transportation Act of 2012.\textsuperscript{42}

4.3.1 DOE/FE Approval to Export the Commodity Natural Gas

As previously stated, Section 3 of the NGA gives the DOE the authority to approve the export of natural gas from the United States. 15 U.S.C. §717b(a) creates a rebuttable presumption where natural gas exports are seen to be in the public interest unless contested and proven inconsistent after opportunity for hearing. Therefore, the DOE/FE’s public interest review is conducted in order to assess whether an application “will not be consistent with public interest.”\textsuperscript{43}

Furthermore, 15 U.S.C. §717b(c) provides that the exportation of natural gas to a nation, with which there is a free trade agreement requiring national treatment for trade in natural gas, shall be deemed to be consistent with the public interest and granted without modification or delay. FTAs the U.S. has in effect requiring national treatment for trade in natural gas are shown in Table 1. Notably, of the 20 FTAs the U.S. has in effect, two, those with Costa Rica and Israel, do not require national treatment for trade in natural gas.

\textsuperscript{42} Coast Guard and Maritime Transportation Act of 2012, P.L.112-213.

\textsuperscript{43} 15 U.S.C. §717b(a).
Table 1: U.S. FTAs Requiring National Treatment for Trade in Natural Gas\textsuperscript{a}

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<td>Dominican Republic</td>
<td>Morocco</td>
<td>Singapore</td>
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\textsuperscript{a} As of March 25, 2015

\textit{Source:} Office of the U.S. Trade Representative

The DOE’s administrative procedures for granting licenses to export natural gas as a commodity are governed by 10 C.F.R Part 590. Within the DOE, the Office of Fossil Energy is in charge of LNG export applications. 10 C.F.R. §590.201 requires those seeking authorization to import or export natural gas must file an application with the DOE/FE within at least 90 days in advance of import or export.\textsuperscript{44} Each application must include a statement of the action being sought from the DOE/FE and why such action is “not inconsistent with public interest.”\textsuperscript{45}

The contents of applications are to include a number of important factual matters including: (1) the “scope of the project” (including the volume of natural gas) including dates the exports are to begin and end and facilities used or constructed; (2) “the source and security of the natural gas supply” to be used; (3) “participants in the transaction;” (4) “terms of the transaction;” (5) the “lack of national or regional need for the gas,” and (6) “the potential environmental impact of the project.”\textsuperscript{46} For applicants, the specific criteria by which applications are judged are unclear beyond the factual matters listed in this section.

\textsuperscript{44} 10 C.F.R. §590.201.
\textsuperscript{45} Id. at §590.202.
\textsuperscript{46} Id.
Filing fees are specified as $50 for each application.\textsuperscript{47} Applications deemed deficient must be remedied within the timeframe set or will be dismissed.\textsuperscript{48} Applicants are allowed to amend or supplement their applications at any time prior to the final opinion given by the Assistant Secretary.\textsuperscript{49} The Assistant Secretary may decline to act “in whole or in part” on requests for amendment or supplementation. An application may be withdrawn after providing written notice to DOE/FE and will be effective 30 days after notice.\textsuperscript{50}

After receiving the application DOE/FE publishes a notice of the application in the Federal Registrar where persons may make protests, comments, or motion to intervene generally no less than 30 days from the date of publication.\textsuperscript{51} In the case of negotiations between the DOE, including the FE, and a foreign government resulting in a formal policy agreement or statement affecting a proceeding the DOE/FE is required including a description of the terms or policy positions in the notice of application.\textsuperscript{52}

The DOE/FE is required to maintain dockets of all filings of each proceeding.\textsuperscript{53} “Any document, including but not limited to an application, amendment of an application, request, petition, motion, answer, comment, protest, complaint, and any exhibit submitted in connection with such documents” filed with DOE/FE is made available to the public.\textsuperscript{54}

\textsuperscript{47} Id. at §590.207.  
\textsuperscript{48} Id. at §590.203.  
\textsuperscript{49} Id. at §590.204.  
\textsuperscript{50} Id.  
\textsuperscript{51} Id. at §590.205.  
\textsuperscript{52} Id.  
\textsuperscript{53} Id. at §590.206.  
\textsuperscript{54} Id. at §590.103.
Off-the-record communications are also prohibited in any contested proceedings.55 “Contested proceedings” refer to “(1) [w]here a protest or a motion to intervene, or a notice of intervention, in opposition to an application or other requested action has been filed, or (2) [w]here a party otherwise notifies the Assistant Secretary and the other parties to a proceeding in writing that it opposes an application or other requested action.”56

Exceptionally, one may export a small volume of natural gas, up to 100,000 cubic feet or the liquefied equivalent thereof, “in a single shipment for scientific, experimental, or other non-utility gas use without prior authorization of the Assistant Secretary.”57

Additionally, DOE approval to export natural gas constitutes a major action by a federal agency requiring compliance with the National Environmental Policy Act (NEPA).58 NEPA is the basic American charter for the protection of the environment and requires the federal government “include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment.”59

In many cases, including LNG, actions by multiple federal agencies may be required. However, instead of conducting NEPA reviews separately a lead agency is designated to coordinate the environmental review. The government agency charged with permitting the export facility, generally FERC, is the lead agency in the NEPA review while the DOE is a cooperating agency in the process as defined in 40 C.F.R.

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55 Id. at §590.108.
56 Id. at §590.102.
57 Id. at §590.208.
59 Id. at §4332.
§1501.4 and §1501.5. As previously mentioned, FERC handles permitting terminals onshore or in state waters while MARAD handles terminals located offshore, beyond state waters. In a case where the exports do not require MARAD or FERC approval the DOE would be required to lead the NEPA review itself.

10 C.F.R. §1021, Department of Energy: National Environmental Policy Act Implementing Procedures, establishes the procedures the DOE uses to comply with NEPA. Three different levels of NEPA reviews are delineated: (1) categorical exclusions, those not requiring preparation of either an EIS or an EA; (2) those requiring an EA but not necessarily an EIS; and (3) those requiring an EIS.

Categorical exclusions do not require a NEPA review including “import or export of natural gas, with operational changes” and “import or export of natural gas, with new cogeneration powerplant.” Operational changes” are limited to “minor […] changes (such as changes in natural gas throughput, transportation, and storage operations) but not new construction.”

An EA is a concise document that briefly provides evidence for determining whether to prepare an EIS or a finding of no significant impact (FONSI). FONSI is a document prepared by a Federal agency that shows why an action “will not have a significant impact on the human environment” and therefore does not need an EIS. This includes import or export of natural gas “involving minor new construction” such as “adding new connections, looping, or compression to an existing natural gas

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61 10 C.F.R. §1021.  
62 Id.  
63 Id.  
64 40 C.F.R. §1508.9.  
65 Id. at §1508.13.
or liquefied natural gas pipeline, or converting an existing oil pipeline to a natural gas pipeline using the same right-of-way.”

An EIS is a more detailed document prepared by a Federal agency pursuant to NEPA Section 102(2)(C). Actions requiring an EIS are the import or export of natural gas involving “major new facilities” and or “major operational change.”

“Major new facilities” include “construction of major new natural gas pipelines or related facilities (such as liquefied natural gas terminals and regasification or storage facilities) or significant expansions and modifications of existing pipelines or related facilities.”

“Major operational change” includes changes such as “major increase in the quantity of liquefied natural gas imported or exported.” Hence, an EA is shorter and therefore less expensive than the more detailed and expensive EIS. Again, however, these procedures are actually led by FERC in practice (See Section 4.3.2).

FERC led NEPA reviews of facilities used for exports of natural gas to FTA countries requiring national treatment for trade in natural gas are actually completed after the DOE public interest review, and as such cannot be factored into the DOE’s decision on the applications as they are approved without modification or delay.

The DOE, upon completion of the public interest review, grants final opinions and orders. The final opinion and orders are to “be based solely on the official record of the proceeding and include a statement of findings and conclusions, as well as the

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66 10 C.F.R. §1021.
67 40 C.F.R. §1508.11.
68 Id.
69 Id.
70 Id.
reasons or basis for them, and the appropriate order, condition, sanction, relief or denial."  

In the past, DOE granted conditional orders for exports of LNG to non-FTA countries based on the condition that the NEPA environmental review conducted by FERC was completed satisfactorily. The DOE would also act on the applications based on a published order of precedence determined by the time applications were received. However, from August 15, 2014 the DOE will only act on applications to export LNG from the lower-48 states to non-FTA countries only after completing the NEPA environmental review conducted by FERC. This suspended the DOE’s practice of issuing conditional decisions before giving its final authorization decision.

Also, the order of precedence will no longer be used. Instead the DOE will act on applications based on when applications become ready for final action. The DOE stated, “[a]n application is ready for final action when DOE has completed the pertinent NEPA review process and when DOE has sufficient information on which to base a public interest determination.” The DOE will use three criteria to determine the order in which it will act on applications, (1) those requiring an Environmental Impact Statement (EIS), 30 days after publishing the Final EIS; (2) those requiring an Environmental Assessment (EA), after publication by the DOE of a FONSI; or (3) those that are determined by the DOE to be eligible for a categorical exclusion

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71 10 C.F.R. §590.404.
72 Id. at §590.402.
74 Id.
pursuant to DOE regulations implementing NEPA.\(^75\) The revised procedures do not affect the conditional orders that have already been granted by the DOE.\(^76\)

Furthermore, the new procedures only apply to the lower-48 states, as there were no pending applications to export LNG from Alaska at the time the Proposed Procedures Notice was issued by the DOE. After the Proposed Procedures Notice was published an application to export LNG from Alaska, Alaska LNG Project, LLC, was received and the DOE noted that it, “will consider whether to issue a conditional decision on that application, or any future application to export from Alaska, in the context of those proceedings.”\(^77\)

After, receiving the DOE/FE approval order reports of changes must be made, “[a]ny person authorized to import or export natural gas has a continuing obligation to give the Assistant Secretary written notification, as soon as practicable, of any prospective or actual changes to the information submitted during the application process upon which the authorization was based.”\(^78\) This includes changes to the parties involved, terms and conditions of contracts, place of entry and exit, transporters, volumes of LNG, or price.\(^79\)

\subsection*{4.3.2 FERC Approval of the Construction and Operation of LNG Export Terminals}

NGA Section 3(e) gives FERC, the “exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG
FERC must approve all potential LNG import and export facilities and does not distinguish between FTA and non-FTA countries in its application review process. Furthermore, FERC is designated as the lead agency for the NEPA review process, which is required by U.S. environmental regulations.

Specific FERC procedures for LNG export terminal approval are governed by 18 C.F.R. §153 and 18 C.F.R. §157. An applicant must first complete a pre-filing with FERC at least 180 days before filing a formal application. The pre-filing plays an important role in the environmental review process illustrated in Figure 7. Contents of the pre-filing include: (1) “a description of the schedule desired,” (2) a “description of the zoning and availability of the proposed site and marine facility location,” (3) a “detailed description of the project, including location maps,” (4) a list identifying “relevant federal agencies in the project area” and the “agency designated by the governor of the state in which the project will be located,” (5) a “list and description of interests of other persons and organizations who have been contacted about the project,” (6) a “description of work that has already been done,” (7) “proposals for at least three prospective third-party contractors from which Commission staff may make a selection to assist in the preparation of the requisite NEPA document,” (8) an “acknowledgement that a complete Environmental Report and complete application are required at the time of filing,” (9) “a description of a Public Participation Plan which identifies specific tools and actions to facilitate stakeholder communications and public information,” and a “[c]ertification that a Letter of Intent and a Preliminary Waterway Suitability Assessment (WSA) have been submitted to the U.S. Coast

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81 40 C.F.R. §1501.5.
The applicant must also actually file the Letter of Intent and Preliminary WSA with the U.S. Coast Guard.  

After at least 180 days a formal application may be filed with FERC. The application is to include: (1) “[i]nformation regarding the applicant;” (2) a “detailed summary of the proposal,” including state, foreign, or other [f]ederal governmental licenses or permits for the construction, operation, or modification of the facilities related to the proposal; and (3) statements “demonstrating that the proposal or proposed construction is not inconsistent with the public interest” and “representing that the proposal will be used to render transportation services […], private transportation, or service that is exempt from the provisions of the Natural Gas Act pursuant to section 1(b) or 1(c).” Hence, like the DOE review, approval of the LNG facility hinges on a “public interest” assessment. However, unlike the DOE review procedures, FERC procedures explicitly ask the applicant to demonstrate the facility is in public interest.

In the statements the applicant must provide that the proposed facility will (1) “improve access to supplies of natural gas, serve new market demand, enhance the reliability, security […], improve the dependability of international energy trade, or enhance competition within the United States for natural gas transportation or supply;” (2) will “not impair the ability of the applicant to render transportation service in the United States at reasonable rates to its existing customers;” and (3) will “not involve any existing contract(s) between the applicant and a foreign government or person concerning the control of operations or rates for the delivery or receipt of natural gas.

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83 Id.
84 Id.
85 18 C.F.R. §153.7.
which may restrict or prevent other United States companies from extending their activities in the same general area.”

The application to FERC must also include specified exhibits such as engineering and design information and an environmental report. The content of the environmental report to be prepared by the applicant is indicated in 18 C.F.R. §380.12. The environmental report is composed of thirteen Resource Reports including: general project description; water use quality; fish, wildlife, and vegetation; cultural resources; socioeconomics; geological resources; soils; land use, recreation and aesthetics; air and noise quality; alternatives (other routes or locations considered for the facility; reliability and safety; polychlorinated biphenyl (PCB) contamination; and engineering and design material. The specific requirements are highly detailed informing the applicant of specific criteria upon which the environmental review will be based upon. The environmental report is used by FERC and a third-party contractor to assist in the drafting of the required NEPA EA and/or EIS.

As mentioned, in practice, FERC is the agency leading the NEPA review required for both DOE and FERC approvals. The FERC environmental review process is illustrated in Figure 7. After the pre-filing process and filing an official application with FERC, an EA and/or EIS will be conducted. As delineated in 10 C.F.R. §1021, Department of Energy: National Environmental Policy Act Implementing Procedures, there are three different levels of NEPA reviews: (1)
categorical exclusions, those not requiring preparation of either an EIS or an EA; (2) those requiring an EA but not necessarily an EIS; and (3) those requiring an EIS.\textsuperscript{90}

Categorical exclusions do not require a NEPA review including “operational changes” that are limited to “minor […] changes (such as changes in natural gas throughput, transportation, and storage operations) but not new construction.”\textsuperscript{91} EAs briefly provide evidence for determining whether to prepare an EIS or a finding of no significant impact (FONSI).\textsuperscript{92} This includes import or export of natural gas “involving minor new construction” such as “adding new connections, looping, or compression to an existing natural gas or liquefied natural gas pipeline, or converting an existing oil pipeline to a natural gas pipeline using the same right-of-way.”\textsuperscript{93}

An EIS is a more detailed document prepared by a Federal agency pursuant to NEPA Section 102(2)(C).\textsuperscript{94} Actions requiring an EIS are the import or export of natural gas involving “major new facilities” and or “major operational change.”\textsuperscript{95} (See Section 4.3.1). These requirements are also codified at 18 C.F.R. §380.5 and §380.6 detailing FERC procedures.

\textsuperscript{90} 10 C.F.R. §1021.
\textsuperscript{91} Id.
\textsuperscript{92} 40 C.F.R. §1508.9.
\textsuperscript{93} 10 C.F.R. §1021.
\textsuperscript{94} 40 C.F.R. §1508.11.
\textsuperscript{95} Id.
Figure 7: FERC Environmental Review Process

**Applicant Process**
- Assesses market need and considers project feasibility
- Studies potential site locations
- Identifies stakeholders
- Requests use of FERC’s pre-filing
- Holds open house to discuss project
- Files formal application with FERC

**FERC Process**
- Receives applicant’s request to conduct its review of the project within FERC’s NEPA pre-filing process
- Formally approves pre-filing process, issues PF Docket No. to applicant, and begins project review
- Receives formal application from applicant
- Issues notice of intent for preparation of an EA/EIS, opens NEPA scoping period to seek public comments on the project
- Issues preliminary draft EIS to cooperating agencies for review
- Issues preliminary draft EA to cooperating agencies for review
- Issues EIS and opens comment period
- Issues EA and opens comment period
- Holds meeting(s) in the project area to hear public comments on the draft EIS
- Responds to comments and revises the Draft EIS
- Responds to comments received on EA in commission order
- Approves or denies project

**Public Input Opportunities**
- (If approved) May construct and operate the project, only after obtaining Clean Water Act, Coastal Zone Management Act, and Clean Air Act permits.
- (If denied) Applicant and/or public can ask FERC to rehear case or refer to FERC administrative law judge
- Applicant and/or parties can take FERC to court

**Source:** Federal Energy Regulatory Commission
During the review process, including the environmental review, FERC allows interventions and protests. Notices of applications fix the time within which someone may file a petition to intervene or an interested regulatory agency that seeks to intervene may file a notice of intervention.\(^96\) A notice of each application filed with FERC is made within 10 business days of the application filing.\(^97\) For applications that require an EA or EIS, a notice of a schedule for the environmental review is issued within 90 days of the notice of application.

After conducting an EA and associated FONSI, an EA and subsequent EIS, or an EIS alone and after reviewing other public interest concerns; FERC can give approval for the facility. After obtaining permits as required by the Coastal Zone Management Act, Clean Air Act, and the Federal Water Pollution Control Act the facility may actually be constructed and operated.\(^98\) As well, after gaining approval from FERC, if a relevant application has be filed with the DOE a final order can be made regarding exporting the LNG commodity to non-FTA countries.

4.4. Current Status of LNG Export Applications

As of March 3, 2015, shown in Table 2, the DOE has only approved nine applications for the export of LNG to non-FTA countries, four of which have only received conditional approval.\(^99\) There are currently 31 applications pending approval to export to non-FTA countries.\(^100\) Contrasting, 41 applications have been approved

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\(^96\) 18 C.F.R. §157.10.
\(^97\) Id. at §157.9.
\(^100\) Id.
and seven are pending approval for export to FTA countries.\textsuperscript{101} The time it takes to approve FTA applications is much shorter than for non-FTA applications. As summarized in Table 2, the average time for approval of FTA applications was approximately 96 days (0.26 years) as compared with 1048 days (2.8 years) for non-FTA applications. A complete list of approved and pending long-term applications to export domestically produced LNG from the lower-48 States to FTA and non-FTA countries as of March 3, 2015 can be found in Table 4 of the Appendix.

<table>
<thead>
<tr>
<th></th>
<th>FTA Applications</th>
<th>Non-FTA Applications</th>
</tr>
</thead>
<tbody>
<tr>
<td>Approved</td>
<td>41</td>
<td>9\textsuperscript{b}</td>
</tr>
<tr>
<td>Pending</td>
<td>7</td>
<td>31</td>
</tr>
<tr>
<td>Average Time for Approval</td>
<td>96 days</td>
<td>1048 days\textsuperscript{c}</td>
</tr>
</tbody>
</table>

\textsuperscript{a} As of March 3, 2015
\textsuperscript{b} Includes four of which have only received conditional approval
\textsuperscript{c} Includes only those receiving final approval

Source: U.S. Department of Energy

As of March 4, 2015, shown in Table 3, only five LNG terminal applications have been approved by FERC. Eight projects have made a formal application with FERC and are pending final approval. Seven projects have begun the NEPA pre-filing process. There are eleven projects that have been demarcated by FERC as potential projects. Hence, there are fewer FERC applications than DOE/FE applications to export LNG. One reason for this is that some companies have chosen to file an application with FERC at a later time. Also, other projects, such as Carib Energy, will use their currently operating liquefaction facilities to liquefy domestic natural gas for

\textsuperscript{101} Id.
exports. Such projects do not have to receive FERC approval. There are also two projects, Freeport-McMoRan Energy and Delfin LNG, which will need to receive approval from MARAD as they are located offshore.

As shown in Table 3, the average time for approval of LNG terminals by FERC was about 937 days (2.5 years). The time to approve LNG terminals is lengthy and attributed to the large number of federal agencies that are involved in the environmental review process.\(^\text{102}\)

**Table 3: Status of FERC Applications and Time for Approval of LNG Terminals in the Lower-48 States\(^a\)**

<table>
<thead>
<tr>
<th>FERC Applications</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Approved</td>
<td>5</td>
</tr>
<tr>
<td>Pending</td>
<td>8</td>
</tr>
<tr>
<td>NEPA Pre-filing</td>
<td>7</td>
</tr>
<tr>
<td>Potential(^b)</td>
<td>11</td>
</tr>
<tr>
<td><strong>Average Time for Approval</strong></td>
<td><strong>937 days</strong></td>
</tr>
</tbody>
</table>

\(^a\) As of March 4, 2015  
\(^b\) Freeport-McMoRan Energy, LLC and Delfin LNG, LLC are excluded; they are potential terminals that would be offshore and fall under MARAD jurisdiction

*Source: Federal Energy Regulatory Commission*

Figure 8 provides illustrative examples of the application timeline for projects that have received approval from the DOE/FE for both FTA and non-FTA exports of LNG and from FERC to construct and operate associated LNG export terminals. Companies may file an application to the DOE first, pre-file under NEPA with FERC first, or file DOE and FERC applications simultaneously.

It is apparent that the time for DOE approval of LNG exports to non-FTA countries is substantially longer than for those to FTA countries. Many companies have applied around the same time for exports to both FTA and non-FTA countries with the DOE/FE and for a single FERC approval of the LNG terminal used for the exports. Exports to FTA countries can actually begin from the facility at the end of the FERC review, whereas applications to export to non-FTA countries must continue to wait for the DOE to grant approval to export the natural gas commodity. In the case an application to export LNG to FTA countries did not require a substantial FERC led environmental review, or did not require FERC approval, the exports could actually begin even sooner, within a few months of filing an application with the DOE. As mentioned from August 15, 2014 for applications to export LNG from the lower-48 states to non-FTA countries, the DOE will only give final action on projects, which have completed the NEPA review under FERC.
### Figure 8: Timeline of Applications Receiving Final Approval from DOE and FERC

<table>
<thead>
<tr>
<th>Project Description</th>
<th>2010</th>
<th>2011</th>
<th>2012</th>
<th>2013</th>
<th>2014</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sabine Pass Liquef.</td>
<td>![Chart Cell]</td>
<td>![Chart Cell]</td>
<td>![Chart Cell]</td>
<td>![Chart Cell]</td>
<td>![Chart Cell]</td>
</tr>
<tr>
<td>Freeport LNG Expansion, and FLNG Liquef.</td>
<td>![Chart Cell]</td>
<td>![Chart Cell]</td>
<td>![Chart Cell]</td>
<td>![Chart Cell]</td>
<td>![Chart Cell]</td>
</tr>
<tr>
<td>Cameron LNG</td>
<td>![Chart Cell]</td>
<td>![Chart Cell]</td>
<td>![Chart Cell]</td>
<td>![Chart Cell]</td>
<td>![Chart Cell]</td>
</tr>
</tbody>
</table>

**DOE FTA Approval**  🟢  **DOE Non-FTA Approval**  🟣  **FERC NEPA Pre-filing**  🟠  **FERC Formal Application**  🟡

*Source: U.S. Department of Energy; Federal Energy Regulatory Commission*
5. Potential Conflicts with WTO Commitments

5.1 Article I:1 Most Favord Nation Treatment

Article I:1 of GATT 1994 embodies the most-favored-nation (MFN) principle, which requires if one country grants another favorable treatment in trade it must give the same favorable treatment to all other members. MFN is seen as “a cornerstone of the GATT” and as “one of the pillars of the WTO trading system.” 103 Article I:1 reads:

“With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.” 104

As Article I:1 provides, the United States is required to provide most-favored-nation status including “all rules and formalities” in connection with the exportation of LNG. The United States is required to accord “any advantage, favor, privilege or immunity” given to LNG destined for any other country unconditionally to the LNG destined for the territories of all other contracting parties. Also, notably, LNG is not listed as an exemption to U.S. commitments under Article I in the Marrakesh Protocol’s schedule for the United States-XX. 105

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In *Canada-Autos* (2000), the Appellate Body (AB) found the object and purpose of Article I:1 is to “prohibit discrimination among like products originating in or destined for different countries” and the prohibition of discrimination “serves as an incentive for concessions, negotiated reciprocally, to be extended to all other Members on an MFN basis.”

Furthermore, the scope of the Article has been interpreted broadly. It has also been found to include both de facto and de jure discrimination as determined in *Canada-Autos*. The Panel, in *Indonesia-Autos*, found the language of Article I:1 provides three elements that must be demonstrated to establish violation of Article I:1: (1) advantages of the type covered in Article I, (2) if such advantages are offered to all like products, and (3) if such advantages are offered unconditionally.

### 5.1.1 Rules and Formalities in Connection with Exportation

In order for the DOE’s expedited public interest review for FTA countries to be inconsistent with Article I:1 it must first be shown to be subject to the disciplines of the Article. The Article covers seven key areas where an “advantage” may be conferred: (1) customs duties, (2) charges of any kind imposed on or in connection with imports or exports, (3) charges imposed on the international transfer of payments, (4) the method of levying such duties and charges, (5) all rules and formalities in

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107 *Id.* at para. 69.

connection with importation and exportation, (6) matters referred to in Article III:2, and (7) matters referred to in III:4.\(^{109}\)

The DOE’s expedited application and approval process is likely to fall under “rules and formalities” in connection with exportation. As evidenced in *EC-Bananas III* and *US-Poultry (China)*, “rules and formalities,” are likely to encompass licensing requirements. In *EC-Bananas III*, the Panel found “import licensing procedures, including the activity function rules, are ‘rules and formalities in connection with importation’ in the meaning of Article I:1.”\(^{110}\) In *US-Poultry (China)* the Panel noted rules and formalities in connection with importation “encompass a wide range of measures.”\(^{111}\) These have included countervailing duties, additional bonding requirements and activity function rules.\(^{112}\) The Panel concluded “‘in connection with importation’ as used in Article I, not only encompasses measures which directly relate to the process of importation but could also include those measures, […], which relate to other aspects of the importation of a product or have an impact on actual importation.”\(^{113}\)

This logic could be extended to exports as Article I:1 provides coverage of rules and formalities in connection with imports and exports. In order to export LNG from the United States, one must obtain an order from the DOE authorizing it to do so,\(^{114}\) constituting an export license. This can be seen as a rule and formality in

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\(^{112}\) *Id.*

\(^{113}\) *Id.* at para. 7.410.

connection with exports. Thus, the DOE’s more favorable treatment in granting export licenses to FTA countries is likely to fall under the scope of Article I:1.

5.1.2 Any Advantage, Privilege, Favor, or Immunity

Second, it is important to consider if “advantages” are of the kind stated in Article I:1. “Advantage” has been interpreted broadly in GATT disputes. In EC-Bananas III (1997), the AB provided “a broad definition has been given to the term “advantage” in Article I:1.” Also, in Canada-Autos the AB found:

“[t]he words of Article I:1 refer not to some advantages granted “with respect to” the subjects that fall within the defined scope of the Article, but to “any advantage”; not to some products, but to “any product”; and not to like products from some other Members, but to like products originating in or destined for “all other” Members.”

The Panel in US-Poultry (China) cited the finding of the Panel in EC-Bananas III regarding advantages noting: “‘advantages’ within the meaning of Article I:1 are those that create ‘more favorable competitive opportunities’ or affect the commercial relationship between products of different origins.”

The application and approval process for export licenses is conducted unevenly. For FTA countries, the process is expedited and granted without modification or delay whereas non-FTA countries are not granted such an advantage. This type of differential treatment may be seen as conferring a distinct “advantage, favor, privilege or immunity” to FTA countries.

Applications to export LNG to non-FTA countries have taken 1048 days on average for approval from the DOE/FE compared with only 96 days for exports to FTA countries. In practice, this creates more favorable competitive opportunities for FTA countries as their applications are approved within a matter of months while non-FTA countries encounter delays of more than two years in many cases.

Applications to export LNG to FTA countries are advantaged by being granted without modification. Applications for export to non-FTA countries, by order of the DOE may be granted “in whole or in part, with such modification and upon such terms and conditions.” For example, the DOE/FE’s Final Order No.3282-C granting Freeport LNG Expansion (FE Docket No.10-161-LNG) authorization to export LNG to non-FTA countries attached nine terms and conditions to the authorization including: term of the authorization; commencement of operations; commissioning volumes; make-up period; transfer, assignment, or change in control; agency rights; contract provisions for the sale or transfer of LNG to be exported; export quantity; and combined FTA and Non-FTA export authorization volume. No such terms and conditions were attached to DOE/FE Order No. 2913 granting authorization to Freeport LNG Expansion to export LNG to FTA countries and the application was accepted as is (FE Docket No. 10-160-LNG).

Applications to export LNG to FTA countries are de facto immune from the public interest review as they are “deemed to be consistent with the public interest.”

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119 Id. at §717b(a).
Thus, export applications to FTA countries benefit from the certainty that they will be approved. Applications to export LNG to non-FTA countries are granted “unless, after opportunity for hearing, [the DOE] finds that the proposed exportation […] will not be consistent with the public interest.” Therefore, applications to export LNG to non-FTA countries are disadvantaged in that it is unclear if they will be approved or not. The LNG industry is highly capital intensive. For example, the Dominion Cove Point LNG project alone required an estimated $3.4 to $3.8 billion overall investment. Uncertainties in project approval make it difficult for applicants to raise capital needed for projects aiming to export LNG to non-FTA countries. Automatically, deeming LNG exports to FTA countries to be in the public interest can therefore lead to more favorable competitive opportunities for exports of LNG destined for FTA countries.

5.1.3 Like Products

Third, one must determine if “advantages” are offered to all like products. There is little debate as to whether LNG is a “like product.” LNG, as a commodity, is clearly a “like product” and as such must be given the same favorable treatment in licensing.

5.1.4 Immediately and Unconditionally

Fourth, it must be determined whether the “advantage” has been conferred immediately and unconditionally to all other members. In EC-Tariff Preferences, the Panel defined “unconditionally” under Article I:1 as its ordinary meaning “not limited

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The case concerned tariff preferences under EC established Drug Arrangements. “Advantages” were conferred only on the condition that receiving countries were experiencing drug problems. As such, the Panel found the tariff advantages to not be given “unconditionally” to like products originating in all other WTO members.

The “advantage” conferred by the NGA’s expedited application and approval process for LNG export applications is conditioned upon whether or not the country has an FTA with the United States requiring national treatment in natural gas. Therefore, the “advantage” is not given “unconditionally” to all other members. Moreover, the advantage is not conferred “immediately” to all other members, as non-FTA countries must undergo a lengthy public review process that can take over two years while export applications to FTA countries are granted within a few months.

In sum, the DOE/FE’s discriminatory treatment of non-FTA versus FTA countries under the NGA appears to be inconsistent with the provisions of GATT Article I:1 and therefore could potentially be inconsistent with U.S. commitments to the WTO unless it finds exception under Article XXIV, XX, or XXI.

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5.2 Article XI:1 General Elimination of Quantitative Restrictions

The prohibition of the use of quantitative restrictions is seen as “form[ing] one of the cornerstones of the GATT system.”125 This is a reflection that “tariffs are GATT’s border protection ‘of choice.’”126 Quantitative restrictions put absolute limits on imports whereas tariffs do not.127 GATT Article XI:1 prohibits quantitative restrictions other than duties, taxes, or other charges. The Article provides:

“No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.”128

Article XI:1 is broad in its coverage, banning import or export restrictions or prohibitions “other than duties, taxes or other charges.”129 The Article clearly prohibits quantitative restrictions in the form of export licenses on the exportation of any product.

The NGA’s requirement that “no person shall export any natural gas from the United States to a foreign country […] without first having secured an order of the [DOE/FE] authorizing it to do so”130 is undisputedly a form of export licensing, as a party cannot export LNG without a permit from the DOE/FE. Thus, the DOE’s export licensing system for the commodity LNG would be found to be within the scope of Article XI:1 if it constitutes a restriction on exports. The key question then in

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126 Id.
127 Id.
this regard is whether or not the DOE/FE’s export licensing system for LNG constitutes a “restriction” of LNG exports.

5.2.1 “Restriction” in the Context of Article XI:1

There are few cases concerning export licensing as quantitative restrictions. Also, the interpretations of what constitutes “restrictions” under Article XI:1 have been seemingly inconsistent. In Japan-Trade in Semiconductors, the Panel examined delays of up to three months in the issuing of export licenses for semiconductors resulting from the monitoring of costs and export prices.¹³¹ The Panel cited an earlier case European Community-Programme of Minimum Import Prices, Licenses and Surety Deposits for Certain Processed Fruits and Vegetable where import certificates issued on the fifth working day following the day the application was lodged were considered automatic licensing systems and therefore not restrictive.¹³² The Panel applied the same standard to export licenses and found “export licensing practices by Japan, leading to delays of up to three months in the issuing of licenses for semiconductors destined for contracting parties other than the United States, had been non-automatic and constituted restrictions on the exportation of such products inconsistent with Article XI:1.”¹³³

India-Quantitative Restrictions concerning India’s import licensing system echoed the same reasoning. The Panel established the scope of a “restriction” as “broad, as seen in its ordinary meaning, which is “a limitation on action, a limiting

¹³² Id. at para. 118.
¹³³ Id. at para. 118.
condition or regulation.” Moreover, the Panel found “discretionary or non-automatic licensing systems by their very nature operate as limitations on action since certain imports may not be permitted.” It concluded that “a discretionary or non-automatic import licensing requirement is a restriction prohibited by Article XI:1.” However, in this case the import-licensing scheme was actually titled “Non-automatic Licensing” or NAL. The complainants were not concerned with delays caused by the system but with the fact that products imported into India subject to the NAL system were treated “to an arbitrary, non-transparent and discretionary import licensing system,” under which licenses were granted “on merit.” The system was deemed non-automatic and therefore a “restriction” not because of delays caused by the system but due to the discretionary nature of the system.

Another concern regarding the term “restriction” has been whether trade volumes or a causal link between the contested measure and low level exports is necessary to establish a restriction on exports. In the Argentina-Hides and Leather case the Panel was required to determine if the presence of officials from the domestic leather processing industry during the Argentinian customs inspection procedures for leather exports constituted a de facto restriction on exports. The Panel found itself to be presented with a unique case requiring, “greater weight attach[ed] to the actual trade impact of [the] measure” because the complainant alleged a de facto restriction. The panel stated, “[e]ven if it emerges from trade statistics that the level of exports if unusually low, this does not prove, in and of itself, that the level is

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135 Id. at para. 5.129.
136 Id.
137 Id. at para. 5.125.
attributable […] to the measure alleged to constitute an export restriction.”\textsuperscript{139} The complainant was ultimately unable to substantiate its claims under these criteria.

In \textit{Columbia-Ports of Entry}, however, the panel found “[i]n light of the unique circumstances surrounding the [complainant’s] characterization of its claim [in Argentina-Hides and Leather], to the extent [the complainant] were able to demonstrate a violation of Article XI:1 based on the measure’s design, structure, and architecture, the [p]anel is of the view that it would not be necessary to consider trade volumes or a causal link.”\textsuperscript{140} Thus, it appears the unique case, \textit{Argentina-Hides and Leather}, warranted a more factual analysis of trade effects due to the alleged de facto restriction.

The more recent case, \textit{China-Raw Materials}, is an important reference for the interpretation of “restriction” in the context of export licensing. The case concerned China’s export licensing system concerning certain raw materials. China’s foreign trade law distinguished between goods that may be freely exported and those that are restricted. Goods that were freely exported were possibly subject to automatic licensing while goods subject to restriction underwent licensing procedures as goods subject to export restriction. Only after obtaining an export license could goods that were subject to export restriction be exported.

The United States and Mexico submitted that rules of the export licensing system were non-automatic by their nature and that licensing agencies could use their own discretion and impose conditions on the granting of licenses to determine quantities of the good that could be exported. The EU similarly argued that the non-

\textsuperscript{139} Id. at para. 11.21.
automatic nature of the licenses was clear in Chinese regulations and that the licensing system allows broad and unfettered discretion to accept or reject applications.

The complainants’ claims then surrounded two key issues of potential restriction: non-automatic and discretionary nature of the export-licensing regime. Importantly, based on China’s regulations, “[i]n general, an export license must be issued within three working days from the receipt of a completed application.”

Thus, delays were not of central concern to the complainants. The claims of being non-automatic were not made in reference to the time it took for the licenses to be granted, or delays incurred. Rather, as in *India-Quantitative Restrictions*, they were made as to the terminology used to characterize the licensing system where licenses were granted “automatically,” in all cases, for freely exported goods or “non-automatically,” not necessarily in all cases, for restricted goods.

Hence, due to the nature of the claims made by the complainants, the Panel stated that it did not find in prior Panels’ reasoning “a specific explanation of why ‘non-automatic’ licensing systems are prohibited under Article XI:1 that would assist it here [in this case].” The Panel stated it saw “no merit in seeking to determine whether or not a measure is permissible under Article XI:1 based solely on its label. In other words, [it] does not find it useful for its analysis here [in this case] whether a measure is categorized as an “automatic” or “non-automatic” license.” It therefore centered its analysis on “the design and structure” of the licensing system to

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142 *Id.* at para. 7.896.
143 *Id.* at para. 7.915.
determine if it had a “limiting” or “restrictive” effect. Hence, semantic issues relating to the actual title or label for a measure were deemed irrelevant.

In this regard, the Panel found “a licensing system that operates such that a license to import or export is granted upon application to each and every applicant would not run afoul to Article XI:1.” This is because it is designed to gather information and is granted in every case. Second, it found, “requiring an applicant to satisfy a certain prerequisite before being granted an […] export license would not necessarily offend Article XI:1.” The prerequisite would only violate the Article if it had a restrictive or limiting effect on exportation. The Panel then set out a test for meeting the requirements of Article XI:1: “whether the licensing system is designed and operates such that by its nature it does not have a restrictive or limiting effect on importation or exportation.”

The Panel then took a different approach than that of Japan-Semiconductors and India-Quantitative Restrictions by departing from the use of automatic or non-automatic terminology to determine restrictions caused by licensing systems. Nevertheless, delays incurred from export licensing systems irrespective of certain terminology used for them such as “non-automatic” may still constitute restrictions in line with the parameters set out in Japan-Semiconductors and European Community- Programme of Minimum Import Prices, Licenses and Surety Deposits for Certain Processed Fruits and Vegetable.

It appears there are myriad types of potential “restrictions” that could need to be considered perhaps giving reason as to why the Panel has used seemingly

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144 Id. at para. 7.916.
145 Id. at para. 7.917.
146 Id. at para. 7.918.
inconsistent criteria to assess “restriction.” Hence, the interpretation of “restriction” could be highly dependent on the nature of the case, the contentions of the complainants, and the nature of the measure at issue.

The Panel, in light of its aforementioned findings, then shifted to consider discretionary licensing requirements. The Panel stated, “if a licensing system is designed such that a licensing agency has discretion to grant or deny a license based on unspecified criteria” the system would not meet the test it established.\textsuperscript{147} This is because the potential to deny applications would be “ever present” and offers “no certainty that licenses will be granted.”\textsuperscript{148}

The Panel ultimately found “undefined other documents” and “undefined other materials” gave China’s licensing authorities “open-ended discretion to restrict or prohibit the exportation” of certain raw materials.\textsuperscript{149} It also was found to create “uncertainty as to an applicant’s ability to obtain an export license.”\textsuperscript{150} This is because “the authority to deny the license is ever present because the conditions for granting it are subject to the demands of the particular licensing authority.”\textsuperscript{151} The Panel concluded the discretion arising from the undefined and generalized requirement to submit unqualified other documents and materials constituted restrictions inconsistent with Article XI:1.

\textsuperscript{147} \textit{Id.} at para. 7.921.
\textsuperscript{148} \textit{Id.} at para. 7.921.
\textsuperscript{149} \textit{Id.} at para. 7.946.
\textsuperscript{150} \textit{Id.} at para. 7.948.
\textsuperscript{151} \textit{Id.} at para. 7.948.
5.2.2 The DOE’s LNG Export Licensing System as a “Restriction” on Exports

In light of prior dispute settlement findings, the U.S. licensing system for LNG exports could potentially constitute a restriction in terms of the system’s “design and structure” having a “limiting effect” in two ways: unreasonable delays in granting permits and or by discretionary licensing requirements.

Setting aside the prior nomenclature “automatic” or “non-automatic” licensing, delays in granting export licenses may still constitute a restriction as found in Japan-Semiconductors. A specific timeframe for when applications to export LNG to are approved is not specified in U.S. C.F.R. or the NGA. Applications to export LNG to non-FTA countries have taken 1048 days on average for approval from the DOE/FE compared with only 96 days for exports to FTA countries. Review of applications that takes more than two years on average has a “limiting effect” on LNG exports to non-FTA countries as the applicants’ exports cannot take place during that time period.

Even if delays are found to not constitute a restriction, the discretionary nature of LNG export licensing requirements may be found to be inconsistent with Article XI:1. The NGA requires that the DOE cannot grant an order for the authorization for exports of LNG, “unless after opportunity for hearing, it finds that the proposed exportation or importation will not be consistent with the public interest.” The prerequisite of a public interest review before granting an export license does not have to imply limiting effect. However, the design and structure of the criteria upon which the DOE’s public interest review is based is uncertain and undefined leaving the DOE/FE with unfettered discretion to determine whether or not potential LNG exports of an applicant are in the public interest.

For applicants, the specific criteria by which applications are judged are unclear beyond the factual matters applicants must submit listed in 10 C.F.R. §590.202 including: (1) the “scope of the project” (including the volume of natural gas) including dates the exports are to begin and end and facilities used or constructed; (2) “the source and security of the natural gas supply” to be used; (3) “participants in the transaction;” (4) “terms of the transaction;” (5) the “lack of national or regional need for the gas;” and (6) “the potential environmental impact of the project.”

In DOE Delegated Order No.0204-112, the DOE set out non-binding guidelines clarifying the criteria of the public interest review for imports. These were “competitiveness of the import,” “need for the natural gas,” and “security of supply.” Regarding exports the DOE merely stated, “[t]he administrator shall regulate exports (including place of exit) based on a consideration of the domestic need for the gas to be exported and such other matters as the Administrator finds in the circumstances of a particular case to be appropriate.” The DOE also acknowledged “Congress did not define ‘public interest,’ thus giving broad discretion to the government in establishing criteria that an importer must fail to meet for the government to deny and authorization.”

The only other reference applicants have for the public interest criteria are a statement by Christopher Smith, Acting Assistant Secretary for Fossil Energy before the House Committee on Oversight and Government Reform, Subcommittee on Energy Policy, Health Care, and Entitlements. In the hearing Smith stated:

154 49 F.R. 6684, (Delegation Order No. 0204-112).
155 Id.
156 Id.
“[a] wide range of criteria are considered as part of the DOE’s public interest review process, including interalia:

- Domestic need for the natural gas proposed for export;
- Adequacy of domestic natural gas supply;
- U.S. energy security;
- Impact on the U.S. economy (GDP), including impact on domestic natural gas prices
- International considerations, [and]
- Environmental considerations.”

Smith went on to state, “[t]hese non-statutory criteria have been developed over several decades and supplemented and refined by subsequent agency adjudication. It is important to emphasize, however, that the criteria are not exclusive. Other issues raised by commenters and/or interveners or DOE that are relevant to a proceeding may be considered as well.”

Furthermore, the DOE commissions reports, which inform the DOE’s public interest evaluations. As of the time of writing, three studies have been commissioned: two domestic price impact studies conducted by the EIA and an economic impact study conducted by National Economic Research Associates (NERA). For a large part of 2012, the DOE actually suspended issuing final orders addressing pending applications to export LNG to non-FTA countries until the completion of the price impact study amounting to what some deemed a de facto

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moratorium on further non-FTA export approvals. This leads to uncertainties as to whether and when and application will be approved. It also implies, in effect, the DOE’s public interest criteria may change based on the findings of the reports while such criteria remain unbeknownst to applicants.

The NGA also states the DOE “may by its order grant such application, in whole or in part, with such modification and upon such terms and conditions as the Commission may find necessary or appropriate.”163 This gives unfettered authority of the DOE to grant or deny licenses based on unspecified criteria that it deems necessary including modifications, terms and conditions. The DOE may also grant “supplemental orders” “as it may find necessary or appropriate.”164 There is no specification as to when such supplemental orders may be made making it unclear when and if a license could be revoked or conditions for holding it modified at a later point.

Therefore, by design and structure, the NGA’s unspecified criteria of the public interest review and the authority of the DOE to grant applications in part, with modification, and upon terms and conditions it “may find necessary or appropriate” and make supplemental orders “as it may find necessary or appropriate” potentially gives the DOE “unfettered or undefined discretion to reject a license application” creating a limiting effect, and hence could be considered a restriction. In sum, it appears the DOE/FE’s LNG export licensing system likely constitutes a restriction on exports and, as such, is inconsistent with the obligations of Article XI:I. To avoid this

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164 Id.
inconsistency the U.S. would need to find exception under GATT Article XI:2, XX, or XXI.

6. Potential Defenses

6.1 Article XXIV Exceptions for Free-trade Areas

Article XXIV is considered to provide an exception or defense to claims of violation of GATT provisions in order to allow the establishment of free-trade areas and customs unions. There are, however, few cases that have dealt with this provision, reflecting the unwillingness of Members to enforce the Article. The WTO has also declined to rule on the Article. The Article itself contains many concepts that are not clearly defined. As such, many aspects of the Article remain ambiguous and various meanings contested. It is therefore difficult to determine how the Article could apply to this case.

Article XXIV:4 is seen as addressing the purpose of Article XXIV. It provides:

“[t]he contracting parties recognize […] the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to trade of other contracting parties with such territories.”

The Turkey-Textiles case provides the foremost interpretation of Article XXIV. In the case, the AB found the purpose of Article XXIV set out in paragraph 4 is to “‘facilitate trade’ between the constituent members and ‘not to raise barriers to trade’

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167 Id.
with third countries.”\textsuperscript{168} This implies a “customs union should facilitate trade within the customs union, but it should not do so in a way that raises barriers to trade with third countries.”\textsuperscript{169}

XXIV:8(b) defines a free-trade area as:

“understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.”\textsuperscript{170}

The meanings of “other restrictive regulations of commerce” and “substantially all the trade” are unclear and have not been interpreted in the context of a free-trade area in dispute settlements. The AB in \textit{Turkey—Textiles} did not address the term “other restrictive regulations of commerce.” Further, the AB in \textit{Turkey—Textiles} noted that no consensus has been reached among members as to the definition of ‘substantially.’\textsuperscript{171} However, it stated it is clear “‘substantially all the trade’ is not the same as \textit{all} the trade, and also that ‘substantially all the trade’ is something considerably more than merely \textit{some} of the trade.”\textsuperscript{172} Therefore, it is uncertain if all U.S. FTAs granting national treatment in natural gas would meet these requirements.

Free-trade areas, as required by Article XXIV:5, are not to raise barriers to trade to third party members. It provides in relevant part:

“the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area; [p]rovided that:”

\textsuperscript{169} \textit{Id}.
\textsuperscript{170} \textit{General Agreement on Tariffs and Trade 1994}, Art. XXIV:8(b).
\textsuperscript{172} \textit{Id}.
“(b) with respect to a free-trade area […] the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free-trade area […] to the trade of contracting parties not included in such area or not parties to such agreement shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area.”

Here, it is unclear what is meant by “other regulations of commerce” and “higher or more restrictive.” With regards to “other regulations of commerce” the Panel in Turkey-Textiles found it to “include any regulation having an impact on trade” and suggested that it is an “evolving concept.”

Nevertheless, it appears that the expedited application and approval process (15 U.S.C. §717b(c)) of the NGA, enacted in 1992, at least de jure did not raise barriers to trade to non-FTA, member countries as the requirement for the public interest review for LNG exports (15 U.S.C. §717b(a)), was pre-existing, being established in 1938. In other words the same standard of public interest review extended to all natural gas trading partners prior to 1992.

The AB in Turkey-Textiles provided two conditions, emphasizing the context of the chapeau of paragraph 5, that a measure otherwise incompatible with WTO law must satisfy in order to be justified by Article XXIV in the case of a customs union. (1) “the party […] must demonstrate that the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV” and (2) “the party must demonstrate that the formation of the customs union would be prevented if it were not allowed to introduce the measure

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174 Panel Report, Turkey—Restrictions on Imports of Textile and Clothing Products, WT/DS34/R, (May 31, 1999), para. 9.120.
These two conditions could be extended to FTAs. However, subparagraphs 8(b) and 5(b) would have to be met in the case of FTAs.

Considering the two conditions, in order to find exception under XXIV, U.S. FTAs requiring national treatment in natural gas would need to qualify as FTAs as defined by XXIV:8(b) and 5(b). Also, the expedited application and approval process (15 U.S.C. §717b(c)), if qualifying as “other regulations of commerce,” would have to have been enacted at the formation of the FTA. Finally, it would need to be demonstrated that the formation of the FTA would have been prevented if it were not allowed to introduce the measure.

It appears that it would be difficult for the measure to meet such criteria. The expedited application and approval process was enacted in 1992, and there is evidence the measure was introduced in order to establish the US-Canada FTA which entered into force on January 1, 1989 and was later superseded by NAFTA. It was also the first FTA requiring national treatment in natural gas. However, it is questionable that the agreement would have been prevented if the expedited application and approval process for the export of natural gas to FTA countries was not introduced.

Even if the U.S. was able to gain exception for the expedited approval and application process for FTA countries which potentially violates Article I:1 it would not be able to gain exception for potential violation of Article XI:1 as the NGA’s “discretionary” public interest review of natural gas exports (15 U.S.C. §717b(a)), was enacted in 1938 well before any U.S. FTAs entered into force.

6.2 Article XI:2 Exceptions to General Elimination of Quantitative Restrictions

Article XI:2 offers a potential exception to violation of XI:1 to temporarily relieve shortages of essential products. The Article provides in relevant part:

“The provisions of paragraph 1 of this Article [XI:1] shall not extend to the following:

(a) export prohibitions or restrictions temporarily applied to prevent relieve critical shortages of food stuffs or other products essential to the export contracting party;

(b) import and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade”\[177\]

Key here is the existence of a critical shortage of gas. Currently, there is not a shortage of natural gas supply due to the natural gas boom (see Section 3). Therefore, it would be difficult to argue there is a temporary, critical shortage of natural gas. Furthermore, the NGA is not needed to apply standards or regulations for the classification, grading, or marketing of natural gas.

If U.S. restrictions on natural gas exports under the NGA could meet the requirements of XI:2 they would still have to meet the obligations of Article XIII, Non-discriminatory Administration of Quantitative Restrictions, which creates an MFN requirement for quantitative restrictions that are exceptions to Article XI:1. Article XIII:1 provides in relevant part:

“No prohibition or restriction shall be applied by an contracting party on the [...] exportation of any product destined for the territory of any other contracting party, unless [...] the exportation of the like product to all third countries is similarly prohibited or restricted.”\[178\]

As demonstrated in Section 5.1 of this paper, however, the discretionary public interest review is likely to be seen as not being applied on an MFN basis as it

\[178\] Id. at Art. XIII:1.
allows an expedited application and approval process (15 U.S.C. §717b(c)) for FTA countries only. Therefore, it appears it would be difficult for the “discretionary” public interest review for natural gas (15 U.S.C. §717b(a)) to find exception under Article XI:2.

6.3 Article XX General Exceptions

Article XX, contains general exceptions to the obligations of GATT meaning the Article can potentially justify inconsistencies with any GATT obligations. The chapeau Article XX provides:

“[s]ubject to the requirement 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, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures.”

There are two provisions under the Article that could provide exception to inconsistency with Article XI:1. First, Article XX(b) provides exceptions “necessary to protect human, animal or plant life or health.” Second, Article XX(g) provides exceptions “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.” These provisions could be available as the public interest review considers environmental concerns.

Notably, however, the expedited application and approval provision of the NGA’s potential violation of Article I would likely not find exception under Article XX. This is because an environmental review is not factored into the DOE’s licensing

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179 Id. at Art. XX.
180 Id. at Art. XX(b).
181 Id. at Art. XX(g).
decision for applications to FTA countries. The NEPA review, which is generally led by FERC is completed well after the DOE approves FTA applications to export LNG. Applications to export LNG to FTA countries are granted without modification or delay. Therefore, it is clear that this provision is not necessary to protect human, animal, or plant life or health; or the conservation of exhaustible natural resources.

The AB in *US-Gasoline* established a two-tiered test for finding justification under Article XX. First, the inconsistent measure must be justified under one of the provisions XX(a)-(j). Second, the measure must meet the requirements of the chapeau of Article XX.

### 6.3.1 XX(b) Necessary to Protect Human, Animal, or Plant Life or Health

The Panel in *US-Gasoline* set out three criteria for provisional justification under Article XX(b). First, “the policy in respect of the measures for which the provision was invoked fell within the range of policies designed to protect human, animal or plant life or health.” Second, “the inconsistent measures for which the exception was being invoked were necessary to fulfill the policy objective.” Finally, it must comply with the chapeau of Article XX.

The public interest review of non-FTA applications to export LNG could be seen as having a policy goal to protect human, animal or plant life or health. The

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183 Id.
184 Id.
185 Id.
186 Id.
187 Id.
188 Id.
elements of the environmental report\textsuperscript{189} required to prepare a FERC led NEPA review requires detailed information on water use quality; fish, wildlife, and vegetation; geological resources; soils; land use, recreation and aesthetics; air and noise quality; polychlorinated biphenyl (PCB) contamination.\textsuperscript{190} Therefore, presumably, a goal of the measure could be seen to be protection of human, animal, or plant life or health.

Christopher Smith, an Assistant Secretary for Fossil Energy, also mentioned before Congress that a wide range of criteria are considered as part of the DOE’s public interest review process, including domestic need for the natural gas proposed for export; adequacy of domestic natural gas supply; U.S. energy security; impact on the U.S. economy (GDP), including impact on domestic natural gas prices international considerations; and environmental considerations.\textsuperscript{191} However, environmental considerations appear to be only one among a number of other criteria factored into the public interest review and are a general category. It is uncertain to what extent the concerns are considered relative to the other factors. Furthermore, nowhere in 15 U.S.C. §717b of the NGA is the goal to protect human, animal or plant life or health explicitly expressed. Rather, the more general term “public interest” is used making the policy goal of the measures ambiguous.

The Panel in \textit{EC-Tariff Preferences}, in examining whether Drug Arrangements were designed to achieve their stated health objectives, the panel considered both “the express provisions of the EC Regulations” and also the “design,
architecture and structure of the measure” as put forth in *Japan-Alcoholic Beverages* II and *US-Shrimp*.192

In *China-Raw Materials* a similar stance was taken. China claimed the objective of its export restrictions of certain raw materials was to “reduce pollution caused by the production of the restricted exports and lead to better health for the Chinese population” and that they were part of a “comprehensive environmental protection framework.” The export restriction measures at issue did not mention any environmental or health concerns.194 However, China attempted to substantiate its claim by pointing to various additional measures relating to reducing pollution and the protection of the environment in Chinese law.195

The Panel found “the breadth of measures touching on environmental (and other) matters is impressive. However […] we do no discern in this array of measures a comprehensive framework aimed at addressing environmental protection and health […] this is not to say that Members can only succeed in justifying their measures under Article XX(b) by producing one or more instruments stating explicitly that a challenged measure has been put in place because it is necessary to protect human, animal, or plant life or health, or that such instrument details the manner in which its objective will be achieved. However, in our view, a Member must do more than simply produce a list of measures referring, inter alia, to environmental protection and

194 Id. at para. 7.501.
195 Id. at para. 7.502-7.509.
polluting products. It must be able to show how these instruments fulfill the objectives it claims to address.\textsuperscript{196}

Hence, the goal the relevant party claims the measure at issue is aimed at is important. Particularly, considering 15 U.S.C. §717b of the NGA does not make direct reference to the goal of the measures to protect human, animal, or plant life, or health, the U.S. would have to show a clear link between what it claims as the policy objective relating to the protection of human, animal, or plant life or health and the potentially restrictive LNG export licensing system.

If the measures met the first test, they would then have to be shown to be “necessary” to fulfill the policy objective. The AB in Brazil—Retreaded Tyres found in order to determine whether a measure is “necessary” within the meaning of Article XX(b) the panel must consider “particularly the importance of the interests or values at stake, the extent of the contribution to the achievement of the measure’s objective, and its trade restrictiveness.”\textsuperscript{197} If this is met then “the result must be confirmed by comparing the measure with possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective.”\textsuperscript{198} The comparison must also weigh the importance of the “interest or values at stake.”\textsuperscript{199} This implies the need to balance trade restrictiveness and the measure’s objective. Also, the availability of alternatives is an important consideration. Further, the AB

\textsuperscript{196} Id. at para. 7.511.
\textsuperscript{198} Id.
\textsuperscript{199} Id.
found a measure has to bring about a material contribution or is apt to produce a material contribution.\textsuperscript{200}

It would appear that a more than two year restriction on exports to non-FTA countries and uncertainty as to whether applications will be approved in order to review relevant environmental concerns aimed at protecting human, animal, plant life or health would be unnecessary as there are likely less restrictive alternatives. For example, the measure could be less restrictive if the criteria of the public interest review could be made available to the public and if the time it takes for applications to be approved was more reasonably finite. It is unclear whether the public interest review brings about a material contribution.

\textbf{6.3.2 XX(g) Conservation of exhaustible natural resources}

Article XX(g) provides provisional exception for otherwise inconsistent measures for the conservation of exhaustible natural resources. Article XX(g) may be seen as setting out a three tier test where a measure must: (1) relate to the “conservation of exhaustible resources,” (2) “relate to” the conservation of natural resources, and (3) be “made effective in conjunction with” restrictions on domestic production or consumption.\textsuperscript{201}

Natural gas clearly meets the first criteria, as a non-renewable resource it can be considered exhaustible. The other two criteria are less certain. The AB in \textit{US-Gasoline} addressed “relate to.” Participants to the appeal all agreed that the term

\textsuperscript{200} Id.
“relating to” was equivalent to “primarily aimed at.”\textsuperscript{202} The AB in \textit{China-Raw Materials} further elaborated there “must be ‘a close and genuine relationship of means and ends.’”\textsuperscript{203}

It is difficult to determine whether the DOE’s public interest review for LNG is primarily aimed at the conservation of exhaustible natural resources as it considers other factors like the domestic need for the natural gas proposed for export, adequacy of domestic natural gas supply, U.S. energy security, impact on the U.S. economy (GDP), including impact on domestic natural gas prices international considerations, in addition to “environmental concerns.” The exact criteria of the public interest review pertaining to environmental concerns or adequacy of domestic natural gas supply are not publically available. Nevertheless, there is no explicit mention of the aim to conserve natural gas for environmental purposes.

Resource Report 10- Alternatives of the environmental report used by FERC to prepare the NEPA environmental review requires the applicant to “discuss the ‘no action’ alternative and the potential for accomplishing the proposed objectives through the use of other systems and/or energy conservation” and to “provide an analysis of the relative environmental benefits and costs for each alternative.”\textsuperscript{204}

Based solely on the criteria that has been made available in DOE statements and based on the requirements of the application to export LNG it would seem the public interest review is more aimed at protecting the security of the domestic supply of natural gas domestically than the conservation of exhaustible natural resources.

\textsuperscript{204} 18 C.F.R. §380.12.
If the U.S. public interest review was found to “relate to” the conservation of exhaustible natural resources it must also be “made effective in conjunction with” restrictions on domestic production and consumption.” In *US-Gasoline* this requirement was elaborated by the AB as a “requirement of even-handedness in the imposition of restrictions” but does not require “identical treatment.”

The AB’s finding in *US-Shrimp* is an illustrative example. The AB found the U.S. had made regulations earlier concerning domestic shrimp trawl vessels to avoid the incidental killing of sea turtles. As such, it found the domestic restriction coupled with the import ban at issue to meet the requirement of even-handedness. The AB in *China-Raw Materials* clarified that the purpose of export restriction itself does not have to be ensuring the effectiveness of restrictions on domestic production and consumption. Rather, trade restrictions relating to the conservation of natural resources must “work together with” restrictions on domestic production or consumption.

Several states have laws for the conservation of natural gas. For example, the Pennsylvania Oil and Gas Conservation Law 58 P.S. §§ 401-419 aims at promoting the conservation of gas and prohibits waste of natural gas. At the federal level, the NEPA environmental review is also required for permitting the construction and extension of inter-state natural gas pipelines. NEPA also requires the federal

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206 Id. at 21.
209 Id.
210 58 P.S. §§ 401-419.
government “include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment.”

Furthermore, 18 C.F.R. §2.78, entitled Utilization and Conservation of Natural Resources—Natural Gas, provides: “[t]he national interests in the development and utilization of natural gas resources throughout the United States will be served by recognition and implantation of the following priority-of-service categories for the use during periods of curtailed deliveries by jurisdictional pipeline companies.”

However, based on this language, the conservation of natural gas via priority-of-service categories only occurs during periods of “curtailed deliveries.” Hence, conservation appears to be aimed at the protection of the domestic supply of energy sources not at conservation of natural gas to prevent exhaustion of the resource.

6.3.3 Requirements of the Chapeau

If the measures met the requirements of XX(b) and or XX(g), they would still have to also meet the provisions of the chapeau. It requires that measures not be applied in a manner that is “arbitrary or unjustifiable discrimination in countries where similar conditions prevail,” or a “disguised restriction” on international trade.

The AB in US-Gasoline noted that the object and purpose of the chapeau is to prevent abuse of the exceptions provided under Article XX. The AB in US-Shrimp further elaborated the chapeau recognizes the need to balance rights of members to

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213 18 C.F.R. §2.78
214 Id.
evoke exceptions XX(a)-XX(j) and the rights of other members under GATT.\textsuperscript{216} The AB in \textit{US-Gasoline} found discrimination mentioned in the chapeau is not the same as that found in other GATT provisions.\textsuperscript{217} It found “the provisions of the chapeau cannot logically refer to the same standard(s) by which violation of a substantive rule has be determined to have occurred.”\textsuperscript{218} Rather, the chapeau prohibits specifically discrimination resulting from measures being applied in a manner, which is arbitrary or unjustifiable between countries where the same conditions prevail.

The \textit{Brazil-Retreaded Tyres} case provides a relevant example pertaining to discrimination in the Article XX chapeau arising from exemption of particular countries from a measure due to commitments relating to a preferential trade agreement. Brazil had introduced a ban on imports of retreaded tires and contended the measure was necessary in order to reduce risks to human, animal or plant life or health arising from the accumulation of waste tires. Brazil’s import ban on retreaded tires was found to provisionally meet the requirements of Article XX(b) and was then considered in light of the chapeau.

Brazil argued the exemption was needed to comply with a ruling issued by a MERCOSUR tribunal. The Panel found the application of the measure caused discrimination arising from the exception of MERCOSUR countries from an import ban on remolded tires. The Panel then considered whether the discrimination was


\textsuperscript{218} Id.
arbitrary or unjustified. The Panel found the discrimination was not random and that it was not unjustifiable as the levels of imports involved were not significant.\(^{219}\)

In the appeal, the AB disagreed with the Panel’s findings based mostly on the quantitative impact. Contrastingly, it centered its analysis on the “cause or the rationale of the discrimination.”\(^{220}\) The AB argued that there is “unjustifiable discrimination when a measure provisionally justified under a paragraph of Article XX is applied in a discriminatory manner ‘between countries where the same conditions prevail’ and when the reasons given for this discrimination bear no rational connection to the objective falling within the purview of a paragraph of Article XX, or would go against that objective.”\(^{221}\) Accordingly, the AB found “the ruling issued by the MERCOSUR arbitral tribunal is not an acceptable rational for the discrimination, because it bears no relationship to the legitimate objective pursued by the Import Ban that falls within the purview of Article XX(b), and even goes against this objective, to however small a degree.”\(^{222}\)

Applications to export LNG from the U.S. to FTA countries are deemed to be consistent with the public interest and are granted approval without modification or delay.\(^{223}\) Hence, the potential findings of the NEPA environmental review do not play a part in the DOE’s decision to grant a license to export the commodity LNG. The FERC led environmental review is actually completed after the DOE has granted approval for the export of the commodity LNG to FTA countries and as such is not


\(^{220}\) Id. at para. 225.

\(^{221}\) Id. at para. 227.

\(^{222}\) Id. at para. 228.

\(^{223}\) 15 U.S.C. §717b(c).
factored into the DOE’s decision as it is in the case of non-FTA countries (see Figure 8). This could be seen as discrimination under Article XX.

The reason FTA countries are exempted from the standard of environmental review that non-FTA exports must go through is because exports to these countries are governed by FTA’s requiring national treatment for trade in natural gas. This reasoning has nothing to do with the policy goals of protecting human, animal, plant life, or health, or conservation of exhaustible recourses. Rather, it concerns the claimed requirement that the FTAs require national treatment for trade in natural gas.

Therefore, needing to meet the obligations of FTAs requiring national treatment for trade in natural gas is unlikely to be an acceptable rationale for discrimination as there is no relationship with the legitimate objective pursued by the environmental review as a part of the public interest assessment required to grant licenses to export LNG. It could even be seen as going against the objective as the NEPA environmental review is not even factored into decisions on applications to export LNG to FTA countries.

Hence, the discrimination arising from the DOE not considering the NEPA environmental review for applications to export to FTA countries appears to be unjustifiable based on the standard applied by the AB in Brazil-Retreaded Tyres. Adding to these findings, it has generally been difficult to justify measures that are otherwise inconsistent with GATT with Article XX. There is only one such successful case of justification, US-Shrimp (Article 21.5 Malaysia).\textsuperscript{224}

\textsuperscript{224} Peter Van den Bossche and Werner Zdouc, The Law and Policy of the World Trade Organization, 3\textsuperscript{rd} Ed. (New York: Cambridge, 2013), 553.
6.4 Article XXI Security Exceptions

Article XXI provides security exceptions stating:

“Nothing in this Agreement shall be construed […] (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests […] (iii) taken in time of war or other emergency in international relations.”

This provision provides broad exception for actions necessary to protect “essential security” interests. However, in the case of LNG it is not apparent that the U.S. LNG export licensing system is necessary for the protection of essential security interests or that there is a war or other emergency in international relations warranting such actions. Furthermore, there are no AB or Panel reports regarding the Article and only one case directly cited the Article implying reluctance of Members to defer to this exception.

7. Conclusion

This paper found the DOE’s dual standard of approval for the issuance of export licenses to export LNG to FTA versus non-FTA countries appears to violate GATT Article I:1. Additionally, the discretionary nature of the public interest review for applicants to export LNG to non-FTA countries likely has a limiting effect on exports prohibited by Article XI:1. Moreover, the U.S. is unlikely to find exception under Article XXIV, XI:2, XX, or XXI. Therefore, it will be important for the U.S. to bring the NGA and DOE procedures into compliance with obligations to the WTO.

225 General Agreement on Tariffs and Trade 1994, Art. XXI.
particularly in light of recent cases the US has brought to the WTO concerning China’s export restrictions on raw materials and rare earths.

Ideally, the NGA could be revised to require the same, non-discretionary standard of public review for the issuance of export licenses to export LNG to both FTA and non-FTA countries. If this is not possible, perhaps more modest steps could be taken. For example, to remedy the discretionary nature of the public interest review, a provision clarifying the exact criteria of the public interest review could be added at 10 C.F.R. §590. Also, a more reasonable timeline for the approval of non-FTA export applications could be established and a specific amount of time that it will take for non-FTA applications to be approved could be precisely specified at 10 C.F.R. §590. Furthermore, if environmental concerns are truly of central concern, the public interest review could be revised to explicitly reflect this policy goal. Also, relevant environmental regulations could be amended to create an evenhanded application of environmental standards for the production and consumption of natural gas destined domestically and internationally.

Congress has made greater consideration of these issues by introducing a number of bills in this respect. For example, the Expedited LNG for American Allies Act was introduced in the Senate in 2013. Yet, the bill still privies select countries over others in the issuance of licenses to export LNG. The more recent LNG Permitting and Transparency Act was passed in the house in January 2015 and is currently under consideration by the Senate. It aims at speeding up the process of DOE approval to a proposed 30 or 45 days after receiving specified approvals from FERC. Unlike the title suggests, however, it does not at all clarify the criteria the
public interest review is based upon and does not directly address the dual standard of approval for exports to FTA versus non-FTA countries.

As a whole, the potential inconsistencies of the DOE’s export licensing system entailed in the NGA with U.S. commitments to the WTO are illustrative of conflicts that arise between domestic and international law and conflicts between the multilateral and bilateral trade systems. These conflicts are likely to occur more frequently with further international economic integration underscoring the need to place greater attention on developing avenues that can reconcile such contradictions.
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---- Panel Report, *Turkey—Restrictions on Imports of Textile and Clothing Products*,

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# APPENDIX

## Table 4: DOE and FERC Approval Status of LNG Export Projects

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*aDOE as of March 3, 2015; FERC as of March 4, 2015  
*bConditional approval date, awaiting final approval (conditional approval no longer granted from August 15, 2014)  
*cNA= not applicable, no application submitted  
*dCarib Energy will use its currently operating liquefaction facilities to liquefy domestic natural gas for exports  
*eTransport LNG from various sources for final export  

Source: U.S. Department of Energy; Federal Energy Regulatory Commission
초 록

미국 천연가스법(Natural Gas Act,NGA)은 에너지부(Department of Energy, DOE)가 액화천연가스(LNG)에 대한 수출을 승인해야 한다고 명시하고 있다. 에너지부(Department of Energy, DOE)는 ‘공익’의 관점에서 수출허가 승인을 철저히 검토해야 한다. 액화천연가스(LNG) 수출 신청을 검토하는 데는 각기 다른 기준이 존재한다. 천연가스 교역에서 미국과 자유무역협정(FTA)을 체결한 국가들은 내각의 대우를 적용하여 신청에 대해 ‘수정 또는 지체없이’ 승인된다. 반면, 미국과 자유무역협정(FTA)을 체결하지 않은 국가들의 신청은 다음과 같은 사항들을 포함한 철저하게 검토해야 한다: 수출의 필요성, 국내 공급의 타당성, 에너지 안보 및 경제에 대한 영향, 국제적 상황 그리고 환경문제. 실제로, 미국 천연가스법(Natural Gas Act, NGA)은 미국과 자유무역협정(FTA)을 체결하지 않은 국가들에 대해 추가적인 자격과 불확실성 그리고 비용을 야기한다. 이 법이 WTO와 미국 간 협의사항과 갖는 절제적 상호가능성은 지금까지 거의 관심을 받지 못했다. 그러나 수평적추가법과 수평적상호법과 같은 신기술 개발이 미국 내 천연가스를 촉진시켜, 천연가스의 미국 내 공급량은 계속적으로 증가할 것으로 예상되며, 이 에너지정보국(Energy Information Administration, EIA)은 빠르면 2020년경 미국이 천연가스의 수출국이 될 것이라고 전망한다. 이 연구에서는 미국과 자유무역협정(FTA)을 체결한 국가들과 그렇지 않은 국가들이 액화천연가스(LNG) 수출 허가 신청 과정에서 겪는 차별적 대우와 ‘공익’의 관점에서 수행되는 검토의 정제적인구속효과에 주목하여 이러한 차단이 WTO 외의사항에 위반되지 않는지에 대해 살펴보았다. 특히, 이 논문에서는 최우대국제(most-favored nation treatment)와 수출규제를 관리하는 WTO의 원칙에 대해 살펴본다. 연구를 통해 에너지부(Department of Energy, DOE)가 액화천연가스(LNG) 수출을 승인하는데 있어 미국과 자유무역협정(FTA)을 체결한 국가들과 그렇지 않은 국가들에 대한 서로 다른 기준을 적용하는 것이 GATT Article I:1을 바꾸는 것으로 나타났다. 그리고 미국과 자유무역협정(FTA)을 체결하지 않은 국가들의 액화천연가스(LNG) 수출 신청에 대하여 ‘공익’의 관점에서 검토한다는 절제적 속성이 Article XI:1에서 금지하고 있는 구속효과를 가질 수 있다는 것을 보였다. 나아가 미국은 Article XXV, XI:2, XX, 또는 XXI 하에 예외 조항에도 해당하지 않는 것을 보였다. 따라서 미국 천연가스법(Natural Gas Act, NGA)과 에너지부(Department of Energy, DOE)의 관련 절차를 WTO 외의사항에 따라 수정하는 것은 최근 중국의 원자재와 화석류 수출규제에 대한 미국의 WTO 제소 사례에서 알 수 있듯이 매우 중요하다.

키워드: NGA, FTA, WTO, LNG
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