

The Bear, the Boom, and the Barriers to Liquefied Natural Gas Exports

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I. INTRODUCTION

In late February 2014, Russian forces entered the ex-soviet state of Ukraine—escalating a conflict stemming as far back as the 1991 dissolution of the Soviet Union.¹ A major factor in this recent crisis has been the supply and price of Russian natural gas.² Ukraine, like many countries, relies on Russia to provide much of its natural gas.³ The Russian supply lines running through Ukraine also carry as much as seventy percent of the gas Russia provides to the European Union (“EU”).⁴

So it was of significant concern when, in June of 2014, Russia cut natural gas to Ukraine and, in doing so, reduced the flow of gas into Europe to a trickle.⁵ As Europe and the global community considered sanctions on the Russian energy sector, the gas supplies to Poland, Slovakia, and Germany mysteriously dropped—perhaps as a warning.⁶

This would not be the first time Russia has used natural gas to exert political pressure.⁷ In the winters of 2004 and 2006, Russia’s state-owned natural gas firm, Gazprom,⁸ severely reduced gas supplies to Belarus.⁹ Belarus is now a member of the Eurasian Customs Union, President Vladimir Putin’s free trade association of former Soviet republics.¹⁰ Latvia and Lithuania have also seen their gas cut several times as punishment for awarding contracts to European rather than Russian companies.¹¹

Russia’s recent use of natural gas to exert political influence raised the

¹ *Ukraine Crisis: Timeline*, BBC (Nov. 13, 2014), <http://www.bbc.com/news/world-middle-east-26248275>.

² See Paul Kirby, *Russia’s Gas Fight with Ukraine*, BBC (Oct. 31, 2014), <http://www.bbc.com/news/world-europe-29521564>.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Diane Francis, *Sanctions or No, Here’s How Putin Has Laid the Groundwork to Bully Europe for Years to Come*, BUS. INSIDER (Aug. 11, 2014, 12:41 PM), <http://www.businessinsider.com/russian-natural-gas-dominance-2014-8>.

⁸ Gazprom, a remnant of the former Soviet gas ministry, is the world’s largest natural gas producer. *Russia’s Wounded Gas Giant*, THE ECONOMIST (May 23, 2013), <http://www.economist.com/news/business/21573975-worlds-biggest-gas-producer-ailing-it-should-be-broken-up-russias-wounded-giant>. While Gazprom issues shares to outside investors, it is majority-owned by the Russian state. *Id.* As such, the firm may sometimes pursue strategies that make little economic sense but that serve the long-term interests of the state, namely, ensuring European dependence on Russian energy. Zeyno Baran, *EU Energy Security: Time to End Russian Leverage*, 30 WASH. Q., Autumn 2007, at 135.

⁹ Francis, *supra* note 7.

¹⁰ *Id.*

¹¹ *Id.*

possibility of similar interruptions of supplies to other countries.¹² The threat prompted renewed calls for diversification and a desire to reduce Russian imports of natural gas.¹³ Countries around the world began looking to the United States (“U.S.”) as a potential alternate natural gas supplier.¹⁴

The United States is in a position to capitalize on this increased demand. With the development of new technologies like hydraulic fracturing (“fracking”) and horizontal drilling, shale gas has become increasingly accessible.¹⁵ The shale boom has quickly made the United States the number one producer of natural gas in the world.¹⁶

The country’s potential for liquefied natural gas (“LNG”) exports is particularly significant and timely in light of Russia’s recent actions in Ukraine. LNG sourced from the United States promises to serve an important geopolitical purpose by supplanting the influence of traditional natural gas suppliers. Moreover, studies predict that U.S. LNG exports would benefit the economy—creating jobs and increasing the GDP.¹⁷

Yet, the U.S. LNG export licensing system imposes procedural hurdles for potential exporters to reach the most promising importers. Companies hoping to export LNG to these countries must satisfy the Department of Energy’s “public interest” review before receiving an export license.¹⁸ This procedural hurdle limits access to the global market, causes delays, creates uncertainty, and likely violates international trade rules. In doing so, the licensing system creates barriers to LNG exports.

This Article argues that the U.S. should reduce these regulatory barriers to LNG export by either limiting the scope of the public interest determination or eliminating it altogether. Part II provides background on the issue, including the

¹² *See id.*

¹³ RALF DICKEL ET. AL., OXFORD INST. FOR ENERGY STUDIES, REDUCING EUROPEAN DEPENDENCE ON RUSSIAN GAS: DISTINGUISHING NATURAL GAS SECURITY FROM GEOPOLITICS 2 (Oct. 2014), <http://www.oxfordenergy.org/wpcms/wp-content/uploads/2014/10/NG-92.pdf>.

¹⁴ *See* CHI-KING CHYONG, LOUISA SLAVKOVA & VESSELA TCHERNEVA, EUROPEAN COUNCIL ON FOREIGN RELATIONS, EUROPE’S ALTERNATIVES TO RUSSIAN GAS (2015); *see Geopolitical Implications and Mutual Benefits of U.S. LNG Exports: Forum hosted by the H. Comm. on Energy and Com.*, 113th Cong. (Oct. 10, 2013); *see* Oleg Vukmanovic & Edward McAllister, *Exclusive: World Buyers Line Up to Buy U.S. Natural Gas*, (Jan. 24, 2014, 8:18 AM), <http://www.reuters.com/article/2014/01/24/us-Ing-sales-idUSBREA0N0XS20140124>.

¹⁵ JASON BORDOFF & TREVOR HOUSER, COLUMBIA CTR. ON GLOB. ENERGY POL’Y, AMERICAN GAS TO THE RESCUE?: THE IMPACT OF U.S. LNG EXPORTS ON EUROPEAN SECURITY AND RUSSIAN FOREIGN POLICY 8 (Sept. 2014).

¹⁶ U.S. ENERGY INFO. ADMIN., INTERNATIONAL ENERGY STATISTICS (2012), <http://www.eia.gov/cfapps/ipdbproject/IEDIndex3.cfm?tid=3&pid=3&aid=1> [hereinafter INTERNATIONAL ENERGY STATISTICS].

¹⁷ NERA ECON. CONSULTING, MACROECONOMIC IMPACTS OF LNG EXPORTS FROM THE UNITED STATES 76, 77 (Dec. 2012), http://energy.gov/sites/prod/files/2013/04/f0/nera_lng_report.pdf (study commissioned by the U.S. Department of Energy).

¹⁸ Natural Gas Act, 15 U.S.C. § 717b(a) (2012).

rising potential for exports, the geopolitical role of LNG exports, the licensing process, and the regulatory barriers that process creates. Part III outlines two possible solutions to overcoming these issues—providing analysis, sample statutory language, and counterarguments for each. Part IV concludes.

II. BACKGROUND

Before discussing why and how the United States should reduce barriers to LNG exports, this section provides crucial context. Specifically, this section details the rise of natural gas in the United States, the geopolitical benefits of LNG, the current licensing system, and the regulatory barriers that the system creates.

A. *The Rise of American Natural Gas*

Not long ago, the United States was the world's largest natural gas importer.¹⁹ As recently as 2005, the U.S. Energy Information Administration (“EIA”) projected that the United States would become increasingly dependent on foreign natural gas.²⁰ In anticipation of a growing U.S. demand for imported gas, companies constructed eleven LNG import terminals along the Gulf Coast and East Coast, and LNG exporters around the world invested in new liquefaction capacity to supply the expanding U.S. market.²¹

At the same time, however, technological advancements brought about a revolution in domestic natural gas production.²² Processes like fracking and horizontal drilling allowed companies to extract natural gas from shale formations, previously considered inaccessible.²³ Access to shale gas has quickly made the United States the largest natural gas producer in the world, and rendered natural gas imports largely unnecessary.²⁴

As production increased, mostly from shale gas, the price of natural gas in the United States fell dramatically.²⁵ Global gas prices, however, remained high.²⁶ Last year, the price of natural gas in Europe and Asia was 100 to 250 percent higher than prices in the United States.²⁷ The price differential has garnered

¹⁹ BORDOFF & HOUSER, *supra* note 15, at 9.

²⁰ U.S. ENERGY INFO. ADMIN., ANNUAL ENERGY OUTLOOK 2005 96 (2005).

²¹ BORDOFF & HOUSER, *supra* note 15, at 9.

²² U.S. GOV'T ACCOUNTABILITY OFF., GAO-14-762, FEDERAL APPROVAL PROCESS FOR LIQUEFIED NATURAL GAS EXPORTS I (Sept. 2014) [hereinafter FEDERAL APPROVAL PROCESS FOR LIQUEFIED NATURAL GAS].

²³ *Id.* at 4.

²⁴ See INTERNATIONAL ENERGY STATISTICS, *supra* note 16.

²⁵ FEDERAL APPROVAL PROCESS FOR LIQUEFIED NATURAL GAS, *supra* note 22, at 4.

²⁶ BORDOFF & HOUSER, *supra* note 15, at 8.

²⁷ FED. ENERGY REG. COMM'N, WORLD LNG ESTIMATED AUGUST 2014 LANDED PRICES (June 2014), <http://www.ferc.gov/market-oversight/mkt-gas/overview/2014/06-2014-ngas-ovr-archive.pdf>.

interest from a number of companies wanting to operate LNG export terminals, in many cases by repurposing the now idle LNG import facilities once built to accommodate projected U.S. demand.²⁸

B. *Geopolitical Incentive for LNG exports*

Increased U.S. LNG extraction from technological advancements, or the “shale boom”, has set the United States on the verge of becoming an energy superpower, surpassing even Russia and Iran in natural gas production.²⁹ By providing another reliable source of natural gas, the United States has the potential to reframe tenuous geopolitical relationships centered on energy supply.³⁰

As the world’s largest natural gas exporter, Russia gains a distinct geopolitical advantage through its natural gas. For one, the success of Russian LNG exports garners significant support for the nation’s top leaders, including President Vladimir Putin.³¹ Russia’s *National Security Strategy to 2020*, published in 2009, described the country’s energy reserves as “expand[ing] the possibilities of the Russian Federation to strengthen its influence in the world arena.”³² The country’s influence is particularly strong in Central and Eastern Europe, where countries rely heavily on Russian natural gas, and have historically lacked alternative suppliers.³³ Specifically, Russia used natural gas to exert pressure against Lithuanian efforts to break free from the Russian sphere of influence and align more closely with the European Union and United States.³⁴ On several occasions, the Russian Federation has threatened Lithuania and other Baltic States with gas cutoffs—occasionally following through on those threats.³⁵ Estonia, Latvia, and Lithuania import nearly all of their natural gas from Russia, which reduces their foreign policy options.³⁶ Developing LNG trade partnerships in regions like the Baltic would anchor U.S. economic presence and strengthen strategic partnerships, providing an opportunity for the United States to exert western

²⁸ BORDOFF & HOUSER, *supra* note 15, at 10.

²⁹ Robert D. Blackwill & Meghan L. O’Sullivan, *America’s Energy Edge: The Geopolitical Consequences of the Shale Revolution*, FOREIGN AFFAIRS, Jan./Feb. 2014, at 103.

³⁰ See Meg Handley, *Natural Gas Exports: A Geopolitical Game Changer?*, U.S. NEWS, Mar. 5, 2013, <http://www.usnews.com/news/articles/2013/03/05/natural-gas-exports-a-geopolitical-game-changer>.

³¹ Laura Alfaro, Richard H.K. Vietor & Hilary White, *The U.S. Shale Revolution: Global Rebalancing?*, HARVARD BUS. SCHOOL, Case 714-008 (Sept. 2013, revised Oct. 2014).

³² Стратегия: национальной безопасности Российской Федерации до 2020 года (Mar. 12, 2009), <http://www.scrf.gov.ru/documents/99.html>.

³³ See H.R. COMM. ON ENERGY AND COMMERCE, 113TH CONG., PROSPERITY AT HOME AND STRENGTHENED ALLIES ABROAD—A GLOBAL PERSPECTIVE ON NATURAL GAS EXPORTS 10 (Comm. Print Feb. 4, 2014).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

influence.³⁷

A diversified energy supply also enables the United States and its allies to levy economic sanctions and exert political pressure on traditional natural gas suppliers.³⁸ The ability to do so is particularly important in the Middle East, where the United States has a vital interest in preventing terrorism, countering nuclear proliferation, promoting regional security, and protecting close allies like Israel.³⁹ It would have been nearly impossible to impose such unprecedented restrictions on Iran's oil exports, for example, without a North American supply of oil.⁴⁰

The feasibility of imposing sanctions on a natural gas supplier has also been an issue in the current Russia-Ukraine conflict. When Russia invaded Ukraine, Europe avoided sanctioning Russia's energy sector, undoubtedly because Russia supplies almost a third of Europe's natural gas.⁴¹ Europe eventually joined the United States in imposing sanctions on Russian energy, but completely excluded the gas industry from the scope of those sanctions.⁴² By creating diversity in the market of natural gas suppliers, LNG exports promise to undermine Russian political pressure, strengthen U.S. relationships, and embolden our allies.

C. The Current Licensing Process

Despite the geopolitical advantages of U.S. LNG exports, potential exporters to strategic regions face an expensive, uncertain regulatory process. Two agencies are primarily responsible for LNG export licensing: the Department of Energy ("DOE")⁴³ and the Federal Energy Regulatory Commission ("FERC").⁴⁴ DOE is responsible for approving LNG exports as a commodity, while FERC is responsible for approving the facilities used to export the commodity.⁴⁵ Prior to

³⁷ *Id.* at 11; see Karl Sorri, *Baltic Dependence on Russian Gas About to End*, GLOBAL INSIGHTS (Oct. 19, 2013) <http://globalriskinsights.com/2013/10/baltic-dependence-on-russian-gas-about-to-end/>.

³⁸ See Blackwill & O'Sullivan, *supra* note 29, at 111.

³⁹ *Id.* at 107.

⁴⁰ *Id.* at 111.

⁴¹ See generally Dmytro Gorshkov & Oleksandr Savochenko, *EU to Russia: Let's Not Use Natural Gas as a Political Tool*, BUS. INSIDER (Sept. 23, 2014, 5:15 PM), (quoting EU Energy Commissioner, Guenther Oettinger) <http://www.businessinsider.com/afp-eu-warns-russia-not-to-use-gas-as-weapon-in-ukraine-crisis-2014-9> ("It was our and my position to avoid sanctions into . . . any gas industries. It is our clear preference to come to an interim solution and to get enough gas from Russia.").

⁴² *How Far Do EU-US Sanctions on Russia Go?*, BBC (Sept. 15, 2014), <http://www.bbc.com/news/world-europe-28400218>.

⁴³ Specifically, the Department of Energy/Fossil Energy.

⁴⁴ Natural Gas Act, 15 U.S.C. § 717b(a) (2012); *Department of Energy's Program Regulating Liquefied Natural Gas Export Applications: Hearing before the Subcomm. on Energy and Power of the H. Comm. on Energy and Com.*, 113th Cong. (2014) [hereinafter *DOE's Program Regulating LNG Export Applications*] (statement of Paula Gant, Deputy Assistant Secretary for Oil and Natural Gas).

⁴⁵ Natural Gas Act, 15 U.S.C. § 717b(e) (2012); *DOE's Program Regulating LNG Export Applications*, *supra* note 44 (statement of Paula Gant, Deputy Assistant Secretary for Oil and Natural

August 2014, an applicant could start the licensing process at either agency. If the applicant started at DOE, the applicant could receive conditional approval contingent on completion of the FERC process.⁴⁶ DOE, however, has since ended the practice of issuing conditional approvals, and now assesses applications only after the FERC process concludes.⁴⁷

FERC is responsible for authorizing any siting, construction, expansion, or operation of LNG export terminals.⁴⁸ FERC also serves as the lead agency for the purposes of complying with the National Environmental Policy Act (“NEPA”).⁴⁹ Per the federal environmental requirements under NEPA, FERC conducts an environmental review wherein the agency assesses the projected effects of the facility.⁵⁰ Based on that review, FERC may approve applications, in whole or in part, with such modifications and upon such terms and conditions as it finds necessary and appropriate.⁵¹ The FERC environmental review portion is the longest and most expensive part of the application process, often costing applicants over \$100 million and taking years.⁵²

Upon completion of the FERC environmental review, the potential exporter applies to DOE requesting permission to export the LNG.⁵³ The Natural Gas Act (“NGA”) provides two statutory standards for reviewing these applications: one for export to nations with whom the United States has a free trade agreement requiring national treatment in natural gas (“Free Trade Agreement countries” or “FTA countries”), and one for export to nations with whom the United States does not have such an agreement (“non-FTA countries”).⁵⁴ For exports to FTA countries, licenses are *deemed* consistent with the public interest and must be granted by DOE *without modification or delay*.⁵⁵ Licenses for export to non-FTA countries, however, are only *presumed* consistent with the public interest and may be granted in whole or in part, with such modification and upon such terms as

Gas).

⁴⁶ FEDERAL APPROVAL PROCESS FOR LIQUEFIED NATURAL GAS, *supra* note 22, at 2; *see generally* Procedures for Liquefied Natural Gas Export Decisions, 79 Fed. Reg. 158, 48132-33 (Aug. 15, 2014).

⁴⁷ *See generally id.* at 132.

⁴⁸ Natural Gas Act, 15 U.S.C. § 717b(e) (2012); *DOE’s Program Regulating LNG Export Applications*, *supra* note 44 (statement of Paula Gant, Deputy Assistant Secretary for Oil and Natural Gas).

⁴⁹ FEDERAL APPROVAL PROCESS FOR LIQUEFIED NATURAL GAS, *supra* note 22, at 8.

⁵⁰ *Id.*

⁵¹ Natural Gas Act, 15 U.S.C. § 717b(a) (2012).

⁵² *See* Ayesha Rascoe, *New U.S. LNG Export Approvals Face Long Wait - Cheniere Energy*, REUTERS (Nov. 13, 2012, 6:41 PM), <http://www.reuters.com/article/2012/11/13/lng-exports-approvals-idUSL1E8MD7NA20121113>.

⁵³ FEDERAL APPROVAL PROCESS FOR LIQUEFIED NATURAL GAS, *supra* note 22, at 12.

⁵⁴ Natural Gas Act, 15 U.S.C. § 717b(a), (c) (2012).

⁵⁵ *Id.* § 717b(c).

DOE seems fit.⁵⁶

Because exports to FTA countries are deemed to be in the public interest, those do not require a public interest analysis.⁵⁷ Exports to non-FTA countries, on the other hand, being only presumptively in the public interest, undergo a public interest review.⁵⁸ The statute neither defines “public interest,” nor provides specific criteria to be considered.⁵⁹ However, DOE, has identified a range of factors that it evaluates when conducting a public interest analysis.⁶⁰ These factors include economic impact, international considerations, domestic supply, environmental considerations, and any other factors relevant to the public interest.⁶¹

D. Barriers to Trade

Subjecting exports to non-FTA countries to the public interest determination limits access to strategic countries, causes delays, creates uncertainty for potential exporters, and violates the United States’ trade obligations.

1. Limits Access

First, the licensing regime, specifically the FTA/non-FTA distinction, impedes access to certain countries by potential exporters. The United States has free trade agreements requiring national treatment in natural gas in force with only eighteen countries: Australia, Bahrain, Canada, Chile, Colombia, Dominican Republic, El Salvador, Guatemala, Honduras, Jordan, South Korea, Mexico, Morocco, Nicaragua, Oman, Panama, Peru, and Singapore.⁶² Excluded from this list are major LNG importers like Japan and India.⁶³ Of the eighteen countries with which the U.S. has a free trade agreement requiring national treatment in natural gas, only six—South Korea, Singapore, Mexico, Canada, Chile, and the Dominican Republic—currently import LNG or have an import terminal.⁶⁴ With so few natural gas importing FTA countries, the total demand from FTA countries alone

⁵⁶ *Id.* § 717b(a).

⁵⁷ *Id.* § 717b(c).

⁵⁸ *Id.* § 717b(a).

⁵⁹ *Id.* § 717(a).

⁶⁰ *See, e.g.*, Opinion and Order Conditionally Granting Long-Term Authorization to Export Liquefied Natural Gas from Sabine Pass LNG Terminal to Non-Free Trade Agreement, Order No. 2961, FE Docket No. 10-111-LNG (Dep’t of Energy May 20, 2011) [hereinafter Sabine Pass Conditional Opinion and Order No. 2961].

⁶¹ *DOE’s Program Regulating LNG Export Applications*, *supra* note 44 (statement of Paula Gant, Deputy Assistant Secretary for Oil and Natural Gas).

⁶² *Id.*; *see* OFF. OF THE U.S. TRADE REP., FREE TRADE AGREEMENTS, <https://ustr.gov/trade-agreements/free-trade-agreements> (last visited Jan. 28, 2015).

⁶³ FEDERAL APPROVAL PROCESS FOR LIQUEFIED NATURAL GAS, *supra* note 22, at 7.

⁶⁴ BORDOFF & HOUSER, *supra* note 15, at 10.

is not nearly enough to absorb all U.S. gas exports.⁶⁵ Access to non-FTA countries—especially those in Asia where demand is rapidly growing—is considered essential to making U.S. LNG projects viable.⁶⁶

From a geopolitical perspective, the FTA/non-FTA distinction makes it more difficult for U.S. LNG exports to reach strategic regions. Exports to almost all Asian and European countries will be subject to the public interest review because they lack a free trade agreement with the United States requiring national treatment in natural gas.⁶⁷ Many of the United States' closest and most important allies are non-FTA countries. Simonas Satunas, deputy chief of mission at the Lithuanian Embassy in Washington, noted, "It's an interesting situation, we are in the same defense alignment (NATO), but we are unable to trade the energy resources which are so important for us, not only for the economy but in terms of national security as well."⁶⁸

2. Causes Delays

While it is possible to receive an export license for non-FTA countries, doing so is a lengthy, cumbersome process.⁶⁹ This is due, in large part, to the way DOE reviews export applications. DOE reviews applications not as a standardized assessment but rather a case-by-case deliberation, with applications considered independent of one another and one-at-a-time.⁷⁰ Sabine Pass, the first project to receive approval, took 255 days to receive its permit from DOE.⁷¹ The more recent Freeport project took even longer, two years, to receive approval.⁷² Some projects, like Gulf Coast's, have been waiting more than three years and still have not received a decision.⁷³ In comparison, approvals for FTA licenses average just over

⁶⁵ BORDOFF & HOUSER, *supra* note 15, at 10.

⁶⁶ *Id.*

⁶⁷ See OFF. OF THE U.S. TRADE REP., FREE TRADE AGREEMENTS, <https://ustr.gov/trade-agreements/free-trade-agreements> (last visited Jan. 28, 2015) (noting the lack of European and Asian countries listed as having a free trade agreement with the United States requiring national treatment in natural gas).

⁶⁸ Keith Johnson, *The Geopolitics of Gas Exports: Why Lawmakers from Both Parties and Plenty of Countries Overseas, are Desperate to Speed Up U.S. Energy Exports*, FOREIGN POL'Y (Feb. 11, 2014), <http://foreignpolicy.com/2014/02/11/the-geopolitics-of-gas-exports/>.

⁶⁹ See Michael Ratner, Paul Parfomak & Adam Vann, CONG. RES. SERV., LNG EXPORTS PERMITTING PROCESS (2013), http://www.energy.senate.gov/public/index.cfm/files/serve?File_id=fb60c4c3-bff2-4fd5-b669-bf0049c4689b.

⁷⁰ FEDERAL APPROVAL PROCESS FOR LIQUEFIED NATURAL GAS, *supra* note 22, at 12.

⁷¹ Ratner, Parfomak & Vann, *supra* note 699.

⁷² *Id.*

⁷³ See DEP'T OF ENERGY, *Gulf Coast LNG Export, LLC – FE Dkt. No 12-05*, http://www.fossil.energy.gov/programs/gasregulation/authorizations/2012_applications/gulf_coast_export12_05_ing.html (last visited Oct. 18, 2014) (Gulf Coast LNG Export, LLC filed their application in January of 2012. As of November 2015, there has not been a decision.).

two months—sometimes taking as few as twenty-nine days.⁷⁴

The delay matters because it hampers the United States' efforts to compete for market share. *Global demand for natural gas is expected to increase significantly by 2025.*⁷⁵ *Proposed new global LNG capacity exceeds projected demand.*⁷⁶ Unless there is significant growth in LNG demand, the number of the “speculative” projects implies increasing supply-side competition.⁷⁷ *The facilities that come online most quickly will have a competitive advantage in meeting the projected global LNG demand.*⁷⁸ Ultimately, the commercial viability of a number of LNG export projects depends on whether they can be approved and built in time.⁷⁹

Delays have geopolitical consequences as well. Moscow is already trying to compensate for current and potential losses in Europe by making inroads into Asia.⁸⁰ Just recently, Russia entered into two major natural gas supply agreements with China.⁸¹ These arrangements could form the basis of a more extensive geopolitical relationship.⁸² Having seized Crimea from Ukraine, Russia's Gazprom also intends to fast track its South Stream pipeline, which would travel under the Black Sea and transport gas directly into Europe.⁸³

3. Creates Uncertainty

The current licensing regime also creates uncertainty for potential exporters. While the FERC permitting process is more onerous and costly than the DOE process, it is at least well defined.⁸⁴ The real wildcard for potential exporters is DOE's public interest determination—namely, the lack of transparency regarding the criteria used to evaluate non-FTA export applications, and the time it will take to receive approval.⁸⁵

⁷⁴ Ratner, Parfomak & Vann, *supra* note 69.

⁷⁵ ANGA CEO Tells Congress: “Time is of the Essence” on LNG Exports, AM. NAT. GAS ASSOC., (June 20, 2014), <http://anga.us/blog/2014/6/20/anga-ceo-tells-congress-time-is-of-the-essence-on-lng-exports> (Demand for natural gas is expected to increase between 18 bcf/d and 38 bcf/d in the next ten years while capacity outside the U.S is expected to increase by 50 bcf/d.).

⁷⁶ *Id.*

⁷⁷ Ernst & Young, *Global LNG: New pricing ahead? – LNG Supply*, <http://www.ey.com/GL/en/Industries/Oil---Gas/Global-LNG--New-pricing-ahead---LNG-supply> (last visited Oct. 18, 2015).

⁷⁸ *See id.*

⁷⁹ *See id.*

⁸⁰ Blackwill & O'Sullivan, *supra* note 29, at 107.

⁸¹ *See* Eric Yep, *New Russia-China Deal Could Further Hit Natural-Gas Prices*, WALL ST. J., Nov. 10, 2014, <http://www.wsj.com/articles/new-russia-china-deal-could-further-hit-natural-gas-prices-1415614816>.

⁸² Blackwill & O'Sullivan, *supra* note 29, at 109.

⁸³ Francis, *supra* note 7.

⁸⁴ Ratner, Parfomak & Vann, *supra* note 699, at 5.

⁸⁵ Natalie Regoli & Brian Polley, *Regulatory Uncertainty Hampers LNG Export Projects*, UNCONVENTIONAL OIL & GAS REP. (Apr. 2014), <http://www.ogj.com/articles/uogr/print/volume->

DOE also retains post-approval revocation authority, meaning DOE reserves the power to rescind approvals of non-FTA export licenses even after potential exports have begun moving forward.⁸⁶ This worries investors, owners, and potential offtakers.⁸⁷ A recent change to DOE application procedures adds further uncertainty. Applicants must now complete the environmental review *before* DOE will consider their export license application.⁸⁸ This requires potential exporters to through the most expensive and time-consuming part of the process without knowing whether they will ultimately receive an export license.⁸⁹ This uncertainty, as well as delays and inhibited access, create barriers not only for individual exporters but also for the United States as a country.

4. Violates International Obligations

As member of the World Trade Organization (“WTO”), the United States is bound by General Agreement on Tariffs and Trade (“GATT”), a multilateral agreement aimed specifically at reducing barriers to international trade.⁹⁰ The delays, uncertainty, and exclusion associated with the U.S. LNG export licensing process contradict the basic principles of this agreement and the organization. Among these principles are the ideals that trade should be without discrimination, freer, and more predictable.⁹¹ The United States loses credibility with the WTO when it is itself willing to violate its agreements. The United States also risks having countermeasures imposed against it. By undermining the country’s role in the WTO, creating uncertainty, causing delays, and limiting access, the U.S. LNG export licensing system erects barriers to trade.

2/issue-2/regulatory-uncertainty-hampers-lng-export-projects.html.

⁸⁶ Sabine Pass Conditional Opinion and Order No. 2961, *supra* note 60, at n.45 (“In the event of any unforeseen developments of such significant consequence as to put the public interest at risk, DOE/FE is...authorized by section 16 of the Natural Gas Act “to perform any and all acts and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate” to carry out its responsibilities.”).

⁸⁷ Regoli & Polley, *supra* note 85.

⁸⁸ See Procedures for Liquefied Natural Gas Export Decisions, 79 Fed. Reg. 158, 48132-33 (Aug. 15, 2014).

⁸⁹ See Zack Colman, *The Energy Department is Stepping Out of the Way on Natural Gas Exports. So Why isn't the Industry Happy?*, WASH. EXAM’R Aug. 15, 2015, <http://www.washingtonexaminer.com/the-energy-department-is-stepping-out-of-the-way-on-natural-gas-exports.-so-why-isnt-the-industry-happy/article/2552042>.

⁹⁰ General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11. 55 U.N.T.S. 194 [hereinafter GATT].

⁹¹ WORLD TRADE ORG., *Principles of the Trading System*, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (last visited Oct. 18, 2015).

III. SOLUTIONS

This section outlines two potential solutions for reducing the barriers discussed above: (A) limit the scope of the public interest determination, or (B) eliminate the public interest determination all together.

A. *The public interest determination must be limited in scope.*

The first possible solution is to narrow the scope of the public interest determination. Currently, DOE considers economic impacts, international considerations, U.S. energy security, environmental considerations, and any other factors relevant to the public interest. The breadth of factors DOE considers in its analysis violates not only the language of the statute, but DOE policy as well.

1. Congress established through statutory language that LNG exports are in the public interest.

First, the scope of the public interest determination violates the language of the Natural Gas Act. The Act establishes a rebuttable presumption in favor of export authorization for licenses to non-FTA countries.⁹² LNG exports are presumed consistent with the public interest. In theory, this means the onus should be on any opponents to show otherwise.⁹³ In practice, however, the rebuttable presumption is merely pro forma, with applicants often finding themselves having to defend LNG exports as a whole.⁹⁴ This becomes apparent when looking at what DOE considers as part of its review. DOE has commissioned, and considered in its reviews, various studies on the effects of LNG exports. These include reports on the international effects of LNG exports, the effect on domestic prices, the environmental effects of induced unconventional natural gas production from LNG as opposed to other forms of energy,⁹⁵ and the life cycle of greenhouse gas emissions of U.S. LNG exports to Europe and Asia compared with alternative fuel supplies. While these diffuse issues factor into whether LNG exports are a good idea, this is not decision for DOE to make in the context of an LNG export

⁹² See Natural Gas Act, 15 U.S.C. § 717b(a) (2012).

⁹³ See 15 U.S.C. § 717b(a).

⁹⁴ See *U.S. Energy Abundance: Regulatory Market and Legal Barriers to Export: Hearing before the Subcomm. on Energy and Power of the H. Comm. on Energy and Com.*, 113th Cong. (2013) [hereinafter *U.S. Energy Abundance Hearing*] (statement by Lucian Pugliaresi, President of the Energy Policy Research Foundation, Inc.).

⁹⁵ See Final Opinion and Order Granting Long-Term Multi-Contract Authorization to Export LNG by Vessel from the Cameron LNG Terminal in Cameron Parish, Louisiana, to Non-FTA Nations Cameron LNG, LLC, DOE/FE Order No. 3391-A, FE Docket No. 11-162-LNG, 37 (Dep't of Energy Sept. 10, 2014) [hereinafter Cameron Final Opinion and Order No. 3391-A] (“DOE cannot meaningfully estimate where, when, or by what particular method additional natural gas would be produced in response to non-FTA export demand. Therefore, the Addendum focuses broadly on unconventional production in the United States as a whole, making observations about regional differences where appropriate.”).

application. As Lucian Pugliaresi, President of the Energy Policy Research Foundation, Inc., said in a recent statement to Congress, the DOE review process for LNG exports should not be an evaluation to determine whether LNG exports as a whole are in the public interest; Congress has already established that they are.⁹⁶ Had Congress intended for DOE to re-evaluate the merits of LNG exports on every single application, it would not have created the presumption that LNG exports are in the public interest.

2. DOE's own guidance supports limiting the public interest determination.

DOE policy itself suggests that the public interest determination should be limited and should exclude environmental considerations. DOE follows certain principles established in 1984 Policy Guidelines.⁹⁷ The goals of those guidelines were to minimize federal control and involvement in energy markets:

The market, not government, should determine the price and other contract terms of imported natural gas. False The federal government's primary responsibility in authorizing imports will be to evaluate the need for the gas and whether the . . . arrangement will provide the gas on a competitively priced basis for the duration of the contract while minimizing regulatory impediments to a freely operating market.⁹⁸

While nominally applicable to natural gas *imports*, DOE subsequently held that these policies should apply to natural gas *exports* as well.⁹⁹ In Order No. 1473, DOE also stated that it was guided by DOE Delegation Order No. 0204-111.¹⁰⁰ That delegation order, which authorized the Administrator of the Economic Regulatory Administration to exercise the agency's review authority under the NGA, directed the Administrator to regulate exports "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."¹⁰¹ The Assistant Secretary for Fossil Energy later assumed these delegated responsibilities.¹⁰² Though DOE Delegation Order No. 0204-111 has since been

⁹⁶ *U.S. Energy Abundance Hearing*, *supra* note 94 (statement by Lucian Pugliaresi, President of the Energy Policy Research Foundation, Inc.).

⁹⁷ Cameron Final Opinion and Order No. 3391-A, *supra* note 95, at 9-10.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Order Extending Authorization to Export Liquefied Natural Gas from Alaska, Phillips Alaska Natural Gas Corp. & Marathon Oil Co., DOE/FE Order No. 1473, FE Docket No. 96-99-LNG, n. 45 (Dep't of Energy Apr. 2, 1999).

¹⁰¹ Delegation Order No. 0204-111 to the Administrator of Economic Regulatory Administration 1 (Dep't of Energy Feb. 22, 1984) (rescinded).

¹⁰² Delegation Order No. 0204-127 to the Assistant Secretary for Fossil Energy 2 (Dep't of Energy Feb. 7, 1989) (rescinded).

rescinded, DOE continues to follow its guidance, focusing on (i) the domestic need for the natural gas proposed to be exported, (ii) whether the proposed exports pose a threat to the security of domestic natural gas supplies, (iii) whether the arrangement is consistent with DOE's policy of promoting market competition, and (iv) any other factors bearing on the public interest.¹⁰³

A public interest determination without environmental considerations seems to be in line with the 1984 Policy Guideline:

While a two-part regulatory process is unavoidable under the enabling legislation, some efficiencies can be achieved through clarification of the ERA[DOE] and FERC gas import responsibilities and through streamlining some aspects of the process. . . These revised orders seek to make a clearer distinction between the responsibility of the Administrator in exercising the Secretary's authority to approve natural gas imports and the FERC's responsibility to regulate the imported gas within the domestic natural gas system.¹⁰⁴

It appears that the policy envisioned a process where FERC dealt with environmental issues and DOE dealt with economic issues.¹⁰⁵ The policy omitted environmental considerations, presumably because FERC and a host of environmental regulations sufficiently address those concerns.¹⁰⁶ With environmental issues already accounted for, the policy of keeping environmental concerns exclusively with FERC simply eliminates redundancy.

3. The Statute

Below is proposed statutory language that would limit the scope of the public interest determination. Using DOE policy as a guide, but excluding environmental issues, this language limits the public interest determination to: (1) economic impacts (2) U.S. energy security (3) domestic need for gas (3) international need for the exports (4) whether the arrangement is consistent with DOE/FE's policy of promoting market competition:

§ 717b. Exportation or importation of natural gas; LNG terminals (a) Mandatory authorization order

¹⁰³ Cameron Final Opinion and Order No. 3391-A, *supra* note 95, at 9-10.

¹⁰⁴ New Policy and Delegation Orders Relating to the Importation of Natural Gas, 49 Fed. Reg. 6684, 11 (Feb. 22, 1984).

¹⁰⁵ *See generally id.*

¹⁰⁶ *See generally id.*

After six months from January 1, 2016, 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 first having 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. In considering the public interest for the purpose of a license, the Commission shall limit its review to economic impacts, U.S. energy security, domestic need for gas, international need for the exports, and a desire to promote market competition.

Eliminating environmental considerations from the public interest determination would reduce permitting delays for companies planning to export LNG. It would reduce delays by eliminating what are ultimately redundant environment-based interventions. Identical claims are being raised during both the FERC process and the DOE public interest determination that affect neither outcome.¹⁰⁷ Making one agency responsible for assessing the public's interest in protecting the environment would eliminate this redundancy. Doing so would also reduce delays by eliminating the need for DOE to order environmental reports and engage in the subsequent comment periods.¹⁰⁸

Narrowing the scope of the public interest determination and giving specific criteria for evaluation would also help reduce uncertainty for potential exporters. Providing specific criteria would allow applicants to prepare the correct information and assess the likelihood of receiving a license. By narrowing and clarifying the scope of the public interest review, the proposed language would simplify the licensing process for LNG exporters in a way that reduces delays and uncertainty.

4. Counterarguments

One major, and understandable, concern about limiting the public interest determination is the consequent reduction in the public's ability to address

¹⁰⁷ See, e.g., Sierra Club Motion to Intervene, Protest, and Comment in the Matter of Cameron LNG, LLC (Dep't of Energy Apr. 18, 2012), http://www.fossil.energy.gov/programs/gasregulation/authorizations/2011_applications/Sierra_Club_Cameron_MTI_Protest_and_Comm.pdf; Order Granting Authorization Under Section 3 of the Natural Gas Act and Issuing Certificates 6-10 (Fed. Energy Reg. Comm'n June 19, 2014), <https://www.ferc.gov/whats-new/comm-meet/2014/061914/C-1.pdf>; Cameron Final Opinion and Order No. 3391-A, *supra* note 95, at 25-35, 76.

¹⁰⁸ See, e.g., *Addendum to Environmental Review Documents Concerning Exports of Natural Gas from the United States*, 79 Fed. Reg. 48132 (Aug. 11, 2014) (providing DOE response to over 40,000 public comments concerning natural gas policies); *Life Cycle Greenhouse Gas Perspective on Exporting Liquefied Natural Gas from the United States*, 79 Fed. Reg. 32260 (May 29, 2014) (soliciting public comments on life cycle greenhouse gas emissions policies).

environmental concerns. Even without a public interest review, however, potential exporters would still have to complete an extensive environmental regulatory process. This may include a NEPA Environmental Impact Statement or Environmental Assessment, Environmental Protection Agency (“EPA”) and state approval of air permits, U.S. Army Corps of Engineers approval of wetland permits, EPA and state approval of water quality permits, and even U.S. Coast Guard approval of a water suitability assessment.¹⁰⁹ And it is not as though the environmental assessment stops after the FERC review. All projects approved and built remain subject to FERC oversight for as long as the facility operates.¹¹⁰ Several FERC approvals, like Cameron LNG’s, have over fifty environmental conditions attached, some of which remain throughout the life of the facility.¹¹¹

Finally, the DOE public interest determination provides no further environmental safeguards than the FERC process. DOE is a cooperating agency in the environmental review, and the agency has stated that its environmental assessment is neither different nor broader than FERC’s.¹¹² DOE’s environmental review adds nothing to FERC’s environmental review, providing another argument for making environmental review FERC’s exclusive responsibility.

B. The public interest determination must be eliminated altogether.

An alternative solution to limiting the scope of the public interested determination is to eliminate it altogether. The public interest determination likely violates the United States’ treaty obligations. And as a practical matter, the elimination of the public interest determination may be inevitable given the effect of WTO compliance and forthcoming U.S. trade deal negotiations.

1. The United States’ international trade obligations require the elimination of the public interest determination.

The public interest determination violates the United States’ international trade

¹⁰⁹ *U.S. Energy Abundance Hearing*, *supra* note 94 (statement by Lucian Pugliaresi, President of the Energy Policy Research Foundation, Inc.).

¹¹⁰ FED. ENERGY REG. COMM’N, *LNG* (Mar. 6, 2015), <http://www.ferc.gov/industries/gas/industryact/lng.asp>.

¹¹¹ FED. ENERGY REG. COMM’N, *supra* note 107, at 31-46; *see, e.g.*, Order Granting Section 3 and Section 7 Authorizations, 95-111 (Fed. Energy Reg. Comm’n Sept. 29, 2014).

¹¹² Final Opinion and Order Granting Long-Term Authorization to Export Liquefied Natural Gas from Sabine Pass LNG Terminal to Non-free Trade Agreement Nations, DOE/FE Order No. 2961-A, 27 (Dep’t of Energy, Aug. 7, 2012) [hereinafter Sabine Pass Final Opinion and Order No. 2961-A] (“We do not agree with the Sierra Club insofar as it appears to be arguing that the nature of DOE’s authority over the export of natural gas requires a broader or different environmental analysis than the one performed by the FERC. Because the Commission examined all reasonably foreseeable impacts of the Liquefaction Project, DOE believes that the scope of the EA is appropriate and the EA provides a complete picture for purposes of meeting DOE’s NEPA responsibilities and fulfilling its duty to examine environmental factors as a public interest consideration under the NGA.”).

obligations as a member of the World Trade Organization. By virtue of its membership, the United States submits to the jurisdiction of the WTO dispute settlement system.¹¹³ The Dispute Settlement Body, which administers the dispute settlement system, has the authority to establish panels and an Appellate body, adopt their rulings and recommendations, enforce their decisions (“surveillance of implementation of rulings and recommendations”), and authorize countermeasures to encourage compliance (“suspension of concessions and other obligations”).¹¹⁴ While panel and Appellate Body reports are not binding, panels and the Appellate Body typically follow precedent.¹¹⁵

The purpose of the system is to clarify the existing provisions of WTO agreements in accordance with customary rules of interpretation of public international law and to preserve the rights and obligations of Members under the covered agreements.¹¹⁶ The GATT is one such covered agreement.

a. Violations

The U.S. LNG licensing regime likely violates the GATT in two ways: it discriminates between WTO members that are FTA countries and those that are not, and it imposes a public interest review.

The first issue is discriminatory treatment. While some WTO members have a free trade agreement requiring national treatment in natural gas, most do not.¹¹⁷ Those that have such an agreement are not required to complete a public interest determination. This violates the most-favored-nation (“MFN”) principle outlined in GATT Article I:1. Article I:1 requires that, with respect to all rules and formalities in connection with importation or exportation, any advantage, favor, privilege, or immunity granted to products destined for any other country be immediately and unconditionally granted to like products destined for WTO members.¹¹⁸

Whether the public interest review violates Article 1 depends on whether the

¹¹³ *Dispute Settlement System Training Module: Chapter 1: Introduction to the WTO Dispute Settlement System*, WORLD TRADE ORG. (last visited Dec. 21, 2015), https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c1s1p1_e.htm/.

¹¹⁴ Marrakesh Agreement Establishing the World Trade Organization, Annex 2, April 15, 1994, 1869 U.N.T.S. 401.

¹¹⁵ *Dispute Settlement System Training Module: Chapter 7: Legal effect of panel and appellate body reports and DSB recommendations and rulings*, WORLD TRADE ORG. (last visited Dec. 21, 2015), https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c7s1p1_e.htm/.

¹¹⁶ Marrakesh Agreement Establishing the World Trade Organization, Annex 2, April 15, 1994, 1869 U.N.T.S. 401.

¹¹⁷ National treatment is a basic principle of the WTO that requires equal treatment of domestic and imported goods. *See e.g.* GATT art. III:2 (“The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products”).

¹¹⁸ *Id.* art. I:1.

review is subject to the disciplines of Article 1—that is, whether it is a “rule or formality in connection with . . . exportation.”¹¹⁹ The GATT lacks case law as to what constitutes a rule or formality in the export context. However, for imports, panels interpret “rules and formalities” as “encompass[ing] a wide range of measures” relating to or affecting actual importation.¹²⁰ In *United States—Certain Measures Affecting Imports of Poultry from China*, the GATT found that a U.S. measure was subject to Article I:1 where it required foreign poultry exporters to complete a two-year, three-step approval process to import into the United States.¹²¹ Similarly, the U.S. LNG export licensing regime requires a multi-step, multi-year process to receive authorization.¹²² As such, a panel would likely treat the U.S. LNG exporting licensing process as it did the U.S. poultry importing process and consider it a “rule or formality.”

Moreover, there must be an advantage, favour, privilege, or immunity conferred.¹²³ Thus, the issue becomes whether, in avoiding the public interest determination, FTA WTO members receive an advantage of the type covered by the article. GATT panels also interpret “advantage” broadly.¹²⁴ In *European Communities—Regime for the Importation, Sale, and Distribution of Bananas*, the panel found an advantage where procedural and administrative requirements for banana imports from certain countries “differ[ed] from, and [went] significantly beyond, those required” of banana imports from other countries.¹²⁵ The measure required certain countries to maintain and submit “substantially more data . . . to show entitlement to a license.”¹²⁶ The U.S. LNG export licensing regime is similar in that requirements for exports to non-FTA WTO members differ and go significantly beyond those for exports to FTA WTO members. Specifically, exports to non-FTA countries require a public interest determination, opportunities for comment, studies, etc.¹²⁷ As a consequence, potential exporters to non-FTA countries end up providing substantially more data than potential exporters FTA countries.¹²⁸ Thus, a panel would likely find as it did in *EC—*

¹¹⁹ *Id.*

¹²⁰ Panel Report, *United States—Certain Measures Affecting Imports of Poultry from China*, ¶¶ 7.407, 7.410 WTO Doc. WT/DS392/R (adopted Sept. 29, 2010) [hereinafter *US—Poultry*] (finding that importation measures include those that “relate to other aspects of the importation of a product or have an impact on actual importation”).

¹²¹ *Id.* ¶ 4.185.

¹²² See FEDERAL APPROVAL PROCESS FOR LIQUEFIED NATURAL GAS, *supra* note 22, at 12-15.

¹²³ GATT art. I:1.

¹²⁴ *US—Poultry*, *supra* note 120, at ¶ 7.414.

¹²⁵ Panel Report, *European Communities—Regime for the Importation, Sale, and Distribution of Bananas*, ¶ 7.221, WTO Doc. WT/DS27/R/ECU (adopted May 22, 1997).

¹²⁶ *Id.*

¹²⁷ See generally, DEP’T OF ENERGY, *Long Term Applications Received by DOE/FE to Export: Domestically Produced LNG from the Lower-48 States* (Dec. 31, 2014), <http://energy.gov/sites/prod/files/2015/01/f19/Summary%20of%20LNG%20Export%20Applications.pdf>.

¹²⁸ Compare Sabine Pass Liquefaction, Application for Long-term, Multi-contract Authorization

Bananas and hold that avoiding the public interest determination is an advantage.

The second way the U.S. export licensing system might violate the GATT is through the public interest determination, which likely violates Article XI. Article XI prohibits WTO members from imposing export restrictions on any product destined for the territory of any WTO member, including those made effective through export licensing.¹²⁹ Broadly interpreted by panels, the term “restriction” can apply to any measure other than duties, taxes, or other charges that has a limiting or restrictive effect.¹³⁰

In *China—Measures Related to the Exportation of Various Raw Materials* (“*China—Raw Materials*”), the panel found that “discretionary” licensing—that is, licensing where the administering authority has the freedom to grant or reject a license based on unspecified merits—constituted a restriction and a violation of GATT art. XI.¹³¹ The measure here is similar. DOE has the authority to grant or deny applications based on its public interest analysis.¹³² While the Department names specific factors that it considers as part of that determination, it may ultimately consider any factor it deems relevant.¹³³ Notably, DOE has yet to deny an export license.¹³⁴ In *China—Raw Materials*, however, the panel held that discretionary licensing violates the GATT regardless of whether that discretion results in approval of a particular license.¹³⁵ What matters is that a discretionary system based on unspecified merits offers potential exporters no real certainty that licenses will be granted.¹³⁶ Thus, the discretionary nature of the U.S. licensing system alone is enough to be an Article XI violation.

Delays in the licensing process might also constitute a violation of the Article XI. The panel in *Japan—Trade in Semi-Conductors* held that administrative delays of up to three months were inconsistent with Article XI.¹³⁷ In that case, the delays were caused by a high number of applications, incomplete applications, and data collection.¹³⁸ There was also no time limit for processing export license applications, maximum or minimum.¹³⁹ The U.S. LNG export licensing faces

to Export LNG by Vessel to Free Trade Countries (Dep’t of Energy Aug. 11, 2010), with Sabine Pass Liquefaction, LLC, Application for Long-term Authority to Export LNG to Non-Free Trade Agreement Countries (Dep’t of Energy Sept. 7, 2010).

¹²⁹ GATT, art. XI:1.

¹³⁰ See Panel Report, *China—Measures Related to the Exportation of Various Raw Materials* 228, WTO Doc. WT/DS394/R (July 5, 2011) [hereinafter *China—Raw Materials*].

¹³¹ See *id.* at 229.

¹³² Natural Gas Act, 15 U.S.C. § 717b(a) (2012).

¹³³ See Sabine Pass Final Opinion and Order No. 2961-A, *supra* note 112, at 27.

¹³⁴ See DEP’T OF ENERGY, *supra* note 127.

¹³⁵ *China—Raw Materials*, *supra* note 130, at 229.

¹³⁶ *Id.*

¹³⁷ Panel Report, *Japan—Trade in Semi-Conductors* ¶ 118, GATT Doc. L/6309 - 35S/116 (Mar. 24, 1988).

¹³⁸ *Id.* ¶¶ 22, 100, 103.

¹³⁹ *Id.*

similar administrative delays and for largely the same reasons.¹⁴⁰ DOE also has no timeframe within which it must consider an application.¹⁴¹ If the panel thought a three-month administrative delay was an impermissible restriction on exports, it would almost certainly find that a two-year administrative delay was similarly impermissible. Thus, the U.S. natural gas export licensing system appears to violate Articles I and XI.

b. Possible Justifications

Still, a measure inconsistent with one or more obligations in the GATT may nevertheless be justified if it falls within an exception.¹⁴² Two exceptions may apply in this case: Article XX (General Exceptions) and Article XXI (National Security Exceptions).

GATT Article XX consists of two cumulative requirements. For an otherwise GATT-inconsistent environmental measure to be justified under Article XX, a member must perform a two-tier analysis showing: that its measure falls within at least one of the enumerated exceptions (paragraphs (a) to (j)) and, then that the measure satisfies the requirements of the introductory paragraph (the “chapeau”).¹⁴³

Two paragraphs that are particularly relevant to energy and the environment are paragraphs (b) and (g), which apply to human, plant, and animal health and the conservation of exhaustible natural resources, respectively.¹⁴⁴ Typically, a country seeking to justify export restrictions on an energy resource would argue under both paragraphs. This Article, however, will focus only the argument under paragraph (g). Whereas measures under paragraph (g) need only “relate to” the conservation of exhaustible natural resources, measures under paragraph (b) must be “necessary” for the protection of human, plant, and animal health.¹⁴⁵ Considering the higher standard for paragraph (b), an argument under paragraph (g) is more realistic.

¹⁴⁰ See *U.S. Energy Abundance Hearing*, *supra* note 94 (statement by Christopher Smith, Assistant Secretary for Fossil Energy) (citing incomplete applications and studies).

¹⁴¹ See *id.*

¹⁴² See, e.g., GATT art. XX-XXI.

¹⁴³ WORLD TRADE ORG. COMM. ON TRADE AND ENV'T, *GATT WTO Dispute Settlement Practice Relating to GATT Article XX Paragraphs (b), (d), and (g)* 6 (Mar. 8 2002) (The burden of proof lies on the member claiming the exception.); *id.*

¹⁴⁴ WORLD TRADE ORG., *WTO Rules and Environmental Policies: GATT Exceptions*, http://www.wto.org/english/tratop_e/envir_e/envt_rules_exceptions_e.htm (last visited Oct. 18, 2015); see, e.g., Panel Report, *China—Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WTO Doc. WT/DS431/R, WT/DS432/R and WT/DS433/R (Mar. 26, 2014) [hereinafter *China—Rare Earths*]; Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/RW (June 15, 2001); Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, WTO Doc. WT/DS2/9 (May 20, 1996).

¹⁴⁵ GATT art. XX(b), (g).

Pursuant to this paragraph, WTO members may adopt policy measures that are inconsistent with GATT disciplines if they “relate to the conservation of exhaustible natural resources.”¹⁴⁶ For a measure to “relate” to the conservation of natural resources, a substantial relationship between the measure and the conservation of exhaustible natural resources needs to be established.¹⁴⁷ In the words of the WTO Appellate Body, a member must demonstrate that the means (i.e. the chosen measure) are “reasonably related” to the ends (i.e. the conservation of exhaustible natural resources).¹⁴⁸ Moreover, in order to justify a measure under Article XX(g), it must be applied “in conjunction with restrictions on domestic production or consumption” (also known as the even-handedness requirement).¹⁴⁹

The U.S. LNG export licensing issue is much like the recent *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum* (“*China – Rare Earths*”) case, which involved measures restricting exports of rare earths, tungsten, and molybdenum.¹⁵⁰ In that case, China conceded that the measures violated Article XI, but argued that they could be justified under Article XX(g).¹⁵¹ China claimed that the policy goal of “conservation” under GATT Article XX(g) was not limited to preserving exhaustible natural resources in their current state, but also covered the use and management of those resources in line with a Member’s sustainable economic development.¹⁵² The panel held that measures designed to promote economic development were not “measures relating to conservation.”¹⁵³ Were the United States to assert GATT article XX(g) as justification for the XI violation, the outcome would probably be the same. As with export restrictions in *China – Rare Earths*, the public interest determination is less about conserving the exhaustible resource (natural gas) in its current state than it is about preserving that resource for economic development.¹⁵⁴ While

¹⁴⁶ *Id.* art. XX(g).

¹⁴⁷ WORLD TRADE ORG., *WTO rules and environmental policies: GATT exceptions* (last visited Oct. 18, 2015), http://www.wto.org/english/tratop_e/envir_e/envt_rules_exceptions_e.htm.

¹⁴⁸ *Id.*

¹⁴⁹ GATT art. XX(g).

¹⁵⁰ See generally *China—Rare Earths*, *supra* note 144.

¹⁵¹ *Id.* ¶ 7.236.

¹⁵² *Id.* ¶ 7.457.

¹⁵³ *Id.* ¶ 7.460.

¹⁵⁴ See, e.g., Freeport LNG Expansion, L.P., Final Opinion and Order Granting Long-term Multi-contract Authorization to Export LNG by Vessel to Non-FTA Nations, WTO Doc. DOE/FE NO. 3357-B, FE docket No. 11-161-LNG 86-87 (Dep’t of Energy, Mar. 14, 2014) (“The current rapid development of natural gas resources in the United States likely will continue, with or without the export of natural gas to non-FTA nations. . . . We believe the public interest is better served by addressing these environmental concerns directly—through federal, state, or local regulation, or through self-imposed industry guidelines where appropriate—rather than by prohibiting exports of natural gas. . . . Section 3(a) of the NGA is too blunt an instrument to address these environmental concerns efficiently. . . . [W]e conclude that the environment concerns associated with natural gas production do not establish that exports of natural gas to non-FTA nations are inconsistent with the public interest.”).

environmental considerations are part of the public interest determination, the analysis is not aimed at protecting the environment from excessive withdrawal and production of natural gas.¹⁵⁵ The United States can hardly argue that its goal is to conserve natural gas when domestic production and consumption have risen consistently.¹⁵⁶

Even if the measure fell under the conservation exception, it would also need to satisfy the introductory paragraph of Article XX, the chapeau. The chapeau requires that measures not be applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.¹⁵⁷

China failed to satisfy the chapeau in *China—Rare Earths*.¹⁵⁸ The panel held that, where China imposed its export restrictions to ensure domestic access to ample supplies of exhaustible natural resources, it had failed show that the measures were not a disguised restriction on international trade.¹⁵⁹ The United States would similarly fail to satisfy the chapeau because the public interest determination seems primarily aimed at protecting domestic access to natural gas. In fact, opponents of increased LNG exports argue that the natural gas the United States produces needs to remain for domestic use.¹⁶⁰ Increased exports, they argue, will raise the domestic price of natural gas and make manufacturing more expensive.¹⁶¹ But as *China—Rare Earths* illustrates, protectionism is not a justification for violating the GATT.¹⁶² As one of the complainants, the United States argued this very point.¹⁶³

Notably, Article XX claims are rarely successful.¹⁶⁴ Even when a measure can be justified under Article XX, Article XIII requires that the measure be

¹⁵⁵ *Id.*

¹⁵⁶ See U.S. ENERGY INFO. ADMIN., *U.S. Natural Gas Market Production*, <http://www.eia.gov/dnav/ng/hist/n9050us2a.htm> (last visited Oct. 18, 2015); U.S. ENERGY INFO. ADMIN., *U.S. Natural Gas Total Consumption*, <http://www.eia.gov/dnav/ng/hist/n9140us2a.htm> (last visited Feb. 18, 2015).

¹⁵⁷ GATT art. XX:1.

¹⁵⁸ *China—Rare Earths*, *supra* note 144, at ¶ 7.658-7.663.

¹⁵⁹ *Id.* (“[T]he discrimination seems to result from components of its export quota systems that reflect industrial policy considerations. . . . In the Panel’s view, although China maintains and enforces a comprehensive conservation policy, the manner in which it operates its rare earths export quota system seems to indicate that its export quota does not relate to conservation considerations but is aimed rather at controlling the amount of rare earths that leaves the country.”).

¹⁶⁰ Matthew Phillips, *Strange Bedfellows Debate Exporting Natural Gas*, BLOOMBERG, Aug. 22, 2012.

¹⁶¹ *Id.*

¹⁶² See *China—Rare Earths*, *supra* note 144, ¶ 7.254-7.255.

¹⁶³ See *id.*

¹⁶⁴ *Only One of 40 Attempts to Use the GATT Article XX/GATS Article XIV “General Exception” Has Ever Succeeded: Replicating the WTO Exception Construct Will Not Provide for an Effective TPP General Exception*, PUB. CITIZEN (Aug. 2015), <https://www.citizen.org/documents/general-exception.pdf>.

administered in a non-discriminatory manner.¹⁶⁵ Under Article XIII, no restriction shall be applied by any WTO member on exports destined for the territory of any other member, unless exports of the like product to all countries are similarly restricted.¹⁶⁶ Accordingly, the public interest determination, even if justified under Article XX, would need to apply to all WTO members, effectively eliminating the FTA/non-FTA distinction.

As an alternative justification, the United States could invoke Article XXI, the exception for essential security interests.¹⁶⁷ This measure is considered self-judging; that is, panels typically defer to a country's own judgment of what is necessary or contrary to its essential security interests.¹⁶⁸ That said, panels also have an interest in preventing members from imposing what are actually commercial measures under the guise of security.¹⁶⁹ The United States might face heavy scrutiny if it sought to use this justification.

Essentially, if the United States were challenged at the WTO over this measure, it would almost certainly lose. At that point, the United States would either have to bring its LNG licensing process into compliance or face countermeasures.¹⁷⁰

2. The elimination of the public interest determination may be inevitable

Eliminating the public interest determination would not only be good trade practice, it may be inevitable. To reconcile its licensing procedures with its GATT obligations, the United States would need to extend expedited application and approval process to all WTO members. The 159 member nations of the World Trade Organization include all of the likely potential importers of U.S. LNG, such as China, India, Japan, and European countries.¹⁷¹

If the U.S. extended expedited application and approval to all WTO members, the only countries still subject to the public interest review would be countries to which the U.S. would not export natural gas anyway. Thus, the practical effect of extending expedited application and approval to all WTO members would be to eliminate the DOE's public interest review.¹⁷²

Elimination of the public interest review may also be inevitable because of forthcoming trade agreements. Europe and Japan are currently negotiating free

¹⁶⁵ GATT art. XIII:1.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* art. XXI:1.

¹⁶⁸ WORLD TRADE ORG., *Analytical Index of the GATT: Article XXI Security Exceptions* 600 (May 7, 1985), http://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art21_e.pdf.

¹⁶⁹ *Id.*

¹⁷⁰ See generally Tarcisio Gazzini, *The Legal Nature of WTO Obligations and the Consequences of their Violation*, 17 EUR. J. OF INT'L LAW 723 (2006).

¹⁷¹ DOE's Program Regulating LNG Export Applications, *supra* note 44 (statement by Paula Gant, Deputy Assistant Secretary for Oil and Natural Gas).

¹⁷² *Id.*

trade agreements with the United States that would give the countries FTA status for the purposes of LNG exports.¹⁷³ The countries that really want the natural gas are similarly going to negotiate agreements that put them into the FTA category. At that point, the only exporters that would be subject to the public interest determination would be those exporting to countries that have no interest in U.S. LNG anyway—effectively gutting the public interest determination. This begs the question, of course, as to why the United States should not just wait for the public interest issue to resolve itself. In answering that question, it is important to remember that the viability of U.S. LNG exports is time-sensitive. The United States has a limited window within which to gain market share. While these agreements could effectively eliminate the public interest determination, they may take years to negotiate if an agreement is reached at all.

3. The Statute

Below is alternative statutory language that would effectively eliminate the public interest determination:

§ 717b. Exportation or importation of natural gas; LNG terminals

(a) Mandatory authorization order

After six months from January 1, 2016, 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 first having 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. The exportation of natural gas shall be deemed consistent with the public interest, and applications for such importation or exportation shall be granted without modification or delay.

. . .

~~(c) Expedited application and approval process For purposes of subsection (a) of this section, the importation of the natural gas referred to in subsection (b) of this section, or 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.~~

¹⁷³ CONG. RES. SERV., R42074, U.S. NATURAL GAS EXPORTS: NEW OPPORTUNITIES, UNCERTAIN OUTCOMES 11 (2015).

Eliminating the public interest determination would encourage exports to a broader range of countries, reduce delays, and mitigate uncertainty.

4. Counterarguments

One concern with eliminating the public interest determination is that LNG exports would be completely unfettered resulting in higher manufacturing costs, rising domestic gas prices, and increased fracking.¹⁷⁴ Even without the public interest review, however, the FERC process would limit the number and rate at which new projects could be approved.¹⁷⁵ Because the review is so extensive and costly, time and money are already practical constraints against less serious exporters.¹⁷⁶ U.S. LNG exports will also be limited by the market, as the export market is largely self-regulating. Were the price of natural gas rises in the United States to rise, the extra costs of liquefaction and shipping would make exports too expensive for foreign buyers.¹⁷⁷ Ultimately, it may be best to grant permits for *all* applications and let investors and consumers decide which projects are viable.

IV. CONCLUSION

This Article argues for reducing regulatory barriers to LNG exports and puts forth two possible solutions: narrow the scope of the public interest determination or eliminate it altogether. Russia's recent actions in Ukraine have made it apparent that robust U.S. LNG exports are about more than economic growth—they can affect the geopolitical balance of power. Our current system limits access to foreign markets, causes delays, and creates uncertainty for potential exporters. Currently, the public interest determination puts DOE at odds with its own policies of deferring to the free market, contradicts the language of the statute, and puts the United States in a position contrary to its international obligations. For these reasons, the United States must limit the scope of the public interest determination, if not eliminate it altogether.

¹⁷⁴ Ayesha Roscoe, *UPDATE 2-U.S. lawmakers mull speedier gas exports to help Ukraine, Europe*, REUTERS (Mar. 25, 2014), <http://www.reuters.com/article/2014/03/25/usa-lng-congress-idUSL1N0MM0V120140325/>.

¹⁷⁵ *U.S. Energy Abundance Hearing*, *supra* note 94, at 136 (statement by Lucian Pugliaresi, President of the Energy Policy Research Foundation, Inc.).

¹⁷⁶ Lucian Pugliaresi, *Don't Let Protectionism Strangle America's Energy Renaissance*, THE HILL, Dec. 23, 2013.

¹⁷⁷ Wendy Koch, *U.S. Natural Gas Exports Poised for Takeoff despite Debate*, USA TODAY, Apr. 7, 2014 (citing statements by W. David Montgomery, senior vice president of NERA Economic Consulting and author of a DOE-commissioned 2012 report on the impact of LNG exports).