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Cover Page Footnote

J.D., *summa cum laude*, 2016, The Catholic University of America, Columbus School of Law; B.A., 2004, Grove City College. The author would like to thank Salo Zelermyer of Bracewell LLP for his invaluable expertise and feedback throughout the writing process.

REFINING STATUTORY INTERPRETATION: HOW NATURAL GAS EXPORT REGULATIONS VIOLATE U.S. INTERNATIONAL TRADE OBLIGATIONS

Amanda L. Tharpe⁺

Four decades ago the Middle East cut off oil shipments to the United States in retaliation for U.S. military support of Israel.¹ The resulting Arab Oil Embargo taught the United States a hard lesson.² It crippled the U.S. economy and sent fuel prices skyrocketing, while bringing to the forefront our nation's dangerous and fragile dependence on Middle Eastern oil, which powers the U.S. economy.³

Today, Washington, D.C. is locked in an exhaustive debate over how to manage a domestic oil and natural gas boom responsible for the creation of over a million American jobs.⁴ For the first time in history, the United States is inching its way towards energy independence.⁵ Advances in energy technology led by the combination of horizontal drilling and hydraulic fracturing have catapulted the United States into a position of global leadership as a top international energy producer.⁶ Thanks to the enormous increase in unconventional oil and natural gas production, the United States has recently overtaken both Saudi Arabia and Russia as the world's largest oil producer.⁷ The International Energy Agency predicts that by 2020 the United States could become a net exporter of natural gas.⁸

Standing as an obstacle to this progress are outdated and contrasting laws that prohibit the United States from exporting domestically produced natural gas

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1. Daniel Yergin, *Congratulations, America. You're (Almost) Energy Independent*, POLITICO (Nov. 2013), <http://www.politico.com/magazine/story/2013/11/congratulations-america-youre-almost-energy-independent-now-what-098985>.

2. *Id.*

3. *Id.*

4. Angel Gonzelez, *Making Sense of the U.S. Oil Boom*, WALL ST. JOURNAL, Sept. 17, 2012, at R3.

5. *Id.*

6. *Id.*

7. *Latest Analysis: U.S. Overtakes Saudi Arabia and Russia as Largest Oil Producer*, INST. FOR ENERGY RESEARCH (July 10, 2014), <http://instituteeforenergyresearch.org/analysis/u-s-overtakes-saudi-arabia-russia-worlds-biggest-oil-producer>.

8. Press Release, Int'l Energy Agency, North America leads shift in global energy balance, IEA says in latest World Energy Outlook (Nov. 12, 2012), <http://www.iea.org/newsroomandevents/pressreleases/2012/november/name,33015,en.html>.

while freely permitting the export of domestically produced crude oil.⁹ The laws regulating natural gas exports are decades old and reflective of political and international circumstances that are largely outdated in light of today's ever changing global energy market.¹⁰

As a result, the United States is prevented from taking full advantage of this economic opportunity that could create millions of U.S. jobs and historically shift the global balance of power in the international energy market.¹¹ Critically, these current policies also likely violate the United States' international trade obligations as a member of the World Trade Organization (WTO).¹² For these reasons, many are calling for the United States to revise these outdated policies to better reflect the reality of domestic energy production in America today.¹³

In the current regulatory regime, the U.S. Department of Energy (DOE) and the Federal Energy Regulatory Commission (FERC) regulate exports of natural gas under the Natural Gas Act of 1938.¹⁴ Until recently, crude oil was historically regulated by the U.S. Department of Commerce (DOC) through the Energy Policy and Conservation Act ("EPCA") and the Export Administration

9. See generally *infra* notes 14–17 and accompanying text.

10. See Natural Gas Act of 1938, ch. 556, 52 Stat. 812 (codified as amended at 15 U.S.C. §§ 717(a)-717(z) (2006)); Energy Policy and Conservation Act, Pub. L. No. 94-163, 89 Stat. 871 (1975) (codified as amended in scattered sections of the U.S. Code).

11. Jim Efstathiou Jr., *Fracking will Support 1.7 Million Jobs, Study Shows*, BLOOMBERG (Oct. 23, 2012), <http://www.bloomberg.com/news/articles/2012-10-23/fracking-will-support-1-7-million-jobs-study-shows>; Frank Verrastro & Guy Caruso, *The Arab Oil Embargo—40 Years Later*, CTR. FOR STRATEGIC & INT'L STUDS. (Oct 16, 2013), <http://csis.org/publication/arab-oil-embargo-40-years-later>.

12. See *infra* Section II.A–B.

13. Steven Rattner, *Let Our Oil and Gas Go: America Should Rescind the Ban on Crude–Oil Exports*, N.Y. TIMES (July 23, 2014), http://www.nytimes.com/2014/07/24/opinion/america-should-rescind-the-ban-on-crude-oil-exports.html?_r=0 (highlighting the fact that much of the lightweight oil now being produced from major shale formations in the United States cannot be refined by U.S. refineries that were built to process heavy imported crude); see Andrew Restuccia, *Bid to end oil export ban runs into pump politics*, POLITICO (Jan. 12, 2015), <http://www.politico.com/story/2015/01/bid-to-end-oil-export-ban-runs-into-pump-politics-114192.html> (federal legislators are debating the idea of changing these policies).

14. Natural Gas Act of 1938, ch. 556, 52 Stat. 812 (codified as amended at 15 U.S.C. § 717(b) (2006)); *Natural Gas Regulation*, U.S. DEPT. OF ENERGY, <http://energy.gov/fe/services/natural-gas-regulation> (last visited Aug. 1, 2016). Companies can apply for two types of export permits. A blanket authorization permits a company to export natural gas for no more than two years. A long-term authorization enables a company to export natural gas for longer than two years. See JAMES BACCHUS & ROSA JEONG, GREENBERG TRAUIG LLP, LNG AND COAL: UNREASONABLE DELAYS IN APPROVING EXPORTS LIKELY VIOLATE INTERNATIONAL TREATY OBLIGATIONS 5 (2013), <http://www.nam.org/Issues/Energy/LNG-and-Coal-Report-NOV-2013/LNG-COAL-Report.pdf> (noting that the DOE issues a license allowing the company to export a certain amount of natural gas, while the siting, construction, and operation of LNG export facilities is regulated and permitted by FERC).

Act of 1979 (“EAA”).¹⁵ Under these laws, the export of both commodities required approval of a permit, which allowed the Executive Branch to prohibit the export of both products by either denying or delaying the approval of the permit.¹⁶ However, in December 2015, after a lengthy debate, Congress lifted the prohibition on crude oil exports, allowing U.S. oil producers to freely export crude oil overseas.¹⁷

This leaves an inconsistent and controversial federal process that restricts only natural gas exports and impacts the United States’ international commitments as a member of the WTO. As a member country, the United States has agreed to abide by certain trade commitments when trading with other WTO member nations.¹⁸ By using these restrictive export policies to prohibit or delay exports of natural gas to other countries, the United States may be in violation of its international trade obligations as a member of the WTO.¹⁹ As a result of Congress lifting the ban on crude oil exports, these two very similar commodities are regulated in two different ways: one is regulated in compliance with the United States’ obligations as a WTO member, while regulation of the other likely violates these same obligations.²⁰

This Comment analyzes the differences in federal laws and regulations governing the export of crude oil and natural gas in conjunction with the United States’ international trade obligations as a member of the WTO. Part I discusses the history of federal oil and gas export regulations, with additional analysis of our trade obligations as a member of the WTO. It also analyzes WTO-approved exceptions to those obligations that have been given to other countries with restrictive trade policies. Part II discusses and analyzes recent WTO challenges filed against Chinese export policies that are similar to the United States’ own export policies. Part II then explains why it is unlikely that current U.S. natural

15. See Energy Policy and Conservation Act, Pub. L. No. 94-163, § 103, 89 Stat. 871, 877 (1975) (codified as amended in scattered sections of the U.S. Code); Export Administration Act of 1979, Pub. L. No. 96-72, § 10, 93 Stat. 503, 526 (codified as amended at 59 U.S.C. §§ 2401-2420).

16. See Energy Policy and Conservation Act § 103; Export Administration Act of 1979 § 10.

17. Amy Harder & Lynn Cook, *Congressional Leaders Agree to Lift 40-Year Ban on Oil Exports*, WALL ST. JOURNAL (Dec. 16, 2015), <http://www.wsj.com/articles/congressional-leaders-agree-to-lift-40-year-ban-on-oil-exports-1450242995>.

18. See *Understanding the WTO: What is the world trade organization?*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm (last visited Mar. 12, 2016) (explaining that the overarching goal of the WTO agreements is to encourage the free flow of trade among its member countries for economic development).

19. ALAN M. DUNN, BUSH CTR., U.S. EXPORT RESTRAINTS ON CRUDE OIL VIOLATE INTERNATIONAL AGREEMENTS AND ARE VULNERABLE TO CHALLENGE 4 (2013), http://www.bushcenter.org/sites/default/files/USExportRestrains_Dunn.pdf (describing export restrictions in international forums for crude oil, which is treated the same way as any other product under GATT, including natural gas in any form).

20. *Id.* at 2 (explaining that natural gas and crude oil are treated the same as any other product under the WTO, so the remaining ban on natural gas likely remains a violation of WTO obligations while the new policies on crude oil exports are more compliant with them); see also Harder & Cook, *supra* note 17, at 89–90.

gas export policies qualify for an exception to WTO international trade obligations and instead likely violate these obligations. Part III suggests that U.S. executive agencies may be able to bring current U.S. laws into compliance with international trade obligations by interpreting existing statutes differently. It also suggests, alternatively, that Congressional action, similar to Congressional action taken to lift the ban on crude oil exports, can be a viable solution to this regulatory disparity.

I. DECADES-OLD STATUTES GREATLY RESTRICT EXPORTS OF LIQUEFIED
NATURAL GAS WHILE CRUDE OIL IS FREELY EXPORTED TO INTERNATIONAL
TRADING PARTNERS

Federal regulation of oil and gas began in 1920 when the Mineral Leasing Act gave the federal government the authority to regulate and lease public lands for the development of crude oil, natural gas, and other minerals found on public lands.²¹

A. *Natural Gas Regulations Lead to Disparate Treatment among Trading Partners*

Federal regulation of natural gas started in 1928 when Senator Thomas Walsh (D-MT) introduced a Congressional resolution to make policy recommendations and study the natural gas industry.²² A decade later, after a series of smaller regulatory bills, the Natural Gas Act of 1938 (“NGA”) was signed into law.²³ The NGA passed without opposition from the natural gas industry, which, while supportive of the various state regulatory schemes that were being implemented, believed federal regulation would further stabilize the industry and provide regulatory uniformity.²⁴ In turn, legislators were reassured that the public would

21. Mineral Leasing Act, Pub. L. No. 66-146, 41 Stat 437 (1920). Prior to the Mineral Leasing Act, the General Mining Act of 1872 allowed citizens who discovered minerals to have exclusive possession of that land and the land surrounding those minerals. General Mining Act of 1872, 30 U.S.C. § 26 (2006). This policy presented a problem for oil prospectors who used their own resources to drill for and discover oil, but had no legal recourse or security against speculators. SAMUEL HAYES, CONSERVATION AND THE GOSPEL OF EFFICIENCY: THE PROGRESSIVE CONSERVATION MOVEMENT, 1890-1920 89 (1959).

22. ROBERT L. BRADLEY, JR., OIL, GAS AND GOVERNMENT: THE U.S. EXPERIENCE 861 (1996) (focusing specifically on the market and economics of the natural gas industry).

23. *Id.* at 862, 871 (noting that the precursors for the Natural Gas Act were the Public Utility Holding Company Act and the Federal Power Act, both of which sought to regulate energy companies and the rates they charged consumers).

24. *Id.* at 864–67. In testimony regarding the House version of the NGA, a natural gas industry witness only suggested changes that would “reduce the expense and paperwork for the industry.” *Id.* at 867. And while they felt the bill would not lead to a lower rate for consumers as the increased costs would likely be passed on to them, the industry generally did not oppose federal regulation. *See id.*

not become victims of increased rates nor be subjected to the nuisance of constant pipeline construction in cities and towns.²⁵

The NGA still regulates natural gas today and requires that no person or company may export natural gas from the United States without submitting an application and receiving approval from the Federal Power Commission (the “Commission” or “FPC”) to export the natural gas they produce.²⁶ Under the NGA, the approval is to be issued unless the Commission finds the proposed export of the natural gas is not “consistent with the public interest.”²⁷

In 1938, the Commission regulated the hydroelectric, electric, and natural gas industries.²⁸ That same year, the Department of Energy Organization Act transferred all of the Commission’s responsibilities to the DOE.²⁹ Today, the Office of Fossil Energy within the DOE is responsible for approving or denying natural gas export applications based on “public interest” determinations.³⁰ Because the term “public interest” is not statutorily defined, the DOE has broad flexibility in deciding whether natural gas exports are “consistent with the public interest.” Over time, there has been considerable confusion and disagreement over what factors should be evaluated when making this determination.³¹

The process for exporting liquefied natural gas (“LNG”) was further clarified by the Energy Policy Act of 1992, which allows expeditious approval for permits to export to countries with which the United States has a free trade agreement (“FTA”).³² Export requests to these countries are deemed “consistent with the

25. See *id.* at 855–56 (explaining that while the traditional view is that it is the public who pushes for government regulation of enterprises, in this case, it was actually the energy industry that convinced the public of the need for regulation).

26. Natural Gas Act of 1938, 15 U.S.C. § 717b(a) (2012).

27. *Id.*

28. *Id.* § 717a(9); *History of FERC*, FED. ENERGY REGULATORY COMM’N, <http://www.ferc.gov/students/ferc/history.asp> (last visited Mar. 12, 2016).

29. Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565, 577–78 (1977) (codified at 42 U.S.C. §§ 7101–7352 (2012)).

30. Administrative Procedures with Respect to the Import and Export of Natural Gas, 10 C.F.R. §§ 590.101, 590.102(a) (1998).

31. Jeremy Brown, *An Inconsistent Approach to “Public Interest” Consistency Determinations: Section 3 of the Natural Gas Act and the Rush to Export LNG*, KAY BAILEY HUTCHINSON CTR. FOR ENERGY, LAW & BUS. (Sept. 26, 2014), <http://www.utexas.edu/law/centers/energy/blog/2014/09/an-inconsistent-approach-to-public-interest-consistency-determinations-section-3-of-the-natural-gas-act-and-the-rush-to-export-lng/> (arguing that while the DOE claims they review a variety of factors such as “economic impacts, international impacts, security of natural gas supply, and environmental impacts” when making public interest determinations, these factors are more of a “grab bag” rather than a “coherent framework” for analysis).

32. Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, 2866. The United States currently has Free Trade Agreements with 20 countries. *Free Trade Agreements*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-agreements/free-trade-agreements> (last visited Mar. 14, 2016). “The existing regulatory framework only allowed for exports of LNG to countries with a Free Trade Agreement (“FTA”). These FTA countries are mostly large producers of natural gas themselves (Canada, Mexico) or did not consume any relevant amounts (many

public interest” and are approved “without modification or delay.”³³ As a result, public attention on the DOE approval process has largely focused on permit applications submitted by companies seeking to export natural gas to countries with which the United States does not have a free trade agreement (“non-FTA countries”).³⁴ While these applications historically have not attracted much public attention, in the wake of the domestic natural gas renaissance, the DOE has more closely considered the determination as to whether or not the proposed export would be consistent with the public interest.³⁵ This increased scrutiny has led to lengthy delays in approving exports to non-FTA countries.³⁶

Central American States).” Charles K. Ebinger & Tim Boersma, *To Export LNG Without Restriction, or Not?*, BROOKINGS: UP FRONT (Apr. 2, 2014, 3:27 PM), <http://www.brookings.edu/blogs/up-front/posts/2014/04/02-export-lng-restriction-ebinger-boersma>.

33. 15 U.S.C. § 717b(c) (2012).

34. See Salo Zelermyer, *DOE study shows net economic benefits from lng exports and kicks off key period for industry*, LEXOLOGY (Dec. 7, 2012), <http://www.lexology.com/library/detail.aspx?g=141a1719-11b7-445e-9971-9a754f3913a7> (explaining that the “public interest” issue came to the forefront after the DOE granted its first LNG permit for exporting to a non-FTA country); see also Margo L. Thorning, Ph.D., *Act on LNG Encourages USTR to Support LNG Exports*, ACT ON LNG EXPORTS: BLOG (May 7, 2015), <http://actonlng.org/2014/05/act-on-lng-encourages-ustr-to-support-expedited-lng-exports/> (explaining that expediting the approval process for LNG export applications is necessary for the American economy).

35. See *Natural Gas Resources: Hearing Before the S. Comm. on Energy and Nat. Res.*, 113th Cong. 25 (2013) [hereinafter *Hearing*]; see Thorning, *supra* note 34 (reminding the readers that the USTR has only approved one LNG export permit to date and has twenty applications pending still); see also David L. Goldwyn, *DOE’s New Procedure for Approving LNG Export Permits: A More Sensible Approach*, BROOKINGS (June 10, 2014), <http://www.brookings.edu/research/articles/2014/06/10-doe-approving-lng-export-goldwyn-hendrix> (describing that the DOE approves projects, on average, every eight weeks, and that with twenty four applications pending, it will take the DOE four years to review them).

36. See *Hearing*, *supra* note 35; BACCHUS & JEONG, *supra* note 14, at 2–3 (discussing that LNG export projects can take five years from the time of DOE approval to the time the company begins exporting LNG. As a result, the DOE’s delay in approving export applications can have serious economic consequences for both the company and the United States). The DOE has received an influx of LNG export applications since 2010, yet has approved less than ten applications to export to non-FTA countries. Brown, *supra* note 31; see *Long Term Applications Received by DOE/FE to Export Domestically Produced LNG from the Lower-48 States*, U.S. DEPT. OF ENERGY, http://energy.gov/sites/prod/files/2014/10/f18/Summary%20of%20LNG%20Export%20Applications_0.pdf (last updated Oct. 21, 2014) (showing disparate timelines in approving export applications to FTA countries vs. non-FTA countries). It should also be noted that the DOE recently finalized changes to its LNG export application approval process to non-FTA countries. *Procedures for Liquefied Natural Gas Export Decisions*, 79 Fed. Reg. 48,132 (Aug. 15, 2014). Under the current structure, DOE can issue conditional approval for an LNG export application prior to the FERC finalizing its required National Environmental Policy Act (“NEPA”) review for an LNG export facility. *Id.* at 48,133. Moving forward, however, DOE will wait until the FERC NEPA review is complete before issuing its own public interest determination. *Id.* at 48,135. These changes came in response to industry commenters’ request for regulatory certainty and to streamline the current LNG approval process. However, some in the industry feel this new approval process could negatively impact proposed projects. See Bobby McMahon, *US DOE finalizes changes to LNG export review process*, PLATTS (Aug. 14, 2014, 2:46 PM), <http://www.platts.com/latest-news/shipping/washington/us-doe-finalizes-changes-to-lng-export-review-21077079>.

B. Crude Oil Export Regulations Resulted in a Decades-Long Ban on Crude Oil Exports

Until recently, the DOC had historically regulated the export of crude oil through two laws that were passed in the 1970s.³⁷ During the Arab-Israeli War in 1973, the Arab nations threatened to cut off oil exports to any country supporting Israel's war efforts.³⁸ When the United States continued supplying Israel with material support, the Organization of Arab Petroleum and Exporting Countries (OPEC) cut off exports of crude oil to the United States.³⁹

The resulting shortage and price shock culminated in the passage of EPCA.⁴⁰ EPCA aimed to "increase the supply of fossil fuels in the United States" and allowed the President to "promulgate a rule prohibiting the export of crude oil or natural gas produced in the United States, except that the President may . . . exempt from such prohibition such crude oil or natural gas exports which he determines to be consistent with the national interest."⁴¹

EPCA was implemented through short supply controls enforced by the Bureau of Industry and Security (BIS)—a bureau of the DOC.⁴² Similar to natural gas, a company seeking to export domestically produced crude oil was required to submit an application for a license to export the commodity.⁴³ The license was to be granted if it was found that the proposed export was consistent with the national interest.⁴⁴ There were exceptions to the license requirement for certain oil exports such as those from Alaska's Cook Inlet, exports to Canada, exports dealing with the management of the Strategic Petroleum Reserve, and exports of heavy California crude oil, among other exceptions.⁴⁵

37. See Energy Policy and Conservation Act, Pub. L. No. 94-163, 89 Stat. 871 (1975) (codified as amended in scattered sections of the U.S. Code); Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503 (codified as amended at 59 U.S.C. §§ 2401-2420).

38. BRADLEY, *supra* note 22, at 486-87.

39. *Id.* Following the embargo, citizens began "panic buying" which caused prices to rise by seventy five percent that October. *Id.* at 487 n.76.

40. *Id.* at 486-93; Frank Verraastro & Guy Caruso, *The Arab Oil Embargo—40 Years Later*, CTR. FOR STRATEGIC AND INT'L STUDIES: COMMENTARY (Oct. 16, 2013), <http://csis.org/publication/arab-oil-embargo-40-years-later>. Prior to EPCA's passage on December 22, 1975, the Emergency Petroleum Allocation Act authorized "the imposition of broad price, production, allocation, and marketing controls". *Id.*

41. Energy Policy and Conservation Act, Pub. L. No. 94-163, § 103(B)(b)(1), 89 Stat. 871, 877 (1975) (codified at 42 U.S.C. § 6212(b)(1) (2012)).

42. Export Administration Regulation, 15 C.F.R. § 754.2(b)(2) (2011). Short supply controls allow the President to control the export of goods that are in short supply by issuing and limiting export licenses or implementing quantitative restrictions on the product. PHILLIP BROWN, CONG. RESEARCH SERV., R43442, U.S. CRUDE EXPORT POLICY: BACKGROUND AND CONSIDERATIONS 7 (2014).

43. 15 C.F.R. § 754.2(b)(2).

44. *Id.*

45. Export Administration Regulation, 15 C.F.R. § 754.1 (2011); 15 C.F.R. § 754.2(b)(1). BIS will issue a license to exports falling under one of the exemptions. *Id.* Throughout the 1980s and 1990s, the President made determinations that these exports, and crude oil transported

A second response to the shortage caused by the Arab Oil Embargo was the decision by the Federal Energy Office to include crude oil on the Commodity Control List, which was established by the Export Administration Act of 1969 (EAA).⁴⁶ The 1979 Amendments to the EAA tightened these export restrictions by conferring “upon the President the power to control exports for national security, foreign policy, or short-supply purposes, [and] authoriz[ing] the President to establish export licensing mechanisms for certain items.”⁴⁷ The EAA of 1979 required crude oil exports be approved only if the President finds “such exports would not reduce the domestic supply of oil . . . and would be in the national interest.”⁴⁸ The EAA restrictions expired in 2001 but the President continued to implement them through annual executive orders.⁴⁹ Congress ultimately took action and overturned the ban on crude oil exports in December 2015 in an effort to increase American energy production, recognizing the impracticality of these restrictive laws and to give the United States a stronger position on the international energy stage.⁵⁰

Historically, agency interpretation of statutes and regulations are accorded broad deference under the standard applied in *Chevron, Inc. v. Natural Resources Defense Council, Inc.*,⁵¹ which gives strong deference to agency statutory interpretations so long as that interpretation is not “arbitrary, capricious, or manifestly contrary to the statute.”⁵² Later courts would clarify that this deference was not so absolute in that it allowed agencies to interpret statutes in a way that violated international obligations. The court in *Caterpillar, Inc. v. United States*⁵³ articulated this reasoning by holding that “statutes should

through the Trans-Alaska Pipeline, were within the national interest. NEELESH NERURKAR, CONG. RESEARCH SERV., R42465, U.S. OIL IMPORTS AND EXPORTS 22 (2012).

46. BRADLEY, *supra* note 22, at 770. The Commodity Control List is a list of products requiring export licenses and approval of the Department of Commerce to export the product to specific or all countries. IAN F. FERGUSSON & PAUL K. KERR, CONG. RESEARCH SERV., R41916, THE U.S. EXPORT CONTROLS SYSTEM AND THE PRESIDENT’S REFORM INITIATIVE 3–4 (2014). The Commodity Control List is divided up into multiple categories such as electronics, computers, materials processing, etc., and it describes the reason for the export control of each product. *Id.*

47. PHILLIP BROWN, CONG. RESEARCH SERV., R43442, U.S. CRUDE EXPORT POLICY: BACKGROUND AND CONSIDERATIONS 7 (2014).

48. BRADLEY, *supra* note 22, at 771.

49. *See, e.g.*, Continuation of the National Emergency with Respect to Export Control Regulations, 78 Fed. Reg. 59,107 (Aug. 13, 2013).

50. Billy House & Erik Wasson, *Congress Passes U.S. Spending Bill to End Oil Export Ban*, BLOOMBERG (Dec. 18, 2015), <http://www.bloomberg.com/politics/articles/2015-12-18/house-passes-u-s-spending-bill-that-ends-crude-oil-export-ban>.

51. 467 U.S. 837 (1984).

52. *Id.* at 844 (“[C]onsiderable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer . . .”).

53. 941 F. Supp. 1241 (Ct. Int’l Trade 1996).

not be interpreted to conflict with international obligations.”⁵⁴ Courts have also emphasized that agencies should make an effort to ensure their statutory interpretations allow for the United States’ compliance with international agreements.⁵⁵

As a result of these differing legal structures and varying agency interpretations, the export of these two similar resources—natural gas and crude oil—are regulated by multiple statutory schemes and two different agencies.⁵⁶ Crude oil can be freely exported while natural gas is still subject to multiple reviews and scrutiny.⁵⁷ This structure lends itself to inconsistent national energy policies, robust criticism from industry and other stakeholders, and poses significant questions as to the legality of current U.S. export policies regulating natural gas.⁵⁸

C. As WTO Members, the United States is Obligated to Enact Nondiscriminatory Trade Practices

The General Agreement on Tariffs and Trade (GATT) was a multinational agreement originating in 1948, and updated in 1986, that was established to reduce trade barriers among nations.⁵⁹ In 1994, GATT was modified by the WTO, which kept in place many of GATT’s key trade provisions that WTO

54. *Id.* at 1248; *see also* Fed. Mogul Corp. v. United States, 63 F.3d 1572, 1581 (Fed. Cir. 1995) (holding that statutes should be interpreted in a way that allows for compliance with international agreements in balancing domestic statutes with our obligations under the GATT).

55. *See* Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (one of the earliest cases involving domestic statutory interpretation in light of international obligations); *see also* Union Steel v. United States, 823 F. Supp. 2d 1346, 1358 (Ct. Int’l Trade 2012), *aff’d*, 713 F.3d 1101 (Fed. Cir. 2013).

56. ADAM VANN, DANIEL T. SHEDD & BRANDON J. MURRILL, CONG. RESEARCH SERV., R43231, FEDERAL PERMITTING AND OVERSIGHT OF EXPORT OF FOSSIL FUELS 2 (2013).

57. Harder & Cook, *supra* note 17. *See generally supra* notes 14–17 and accompanying text.

58. Doug Palmer, *US ban on LNG exports would violate WTO rules – experts*, REUTERS (Jan. 31, 2013), <http://www.reuters.com/article/2013/01/31/usa-trade-lng-idUSL1N0AZMTU20130131> (highlighting the conflict between companies that have benefited from low natural gas prices and business groups that are concerned about a WTO challenge in light of the Chinese export cases); James Bacchus, *U.S. Should Rethink Restrictions on Natural Gas Exports*, INT’L BUS. TIMES (Aug. 19, 2013), <http://www.ibtimes.com/fighting-words/us-should-rethink-restrictions-natural-gas-exports-1390823> (highlighting the Congressional debate over natural gas export restrictions); Jim Snyder & Mark Drajem, *Oil Industry May Invoke Trade Law to Challenge Export Ban*, BLOOMBERG (Nov. 6, 2013), <http://www.bloomberg.com/news/2013-11-06/oil-industry-may-invoke-trade-law-to-challenge-export-ban.html> (citing the oil industry’s challenge to export restrictions); Daniel J. Ikenson, *WTO Indictment of Chinese Export Restrictions Unearths U.S. Hypocrisy*, CATO INST.: CATO AT LIBERTY (Apr. 1, 2014, 10:06 AM), <http://www.cato.org/blog/wto-indictment-chinese-export-restrictions-unearts-us-hypocrisy> (calling the U.S. challenge to Chinese export restrictions “hypocrisy” while the United States continues to restrict energy exports).

59. *See generally* *The GATT Years: From Havana to Marrakesh*, WORLD TRADE ORG.: UNDERSTANDING THE WTO, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm (last visited Aug. 4, 2016).

member nations are expected to abide by when trading with other member nations.⁶⁰ Under these trade provisions, WTO members are prohibited from imposing restrictions on exports among WTO members unless certain limited exceptions apply.⁶¹

Article I of the GATT, the “most favored nation” clause, dictates: “[A]ny advantage, favour, privilege or immunity granted by any [WTO Member] 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 [WTO Members].”⁶² This nondiscrimination clause applies to any policies WTO members implement regulating commodity imports and exports. It also requires that if exports are treated a certain way in regards to exporting a commodity to one WTO member country, the same privileges and treatment must be extended to all other member countries.⁶³ Further, Article XI of the GATT bars any export prohibitions between WTO member nations other than duties, taxes, or other charges, regardless of whether the prohibitions are implemented through quotas or import or export licenses.⁶⁴

D. The WTO Allows for the Implementation of Restrictive Trade Policies under Certain Circumstances

The WTO does allow for exceptions to Articles I and XI of the GATT in certain circumstances. If a country with prohibitive export policies can successfully argue the policy falls within one of the WTO exceptions, there may be no violation of international trade commitments.⁶⁵

Under Article XI: 2(a) of the GATT, restrictive export policies may be acceptable if they are necessary to prevent or relieve a critical shortage of the product.⁶⁶ Specifically, Article XI: 2(a) allows for “[e]xport prohibitions or restrictions [to be] temporarily applied to prevent or relieve critical shortages of foodstuff or other products essential to the exporting contracting party.”⁶⁷ However, this exception requires the export prohibition be “primarily aimed” at

60. See *The Uruguay Round*, WORLD TRADE ORG.: UNDERSTANDING THE WTO, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm (last visited Aug. 4, 2016).

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

62. *Id.* at art. I. (alteration in original).

63. *Id.*

64. *Id.* at art. XI (specifying that trade prohibitions cannot be enforced through licensing procedures). While GATT generally prohibits licensing requirements, a WTO panel has found that a license approved within five days may not constitute a restriction. Report of the Panel, *Japan—Trade in Semi-Conductors*, ¶ 118, L/6309 (Mar. 24, 1988), GATT B.I.S.D. (35th Supp.), at 31 (1989).

65. GATT, *supra* note 61, at arts. XI, XIV, XX, XXI.

66. GATT, *supra* note 61, at art. XI 2(b).

67. *Id.* at art. XI 2(a) (alteration in original).

conservation of the product,⁶⁸ and is mainly used to manage and conserve agricultural products.⁶⁹

Article XX of the GATT, which has often been used for environmental management purposes, provides a variety of mechanisms that allow a country to argue that the imposition of restrictive trade policies serve a legitimate purpose, such as to “protect public morals,” or “human, animal or plant life or health.”⁷⁰ Under this article, trade restrictions may also be valid if they are imposed for the “protection of national treasures of artistic, historic or archaeological value,” or if they relate “to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.”⁷¹

More narrowly, under Article XX(b) of the GATT an export restriction may be acceptable if the restriction is in place to protect human, animal or plant life, or health.⁷² The WTO Appellate Body has analyzed the applicability of an Article XX(b) claim as follows:

For an Article XX(b) claim, a panel should begin the sequence of analysis by considering whether the challenged measure fits within the scope of a particular paragraph in Article XX, and whether the purported state interest in preventing a risk is genuine. Then the panel looks for the required ‘degree of connection’ specified in the paragraph (e.g., ‘necessary’).⁷³

In *United States—Standards for Reformulated and Conventional Gasoline*,⁷⁴ the WTO Panel created a three-part test a defending country must meet in order to argue an Article XX(b) restriction successfully.⁷⁵ The country must successfully show:

68. See generally Report of the Panel, *Canada—Measures Affecting Exports of Unprocessed Herring and Salmon*, ¶ 4.7, L/6268 (Nov. 20, 1987), GATT B.I.S.D. (35th Supp.), at 12 (1989) [hereinafter Report of the Panel, *Exports of Herring and Salmon*] (rejecting Canada’s Article XI 2(a) argument because their prohibitive export policies regulating herring and salmon were not “primarily aimed” at conserving the resource).

69. GIOVANNI ANANIA, INT’L CTR. FOR TRADE AND SUSTAINABLE DEV., AGRICULTURAL EXPORT RESTRICTIONS AND THE WTO: WHAT OPTIONS DO POLICY-MAKERS HAVE FOR PROMOTING FOOD SECURITY 16 (Nov. 2013), <http://www.ictsd.org/downloads/2013/11/agricultural-export-restrictions-and-the-wto-what-options-do-policy-makers.pdf>.

70. GATT, *supra* note 61, at art. XX.

71. *Id.* at art. XX(f)–(g).

72. *Id.* at art. XX(b).

73. Steve Charnovitz, *Trade and the Environment in the WTO* 16 (Geo. Wash. Sch. of Law Pub. Law & Legal Theory Working Paper, Paper No. 338, 2007).

74. Panel Report, *United States—Standards for Reformulated and Conventional Gasoline*, ¶ 2.6, WTO Doc. WT/DS2/R (adopted Jan. 29, 1996) [hereinafter Panel Report, *Standards for Gasoline*].

75. *General Agreement on Tariffs and Trade 1994*, WORLD TRADE ORG.: WTO ANALYTICAL INDEX, http://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_07_e.htm#article20 (last visited Aug. 5, 2016).

(1) that 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; (2) that the inconsistent measures for which the exception was being invoked were *necessary* to fulfill the policy objective; and (3) that the measures were applied in conformity with the requirements of the *introductory clause* of Article XX.⁷⁶

The crux of this analysis is the determination of whether the restriction is “necessary” to meet its intended purpose of protecting life or health; the validity of many prohibitive export policies has been decided based on this analysis.⁷⁷ The burden is on the country arguing the validity of the restriction to prove, by means of a balancing test, that the restriction is either “indispensable” or “justifiable”. The balancing test’s factors include: “(1) the relative importance of the common interests or value pursued by the measure, (2) the contribution made by the measure to the realization of the ends pursued by it, and (3) the restrictive impact of the measure on international commerce.”⁷⁸

Under Article XX(g) of the GATT, export restrictions may be appropriate if the restriction is necessary to conserve an exhaustible natural resource and if the restriction is implemented “in conjunction with restrictions on domestic production or consumptions.”⁷⁹ In order to argue that the Article XX(g)

76. *Id.*

77. Charnovitz, *supra* note 73, at 17. Compare Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶¶ 164, 168, 175, WTO Doc. WT/DS135/AB/R (adopted Mar. 12, 2001) [hereinafter Appellate Body Report, *Measures Affecting Asbestos*] (noting that a French ban on the import of asbestos and products containing asbestos was necessary for the protection of human health and there was “no reasonably available alternative”), and Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, ¶¶ 155, 211, WTO Doc. WT/DS332/AB/R (adopted Dec. 3, 2007) [hereinafter Appellate Body Report, *Imports of Retreaded Tyres*] (upholding a Brazilian ban on the import of retreaded tires because it was “necessary” to accomplish Brazil’s goal of reducing tire waste, the disposal of which had detrimental effects to the environment and human health), *with* Report of the Panel, *Thailand—Restrictions on Importation of and International Taxes on Cigarettes*, ¶ 75, DS10/R (Oct. 5, 1990), GATT B.I.S.D. (37th Supp.), at 21 (1991) [hereinafter Report of the Panel, *Restrictions on Cigarettes*] (finding taxes and restrictions Thailand imposed on imported cigarettes were not “necessary” to Thailand’s stated goal of protecting its citizens from chemicals in cigarettes, particularly since the sale of cigarettes produced in Thailand were not restricted in any way), and Panel Report, *Standards for Gasoline*, *supra* note 74, at ¶¶ 6.21-22, 6.29 (finding regulations applied by the United States on gasoline imported from other countries was not “necessary” to protect U.S. citizens from air pollution partly because domestically produced gasoline did not have to meet the same strict chemical composition standards).

78. Charnovitz, *supra* note 73, at 17–19. Adding more difficulty to proving the necessity of the restrictive trade policy, if the challenging country can show a “reasonably available alternative measure” will be less restrictive on trade, the WTO will likely find the defendant country’s restrictive policy unjustifiable. Christopher Doyle, *Gimme Shelter: The “Necessary” Element of GATT Article XX in the Contest of the China-Audiovisual Products Case*, 29 B.U. INT’L L.J. 143, 163 (2011).

79. GATT, *supra* note 61, at art. XX(g).

exemption applies, the defending country must prove the restriction relates to an exhaustible natural resource. A resource may be considered “exhaustible” if both parties to the dispute mutually agree that the resource is exhaustible, or if the WTO has previously recognized the designation.⁸⁰ Additionally, the restrictive measure must relate to the conservation of the resource, and the measure must be enacted “in conjunction with [conservation] restrictions on domestic production or consumption.”⁸¹

Despite this exception, Articles XI and XX are not standalone defenses for restrictive export policies.⁸² If an exception is argued, Article XIII then requires the restriction be applied in a non-discriminatory manner, which means the restriction must be applied equally to all trading partners and not merely to certain parties.⁸³

If a country cannot successfully argue an exception under Article XI or XX, Article XXI provides another avenue for restrictive export policies.⁸⁴ Under Article XXI, the “national security exception,” a restrictive export policy may be valid if the member nation is enacting the policy as a way to take “action which it considers necessary for the protection of its essential security interests.”⁸⁵ An action that a member nation considers “necessary” is a subjective standard, as it is the decision of the WTO member nation itself to determine what actions are “necessary” for the protection of their “essential” security interests.⁸⁶

A WTO panel has never ruled on the national security exception, making it both the most broad and unclear exception as to what exactly would qualify for

80. Charnovitz, *supra* note 73, at 20. The WTO has found that the term “exhaustible natural resource” should not be strictly interpreted, but instead interpreted as an “evolutionary” term that should be considered “in light of contemporary concerns of the community of nations about the protection and conservation of the environment.” *Id.* at 20–22; see Appellate Body Report, *United States—Import Prohibitions of Certain Shrimp and Shrimp Products*, ¶ 128, WTO Doc. WT/DS58/AB/R (adopted Oct. 12, 1998) [hereinafter Appellate Body Report, *Import Prohibitions of Shrimp*] (stating that shrimp is likely an exhaustible natural resource); see also Report of the Panel, *United States—Prohibitions of Imports of Tuna and Tuna Products from Canada*, ¶ 4.9, L/5198 (Dec. 22, 1981), GATT B.I.S.D. (29th Supp.) (1982) [hereinafter Report of the Panel, *Prohibitions of Imports of Tuna*] (noting that both parties to the dispute mutually agreed tuna was an exhaustible natural resource and conservation management measures should be implemented).

81. Charnovitz, *supra* note 73, at 20 (alteration in original). To determine whether the restriction is “reasonably related” to conservation, the WTO has historically “examined the relationship between the general structure/design of the measure and the conservation policy goal it purports to serve.” *Id.* The third qualification, that the restriction be implemented in conjunction with domestic production or consumption restrictions, has been interpreted to require “evenhandedness between the regulation of imports and domestic activity.” *Id.* at 23.

82. Compare GATT, *supra* note 61, at art. XI, and art. XX, with art. XIII.

83. GATT, *supra* note 61, at art. XIII.

84. *Id.* at art. XXI.

85. *Id.*

86. VANN ET. AL., *supra* note 56, at 11.

it.⁸⁷ However, the United States has taken the position that this exception is “self-judging”, which means the member nation invoking this exception is considered the best judge of whether or not its export policy is valid and qualifies for this exception.⁸⁸ Despite the United States’ interpretation of this exception, the question remains whether a WTO panel would simply defer to the country itself to make the decision as to what policies are necessary and essential to its national security interests.⁸⁹

II. ATTEMPTS TO DEFEND SIMILAR EXPORT POLICIES HAVE BEEN UNSUCCESSFUL AND IT IS UNLIKELY THE UNITED STATES CAN SUCCESSFULLY ARGUE A TRADE EXEMPTION APPLIES

A. *The WTO Has Ruled Against Analogous Export Policies*

Although the United States continues to maintain strict licensing requirements for natural gas exports to WTO member nations in the absence of a free trade agreement, in 2009 the United States along with Mexico, the European Union, Canada, Turkey, and other WTO member nations, initiated a WTO challenge against similarly restrictive Chinese policies regulating exports of raw materials to WTO member nations.⁹⁰ The United States challenged Chinese policies such as export quotas,⁹¹ export duties,⁹² and the imposition of export licenses that unfairly restricted the export of these commodities.⁹³ The United States argued that Chinese export policies imposing limits on the amount of raw materials that can be exported disadvantaged U.S. and foreign manufacturers in industries that relied on these raw materials to produce downstream products such as steel,

87. *Id.*

88. *Id.*; see Dapo Akande & Sope Williams, *International Adjudication on National Security Interests: What Role for the WTO?* 43 VA. J. INT’L L. 365, 375–77 (2003).

89. VANN ET. AL., *supra* note 56, at 11–12.

90. Bacchus, *supra* note 58; *WTO Case Challenging China’s Export Restraints on Raw Material Inputs*, OFFICE OF THE U.S TRADE REPRESENTATIVE, <http://www.ustr.gov/about-us/press-office/fact-sheets/2009/june/wto-case-challenging-chinas-export-restraints-raw-material> (last visited July 28, 2016) [hereinafter *Challenging China’s Export Restraints*] (the policies being challenged were export policies regulating the export of magnesium, coke, zinc, and others).

91. *Challenging China’s Export Restraints*, *supra* note 90.

92. *Id.*

93. *Id.* The United States argued WTO rules prohibit a WTO member from imposing export quotas and licensing requirements. *Id.* Further, the U.S. argued that when China joined the WTO it made a commitment to free trade practices, not to implement prohibitive trade policies.

aluminum, and chemicals.⁹⁴ Interestingly, the United States specifically pointed out that WTO rules prohibit “export restraints such as export licensing”.⁹⁵

China responded by arguing that their export policies fell under the general exceptions included in Article XX of the GATT.⁹⁶ Specifically, they argued that these export restrictions were in place to prevent a critical shortage of these materials and that the restrictions were aimed at conservation and environmental management of the resources in question.⁹⁷ In January 2012, the WTO found that China’s export policies violated the international trade obligations they had agreed to abide by when joining the WTO in 2001.⁹⁸ In 2013, China reported to the WTO that its policies regarding these materials had been brought into compliance with WTO rules.⁹⁹

A second United States challenge to restrictive Chinese export policies yielded similar results in 2012.¹⁰⁰ Along with Japan, the European Union, and several other nations, the United States argued Chinese export policies limiting the export of rare earth minerals violated WTO rules.¹⁰¹ Rare earth minerals are essential to manufacture products such as mobile phones, computers, automobiles, and televisions.¹⁰² As one of the largest global suppliers of these minerals, China’s restrictive export policies, such as export duties and quotas, not only violated its WTO commitments to other WTO member nations but also discriminated against U.S. manufacturers.¹⁰³ Restrictive Chinese export policies

94. *Id.* The United States used the pricing example of coke, a material used in the steel industry, in making their argument. *Id.* In 2008, China produced 60% of the global supply of coke, which was 335 million metric tons. *Id.* Chinese export quotas limiting exports to 12 million metric tons and a duty rate of 40% caused the price of coke to increase to \$740 per metric ton for global producers. *Id.* Meanwhile, Chinese domestic producers were only paying \$472 per metric ton, giving Chinese manufacturers a significant competitive advantage over their international counterparts. *Id.*

95. *Id.*

96. Appellate Body Report, *China—Measures Related to the Exportation of Various Raw Materials*, ¶ 28, WTO Doc. WT/DS394/AB/R (adopted Feb. 22, 2012).

97. *Id.* ¶ 40.

98. *China—Measures Related to the Exportation of Various Raw Materials*, WORLD TRADE ORGANIZATION: DISPUTE SETTLEMENT, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds394_e.htm (last visited Aug. 1, 2016).

99. *Id.*

100. Press Release, Office of the U.S. Trade Representative, United States Challenges China’s Export Restraints on Rare Earths (Mar. 2012), <http://www.ustr.gov/about-us/press-office/press-releases/2012/march/united-states-challenges-china%E2%80%99s-export-restraints-r>.

101. *Id.*; *Rare Earths Statistics and Information*, U.S. GEOLOGICAL SURVEY, http://minerals.usgs.gov/minerals/pubs/commodity/rare_earths/ (last visited Aug. 1, 2016) (noting that rare earth minerals are seventeen elements on the periodic table used in a wide variety of industries and products). The policies challenged limited exports of these elements. Daniel Pruzin, *WTO Rules Against China on Rare Earth Export Restrictions*, BNA (Mar. 28, 2014), <http://www.bna.com/wto-rules-against-n17179889210/>.

102. Pruzin, *supra* note 101.

103. Press Release, Office of the U.S. Trade Representative, United States Wins Victory in Rare Earth Dispute with China: WTO Report Finds China’s Export Restraints Breach WTO Rules

resulted in American manufacturers paying three times more for rare earth minerals than Chinese manufacturers—an outcome prohibited by WTO rules that require member nations to ensure equal and nondiscriminatory treatment when trading with other WTO member nations.¹⁰⁴

In defending its rare earth export policies, China argued that export duties on rare earth mineral were implemented for environmental reasons and qualified for an exception under Article XX(b) of the GATT.¹⁰⁵ China further argued that export quotas on rare earth minerals were permissible as restrictions necessary for the conservation of exhaustible natural resources under Article XX(g) of the GATT.¹⁰⁶ Again ruling against China, the WTO concluded that China's export restrictions were inconsistent with WTO international trade policies and that China failed to justify its export restrictions as qualifying for an exception to WTO rules.¹⁰⁷

B. It is Unlikely the United States Can Successfully Argue a WTO Exemption Applies to Current Policies

In light of the two recent WTO cases against China, it has become increasingly clear that U.S. policies restricting the export of LNG likely violate the United States' international trade obligations as a member of the WTO.¹⁰⁸ Based on Articles I and XI of the GATT, current U.S. export policies that regulate the export of LNG likely violate the nondiscriminatory trade policies the United States agreed to abide by as an WTO member.¹⁰⁹

LNG export applications are subject to lengthy and burdensome licensing procedures that prohibit the efficient export of LNG to other WTO member

(Mar. 2014), <http://www.ustr.gov/about-us/press-office/press-releases/2014/March/US-wins-victory-in-rare-earths-dispute-with-China>.

104. *Id.*

105. Press Release, Office of the U.S. Trade Representative, U.S. Trade Representative Michael Froman Announces U.S. Victory in Challenge to China's Rare Earth Export Restraints (Aug. 2014), <http://www.ustr.gov/about-us/press-office/press-releases/2014/August/USTR-Froman-US-Victory-in-Challenge-to-China-Rare-Earth-Export-Restraints>.

106. *Id.*

107. *Id.* (reporting that China could not justify its export restrictions as necessary to conserve an exhaustible natural resource and they were not "legitimate . . . environmental protection measures").

108. See generally GEORGE DAVID BANKS, AM. COUNCIL FOR CAPITAL FORMATION, U.S. RESOURCE NATIONALISM: THE IMPACT OF ENERGY TRADE RESTRICTIONS ON NATIONAL SECURITY 4 (July 2015), http://unlockcrudeexports.org/wp-content/uploads/2015/07/ACCF-Nationalism-Report_FINAL.pdf; Joe Fisher, *U.S. LNG Process an Affront to Free Trade*, *WTO Expert Says*, NAT. GAS INTELLIGENCE (Dec. 3, 2013), <http://www.naturalgasintel.com/articles/96608-us-lng-process-an-affront-to-free-trade-wto-expert-says>.

109. Fisher, *supra* note 108 (highlighting that nations that could take a case to the WTO challenging a country's trade policies often choose not to for political reasons, and a WTO challenge to U.S. LNG export restrictions would likely be successful).

nations if there is no FTA in place.¹¹⁰ Notably, in its challenge against Chinese export restrictions for raw materials, the United States successfully argued that WTO rules specifically prohibit export restraints such as licensing.¹¹¹ Yet the DOE subjects LNG export applications (to WTO, non-FTA countries) to lengthy licensing procedures while simultaneously fast-tracking approvals for applications for LNG exports to FTA countries based on a national interest determination.¹¹² These different approval processes result in disparate treatment among WTO member nations, which is specifically prohibited in the nondiscrimination clause of Article I of the GATT. Furthermore, Article XI of the GATT specifically bars the imposition of export licenses among WTO member nations.¹¹³

If U.S. export policies are challenged, in order for the United States to comply with its international trade obligations, it would have to argue successfully that these policies qualify for an exception to WTO trade rules.¹¹⁴ If a WTO challenge to U.S. LNG policies were pursued by another member nation, it is unlikely the United States can successfully argue that a WTO exception applies to current U.S. policies governing the export of natural gas.

The first exception the United States would likely argue is that under Article XI: 2(a), the restriction is necessary to prevent a shortage of the product.¹¹⁵ In order to argue this exception successfully, the defending country bears the burden of proof to show: 1) the restriction is temporary, 2) the restriction will relieve a critical shortage of the product, and 3) the product is essential to the exporting country.¹¹⁶

First, it is unlikely the United States would be able to convince a WTO Panel that a decades-long export licensing procedure for LNG is merely a “temporary” restriction as the ban and licensing procedures have been in place for decades.¹¹⁷ Second, in deciding the *China—Measures Related to the Exportation of Various Raw Materials*¹¹⁸ case, the WTO Appellate Body found the term “critical shortage” “refers to those situations or events that may be relieved or prevented through the application of measures on a temporary, and not indefinite or

110. Goldwyn, *supra* note 35; Letter from Margo Thorning, Ph.D., Senior Vice President and Chief Economist, American Council for Capital Formation, to Michale Froman, U.S. Trade Representative, (May 7, 2014), <http://actonlng.org/2014/05/act-on-lng-encourages-ustr-to-support-expedited-lng-exports>.

111. DUNN, *supra* note 19, at 2–3.

112. *Id.* at 4–6.

113. GATT, *supra* note 61, at arts. I, XI.

114. *Id.* at art. XI: 2(a) (stating that prohibitions of Article XI are subject to certain exceptions).

115. *Id.*

116. *Id.*

117. *See supra* Section I.A–B.

118. Appellate Body Report, *China—Measures Related to the Exportation of Various Raw Materials*, WTO Docs. WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R (adopted Feb. 22, 2012).

permanent, basis.”¹¹⁹ It is highly unlikely the WTO would accept a U.S. argument that there is a “critical shortage” of natural gas, as production of natural gas in the United States is steadily increasing.¹²⁰ Third, in the *China—Measures Related to the Exportation of Various Raw Materials* case, when determining whether a product is “essential,” the WTO Appellate Body found that the determination is not solely at the discretion of the WTO member to decide what products are “essential” to the country; particular circumstances faced by the member nation at the time could be taken into account.¹²¹ While the United States may be able to argue LNG is “essential” to the national economy, it is unlikely the United States can argue particular circumstances exist today that warrant such restrictive export policies on this commodity.¹²² As a result, it is unlikely the United States can argue current export restrictions qualify for an Article XI: 2(a) exception.

Next, the United States could attempt to argue the policies fall under an Article XX exemption.¹²³ Under Article XX(b), an export restriction would be valid if it is in place to protect human, animal, or plant life.¹²⁴ Generally, countries attempting to defend a restrictive trade policy under this Article have had extremely low success rates. The only significant victory came from a challenge over a French import ban on asbestos and goods containing asbestos in which the WTO Appellate Body found each country has a “right to determine the level

119. Panel Report, *China—Measures Related To The Exportation Of Various Raw Materials*, ¶ 7.306, WTO Docs. WT/DS394/R, WT/DS395/R, WT/DS398/R (adopted July 5, 2011); see Report of the Panel, *Exports of Herring and Salmon*, *supra* note 68, at ¶ 4.7 (finding Canadian export prohibitions on salmon and herring were not “primarily aimed at the conservation of salmon and herring” because they only limited foreign, not domestic, access to the fish and only restricted access to unprocessed salmon and herring); see also Report of the Panel, *United States—Restrictions on Imports of Tuna*, ¶ 5.33, DS21/R (Sept. 3, 1991) (not adopted) (showing that a GATT panel found a U.S. ban on certain tuna imports from Mexico did not meet the XX(g) requirements because the dolphin take rate Mexico had to meet in order to export tuna products to the U.S. was the same as the take rate in the U.S. Because this was an unpredictable standard, the Panel found this import restriction was not “primarily aimed” at dolphin conservation).

120. *U.S. Natural Gas Marketed Production*, U.S. ENERGY INFO. ADMIN., <https://www.eia.gov/dnav/ng/hist/n9050us2a.htm> (last visited July 24, 2016) (showing a steady increase in production of natural gas in the United States); Press Release, Int’l Energy Agency, North America Leads Shift in Global Energy Balance, IEA Says in Latest World Energy Outlook (Nov. 12, 2012), <http://www.iea.org/newsroomandevents/pressreleases/2012/november/name,33015,en.html>.

121. Appellate Body Report, *China—Measures Related to the Exportation of Various Raw Materials*, ¶¶ 7.276, 7.282, WTO Docs. WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R (adopted Feb. 22, 2012) (finding also that products which are “input” products to a particular product or industry may also be deemed “essential” for Article XI: 2(a) purposes).

122. *U.S. Natural Gas Marketed Production*, U.S. ENERGY INFO. ADMIN., <https://www.eia.gov/dnav/ng/hist/n9050us2a.htm> (last visited July 24, 2016) (showing production steadily rising, making it unlikely for the United States to successfully argue that there are circumstances that warrant restrictive export policies).

123. GATT, *supra* note 61, at art. XX.

124. *Id.* at art. XX(b).

of protection of health that they consider appropriate in a given situation” and that “no reasonably available alternative measure” existed.¹²⁵

The “necessary” prong of the three-part test has been very difficult for countries to prove. Many Article XX(b) arguments have failed this prong and thus it would be a very difficult argument for the United States to make.¹²⁶ Not only would the United States have to prove that both the ban on crude exports and the lengthy licensing process for natural gas exports are in place to “protect human, animal, or plant life”, but it would have to further prove these restrictions are “necessary” and there is “no reasonably available alternative measure” that could possibly meet this goal.¹²⁷ This high standard of proof is nearly impossible for the United States to meet in this instance.

Similarly, Article XX(g) provides an exception for restrictive policies that are necessary to conserve an exhaustible natural resource if the restrictions are “effective in conjunction with restrictions on domestic production or consumption.”¹²⁸ In order to argue that this exception applies, the defending country must show that the trade restrictions relate to the conservation of an exhaustible natural resource and must be enacted with restrictions on domestic production or consumption.¹²⁹ Again, this has typically been a difficult standard to meet.

In determining whether trade restrictions relate to conservation, the WTO has found trade measures do not have to be “necessary or essential” to conservation of the resource, but they must be “primarily aimed” at conservation.¹³⁰ It would be difficult for the United States, in a time of increasing production, to argue that current policies regulating the export of crude oil and LNG are “primarily aimed” at conservation. This is particularly so because of the disparate treatment countries receive in DOE’s approval of LNG exports, which links the approval

125. Appellate Body Report, *Measures Affecting Asbestos*, *supra* note 77, at ¶¶ 168, 175.

126. See Panel Report, *Standards for Gasoline*, *supra* note 74, at ¶¶ 6.1–3, 6.26, 6.28–29 (finding discriminatory trade policies the United States enacted through the Clean Air Act that treated imported gasoline different than domestic gasoline were “not necessary under Article XX(b)”; Report of the Panel, *Restrictions on Cigarettes*, *supra* note 77, at ¶¶ 76, 79 (finding Thai prohibitions on importing foreign cigarettes due to chemical additives were not “necessary” to protect human health because there were no restrictions on domestically produced cigarettes). *But see*, Appellate Body Report, *Imports of Retreaded Tyres*, *supra* note 77, at ¶ 155 (finding that Brazil’s prohibition on the importation of retreaded tires did qualify for an exception under XX(b) because there were no reasonable alternatives available and the ban was a “key element” of Brazil’s strategy to generate fewer waste tires).

127. See Appellate Body Report, *Imports of Retreaded Tyres*, *supra* note 77, at ¶ 156; GATT, *supra* note 61, at art. XX(b).

128. GATT, *supra* note 61, at art. XX(g).

129. *Id.*

130. See generally Report of the Panel, *United States—Restrictions on Imports of Tuna*, ¶ 5.33, DS21/R (Sept. 3, 1991) (not adopted).

time of the permit not to conservation of the resource, but to whether or not a free trade agreement is in place with the destination country.¹³¹

The strongest argument the United States has in arguing an Article XX(g) exemption is that LNG may be considered an “exhaustible natural resource.”¹³² Not only has the definition of “exhaustible natural resource” been interpreted broadly to include both living and non-living resources, but also WTO panels have been deferential to the parties in circumstances where both parties in the dispute agree that the product in question is an “exhaustible natural resource.”¹³³ Further bolstering the U.S. argument that LNG is an “exhaustible natural resource” is the WTO decision in *United States – Import Prohibition of Certain Shrimp and Shrimp Products*,¹³⁴ in which the Appellate Body specifically lists similar commodities, petroleum and iron ore, as “exhaustible natural resources.”¹³⁵

While the United States can likely argue LNG is an “exhaustible natural resource,” they will still lose on the second Article X(g) requirement—that the trade restriction be implemented in conjunction with domestic production or consumptions restrictions.¹³⁶ The WTO has interpreted this requirement in the most simple fashion: if no domestic restrictions are in place, the country cannot justify its international trade restriction on the product under XX(g). But if there are restrictions in place, it may be justifiable if the other two qualifications are met.¹³⁷ The United States has not enacted any federal restrictions on domestic production or consumption of natural gas. The legislative history of the Natural Gas Act shows it was enacted not for conservation purposes but to “regulate monopolistic practices in the natural gas market.”¹³⁸ As a result, it will likely fail this prong of the analysis and thus the United States will be unable to successfully argue the restrictions are valid under Article XX(g).

131. Natural gas production has increased from 21,112,053 million cubic feet in 2008 to 25,690,878 million cubic feet in 2013. *Natural Gas Wellhead Value and Marketed Production*, U.S. ENERGY INFO. ADMIN., http://www.eia.gov/dnav/ng/ng_prod_whv_dc_u_nus_a.htm (last visited Aug. 1, 2016); see VANN ET. AL., *supra* note 56, at 2-3 (explaining the difference in the permit process between FTA and non-FTA countries).

132. GATT, *supra* note 61, at art. XX(g).

133. Appellate Body Report, *Import Prohibitions on Shrimp*, *supra* note 80, at ¶ 128; see also Report of the Panel, *Prohibitions on Imports of Tuna*, *supra* note 80, at ¶ 4.9; Report of the Panel, *Exports of Herring and Salmon*, *supra* note 68, at ¶ 4.4 (agreeing with the parties that the product in question was an “exhaustible natural resource”).

134. See Appellate Body Report, *Import Prohibitions on Shrimp*, *supra* note 80, at ¶ 128.

135. *Id.*

136. GATT, *supra* note 61, at art. XX(g).

137. Report of the Panel, *Prohibitions on Imports of Tuna*, *supra* note 80, at ¶ 3.17 (finding that the United States’ restrictions on tuna imports from Canada were unjustifiable because there were no corresponding domestic restrictions on tuna production or consumption). Canadian export restrictions on salmon and herring did not entirely fulfill the XX(g) test, but met the requirement of domestic production restrictions because Canada also restricted domestic harvests. Report of the Panel, *Exports of Herring and Salmon*, *supra* note 68, at ¶ 4.4.

138. BACCHUS & JEONG, *supra* note 14, at 12.

However, if the United States can successfully argue current export policies qualify for an exception under Article XX, Article XIII of the GATT requires the restriction be applied in a nondiscriminatory manner—which means the restriction must be applied equally to all trading partners.¹³⁹ Rather than applying export restrictions equally among trading partners, the United States has implemented disparate licensing requirements and has expedited the exportation of natural gas to certain nations while delaying exportation to others.¹⁴⁰

The “national security exemption” in Article XXI holds the greatest possibility of success for the United States. Under Article XXI, a member nation may take “any action which it considers necessary for the protection of its essential security interests”, which can extend to restrictive export regulations.¹⁴¹ This is a subjective standard, making it the most flexible of the WTO exemptions, as the WTO member may take whatever measures it considers “necessary” for the protection of its “essential” security interests.¹⁴² The WTO has not yet attempted to judge the validity of these measures.

The United States has taken the position that this exception is “self-judging,” meaning the member nation invoking the exception is the best judge in deciding if the exception is valid.¹⁴³ The United States’ position that the WTO member nation itself determines whether its export restriction is necessary for national security purposes would be most useful for the United States to defend its own export restrictions; however, a WTO panel has never ruled on this exemption.¹⁴⁴

Considering the current global turmoil in regions that produce and import significant quantities of natural gas, the national security exemption is the strongest argument the United States can make to defend its current LNG export

139. GATT, *supra* note 61, at art. XIII; see Panel Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas—Complaint by the United States*, ¶ 7.69, WTO Doc. WT/DS27/R/USA (adopted May 22, 1997) (explaining that restrictions should apply equally to all members).

140. 15 U.S.C. § 717b(c) (2006); 15 C.F.R. §754.2 (2011).

141. GATT, *supra* note 61, at art. XXI.

142. VANN ET. AL., *supra* note 56, at 11–12, 14; WORLD TRADE ORG., GATT ANALYTICAL INDEX 601 (1995), http://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art21_e.pdf (citing a panel report, which was not adopted, regarding the imposition of an embargo the United States enacted against Nicaragua where the Panel held “the Panel cannot examine or judge the validity of motivation for the invocation of Article XXI(b)(iii) by the United States.”).

143. See Akande & Williams, *supra* note 88, at 376. At a 1982 meeting discussing trade regulations, multiple countries had enacted restrictions of Argentinian imports. The Canadian representative stated, “Canada’s sovereign action was to be seen as a political response to a political issue . . . the GATT had neither the competence nor the responsibility to deal with the political issue that had been raised.” WORLD TRADE ORG., GATT ANALYTICAL INDEX 600 (1995), http://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art21_e.pdf. The U.S. representative stated, “The General Agreement left to each contracting party the judgment as to what it considered to be necessary to protect its security interests. The contracting parties had no power to question that judgment.” *Id.* at 600–01.

144. VANN ET. AL., *supra* note 56, at 11.

restrictions as being necessary to the national security of the United States.¹⁴⁵ The United States could, for example, argue that restricting LNG exports to Iran would fall within the national security exemption.¹⁴⁶

However, it should be noted that the United States' case for a national security exemption would be extremely narrow considering there are arguments that overturning the current restrictive permitting process and allowing producers to freely export LNG would actually be beneficial to the national security of the United States.¹⁴⁷ For example, recent global conflicts involving Russian intervention in Ukraine and Syria have refocused the natural gas debate and led to a call for the United States to counter Russian energy dominance in the region with its own natural gas exports.¹⁴⁸ The United States might plausibly claim LNG export restrictions serve a valid national security purpose; however, overcoming the contradicting argument that easing export restrictions would benefit national security may prove to be insurmountable.¹⁴⁹ Ultimately, the lack of any definitive precedential rulings make it impossible to tell what test a WTO panel would apply to a claimed exemption under Article XXI.¹⁵⁰

145. Lewis E. Leibowitz & C. Kyle Simpson, *Move Quickly on LNG Exports*, OIL & GAS FIN. JOURNAL (Nov. 12, 2013), <http://www.ogfj.com/articles/print/volume-10/issue-11/features/move-quickly-on-lng-exports.html> (“[N]ational security is clearly a valid reason to impose export restrictions.”).

146. *Id.* (suggesting that while export restrictions to Iran or Cuba may be valid, restrictions limiting exports to other non-FTA countries, such as Japan, India, or Haiti, would likely not pass the national security test).

147. Rep. Mike Turner, *Exporting American natural gas boosts economy and national security*, THE HILL (Oct. 22, 2013), <http://thehill.com/opinion/op-ed/329999-exporting-american-natural-gas-boosts-economy-and-national-security> (highlighting the fact that many American allies are dependent on unstable regions or unfriendly countries, such as Russia, for their natural gas imports); see also ELIZABETH ROSENBERG, CTR. FOR A NEW AM. SECURITY, ENERGY RUSH: SHALE PRODUCTION AND U.S. NATIONAL SECURITY 9 (2014), http://www.cnas.org/sites/default/files/publications-pdf/CNAS_EnergyBoom_Rosenberg_0.pdf.

148. Jordan Weissmann, *Frack You, Putin: Could the U.S. battle Russia with natural gas exports?*, SLATE (Mar. 7, 2014), http://www.slate.com/articles/business/moneybox/2014/03/putin_ukraine_and_energy_could_u_s_natural_gas_exports_alter_the_geopolitical.html; see Turner, *supra* note 147 (highlighting prior problems with Russian dominance in the global energy market, such as the fact that in 2006 and 2009, Russia cut off natural gas supplies to several European nations).

149. *New Paper Examines Harmful Impact of Energy Trade Policies on National Security*, PR NEWSWIRE (July 15, 2015), <http://www.prnewswire.com/news-releases/new-paper-examines-harmful-impact-of-energy-trade-policies-on-national-security-300113730.html>; BANKS, *supra* note 108.

150. Akande & Williams, *supra* note 88, at 373 (considering if a GATT/WTO panel should analyze whether a national security exemption invoked by a member is legitimate or if it should be up to the state to decide what actions should be taken in the interests of their own national security).

III. STATUTORY INTERPRETATION OR LEGISLATIVE ACTION IS THE KEY TO ENSURING COMPLIANCE WITH INTERNATIONAL TRADE OBLIGATIONS

A. *U.S. Courts Have Emphasized Agencies Should Strive for Compliance with International Obligations*

Ultimately, the best way to ensure current LNG and crude oil export regulations comply with WTO international trade obligations is for the DOE to interpret the current statutes in a way that allows for compliance with international trade obligations. The legislation underlying the current export regulations gave the Executive Branch discretion to interpret whether LNG exports are consistent with the “national interest,” although this term is not defined in any of the applicable statutes.¹⁵¹ In the leading decision on statutory interpretation, *Chevron, Inc. v. Natural Resources Defense Council, Inc.*,¹⁵² the Supreme Court held that when a statute or a term in a statute is ambiguous, courts defer to agency interpretation so long as it is “permissible” and “reasonable” and is not “arbitrary, capricious, or manifestly contrary to the statute.”¹⁵³ As noted by Alan M. Dunn, “The Court of Appeals for the Federal Circuit has held that when interpreting statutes, a ‘permissible’ and ‘reasonable’ interpretation means that wherever a statutory standard—such as ‘public interest’ or ‘national interest’ finding—can be interpreted in a manner consistent with GATT, it should be.”¹⁵⁴

In addition to giving the agency authority to broadly interpret current export regulations, since the early nineteenth century, U.S. courts have consistently held that U.S. laws should not be interpreted in a manner that violates international obligations.¹⁵⁵ The U.S. Court of Appeals has specifically held that “an interpretation and application of statutes which would conflict with the GATT Codes would clearly violate the intent of Congress.”¹⁵⁶ In *Caterpillar*,

151. See Natural Gas Act of 1938, ch. 556, 52 Stat. 812 (1938); Energy Policy and Conservation Act, Pub. L. No. 94-163, 89 Stat. 871 (1975) (codified as amended in scattered sections of the U.S. Code); Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503 (codified as amended at 59 U.S.C. §§ 2401–2420).

152. 467 U.S. 837 (1984).

153. *Id.* at 843–44.

154. DUNN, *supra* note 19, at 4–5 (“[T]he Commerce Department’s strong reluctance to make a determination that is GATT consistent . . . could be viewed by the U.S. Courts as a failure to apply a ‘permissible construction’ or a ‘reasonable interpretation’ to the ambiguous statutory provision because Commerce’s decision would be in conflict with the U.S. commitments under GATT 1994.”).

155. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . .”).

156. *Fed. Mogul Corp. v. United States*, 63 F.3d 1572, 1581 (1995) (“GATT agreements are international obligations, and absent express Congressional language to the contrary, statutes should not be interpreted to conflict with international obligations.”).

Inc. v. United States,¹⁵⁷ the Supreme Court held if an agency is interpreting a statute in a way that violates the GATT, the agency must prove Congress specifically intended the statute to violate the GATT.¹⁵⁸

If the Administration's national interest determinations were challenged in U.S. courts, the Administration would be required to prove that the Congressional intent of each of the applicable regulating statutes was to violate GATT.¹⁵⁹ GATT originated in 1948, but at least one of the four applicable export statutes, the Natural Gas Act, originated in 1938.¹⁶⁰ Further, the last revision of the GATT was in 1986, yet the Energy Policy and Conservation Act became law in 1975.¹⁶¹ This statutory timeline could make it difficult for the Administration to argue that through these laws Congress intended to permit the Administration to violate international trade rules that were not in existence at the time the statutes were enacted.¹⁶² If challenged in federal court, there is significant Supreme Court precedent for a court to find that current agency interpretation of these regulations is not "reasonable" or "permissible" because it violates the GATT and our obligations under the WTO.¹⁶³

As strong as this statutory interpretation argument is, ultimately, to prevail in a challenge against the Administration's interpretation of current regulations, a party would have to argue that current agency interpretation is "arbitrary" or "capricious."¹⁶⁴ Courts have historically been very deferential to agency

157. 941 F. Supp. 1241 (Ct. Int'l. Trade 1996).

158. *Id.* at 1248; *see also* *Union Steel v. United States*, 823 F. Supp. 2d 1346, 1358 (Ct. Int'l Trade 2012) (finding that the Department of Commerce has broad discretion to ensure its actions comply with WTO obligations and it may adjust its compliance efforts as long as they do not violate the statute), *aff'd*, 713 F.3d 1101 (Fed. Cir. 2013).

159. *Caterpillar*, 941 F. Supp. at 1248 (holding that the burden is on the Government to prove Congress intended a statute to violate the GATT). While the court acknowledged the Government's contention that if the GATT conflicts with a statute, then the statute controls, they noted the "commitment of the judicial branch to interpret acts of Congress consistently with international agreements" and that "statutes should not be interpreted to conflict with international obligations." *Id.* at 1247.

160. *See supra* notes 23, 59 and accompanying text.

161. *See supra* notes 40, 59 and accompanying text.

162. *See Comm. of U.S. Citizens Living in Nicar. v. Reagan*, 859 F.2d 929, 936 (D.C. Cir. 1988) ("[O]ur court reaffirmed the principle that treaties and statutes enjoy equal status and therefore that inconsistencies between the two must be resolved in favor of the *lex posterior*."). The question would then become whether *lex posterior*, the doctrine stating that the "last in time" controls, would apply to international agreements like the GATT. *See* STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 181 n.6 (5th ed. 2011).

163. *See Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (propounding the Charming Betsy principle, which states that an "act of Congress ought never be construed to violate the law of nation if any other possible construction remains.").

164. *Chevron, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) ("[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.").

interpretation, making this a challenging, but not impossible, standard to overcome.¹⁶⁵

While amending the current regulatory statutes would certainly solve the issue, the current statutes do not need to be rewritten if the DOE simply interprets the original language of the statute in a manner that does not violate U.S. trade obligations.¹⁶⁶

B. The Department of Energy Should Consider Compliance with International Trade Obligations as being Consistent with the Public Interest

Currently, the DOE takes months or years to approve a license for natural gas exports to non-FTA countries, while exports to FTA countries receive expeditious approval.¹⁶⁷ There are two ways to solve this inconsistency that would allow DOE to interpret LNG export regulations in a way that does not violate WTO rules. First, the DOE could simply interpret the Natural Gas Act of 1938 so that LNG export applications to any country should be approved in five days or less, so long as the approval is not inconsistent with the public interest.¹⁶⁸ Second, the DOE could issue a finding that compliance with our existing WTO obligations is “consistent with the public interest,” or to consider our obligations as WTO members as one determination for an LNG export application.¹⁶⁹

C. Congress Should Legislatively Lift Prohibitive Export Restrictions on Natural Gas Exports

On December 18, 2015, after years of debate and multiple legislative efforts, the United States Congress passed a mandatory annual spending measure that

165. *Id.* (“[C]onsiderable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations.”).

166. *Id.* (demonstrating that the courts give deference to an agency’s interpretation of Congressional statutes); see *Caterpillar, Inc. v. United States*, 941 F. Supp. 1241, 1247 (Ct. Int’l Trade 1996) (finding that an agency should not interpret statutes in a way that violate international agreements).

167. Tyler Wilson & Uday Turaga, *Summary of the LNG Export Regulatory Process*, ADI ANALYTICS (Feb. 17, 2015), <http://adi-analytics.com/2015/02/17/summary-of-the-lng-export-regulatory-process/>.

168. See Report of the Panel, *Japan—Trade in Semi-Conductors*, ¶ 118, L/6309 (Mar. 24, 1988), GATT B.I.S.D. (35th Supp.), at 31 (1989) (finding license approvals granted within five days may not violate GATT rules).

169. Brown, *supra* note 31 (noting that the DOE considers a wide variety of factors, such as economic, international, domestic security and environmental impacts when making public interest determinations). The DOE has also stated its intent to “monitor” factors such as changes in natural gas demand and technological advancements to ensure LNG exports do not result in a decrease of LNG available to meet domestic needs, as the “cumulative impact of these . . . could pose a threat to the public interest.” *Sabine Pass Liquefaction, LLC*, DOE/FE Order No. 2961, at 32–33 (May 20, 2011).

quietly lifted the forty-year ban on crude oil exports.¹⁷⁰ Through lifting the ban, Congress has brought U.S. crude oil export policies not only into the twenty-first century, but also into compliance with our international trade obligations as members of the WTO.¹⁷¹

If the Administration does not pursue administrative action to ease or eliminate permitting restrictions on LNG exports, Congress can take legislative action on its own to lift LNG export restrictions.¹⁷² Accordingly, there have been legislative efforts to this end but they have failed to gain momentum, possibly due to being overshadowed by the crude oil export debate, which has taken center stage in recent years.¹⁷³ One potential obstacle to legislative efforts to lift LNG export restrictions may be the current Administration itself, which has opposed recent legislative efforts to lift or streamline both crude oil and natural gas export restrictions.¹⁷⁴ Despite this opposition, the best way to bring U.S. export policies into compliance with international trade obligations as a WTO member may be for Congress to “amend the Natural Gas Act to formally allow exports of natural gas to all WTO member countries, without the need for the current project-by-project approval from the DOE.”¹⁷⁵

170. HOUSE & WASSON, *supra* note 50; see Matt Piotrowski, *Update: The Crude Oil Export Debate Explained*, THE FUSE (Sept. 11, 2015), <http://www.energyfuse.org/crude-oil-export-debate-explained/> (outlining the multiple legislative efforts to overturn the crude oil export ban).

171. DUNN, *supra* note 19, at 1. Despite previously issuing a veto threat for legislation in the House of Representatives that would have lifted the crude export ban, the President signed the spending bill into law. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY: H.R. 702 – TO ADAPT TO CHANGING CRUDE OIL MARKET CONDITIONS (Oct. 7, 2015), https://www.whitehouse.gov/sites/default/files/omb/legislative/sap/114/saphr702r_20151007.pdf.

172. MICHAEL E. PORTER ET AL., HARV. BUS. SCH., AMERICA’S UNCONVENTIONAL ENERGY OPPORTUNITY 45 (2015), <http://www.hbs.edu/competitiveness/Documents/america-unconventional-energy-opportunity.pdf>.

173. Turner, *supra* note 147; see HOUSE & WASSON, *supra* note 50.

174. PORTER, *supra* note 172, at 45; see OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT ON ADMINISTRATION POLICY: H.R. 702 – TO ADAPT TO CHANGING CRUDE OIL MARKET CONDITIONS (Oct. 7, 2015), https://www.whitehouse.gov/sites/default/files/omb/legislative/sap/114/saphr702r_20151007.pdf (the Obama Administration opposed previous Congressional efforts to lift the ban on similar restrictions to crude oil exports); see also OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT ON ADMINISTRATION POLICY: H.R. 8 – NORTH AMERICAN ENERGY SECURITY AND INFRASTRUCTURE ACT OF 2015 (Nov. 30, 2015), https://www.whitehouse.gov/sites/default/files/omb/legislative/sap/114/saphr8r_20151130.pdf. While the Administration has not explicitly opposed easing natural gas permit restrictions or natural gas exports, it opposed similar legislation regarding natural gas pipelines, which it believed would have “curtailed DOE’s ability to fully consider whether natural gas export projects are consistent with the public interest.” *Id.*

175. PORTER, *supra* note 172, at 45; see Danielle Spiegel-Feld, *In the LNG Export Debate, the WTO Can’t be Ignored*, BREAKING ENERGY (June 23, 2014), <http://breakingenergy.com/2014/06/23/in-the-lng-export-debate-the-wto-cant-be-ignored/> (concluding that the United States may be able to continue to curtail exports in a way that does not violate WTO obligations through careful policy formulation).

IV. CONCLUSION

In the midst of growing calls to revise and modernize America's policies regulating the export of LNG for economic reasons, renewed focus has been placed on whether or not this decades-old policy complies with our international trade obligations.¹⁷⁶ Several exceptions in the GATT allow for countries to enact restrictive trade policies if the country can successfully argue the policy is in place to conserve a natural resource, protect the public, or is essential to the country's national security interests.¹⁷⁷ As U.S. policies are not applied in a nondiscriminatory fashion and are not enacted simultaneously with domestic policies that restrict production or consumption of LNG, it is unlikely the United States can successfully argue these policies are valid exercises of conservation or protection measures.¹⁷⁸ The strongest argument the United States has for its current restrictions to qualify that a WTO exemption is assert that the export restrictions are essential to America's national security interests. But because the WTO has never ruled on this exemption, there is no precedent to look to for guidance.¹⁷⁹

Contrary to claims that the United States must statutorily revise current LNG and crude oil regulations in order to comply with our international trade obligations, the solution lies in simply revising the DOE's interpretation of current statutes.¹⁸⁰ By adhering to legal precedent and concluding that free trade in energy commodities and complying with international trade obligations is in our best national interest, the Administration can avoid a WTO challenge and ensure the United States is complying with our international trade obligations as WTO members.

176. Rattner, *supra* note 13.

177. GATT, *supra* note 61, at art. XXI.

178. BACCHUS & JEONG, *supra* note 14, at 12.

179. VANN ET. AL., *supra* note 56, at 11.

180. *Chevron, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

