

## DO U.S. LNG EXPORT LAWS, REGULATIONS, AND PRACTICES VIOLATE INTERNATIONAL FREE TRADE OBLIGATIONS?

**Synopsis:** This comment discusses the relationship between the World Trade Organization (WTO) report *China—Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum* (DS431) and possible challenges to certain U.S. energy laws, regulations, and practices concerning the exportation of liquefied natural gas (LNG).<sup>1</sup> In the Appellate Body Report, the WTO agreed with the United States’ arguments, finding China had imposed trade restrictions on rare earth minerals in violation of the General Agreement on Tariffs and Trade (GATT) and that China’s restrictions did not qualify under the health or environmental exceptions of the GATT.<sup>2</sup>

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### I. INTRODUCTION

The United States’ recent success in challenging China’s various export restrictions in WTO case DS431 may have paved the way for other WTO members to challenge our own LNG exportation laws.<sup>3</sup> To date, U.S. law requires the Department of Energy to first make a public-interest determination before LNG can

1. See e.g. Appellate Body Report, *China—Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431/AB/R (Aug. 7, 2014) [hereinafter *Appellate Body Report*].

2. *Id.* at 17-18.

3. Timothy Gardner & Valerie Volcovici, *Exclusive: U.S. Considering Options if Oil Export Ban Challenged*, REUTERS (Sept. 17, 2014), <http://www.reuters.com/article/2014/09/17/us-oil-exports-trade-exclusive-idUSKBN0HC10020140917>; See, e.g., Alan M. Dunn, *U.S. Export Restraints on Crude Oil Violate International*

be exported to countries with whom the United States does not have a free-trade agreement (FTA).<sup>4</sup> Countries that have FTAs with the United States can trade LNG without having to go through the additional public interest determination because they are considered *per se* in the public interest.<sup>5</sup> Since markets for LNG—natural gas cooled to a liquid state for transport—exist in many countries without FTAs with the United States, but are members of the WTO, the public interest review may violate GATT because it is facially discriminatory.<sup>6</sup>

Some of the arguments raised by the United States against China in DS431 could be made against the U.S. LNG export laws.<sup>7</sup> Additionally—like China did in DS431—the United States would likely try to justify its trade restrictions using the General Exceptions to the GATT. If challenged, the United States' LNG export laws may not withstand WTO scrutiny because they may be inconsistent with its obligations to other members of the WTO.<sup>8</sup>

## II. BACKGROUND

### A. *The GATT and the WTO*

From the mid-to-late 1900's, the GATT set forth the rules for most of world trade.<sup>9</sup> During that time, the GATT was only a provisional agreement between nation signatories, yet it was the leading platform for free trade negotiations.<sup>10</sup> After many years of negotiations, member nations ratified an amended GATT in 1994.<sup>11</sup> The amendments made to the GATT became known as the Marrakesh Agreement, and the treaty is comprehensively known as the GATT of 1994.<sup>12</sup>

The GATT of 1994 has struck down many barriers to free trade between member countries, most notably export quotas and duties. GATT Article XI(1) provides for the general elimination of quantitative restrictions:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or *export licences* or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the

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*Agreements*, GEORGE W. BUSH INSTITUTE 3 (Sept. 11, 2013), [http://bushcenter.imgix.net/legacy/USExport-Restrains\\_Dunn.pdf](http://bushcenter.imgix.net/legacy/USExport-Restrains_Dunn.pdf) [hereinafter *U.S. Export Restraints*]. Alan Dunn served as Secretary of the U.S. Dep't of Commerce under George H.W. Bush. Additionally he was a lead negotiator at the GATT Uruguay Round, which founded the WTO. *Id.* at 9.

4. Natural Gas Act, 15 U.S.C. § 717b (2005).

5. *Id.*

6. See e.g. Alan M. Dunn, et. al., *A Review of International Trade-Related Legal Obligations and Policy Considerations Governing U.S. Export Licenses for Liquefied Natural Gas* (Aug. 23, 2010), [http://www.fossil.energy.gov/programs/gasregulation/authorizations/Orders\\_Issued\\_2010/10\\_111sabine.pdf](http://www.fossil.energy.gov/programs/gasregulation/authorizations/Orders_Issued_2010/10_111sabine.pdf) [hereinafter *Dunn Obligations and Policy Considerations*].

7. *U.S. Export Restraints*, *supra* note 3.

8. *Id.*

9. *The GATT Years: from Havana to Marrakesh*, WORLD TRADE ORGANIZATION, [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact4\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm) (last visited Apr. 7, 2017).

10. *Id.*

11. *Id.*

12. *Id.*; See, e.g., General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter *General Agreement on Tariffs and Trade*]; See e.g. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867, U.N.T.S. 154 [hereinafter *Marrakesh Agreement*].

territory of any other contracting party *or on the exportation or sale for export of any product* destined for the territory of any other contracting party.<sup>13</sup>

GATT Article I also requires nation signatories to grant each other “most favored nation” status.<sup>14</sup> However, it is important to note that the GATT Article XX provides a number of exceptions, which countries can use to justify qualified violations.<sup>15</sup>

It was under the Marrakesh Agreement that the WTO was founded.<sup>16</sup> The WTO is an international body located in Geneva, Switzerland, tasked with overseeing trade between the WTO’s 164 member countries and enforcing the provisions of the GATT when disputes arise.<sup>17</sup> The WTO has its own adjudicatory body, and though it is not bound by *stare decisis*, the WTO endeavors to resolve disputes similarly to past cases.<sup>18</sup>

### B. WTO Dispute Settlement Process

Under the GATT of 1994 stringent deadlines and procedures were established to settle disputes between WTO member countries.<sup>19</sup> Disputes are settled between countries through the Dispute Settlement Understanding.<sup>20</sup> The dispute settlement process begins when a country requests consultations with the WTO alleging a member country has violated its obligations under the GATT.<sup>21</sup> From that point there is a mediation process.<sup>22</sup> If mediation fails, then a Panel is assembled to hear the case and publish its findings.<sup>23</sup>

If a party to the Panel’s findings seeks review of those findings, then the Appellate Body reviews the Panel’s findings and publishes an Appellate Body Report.<sup>24</sup> WTO member countries automatically adopt rulings within the Appellate Body’s Report unless there is a consensus among all member countries to reject it.<sup>25</sup>

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13. General Agreement on Tariffs and Trade, *supra* note 12 (emphasis added).

14. *Id.*

15. *Id.*

16. *What is the WTO?*, WORLD TRADE ORGANIZATION, [https://www.wto.org/english/thewto\\_e/whatis\\_e/whatis\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm) (last visited Apr. 7, 2017).

17. *Id.*

18. Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico* WT/DS344/AB/R 66-68 (May 20, 2008).

19. *Understanding The WTO: Settling Disputes*, WORLD TRADE ORGANIZATION, [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/disp1\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm) (last visited Oct. 22, 2016).

20. *U.S. Export Restraints*, *supra* note 3, at 2.

21. *Understanding the WTO: Settling Disputes*, *supra* note 19; *See, e.g.*, Understanding on Rule and Procedure Governing the Settlement of Disputes art. 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

22. *Understanding the WTO: Settling Disputes*, *supra* note 19.

23. *Id.*

24. *Id.*

25. *Id.*

*C. DS431: The United States' Complaint Against China, China's Response and the WTO's Dispute Settlement*

Four months after China became a WTO member, the United States requested consultations with the country on March 13, 2012.<sup>26</sup> The United States opposed the export restrictions China had placed on various forms of rare earths, tungsten, and molybdenum.<sup>27</sup> The United States alleged that China had imposed export duties and quotas on rare earths, tungsten, and molybdenum, which violated GATT Article XI.<sup>28</sup> The United States further alleged that China was unreasonably administering licensing requirements to enforce its trade restrictions, while favoring domestic entities over foreign competition.<sup>29</sup> The parties were unable to resolve the dispute and on September 24, 2012, a Panel was assembled.<sup>30</sup>

In its defense, China asserted that it could justify its export duties and quotas pursuant to the General Exceptions of the GATT.<sup>31</sup> Specifically, China attempted to raise General Exception (b), which allows a country to take measures that are "necessary to protect human, animal or plant life or health."<sup>32</sup> China argued that the export limitations were justified as an environmental measure because the mining operations undertaken to recover minerals are both dangerous to human health and negatively affect the environment.<sup>33</sup>

The WTO Panel circulated its findings on March 26, 2014.<sup>34</sup> The Panel found General Exception (b) was unavailable to China as a justification for the country's failure to meet the WTO's free trade obligations.<sup>35</sup> China's export duties were not "necessary to protect human, animal, or plant life or health," as General Exception (b) requires.<sup>36</sup> Therefore, China's export duties were in violation of its obligations, under the GATT, as administered by the WTO.<sup>37</sup>

With regard to China's export quotas, China attempted to raise General Exception (g) of the GATT, which allows for restrictions related to the conservation of natural resources so long as the restrictions are made in conjunction with domestic restrictions.<sup>38</sup> China argued that the export quotas were justified as a con-

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26. *Dispute Settlement: Dispute DS431*, WORLD TRADE ORGANIZATION, [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds431\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds431_e.htm) (last visited Oct. 21, 2016) [hereinafter *Dispute Settlement: DS431*]; See e.g. *China—Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum, Request for Consultations*, WT/DS431/1 (Mar. 13, 2012) (complaint by the United States) [hereinafter *U.S. Complaint*].

27. *Dispute Settlement: Dispute DS431*, *supra* note 26.

28. *U.S. Complaint*, *supra* note 26.

29. *Id.*

30. *Dispute Settlement: Dispute DS431*, *supra* note 26.

31. *Id.*; Panel Report, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431/R, at 58 (March 26, 2014) [hereinafter *Panel Report*].

32. *Appellate Body Report*, *supra* note 1, at 88; General Agreement of Tariffs and Trade, *supra* note 12, at 45.

33. *Panel Report*, *supra* note 31, at 74-75.

34. *Id.* at 1.

35. *Id.* at 65-6.

36. *Id.* at 252.

37. *Panel Report*, *supra* note 31, at 252.

38. *Id.* at 90; General Agreement on Tariffs and Trade, *supra* note 12, at 39.

servation measure, claiming that the quotas have spurred recycling efforts in addition to investment in mining locations outside China.<sup>39</sup> However, the Panel found that the quotas did not fall within the exception claimed.<sup>40</sup> Rather, the Panel found that the quotas were implemented in an effort to achieve policy goals, not conservation.<sup>41</sup> The Panel further found that such implementation was applied in a discriminatory manner and/or were disguised restrictions on international trade, which did not comport with General Exception (g) or the Chapeau of Article XX.<sup>42</sup>

China appealed the Panel's rulings to the Appellate Body (Body).<sup>43</sup> Some of the issues the Body had to decide were whether the Panel correctly determined that General Exceptions (b) and (g) of the GATT did not apply to China's export restrictions.<sup>44</sup> The Body ultimately agreed with the Panel's determination that China's various export restrictions on rare earths, tungsten, and molybdenum violated its international obligations under the GATT and were not justified under General Exceptions (b) or (g).<sup>45</sup>

The Body affirmed the Panel's finding that China did not justify its export quotas under General Exception (g) or its export duties under General Exception (b) because China failed to demonstrate the quotas and duties were applied in a permissible manner under GATT Article XX, notably the Chapeau.<sup>46</sup> Thus, the Body upheld the Panel's finding that China's export quotas and duties were not justified by the exceptions of the GATT.<sup>47</sup>

### III. ANALYSIS: DS431 AND THE INCONSISTENCY OF U.S. LNG EXPORT LAWS

The WTO's findings in DS431 could have considerable implications for U.S. LNG export laws.<sup>48</sup> DS431 and concern that analogous action might be brought against the United States may have encouraged the animus leading to a lifting of

39. *Appellate Body Report*, *supra* note 1, at 37.

40. *Dispute Settlement: Dispute DS431*, *supra* note 26.

41. *Appellate Body Report*, *supra* note 1, at 111; *See also Panel Report*, *supra* note 31, at 254.

42. *Id.* at 254. The Chapeau is the precursor paragraph to the General Exceptions found in Article XX of the GATT, which provides:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures.

General Agreement on Tariffs and Trade, *supra* note 12.

43. *Appellate Body Report*, *supra* note 1.

44. *Id.*

45. *Id.* at 154.

46. *Id.* at 152.

47. *Id.*

48. *See, e.g.*, Timothy Gardner & Valerie Volcovici, *supra* note 3; Brian Scheid, *US Limits on Crude, LNG Exports Violate World Trade Commitments: Report*, PLATS (July 15, 2015), <http://www.platts.com/latest-news/oil/washington/us-limits-on-crude-lng-exports-violate-world-21800258>.

the long-standing ban on U.S. crude oil exports, which were lifted in the omnibus-spending bill in December 2015.<sup>49</sup>

WTO findings may still have a role to play in U.S. laws, regulations and practices concerning the exportation of LNG to countries without FTAs with the United States, who are also members of the WTO.<sup>50</sup> Although no WTO member country has requested consultations on the matter, the U.S. laws concerning the exportation of LNG may be inconsistent with its obligations to other WTO countries.<sup>51</sup>

#### A. *The U.S. LNG Export Laws and Licensing Process*

LNG is created by condensing natural gas into a liquid state, which includes cooling it to below -162 °C.<sup>52</sup> LNG is particularly relevant in the context of exports because in its liquid state it is 1/600th the volume of methane in its gaseous state.<sup>53</sup> Condensing natural gas into LNG is ideal for transporting the commodity overseas.<sup>54</sup> Historically, the European Union and countries like South Korea and Japan have been colossal net-importers of LNG.<sup>55</sup> While the United States has an abundant supply of natural gas, many politicians and manufacturers oppose exporting it to foreign nations.<sup>56</sup> This is in large part based on arguments that it would raise the price of natural gas and in turn raise the cost of manufacturing in the United States.<sup>57</sup> In addition to manufacturers' opposition to exporting LNG, environmental groups have expressed opposition to exporting the fossil fuel in an effort to limit the growth of greenhouse gas emissions.<sup>58</sup>

The Natural Gas Act, as amended, requires any individual seeking to export LNG to receive a license from the Department of Energy (DOE).<sup>59</sup> Before the

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49. Gabrielle Levy, *Deal on Spending Bill Offers Something for Everyone*, U.S. NEWS & WORLD REPORT (Dec. 15, 2015), <http://www.usnews.com/news/articles/2015-12-15/deal-on-spending-bill-tax-package-will-lift-oil-export-ban>.

50. Brian Scheid, *supra* note 48.

51. *See, e.g., U.S. Export Restraints, supra* note 3.

52. *Basics*, CENTER FOR LIQUEFIED NATURAL GAS, <http://www.lngfacts.org/about-lng/basics/> (last visited Aug. 9, 2016).

53. *Id.*

54. *Id.*

55. *See* Jude Clemente, *Europe's Rise in Natural Gas Demand Means More LNG*, FORBES (June 19, 2016), <http://www.forbes.com/sites/judeclemente/2016/06/19/europes-rise-in-natural-gas-deman-means-more-lng>; *See also* Howard Rogers, *Asian LNG Demand: Key Drivers and Outlook*, THE OXFORD INSTITUTE FOR ENERGY STUDIES (April 2016), <http://www.oxfordenergy.org/wpcms/wp-content/uploads/2016/04/Asian-LNG-Demand-NG-106.pdf>.

56. Michael Bastasch, *Fight Over LNG Exports Pits Energy Industry Against Manufacturers*, *Chemical Industry*, DAILY CALLER (Jan. 12, 2013), <http://dailycaller.com/2013/01/12/fight-over-lng-exports-pits-energy-industry-against-manufacturers-chemical-industry/>; *See, e.g.,* Doug Palmer, *US Ban on LNG Exports Would Violate WTO Rules – Experts*, REUTERS (Jan. 31, 2013), <http://www.reuters.com/article/usa-trade-lng-idUSL1N0AZMTU20130131>.

57. *Id.*

58. *See e.g. Environmental Groups Petition Against Natural Gas Exports*, LNG WORLD NEWS (Aug. 14, 2015), <http://www.lngworldnews.com/environmental-groups-petition-against-natural-gas-exports/>.

59. 15 U.S.C. § 717b (2005).

DOE makes a determination on whether to approve individual license applications, it must comply with the National Environmental Policy Act (NEPA).<sup>60</sup> For most license applications to export LNG, the responsibility for preparing an “environmental assessment/impact statement” falls to the Federal Energy Regulatory Commission (FERC).<sup>61</sup> After FERC has completed its environmental review, the DOE must approve the license application unless the agency finds the proposed LNG exportation would be inconsistent with the public interest.<sup>62</sup>

Section 201 of the Energy Policy Act of 1992 (EPAct 1992) established a two-tier system for approving LNG export license applications.<sup>63</sup> EPAct 1992 has the legal effect of deeming all applications to export LNG to countries with FTAs as *per se* in the “public interest.”<sup>64</sup> Furthermore, the applications must be granted “without modification or delay.”<sup>65</sup> However, countries without FTAs are not deemed *per se* in the “public interest” and can often take months or longer to obtain approval from DOE.<sup>66</sup>

### *B. How U.S. LNG Export Laws Concerning Exportation to Non-FTA Countries Might Violate its International Obligations Under the GATT*

#### 1. Denial or Approval with Restrictions on Quantity (Export Quotas)<sup>67</sup>

James Bacchus, a former U.S. Congressman and former Chairman of the WTO Appellate Body, has asserted that the U.S. laws concerning the exportation of LNG to FTA countries and non-FTA countries differ, as preferential and more expedient treatment is given to applications seeking licenses to export LNG to FTA countries.<sup>68</sup> Thus, the “public interest” determination may be facially discriminatory to WTO countries without FTAs.<sup>69</sup> The two-tier system, with respect to non-FTAs, acts as a quantitative restriction as contemplated in GATT Article XI, which dictates that there shall be “[n]o prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures.”<sup>70</sup> Because the United States does not have FTAs with all WTO countries, it may be in violation of its obligations to WTO

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60. *Procedures for Liquefied Natural Gas Export Decisions*, 79 Fed. Reg. 48,132 (Aug. 15, 2014).

61. *Id.*

62. 15 U.S.C. § 717b (2005).

63. See e.g. *How to Obtain Authorization to Import and/or Export Natural Gas and LNG*, ENERGY.GOV, <http://energy.gov/fe/services/natural-gas-regulation/how-obtain-authorization-import-and-or-export-natural-gas-and-lng> (last visited Mar. 4, 2016).

64. *Id.*

65. *Id.*

66. *Id.*

67. Export Quota is defined as: “A restriction imposed by a government on the amount or number of goods or services that may be exported within a given period, usually with the intent of keeping prices of those goods or services low for domestic users.” Definition of Export Quota, DICTIONARY.COM, <http://dictionary.reference.com/browse/export-quota> (Apr. 7, 2017).

68. *Testimony of James Bacchus to the Subcommittee on Energy and Power* 5 (March 25, 2014).

69. *Dunn Obligations and Policy Considerations*, *supra* note 6, at 40-42.

70. General Agreement on Tariffs and Trade, *supra* note 12 (emphasis added).

members under GATT Article XI, which provides for the general elimination of quantitative restrictions.<sup>71</sup>

The laws, procedures, and standards used by the United States to license LNG exports are considerably similar to the export quotas and trade restrictions at issue in DS431, which the WTO Panel and Body found were inconsistent with its obligations under the GATT.<sup>72</sup> When the United States challenged China's imposition of quantitative restrictions on the exports of certain natural resources, the WTO found its export laws violated GATT Article XI and could not be justified by the General Exceptions found in Article XX.<sup>73</sup>

U.S. LNG export licenses provide for limits on the amount of LNG to be exported by licensed facilities to FTA countries and approved non-FTA countries.<sup>74</sup> This is analogous to China's export quotas on rare earths, tungsten, and molybdenum, which the WTO found to violate its obligations under the GATT.<sup>75</sup> At various stages in the Dispute Settlement Understanding (DSU) process the United States alleged (and the Panel and Body held) that the overall effect of China's export quotas was "to encourage domestic extraction and secure preferential use of those materials by Chinese manufacturers."<sup>76</sup>

The same argument could be made by a member of the WTO against the U.S. LNG export quotas.<sup>77</sup> Specifically, the "public interest" inquiry procedure of the licensing process shows that exports of LNG will be approved only if it is in the public interest.<sup>78</sup> Assuming *arguendo* that a member of the WTO brought a DSU suit against the United States, the country would likely draw on the arguments made by the United States and the Body's findings in DS431, arguing that the public interest determination is evidence of U.S. policies designed to encourage domestic extraction of natural gas and secure preferential use by U.S. manufacturers.<sup>79</sup> Though a search of legislative history does not support or work against an assertion that this was the intent of Congress when it passed EPAct 1992, this possible argument cannot be dismissed lightly.

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71. *Id.*

72. *U.S. Export Restraints*, *supra* note 3, at 3. Additionally, the United States brought suit against China in *China—Measures Related to the Exportation of Various Raw Materials*, under which the United States brought an almost identical suit alleging (and ultimately found by the DSU panel) China had violated its obligations under GATT Article XI by imposing quantitative restrictions on the export of coke, fluorspar, bauxite, zinc, and silicon carbide. *China—Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R (circulated Jan. 30, 2012) (complainant United States) (Body found that quantitative restrictions imposed by China were inconsistent with its obligations under GATT).

73. *Appellate Body Report*, *supra* note 1, at 23-25.

74. 15 U.S.C. § 717b (2005).

75. *Appellate Body Report*, *supra* note 1, at 154.

76. *Dispute Settlement: Dispute DS431*, *supra* note 26.

77. *U.S. Export Restraints*, *supra* note 3, at 3.

78. *Dunn Obligations and Policy Considerations*, *supra* note 6, at 40-42.

79. This premise is substantially supported by the enormous opposition to exporting natural gas. Several industrial groups and companies including chemical manufactures like Dow Chemical oppose and have lobbied against exporting Natural Gas because the abundance and cheap price of gas allows for cheaper production and in turn benefits U.S. manufacturing. *See e.g.* Michael Bastasch, *supra* note 56; *See also* Doug Palmer, *supra* note 56. As discussed previously it is also important to note that some of the opposition to LNG exports has also been driven by environmental groups who oppose the increased use of fossil fuels as it increases GHG emissions.

## 2. Delay and Discrimination as a Possible Basis for Violation of the GATT

Though the DOE has approved multiple licenses for the export of LNG to non-FTA countries, the restrictions on volume and delays in the licensing process may be a violation of the United States' obligations under the GATT.<sup>80</sup> The fact that DOE approves licenses to FTA countries without further delay or modification, while requiring further determinations and review under the public interest procedure for non-FTA countries may constitute discrimination under Article I or an undue delay under Article XI, similar to that found in DS431.<sup>81</sup>

Under Article I of the GATT, all signatories effectively grant "most favored nation" status to every member of the WTO.<sup>82</sup> This status essentially requires the United States to treat non-FTA members of the WTO with the same treatment it has granted FTA countries.<sup>83</sup> Furthermore, even if the U.S. licensing scheme is a permissible exception to Article XI, such as General Exception (b) or General Exception (g), both of which China raised as a defense for its trade restrictions, the restrictions must be administered reasonably under Article X:3(a) and in a non-discriminatory manner under Article XIII.<sup>84</sup> When viewing the current licensing scheme from this perspective, the additional requirements and review required of applications seeking to export LNG to non-FTA countries (who are members of the WTO) may violate Article I, Article XI:3(a), and Article XIII of the GATT.<sup>85</sup>

Additionally, undue delay in the approval of export licenses may violate Article XI.<sup>86</sup> Denial of a license is not a prerequisite to establishing a GATT violation.<sup>87</sup> While previous WTO cases have not clarified what amount of delay would constitute a GATT violation, the Panel in *Japan—Semi-Conductors* (complainant United States) found that export license reviews lasting three months violated the GATT.<sup>88</sup> In that case, the Panel found that delays on issuing export licenses constituted restrictions on exports in violation of Article XI.<sup>89</sup> Although government regulation of exports by requiring licenses is not *per se* a violation, it must be automatic to conform to the requirements of Article XI.<sup>90</sup>

In *Japan—Semi-Conductors*, the Panel noted that in a previous case import licenses that were approved within five business days were considered to be automatic.<sup>91</sup> Furthermore, the Panel found that the standard was applicable and "should, by analogy, be applied also to export licenses because it saw no reason

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80. Brian Scheid, *Could Any Limits on the US Export of LNG Violate the Law?*, PLATTS (Feb. 5, 2013), <http://blogs.platts.com/2013/02/05/lng-exports/>.

81. *Dunn Obligations and Policy Considerations*, *supra* note 6, at 40-42;

82. *Id.* at 42.

83. *Id.*

84. *Id.* at 34-36.

85. *Id.* at 34-42.

86. *U.S. Export Restraints*, *supra* note 3, at 6.

87. *Id.* at 6.

88. *Id.* at ft. n. 11; Panel Report, *Japan—Semi-Conductors*, BISD 35S/116 (adopted May 4, 1988).

89. *Id.*

90. *Id.*

91. *Id.*

that would justify the application of a different standard.”<sup>92</sup> This conclusion is probably based on the premise that Article I of the GATT applies to imports and exports.<sup>93</sup> Also, the Center for World Trade Organization Studies has asserted,

[s]pecifically in the context of energy, licensing requirements governing access to oil and gas pipelines and other export distribution networks have the effect of restricting the volume of oil and gas exported and could come under the disciplines of Article XI.<sup>94</sup>

Thus, even if the current licensing scheme is not facially discriminatory and within the confines of Article XI (and other articles discussed above), the lengthy approval of non-FTA exports may procedurally be in violation of the GATT.<sup>95</sup>

#### *D. Application of Exceptions Under GATT Article XX*

DS431 holds further significance because of the Body’s finding that China’s export quotas were not justified under Article XX, General Exception (g), and that it was inconsistent with the Chapeau.<sup>96</sup> It is important to note that all of the General Exceptions found in Article XX are subject to the Chapeau (first paragraph of Article XX).<sup>97</sup> The Chapeau essentially provides that the exceptions shall not apply to restrictions when they are applied in a discriminatory manner or disguised restrictions on international trade.<sup>98</sup>

In the event that a member of the WTO brings a complaint against the United States it would likely follow the U.S. complaint filed in DS431 and the arguments contained therein.<sup>99</sup> This is particularly significant because, logically, the United States would attempt to justify its restrictions on the volume of LNG exported and its facially discriminatory licensing scheme through the General Exceptions found in Article XX. China raised a couple of these General Exceptions as justification for its export restrictions on rare earths, tungsten, and molybdenum, which in DS431, the Body ultimately found unpersuasive or did not apply under the circumstances.<sup>100</sup>

In DS431 China attempted to justify its export quotas based on General Exception (g), which provides for the conservation of exhaustible resources and General Exception (b), which is a justification for restrictions implemented to protect human, animal or plant life.<sup>101</sup> The Panel in DS431 found that General Exception (g) could not justify China’s export quotas because the quotas were implemented to achieve policy goals and not conservation.<sup>102</sup> Although the Panel found that

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92. *Id.*

93. *See e.g.* General Agreement on Tariffs and Trade, *supra* note 12.

94. CENTER FOR WTO STUDIES, TRADE, THE WTO AND ENERGY SECURITY: MAPPING THE LINKAGES FOR INDIA 25 (Sajal Mathur ed., Springer 2014).

95. *U.S. Export Restraints*, *supra* note 3, at 4-5.

96. *Appellate Body Report*, *supra* note 1, at 154.

97. *Id.* at 124.

98. General Agreement on Tariffs and Trade, *supra* note 12.

99. *U.S. Export Restraints*, *supra* note 3; *See also* Brian Scheid, *supra* note 80.

100. *Appellate Body Report*, *supra* note 1, at 154.

101. *Id.*; General Agreement on Tariffs and Trade, *supra* note 12.

102. *Appellate Body Report*, *supra* note 1, at 124, 154.

General Exception (b) was entirely unavailable to justify the restrictions that violated its obligations under its accession protocols, on an *arguendo* basis it concluded that the exception was unavailable because the restrictions were applied to affect policy goals and not to protect human, animal, or plant life.<sup>103</sup> The panel found that such application violated the Chapeau.<sup>104</sup>

If challenged by a member of the WTO, the United States may find it hard to justify its restriction on the volume of LNG exported by licensees and its discriminatory licensing process by raising General Exceptions (g) or (b).<sup>105</sup> As discussed above, the United States treats FTA and non-FTA countries differently, thus, discriminating against non-FTAs.<sup>106</sup> The Chapeau (and Article XII) specifically requires that restrictive measures be made in a non-discriminatory manner.<sup>107</sup> For those reasons it may be difficult for the United States to justify its restrictions under any other General Exception.<sup>108</sup>

In light of the Chapeau, there is a strong argument to be made that the U.S. restrictions on LNG are similar to China's restrictions challenged in DS431 in the sense that they are arguably based on policy goals intended to benefit domestic manufacturing rather than a General Exception.<sup>109</sup> By using a "public interest" determination a WTO member could argue that the United States is concerned with their own interests without regard to its obligations under GATT. Additionally, the United States has previously failed to justify restrictions on trade through the Article XX's General Exceptions.<sup>110</sup>

#### IV. CONCLUSION

Some of the arguments raised by the United States against China in DS431, could be made against U.S. LNG export laws.<sup>111</sup> Concern that a suit analogous to DS431 could be brought against the United States may have partially supported and led to the lifting of the United States' longstanding ban on the exportation of crude oil in December 2015.<sup>112</sup> The "public interest" determination made by the DOE before approving licenses to export LNG to non-FTA members of the WTO

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103. *Id.* at 20.

104. *Id.* at 124.

105. *U.S. Export Restraints*, *supra* note 3, at 6-8; *Dunn Obligations and Policy Considerations*, *supra* note 6, at 24-25.

106. Testimony of James Bacchus, *supra* note 68, at 5.

107. General Agreement on Tariffs and Trade, *supra* note 12.

108. *U.S. Export Restraints*, *supra* note 3, at 6-8.

109. *Id.*

110. *Dunn Obligations and Policy Considerations*, *supra* note 6, at 28; *See also* Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (1997) (panel found that U.S. restrictions were discriminatory and "disguised restrictions on international trade"); Appellate Body Report, *United States—Tuna and Tuna Products from Canada*, BISD 29S/91 (1982) (panel found U.S. restrictions were not made in conjunction with restrictions on domestic production or consumption); Appellate Body, *US—Shrimp*, WT/DS58/AB/R (1998) (panel found that U.S. restrictions were discriminatory, "disguised restrictions on international trade," and in violation of the Chapeau).

111. *U.S. Export Restraints*, *supra* note 3.

112. *See e.g.* Timothy Gardner & Valerie Volcovici, *supra* note 3.

appears to be facially discriminatory.<sup>113</sup> Furthermore, even when licenses are granted, after a long and delayed process, they are granted for a specific maximum quantity per year.<sup>114</sup> The public interest determination, delayed licensing process, and the quantitative restrictions placed on licensees may constitute violations of U.S. obligations under the GATT.<sup>115</sup>

Like China in DS431, the United States may be unable to justify its violations under the General Exceptions in Article XX.<sup>116</sup> This is in large part due to the Chapeau, which governs the use of any exception.<sup>117</sup> Any exception the United States raises may be determined to be a disguised restriction on international trade and intended to achieve national policy goals, such as cheap natural gas for local manufacturing.<sup>118</sup>

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113. *Dunn Obligations and Policy Considerations*, *supra* note 6, at 40-42.

114. 15 U.S.C. § 717b (2005).

115. *Dunn Obligations and Policy Considerations*, *supra* note 6.

116. *U.S. Export Restraints*, *supra* note 3.

117. *Appellate Body Report*, *supra* note 1.

118. *U.S. Export Restraints*, *supra* note 3.

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