GATS & LNG Facility Siting in California
A Case Study of Proposed Trade Rules on Domestic Regulation

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# GATS & LNG Facility Siting in California

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Summary

**Liquified natural gas as an international service.** As the United States copes with expected energy shortages, foreign and U.S. companies have filed over 40 applications to build liquid natural gas (LNG) facilities on or near U.S. coastlines. Congress recently recognized and preserved the authority of state coastal commissions to review LNG projects for consistency with federal and state laws. At the same time, negotiators at the World Trade Organization (WTO) are debating proposals to “discipline” how governments regulate service suppliers, including those who operate coastal facilities for energy services.

**International trade rules & regulation of coastal facilities.** The WTO aims to complete the first round of negotiations on domestic regulation of services by the end of 2006. The negotiations are authorized by GATS, the General Agreement on Trade in Services. Proposals from various countries are controversial because they reach deep into domestic services that are traditionally regulated by states. U.S. trade negotiators will have to respond to deadlines that leave very little time to consult with state and local governments. This study seeks to promote federal-state consultation in advance of those deadlines by raising questions and options from the perspective of state regulators.

**Coverage of LNG facilities.** The GATS proposals would cover LNG facilities as a type of licensing or technical standard in over 90 sectors where the United States has committed or offered to follow GATS rules. LNG facilities appear to be covered by several commitments in the proposed U.S. schedule, including bulk storage of fuels and pipeline transportation of fuels. Questions identified by this study include: How can USTR carve out all LNG services from the U.S. offer and existing commitments? More generally, are rules on domestic regulation necessary for such a broad range of services?

**Proposed trade rules on domestic regulation.** GATS negotiators are debating the need for a variety of proposed rules, which they call “disciplines” –

- **Burdensomeness.** GATS authorizes a rule that domestic regulations must be “not more burdensome than necessary to ensure the quality of the service.” If adopted, a “burden” or “necessity” test would preclude the middle-range of policies that are not least burdensome. A test of ensuring the quality of the service would preclude policies that seek to regulate external impact of a service (beyond quality concerns of a consumer). Questions include: Would even the least intrusive proposal, which is that regulations must “relate to” LNG utility services, conflict with coastal regulations that seek to preserve natural resources, scenic views or historic places?

- **Legitimate objectives.** Some proposals require that domestic regulations be necessary to meet “legitimate” or “national” policy objectives. Several of these countries define “legitimate” policy objectives with a list of examples, which include only measures that relate to consumer interests in the quality of a service. Questions include: Are policy objectives legitimate if they go beyond consumer concerns to regulate external environmental or aesthetic impacts of a coastal facility? Would an obligation to serve national policy objectives constrain states that have different objectives or regulatory approaches than the federal government and other states?

- **Transparency.** The United States proposed a requirement to give notice and opportunity to comment before regulations are adopted. Most states already comply with this proposal, but many cities do not. Other proposals require domestic regulators to base their decisions on objective and transparent criteria. Questions include: Does the public participation process of a coastal commission introduce subjective and unpredictable issues into the review of a coastal facility permit? Would transparency obligations be an unfunded mandate on local governments?

- **Recognition and international standards.** Some proposals require use of international standards where they exist. Questions include: Would future development of international standards for LNG services limit states’ ability to develop innovative regulations?
I. Introduction and Methodology

Recent developments in international negotiations may conflict with the role of state coastal commissions and other agencies in regulating the siting of Liquefied Natural Gas (LNG) facilities.1 These facilities are part of a chain of services that transfer a volatile fuel from ship to shore; they include a port for ocean-going tankers, regasification technology, on-shore storage tanks and interconnections to pipelines.

As the United States has grown concerned about expected energy shortages, coastal states have received an increasing number of applications from companies that wish to build LNG facilities. State coastal commissions review LNG projects for consistency with federal and state laws. The extent to which governments can regulate service suppliers is currently a major topic that members of the World Trade Organization (WTO) are discussing under the General Agreement on Trade in Services (GATS).2 As an agreement that seeks to liberalize trade, the GATS is concerned with how countries regulate because government measures that make substantive and procedural demands may hinder the ability of domestic and foreign suppliers to provide services.

Negotiations about domestic regulation take place through a WTO Working Party on Domestic Regulation (WPDR) that has been attempting to draft “disciplines,” or trade rules that seek to minimize the burdens that WTO members place upon service providers. The proposed disciplines concern government “measures,” or a variety of regulatory means by which governments require service suppliers to meet qualifications, licensing requirements, and technical standards.

The rules that the WPDR is drafting are different from other trade rules in the GATS. The new rules are not concerned with whether a government measure discriminates between foreign and domestic companies, nor with whether the measure is a barrier to market access. Rather, the disciplines that the WPDR is negotiating would test for whether domestic regulations unnecessarily burden trade and whether regulatory procedures lack transparency. The tests are controversial because citizens elect governments to regulate for a wide variety of reasons and in ways that are unrelated to burdens on international trade. Therefore, a WTO test that narrowly defines the scope of permissible government regulation could be at odds with the practice of democratic lawmaking. Since the stakes are high, movement within the WPDR toward consensus on the new disciplines warrants scrutiny by state and local lawmakers and regulators.

The WPDR was slow to make progress on domestic regulation for many years, but its pace is quickening.3 Over the past few years, more than a dozen WTO members, including Switzerland, the EU, China, Australia, Japan, Poland, Mexico, Taiwan, Brazil, India, Chile and others have submitted proposals for the WPDR to consider. In October 2005, the Chairman of the WPDR prepared a draft that compiled the domestic regulation disciplines in a negotiating framework and applied them to an

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1 Not all coastal states have coastal commissions. Other agencies that might be involved in facility siting include land use commissions, energy commissions, environmental protection agencies, and utility commissions.

2 The negotiations on future rules most likely would apply to all levels of government. GATS Article I states that the agreement covers measures that control, direct, and regulate local governments as well as non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities. Article I.3 obligates WTO members to ensure that regulatory and local governments comply with GATS rules by taking “such reasonable measures as may be available.” GATS Art. I.

3 In 1998, the GATS WPDR (Working Party on Professional Services at the time) developed Accountancy Disciplines and negotiators have discussed making the discipline a model for other disciplines on government regulation. WTO, Council for Trade in Services, Decision on Disciplines Relating to the Accountancy Sector, S/L.63, (14 December 1998); see, Ellen Gould, TACD Background Paper on Trade in Services 4 (Trans-Atlantic Consumer Dialogue, October 2002).
“illustrative list” of specific functions.\textsuperscript{4} The Chairman’s 2005 Note was significant as a launching pad for discussions during the WTO Sixth Ministerial Conference in Hong Kong.\textsuperscript{5} In February 2006, the Chairman expressed the WTO’s intent to finalize the language of the domestic regulation rules.\textsuperscript{6} The United States Trade Representative (USTR) stated its intent to join other countries and the WPDR in “jumpstarting” the negotiations.\textsuperscript{7} Several years earlier, the United States, along with a core group of WTO members including Canada, Chile, the European Union, and Japan, had drafted initial negotiating papers order to begin clarifying their positions on energy services under the GATS disciplines.\textsuperscript{8}

This case study examines the role of the California Coastal Commission in regulating the siting of LNG facilities under the Coastal Zone Management Act (CZMA) as an example of how proposed GATS rules could compromise states’ ability to regulate LNG facilities. The study considers the potential conflict between GATS rules and state regulation of LNG through the methodology a WTO dispute panel would apply to the inquiry. The measure at stake is the California Coastal Commission’s review of proposed LNG projects based on the criteria and procedures of California’s coastal zone management plan.

First, in reviewing compliance with the GATS, a WTO tribunal would consider how the relevant measure affects the supply of the service or the service suppliers involved.\textsuperscript{9} Under the GATS, “Measures by Members affecting trade” are laws, regulations, rules, procedures, decisions, and administrative actions, including in respect of the presence of corporations in order to produce, distribute, sell, and deliver a service.\textsuperscript{10} The GATS is concerned with the impact of state measures on not only the operation of a given service, but also the company wishing to provide a service.

This case study describes the laws, regulations, procedures, decisions, and administrative actions that the California Coastal Commission applies to companies that wish to pursue projects that would provide LNG services. The study first illustrates that state review of proposed LNG projects could affect trade by slowing down or blocking the ability of foreign companies to provide LNG services. Congress recently clarified ambiguity about the states’ authority in this area in the Energy Policy Act of 2005 (EPAct 2005). The EPAct 2005 preserved a strong role for states to participate in approving proposed projects under the CZMA and other federal laws.\textsuperscript{11}

Second, a dispute panel would examine whether a challenged measure relates to qualification requirements and procedures, technical standards, or licensing requirements and procedures. These are the types of measures that are covered by GATS proposals on domestic regulation. The study suggests

\textsuperscript{4} WTO, Working Party on Domestic Regulation, \textit{Domestic Regulation: Preparation for the Sixth Ministerial Conference, Note by the Chairman}, Job(05)*** (5 October 2005).

\textsuperscript{5} Id.

\textsuperscript{6} WTO, Working Party on Domestic Regulation, \textit{Note by the Secretariat: “Road-Map” and Calendar of Meetings for 2006, Job(06)/28} (February 2006).


\textsuperscript{8} Peter C. Evans, Liberalizing Global Trade in Energy Services, \textit{in} AES Studies on Services Trade Negotiations 29 (2002).


that countries have proposed definitions of licensure and technical standards that are broad enough to cover the measures with which the Coastal Commission regulates the siting of LNG facilities. Recent proposals have not narrowed earlier definitions of these requirements.

Third, a panel would examine whether the measure affects a sector to which the GATS rules apply, most likely by considering the sectors to which a country has made a commitment to follow trade rules on market access and national treatment.12 “Affect” has a broad scope of application under the GATS and encompasses measures to the extent that they either directly or indirectly affect a service.13

This study argues that the Coastal Commission review affects trade in a subsector where the United States has made or has offered to make a commitment. The current U.S. offer proposes to commit bulk storage and pipeline transportation services. The study suggests that since the Coastal Commission review affects these services both directly and indirectly, the proposed disciplines on domestic regulation may apply to LNG facilities. This study also argues that neither the maritime transport exception to storage and warehouse services in the U.S. schedule nor other explanatory notes that relate to LNG are sufficient to exempt LNG from coverage under domestic regulation rules.

Fourth, a panel would examine whether the measure violates the provision of the GATS in question.14 This study considers how GATS rules and future disciplines may conflict with state siting of LNG facilities by analyzing possible interpretations of the burdensomeness test, legitimate objectives, transparency requirements, and international standards. The study focuses on several tests that the WPDR is considering that describe standards and delineate categories of permissible regulation. The study argues that the proposed tests would effectively limit permissible regulation to those government measures that assure the quality of a service, to the exclusion of those that regulate the environmental, safety, and other impacts of a service. The crux of the analysis describes the potential conflict between GATS rules and the specific measures by which the California Coastal Commission addresses environmental, safety, and security concerns. The study argues that these measures are prone to challenge under the GATS as being outside the scope of “legitimate policy objectives” or not sufficiently “related to” the activities of operating an LNG facility.

Finally, a panel would consider whether any exceptions provide a defense for a measure that would otherwise violate the GATS.15 The study argues that many Coastal Commission measures, including those that consider visual impact and public access concerns, would fit under none of the GATS exceptions.16

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14 Supra note 12 at 6.6.
15 Id. at 6.7.
16 Since the GATS jurisprudence is not well-developed, the case study utilizes analogy to the GATT in some sections, i.e. on exceptions. Of 330 complaints between 1995 and June 2005, only 12 were claims under the GATS and only 5 of the 12 came before a WTO dispute settlement body. See Matthew Tone, GATS Jurisprudence: Overview of Trade Law Issues and Implications, Ontario Ministry of Economic Development and Trade 1 (2005).
II. LNG Projects and State Regulation

A. LNG Projects

California and many other states anticipate energy shortages; they need new natural gas supplies as domestic gas consumption increases, reserves deplete, and gas prices rise. If the shortages are to be prevented, natural gas must be imported from other countries because the United States holds only a tiny fraction of total world reserves. The California Public Utilities Commission and the California Energy Commission agree that importing and extracting LNG may alleviate energy shortages and decrease natural gas prices. This is because LNG, gas that occupies 1/600th the volume of natural gas, may be efficiently stored in bulk and more cheaply transported across great distances. Importing LNG requires the construction of terminals to transfer LNG from tanker ships to the pipeline system.

Domestic and foreign corporations have responded to the energy shortage by proposing approximately forty projects to construct LNG receiving facilities. The new projects seek to supplement the six LNG terminals currently operating in Georgia, Louisiana, Maryland, Massachusetts, Puerto Rico, and the Gulf of Mexico. The Federal Energy Regulatory Commission (or the FERC) has approved twelve of these projects on the East and Gulf Coasts of the United States. These projects are awaiting other federal, state, and local approvals.

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17 See generally, Jeff C. Wright, The Developing Market for LNG in the United States: Demand for natural gas is expected to exceed supply, in Proceedings: The Coast Guard Journal of Safety at Sea of the Marine Safety & Security Council, 8 (2005) (U.S. gas demand expected to increase by 40% and supply by only 14.5% by 2025).

18 Id.

19 See, e.g., Presentation of Harvey Y. Morris, Assistant General Counsel of the Public Utilities Commission of the State of California, to 2005 Environmental Law Conference at Yosemite Sponsored by the Environmental Law Section of the State Bar of California, Chasing LNG Terminals in Coastal California (2005).


23 Id.; FERC is responsible for regulating interstate natural gas and electricity. Under Section 3 of the Natural Gas Act (15 U.S.C. § 717 (1994)) and EPAct 2005, it is the lead agency that permits the siting and construction of LNG projects.
Since California produces only a small percentage of its own energy and currently depends on a long and “leaky” supply chain from the East Coast and the South for its energy needs, several LNG suppliers have proposed constructing LNG facilities in California. Sound Energy Solutions (a joint venture of a Mitsubishi subsidiary and the ConocoPhillips corporation) has proposed an onshore project in the Port of

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Long Beach. Two Australian companies (BHP Billiton and Woodside Energy) have proposed separate projects off the shore of Ventura and Santa Monica Bay, in Cabrillo Deepwater Port and the Santa Monica Basin, respectively. An American company (Crystal Energy, LLP) has proposed a project off the shore of Ventura, in Crystal Clearwater Port. These projects are also currently undergoing various federal, state, and local reviews.

While California and other states have an interest in permitting LNG projects as a potential solution to their energy supply concerns, states also have an interest in carefully evaluating the safety and environmental effects of prospective LNG projects. International trade rules that minimize domestic regulation advance the former interest, but the latter interest potentially conflicts with trade rules that restrict state regulatory authority. Because it represents a sensitive balance between international trade liberalization and state regulatory goals, LNG siting illustrates the potential effects of GATS rules on state regulatory autonomy.

B. State Authority to Regulate LNG

Under current federal law, states have an active role in regulating LNG facilities. Before Congress passed the EPAct 2005, it was not clear whether authority over the siting of LNG rested with FERC or with the states. The basis for FERC’s authority was section 3 of the Natural Gas Act, which did not explicitly cover LNG facilities. After years of litigation over jurisdiction between the states and FERC, section 311 of EPAct 2005 amended the Natural Gas Act to vest FERC with exclusive authority to approve or deny an application for the siting of an LNG facility. However, under the EPAct 2005, Congress retained an active state role in the siting process. If Congress had not left a state role in place, the issue of international obligations trumping state law might have become moot. However, the GATS obligations on domestic regulation remain relevant because they could create grounds for legal challenges to state measures that states worked hard to protect.

Section 311 of the EPAct 2005 carved out the states’ authority under the CZMA, the Clean Air Act, and the Clean Water Act. Section 311(c) provides for the following:

(2) Section 3 of the Natural Gas Act (15 U.S.C. 717b) is amended by adding at the end the following:

(d) Except as specifically provided in this Act, nothing in this Act affects the rights of States under—
   (1) the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.);
   (2) the Clean Air Act (42 U.S.C. 7401 et seq.); or

29 On April 4, 2006, Esperanza Energy, a subsidiary of Tidelands Oil & Gas (a Texas corporation) was the latest company to announce plans to apply for a floating terminal in southern California. See Esperanza Energy Evaluating Southern California Offshore LNG Receiving Terminal, http://www.tidelandsoilandgas.com/flash_newsstand_040406.htm (last visited April 12, 2006).
(3) the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.).

(e) (1) The Commission [FERC] shall have the exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal. Except as specifically provided in this Act, nothing in this Act is intended to affect otherwise applicable law related to any Federal agency’s authorities or responsibilities related to LNG terminals.

The FERC website offers an interpretation of section 311:

States still have the ability to effectively ‘veto’ an LNG facility by denying permits associated with the Clean Water Act, the Coastal Zone Management Act, and the Clean Air Act.

The Federal Energy Regulatory Commission has exclusive authority under the Natural Gas Act to authorize the siting of facilities for imports or exports of LNG. But that authorization is conditioned on the applicant’s satisfaction of other statutory requirements for various aspects of the project. Substantial authority exists through current federal statutes pertaining to those aspects of the project for states to authorize or block and thereby effectively ‘veto’ development of an LNG facility. Nothing in the Energy Policy Act of 2005 changes the states’ authorities in this regard.33 (emphasis added)

Thus, a state agency may make determinations that could block a proposed LNG project by exercising its authority as recognized by federal law. Under the CZMA, states develop coastal zone management programs, and LNG projects must meet the requirements of the programs in order to be approved.34 The California Coastal Act comprises California’s coastal zone management program.35 Chapter three of the state’s Coastal Act provides the relevant standard of review by which the California Coastal Commission determines consistency between a proposed project and the Coastal Act.36 Without the state’s approval, FERC may not permit or approve the construction of a project.37 Yet notwithstanding this clear state authority, state regulation under the CZMA may conflict with international trade rules that the WTO is now considering. These are the proposed “disciplines” on domestic regulation under the GATS that seek to minimize burdens that states place upon service providers.

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33 Federal Energy Regulatory Commission, www.ferc.com, LNG- Laws and Regulations: States’ Rights in Authorization of LNG Facilities, http://www.ferc.gov/industries/lng/gen-info/laws-reggs/state-rights.asp#skipnavsub (last visited April 12, 2006). FERC’s reference to the states’ “effective veto” power could be an overstatement, given the possibility of a federal appeal of state decisions under the CZMA. However, FERC’s explanatory language underscores that the federal government did not preempt the entire field of LNG siting and left in tact a strong state regulatory role. Furthermore, states realistically may veto the siting of onshore terminals by virtue of ownership of coastal land, over which the federal government lacks eminent domain authority. Since LNG terminals are proprietary, not public utilities, the federal government may not constitutionally take state property to proceed with federally favored construction.

34 16 U.S.C. § 1451 et seq.


37 However, as mentioned and discussed further below, a project applicant may appeal a state’s determination of inconsistency to the Secretary of Commerce. It also bears mention that states have an advisory role to FERC under § 311(d) of the EPAct, 15 USC 717b-1, which requires FERC to consult with states on safety concerns regarding a proposed LNG facility. While this safety consultation does not rise to the level of state authority under the CZMA, FERC is likely to take a hard look and address the states’ safety concerns.
This study focuses on state authority under the CZMA, but states have additional authority under federal law to consult about and potentially block proposed LNG terminals. State exercise of this authority could conflict with GATS obligations. First, states have the authority to block off-shore facilities under the federal Deepwater Ports Act (DWPA). Under the DWPA, the Maritime Administration (MARAD) may approve offshore projects only if the governor of the coastal state adjacent to the proposed facility either recommends approval or remains silent during the time allowed for his or her recommendation. Second, a governor may either disapprove of the project (in which case a project applicant has no recourse to an appeal) or require MARAD to place conditions on the approval of the license in order to comply with state environmental, coastal zone management, or land use concerns.

In May 2006, the Governor of Louisiana vetoed a proposed LNG project, based upon her concerns about potential harm to fisheries, among other concerns. The governor also cited the project's lack of revenue sharing with the state as another reason for her veto. In its order rejecting the LNG facility, MARAD noted that revenue sharing was not an authorized reason for the governor to veto the project, but upheld the veto on the basis of the governor's remaining reason. This authority is important in California because all but one of the applications to date involve off-shore ports. Deepwater port applications have been filed for waters adjacent to many states besides California, including Massachusetts, Florida, and all of the Gulf Coast states.

In addition, section 311 of the EPAct 2005 requires governors of states affected by on-shore LNG projects to designate a lead state agency to consult with FERC about state and local public health and safety concerns. For example, the designated agency may provide safety advisory reports that FERC must consider and address before approving an LNG project.

III. GATS Rules: Current & Potential Coverage

A. Overview of GATS Structure

1. General Principles and Future Disciplines

The purpose of the GATS is to liberalize trade. In the context of domestic regulation, the GATS sets out general principles for member nations to restrict regulations on service providers. The GATS preamble as well as Articles III and VI include the obligations to administer measures that regulate services “impartially” and “reasonably” and to publish these measures in a way that is transparent. Article VI also provides a mandate for the Council for Trade in Services to develop any necessary disciplines “with a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services.”

(a) based on objective and transparent criteria, such as competence and the ability to supply the service;

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38 33 U.S.C. §§ 1501 et seq.
41 Supra note 10.
42 GATS Art. VI:4.
(b) not more burdensome than necessary to ensure quality of the service, and
(c) in the case of licensing procedures, not in themselves a restriction on the supply of the
service.43

The WTO’s Council on Trade in Services has delegated these negotiations to a Working Party on
Domestic Regulation (WPDR). Unless the WPDR chooses to limit the application of future disciplines to
only measures of the national government, the general principles as well as future disciplines would apply
to all levels of government.44

2. Sector Commitments and Scheduling

Under the GATS, countries make offers to liberalize specific services in order to extract favorable
terms from trading partners in return. When two or more countries agree to accept each other’s offers,
they make a commitment to the terms in their national schedules. These trading benefits are then
extended to all WTO Members. There are three elements of a commitment: the sector, the trade rules to
apply, and the modes of supply.45 The trade rules are listed in three columns in the national schedules,
including market access, national treatment, and additional obligations. The “national treatment” rules
prohibit government measures that deny the same “conditions of competition” to foreign and domestic
service providers.46 The “market access” rules generally prohibit government measures that impose
quantitative limits on service sectors.47 The sectors may refer to the United Nations Central Product
Classification (CPC) list of twelve sectors and 160 sub-sectors or rely on a country’s own description of a
sector.48

According to the GATS Scheduling Guidelines, if a WTO member wishes not to commit itself in a
subsector, the member could list the subsector and specify that the member is therein “unbound.”49 A
member could also limit a commitment by describing a particular measure that it wishes to carve out from
GATS obligations. Finally, a WTO member could limit the impact of commitments on a particular sector
through scheduling a limitation that would apply “horizontally” to all service sectors in which it makes a
commitment.

The negotiators from WTO countries have three options for coverage under domestic regulation rules.
The first option is to apply disciplines generally to all service sectors whether or not they have been
committed, as is the case for the existing transparency obligation. For example, the European Union has
favored general applicability without reference to commitments.50 The second coverage option is to apply

43 The USTR has raised the possibility that new disciplines may not be necessary. This is because Art. VI:4 does not create a
negotiating mandate that inevitably concludes with necessity disciplines, but a mandate to negotiate. Thus, the possibility
remains open that negotiators may decide that existing GATS provisions are sufficient and that new disciplines are
unnecessary to avoid regulatory barriers.
44 GATS Art I.3.
45 WTO, Council for Trade in Services, Guidelines for the Scheduling of Specific Commitments under the General Agreement
on Trade in Services, S/L/92 (28 March 2001).
46 GATS Art. XVII.
47 GATS Art. XVI.
48 WTO, Services Sectoral Classification List, MTN.GNS/W/120.
49 WTO, supra note 45, at ¶¶ 41-46.
50 Although not many members support this option of coverage, the WTO Secretariat has suggested, that because there is no
limitation in Article VI:4, Article VI:4 disciplines should cover all sectors. See WTO, Article VI:4 of the GATS: Disciplines
on Domestic Regulation Applicable to All Sectors, Note by the Secretariat, S/C/W/96, ¶ 6 (1 March 1999).
disciplines “horizontally” to all sectors that a country has included in its schedule of specific commitments to follow the rules on market access and national treatment. Some countries have proposed a hybrid of the first two options so that some disciplines would apply generally and others horizontally.\textsuperscript{51} The third option is to apply disciplines to individual sectors one-by-one and tailor obligations as they apply to those sectors. For example, the United States has accepted additional disciplines on accountancy and telecommunication services (and proposed to do so for energy services) in a reference paper that is attached to the schedule of commitments, rather than committing to broader coverage.

\textbf{B. Coverage of Measures that Affect LNG Facilities}

\textit{1. Measures “Related to” Licensure and Technical Standards}

Based on its review, the Coastal Commission either approves or recommends against a project to provide LNG services. The GATS article on domestic regulation covers “measures relating to qualification requirements and procedures, technical standards and licensing requirements.”\textsuperscript{52} Generally in GATS terminology, “qualification” refers to regulatory requirements on people, “licensing” refers to regulatory requirements on service providers, and “standards” are rules by which a service is performed.\textsuperscript{53}

The categories of regulations most relevant to the siting of LNG facilities are licensing requirements, licensing procedures and technical standards. Licenses have been defined broadly within the negotiations as any providing of formal permission to supply a service. The European Union defines licenses as a “relatively wide concept” that covers “licenses, authorizations, permits, for which certain requirements have to be fulfilled in order to obtain permission to supply a service.”\textsuperscript{54} The WTO Secretariat has defined technical standards as “requirements which may apply both to the characteristics or definition of the service itself and to the manner in which it is performed.”\textsuperscript{55}

The recent WPDR proposals do not depart from the earlier “relate to” test, and they propose definitions of licensing requirements, licensing procedures, and technical standards that remain broad. Brazil has recently used language identical to the definition Japan had proposed to define licensing requirements as “the substantive requirements, other than qualification requirements, which a service supplier is required to comply with in order to obtain a license or a formal permission to supply a service.”\textsuperscript{56} The Brazilian proposal also borrowed the Japanese definition of licensing procedures verbatim, as “the administrative procedures relating to the submission and processing of an application for a license.”\textsuperscript{57} Finally, the Brazilian proposal relies on a definition of technical standards that is similar to language Japan and Switzerland had proposed. The Brazilian paper refers to technical standards as “all


\textsuperscript{52} GATS Art. VI:4.

\textsuperscript{53} See Gould, supra note 3, at 7.


\textsuperscript{55} WTO, Working Party on Professional Services, \textit{The Relevance of the Disciplines of the Agreements on Technical Barriers to Trade and on Import Licensing to Article VI.4 of the GATS,} S/WPPS/W/9 (11 September 1999).

\textsuperscript{56} Working Party on Domestic Regulation, \textit{Communication from Brazil and the Philippines JOB (06)133} (2 May 2006); Working Party on Domestic Regulation, \textit{Communication from Japan, Draft Annex on Domestic Regulation, Job(03)/45/Rev.1} (2 May 2003).

\textsuperscript{57} Id.
technical regulations, which are mandatory, as well as voluntary technical standards when they become mandatory when adopted as a measure by a Member. Technical standards apply to the characteristics of the services definition and to the manner in which the services are supplied. The measures that the Coastal Commission applies in its review of LNG projects fit these definitions because they entail substantive and administrative requirements for licensure as well as technical regulations that apply to the manner in which LNG services are supplied or performed.

2. Committed Services

If negotiators from WTO countries choose to make disciplines on domestic regulation generally applicable, the disciplines would apply to all services, whether or not they have been committed in the U.S. schedule. However, if the negotiators choose to apply the disciplines “horizontally,” the revised U.S. offer of May 2005 will be of particular importance in determining the impact of domestic regulation disciplines on state regulation of LNG facilities. Under horizontal coverage, the proposed disciplines would apply to any Coastal Commission measure that affects the supply of services or the service suppliers involved in a committed sector or subsector.

The revised U.S. offer contains commitments under “bulk storage services of liquids or gases (except maritime transport services...) (CPC 7422)” and “pipeline transportation of natural gas (CPC 7131)” Liquefaction and regasification comprise a greater component of the total cost of the LNG value chain than storage and transportation, and it appears that the current offer does not cover these transitional stages of the LNG supply chain. However, the fact that the offer does not mention one element of the LNG supply chain does not mean that measures that affect other stages are exempt from coverage. If the United States makes a commitment on bulk storage or pipeline transportation, GATS rules on domestic regulation would apply to any Coastal Commission measure that affects the supply of those services or the supplier involved.

The word “affects” has a broad scope of application: the GATS applies to both direct and indirect affects of government measures on service suppliers. In European Communities – Bananas, the WTO Appellate Body affirmed that since tariff quotas on wholesale bananas affected the cost of goods procured and distributed by operators, they had an indirect affect on the supply of wholesale services and were thus covered under the GATS. Thus, measures that the California Coastal Commission applies to regulate the siting of LNG facilities are prone to challenge under the GATS if they either directly affect a covered component of the LNG supply chain or if they indirectly affect covered service activity.

LNG project applicants are corporations seeking to construct a facility that provides a variety of services, including storage and transportation of natural gas. At the facilities siting stage, it is the storage design and pipeline transportation plans of a service provider, and only tangentially the regasification

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58 Id.; The Japanese proposal defined technical standards as “either a mandatory or a voluntary standard which may apply both to the characteristic or definition of the services itself and to the manner in which it is performed.” Working Party on Domestic Regulation, Communication from Japan, Draft Annex on Domestic Regulation, Job(03)/45/Rev.1 (2 May 2003). For a very similar definition, see Working Party on Domestic Regulation, Communication from Switzerland, Proposal for Disciplines on Technical Standards in Services, S/WPDR/W/32 (1 February 2005).

59 See supra note 9 and accompanying text.


61 The Appellate Body quoted the Panel in the US-Bananas: “The scope of the GATS encompasses any measure of a Member to the extent it affects the supply of a service regardless of whether such measure directly governs the supply of a service or whether it regulates other matters but nevertheless affects trade in services.” Report of the Appellate Body, European Communities- Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/AB/R ¶ 217 (25 September 1997).
component of the LNG service, that state measures address. For LNG service suppliers wishing to construct an LNG facility, storage accounts for up to 50% of the total capital expenditure. Furthermore, the storage components of projects are becoming increasingly large as companies capture economies of scale. Coastal Commission review of proposed LNG projects affects suppliers involved in bulk storage and pipeline transportation both directly and indirectly.

- **Storage and warehouse services.** The U.S. revised offer excludes “maritime transport” from its commitment on storage and warehouse services. Although this exception appears to cover regulation of storage tanks that are onboard an ocean-going ship, it does not appear to exempt bulk storage on land. The Organization for Economic Cooperation and Development (OECD) has interpreted maritime transport to cover “LNG transported via tankers” but elaborates on neither how the other components of LNG services may relate to the WTO classification list, nor on the point at which onshore LNG services are to be distinguished from tanker transportation.

In determining coverage, a WTO dispute panel would examine the Services Sectoral Classification List (W/120), an official list of all sectors which are the subject of negotiations under the GATS. The panel would determine the correspondence between the relevant sector and a UN Provisional Central Product Classification (CPC) number, including explanatory notes for each subsector. If there is ambiguity about a discrete service that was more disaggregated than that provided by the W/120, the panel would assume that a country intended to include the service, unless the country explicitly stated otherwise.

“Maritime transport” appears in the W/120 as a subset of transport services that includes maritime freight transportation (CPC 7212); it is separate from freight transportation through internal waterways. Thus, the maritime transport exception applies to CPC 72122, which includes “transportation by seagoing vessels of bulk liquids or gasses in special tankers [that] may be refrigerated.” This class is exclusive of bulk storage of liquids or gasses onshore, which falls under a separate class, CPC 742. Since CPC classes are mutually exclusive, the U.S. commitment to bulk storage covers bulk storage of liquids or gasses onshore.

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64 Supra note 12 at 6.85.

65 Id.

66 Supra note 45.

67 In *US-Internet Gambling*, the Appellate Body confirmed that CPC classes are mutually exclusive. The Appellate Body reasoned that where a country’s schedule “follows the structure of W/120 in all other respects, and adopts precisely the same terminology as used in W/120” a schedule is interpreted to have the same coverage as the corresponding W/120 sector unless the WTO member clearly indicates otherwise. Report of the Appellate Body, *United States—Measures Affecting the Cross Border Supply of Gambling and Betting Services*, WT/DS285/AB/R ¶¶ 202-205 (7 April 2005). The Appellate Body explained that, “[T]he [Scheduling] Guidelines make clear that parties wanting to use their own subsectoral classification or definitions—that is, to disaggregate in a way that diverges from W/120 and/or the CPC—were to do so in a "sufficiently detailed" way ‘to avoid any ambiguity as to the scope of the commitment.’” The example given in the Scheduling Guidelines illustrates how to make a positive commitment with respect to a discrete service that is more disaggregated than a service subsector identified in W/120. It is reasonable to assume that the parties to the negotiations expected the same technique to be applied to exclude a discrete service from the scope of a commitment, when the commitment is made in a subsector identified in W/120 and the excluded service is more disaggregated than that subsector.” Id at ¶ 203. Since the U.S. commitment clearly adopts the terminology of W/120, the absence of an indication to exempt onshore bulk storage of
Thus, the maritime transport exception would not exempt from coverage measures that directly regulate onshore LNG warehouse and storage services. Even a measure that directly affects maritime transport might not be exempted from coverage if it indirectly affects onshore storage services. For example, if the Coastal Commission requires onboard storage in order to minimize the impact of large storage tanks on the coastline, this measure would affect maritime transport services as well as onshore bulk storage of natural gas.

- **Pipeline transportation of fuels.** The U.S. schedule does not exempt maritime transport from pipeline transportation of fuels. The relevant CPC Code (7131) may correspond to a subclass in CPC Ver. 1.0 (64310) which contains explanatory notes that exempt regasification and distribution services of natural gas from pipeline transportation services. However, the U.S. offer does not explicitly make reference to the explanatory notes. Furthermore, the U.S. offer does not distinguish LNG services in such a way that the service would correspond fully to an activity to which the CPC makes reference.

LNG services providing “pipeline transportation of fuels” entail a variety of activities, including some that are outside the scope of “regasification services of natural gas” or “distribution services of natural gas to end-users.” For example, a new technology would provide “vaporizing” services which would involve a coaxial pipe-in-pipe arrangement and the “injecting” of natural gas from the pipeline to a salt cavern located onshore or offshore. Since the technology involves seawater acting as a heating agent that flows through the outer pipe and warms LNG from -260 degrees Fahrenheit to 40 degrees, the Coastal Commission would be interested in reviewing the thermal effects of the project as they relate to marine biology and air quality. Since “vaporizing,” “injecting,” and “heat-exchanging” are not necessarily identical to “regasification” or “distribution,” exceptions of regasification and distribution services, even if they were to apply, may not be sufficiently broad to cover an environmental or safety review of this process. Exposing LNG pipes to sea water could have a significant thermal impact on coastal marine ecology.

Since the United States has not yet incorporated the current offer into its schedule of specific commitments, it is not too late for the USTR to make changes to the revised U.S. offer in order to limit the extent to which trade rules apply to the regulation of LNG. For example, the USTR could modify the natural gas would suggest that such storage is included in coverage, even in the absence of specific reference to the precise CPC codes.

68 Central Product Classification Version 1.0, ST/ESA/STAT/Ser.M/77/Ver. 1.0, E.98.XVII.5


70 Furthermore, the U.S. schedule includes “services incidental to energy distribution” (CPC 88700) and “all sectors: acquisition of land,” which means that the United States may have made a commitment in sectors relevant to LNG services without entering a particular specification to exempt LNG from coverage.

First, as for “services incidental to energy distribution,” the United States has submitted a communication to the WTO that includes the operation of natural gas facilities provided for distribution networks and the “operation of liquefaction and regasification of natural gas” as activities related to the operation of an energy facility. WTO, *Communication from the United States, Classification of Energy Services*, S/CSC/W/27 (18 May 2000). An extensive analysis of the commitment on services incidental to the distribution of energy is outside of the scope of this study, but it is also worth noting that the Communication from the United States lists “operators of natural gas” under “Activities related to energy networks (e.g., Energy transportation, Transmission, and Distribution).” For fuller treatment of this commitment in the context of electricity services, see Working Group on Energy & Trade Policy, *GATS and Electricity* (2005), available at
the U.S. schedule to exclude not only maritime transport in the context of storage and warehouse services, but more explicitly LNG facilities in the context of both pipeline transportation of fuels and storage and warehouse services.

**Revised GATS Offer of the United States – May 2005**

**Bulk Storage**
- Storage and warehouse services
- Includes “bulk storage services of liquids and gasses”

**Transportation**
- Pipeline transportation of fuels
- Includes “transportation of petroleum and natural gas”

Finally, an additional question remains about whether a limit on U.S. commitments (market access and national treatment) would also limit coverage under disciplines on domestic regulation. With one exception, the proposals are silent as to whether the domestic regulation rules would cover limits on commitments. Brazil recently proposed that the domestic regulation rules would apply horizontally and would cover domestic regulation measures that are carved out of commitments on national treatment and market access.71 Such an approach would negate the effectiveness of scheduling a limit in the national treatment and market access commitments in order to exclude LNG from domestic regulation coverage. Alternatively, if negotiators do not cover limits on commitments, then any exceptions in the U.S. schedule under storage and warehouse services would not be covered by any new disciplines on domestic regulation.

**IV. Potential Conflicts**

http://www.ncsl.org/print/standcomm/scecon/GATSandElectricity0405.pdf (last visited April 15, 2006). If services incidental to energy distribution includes activities related to the operation of an energy facility, the United States has already made a commitment that covers regulation of LNG facilities. The USTR therefore may wish to clarify the U.S. offer and schedule of commitments to avoid an interpretation covering LNG facilities siting.

Second, “acquisition of land” is particularly relevant to LNG facility siting because states may block LNG projects by refusing to sell land to LNG service suppliers or through regulation of coastal land use. See supra note 33. For example, in order to block land access states may apply the approach of a transportation bill in Massachusetts that blocked water access. The bill included “slip language” to prevent the planned destruction of an old bridge in order to block the ability of LNG tankers to pass through the area. This presented a burden on the company developing the project which responded by shipping the gas in smaller tankers that had to operate more frequently. See, e.g., Jim Snyder, Fight Over Gas Terminal May Go a Bridge Too Far, in The Hill (May 3, 2006), available at http://www.hillnews.com/thehill/export/TheHill/Business/050306_gas.html (last visited May 24, 2006). Denial of a coastal land use permit or a recommendation against granting a federal LNG facility permit is a more overt barrier to acquisition of land for purposes of providing a service in a committed sector.

71 Supra note 56.
Any disciplines on domestic regulation would implicate state regulation of service providers in a way that the existing GATS rules on “national treatment” and “market access” have not. The “national treatment” rules prohibit government measures that deny the same “conditions of competition” to foreign and domestic service providers. The “market access” rules generally prohibit government measures that impose quantitative limits on service sectors. In contrast to these, the disciplines on domestic regulation propose to require state measures to be “no more burdensome than necessary” on trade. The WTO could find a wider variety of state measures to be “unnecessarily burdensome” even if the measures are protectionist neither in motivation (national treatment) nor quantitative effects (market access), but rather, are measures that seek to advance legitimate regulatory objectives. A WTO finding that state measures are “more burdensome than necessary,” “not relevant,” and/or “not reasonable” constraints on international trade could trigger enforcement mechanisms that could restrict state participation in siting LNG facilities. This would conflict with Congress’ intent to give states a major role in assuring the environmental safety and security of LNG facilities.

A. Elements of Proposed Disciplines

The WTO Secretariat has written a paper, and numerous countries have submitted proposals interpreting “no more burdensome than necessary to ensure the quality of the service.” The proposals use several different phrases to describe the “necessity” test that would check for a measure’s legitimacy.

- The Secretariat’s Note explains that necessity tests require that measures which restrict trade in some way "are permissible only if they are 'necessary' to achieve the Member's policy objective."74

- In the Swiss proposal, a standard would only pass the necessity test if it were “not more trade-restrictive than necessary to fulfill legitimate national policy objective.”75

- In the Japanese proposal, the measure would have to be “not more burdensome than necessary to fulfill a national policy objective.”76

- In one of the proposals submitted by the EU, licensing procedures could not have "the effect of creating unnecessary barriers to trade in services" or be "a restriction on the supply of services."77 Decisions would have to "be taken promptly on all applications."

- In the Mexican proposal, a standard could “not restrict trade more than is necessary for attaining a legitimate objective.”78

- In the recent Brazilian proposal, the requirements for obtaining a license would have to be “related to the activities for which the license is sought.”79

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72 GATS Art. XVII.
73 GATS Art. XVI.
76 WTO, Communication From Japan, Draft Annex on Domestic Regulation. JOB(03)/45/Rev.1 (May 2003).
77 WTO, Communication From the European Community and Its Member States, Proposal for Disciplines in Licensing Procedures (July 2003).
78 WTO, Communication From Mexico, Mexico’s Experience of Disciplines on Technical Standards and Regulation in Services, S/WPDR/30 (24 September 2004).
79 WTO, Communication From Brazil and the Philippines, JOB(06)/133 ¶ III.2(b) (2 May 2006).
The trend in the WPDR appears to move away from a focus on what is necessary to “ensure the quality of the service.” Demonstrating the trend, the Chairman of the WPDR compiled an illustrative list of elements of domestic regulation disciplines, which did not interpret “quality of the service” and omitted explicit reference to “necessity” or “burdensome” with respect to substantive requirements.\textsuperscript{80} Instead, the Chairman’s Note suggested restricting licensing requirements to those “relevant” to the activities for which authorization is sought.\textsuperscript{81}

Although the alternative tests before the WPDR use a decreasingly demanding standard, they would apply to categories of “related” activities and “legitimate policy objectives” that remain narrow in scope. As standards, “related to” and “relevance” are less demanding than “not more burdensome” because a measure can be related or relevant even though it is more burdensome than other alternatives. However, the “relate to” or relevance tests could effectively mirror the burdensomeness test by reflecting the GATS focus on ensuring the quality of the service.

“Ensuring the quality of the service” may refer only to consumer interests, to the exclusion of other vital public interests, such as environmental protection, coastal development, and public safety.\textsuperscript{82} The “relate to” or “relevance” tests link permissible government measures to service activities, \textit{i.e.}, ensuring its inherent quality as a service, but not necessarily its external impact on the environment.\textsuperscript{83} For example, if a relevance test is applied to a review of an LNG project, the test may exclude a review of the affects of an LNG facility on sedimentation of a beach if coastal degradation is not sufficiently “related” or “relevant” to providing natural gas to utility companies.

“Legitimate policy objectives” may also restrict government regulation to a narrow category of measures. A dispute panel could interpret “legitimate” objectives as those that focus solely on the efficiency or reliability of a service, to the effective exclusion of other objectives. For example, the accountancy disciplines list four legitimate policy objectives: consumer protection, quality of the service, professional competence, and the integrity of the profession.\textsuperscript{84} The list, which appears in other proposals, leaves unanswered questions such as whether protecting worker’s rights or antitrust regulation would be legitimate policy objectives.\textsuperscript{85} The Mexican and Swiss paper adds protection of health and safety, public morals, national security, and prevention of fraud to the list in the accountancy discipline.\textsuperscript{86} However, in the context of LNG siting, even this expanded list of objectives leaves out environmental habitat protection, coastal land conservation, historic preservation, scenic preservation. Furthermore, even if

\begin{itemize}
\item \textsuperscript{80} \textit{Supra} note 4.
\item \textsuperscript{81} \textit{Id.}
\item \textsuperscript{83} It is interesting to note that the relevance test appears in Accountancy Disciplines. WTO, supra note 3 at ¶ 20.
\item \textsuperscript{84} WTO, \textit{Trade in Services, Disciplines on Domestic Regulation in the Accountancy Sector}, S/L/64, ¶ 2 (17 December 1998).
\item \textsuperscript{85} See, \textit{e.g.}, Working Party on Domestic Regulation, \textit{Communication from Australia: Draft Disciplines in the Engineering Sector}, S/WPDR/W/34, ¶ 2 (6 September 2005).
\end{itemize}
environmental and health concerns are legitimate policy objectives, the existence of less-burdensome alternatives would likely be a consideration in determining whether a measure is sufficiently relevant to a desired objective.  

As used by the Secretariat and the country proposals, a burdensomeness test may restrain governments from considering a range of policy options. Most legislatures work toward compromise in which neither the most-burdensome nor the least-burdensome option would satisfy a majority of legislators. The compromise is usually in the middle in terms of the burden on a service provider. A burdensome test would suggest that a government would have to choose the one regulation that least burdens trade, regardless of how that regulation related to a variety of other policy interests. Even if the WTO adopts a test with a less demanding standard, “legitimate objectives” and related “activities” may restrict the types of regulatory goals that governments might pursue to reviews of quality, leaving environmental and safety assessments outside the scope of permissible regulation.

The trend in the WPDR appears to be moving toward less demanding standards for substantive disciplines, but the proposals still appear to limit the scope of legitimate regulation, and they shift the focus to procedural promptness and transparency. For example, the Chairman’s Note included “review of necessity” as a transparency discipline and “reasonableness” under procedures and documentation. The Brazilian paper would require that licensing procedures not “unduly impede” licensure and that the time required for licensure be “reasonable.” Under a reasonableness test for licensing procedures, the Coastal Commission might violate the GATS by not providing approval in a “reasonable” period of time, even if it provides due process under U.S. law.

B. Conflict with Proposed Disciplines

1. Necessity

The following examples illustrate how California’s participation in siting LNG under the Coastal Act might fail the proposals for a GATS necessity test for domestic regulation:

- **Environmental review.** Under the Coastal Act, the Coastal Commission regulates to protect natural resources and restore coastal water quality. Uses of the marine environment are to be “carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term

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87 In a background note on energy services, the WTO Secretariat wrote, “[I]f on the one hand WTO Members have the right to continue to regulate the energy sector to ensure the achievement of legitimate policy objectives such as environmental protection, and health and safety in the energy sector, on the other hand the trade distortive effect of such regulatory measures should be minimised, by ensuring that they are no more trade restrictive than necessary to achieve a given policy objective.” WTO, Council for Trade in Service, *Energy Services- Background Note by the Secretariat*, S/C/W/52, ¶ 69 (9 September 1998).


89 Leebron, *supra* note 82.


91 *Supra* note 4.

92 *Supra* note 79 at ¶ IV.3(b)- IV.3(c).
commercial, recreational, scientific, and educational purposes." Projects are to minimize interference with surface water flow, natural vegetation buffer areas that protect riparian habitats, and minimize alterations to natural streams. However, if the Coastal Commission undertakes a review to protect coastal quality and marine biology, such objectives might fail to qualify as a "legitimate" and/or "national" objectives.

LNG services might have adverse affects on coastal vegetation or cause coastal degradation by disturbing landforms that protect against erosion and movement of beach materials. Building a bulk storage tank and constructing a pipeline system might entail bulldozing fragile sand dunes and thereby increase the likelihood of flooding during storms. If the Coastal Commission reviews a project’s impact on coastal degradation, the review would have direct effects on the ability to build onshore storage tanks and underground pipelines. Such an ecological review might fail to qualify as sufficiently “related to” providing storage and pipeline transportation services.

LNG services might also have adverse environmental impacts if tankers discharge or take on ballast water in order to maintain stability before or after unloading LNG. In order to assess environmental impacts, the Coastal Commission may review the affects on marine species of screens that an LNG tanker may use to prevent fish, other species, or debris from entering the ship. The Coastal Commission may also consider the environmental impact of ballast water pumps. A Coastal Commission review of a project’s impact on marine species and water quality would have direct effects on the maritime transport stage of the LNG process, which is not a committed sector, but also indirect effects on pipeline transportation, which is a committed sector. The protection of local ecosystems from invasive species might fail to qualify as a legitimate policy objective or “related to” providing LNG services to utilities.

Finally, under proposed disciplines on licensing procedures, the Coastal Commission may violate the GATS by not providing approval “promptly” or in a “reasonable” period of time as the Coastal Commission undertakes complex assessments of a project’s environmental impact and provides opportunities for public comment.

- **Safety review.** The Coastal Commission may require that an LNG project applicant provide for “protection against the spillage of crude oil, gas, petroleum products, or hazardous substances shall be provided in relation to any development or transportation of such materials” and that “effective containment and cleanup facilities and procedures shall be provided for accidental spills that do occur.” Since there is not much documentation of LNG spills in water, there are not yet standard procedures for cleaning such spills. A country may challenge Coastal Commission design requirements as more burdensome than necessary on a service provider if a less burdensome design could address the risk of a

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95 See, e.g., California Coastal Commission, Sample Policies for Planners Developing, Amending, or Reviewing LCP Policies on Shoreline Protective Structures, Hazards, and Beach Erosion, at http://www.coastal.ca.gov/la/docs/bear_ch5.pdf (last visited May 24, 2006).
96 California Energy Commission, supra note 20.
hazardous spill.  

- **Proximity to development.** The Coastal Act provides that, “Where feasible, new hazardous industrial development shall be located away from existing developed areas.” The Coastal Act defines "feasible" as "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors." “Feasibility” allows the Coastal Commission more discretion to deny a project than the proposed GATS obligation of “necessity.” The standard takes economic factors into consideration but does not require the Coastal Commission to regulate in a way that would be least burdensome upon a service provider. The California Appeals Court has held that the Coastal Commission may completely prohibit a development that has adverse environmental affects without undertaking to redesign the project in a way that would be economically feasible for the project applicant.

Since completely prohibiting a project is more burdensome than redesigning the project, the Coastal Commission’s regulation would conflict with the proposed GATS rules. If the Coastal Commission decides that a specific LNG project does not comply with the Coastal Act and could feasibly be located farther from a given population or offshore, the project applicant may find the requirement to redesign its proposal costly and a country may challenge this provision of the Coastal Act as burdensome.

- **Public access.** The Coastal Act requires new developments to provide for non-automobile circulation within the development and to address coastal recreational needs. Requiring an LNG supplier to maintain existing recreational uses or patterns of public circulation through an area might not be deemed to be a legitimate objective. If the Coastal Commission were to recommend against a site unless the facility or parts of the facility were located away from the coast, a country may challenge the public access provision as outside the scope of national policy objectives.

- **Scenic and visual qualities:** In approving a project, the Coastal Commission considers coastal development and aesthetic coastal features (including “the scenic and visual qualities of the coast”). The Coastal Act provides that, “Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas, to minimize the alteration of natural land forms, to be visually compatible with the character of surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded

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99 Not only Chapter 3, but also Chapter 8 (Ports) of the California Coastal Act may be relevant to environmental and safety review of LNG projects. Chapter 8 provides that port-related development “take into consideration the minimizing of substantial adverse environmental impacts” and that new or expanded tanker terminals be designed to minimize the volume of spills and to take account of the dangers associated with an earthquake that could cause spills of hazardous material. Cal. Pub. Res. Code §§ 30707-30708.


104 The California Coastal Act contains a safety exception that applies to maximizing public and recreational access. Cal. Pub. Res. Code § 30210. While it is unlikely that the Coastal Commission would require an LNG project to provide for public circulation through a tightly sealed facility, the Commission review may consider the affects of the project on existing public access within a proposed project location. Furthermore, the issue of public access may be relevant to projects that entail boating exclusion zones.
areas." The California Appeals Court has held that adverse cumulative affects on natural vegetation and natural habitats in an area constitute grounds for denying a permit under this provision. This standard and visual impact assessments serve objectives that may not be recognized as legitimate by a WTO tribunal.

Even if the objectives were accepted as legitimate, the requirements imposed to achieve them might be ruled to be unnecessarily burdensome, unreasonable, not relevant to the licensed activity, or trade restrictive. If an LNG project visually impacts a sensitive view shed, could the Coastal Commission condition a permit on its being placed underground, or would this be prone to a burdensomeness challenge? If the Coastal Commission were to recommend that a site be minimized in size by relocating storage facilities away from the coast, might this response to adverse scenic impact be prone to a challenge for being unreasonable, not relevant to the licensed activity, or outside the scope of ensuring the quality of the service?

Furthermore, the Coastal Act acknowledges that coastal-dependent industrial facilities will have some adverse consequences and permits the Coastal Commission to apply an industrial override policy in instances where alternatives have been exhausted, effects mitigated, and the public welfare considered. The three criteria of the “industrial override” provision may not correspond to legitimate national objectives. If the Commission chooses not to approve an environmentally harmful LNG project or a project that does not sufficiently consider public welfare, would the decision be more burdensome than necessary under the GATS?

To summarize, several state objectives under the California Coastal Act may serve objectives and impose requirements that would fail a GATS necessity test. National objectives for LNG services might be defined as increasing supply, dependability, and safety. To the extent that the Coastal Commission considers other issues as part of its review process, including recreational, historical, and aesthetic factors, the review may be prone to challenge as not necessary, not relevant or not reasonable with respect to the activity of operating a licensed LNG facility.

2. Legitimate Objectives

The WPDR has considered including a list of legitimate objectives in the future disciplines on

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106 Bel Mar Estates, 115 Cal App 3d at 936.

107 Japan has responded to the visual concerns LNG facilities raised by placing some facilities underground. See, California Energy Commission, supra note 20 at n.35.

108 Cal. Pub. Res. Code § 30260. "Coastal-dependent development or use" is “any development or use which requires a site on, or adjacent to, the sea to be able to function at all.” Cal. Pub. Res. Code § 30101.

109 Similarly, a foreign country may challenge state review under the DWPA and other state laws, including security regulation, as burdensome. (Supra note Error! Bookmark not defined.). A WTO member could challenge the DWPA requirement that a state governor approve an offshore project as burdensome. Under the DWPA, a state governor may consider a host of environmental and safety considerations that may fall outside the scope of ensuring the quality of the service. 33 U.S.C. §1503(c)(8). Other state regulation of the security dimension of a facility may also lie outside the scope of “ensuring the quality of the service.” The EPAct 2005 gives states a key role in regulating the safety and security of LNG facilities. Pub. Law No. 109-58, § 311(d)(sec.3A)(b). The Act requires governors of states in which LNG facilities are proposed to designate state agencies to coordinate with FERC on safety and security issues. The EPAct 2005 provides that state considerations should include: 1) the type and uses of facilities; 2) existing and expected population density and demographics; 3) existing and expected land use; 4) natural and physical properties of the proposed location; 5) emergency response capabilities near the proposed facility; and 6) the need to encourage remote siting. Like the Coastal Act criteria, these criteria may lie outside of the scope of ensuring the quality of the service.
domestic regulation. Under this alternative, rather than being limited to what was necessary to “ensure the quality of the service,” a measure would be compatible with the GATS disciplines if it is necessary to “fulfill national policy objectives.” One concern is that all of a state’s environmental and coastal considerations may not be deemed "legitimate." Another concern is that some countries would place state-level policy objectives in a precarious position by recognizing only “national policy objectives.” Were the WTO to adopt this phrase, the mere existence of a separate sub-federal review may be subject to challenge. Foreign delegations have previously expressed displeasure with regulatory differences between different states, which is a central feature of U.S. lawmaking. An illustrative list of examples that the WTO compiled of measures that countries suggested should be covered by the disciplines mentions “federal and sub-federal licensing and qualification requirements and procedures are different, making a license or qualification recognition obtained in one state not valid in other states.” Under the CZMA, each coastal state develops its own coastal zone management plan that provides for state-specific implementation and criteria of review. If the legitimacy of policy objectives were determined at the national level, would idiosyncratic state criteria of review be outside the scope of legitimate policy objectives?

3. Transparency

The GATS already requires regulatory transparency in order to prevent unnecessary barriers to trade. Additional domestic regulation disciplines are to be developed with the goal of ensuring that government measures are “based on objective and transparent criteria, such as competence and the ability to supply the service.” The idea is that transparency in the adoption and implementation of national regulations creates predictable conditions and minimizes subjectivity in decision-making that might restrict a supplier’s ability to provide a service. A country could challenge the Coastal Commission’s regulation of LNG services as subjective under the transparency discipline.

The review process under the Costal Act tends to be general and not entirely predictable. For example, a review of scenic and visual impact necessarily relies on criteria that are inherently subjective. The review process is also specific to individual projects. The scenic and visual impact review is based on an individual assessment of a given project.

Furthermore, the California Coastal Act provides meetings and hearings for voicing public questions and concerns about proposed projects. In some states, a negotiation process may give the public an opportunity to participate through voting in which the public considers short-term and long-term impacts on town safety, property values, economic impacts on nearby residential properties, and social impact on public properties such as schools. To the extent that opportunities for public comment decrease the

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110 WTO, Working Party on Domestic Regulation, *Summary of Discussions on the Checklist of Issues for the WPDR, Revision, JOB(02)/3/Rev.3, No.7* (3 December 2002); This approach was adopted in the Accountancy Disciplines. See WTO, *supra* note 3.


112 Article VI:4.


predictability of the review process, the Coastal Commission review may be insufficiently transparent and objective under the GATS.

4. International Standards

Some WTO Members are proposing that in determining whether a measure is "unnecessarily" burdensome, reference should be made to international standards. Switzerland and Mexico, for example, have proposed in a joint submission that: "Each Member shall use, as a basis for its technical standards, relevant international standards… A Member’s standards-related measure that conforms to an international standard shall be presumed to be consistent with these Disciplines."¹¹⁶

There are not yet international standards directly related to onshore LNG facilities, but as technical committees organize to develop such standards, the standards could impact state regulatory autonomy.¹¹⁷ Although several countries, including Europe and Japan generally utilize more stringent safety and environmental standards than those the United States considers, the United States has unique priorities that an international standard may not adequately address. For example, California has unique concerns related to the seismic activity of the state’s fault-lines and the state’s position of dependence at the end of a long set of pipelines.¹¹⁸ These unique concerns present a need to maintain regulatory autonomy over LNG facilities.

C. Exceptions

Articles XIV and XIVbis of the GATS provide exceptions under which a WTO member may justify any failure to comply with GATS obligations. These exceptions, which apply to both general obligations and specific commitments, may affect the impact of GATS disciplines on state regulation of services.

Article XIV includes an exception for measures “necessary to protect human, animal or plant life or health” and those “necessary to secure compliance with laws or regulations” including those related to safety. A similar provision in the GATT (Article XX(b)) has been used to justify measures regulating asbestos-containing products.¹¹⁹ Unlike the harmful effects of asbestos, which are well-documented, the safety of LNG for human and animal life is controversial. Furthermore, the adverse affects of LNG facilities may be mitigated in a way that the adverse affects of asbestos cannot, which suggests that government measures that block the ability to provide LNG services may be less likely to qualify as “necessary.” There is little precedence in the jurisprudence to suggest that the “human, animal, or plant life or health” provisions of Article XIV would provide an exception for California’s safety and environmental review of LNG facilities.


One reason that GATT art. XX(b) has been interpreted narrowly relates to a separate exception in GATT for conservation of exhaustible resources such as coastal land. This exception is missing from the GATS, suggesting that the GATS may not safeguard coastal conservation and other environmental protection from successful dispute challenges. The notes about the provision suggest that the drafters of GATS intended to include environmental protection, but the boundaries of the exception will not be clear until a greater body of GATS case law develops.\(^{120}\)

Second, a measure that is “necessary to secure compliance with laws or regulations” related to safety would qualify as an exception only if it is consistent with WTO law. To the extent that a state safety measure is in conflict with the burdensomeness or transparency disciplines, the justification for the measure would turn on a review of consistency with GATS disciplines that would make this exception irrelevant. For example, the exception would not protect the review of an LNG project’s ability to mitigate the affects of gas spills if the Coastal Commission design requirements were more burdensome than necessary on a service supplier.\(^{121}\)

Article XIV\(^{bis}\) lists security exceptions related to protecting measures a country considers to be essential security interests. Coastal Commission requirements that a proposed project be built away from existing development may be defended on the grounds that the measure mitigates the potential harms of a terrorist attack on a facility, a security interest the country deems essential. However, although the phrase seems deferential to a government’s ability to regulate for security reasons in such instances, this exception would not serve as an affirmative defense for most Coastal Commission measures, which are unrelated to homeland security.\(^{122}\) Many Coastal Commission review criteria, including visual impact and public access would fit under none of the GATS exceptions.\(^{123}\)

V. Enforcement

If there is a conflict, the GATS can be enforced in several ways that would compromise state ability to regulate LNG facilities. First, as with enforcement under other WTO agreements, another country may challenge federal or state laws under the GATS through WTO disputes and sanctions. If the challenge is successful, a WTO dispute settlement body could find the United States in violation of its trade commitments and subject the nation to trade sanctions such as tariffs.\(^{124}\) The complaining foreign government would have wide latitude to choose which imports to target.\(^{125}\) Foreign domestic industries would seize on the opportunity to push for greater protection from American imports that may not have to do with the dispute.\(^{126}\) American service providers that felt the affects of the trade sanctions would have

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120 WTO, Background Note by the Secretariat, Environment and Services, WT/CTE/W/9, ¶ 8 (18 June 1995).
121 See supra note 97 and accompanying text.
122 Furthermore, the exception clause like the one in the GATS has been successful as a defense only once in WTO case, in France’s ban on asbestos. The WTO panel found that the government measure was necessary because there were not other things the government could have done that were less trade restrictive. Gould, supra note 3 at 6.
123 The visibility review may partly relate to security, but is primarily motivated by scenic concerns in the Coastal Act. LNG facilities are highly visible and easily identified, which makes them vulnerable to terrorist attacks. Paul Parfomak, Congressional Research Service’s (CRS) Report for Congress, Liquefied Natural Gas(LNG) Infrastructure Security: Background and Issues for Congress 8 (2003), available at http://www.energy.ca.gov/lng/documents/CRS_RPT_LNG_INFRA_SECURITY.PDF (last visited April 23, 2006).
126 Id.
incentive to lobby Congress or the Executive Branch, which may then pressure the states to come into compliance with WTO rules.\textsuperscript{127}

Second, under the Uruguay Round Agreement Act (URAA), the federal government could sue a state to invalidate a state law that does not comply with treaty obligations.\textsuperscript{128} The URAA does not automatically preempt state law that conflicts with international law, but the federal government could take this action because it has a legal obligation under the GATS to enforce the trade commitments that apply at the sub-federal level.\textsuperscript{129} Particularly if a WTO dispute settlement body finds that a given state measure is inconsistent with the GATS, the threat of trade sanctions would give the federal government an incentive to bring states into compliance through legal action.\textsuperscript{130}

Third, under the CZMA, the Secretary of Commerce could use the Coastal Zone Management Act to override state decisions. If a state determines a project to be inconsistent with its coastal zone management plan, the Secretary of Commerce can grant an appeal or initiate a procedure to determine that the project is “consistent with the objectives of [the CZMA] or is otherwise necessary in the interests of national security.”\textsuperscript{131} If the Coastal Commission were to find that an onshore LNG terminal would adversely affect its coastline or jeopardize the safety of its residents, the Secretary of Commerce may have incentive to override a state decision if pressured by the threat of an international challenge.

Finally, apart from the threat of preemption, the federal government may press the states into conformity with the GATS by withholding certain types of grants from state coastal management programs. This might also include withholding of approval of state plans for spending federal funds. For example, when California attempted to apply state licensing standards on Mexican commercial vehicles in violation of a NAFTA agreement, the federal government convinced California to accept Mexican licenses as equivalent by threatening to withhold state highway funds.\textsuperscript{132}

VI. Conclusion: Protecting State Participation in LNG Siting

The proposed GATS disciplines on domestic regulation could cover and conflict with state regulation of LNG siting. Without clearly addressing the potential conflict prior to adoption of the disciplines, negotiators may create grounds for both domestic and international legal challenges to state participation in LNG siting. This study raises questions and options for U.S. negotiators to consider in order to preserve the authority of states to regulate coastal zones, which Congress has recently recognized and preserved.

\textsuperscript{127} Jide Nzelibe, \textit{The Role and Limits of Legal Regulation of Conflict of Interest (Part I): The Credibility Imperative: The Political Dynamics of Retaliation in the World Trade Organization's Dispute Resolution Mechanism.} \textit{6 THEORETICAL INQ. L.} 215, 224 (2005).

\textsuperscript{128} 19 U.S.C.A. § 3512.


\textsuperscript{130} The U.S. obligation to abide by international law is independent of domestic law on preemption.

\textsuperscript{131} Pub. Law No. 104-150 § 1456(C)(3)(a). The Act does not define “national security” but the Secretary of Commerce could presumably make an argument that an LNG facility addressed energy shortages in a way that was “necessary in the interest of national security.”

A. Summary of Analysis and Questions

1. **Coverage.** The proposed disciplines on domestic regulation may cover state regulation of LNG siting. First, when states review an LNG project in order to either approve or recommend against the construction of an LNG facility, they are applying a measure that relates to licensing procedures, licensing requirements, and technical standards, which the GATS proposals define broadly. Second, the most recent proposals on domestic regulation apply “horizontally” to all service sectors in which WTO members have made commitments.

The revised U.S. offer (May 2005) includes two new sectors that are relevant to LNG: one on bulk storage services of liquids or gases and one on pipeline transportation of fuels. Although there is no explicit reference to regasification services, bulk storage and pipeline transportation are central service components of LNG facilities. The exception for maritime transport services under the bulk storage subsector means that storage on ships is carved out, but storage on land is covered. There is no maritime transport exception associated with the commitment on pipeline transportation. There is also no explicit exception for LNG services under either commitment.

- **Sector coverage:** If the United States does not intend to commit LNG services (including coastal facilities), how can USTR carve out all LNG services from the U.S. offer and existing commitments? Alternatively, how can USTR limit its commitments with respect to regulation of coastal facilities? More generally, must rules on domestic regulation cover such a broad (“horizontal”) scope of service sectors, as opposed to individual sectors?

2. **Burdensomeness and Legitimate Policy Objectives.** Some of the recent proposals require that domestic regulations must not be “more burdensome than necessary” to meet “legitimate” or “national” policy objectives. A least-burdensomeness requirement would restrain governments using methods that are well within their constitutional authority. Even a more deferential test that requires regulations to “relate to” the activities for which a license is sought could conflict with state regulations that relate not to the service, per se, but to avoiding external environmental or aesthetic impacts of a coastal facility.

- **“Burden” or “necessity” test:** Will USTR agree to a “burden” or “necessity” discipline that lowers the regulatory burden that a state may impose in nondiscriminatory legislation under the U.S. Constitution?

- **“Relevance” or “relate to” test:** Would a less onerous discipline that requires licensing or technical standards to “relate to” LNG utility services conflict with coastal regulations that seek to preserve natural resources, scenic views or historic places?

The proposals that require domestic regulations to serve “legitimate” or “national” policy objectives are more deferential to state authority than the original language of GATS, which requires regulations to “ensure the quality of the service.” However, various countries are still defining “legitimate” objectives in terms of consumer interests in the quality of a service. When the Coastal Commission reviews LNG projects, its objectives include environmental protection, recreation, and scenic or historic preservation, which go well beyond providing LNG services to utility companies. Furthermore, if domestic regulations must serve national policy objectives, the coastal zone management plans of individual states may be challenged merely for variability at the sub-federal level.

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Variation among states: Would an obligation to serve national policy objectives conflict with states that have different objectives from the federal government or each other? Would GATS disciplines explicitly recognize that states and the federal government may have different objectives?

Legitimate policy objectives: What is the range of legitimate policy objectives? Are policy objectives legitimate if they go beyond consumer quality concerns to regulate external environmental or aesthetic impacts of a coastal facility?

Transparency. A country could challenge state regulation of LNG siting as subjective under transparency disciplines. The Coastal Commission applies general criteria in a review process that is not entirely predictable. The review criteria are applied individually to projects, which also decreases predictability. For example, a review of visual and scenic affects of a project is an inherently subjective and case-specific process. Furthermore, public meetings and hearings that are an integral part of the review may also be challenged as introducing subjective and unpredictable considerations for review.

Public participation: Does consideration of subjective and unpredictable concerns raised by the public contravene proposals that regulations must be based on transparent and objective criteria?

International Standards. As technical committees create international standards that cover LNG, state laws may have to conform to regulatory standards that states do not develop. States are currently working to create regulatory standards that address their unique safety and security needs. The requirement to conform to international standards would prevent them from further developing innovative standards.

Uniformity: Would proposed compliance with international standards limit the ability of states to innovate and develop regulations that go further or respond to unique local needs?

B. Options for GATS Negotiations

Because negotiators are still determining the exact language and coverage of the new disciplines, the USTR has an opportunity to minimize the likelihood that the domestic regulation disciplines will cover LNG facilities siting. The USTR could provide clarification of its commitments by carving out exceptions. The USTR could:

1. Clarify the revised offer on storage and transportation by specifying that the subsectors do not include LNG regasification or siting or operation of coastal facilities that are governed by coastal zone regulations or coastal zone management plans. Rather than referring to the CPC classifications, the USTR could refer to the intended services in words that explicitly exclude the LNG supply chain from coverage.

2. Clarify in similar fashion the scope of services within commitments on services incidental to distribution of energy and acquisition of land.

3. Place horizontal limits on coastal zone regulation to carve out the CZMA and other state measures.
4. Place the same limits on sector-specific coverage in those subsectors directly relevant to storage and transportation of gas.

5. Include notes in the U.S. schedule to clarify limits on the commitment.

Federal-state consultation could address the potential conflict between GATS rules and state measures. Negotiators would be in a more knowledgeable position in WTO discussions about burdensomeness, legitimate objective, transparency, and international standards if they were familiar with the state review process and state priorities for LNG facilities siting. They could better respond to other countries’ interpretations of GATS principles that push the negotiations in a direction unfavorable to state regulation of LNG facilities, such as the Brazilian and Japanese proposals on “national policy objectives.” The states could also help negotiators carve out LNG facilities siting from coverage under GATS rules. These are important steps to take to prevent potential WTO challenges.

Consultation with the states would also help negotiators draft appropriate exceptions to serve as affirmative defenses should a challenge arise against state regulation. Since the disciplines on domestic regulation have not yet been drafted, the negotiators are in a good position to prevent and mitigate the affects of a conflict between GATS rules and measures that states have fought hard to protect.