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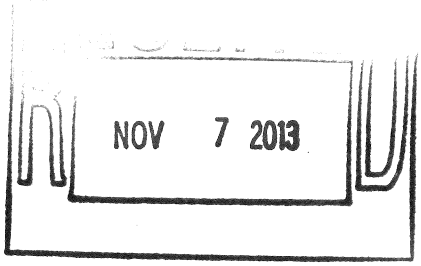

November 6, 2013

Office of Fuels Programs, Fossil Energy
U.S. Department of Energy
Docket Room 3F-056, FE-50
Forrestal Building
1000 Independence Ave., SW
Washington, DC 20585

To Whom It May Concern:

Enclosed for filing, please find a supplement to Applications for Long-Term Authorization to Export Liquefied Natural Gas currently pending before the U.S. Department of Energy, Office of Fossil Energy submitted by Joshua Zive on behalf of Cheniere Energy, Inc. for Sabine Pass Liquefaction, LLC (FE DOCKET NO. 13-30-LNG; FE DOCKET NO. 13-42-LNG; and FE DOCKET NO. 13-121-LNG). Should you have any questions, please do not hesitate to contact me directly at 202-828-5838. Thank you.

Respectfully submitted,

Joshua Zive
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Attorney for Sabine Pass Liquefaction, LLC

UNITED STATES DEPARTMENT OF ENERGY
BEFORE THE
DEPARTMENT OF ENERGY
OFFICE OF FOSSIL ENERGY

IN THE MATTER OF:

	)	**FE DOCKET NO. 13-30-LNG**
SABINE PASS LIQUEFACTION, LLC	)	**FE DOCKET NO. 13-42-LNG**
	)	**FE DOCKET NO. 13-121-LNG**

SUPPLEMENT TO APPLICATIONS OF SABINE PASS LIQUEFACTION, LLC FOR LONG-TERM AUTHORIZATION TO EXPORT LIQUEFIED NATURAL GAS

Pursuant to 10 C.F.R. § 590.204(a),[1] Sabine Pass Liquefaction, LLC ("Sabine Pass") hereby submits this supplement ("Supplement") to its Applications for Long-Term Authorization to Export Liquefied Natural Gas currently pending before the U.S. Department of Energy, Office of Fossil Energy ("DOE/FE") in the above-captioned proceedings ("Applications").[2] In its Applications, Sabine Pass is seeking authorization to export additional volumes of liquefied natural gas ("LNG") from the Sabine Pass Liquefaction Project, which currently is under construction in Cameron Parish, Louisiana. Through this Supplement, Sabine Pass seeks to bring to DOE/FE's attention certain provisions of the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and recent decisions by World Trade Organization ("WTO") dispute

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1 *See* 10 C.F.R. § 590.204(a) (2013) (providing that any person who has submitted an application for authorization to import or export natural gas under Section 3 of the Natural Gas Act "may amend or supplement the application at any time prior to issuance of the Assistant Secretary's final opinion and order resolving the application, and shall amend or supplement the application whenever there are changes in material facts or conditions upon which the proposal is based.").

2 *See* Application of Sabine Pass Liquefaction, LLC for Long-Term Authorization to Export Liquefied Natural Gas, *Sabine Pass Liquefaction, LLC*, FE Docket No. 13-30-LNG (Feb. 27, 2013); Application of Sabine Pass Liquefaction, LLC for Long-Term Authorization to Export Liquefied Natural Gas, *Sabine Pass Liquefaction, LLC*, FE Docket No. 13-42-LNG (Feb. 27, 2013); Application of Sabine Pass Liquefaction, LLC for Long-Term Authorization to Export Liquefied Natural Gas, *Sabine Pass Liquefaction, LLC*, FE Docket No. 13-121-LNG (Sept. 9, 2013).

settlement bodies[3]—as well as reports regarding those decisions[4]—which make clear that: (i) the United States ("U.S.") is obligated to grant most favored nation ("MFN") status for LNG exports to all WTO member countries including Japan ("WTO countries"), and (ii) under Article XI:1 of GATT 1994, DOE/FE may not restrict exports of LNG from the U.S. to WTO countries through either delays in application review or the imposition of a quota on exports.

I. Supplementation Is Appropriate at This Time

Sabine Pass respectfully submits that supplementing its Applications is appropriate and necessary in order to bring to DOE/FE's attention recent changes in material facts and conditions regarding trade policy and the WTO, and DOE/FE's determination in regulating natural gas exports under the Natural Gas Act of 1938, as modified by the Energy Policy Act of 1992 ("NGA"). As further detailed in Section III, *infra*, Article XI:1 of GATT 1994 forbids "prohibitions or restrictions" on the exportation of products to other WTO countries and specifically lists "quotas" as a forbidden means of imposing a prohibition or restriction. Accordingly, LNG exports to WTO countries should not be subjected to longer delays than LNG exports to countries with which the U.S. has Free Trade Agreements ("FTAs") that require

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3 *See* Panel Report, *China—Measures Related to the Exportation of Various Raw Materials* 77, 236, WT/DS394/R (2011) and Appellate Body Report, *China—Measures Related to the Exportation of Various Raw Materials*, AB-2011-5, WT/DS394/AB/R (Jan. 30, 2012).

4 The recent reports include a September 17, 2013, report by the Congressional Research Service ("CRS Report") that is attached as Exhibit A to this Supplement. *See* Adam Vann et al., Cong. Research Serv., R43231, *Federal Permitting and Oversight of Export of Fossil Fuels* (2013). The Congressional Research Service is required by law to conduct research on behalf of the Congress with "complete research independence" and "without partisan bias." 2 U.S.C. § 166(b), (c) (2012). While its reports are commissioned by Congress, they are frequently relied upon by other branches of the federal government. *See, e.g.*, *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 672 (2012). Also worth noting are media reports regarding the preliminary report that WTO will issue regarding Chinese rare earth metals. *See* Jijo Jacob, *China Opposes Release of WTO's Rare Earths Report Favouring US, Japan and EU*, International Business Times (Nov. 1, 2013).

national treatment for trade in natural gas ("FTA countries") or be subjected to restriction in the form of quotas, as both violate GATT 1994.

The U.S. is currently engaged in negotiating multiple new FTAs while simultaneously seeking WTO action to prevent China from restricting its exports of rare earth materials. These policy initiatives are premised on the centrality of free trade to the global economy and the notion that WTO countries cannot restrict exports to other WTO countries unless the relatively narrow exception requirements established by the WTO are satisfied. For the foregoing reasons, good cause exists for DOE/FE's record in the above-captioned proceedings to be supplemented in order to include Sabine Pass's arguments herein.[5]

II. WTO Countries are Afforded Most Favored Nation Status for Exports

Article I of GATT 1994 grants MFN status to all GATT 1994 signatories and requires that "any advantage, favour, privilege or immunity granted by any [WTO country] to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other [WTO countries]."[6] These requirements are broad, and Article I applies to all rules and formalities in connection with importation and exportation. Additionally, the U.S., pursuant to its schedule of commitments under GATT 1994, is obligated to afford MFN treatment to all WTO countries with respect to imports and exports of all products not specifically exempted from such

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5 Sabine Pass submitted to DOE/FE with its September 2010 Application a study by Stewart and Stewart, *A Review of International Trade-Related Legal Obligations and Policy Considerations Governing U.S. Export Licenses for Liquefied Natural Gas* (2010) [hereinafter Stewart & Stewart Report]. While Sabine Pass incorporates the Stewart & Stewart Report by reference here, it notes that there have been important developments in WTO jurisprudence since September 2010, as discussed in Section II, *infra*.

6 GATT 1994, Art. I.

commitments. Notably, LNG is not exempted.[7] Furthermore, a recent CRS Report cites WTO precedent finding that, "This broad category of rules and formalities appears likely to include prerequisites for exportation such as licensing requirements or other preliminary measures."[8] It is worth noting that the same report recognizes that the U.S. has almost a half century long history of exporting LNG to non-FTA countries such as Japan.[9] For a period stretching from 1969 until 2013, ConocoPhillips Alaska and its predecessors exported LNG from Alaska to Japan pursuant to multiple licenses issued by DOE/FE and its administrative predecessors.[10] This history of exporting LNG prior to entering into GATT 1994, combined with the fact that LNG is not listed among the products that are exempted from MFN treatment,[11] speak to the fact that the differential treatment of WTO countries by DOE/FE via its process to authorize LNG exports is inconsistent with GATT 1994 requirements.

III. GATT 1994 Prohibits Restriction on Exports of LNG to WTO Countries

GATT 1994 generally prohibits restrictions on exports of fossil fuels to WTO countries, albeit with limited exceptions that are to be construed narrowly. Even invocation of those limited exceptions, moreover, may not be used to justify export restrictions that treat WTO countries in a discriminatory manner.

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7 *See* Marrakesh Protocol to the General Agreement on tariffs and Trade 1994, Schedule XX-United States of America, Part I, Section II, page 54 at HTS 2711.11.00 "Liquefied natural Gas," and Annex C (setting forth U.S. exemptions).

8 *See* CRS Report at 9 (citing Panel Report, U.S.—Certain Measures Affecting Imports of Poultry from China, paras. 7.407, 7.410, WT/DS392/R (September 29, 2010) ("We conclude that 'in connection with importation' as used in Article I, not only encompasses measures which directly relate to the process of importation but could also include those measures ... which relate to other aspects of the importation of a product or have an impact on actual importation." The same reasoning could apply to measures that have an impact on actual exportation, such as licensing requirements)

9 CRS Report at 11.

10 Order 350 and subsequent extensions.

11 *See* Marrakesh Protocol to the General Agreement on tariffs and Trade 1994, Schedule XX-United States of America, Part I, Section II, page 54 at HTS 2711.11.00 "Liquefied natural Gas," and Annex C (setting forth U.S. exemptions).

A. The NGA, as applied by DOE/FE, Establishes Export Restrictions

The NGA establishes a two-track review process for LNG export applications that deems applications to export LNG to FTA countries to be in the public interest, whereas applications to export LNG to WTO countries that are not FTA countries ("non-FTA WTO countries") are forced to endure significant delays and uncertainties as the applications undergo an extensive public interest analysis.[12] In practice, this two-track system has placed LNG export applications to non-FTA WTO countries at a significant disadvantage because of the time and expense associated with reviewing those applications. These disadvantages will only be magnified if they are combined with a DOE-imposed quantitative restriction in the form of quotas on LNG exports.

The NGA and DOE/FE's application of the NGA, with its attendant delays and restrictions on LNG exports to WTO countries, are inconsistent with the U.S.'s commitment to provide MFN treatment to WTO countries pursuant to Article I of GATT 1994. As discussed *supra,* the MFN requirements under Article I and III of GATT 1994 apply broadly, and the U.S. did not elect to exempt LNG from its MFN commitments when it ratified GATT 1994.

It is important to note that Sabine Pass does not contend that FTAs are inherently inconsistent with the obligation to provide MFN treatment to WTO countries. Article XXIV of GATT 1994 allows WTO countries to enter into FTAs.[13] However, the NGA, which notably is not a FTA, maintains a preexisting impediment to MFN treatment in the form of LNG export authorizations by requiring DOE/FE to both consider exports of LNG to FTA countries to be in

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[12] 15 *U.S.C.* § 717b(c).
[13] GATT 1994, Art. XXIV.

the "public interest" and grant applications for such LNG export without modification or delay. The NGA does not satisfy the FTA exceptions in Article XXIV of GATT 1994 because the FTA provisions in the NGA were not made in conjunction with a specific FTA or any future FTA. Moreover, there is no evidence that either the North American Free Trade Agreement ("NAFTA") or any FTAs adopted subsequent to the enactment of the NGA require that a differential process for the authorization of LNG exports be maintained by DOE/FE. In fact, the limited legislative history of the NGA's FTA provisions indicate that these provisions were adopted as the result of a broad concern over their acceptability under a 1988 bilateral trade agreement with Canada.[14] Accordingly, because the NGA was not required to effectuate a FTA and because the NGA's provisions creating preferential treatment for FTA countries are not required by any specific FTAs, the NGA's preferential treatment for applications to export LNG to FTA countries is not covered by the Article XXIV exception to the MFN requirement[15] and is in violation of the WTO's broad MFN treatment obligation.

Furthermore, FTAs are only consistent with GATT 1994 insofar as they are designed to "facilitate trade between the constituent territories and not to raise barriers to the trade of other [WTO countries] with such territories."[16] That is, while GATT 1994 allows for FTAs inconsistent with MFN obligations to the extent that such an inconsistency is necessary to create a free-trade area (that is, necessary to create free trade between the FTA parties), it does not include provisions that allow for impediments to exports to other WTO countries that are not necessary to effectuate the FTA.[17] Accordingly, it is not the duty-free and unencumbered trade

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14 House Report (Energy and Commerce Committee) No. 102-474(I), at 136 (March 30, 1992).
15 Appellate Body Report, *Turkey – Textiles*, WT/DS34/AB/R, adopted Nov. 19, 1999, para 45.
16 GATT 1994, Art. XXIV at para 4.
17 Appellate Body Report, *Turkey – Textiles*, WT/DS34/AB/R, adopted Nov. 19, 1999, para 45.

in LNG with FTA countries that Sabine Pass contends is inconsistent with GATT 1994, but rather the fact that the NGA is being used to justify delays and obstacles to trade in LNG with WTO countries is inconsistent with required MFN treatment.

B. Article XI:1 of GATT 1994 Prohibits Export Restrictions

Article XI:1 of GATT 1994 bars the imposition of prohibitions or restrictions on exports to any WTO country's territory:

> No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.[18]

As a recent CRS Report explains, Article XI:1 "bars the institution or maintenance of *quantitative* restrictions on exports," and lists as "common examples . . . embargoes, quotas, minimum export prices, and certain export licensing requirements."[19] To that end, WTO panel decisions "have consistently found that *import* bans implemented through licensing systems violate Article XI," and "[t]his jurisprudence can be expected to inform any WTO panel decision on the GATT-consistency of export . . . licensing."[20]

The term "restriction" in Article XI has been interpreted broadly by the WTO Dispute Settlement Body to cover not only blanket prohibitions or numerical quotas, but also the imposition of limiting conditions on exports that generate a disincentive due to their effect on trade volumes by creating uncertainties affecting investment plans, restricting market access, or increasing transaction costs to make exportation prohibitively costly.[21] A discretionary or non-

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18 GATT 1994, Art. XI:1.

19 Ex. A. at 9.

20 *Id.*

21 Panel Report, *Colombia – Ports of Entry*, WT/DS366/R, adopted May 20, 2009, paras. 7.233- 41, 7.244, citing Panel Report, *India – Autos*, paras. 7.269-70, Panel Report, *India – Quantitative Restrictions*, para. 5.128, Panel

automatic export licensing requirement has long been considered to be a restriction prohibited by Article XI of GATT 1994 by the WTO Dispute Settlement Body. For example, "a GATT panel held that export licensing practices that cause delays in issuing licenses may be a restraint of exports that is inconsistent with Article XI."[22]

A notable recent WTO panel decision, evaluating claims advanced by the U.S., concluded that China had imposed export restrictions on certain industrial raw materials that violated Article XI:1 in two respects:[23] first, it found that "a series of measures, when operating in concert, establishes export quotas" on bauxite, coke, fluorspar, silicon carbide, and zinc that "resulted in the imposition of a restriction or prohibition on their exportation that are inconsistent with China's obligations under Article XI:1."[24] The panel explained that WTO precedent shows that "the obligation imposed in Article XI:1 is to explicitly forbid Members from maintaining a restriction made effective through a prohibition or quota on the exportation of any product. Export quotas are inconsistent with Member's obligations by virtue of Article XI:1 because they have a restrictive or limiting effect on exportation."[25] Second, the panel noted that Article XI:1 "prohibits restrictions . . . that are made effective through a variety of means not solely through a category of measures that may be considered formal quantitative restrictions, such as a quota," but also "restrictions effected through export licenses, as well as . . . 'other measures.'"[26] The

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Report, *Brazil – Retreaded Tyres*, para. 7.371, Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, paras. 7.252, 7.258; see also Panel Report, *Korea – Various Measures on Beef*, WT/DS161/R, WT/DS169/R, para. 778.

22 *Id.* (citing Panel Report, *Japan—Trade in Semi-Conductors* 31, GATT B.I.S.D. (35th Supp.) (May 4, 1988)); *see also* Panel Report, *Colombia—Ports of Entry* 128–31, WT/DS366/R (2009) (discussing precedent broadly interpreting the term, "restriction" in Article XI, and concluding that it refers to measures that create uncertainties and affect investment plans, restrict market access for imports, or make importation prohibitively costly).

23 *See* Panel Report, *China—Measures Related to the Exportation of Various Raw Materials* 77, 236, WT/DS394/R (2011).

24 *Id.* at 74, 77.

25 *Id.* at 77.

26 *Id.* at 228.

panel thus concluded that, in addition to the aforementioned export quota, China's export-licensing system for the raw materials at issue also operated as a restriction that violated Article XI:1.[27]

The panel decision was upheld by the WTO's Appellate Body,[28] which the U.S. Trade Representative hailed as "'a tremendous victory for the [U.S.],'" and an affirmation of the harm that export restraints can cause by "skew[ing] the playing field" and "artificially increas[ing] world prices."[29] The U.S.'s commitment to Article XI:1 is reflected in the fact that the FTAs it has entered into "prohibit contracting parties from adopting or maintaining any restriction on the export of any good, *except in accordance with GATT Article XI.*"[30] The U.S. has also taken the position that China is violating Article XI:1 by restricting exports of "rare earths," further showing that "the use of export restraints runs contrary to the central [U.S.] stance."[31] It is worth noting that, very recently, the WTO prepared a preliminary report finding that these Chinese export restrictions violate GATT 1994 requirements.[32]

IV. DOE/FE's LNG Export Authorization Process Risks Violating GATT 1994

Continuing delays in processing applications to export LNG to WTO countries, as well as the implementation of a quantitative restriction on LNG exports by DOE/FE as has been

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27 *Id.* at 238.

28 Appellate Body Report, *China—Measures Related to the Exportation of Various Raw Materials*, AB-2011-5, WT/DS394/AB/R (Jan. 30, 2012).

29 Press Release, Office of the United States Trade Representative, U.S. Trade Representative Ron Kirk Announces U.S. Victory in Challenge to China's Raw Materials Export Restraints (Jan. 31, 2012), *available at* http://www.ustr.gov/about-us/press-office/press-releases/2012/january/us-trade-representative-ron-kirk-announces-us-vict.

30 Gary Clyde Hufbauer et al., Peterson Institute, *Liquefied Natural Gas Exports: An Opportunity for America* 6 (2013) [hereinafter Peterson Report] (emphasis added), *available at* http://www.iie.com/publications/pb/pb13-6.pdf.

31 *Id.* at 10.

32 Jijo Jacob, *China Opposes Release of WTO's Rare Earths Report Favouring US, Japan and EU*, International Business Times (Nov. 1, 2013).

advocated by some,[33] risk violating Article XI:1 of GATT 1994, which forbids "restrictions . . . whether made effective through quotas . . . or export licenses . . . on the exportation or sale for export of any product destined for the territory of any other" WTO country.

As an additional matter, none of the exceptions to Article XI:1[34] appear to justify imposition of a limitation on LNG exports—even if applied in a non-discriminatory manner[35]—given that U.S.-marketed natural gas production has grown 33.8% since 2005 to a record high of 25.3 trillion cubic feet in 2012.[36] Indeed, the Peterson Report[37] notes that the exceptions are unlikely to apply to U.S. natural gas exports in light of the "shale gas boom."[38] For instance, Article XI:2(*a*)'s exception for "[e]xport prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party" is clearly inapplicable.

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33 *See, e.g.*, Press Release, U.S. Senate Comm. on Energy & Nat. Res., Senator Wyden Statement on Cove Point Approval (Sept. 11, 2013), *available at* http://www.energy.senate.gov/public/index.cfm/democratic-news?ID=58409802-aa29-425a-a116-2b237e944594 (arguing that DOE/FE's most recent approval of natural gas export application means that limit has been reached above which further exportation cannot be justified absent further analysis of domestic impacts); *see also* Charles K. Ebinger & Govinda Avasarala, Brookings Energy Security Initiative, Natural Gas Task Force., *Natural Gas Briefing Document #2: Revising the LNG Export Process* 6 (Aug. 2013), *available at* http://www.brookings.edu/~/media/research/files/reports/2013/08/19%20revising%20lng%20export%20process%20ebinger%20avasarala/revising%20the%20lng%20export%20process.pdf (acknowledging an "extreme proposal[] of "a volumetric cap, wherein the volume of LNG exported from the United States would be limited"—with "[a]nalysts hav[ing] suggested that such a cap would be imposed somewhere between six and eight billion cubic feet" —but concluding that such a proposal would be "treacherous to implement" and "may increase, rather than decrease, uncertainty").

34 Sabine Pass incorporates by reference the lengthier discussion of the exceptions' inapplicability on pages 24–33 of the Stewart & Stewart Report.

35 Even if an exception to Article XI:1 of GATT 1994 is applicable, Article XIII:1 provides that "[n]o prohibition or restriction shall be applied by any contracting party . . . on the exportation of any product destined for the territory of any contracting party, unless . . . the exportation of the like product to all third countries is similarly prohibited or restricted." In addition, Article XX provides that its general exceptions are "[s]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail."

36 *See* U.S. Energy Info. Admin., *Natural Gas Gross Withdrawals and Production*, http://www.eia.gov/dnav/ng/ng_prod_sum_dcu_NUS_a.htm (last visited Oct. 24, 2013).

37 *See* fn. 30, *supra.*

38 Peterson Report at 8. Previously, a limited excerpt of the Peterson Report was submitted to DOE/FE in response to DOE/FE's request for comments on its LNG Export Study. *See* Email from Julia Muir, Peterson Institute to Larine Moore, DOE/FE, Re: 2012 LNG Export Study (Feb. 27, 2013), *available at* http://www.fossil.energy.gov/programs/gasregulation/authorizations/export_study/reply_comments/Peterson_Institute_for_International_Eco.pdf.

Nor do Article XX's general exceptions justify limits on LNG exports. The Article XX(*b*) exception is for measures "necessary to protect human, animal, or plant life or health." There is no indication that this exception has any applicability to U.S. natural gas exports, especially when one considers that such exports are expected to improve public welfare.[39] The Article XX(*g*) exception allows measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption." As noted above, WTO precedent requires any trade restriction under this exception to operate jointly with restrictions on domestic production or consumption or production. However, the U.S. has not adopted any limit on the domestic use or production of natural gas. Rather, the U.S. has recognized the economic and strategic potential of the U.S.'s large natural gas resource base. Namely, President Obama stated in his 2012 State of the Union address:

> This country needs an all-out, all-of-the-above strategy that develops every available source of American energy—a strategy that's cleaner, cheaper, and full of new jobs.
>
> We have a supply of natural gas that can last America nearly one hundred years, and my Administration will take every possible action to safely develop this energy. Experts believe this will support more than 600,000 jobs by the end of the decade. And I'm requiring all companies that drill for gas on public lands to disclose the chemicals they use. America will develop this resource without putting the health and safety of our citizens at risk.
>
> The development of natural gas will create jobs and power trucks and factories that are cleaner and cheaper, proving that we don't have to choose between our environment and our economy.[40]

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[39] *See* NERA Economic Consulting, *Macroeconomic Impacts of LNG Exports from the United States* 55 (Dec. 3, 2012), *available at* http://energy.gov/sites/prod/files/2013/04/f0/nera_lng_report.pdf ("All export scenarios are welfare-improving for U.S. consumers.").

[40] President Barack Obama, State of the Union Address (Jan. 24, 2012), *available at* http://www.whitehouse.gov/the-press-office/2012/01/24/remarks-president-state-union-address.

Following his address, the President signed an executive order establishing an interagency task force to support the responsible development of unconventional natural gas resources and associated infrastructure, stating that natural gas production "creates jobs and provides economic benefits to the entire domestic production supply chain, as well as to chemical and other manufacturers who benefit from lower feedstock and energy costs."[41]

As an agency charged by the NGA with considering the public interest, DOE/FE should carefully consider the diplomatic and economic consequences of disregarding the U.S.'s international obligations under GATT 1994. Non-discriminatory treatment of WTO countries must include DOE/FE authorization of applications to export LNG to WTO countries without the imposition of delays or quotas similar to the treatment of applications to export LNG to FTA countries. As the recent CRS Report concluded, "Article XIII requires that if an otherwise GATT inconsistent measure is permitted to remain in force due to an Article XX exception, the measure must be administered in a non-discriminatory manner. Export restrictions that treat WTO countries differently does not satisfy the non-discriminatory requirements of Article XIII."[42]

V. Conclusion

For the foregoing reasons, Sabine Pass hereby supplements its Applications. Sabine Pass understands the need for conditional licenses in order to complete a thorough NEPA review and for the reporting requirements of DOE/FE authorizations in order to assure compliance with U.S. law relative to export destinations. Sabine Pass contends, however, that DOE/FE cannot continue to delay the review of, nor impose a quota on, applications to export LNG to WTO

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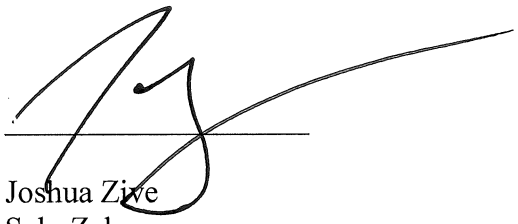
41 Exec. Order No. 13,605, 77 Fed. Reg. 23,107, 23,107 (Apr. 17, 2012).
42 *See* CRS Report, at 14.

countries without causing the U.S. to be in violation of Article XI:1 of GATT 1994. Sabine Pass requests that DOE/FE review applications concerning LNG exports to WTO countries with the same speed and deference afforded to applications related to FTA countries.

Respectfully submitted,



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DATED: November 6, 2013

Attorney for Sabine Pass Liquefaction, LLC

UNITED STATES DEPARTMENT OF ENERGY
BEFORE THE
DEPARTMENT OF ENERGY
OFFICE OF FOSSIL ENERGY

IN THE MATTER OF:

	)	**FE DOCKET NO. 13-30-LNG**
SABINE PASS LIQUEFACTION, LLC	)	**FE DOCKET NO. 13-42-LNG**
	)	**FE DOCKET NO. 13-121-LNG**

VERIFICATION

DISTRICT OF COLUMBIA §

CITY OF WASHINGTON §

Pursuant to 10 C.F.R. § 590.103(b) (2013), Joshua Zive, being first duly sworn, affirms that he is authorized to execute this verification, that he has read the foregoing document, and that all facts stated herein are true and correct to the best of his knowledge, information, and belief.

DAVID R. MANN NOTARY PUBLIC EXP. 3-31-2017 DISTRICT OF COLUMBIA

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Subscribed and sworn to before me this 6th day of November, 2013.

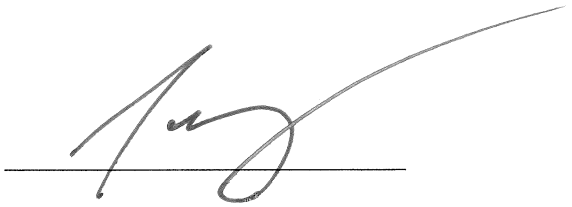
DAVID R. MANN
NOTARY PUBLIC DISTRICT OF COLUMBIA
My Commission Expires March 31, 2017

My Commission Expires: MARCH 31, 2017

CERTIFICATION OF REPRESENTATIVE

Pursuant to 10 C.F.R. § 590.103(b) (2013), I, Joshua Zive, hereby certify that I am a duly authorized representative of Cheniere Energy, Inc. and that I am authorized to sign and file with the Office of Fossil Energy, on behalf of Cheniere Energy, Inc., the foregoing document.

Dated at Washington, D.C., this 6th day of November, 2013.



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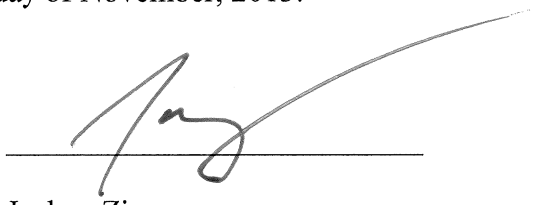
CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 590.107(b) (2013), I hereby certify that I have this day served by regular mail, and by electronic mail, a copy of the foregoing document upon the each person designated on the official service list compiled by the Secretary in these proceedings.

Dated at Washington, D.C., this 6th day of November, 2013.



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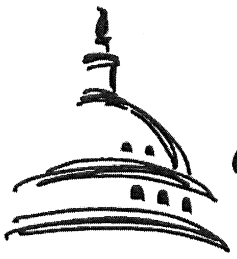
Appendix A



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Federal Permitting and Oversight of Export of Fossil Fuels

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CRS REPORT
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Summary

Recent technological developments have led to an increase in the domestic supply of natural gas. As a result, there is interest among some parties in exporting liquefied natural gas (LNG) to take advantage of international markets. This has placed new attention on the laws and regulations governing the export of natural gas as well as other fossil fuels.

In most cases, export of fossil fuels requires federal authorization of both the act of exporting the fuel and the facility that will be employed to export the fuel. For example, the export of natural gas is permitted by the Department of Energy's Office of Fossil Energy, while the construction and operation of the export facility must be authorized by the Federal Energy Regulatory Commission (FERC). Oil exports are generally forbidden, but an export that falls under one of several exemptions to the ban can be authorized by the Department of Commerce's Bureau of Industry and Security, while oil pipelines that cross international borders must be permitted by the State Department. Coal exports do not require special authorization specific to the commodity; however, as with natural gas and crude oil, other generally applicable federal statutes and regulations may apply to the export of coal.

Restrictions on exports of fossil fuels could potentially have implications under international trade rules. They may possibly be inconsistent with the most favored nation requirement of Article I of the General Agreement on Tariffs and Trade 1994 (GATT 1994) if certain World Trade Organization (WTO) members are treated differently than others. Limits on exports could also potentially violate the prohibition on export restrictions contained in Article XI of the GATT 1994 if they prescribe vague and unspecified criteria for export licensing. However, an export licensing regime does not appear to constitute a "subsidy" to downstream users of fossil fuels under WTO rules.

Article XXI, the exception for essential security interests, may provide justification for potential violations of GATT Articles I and XI. The United States has traditionally considered this exception to be self-judging. However, it is possible that a panel or the Appellate Body might scrutinize the United States' use of the exception.

Article XX of the GATT provides additional exceptions that a member country may invoke if it is found to be in violation of any GATT obligations. For example, WTO Members may maintain an otherwise GATT inconsistent measure if it is necessary to protect an exhaustible natural resource or necessary to protect human health or the environment. Article XIII requires that if an otherwise GATT inconsistent measure is permitted to remain in force due to an Article XX exception, the measure must be administered in a non-discriminatory manner. Export restrictions that treat WTO Members differently would appear not to satisfy the non-discriminatory requirements of Article XIII.

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Introduction

Partly as a result of the increased use of horizontal drilling and hydraulic fracturing to extract natural gas from shale formations in the United States, the domestic supply of natural gas has increased relative to demand, leading to lower domestic prices. This has generated increased interest by some U.S. companies in exporting liquefied natural gas (LNG) to take advantage of relatively higher prices in world markets.[1] This new interest in exporting natural gas has also produced renewed interest in the laws and regulations governing the export of other fossil fuels, including crude oil, natural gas, and coal.[2]

This report reviews federal laws and the regulatory regime governing the export of natural gas, crude oil, and coal. This report provides an overview of federal laws and regulations and agency roles in authorizing and regulating the export of these fossil fuels. The report addresses several categories of federal laws and regulations, including (1) statutes that establish the authorization process for the actual export of any of the three listed fossil fuels; (2) statutes that govern the permitting of the facilities that export any of the listed fossil fuels; and (3) generally applicable trade statutes and treaties that affect exports of fossil fuels.

Generally Applicable Export Requirements

In general, transactions involving the export of items from the United States to a foreign country are subject to the Export Administration Regulations (EAR) enforced by the Department of Commerce's Bureau of Industry and Security (BIS).[3] However, transactions that fall within the scope of the EAR do not necessarily require an export license from BIS.[4] Whether an export license is required depends on several factors, including the nature of the item, its end use, and its ultimate destination.[5] The EAR provides instructions for exporters to follow when determining whether an export transaction is subject to the EAR and, if so, whether the transaction requires a license.[6]

Other general requirements may apply to transactions involving the export of items from the United States. For example, for exports of items subject to the EAR that do not take place electronically or in another intangible form, an exporter is required in certain circumstances to submit a Shipper's Export Declaration (SED) or Automated Export System (AES) Record to BIS and the International Trade Administration in the Department of Commerce's Bureau of the Census.[7] A declaration or record typically contains an identification of the exporter and the

[1] For more information about the potential for natural gas exports, see CRS Report R42074, *U.S. Natural Gas Exports: New Opportunities, Uncertain Outcomes*, by Michael Ratner et al.

[2] For more information about the potential for crude exports, see CRS Report R42465, *U.S. Oil Imports and Exports*, by Robert Pirog.

[3] Export transactions that fall within the exclusive jurisdiction of another federal agency are not subject to the EAR. 15 C.F.R. Part 734. In some cases, more than one federal agency may be responsible for exercising oversight over the export of a particular item.

[4] 15 C.F.R. Part 732.

[5] *Id.*

[6] *Id.*

[7] 15 C.F.R. Parts 30 and 758. The Bureau of Census uses the SED or AES to compile trade statistics. 15 C.F.R. §758.1. BIS uses the records for export control purposes. *Id.* Circumstances in which an SED or AES record is required to be (continued...)

commodity being shipped; the date of exportation; and the country of ultimate destination, among other information.[8]

Statutes Governing Authorization to Export Fossil Fuels

Crude Oil

The Energy Policy and Conservation Act of 1975[9] directed the President to "promulgate a rule prohibiting the export of crude oil and natural gas produced in the United States, except that the President may ... exempt from such prohibition such crude oil or natural gas exports which he determines to be consistent with the national interest and the purposes of this chapter."[10] The act further provides that the exemptions to the prohibition should be "based on the purpose for export, class of seller or purchaser, country of destination, or any other reasonable classification or basis as the President determines to be appropriate and consistent with the national interest and the purposes of this chapter."[11]

This general prohibition on crude oil exports and the exemptions to that prohibition are found in the BIS regulations on Short Supply Controls at 15 C.F.R. §754.2. The regulations provide that a license must be obtained for all exports of crude oil, including those to Canada.[12] The regulations further provide that BIS will issue licenses for certain crude oil exports that fall under one of the listed exemptions, including (i) exports from Alaska's Cook Inlet; (ii) exports to Canada for consumption or use therein; (iii) exports in connection with refining or exchange of strategic petroleum reserve oil; (iv) exports of heavy California crude oil up to an average volume not to exceed 25 million barrels per day; (v) exports that are consistent with certain international agreements; (vi) exports that are consistent with findings made by the President under certain statutes; and (vii) exports of foreign origin crude oil where, based on satisfactory written documentation, the exporter can demonstrate that the oil is not of U.S. origin and has not been commingled with oil of U.S. origin.[13] BIS administers crude oil licensing under these provisions.

Natural Gas/LNG

Section 3 of the Natural Gas Act (NGA) provides that "no person shall export any natural gas from the United States to a foreign country or import any natural gas from a foreign country

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(...continued)

submitted for the export of items subject to the EAR include when the items are destined for certain countries; when the export of the items requires submission of a license application under the EAR; and when the value of the exported commodities classified under a single Schedule B Number (or Harmonized Tariff Schedule number) exceeds $2,500. *Id.* Certain exceptions may apply. *See id.*

[8] U.S. Department of Commerce, A Basic Guide to Exporting 75 (1998).

[9] P.L. 94-163.

[10] 42 U.S.C. §6212(b)(1).

[11] *Id.* at §6212(b)(2).

[12] 15 C.F.R. §754.2(a).

[13] *Id.* at §754.2(b).

without having first secured an order of the Commission authorizing it to do so."[14] This authorization is to be issued "unless, after opportunity for hearing, [the Commission] finds that the proposed exportation or importation will not be consistent with the public interest."[15] The Commission is further empowered to grant authorizations in part and to modify or place terms and conditions upon authorizations and to supplement its orders as appropriate.[16]

At the time of the NGA's enactment in 1938, the "Commission" referred to the Federal Power Commission. However, in 1977 the Federal Power Commission was dissolved and its responsibilities were transferred to the Department of Energy (DOE) as well as the Federal Energy Regulatory Commission (FERC), an independent agency operating within DOE, pursuant to the Department of Energy Organization Act.[17] Title III of this act transferred all functions of the Federal Power Commission to DOE except for those subsequently assigned to FERC in Title IV.[18]

Title III of the DOE Organization Act thus transferred the authority to authorize natural gas imports and exports from the Federal Power Commission to DOE. Title IV provides added clarity on this point. Section 402(f) of the act specifically states that "[n]o function ... which regulates the exports or imports of natural gas or electricity shall be within the jurisdiction of [FERC] unless the Secretary assigns such functions to [FERC]."[19]

Natural gas exporting responsibilities are handled by the Office of Fossil Energy within DOE. The procedures for filing for authorization to import or export natural gas are set forth in DOE regulations found at 10 C.F.R. Part 590. The regulations establish filing requirements as well as the procedures for review of applications, including procedures that allow interested parties to participate in the process prior to the issuance of orders by DOE. The regulations also provide for an expedited filing and review process for one-time small volume imports and exports for "scientific, experimental or other non-utility gas use" without necessitating a permit.[20]

The Energy Policy Act of 1992[21] amended the NGA Section 3 generic requirement for a permit in order to export natural gas to create a more streamlined authorization process for imports from and exports to certain countries. Subsection (c) of Section 3 provides that the importation of natural gas from or exportation of natural gas to a country with which the United States has in effect "a free trade agreement requiring national treatment for trade in natural gas shall be deemed to be consistent with the public interest, and applications for such importation and exportation shall be granted without modification or delay."[22] This provision eased the authorization process

[14] 15 U.S.C. §717b(a). This prohibition on natural gas exports without a determination from the executive branch that the national or public interest echoes the language found in the Energy Policy and Conservation Act of 1975, discussed above. The DOE regulations at 10 CFR. Part 590 cite to both acts as authority for the regulations governing export permitting.

[15] *Id.*

[16] *Id.*

[17] P.L. 95-91.

[18] *Id.* at §301.

[19] 42 U.S.C. §7172(f).

[20] 10 C.F.R. §590.208.

[21] P.L. 102-486.

[22] 15 U.S.C. §717b(c).

for certain countries in the interest of free trade, including Canada and Mexico, the only countries with whom natural gas importation and exportation takes place via pipeline.

Section 3 of the NGA also protects the role of the states in the permitting decisions. State rights under various environmental statutes are protected with respect to both export authorization by DOE and permitting by FERC (discussed *infra*) in Section 3(d),[23] and Section 3(e) mandates the notification of relevant state authorities in order to gather their input during the process.[24]

Coal

Although the Energy Policy and Conservation Act of 1975 authorized the President to restrict coal exports,[25] the President does not appear to have exercised this authority to impose any significant export restrictions specific to coal. In fact, there have been legislative efforts aimed at expanding coal exports. For example, Section 1338 of the Energy Policy Act of 1992 directed the Secretary of Commerce to create a plan for expanding coal exports.[26] Almost all U.S. coal exports pass through ports on the East Coast or in the Gulf of Mexico,[27] so laws and regulations applicable to such facilities would potentially affect coal exports. Such laws and regulations are briefly discussed below.

Export Facility Authorization

The previous section of this report discusses federal authorization of the export of natural resources, not the construction and operation of export facilities. However, in many cases approval for the export facility itself also must be obtained from the federal government. This section discusses various approval requirements for different types of facilities that enable the export of oil and natural gas.

Note that, in addition to the facility approvals described below, a facility used in the export or import of fossil fuels may require additional federal approvals or authorizations. For instance, construction and operation of ports in any navigable waters in the United States are regulated by the U.S. Army Corps of Engineers (ACE). In order to construct any port facility, permits must be obtained from ACE, which will review applications to see that they are in compliance with the Clean Water Act,[28] the Rivers and Harbors Act,[29] and the Marine Protection Research and Sanctuaries Act.[30] Because coal is generally not exported via a special facility designed to transport the commodity, there are no special facility permitting requirements applicable to coal exports, but facilities through which coal (or any fossil fuel) may be exported must satisfy these generic federal requirements.

[23] *Id.* at §717b(d).

[24] *Id.* at §717b(e)(2).

[25] 42 U.S.C. §6212(a).

[26] 42 U.S.C. §13367.

[27] Energy Information Admin, Quarterly Coal Exports October-December 2012 (March 2013), Table 13: U.S. Coal Exports by Customs District, available at http://www.eia.gov/coal/production/quarterly/pdf/t13p01p1.pdf.

[28] 33 U.S.C. §1344.

[29] 33 U.S.C. §403.

[30] 33 U.S.C. §§1401 et. seq.

Oil Pipeline Border Crossings

Crude oil can be exported either by pipeline or via tanker or other vessel. If an oil pipeline crosses the border with Canada or Mexico, the border crossing facility must be authorized by the federal government.[31] The executive branch exercises permitting authority over the construction and operation of "pipelines, conveyor belts, and similar facilities for the exportation or importation of petroleum, petroleum products" and other products pursuant to a series of executive orders. This authority has been vested in the U.S. State Department since the promulgation of Executive Order 11423 in 1968.[32] Executive Order 13337 amended this authority and the procedures associated with the review, but did not substantially alter the exercise of authority or the delegation to the Secretary of State in Executive Order 11423.[33]

Executive Order 11423 provides that, except with respect to cross-border permits for electric energy facilities, natural gas facilities, and submarine facilities:

> The Secretary of State is hereby designated and empowered to receive all applications for permits for the construction, connection, operation, or maintenance, at the borders of the United States, of: (i) pipelines, conveyor belts, and similar facilities for the exportation or importation of petroleum, petroleum products, coal, minerals, or other products to or from a foreign country; (ii) facilities for the exportation or importation of water or sewage to or from a foreign country; (iii) monorails, aerial cable cars, aerial tramways and similar facilities for the transportation of persons or things, or both, to or from a foreign country; and (iv) bridges, to the extent that congressional authorization is not required.[34]

Executive Order 13337 designates and empowers the Secretary of State to "receive all applications for Presidential Permits, as referred to in Executive Order 11423, as amended, for the construction, connection, operation, or maintenance, at the borders of the United States, of facilities for the exportation or importation of petroleum, petroleum products, coal, or other fuels to or from a foreign country."[35] Executive Order 13337 further provides that after consideration of the application and comments received:

> If the Secretary of State finds that issuance of a permit to the applicant would serve the national interest, the Secretary shall prepare a permit, in such form and with such terms and conditions as the national interest may in the Secretary's judgment require, and shall notify the officials required to be consulted ... that a permit be issued.[36]

Thus, the Secretary of State is directed by the order to authorize those border crossing facilities that the Secretary has determined would "serve the national interest."

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[31] For tankers or other vessels conveying oil, the use of such facilities for exportation, in and of itself, does not require a permit akin to that required for oil pipelines that cross international borders. However, oil tankers or other such vessels must comply with other generally applicable export requirements, which are discussed elsewhere in this report.

[32] Exec. Order No. 11423, *Providing for the performance of certain functions heretofore performed by the President with respect to certain facilities constructed and maintained on the borders of the United States*, 33 Fed. Reg 11741. (August 20, 1968).

[33] Exec. Order No. 13337, *Issuance of Permits With Respect to Certain Energy-Related Facilities and Land Transportation Crossings on the International Boundaries of the United States*, 69 Fed. Reg. 25299 (May 5, 2004).

[34] Exec. Order No. 11423, 33 Fed. Reg. at 11741.

[35] Exec. Order No. 13337, 69 Fed. Reg. at 25299.

[36] *Id.* at 25230.

Note that the source of the executive branch's permitting authority is not explicitly stated within the executive orders. Powers exercised by the executive branch are authorized by legislation or are inherent presidential powers based in the Constitution. Executive Order 11423 does not reference any statute or constitutional provision as the source of its authority, although it does state that "the proper conduct of foreign relations of the United States requires that executive permission be obtained for the construction and maintenance" of border crossing facilities.[37] Executive Order 13337 refers only to the "Constitution and the Laws of the United States of America, including Section 301 of title 3, United States Code."[38] Section 301 of Title 3 provides that the President is empowered to delegate authority to the head of any department or agency of the executive branch. Courts that have addressed the legitimacy of this exercise of authority have found that it is a legitimate exercise of "the President's constitutional authority over foreign affairs and his authority as Commander in Chief."[39]

Natural Gas Pipeline Border Crossings

As discussed above, Executive Orders 11423 and 13337 explicitly exclude cross-border natural gas pipelines (among others) from their reach. Instead, permitting for these facilities is addressed in Executive Order 10485, which governs the issuance of Presidential Permits for natural gas facilities.[40] Executive Order 10485 designates and empowers the now-defunct Federal Power Commission:

> (1) To receive all applications for permits for the construction, operation, maintenance, or connection, at the borders of the United States, of facilities for the transmission of electric energy between the United States and a foreign country.
>
> (2) To receive all applications for permits for the construction, operation, maintenance, or connection, at the borders of the United States, of facilities for the exportation or importation of natural gas to or from a foreign country.
>
> (3) Upon finding the issuance of the permit to be consistent with the public interest, and, after obtaining the favorable recommendations of the Secretary of State and the Secretary of Defense thereon, to issue to the applicant, as appropriate, a permit for such construction, operation, maintenance, or connection. The Secretary of Energy shall have the power to attach to the issuance of the permit and to the exercise of the rights granted thereunder such conditions as the public interest may in its judgment require.[41]

In many ways, this authority resembles the authority over oil pipelines granted to the State Department in Executive Orders 11423 and 13337. However, as mentioned above, Executive Orders 11423 and 13337 do not describe the source of the executive branch permitting authority granted by the orders. Judicial opinions strongly suggest the permitting authority is an exercise of the President's "inherent constitutional authority to conduct foreign affairs."[42] By contrast,

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[37] 33 Fed. Reg. at 11741.

[38] 69 Fed. Reg. at 25299.

[39] Sierra Club v. Clinton, 689 F. Supp. 2d 1147, 1162 (D. Minn. 2010).

40 Exec. Order No. 10485, *Providing for the performance of certain functions heretofore performed by the President with respect to electric power and natural gas facilities located on the borders of the United States*, 18 Fed. Reg. 5397 (Sept. 3, 1953).

[41] *Id.*

[42] Sisseton-Wahpeton Oyate v. U.S. Department of State, 659 F. Supp. 2d 1071, 1081 (D.S.D. 2009).

Executive Order 10485 cites federal statutes which may at least partially form the basis for the permitting authority granted to the DOE by the order. The order states that "section 202(e) of the Federal Power Act, as amended ... requires any person desiring to transmit any electric energy from the United States to a foreign country to obtain an order from the Federal Power Commission authorizing it to do so" and that "section 3 of the Natural Gas Act ... requires any person desiring to export any natural gas from the United States to a foreign country or to import any natural gas from a foreign country to the United States to obtain an order from the Federal Power Commission authorizing it to do so." These appeals to statutory authority should be considered and possibly addressed in any legislation seeking to amend the current Presidential Permit process for border crossings for energy facilities.

The Department of Energy Organization Act of 1977[43] eliminated the Federal Power Commission and transferred its functions to either the newly created DOE or the FERC, an independent regulatory agency within DOE. Section 402(f) of that act specifically reserved import/export permitting functions for DOE rather than FERC. As a result, DOE took over the FPC's Presidential Permit authority for border crossing facilities under Executive Order 10485 pursuant to the act. The authority to issue Presidential Permits for natural gas pipeline border crossings was subsequently transferred to FERC in 2006 via DOE Delegation Order No. 00-004.00A.[44]

LNG Export Terminals

Section 3(e) of the NGA, adopted in Section 311 of the Energy Policy Act of 2005,[45] assigns the "exclusive authority to approve or deny an application for the siting, expansion or operation of a Liquefied Natural Gas (LNG) terminal" to FERC.[46] Section 3 designates FERC as the "lead agency for the purposes of coordinating all applicable Federal authorizations" and for complying with federal environmental requirements.[47] Section 3(e) also directs FERC to promulgate regulations for pre-filing of LNG import terminal siting applications and directs FERC to consult with designated state agencies regarding safety in considering such applications.[48]

FERC implements its authority over onshore LNG terminals through the agency's regulations at 18 C.F.R. §153. These regulations detail the application process and requirements under Section 3 of the NGA. The process begins with a pre-filing, which must be submitted to FERC at least six months prior to the filing of a formal application. The pre-filing procedures and review processes are set forth at 18 C.F.R. §157.21. Once the pre-filing stage is completed, a formal application may be filed. FERC's formal application requirements include detailed site engineering and design information, evidence that a facility will safely receive or deliver LNG, and delineation of a facility's proposed location.[49] The regulations also require LNG facility builders to notify landowners who would be affected by the proposed facility.[50] To facilitate natural gas infrastructure projects, which includes LNG projects, FERC has adopted rules to provide "blanket

[43] P.L. 95-91, 42 U.S.C. §4101 note.

[44] Available at http://www.ferc.gov/industries/electric/indus-act/siting/doe-delegation.pdf.

[45] P.L. 109-58.

[46] 15 U.S.C. §717b(e). Gas must be converted to LNG for export by means other than pipeline.

[47] *Id.*

[48] *Id.*

[49] 18 C.F.R. §153.8.

[50] 18 C.F.R. §157.6d.

certificates" that provide authorization to interstate pipelines to improve or upgrade existing facilities or construct certain new facilities pursuant to a streamlined process.[51]

World Trade Organization—General Agreement on Tariffs and Trade

The Marrakesh Agreement Establishing the World Trade Organization (WTO) contains the agreements relating to international trade that are binding for all WTO Members. Although there is no specific agreement relating to trade in energy products, such as liquefied natural gas, coal, or oil, the trade in these products is regulated under the General Agreement on Tariffs and Trade (GATT). Several of these sections could potentially impact a nation's ability to limit or restrict fossil fuels.

Article I—Most Favored Nation Treatment

Article I of the GATT 1994 requires that "any advantage, favour, privilege or immunity granted by any [WTO Member] to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other [WTO Members]."[52] Article I applies to all rules and formalities in connection with importation and exportation.[53] This broad category of rules and formalities appears likely to include prerequisites for exportation such as licensing requirements or other preliminary measures.[54] More favorable treatment given to *imports* from particular countries in the context of *import* licensing requirements has been held to confer an advantage within the meaning of Article I.[55]

Generally, this means that as soon as the United States provides for certain treatment of fossil fuel exports to one country, the United States has to treat exports to all other WTO Members in the same fashion. A licensing regime that provided for more favorable treatment for exports of fossil fuels to some countries, but subjected other WTO countries to a slower process could potentially be inconsistent with Article I of the GATT.

However, there are exceptions to the Most Favored Nation Treatment requirements for Free Trade Agreements (FTA). Article XXIV of GATT 1994 allows countries to provide more favorable treatment to countries with which they have established an FTA.[56] In order to qualify for the Article XXIV exception, the FTA must meet certain requirements outlined in the Article. Most

[51] 18 C.F.R. §§157.201-157.218.

[52] General Agreement on Tariffs and Trade 1994, Art. I:1 (hereinafter GATT 1994).

[53] *Id.*

[54] *See* Panel Report, *U.S.—Certain Measures Affecting Imports of Poultry from China*, paras. 7.407, 7.410, WT/DS392/R (September 29, 2010) ("We conclude that 'in connection with importation' as used in Article I, not only encompasses measures which directly relate to the process of importation but could also include those measures ... which relate to other aspects of the importation of a product or have an impact on actual importation."). The same reasoning could apply to measures that have an impact on actual exportation, such as licensing requirements.

[55] Panel Report, *EC—Regime for the Importation, Sale, and Distribution of Bananas*, ¶ 7.193, WT/DS27/R/USA (May 22, 1997).

[56] GATT 1994, Art. XXIV.

notably, the free trade agreement must eliminate duties—such as tariffs—and restrictions on commerce between the parties to the agreement for "substantially all the trade in products originating in those territories."[57] Therefore, in order for an agreement to qualify, it is likely that the FTA would have to cover more than just energy products flowing between the two territories. However, if the countries have a qualifying FTA, more favorable treatment towards energy products between those countries could be included in that FTA without violating the GATT.

Article XI—Export Restrictions

Article XI of the GATT covers import and export restrictions. Article XI:1 of the GATT bars the institution or maintenance of quantitative restrictions on exports to any WTO Member's territory.[58] Quantitative restrictions limit the amount of a product that may be exported—common examples are embargoes, quotas, minimum export prices, and certain export licensing requirements. Under Article XI, duties, taxes, and other charges are the only GATT-consistent methods of restricting exports.[59] Any government action that expressly precludes the exportation of certain goods is inconsistent with the GATT.

Although there are few WTO panel decisions on export bans, panels have consistently found that *import* bans implemented through licensing systems violate Article XI.[60] This jurisprudence can be expected to inform any WTO panel decision on the GATT-consistency of export bans and licensing.[61] WTO Panel decisions have also held that "discretionary" or "non-automatic" licensing requirements are prohibited under Article XI—therefore, a licensing program that gives discretion to an agency to deny an export license to potential exporters on the basis of vague or unspecified criteria would violate Article XI.[62] Moreover, a GATT panel held that export licensing practices that cause delays in issuing licenses may be a restraint of exports that is inconsistent with Article XI.[63]

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[57] *Id.*

[58] GATT 1994, Art. XI:1 ("No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences [sic] or other measures, shall be instituted or maintained by any contracting party on the ... exportation or sale for export of any product destined for the territory of any other contracting party.").

[59] *Id.*

[60] *See* Panel Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R (June 12, 2007) (holding a licensing system to be in violation of Article XI when a person would be ineligible to import tires based on where those tires came from); Panel Report, *India Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/R (April 6, 1999).

[61] *See* Wen-Chen Shih, *Energy Security, GATT/WTO, and Regional Agreements*, 49 Nat. Res. J. 433, 451 (2009) (noting that it is likely that "the jurisprudence concerning quantitative restrictions on import in the interpretation and application of Article XI:1 also applies to exports.").

[62] *See* Panel Report, *China—Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R (July 5, 2011) (holding that vague export licensing criteria allowed for too much discretion in granting licenses and that they were therefore in violation of Article XI).

[63] Panel Report, *Japan—Trade in Semi-Conductors* (May 4, 1988) GATT B.I.S.D. (35th Supp.), 31.

Articles VI, XVI, and the Agreement on Subsidies and Countervailing Measures—Export Restraints as Actionable Subsidies

A fossil fuel export licensing regime that restricts exports could have the effect of keeping domestic prices of fossil fuels lower than they otherwise would be. This raises the question of whether such a licensing program could be considered an actionable subsidy to downstream users of the fossil fuels such as members of the petrochemical industry. Under the GATT 1994 and the Agreement on Subsidies and Countervailing Measures (SCM Agreement), an actionable subsidy may be the subject of countervailing measures or challenge before a panel by a WTO Member when the subsidy adversely affects the interests of that member.[64] Adverse effects might result if export restraints on fossil fuels lead to lower input costs for downstream manufacturers that use the fuels, giving the manufacturers' products a competitive edge over the products of the other members' manufacturers in domestic or foreign markets.

The SCM Agreement defines a "subsidy" as "a financial contribution by a government or any public body within the territory of a Member" that confers a benefit.[65] Under the agreement, one way that a "financial contribution" may occur is when a government directs a private body to sell goods to a domestic purchaser.[66] In *U.S.—Measures Treating Export Restraints as Subsidies*, the United States Trade Representative (USTR) argued before a WTO panel that a government's restriction on exports could be considered "functionally equivalent" to that government directing private parties to sell a good to domestic purchasers.[67] The USTR argued that this resulted in a subsidy to downstream producers that used the good as an input in their production processes.[68] The panel rejected this argument, stating that although a restriction on exports of a good may result in lower prices for domestic users of that good, the restriction was not an explicit command or direction by the government to private parties to sell the good within the meaning of the SCM Agreement.[69] This ruling suggests that future panels may be reluctant to find that a restriction on exports or a similar government intervention in a market is a "financial contribution" by a government. Thus, it seems unlikely that licensing procedures could constitute a subsidy under WTO rules, even if they lead to restrictions on exports.

Articles XX and XIII—General Exceptions

Article XX of the GATT provides for certain exceptions that a member country may invoke if it is found to be in violation of any GATT obligations. In order for the defense to be successful, the member country must show that its action fits under one of these general exceptions and that it satisfies Article XX's opening clauses, known as the "chapeau."[70] When dealing with trade in

[64] GATT 1994, Arts. VI, XVI; SCM Agreement, Arts. V, VII, XI, XIX.

[65] SCM Agreement, Art. I.

[66] SCM Agreement, Art. I(a)(1)(iv).

[67] Panel Report, *United States—Measures Treating Export Restraints as Subsidies*, ¶ 8.22, WT/DS194/R (June 29, 2001).

[68] *Id.* at paras. 5.36, 5.48-.51.

[69] *Id.* at ¶ 8.42-.44.

[70] The "chapeau" requires, for example, that measures falling under these exceptions shall not be a disguised restriction on international trade. GATT 1994, Art. XX.

energy products, a country will most likely use the exceptions under Article XX(b) or XX(g). A country may justify a GATT inconsistent practice under Article XX(b) if the practice in question is "necessary to protect human, animal, or plant life or health."[71] Article XX(g) may permit otherwise GATT inconsistent measures that "relat[e] to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."[72] If a WTO Member invokes an Article XX exception to the application of any quantitative export restrictions, Article XIII requires that those export restrictions must be administered in a non-discriminatory manner—that is the restrictions must comport with the most-favored nation treatment discussed above.[73]

Article XXI—Security Exceptions

Restrictions on fossil fuels for reasons of international or domestic security that would otherwise violate the GATT 1994 may potentially be justified under the broadly worded exception for essential security interests contained in Article XXI.[74] One paragraph of this article allows a member to take "any action which it considers necessary for the protection of its essential security interests ... taken in time of war or other emergency in international relations."[75]

Because there is a lack of WTO case law on Article XXI, it is necessary to consult the history of the exception's use under the General Agreement on Tariffs and Trade 1947 (GATT 1947). The GATT 1947 has been incorporated into the GATT 1994. Under the GATT 1947, the contracting parties broadly interpreted the concept of an "emergency."[76] Thus, each party was basically the judge of what constituted an emergency in international relations. Measures that parties have sought to justify under Article XXI have included trade embargoes, import quotas, and suspensions of tariff concessions.[77] Parties have pointed to both potential and actual dangers as "emergencies" supposedly justifying these typically GATT inconsistent measures.[78]

With respect to who determines whether a WTO Member's use of the exception is valid, the United States has previously taken the position that Article XXI is "self-judging."[79] That is, each member invoking Article XXI is the judge of whether its use of the exception is valid. As a result, there is currently no WTO case law on the use of Article XXI. However, some scholars have speculated that, in the future, a WTO panel or the Appellate Body may decline to defer to a WTO Member's judgment about when its use of Article XXI is appropriate.[80] One of these international

[71] GATT 1994, Art. XX(b). It is worth noting that the "necessary" requirement is a rather high standard to meet. Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, ¶ 150, WT/DS332/AB/R (December 3, 2007).

[72] GATT 1994, Art. XX(g). Although "relating to" may be an easier standard to meet when relying on the exception, the measure in question must also operate in conjunction with domestic restrictions.

[73] GATT 1994, Art. XIII.

[74] GATT 1994, Art. XXI.

[75] GATT 1994, Art. XXI(b)(iii).

[76] *See* GATT Analytical Index—Guide to GATT Law and Practice 602-05 (6th ed. 1995).

[77] *Id.* at 602-05.

[78] *Id.* at 600.

[79] Dapo Akande & Sope Williams, *International Adjudication on National Security Issues: What Role for the WTO?*, 43 Va. J. Int'l L. 365, 375-76 (2003).

[80] *Id.* at 383-84.

quasi-judicial bodies may instead decide to more carefully scrutinize a member's use of the exception. For example, a panel may consider whether there is an emergency in international relations justifying national security screening for exports of fossil fuels to certain countries but not others.

NAFTA and Other Free Trade Agreements

In addition to the GATT, the United States is party to numerous FTAs. It is beyond the scope of this report to discuss fully the provisions of each FTA signed by the United States. However, as an example, several FTAs require national treatment for trade in natural gas. These include FTAs with Australia, Bahrain, Canada, Chile, Colombia, Dominican Republic, El Salvador, Guatemala, Honduras, Jordan, Mexico, Morocco, Nicaragua, Oman, Panama, Peru, Republic of Korea and Singapore.[81] The FTAs with Costa Rica and Israel do not require national treatment for trade in natural gas.[82]

As a further example, under the North American Free Trade Agreement (NAFTA) the United States has certain obligations related to energy trade with Mexico and Canada. Chapter 6 of NAFTA deals with "Energy and Basic Petrochemicals." Chapter 6 reconfirms the Parties' obligations under the GATT and imposes additional obligations on the Parties, such as certain requirements for export taxes.[83] NAFTA also imposes barriers to invoking some of the general exceptions to the GATT.[84] For example, a country may only invoke the "conservation of exhaustible natural resources" exception if it does not result in a higher price for exports than for domestic consumption of the energy products.[85] These additional obligations illustrate that compliance with FTAs must be considered when establishing export regulations for energy products.

Pending Legislation

S. 192, the Expedited LNG for American Allies Act of 2013, was introduced in the Senate on January 31, 2013, by Senator John Barrasso. An identical bill, H.R. 580, was introduced in the House of Representatives by Representative Michael Turner. The bills would amend section 3 of the NGA to provide that expedited approval of LNG exports would be granted to four different categories of foreign countries: (1) nations for which there is in effect a free trade agreement (FTA) requiring national treatment for trade in natural gas; (2) a member country of the North Atlantic Treaty Organization (NATO); (3) Japan, so long as the Treaty of Mutual Cooperation and Security of January 19, 1960, between Japan and the United States remains in effect; and (4) "any other foreign country if the Secretary of State, in consultation with the Secretary of Defense,

[81] Department of Energy, How to Obtain Authorization to Import and/or Export Natural Gas and LNG, http://energy.gov/fe/how-obtain-authorization-import-andor-export-natural-gas-and-lng.

[82] *Id.*

[83] North American Free Trade Agreement, Arts. 603, 604 [hereinafter NAFTA].

[84] NAFTA, Art. 605.

[85] *Id.*

determines that exportation of natural gas to that foreign country would promote the national security interests of the United States."[86]

At least two other bills that pertain to the export of natural gas have been introduced. H.R. 1189, the American Natural Gas Security and Consumer Protection Act, was introduced in the House by then-Representative Ed Markey. The bill would amend the NGA to require the Secretary of Energy to develop regulations for determining whether an export of natural gas from the United States to a foreign country is in the public interest for the purposes of issuing an export authorization.[87] Under the regulations, the public interest determination would have to be made after the secretary's consideration of several factors, including the energy security of the United States; the ability of the United States to reduce greenhouse gas emissions; and an environmental impact statement issued under the National Environmental Policy Act that analyzes the impact of extraction of exported natural gas on the environment in communities where the gas is extracted.[88] H.R. 1191, the Keep American Natural Gas Here Act, was also introduced in the House by then-Representative Ed Markey. Among other things, it would provide that the Secretary of the Interior could accept bids on new oil and gas leases of federal lands (including submerged lands) only from bidders certifying that all natural gas produced pursuant to such leases would be sold only in the United States.[89]

With regard to oil, H.R. 1190, the Keep America's Oil Here Act, was introduced in the House by then-Representative Ed Markey. The bill would provide that the Secretary of the Interior could accept bids on new oil and gas leases of federal lands (including submerged lands) only from bidders certifying that oil produced pursuant to such leases, and any refined petroleum products produced from that oil, would be sold only in the United States.[90] The bill would allow the President to waive this requirement for a lease in certain circumstances, including when a waiver is necessary under an international agreement.[91] In addition, S. 435, the American Oil for American Families Act of 2013, was introduced in the Senate by Senator Robert Menendez. The bill would ban the export of crude oil or refined petroleum products derived from federal lands (including land on the Outer Continental Shelf).[92]

Conclusion

Recent advances in natural gas exploration and production technology have led to a newfound interest in the possibility of expanding US fossil fuel exports. Such exports, and the facilities needed to conduct export operations, are subject to a panoply of federal laws and regulations. These include the authorizations required by the Natural Gas Act, a generic ban on crude oil exports, and various laws and regulations applicable to construction and operation of export facilities. Currently, any party wishing to export fossil fuels must comply with these laws and regulations.

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[86] S. 192, §2.

[87] H.R. 1189, §2.

[88] *Id.*

[89] H.R. 1191, §2.

[90] H.R. 1190, §3.

[91] *Id. §4.*

[92] S. 435, §2.

Under international trade rules, restrictions on exports of fossil fuels could potentially be difficult to reconcile with Articles I and XI of the GATT 1994. Article XXI, the exception for essential security interests, may be cited in order to justify potential violations of GATT Articles I and XI. The United States has traditionally considered this exception to be self-judging. However, it is possible that a panel or the Appellate Body might scrutinize the United States' use of the exception.

Article XX of the GATT provides additional exceptions that a member country may invoke if it is found to be in violation of any GATT obligations. However, Article XIII requires that if an otherwise GATT inconsistent measure is permitted to remain in force due to an Article XX exception, the measure must be administered in a non-discriminatory manner. Export restrictions that treat WTO Members differently would appear not to satisfy the non-discriminatory requirements of Article XIII.

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