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Federal Permitting and Oversight of Export of Fossil Fuels

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Summary

Recent technological developments have led to an increase in domestic production of natural gas and crude oil. As a result, there is interest among some parties in exporting liquefied natural gas (LNG) and crude oil to take advantage of international markets. This has placed new attention on the laws and regulations governing, and in many cases restricting, the export of 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 restricted, but an export that falls under one of several exemptions can be authorized by the Department of Commerce's Bureau of Industry and Security. 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 potentially 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 nondiscriminatory manner. Export restrictions that treat WTO members differently would appear not to satisfy the potential nondiscriminatory 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. Domestic oil production has also increased after decades of decline thanks to new drilling technologies These production increases have generated new 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 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

[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.*

Census.[7] A declaration or record typically contains an identification of the exporter and the 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 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 25,000 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]

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[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 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). Note that the statute that provides the regulatory framework for promulgation and enforcement of these regulations, the Export Administration Act, expired in 2001. Since then the provisions of the act and the regulations have remained in effect via annual presidential orders issued pursuant to the International Emergency Economic Powers Act. For more information on this authority and other matters related to crude oil export, *see* CRS Report R43442, *U.S. Crude Oil Export Policy: Background and Considerations*, by Phillip Brown *et al*.

[12] 15 C.F.R. §754.2(a).

[13] *Id*. at §754.2(b)(1).

The regulations also direct BIS to review applications to export crude oil that do not fall under one of these exemptions on a "case by case basis" and to approve such applications on a finding that the proposed export is "consistent with the national interest and the purposes of the Energy Policy and Conservation Act."[14] However, the regulations also seem to suggest that only certain specific exports will be authorized pursuant to this case-by-case review. The regulations provide that while BIS "will consider all applications for approval," generally BIS will approve only those applications that are either for temporary exports (e.g., a pipeline that crosses an international border before returning to the United States), or are for transactions (1) that result directly in importation of an equal or greater quantity and quality of crude oil; (2) that take place under contracts that can be terminated if petroleum supplies of the United States are threatened; and (3) for which the applicant can demonstrate that for compelling economic or technological reasons, the crude oil cannot reasonably be marketed in the United States.[15]

The regulations also provide for a few enumerated exceptions to the general license requirement. These exceptions include foreign origin crude oil stored in the Strategic Petroleum Reserves,[16] small samples exported for analytic and testing purposes,[17] and exports of oil transported by pipeline over rights-of-way granted pursuant to Section 203 of the Trans-Alaska Pipeline Authorization Act.[18] These exports do not require a license from BIS.

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 without having first secured an order of the Commission authorizing it to do so."[19] 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."[20] 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.[21]

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.[22] 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.[23]

[14] *Id*. at §754.2(b)(2).

[15] *Id.*

[16] *Id*. at §754.2(h).

[17] *Id*. at §754.2(i).

[18] 43 U.S.C. §1652; 15 C.F.R. §754.2(j).

[19] 15 U.S.C. §717b(a).

[20] *Id*.

[21] *Id.*

[22] P.L. 95-91.

[23] *Id*. at §301.

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]."[24]

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.[25]

The Energy Policy Act of 1992[26] 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."[27] This provision eased the authorization process 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),[28] and Section 3(e) mandates the notification of relevant state authorities in order to gather their input during the process.[29]

Coal

Although the Energy Policy and Conservation Act of 1975 authorized the President to restrict coal exports,[30] 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.[31] Almost all U.S. coal exports pass through ports on the East Coast or in the Gulf of Mexico,[32] so laws and regulations

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[24] 42 U.S.C. §7172(f).

[25] 10 C.F.R. §590.208.

[26] P.L. 102-486.

[27] 15 U.S.C. §717b(c).

[28] *Id.* at §717b(d).

[29] *Id.* at §717b(e)(2).

[30] 42 U.S.C. §6212(a).

[31] 42 U.S.C. §13367.

[32] 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.

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,[33] the Rivers and Harbors Act,[34] and the Marine Protection Research and Sanctuaries Act.[35] 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.

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.[36] 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.[37] 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.[38]

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

[33] 33 U.S.C. §1344.

[34] 33 U.S.C. §403.

[35] 33 U.S.C. §§1401 et. seq.

[36] 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.

[37] 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).

[38] 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).

> 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.[39]

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."[40] 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.[41]

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."

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.[42] 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."[43] 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."[44]

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

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

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

[41] *Id*. at 25230.

[42] 33 Fed. Reg. at 11741.

[43] 69 Fed. Reg. at 25299.

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

facilities.[45] 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.[46]

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."[47] By contrast, 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[48] 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.[49]

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[45] 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 (September 3, 1953).

[46] *Id.*

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

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

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

LNG Export Terminals

Section 3(e) of the NGA, adopted in Section 311 of the Energy Policy Act of 2005,[50] 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.[51] Section 3 designates FERC as the "lead agency for the purposes of coordinating all applicable Federal authorizations" and for complying with federal environmental requirements.[52] 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.[53]

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.[54] The regulations also require LNG facility builders to notify landowners who would be affected by the proposed facility.[55] To facilitate natural gas infrastructure projects, which includes LNG projects, FERC has adopted rules to provide "blanket certificates" that provide authorization to interstate pipelines to improve or upgrade existing facilities or construct certain new facilities pursuant to a streamlined process.[56]

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

[50] P.L. 109-58.

[51] 15 U.S.C. §717b(e). Gas must be converted to LNG for export by means other than pipeline.

[52] *Id.*

[53] *Id.*

[54] 18 C.F.R. §153.8.

[55] 18 C.F.R. §157.6d.

[56] 18 C.F.R. §§157.201-157.218.

accorded immediately and unconditionally to the like product originating in or destined for the territories of all other [WTO members]."[57] Article I applies to all rules and formalities in connection with importation and exportation.[58] This broad category of rules and formalities appears likely to include prerequisites for exportation such as licensing requirements or other preliminary measures.[59] 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.[60]

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.[61] In order to qualify for the Article XXIV exception, the FTA must meet certain requirements outlined in the Article. Most notably, the free trade agreement must generally 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."[62] 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 moving between those countries could be included in that FTA without violating the GATT, although this may require a WTO panel to find that these provisions regarding energy products are essential to the agreement.[63]

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.[64] Quantitative restrictions limit the amount of a product that may be exported—common

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

[58] *Id.*

[59] *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.

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

[61] GATT 1994, Art. XXIV.

[62] *Id.*

[63] *See* Appellate Body Report, *Turkey—Restrictions on Imports of Textile and Clothing Products*, ¶ 58, WT/DS34/AB/R (October 22, 1999).

[64] 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.").

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.[65] 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.[66] This jurisprudence can be expected to inform any WTO panel decision on the GATT-consistency of export bans and licensing.[67] 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.[68] 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.[69]

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.[70] 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.[71] Under the agreement, one way that a "financial contribution" may occur is when a government directs a private body to sell

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[65] *Id.*

[66] *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).

[67] *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.").

[68] *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).

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

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

[71] SCM Agreement, Art. I.

goods to a domestic purchaser.[72] 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.[73] The USTR argued that this resulted in a subsidy to downstream producers that used the good as an input in their production processes.[74] 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.[75] 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."[76] When dealing with trade in 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."[77] 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."[78] If a WTO member invokes an Article XX exception to the application of any quantitative export restrictions, Article XIII potentially requires that those

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

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

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

[75] *Id.* at ¶ 8.42-.44.

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

[77] 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). In addition, a March 2014 WTO panel decision suggests that a WTO member may not rely on an Article XX(b) exception to justify restrictions on exports of "raw materials" when: (1) the member actually intends for the restrictions to benefit downstream domestic producers that use the materials as inputs; or (2) the member could implement increased pollution controls or other WTO-consistent alternatives to export restrictions. Panel Report, *China—Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum,* paras. 7.169-7.171, 7.186-7.187, WT/DS431/R (March 26, 2014). This decision has been appealed to the Appellate Body.

[78] 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. *Id.* In addition, a March 2014 WTO panel decision indicates that a WTO member may not rely on an Article XX(g) exception to justify restrictions on exports of natural resources that have entered into commerce when doing so would interfere with international markets by allocating "quantities [of the resource] between foreign and domestic users." Panel Report, *China—Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum,* ¶ 7.462, WT/DS431/R (March 26, 2014). This decision has been appealed to the Appellate Body.

export restrictions must be administered in a nondiscriminatory manner—that is, the restrictions must comport with the most-favored nation treatment discussed above.[79]

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.[80] 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."[81]

While there is a lack of WTO case law on Article XXI, the nearly identical security exception under Article XXI of the General Agreement on Tariffs and Trade 1947 (GATT 1947) provides some guidance.[82] Under the GATT 1947, the contracting parties had broad discretion with respect to identifying an "emergency."[83] According to one source, each party was the judge of what was essential to its own security interests.[84] Measures that parties sought to justify under Article XXI of the GATT 1947 included trade embargoes, import quotas, and suspensions of tariff concessions.[85] Parties pointed to both potential and actual dangers as "emergencies" to justify measures otherwise inconsistent with the GATT 1947.[86]

With respect to who determines whether a WTO member's use of a national security exception is valid, the United States has taken the position that Article XXI is "self-judging."[87] That is, each member invoking Article XXI judges whether its use of the exception is valid. While there is currently no WTO case law on the use of Article XXI of the GATT 1994, 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 that its use of Article XXI is appropriate and, instead, may subject a member's use of the exception to scrutiny.[88] 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

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79 GATT 1994, Art. XIII.

80 GATT 1994, Art. XXI.

81 GATT 1994, Art. XXI(b)(iii).

82 The GATT 1947 has been incorporated into the GATT 1994.

83 *See* GATT Analytical Index – Guide to GATT Law and Practice 602-05 (6th ed. 1995) (hereinafter GATT Analytical Index).

84 *Id.* at 600. *See also* Dapo Akande & Sope Williams, *International Adjudication on National Security Issues: What Role for the WTO?*, 43 Va. J. Int'l L. 365, 373 (2003).

85 GATT Analytical Index at 602-05.

86 *Id.* at 600.

87 Akande & Williams, *supra* note 84, at 375-76.

88 *Id.* at 383-84.

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.[89] The FTAs with Costa Rica and Israel do not require national treatment for trade in natural gas.[90]

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.[91] NAFTA also imposes barriers to invoking some of the general exceptions to the GATT.[92] 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.[93] These additional obligations illustrate that compliance with FTAs must be considered when establishing export regulations for energy products.

In addition, according to news reports, two proposed FTAs—the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP)—could potentially include international obligations regarding the automatic approval by the United States of LNG exports to countries such as Japan (TPP) or the European Union (TTIP).[94]

Legislation in the 113th Congress

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, determines that exportation of natural gas to that foreign country would promote the national security interests of the United States."[95]

[89] 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.

[90] *Id.*

[91] North American Free Trade Agreement, Arts. 603, 604 (hereinafter NAFTA).

[92] NAFTA, Art. 605.

[93] *Id.*

[94] Mark Drajem & Edward Klump, *Japan's Bid to Enter Trade Talks Opens Route For U.S. LNG,* Bloomberg News, http://www.bloomberg.com/news/2013-03-17/japan-s-bid-to-enter-trade-talks-opens-route-for-u-s-lng.html; *U.S. Trade Talks Could Deliver Cheaper Energy for Europe*, Reuters, (December 13, 2013), http://www.reuters.com/article/2013/12/16/eu-usa-trade-energy-idUSL6N0JP20L20131216.

[95] S. 192, §2.

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.[96] 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.[97] 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.[98] 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.[99]

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.[100] 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.[101] 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).[102]

Various other bills introduced in the 113th Congress seek to loosen restrictions on, or expedite the federal government's consideration of approvals for, the export of oil or natural gas to certain foreign countries.[103]

Conclusion

Recent advances in natural gas exploration and production technology have led to a newfound interest in the possibility of expanding U.S. 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

[96] *See also* S. 2088 (Markey).

[97] H.R. 1189, §2.

[98] *Id.*

[99] H.R. 1191, §2.

[100] H.R. 1190, §3.

[101] *Id. §4.*

[102] S. 435, §2.

[103] *E.g.*, H.R. 6; H.R. 4155 (Poe); H.R. 3760 (Poe); H.R. 4139 (Turner); H.R. 4349 (McCaul); S. 2083 (Udall); S. 2274 (Udall); S. 2494 (Udall); S. 2638 (Hoeven).

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.

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 potentially 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 nondiscriminatory manner. Export restrictions that treat WTO members differently would appear not to satisfy the potential nondiscriminatory requirements of Article XIII.

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