

LNG AND COAL:

UNREASONABLE DELAYS IN APPROVING EXPORTS LIKELY VIOLATE INTERNATIONAL TREATY OBLIGATIONS



Recent technological breakthroughs in natural gas production, combined with growing worldwide demand for fossil fuels, have caused major shifts in domestic energy markets and spurred U.S. producers of both natural gas and coal to sell their products overseas, particularly in Asia. However, before natural gas and coal companies can serve these overseas markets, exports must be approved and new export facilities must be constructed in the United States—facilities that require both federal and state permits. For a variety of reasons, companies have encountered long delays in acquiring the export licenses and permits necessary to construct these facilities in the United States.

Permitting delays have become commonplace in recent years for developers of any large infrastructure project in the United States. However, when those delays impact the free trade of goods, they potentially run afoul of other interests—namely, the international obligations of the United States under the World Trade Organization (WTO) agreements and the actions of other countries restricting their own exports of natural resources and other products.

To better understand the conflict between domestic permitting regulations and our international obligations, the National Association of Manufacturers retained James Bacchus, former chairman of the Appellate Body of the WTO, to provide his expert legal opinion. Bacchus served eight years on the WTO and was twice elected chairman; he possesses a comprehensive knowledge of the more than 30,000 pages of global trade rules in the WTO treaty, and he has written many of the more than 50,000 pages of rulings that have clarified those rules in WTO dispute settlement.

Bacchus was asked to answer two questions: (1) whether unreasonable delays by the Department of Energy to issue licenses to export liquefied natural gas (LNG) to foreign countries constitutes, in and of itself, a violation of our international obligations under the WTO; and (2) whether efforts by state and local authorities in the Pacific Northwest to unduly broaden the scope of the environmental review process for planned coal export terminals beyond the federal scope, and the resulting delay, constitutes a violation of our international obligations under the WTO. Bacchus answered both questions in the affirmative.

Bacchus concludes that the implementation of U.S. rules in ways that unnecessarily impede exports of LNG and coal likely violate WTO rules forbidding export restrictions. The delay in granting LNG export licenses constitutes export restrictions, which are not excused by any of the exceptions available for the protection of the environment or human health or for the conservation of natural resources within the WTO. Similarly, Bacchus believes that state and local reviews of coal export terminals that are attempting to assess the expanded impact of coal production and use in other parts of the world are likely to constitute export restrictions and are unlikely to satisfy any of the exceptions, also likely violating the United States' WTO obligations.

The implications of these unreasonable delays in export approval of U.S. energy resources are substantial, not only in terms of enforcement under the WTO rules, but also for the precedent they set for other nations that are restricting U.S. access to their natural resources and other products, which has highly negative impacts throughout the manufacturing sector.