

FOREIGN POLICY AND EXPORT CONTROLS: HOW WILL THE CANADA-UNITED STATES FREE TRADE AGREEMENT ACCOMMODATE THE EXTRATERRITORIAL APPLICATION OF UNITED STATES LAWS TO CANADIAN EXPORTS OF GOODS AND TECHNOLOGY?*

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INTRODUCTION

The extraterritorial application of United States laws has emerged as an important problem affecting trade relations between the United States and other countries.¹ To an increasing degree, the United States has asserted the view that worldwide application of certain American policies and laws is essential to safeguard U.S. foreign policy, economic, and security interests. Many other states regard this assertion of American authority as unwarranted and disruptive when it reaches conduct within their borders. Not only are American methods of judicial process and discovery much different from those accepted in other countries but also American legal policies often conflict with what other countries regard as their important sovereign interests. The resulting conflicts increase tensions between the United States and other countries and constitute an important barrier to smooth security, trade, and economic relationships between the United States and its trading partners around the world.

* The author wishes to acknowledge the Canadian Embassy for its funding of this research project. Mr. Jonathan Fried, Congressional Relations Office, Canadian Embassy, is owed a particular debt of gratitude.

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¹ See generally Conference on Extraterritoriality for the Business and the Practicing Lawyer, 15 L. & POL'Y INT'L BUS. 1095-1221 (1983) (eleven articles including a bibliography); Comments of the European Community on the Amendments of June 22, 1982, to the U.S. Export Administration Regulations (Aug. 12, 1982); Schoenbaum and Dallmeyer, *The Extraterritorial Application of United States Laws Affecting Trade Between Nations*, in DYNAMICS OF JAPANESE-UNITED STATES TRADE RELATIONS (T. Schoenbaum, M. Matsushita, and D. Dallmeyer eds. 1986). See also *infra* text accompanying notes 47-54.

One example of this extraterritorial reach of U.S. laws is in the control of exports of U.S. goods and technology. The United States asserts jurisdiction over both direct exports from its territory as well as the re-export of U.S.-origin goods, parts, and technology from other countries.² These controls may be invoked to protect U.S. national security interests and to promote U.S. foreign policy objectives. U.S. national security concerns are often pursued in concert with other nations by means of multilateral arrangements such as the Coordinating Committee for Multilateral Export Controls, better known as COCOM.³ This group of 15 nations is composed of the NATO allies minus Iceland plus Japan and Australia. COCOM decides uniform national security export controls on the shipment of military and dual-use goods and technology to certain destinations.⁴ Because items on the COCOM list are included by multilateral consensus, there is virtually no controversy regarding the necessity that their export be controlled, although at times the consensus may be fragile. Canada and the United States have also worked together on a bilateral basis to control the export of strategic goods.

In contrast, U.S. foreign policy controls more often are pursued unilaterally and may encompass not only strategic goods but also militarily insignificant goods as well. This may range from narrow controls over specific commodities to broadly dissociating the United States from another country. By its unilateral attempts to enforce its export controls over conduct taking place wholly outside its territory, the United States, especially in the last decade, has created much resentment among its allies.⁵

² See U.S. Export Administration Act, 50 U.S.C. app. §§ 2401-2420; Export Administration Regulations, 15 C.F.R. pts. 768-799 (1989).

³ For further descriptions of COCOM's activities, see NATIONAL ACADEMY OF SCIENCES, *BALANCING THE NATIONAL INTEREST* 97-99 (1987); Mastanduno, *The Management of Alliance Export Control Policy: American Leadership and the Politics of COCOM*, in *CONTROLLING EAST-WEST TRADE AND TECHNOLOGY TRANSFER* 241-79 (G. Bertsch ed. 1988) [hereinafter Bertsch]; Nau, *Export Controls and Free Trade: Squaring the Circle in COCOM*, in Bertsch 390-416; Root, *COCOM: An Appraisal of Objectives and Needed Reforms*, in Bertsch 417-42; 62 CONG. DIG. 165, 192 (1983).

⁴ Although COCOM regulations are not made public, an examination of the export control regulations of its member countries may reveal the mutually-agreed upon standards of the organization. The 1987 incident involving the sale of COCOM-controlled machinery to the Soviet Union by Japan's Toshiba Machine and Norway's Kongsberg Trading Company, which gave the Soviets the ability to make their submarines run more quietly, is just one example of COCOM's weakness in preventing such transfers. See Note, *Of Ropes, Buttons and Four-By-Fours: Import Sanctions for Violations of the COCOM Agreement*, 29 VA. J. INT'L L. 249 (1989).

⁵ See *infra* text accompanying notes 47-51.

Unlike a number of other Western allies, Canada has not been in direct conflict with the United States over its more egregious foreign policy controls in recent times. Since the Hyde Park Declaration of 1941, both countries have worked together to reinforce the concept of North America as a single, unified defense industrial base.⁶ The United States and Canada have concluded a series of bilateral agreements to develop a common external export control framework for strategic goods.⁷ Since World War II, trade between the two countries has been exempt from export restrictions in exchange for the assurance that each country would control the re-export of goods from the other country, so that one country did not become a "back door" for exports of the products of the other. However, Canada is not immune to the extraterritorial reach of U.S. export controls. These agreements have not ensured symmetry of enforcement of export controls because of differences between Canadian and U.S. laws governing the extent of goods and technologies controlled and the assertion of jurisdiction over those items.⁸

The most recent bilateral trade agreement between the two countries is the Canada-United States Free Trade Agreement (FTA), which entered into force January 1, 1989.⁹ Canada and the United States have a unique economic relationship with the world. While Canada is the United States' largest trading partner, the United States accounts for over three-quarters of Canada's exports.¹⁰ In light of these close ties, the FTA anticipates the establishment of a fully integrated North American market. It provides for the regulation and eventual elimination of tariffs, contingent protection measures (antidumping duties,

⁶ See Fried, *The Impact of U.S. Export Controls on Trade Between Canada and the United States*, 11 CAN.-U.S. L.J. 185, 189-91 (1986). The "Hyde Park Declaration" refers to a joint statement issued by President Franklin D. Roosevelt and Prime Minister Mackenzie King following discussions at Hyde Park, New York, on April 20, 1941. The official title was a "Declaration Regarding Cooperation for War Production."

⁷ See, e.g., 15 C.F.R. § 700.55 (1989) and 15 C.F.R. pt. 700 App. IV (1988) for regulations governing United States-Canada defense mobilization.

⁸ See *infra* text accompanying notes 57-66.

⁹ For the text of the Agreement, see RICHARD & DEARDEN, *THE CANADA-U.S. FREE TRADE AGREEMENT* 75-328 (1988). Canada-United States Free Trade Agreement, Dec. 22, 1987, *reprinted in*, 27 I.L.M. 281 (1988) [hereinafter FTA].

¹⁰ In 1986, nearly 80 percent of Canadian exports went to the United States, while Canada received nearly 25 percent of all U.S. exports, twice the value of U.S. exports to Japan. See Battram, *Canada-United States Trade Negotiations: Continental Accord or a Continent Apart*, 22 INT'L LAW. 346 (1988). See generally DIEBOLD, *BILATERALISM, MULTILATERALISM AND CANADA IN U.S. TRADE POLICY* (1988).

countervailing duties, and escape clause or safeguard actions), and other non-tariff barriers to trade between the two countries, such as export controls.

This paper begins with a comparison of the Canadian and U.S. export control structures. It examines resulting conflicts between the two. It then describes the provisions of the Free Trade Agreement which address the harmonization of export controls. While the Agreement is far-reaching, it is important to note that the FTA is not a Customs Union.¹¹ That is, the two countries are not going to develop a common external trade policy but will continue to maintain independent trade relations with respect to third countries. In light of that fact, the paper analyzes the prospects for continuing conflict between the United States and Canada over export licensing in the foreign policy control area. It examines subsequent U.S. legislation that may alleviate some of the existing inequities. Finally, the paper suggests additional approaches to facilitate the resolution of future disputes over export control policy.

CANADIAN EXPORT CONTROLS

The authority for Canadian export controls lies principally in the Export and Import Permits Act.¹² Under the Act, controls may be imposed to assure that military or strategic goods will not be exported to a destination "wherein their use might be detrimental to the security of Canada."¹³ This language echoes "national security" concerns common in the export control regimes of other COCOM nations.

Goods and technologies subject to control appear on the Export Control List¹⁴ which is divided into ten major groups.¹⁵ Group 9

¹¹ See RICHARD & DEARDEN, *supra* note 9, at 8. The classic example of a Customs Union is the Treaty of Rome, which established the European Economic Community with a common external trade tariff for all Member States. Treaty Establishing the European Economic Community, Mar. 25, 1957, 3 U.N.T.S. III.

¹² R.S.C., ch. E-19 (1985).

¹³ *Id.* § 3(a).

¹⁴ *Id.* § 3. See also VI Consolidated Regulations of Canada, chap. 601 [hereinafter cited as C.R.C.].

¹⁵ Group 1 covers controls on the export of animals and agricultural products. VI C.R.C. §§ 1001-1021. Group 2 covers wood and wood products. *Id.* §§ 2001-2002. Groups 3 through 6 control military and strategic goods drawn almost entirely from the COCOM Industrial List. *Id.* §§ 3072-3920 (general purpose industrial machinery and electronics); §§ 4416-4485 (transportation equipment; §§ 5601-5673 (metals, minerals, and their manufactured products); §§ 6701-6781 (chemicals, metalloids, and petroleum products). Canada's Group 7 is the COCOM Munitions List.

covers U.S.-origin goods.¹⁶ In exchange for U.S.-origin goods entering Canada without the necessity of U.S. export licenses, Canada pledges that Canadian export permits will be required for any subsequent export of those goods from Canada to third countries unless they have been substantially transformed in "value, form, or use of the goods, or in the production of new goods."¹⁷

In Group 10 Canada ensures that technical data in material form that is used in the design, production, operation, or testing of equipment, and materials described in Groups 3 through 9 of the Export Control List are controlled.¹⁸ Therefore, because of the protection extended to U.S.-origin goods by their inclusion in Group 9, Canadian export controls also protect U.S. technology as long as it is in material form.

In addition to the Export Control List, Canada has an Area Control List¹⁹ covering those countries for which export controls are deemed necessary. The Area Control List covers eastern nations²⁰ as well as Mongolia, North Korea, Vietnam, and Libya. Permits are required for the exportation of almost all goods, regardless of whether or not they appear on the Export Control List.

The Export Control List and the Area Control List in combination control the export of strategic goods to all destinations. The United States stands alone in its privilege of receiving exports of nearly all goods license-free.

In addition to the controls embodied in the Export Control List and the Area Control List, the Prime Minister acting on behalf of the government has the discretion to invoke foreign policy controls of the export of strategic, military, and military-related equipment in a narrow range of circumstances.²¹ Export controls can be invoked to prevent shipment of these goods to countries posing a military threat to Canada, to countries engaged in hostilities or where there

Id. §§ 7001-7022. (This list includes arms, munitions, military, naval, or air stores). Items in Group 8 are controlled because of their relevance to atomic energy, and are controlled either by COCOM agreements or other international obligations. VI C.R.C. §§ 8001-8141. Groups 3 through 8 are based principally upon the International Lists established by COCOM, which define those industrial goods, munitions, and technologies considered to be strategic and thus subject to export control.

¹⁶ *Id.* §§ 9001-9002.

¹⁷ *Id.* § 9001.

¹⁸ *Id.* § 10003.

¹⁹ R.S.C., ch. E-19, § 4 (1985).

²⁰ VI C.R.C., chap. 600 (list of countries).

²¹ Fried, *supra* note 6, at 188.

is an imminent threat of hostilities, or to countries subject to United Nations bans on the shipment of arms.

Canada has employed foreign policy controls in several instances in the past decade.²² In 1980, following the taking of hostages in Iran, Canada used foreign policy controls to cut off a wide variety of goods to Iran as well as placing Iran temporarily on the Area Control List. In 1982, Canada joined with the European Community to impose limited sanctions (primarily to ban arms exports) against Argentina in response to the Falklands/Malvinas military intervention. Canada complies with the United Nations' mandatory arms embargo for South Africa and it restricts as well the shipment of items on the Export Control List, such as computers which might be used by police departments and other law enforcement agencies to enforce apartheid. And in 1986, Canada broadened its control of exports to Libya to include not only its longstanding restrictions on the export of military and strategic goods but also the export of oil drilling equipment, particularly that containing technology unique to the West.

U.S. EXPORT CONTROLS

In contrast to the relatively simple and orderly Canadian system, the United States relies on a series of statutes covering export control.²³ The main U.S. statute controlling exports is the Export Administration Act (EAA).²⁴ In its original form as the Export Control Act of 1949,²⁵ the act controlled goods and technology which would "make a significant contribution to the military potential of any other country or combination of countries which would prove detrimental to the national security of the United States."²⁶ Additionally, Congress recognized two other reasons justifying export controls: promoting

²² *Id.*

²³ The major export control statutes are the Export Administration Act, 50 U.S.C. app. §§ 2401-20 (non-emergency control of goods and technology for reasons of national security, foreign policy, short supply, and nuclear non-proliferation); Trading with the Enemy Act, 50 U.S.C. app. 5(b) (wartime embargo or more specific control of transactions); International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-06 (national emergency because of threat to national security, foreign policy, or U.S. economy); Arms Export Control Act, 22 U.S.C. § 2778 (non-emergency controls over defense articles); and Atomic Energy Act, 42 U.S.C. § 2071-2078 (non-emergency nuclear non-proliferation controls). For a useful guide to export controls, see P. RAY, *GUIDE TO EXPORT CONTROLS* (1985).

²⁴ 50 U.S.C. app. §§ 2401-20.

²⁵ 50 U.S.C. app. §§ 2021-32 (1964) (expired 1969).

²⁶ *Id.* § 2021.

American foreign policy and preventing domestic shortages.²⁷ Although the primary reason for the legislation was to serve national security interests, by the late 1970's export controls were being used more and more to manifest U.S. foreign policy interests.²⁸ In recognition of the growing importance of export controls as a weapon to register U.S. displeasure with other nations, the EAA was amended in 1979²⁹ to provide more guidance for the exercise of foreign policy controls over exports.

The EAA is designed to cover all goods, all technology, and all persons involved in the export chain in a licensing regime. This approach allows the law to have as sweeping a jurisdictional base as possible while carving out exceptions in the form of general licenses for exports deemed not to require prior government approval. The system is administered by the Department of Commerce, with advice tendered from the Department of Defense on national security matters, and coordinated primarily with the Department of State on foreign policy concerns.³⁰

With the exception of Canada,³¹ licensing controls exist for exports and re-exports to Free World countries of most commodities controlled for export to communist destinations as well as controls on sensitive technical data, e.g., aircraft, hovercraft, and some types of nuclear equipment.³² The main purpose for these controls on Free World shipments is to prevent transshipment to destinations which would not be approved to receive shipments directly.

EXTRATERRITORIAL JURISDICTION

The United States asserts very broad jurisdiction, authority, and control over U.S.-origin goods and technology regardless of their location and regardless of the amount of time which has elapsed since the goods or technology left the United States. No other nation in the world attempts to assert such extensive jurisdiction. Although

²⁷ 15 C.F.R. § 370.1 (1988).

²⁸ See Long, *The Executive, Congress, and Interest Groups in U.S. Export Control Policy: The National Organization of Power*, in Bertsch, *supra* note 3, at 47-54.

²⁹ The Export Administration Act of 1979, Pub. L. 97-72, 93 Stat. 503, § 6(e), 1979.

³⁰ For an examination of inter-departmental struggles to gain primacy over export controls, see McIntyre, *The Distribution of Power and the Inter-agency Politics of Licensing East-West High-Technology Trade*, in Bertsch, *supra* note 3, at 97-133.

³¹ See 15 C.F.R. § 385.6(b) (1988).

³² See generally 15 C.F.R. pt. 385 (1988) (special country policies).

the exact scope of the meanings are subject to some disagreement, territoriality and nationality are accepted without question as permissible bases for assertion of jurisdiction.³³ Of course, in the case of re-exports, the territoriality principle cannot apply because the goods or technology are no longer within the United States. While the nationality principle is generally an accepted basis for jurisdiction over natural and legal persons, traditionally it is not applied to property.³⁴ Nevertheless, wide-ranging extraterritorial jurisdiction over U.S.-origin goods, technology, and end-products of that technology imbues those items with a "U.S. nationality" which follows them wherever they go.

Because of its sweeping assertion of jurisdiction, the EAA has the potential to be a major irritant in trade relations between the United States and its allies. This is particularly true in the instance of export controls based on U.S. foreign policy objectives which other countries do not share. Since 1978 the United States has imposed foreign policy controls of varying severity on a number of countries.³⁵ In early 1978, in view of United Nations resolutions regarding apartheid in South Africa, the United States imposed an embargo on direct and indirect exports and re-exports of U.S.-origin goods and technical data for use by military and police forces in South Africa.³⁶ The restrictions encompassed not only exporters but also consignees, warehousemen,

³³ See Abbott, *Defining the Extraterritorial Reach of American Export Controls: Congress as Catalyst*, 17 CORNELL INT'L L.J. 79-158 (Winter 1984); Bierman, *The 1983 Export Administration Act Legislation: The Extraterritoriality Issue*, 15 L. POL'Y INT'L BUS. 1181-85 (1983); Marcuss & Mathias, *U.S. Foreign Policy Export Controls: Do They Pass Muster Under International Law?*, 2 INT'L TAX & BUS. LAWYER 1, 17-20 (1984); Marcuss & Richard, *Extraterritorial Jurisdiction in United States Trade Law: The Need for a Consistent Theory*, 20 COLUM. J. TRANSNAT'L L. 439, 440-47 (1981); Moyer & Mabry, *Export Controls as Instruments of Foreign Policy: The History, Legal Issues, and Policy Lessons of Three Recent Cases*, 15 L. & POL'Y INT'L BUS. 1, 108-16 (1983). See also RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 17 (1965).

³⁴ Marcuss & Mathias, *supra* note 33, at 21. See also L. OPPENHEIM, *INTERNATIONAL LAW* § 145 (H. Lauterpacht ed. 1985).

³⁵ See *Dept. of Commerce's First Annual Report on Foreign Policy Export Controls: Hearings on S.2076 Before the Committee on Banking, Housing, and Urban Affairs*, 99th Cong., 2d Sess. 36-49 (1986).

³⁶ 15 C.F.R. § 385.4 (1988). While these restrictions are wide-ranging, they are not as extensive as Canada's foreign policy controls. Interview with David Ryan, Dept. of External Affairs, Jan. 19, 1989. For another aspect of the U.S. controls, see Note, *Federal Preemption and the South African Sanctions: A Survival Guide for States and Cities*, 10 LOY. L.A. INT'L & COMP. L.J. 693, 699-702 (1988); Marcuss & Mathias, *supra* note 33, at 2-3.

distributors, end-users, and service facilities, whether located in South Africa or elsewhere.

In the Middle East, the United States has placed foreign policy controls on exports of crime control and detection equipment and on military vehicles and related production equipment destined for Syria, Iran, and the People's Democratic Republic of Yemen.³⁷ Additionally, Iran, Iraq, and Syria are subject to controls on certain chemicals. These restrictions support U.S. foreign policy concerns regarding the proliferation of chemical weapons.³⁸

Libya has been the object of a series of foreign policy controls since 1978.³⁹ Beginning with imposition of licenses for certain off-road transport vehicles, subsequent controls have covered aircraft, helicopters, and some crime control equipment. By 1986 these controls escalated to a total embargo on direct U.S.-Libya trade.

A series of export restrictions have been aimed at altering the behavior of the Soviet Union in a number of arenas.⁴⁰ To express its disapproval of the treatment given Soviet dissidents, in 1978, the United States imposed export controls on petroleum and natural gas exploration and production equipment destined for the Soviet Union, Estonia, Latvia, and Lithuania.⁴¹ Additionally, exporters of related technical data had to receive assurances from their importers that neither the technical data nor its end-product would be shipped directly or indirectly to the subject countries.

Following the Soviet invasion of Afghanistan, in 1979, the United States imposed both national security and foreign policy controls, including a grain embargo.⁴² Foreign policy concerns provided the basis for imposing first stricter controls and then an embargo on shipments of a range of phosphate fertilizers.⁴³ The President requested a voluntary suspension of shipments of products for use at the 1980 Summer Olympic Games.⁴⁴ Subsequently all goods and tech-

³⁷ 15 C.F.R. § 385.4(d) (1988).

³⁸ 15 C.F.R. § 385.4(e) (1988).

³⁹ 15 C.F.R. § 385.7 (1988). See Marcuss & Mathias, *supra* note 33, at 3-4.

⁴⁰ See generally 15 C.F.R. § 385.2 (1988). For descriptions of the history of the controls, see Marcuss & Mathias, *supra* note 33, at 4-6; Moyer & Mabry, *supra* note 33, at 27-92.

⁴¹ 43 Fed. Reg. 33,699 (1978).

⁴² 45 Fed. Reg. 1883 (1980). See also 45 Fed. Reg. 3027 (1980). These controls were extended to include Afghanistan to ensure against diversions of grain to Soviet forces within the country. See 15 C.F.R. § 385.4(f) (1988).

⁴³ 45 Fed. Reg. 8293 (1980).

⁴⁴ 45 Fed. Reg. 21,612 (1980).

nology for the Moscow Olympics was embargoed,⁴⁵ including execution of payments or transactions related to such exports. The final foreign policy restriction engendered by the Afghanistan invasion was to impose the requirement for a validated license to export truck assembly lines to the Soviet's Kama River assembly plant, based on the notion that vehicles produced there were being used to support Soviet forces in Afghanistan.⁴⁶

By December 1981, the Soviet Union had further impaired its position with the United States by its support of the crackdown on Polish dissidents. At that point, the Commerce Department broadened its restrictions on petroleum industry equipment and data, this time to include oil and gas transportation and refining technology.⁴⁷ Six months later, with no improvement in the Polish situation, the controls were broadened spectacularly. In June 1982, the Department of Commerce promulgated regulations which sought to control not only exports of American corporations but also deliveries of oil and gas equipment to the Soviet Union by foreign corporations or branches owned or controlled by American individuals or corporations and even foreign corporations that produced goods under licensing agreements with United States companies.⁴⁸

When these foreign corporations followed the policies and laws of their own governments and fulfilled the contracts involved with the pipeline, they became subject to enforcement actions by the United States Department of Commerce International Trade Administration.⁴⁹ This agency issued export denial orders against a number of European firms simply for using U.S.-origin technical data and information.⁵⁰ Foreign companies became embroiled in a series of ad-

⁴⁵ President's Memorandum on Prohibition of U.S. Transactions with Respect to the Olympic Games, 16 WEEKLY COMP. PRES. DOC. 559 (Mar. 28, 1980).

⁴⁶ 15 C.F.R. § 385.2(e) (1988). The Commerce Department stated that requests for such licenses generally would be denied.

⁴⁷ 47 Fed. Reg. 141 (1982).

⁴⁸ 47 Fed. Reg. 27,250 (1982). Most of the countries affected were quite surprised by the new regulations. Apparently the Reagan delegation to the Versailles economic summit (held only two weeks before the regulations were expanded) gave no indication that such a measure would be forthcoming. INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) No. 415, at 507 (July 13, 1982).

⁴⁹ See INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) No. 422, at 795 (Aug. 31, 1982).

⁵⁰ *Dresser Industries, Inc. v. Baldrige*, No. 82-2385 (D.D.C. Aug. 23, 1982), reprinted in INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) No. 422, at 795-96 (Aug. 31, 1982).

ministrative and judicial actions challenging the denial orders.⁵¹ The companies were subjected to Department of Commerce orders denying them export privileges for products coming from the United States, i.e., a total blackout which denied them all business from the United States. Later this blackout was modified to restrict only U.S.-origin commodities or technical data relating to oil and gas production and exploration.

Finally, President Reagan lifted the export sanctions on November 13, 1982.⁵² The United States, having taken an untenable position with its allies, was forced to back down. In response to the disruption created in the domestic business scene by the sanctions, in 1985, Congress amended the EAA to shore up "contract sanctity," a concept badly trodden upon by the pipeline restrictions.⁵³ The pipeline case remains the foremost example of the unilateral assertion of U.S. foreign policy through the EAA.⁵⁴

U.S.-CANADIAN CONFLICT OVER EXPORT CONTROLS

By virtue of the recognition that North America constitutes a single, integrated defense industrial base, Canada to some extent has received special treatment in the U.S. export control structure. Canada is the sole exception to the licensing regime set up by the Export Administration Act. In general, a shipment from the United States to Canada

⁵¹ See, e.g., INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) No. 423, at 831-57 (Sept. 8, 1982) (reprinting Dresser France's motion to vacate temporary denial order); *Id.* at 879 (Sept. 14, 1982) (Creusot-Loire motion to vacate order); 18 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) 7 (Oct. 5, 1982) (D.C. district court denies Creusot-Loire motion for a temporary restraining order); *Id.* at 167-69 (Nov. 2, 1982) (Creusot-Loire loses its motion to vacate denial order before agency review commissioner); *Id.* at 199-200 (Nov. 9, 1982) (Dresser France loses in bid for temporary restraining order in D.C. district court and appeal of agency ruling upholding denial order).

⁵² 47 Fed. Reg. 51,858 (1982).

⁵³ 50 U.S.C. app. § 2405(m).

⁵⁴ For articles discussing the impact of the pipeline sanctions, see Atwood, *The Export Administration Act and the Dresser Industries Case*, 15 L. & POL'Y INT'L BUS. 1157-61 (1983); Kincannon, *The Dresser Case: One Step Too Far*, 5 N.Y.L.S. J. INT'L & COMP. L. 191-230 (Spring 1984); Marcus, *Soviet Pipeline Sanctions: The President's Authority to Impose Extraterritorial Controls*, 15 L. & POL'Y INT'L BUS. 1163-67 (1983); Moyer & Mabry, *supra* note 33; Zaucha, *The Soviet Pipeline Sanctions: The Extraterritorial Application of U.S. Export Controls*, 15 L. & POL'Y INT'L BUS. 1169-79 (1983); Zeigler, *The Siberian Pipeline Dispute and the Export Administration Act: What's Left of the Extraterritorial Limits and the Act of State Doctrine?*, 6 HOUS. J. INT'L L. 63-91 (Autumn 1983). See also NATIONAL ACADEMY OF SCIENCES, *BALANCING THE NATIONAL INTEREST* (1987).

for use in Canada requires no license.⁵⁵ Canadian and U.S. officials meet regularly to discuss the administration and enforcement of strategic export controls. Law enforcement and national defense entities also work closely together.⁵⁶ Despite this long history of amicable cooperation, the extraterritorial reach of U.S. export control laws holds the potential for conflict between the United States and Canada. The problem is especially vexing not in the area of national security controls (upon which Canada and the United States agree by virtue of their participation in COCOM), but rather in the area of foreign policy controls on the export of goods and technology. While the United States and Canada have basically the same national security goals, their foreign policy goals often diverge. It is this divergence which creates the potential for continuing conflict between the two countries.

The conflict is particularly evident in the instance of the re-export of U.S.-origin goods or technology from Canada. When Canadian officials receive a request to export U.S.-origin goods, naturally they evaluate the request first on the basis of whether Canadian law or policy imposes a licensing requirement. Absent any Canadian controls, however, they then must look to American law and policy to determine whether to issue or to deny an export permit on the basis of American export control criteria. A series of examples will reveal the extent of the problem.⁵⁷

Example 1. Item of U.S. origin and on COCOM list.

To re-export an item from Canada to a controlled destination, a Canadian exporter must obtain a Canadian export license because the item appears on the COCOM list. The exporter also must obtain a re-export license issued by the United States because of U.S. re-export control laws. The licensing requirement by the United States is superfluous because both countries control exports of goods listed by COCOM in the same manner.

⁵⁵ 15 C.F.R. § 385.6 (1988) (shipment requiring licenses). The general rule is not to require licenses for shipments of commodities and technical data to Canada for consumption within the country. However, when the commodities or technical data are "transitting" Canada or are to be re-exported from Canada to another foreign country, and such a shipment would require a validated license if it were made directly from the U.S., then an export license or reexport authorization is required.

⁵⁶ Fried, *supra* note 6, at 191-93.

⁵⁷ These examples are drawn from Hypotheticals and Discussion Following the Remarks of Mr. Jonathan Fried and Mr. Arthur Downey, 11 CAN.-U.S. L.J. 199-211 (1986) [hereinafter Hypotheticals].

Example 2. Item of U.S. origin and on U.S. foreign policy list.

To be re-exported from Canada, the exporter would need to obtain a Canadian license by virtue of the item's U.S. origin. But depending on the product and destination, the exporter also may need a U.S. license because of U.S. foreign policy controls.

Example 3. U.S. goods, unaltered, and stocked for shipment to any number of destinations.

A Canadian export license is needed since it is a U.S.-origin good that has not been substantially transformed. If the American supplier has reason to believe the product may go to a controlled destination, he must notify the U.S. authorities of that fact and the Canadian exporter must obtain a U.S. re-export license before the item may be shipped to a controlled destination.

Example 4. Canadian product derived from U.S. technology.

Only if the product is on the COCOM list or is a strategic good would Canada require a permit. If the product is destined for a country under U.S. foreign policy controls, the exporter also would have to obtain a U.S. re-export license for the product. This extra-territorial licensing burden defies the undeniable logic of allowing Canada to use its own export control process to license the exports of Canadian companies producing products in Canada.

Example 5. Destination: Cuba—American foreign policy controls but no Canadian foreign policy controls.

Outside the realm of strategic goods, Canada does not restrict trade with Cuba. The United States essentially prohibits direct trade with Cuba. For U.S. subsidiaries in Canada to trade with Cuba, the product must contain less than 20 percent U.S.-origin components and the Canadian subsidiary, through its parent company, must obtain a re-export license for products.⁵⁸ Additionally, if the Canadian consignee subsequently re-exports the goods without a U.S. license, the consignee may be subject to prosecution in the United States, although it never had any physical presence there.⁵⁹

⁵⁸ 15 C.F.R. § 385.1(b)(2) (1988). In the wake of the pipeline debacle, the United States has adopted a more relaxed stance, essentially exempting from the license requirement U.S.-origin goods which have been substantially transformed.

⁵⁹ 15 C.F.R. §§ 387-88 (1988) contain criminal and civil penalties for violation of export control laws. For willful violations, these range from denial of export privileges to fines of up to \$1 million and prison terms up to 10 years.

There is no symmetry, however, regarding U.S. enforcement of export restrictions to destinations under Canadian foreign policy controls. For example, Canada would not permit the direct export of military items to Taiwan. If a U.S. importer planned to re-export military goods of Canadian origin to Taiwan, there is no guarantee of reciprocal enforcement of Canadian foreign policy controls. The Canadian government would expect the United States to deny the re-export on the basis of Canadian policy.⁶⁰ Yet should the re-export take place, the Canadian government would not assert direct jurisdiction over the American consignee for violation of its foreign policy controls.⁶¹ This is in stark contrast to the near universal jurisdiction asserted by the United States over the activities of all entities in the export chain whether or not they actually have a physical presence within the United States. Under the U.S. approach, consignees are deemed to be bound by U.S. controls by virtue of the contractual undertaking.⁶²

Example 6. Technical Data.

As far as restrictions on technology transfer are concerned, the two countries still are very far apart in their definition of what requires a license. Canada requires an export license only for technical data in tangible material form and related to U.S.-origin goods or goods appearing on the COCOM list.⁶³ The product of this data may be controlled but not the data itself. On the other hand, the United States imposes export license requirements on data in virtually all forms—design, process, know-how, and other tangible and intangible forms of technical data not generally available to the public.⁶⁴ As with goods, no license is needed for technology transfer from the United States to Canada. But under the current law, a Canadian company producing Canadian goods in Canada but using American know-how must seek American re-export authorization to ship this product to a country on the U.S. foreign policy control list.

Generally, controls over foreign products derived from U.S.-origin technical data have been imposed only where there was some continuing connection with the United States, such as a licensing agree-

⁶⁰ Hypotheticals, *supra* note 57, at 204; interview with David Ryan, *supra* note 36.

⁶¹ Hypotheticals, *supra* note 57, at 205-06.

⁶² Marcuss & Mathias, *supra* note 33, at 21.

⁶³ See *supra* text accompanying notes 14-18.

⁶⁴ 15 C.F.R. § 379.1(a) (1988).

ment, some written assurance of compliance by the user, or agreement to abide by U.S. controls.⁶⁵ Of course, the pipeline controls have now raised the possibility that the user may be bound not only by rules which existed at the time of the contract but also by subsequent changes in foreign policy which may impose restrictions retroactively.⁶⁶

By having to obtain two licenses, one from Canada and one from the United States, Canadian companies are at a disadvantage compared to their American counterparts. The Government of Canada has conducted no formal studies to assess the burden placed on Canadian companies by the U.S. export license requirements. Anecdotal evidence, however, suggests that many Canadian firms must consider not only their own national requirements but also must factor into their decision-making the uncertainties occasioned by the volatility of U.S. export regulations as well as day-to-day annoyances such as delays in the U.S. licensing process.⁶⁷

THE CANADA-UNITED STATES FREE TRADE AGREEMENT

In view of the extraterritorial reach of U.S. export control laws and differences in interpretation extending even to the definitions of terms such as "origin," "substantially transformed," and "technical data," one might expect the Free Trade Agreement to have produced some clarification of meanings or some relaxation of U.S. requirements, especially in the re-export field. On the other hand, the Agreement established a free trade area, not a Customs Union requiring a common external trade policy. Thus it is not surprising that the export control provisions of the FTA are skeletal at best.

National security considerations are addressed in Article 2003 which states:

Subject to Articles 907 and 1308, nothing in this agreement shall be construed:

a) to require any Party to furnish or allow access to any information the disclosure of which it considers contrary to its essential security interests;

b) to prevent any Party from taking any action which it considers necessary for the protection of its essential security interests.

i) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods, materials and services as is

⁶⁵ See Marcuss & Mathias, *supra* note 33, at 20-26.

⁶⁶ *Id.* at 9-11.

⁶⁷ Interview with David Ryan, *supra* note 36.

carried on directly or indirectly for the purpose of supplying a military establishment,

ii) taken in time of war or other emergency in international relations, or

iii) relating to the implementation of national policies or international agreements relating to the non-proliferation of nuclear weapons or other nuclear explosive device; or

c) to prevent any Party from taking action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.⁶⁸

This article essentially reproduces GATT Article XXI, which permits signatories to restrict trade for national security reasons.⁶⁹ Articles 907 and 1308, as referenced above, carve out additional national security exceptions for energy trade and for government procurement.⁷⁰

Chapter 4 of the FTA contains provisions directly bearing on export restrictions. Article 407 sets out the rules governing import and export restrictions under the parties' rights and obligations as signatories of the GATT. Paragraph 3 of the Article states:

In circumstances where a Party imposes a restriction on importation from or exportation to a third country of a good, nothing in this agreement shall be construed to prevent the Party from:

a) limiting or prohibiting the importation from the territory of the other Party of such good of the third country; or

b) requiring as a condition of export of such good of the Party to the territory of the other Party, that the good be consumed within the territory of the other Party.

⁶⁸ FTA, *supra* note 9.

⁶⁹ Art. XXI allows a contracting party to refuse to disclose information contrary to its security interests, to take any action considered necessary to protect its interests related to fissionable materials, traffic in arms and ammunition, and actions taken in time of war or international emergency. Also, parties are free to act to pursue obligations under the United Nations Charter to maintain peace and security.

⁷⁰ FTA, *supra* note 9. Art. 907 allows restrictions to the extent necessary to:

(a) supply a military establishment of a Party or enable fulfillment of a critical defense contract, of a Party;

(b) respond to a situation of armed conflict involving the Party taking the measure;

(c) implement national policies or international agreements relating to the non-proliferation of nuclear weapons or other nuclear explosive devices; or

(d) respond to direct threats of disruption in the supply of nuclear materials for defense purposes.

Art. 1308 provides that notwithstanding art. 2003 on national security, for purposes of Chapter 13, the provisions of art. VIII of the Code shall apply.

In Paragraph 4 of Article 407, the parties pledge that should one party impose restrictions on imports of a good from third countries, the parties upon request by either party shall consult on ways to avoid undue interference with or distortion of pricing, marketing, and distribution arrangements in the territory of the other party.

Only one other Article addresses directly the issue of export controls. Paragraph 2 of Article 409 states:

With respect to the implementation of the provisions of this Article, the Parties shall cooperate in the maintenance and development of effective controls on the export of each other's goods to third countries.

To foster this cooperation, some progress was made in providing clearer definitions of terms bearing on the issue of jurisdiction over exports. In Annex 301.2, the FTA addresses the issue of what constitutes "substantial transformation" of a good, i.e., the point at which a U.S.-origin good becomes a Canadian good by virtue of further processing or assembly with other components in Canada. Paragraph 2 states that such transformation is deemed to occur when the processing or assembly results in a change in tariff classification according to the Harmonized System of Tariffs. Even if the tariff classification does not change, origin still may shift to the other party if not less than 50 percent value is added during processing in the territory of the other party.

One point, however, should be kept in mind. The relatively detailed exposition of rules of origin in the FTA was not prompted by problems generated by the effect on Canada of overreaching U.S. export controls. Rather, this detail was prompted by the two sides' desire to restrict the benefits of the trade agreement to themselves. The rules of origin were set up to filter out third-party goods, not to distinguish between indigenous products.⁷¹ Thus, discrepancies could arise between the origin of goods for the purpose of the FTA and the origin of goods for purposes of unilateral export controls.⁷² Indeed, in the implementing legislation passed by Congress in September 1988, section 102(a) states that "no provision of the Agreement, nor the application of any such provision to any person or circumstance,

⁷¹ Interview with David Ryan, *supra* note 36.

⁷² See Baker and Battram, *The Canada-United States Free Trade Agreement*, 23 INT'L LAW. 37, 38 (1989). The authors point out that there could be discrepancies in origin of goods for the purpose of the FTA and the origin of goods for the purposes of quota or voluntary restraint agreements with third countries.

which is in conflict with any law of the United States shall have effect."⁷³

Another definitional problem arises in Paragraph 3(b) of Article 407. There the parties agree that in exchange for controlled items passing license-free between the two countries, the item must be "consumed" within the territory of the other party. While "consumption" may be a straightforward concept when applied to items such as agricultural commodities and raw materials for industry, it is less clear what it constitutes for manufactured items. For example, a Canadian company might import a U.S.-origin computer with the expectation that the computer will have a useful life of three years. At the end of that time, the company may choose to upgrade to another model and have the used equipment sold elsewhere. For the purpose of the original export to Canada, the computer has been consumed. Whatever its subsequent destination may be, its export should be controlled solely by Canadian laws.⁷⁴ But the United States would attempt to continue to exert its re-export jurisdiction if the computer were destined for a country under a foreign policy control. Clarification of this and other definitions in the FTA will have to await further negotiations.

A potential moderator of the effect of U.S. extraterritorial controls may be the incorporation of national treatment provisions from GATT Articles XI⁷⁵ and XX⁷⁶ into the FTA. In Article 407 of the FTA, the parties affirm their rights and obligations under the GATT regarding prohibitions or restrictions on bilateral trade.⁷⁷ Similarly, in Article 501 the parties pledge to accord national treatment to the goods of the other in accordance with the GATT. It has been suggested that these provisions may preclude the extraterritorial enforcement of U.S. laws when jurisdiction is based on corporate nationality.⁷⁸ Canada

⁷³ United States-Canada Free-Trade Agreement Implementation Act of 1988, Pub. L. No. 100-449, § 102(a), 102 Stat. 1851, 1853 (1988).

⁷⁴ Interview with David Ryan, *supra* note 36.

⁷⁵ General Agreement on Tariffs and Trade, art. XI, para. 1. Article XI, paragraph 1 provides for the elimination of quantitative restrictions on importation or exportation of products between contracting parties. Paragraph 2 offers exceptions to the general prohibition stated in paragraph 1.

⁷⁶ *Id.* art. XX. Art. XX allows exceptions to national treatment in order to protect public morals, health, gold and silver trade, law enforcement, exclusion of products of prison labor, national cultural treasures, to preserve exhaustible natural resources, and to prevent domestic short supply.

⁷⁷ FTA, *supra* note 9, art. 407.

⁷⁸ Fried, *Competitive Impact of Canadian and U.S. Export Control Regulations: The Canadian Dimension*, 14 CAN.-U.S. L.J. 75, 80 (1988).

has pledged under the FTA to encourage U.S. investment into Canada and to treat such entities exactly as it would treat a Canadian corporation. In light of the entity's status and treatment as a Canadian corporation, it would be inconsistent for the United States to continue to apply U.S. export controls to that corporation. Should this U.S. control continue, in essence, a U.S. corporation would carry different rights and obligations into Canada than a Canadian corporation would have respecting its Canadian activities. This would place Canada in the position of having to treat the corporation differently to respond to U.S. authority and would seem to violate the principles of national treatment.

OMNIBUS TRADE AND COMPETITIVENESS ACT OF 1988⁷⁹

With so many trade issues on the table for discussion between the United States and Canada, export controls, especially the extraterritorial application of U.S. controls in Canada, was not one of the issues high on the list for resolution in the FTA. But these problems can be alleviated by another avenue. Just as the United States can act unilaterally to extend the impact of its controls, it can act to reduce them. It should be noted that, whatever the effect of U.S. foreign policy controls on Canadian exporters, the U.S. export community also suffers from lost business opportunities and diminished competitive position.⁸⁰ The impact on competitive position is particularly acute because many of the same goods and technologies placed under export restrictions by the United States are freely available from competing foreign suppliers.⁸¹ The Soviet pipeline restrictions, with their sweeping assertion of extraterritorial reach, their retroactivity, their impact on alliance relations, and the consequent erosion of confidence in the reliability of U.S. suppliers, provided the main impetus for the export control reform initiatives contained in the

⁷⁹ Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988).

⁸⁰ For a general discussion of the negative effect U.S. export controls have on the U.S. export community, see Moyer & Mabry, *supra* note 33, at 144-56. (Economic costs to the export community include "the costs of lost transactions, damaged business relationships, and lost market shares."). See also NATIONAL ACADEMY OF SCIENCES, *BALANCING THE NATIONAL INTEREST* 103-33 (1987); PRACTICING LAW INSTITUTE, *COPING WITH U.S. EXPORT CONTROLS*, course handbook series no. 353 (1983); *TECHNOLOGY CONTROL, COMPETITION, AND NATIONAL SECURITY* (B. Seward ed. 1987) [hereinafter Seward].

⁸¹ Seward, *supra* note 80, at 77-109. See also 62 CONG. DIG. 170-92 (1983) (arguments pro and con on improving foreign availability analysis).

Omnibus Trade and Competitiveness Act of 1988.⁸² In the Act, Congress took the opportunity to address directly and indirectly the problems created by the extraterritorial impact of export control regulations.

In section 2404(a)(4), the new law eliminates re-export licenses for nearly all goods and technology sold to COCOM countries plus what are known as "5(k)" countries.⁸³ Re-export licenses continue to be required for goods and technology relating to supercomputers, commodities for sensitive nuclear uses, and "bugging" devices.⁸⁴ Additionally, the Commerce Secretary may require re-export permits for certain end-users.⁸⁵ In place of the requirement for re-export licenses, the Secretary may require notification of re-export but only after the fact, not prior to re-export.⁸⁶

In Section 2404(a)(5), the new law eliminates the need for re-export licenses for U.S. parts and components incorporated into foreign-made goods when the value of controlled U.S. content is 25 percent or less of the total value of the goods into which they are incorporated.⁸⁷ Also, the re-export license requirement is eliminated for the re-export of goods and technology to a country under foreign policy controls if only notification, not licensing, is required by COCOM.⁸⁸ However, parts and components incorporated in supercomputers, regardless of technology level or value of U.S. content, remain subject to re-export licensing.⁸⁹ Additionally, at the time the President imposes or expands foreign policy controls, the President must determine whether the export controls will apply to replacement parts for goods subject to control.⁹⁰

The Act also encourages the President first to pursue diplomatic alternatives before imposing new controls or expanding or extending existing controls on items available from other sources.⁹¹ The amend-

⁸² See 62 CONG. DIG. 170-92 (1983) (arguments pro and con on limiting foreign policy controls).

⁸³ 50 U.S.C. app. § 2404(a)(4)(A) (1989). The term "5(k)" comes from 50 U.S.C. app. § 2405(k) which refers to countries, other than COCOM members, who cooperate with the United States on export controls. Currently only Switzerland has been designated as a 5(k) country meeting U.S. standards for export controls.

⁸⁴ 50 U.S.C.A. app. § 2404(a)(4)(B) (1989).

⁸⁵ *Id.* § 2404(a)(4)(B)(iv).

⁸⁶ *Id.* § 2404(a)(4)(A).

⁸⁷ *Id.* § 2404(a)(5)(i).

⁸⁸ *Id.* § 2404(a)(5)(A)(ii).

⁸⁹ *Id.* § 2404(a)(5)(B).

⁹⁰ *Id.* § 2405(p).

⁹¹ 50 U.S.C. § 2405(a)(6) (1989).

ment suggests alternatives such as withdrawal of ambassadors, reductions of embassy staff, private discussions with foreign leaders, or public statements where private discussions fail.

The Act represents a step forward in terms of easing the administrative burden on not only U.S. exporters but also their licensees, consignees, and subsidiaries worldwide. One report estimates a 25 percent reduction in the number of export license applications for goods and technology destined for COCOM countries and other Free World nations.⁹² The reform of the re-export controls is designed to reverse the trend to design out American products simply because of the licensing requirements.⁹³ The Act continues legislative efforts to limit the President's wide-ranging discretion to impose foreign policy controls that has so greatly damaged the United States' reputation as a reliable supplier of goods and technology to the world.

As burdens are decreased for American firms, so are they decreased for Canadian firms. The relaxation of licensing requirements means that Canadian exporters will not be subjected as often to the necessity of obtaining U.S. export licenses in addition to Canadian licenses. But several limitations should be kept in mind. First, none of the statutory changes in the Act is self-implementing.⁹⁴ The existing controls will remain in effect until the Commerce Department produces final regulations after a period of notice and comment, a process which has extended well into 1989.⁹⁵ Unfortunately, delays and different interpretations are beginning to appear in the proposed regulations.

The Act eliminates all licensing requirements for exports of goods and technology to COCOM and 5(k) countries that have "effective" export control systems.⁹⁶ The Act directs the Secretary of Commerce to determine which countries have qualifying control systems within three months of the enactment of the law. Although the Commerce Department is preparing a report evaluating COCOM members, the

⁹² U.S. Chamber of Commerce, *The Omnibus Trade and Competitiveness Act of 1988: A Straightforward Guide to its Impact on U.S. and Foreign Business* 23 (1988).

⁹³ *Id.* See also 62 CONG. DIG. 178 (statement of Rep. Don L. Bonker) and 186, 188, 190 (statement of Scientific Apparatus Makers Ass'n).

⁹⁴ See 2 EXPORT CONTROL NEWS, Sept. 20, 1988, at 2.

⁹⁵ 2 EXPORT CONTROL NEWS, Nov. 23, 1988, at 2.

⁹⁶ 50 U.S.C. app. § 2404(b)(2)(C). "Effective" controls would consist of a program to evaluate export license applications, an appropriate documentation system, procedures for exchange of information with COCOM, and laws with consequent civil and criminal penalties for violations.

list of qualifying nations apparently will not be made public. By designating nations with effective export control systems, the Secretary would also be identifying those not meeting that level of control. Negotiations among the COCOM members are rancorous enough without dropping such a diplomatic bombshell in the midst of U.S. efforts to strengthen the system as a whole.⁹⁷ Designation of other nations to receive exports license-free also impinges on Canada's unique status with the United States for cross-border exports. The passage of goods license-free from the United States into Canada may be seen as a *quid pro quo* for Canada's enforcement of U.S. export controls,⁹⁸ to the detriment of its own exporters. It is unclear what would be offered by the United States to replace this incentive if countries other than Canada become members of this heretofore exclusive club.

In the proposed regulations for parts and components, the Commerce Department, apparently at the recommendation of the State Department, has proposed that the 25 percent threshold not apply to items controlled for foreign policy reasons or for nuclear non-proliferation reasons.⁹⁹ The regulations would require that the U.S. value not exceed \$10,000 or 10 percent of the final value of the product destined for re-export. This distinction places tighter controls on re-exports for foreign policy reasons than those for national security reasons. If this regulation becomes final, it would complicate the re-export control regime because most goods subject to national security controls are also under foreign policy or nuclear nonproliferation controls.

In a related matter, foreign policy controls may still have retroactive effect. According to the conference report accompanying the Act,¹⁰⁰ the term "controlled U.S. content" is intended to mean that no re-export license will be required at the time of re-export as long as the United States does not require *at that time* a validated license for the new destination. Thus, a Canadian re-exporter could still be bound by imposition of new U.S. foreign policy controls or tightening of existing controls in the future.

⁹⁷ See 2 EXPORT CONTROL NEWS, Dec. 22, 1988, at 3 (includes an evaluation of individual members of COCOM).

⁹⁸ Interview with David Ryan, *supra* note 36; interview with T.S.E. Jones, Dept. of National Defence, Jan. 17, 1989.

⁹⁹ See 2 EXPORT CONTROL NEWS, *supra* note 95, at 3.

¹⁰⁰ H.R. Rep. No. 576, 100th Cong., 2d Sess. 809 (1988).

CONCLUSION

From the foregoing discussion it is obvious that many disparities between the Canadian and U.S. export control systems remain to be resolved. These differences could become the source of more conflict as other trade barriers fall during the course of implementing the FTA over the next ten years. Rather than hoping for some grand-scale overhaul of the U.S. system, Canada can contribute best by pursuing incremental change through the avenues opened by the FTA. One of the first areas that needs to be addressed is determining the appropriate scope of definitions of the terms of the Agreement. Canada has already initiated discussions over the definition of "wool" for the purpose of administering textile tariff rate quotas under the FTA.¹⁰¹ Certainly terms in the export control provisions, such as "origin," "substantially transformed," and "consumed," could benefit from closer scrutiny. Also the meaning of the FTA's national treatment provisions remains to be resolved.

Article 407 of the FTA export section is very important to the success of creating a more uniform control system. It institutionalizes the long tradition of bilateral consultation on these matters. Either side may request consultations on export controls to avoid interference with pricing, marketing, and distribution arrangements. By means of this process Canada has the opportunity to influence U.S. foreign policy controls to be more focused, to urge the United States to pursue multilateral rather than unilateral sanctions, and to point out potential hardships that unilateral controls could work on the Canadian economy.

Success in these binational discussions could have positive effects beyond the borders of North America. The pursuit of common ground could set an example for COCOM to follow in developing minimum standards for its member countries. It also may provide an example for members of the European Community to follow in preparing for their proposed integration in 1992. Indeed, one of the reasons given for the relaxation of export controls in the Trade Act of 1988 was to move toward the goal of an export-license-free zone among COCOM countries.¹⁰² To achieve this goal, the United States-Canada relationship will be watched carefully for signs of a truly symmetrical allocation of rights and responsibilities.

¹⁰¹ The law firm of Stikeman, Elliott, Ottawa Brief 7 (Feb. 1, 1989).

¹⁰² See H.R. Rep. No. 576, *supra* note 100, at 810.

The Canada-United States Free Trade Agreement is an admirable experiment aimed toward achieving a more fully integrated North American market. As tariff barriers are phased out, the remaining non-tariff barriers, such as export controls, must be resolved in such a way as to minimize trade friction between Canada and the United States. By moving toward a bilateral consensus on export controls, the United States and Canada will improve their ability to meet the trade challenges of the 1990s and beyond.