I. INTRODUCTION

An Iranian-born resident of Canada and an associate were recently arrested by United States authorities in Vancouver, British Columbia and indicted on charges of conspiracy to smuggle sophisticated American military parts to Iran in violation of the United States arms embargo. A New York Times and CBS News joint undercover investigation learned that this was not an isolated case. Arms dealers apparently have found that the relaxed border situation between the United States and Canada and Canada’s unwillingness to support United States’ embargoes allow arms dealers to circumvent United States’ arms export control regulations. “The result . . . is a steady flow of American-made military parts across the border into Canada and on to Iran” and other embargoed, terrorist-supporting countries.

Emerging from this current arms trafficking is the disclosure of a loophole in the United States Arms Export Control Act (AECA), the regulatory scheme for the sale and transfer of significant military articles and services, including weapons and other valuable technical information. Capitalizing on the lucrative international arms market that has expanded significantly since the collapse of the Communist Bloc and the emergence of new international

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1 See Anthony DePalma & Lowell Bergman, Sneaking United States Jets to Iran: The Canadian Route, N.Y. TIMES, May 15, 1998, at A3. Lowell Bergman is the senior investigative producer for CBS News. After the hostage crisis in 1979, the United States imposed economic sanctions against Iran. A total ban on American trade with Iran was imposed in 1995 after Iran was linked to terrorist attacks. See id.

2 See id.

3 See id.

4 Id. This statement was made by American officials and the Iranians involved in the arms deal.

markets in the 1990s,6 State Department officials have permitted a loophole in the AECA to continue unremedied.

Assuming the United States intends to see that the objectives of the AECA are achieved, several factors must be considered. First, the United States cannot infringe on territorial sovereignty and compel other states to enforce United States’ embargoes. Second, the United States relies on and profits from the sale of American-made defense products and services on the international arms market. Third, while it might be easy for State Department officials to close the Canadian loophole, such action is unlikely in the face of the severe political and economic consequences that could result. Trade relations with Canada and other states could be undermined, and the substantial harm to domestic producers of defense goods and dual-use items makes unilateral action to correct the loophole undesirable for State Department officials. As a result of these factors, multilateral agreements with other nations may be the only avenue for the United States to ensure that American-made weapons and technology do not reach embargoed and terrorist-supporting states.

Following the introduction, the second section of this note gives a brief history of the beginnings of export controls in the United States. The next section dissects and explains the complex regulatory scheme for the export of military and dual-use goods,7 the Arms Export Control Act, and the Export Administration Act, respectively.8 The fourth section discusses the many amendments that have been made to the AECA and EAA and the result: a loosening of export control restrictions to provide a more exporter-friendly system and a reduction in the number of export-restricted products and countries.9 A paradox emerges from the loosening of export restrictions.

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6 See Jonathan D. Westreich, Regulatory Controls on United States Exports of Weapons Technology: The Failure to Enforce the Arms Export Control Act, 7 ADMIN. L.J. AM. U. 463, 467 (1993). American-made weapons and weapons technology accounted for fifty-one percent of total deliveries of major conventional weapons in 1991. See id. at 464. Westreich contends that as the number of regional wars and conflicts increases, due in part to the break up of the Soviet Union and the end of the Cold War, the demand for weapons made in the United States will increase as well. See id.


While in theory United States policy aims to restrict the distribution of potentially destructive weapons and technologies, in reality, the United States is striving to maintain a global share in the production, sale, and transfer of weapons and technologies on the profitable international market. This note contends that this economic incentive is diverting the United States from a consistent arms policy.

The fifth section of this note analyzes the Canadian loophole, from its historical underpinnings to its statutory foundation and negative consequences. This section also discusses the failure of State Department officials to address and remedy the “Canadian Connection” problem. Finally, this note argues that it is impracticable for the United States to unilaterally close the loophole in the face of an ongoing paradox between the competing and conflicting goals of arms control and arms sales. Multilateral arms transfer agreements, and the Wassenaar Arrangement specifically, are discussed as possible ways to promote internationally the United States’ policy toward arms reductions while maintaining a share of the lucrative arms market.

II. THE UNITED STATES’ EXPORT CONTROL REGIME: A BRIEF HISTORY

Preceding 1949 and the Export Control Act, export controls in the United States consisted of wartime export restrictions that were lifted at war’s end. After the destruction of World War II, however, the United States chose to retain its wartime export restrictions in peacetime. This was done to insulate the domestic market from manufacturing supply shortages and to aid in Europe’s reconstruction by controlling certain shipments of goods to particular countries.

As the Cold War intensified, a third justification for preserving the strict export controls emerged: preventing the flow of arms and other “militarily significant shipments from reaching the Union of Soviet Socialist Republics and other communist countries.” By the late 1940s, safeguarding national security by prohibiting transfers of superior Western technology to Communist states became the principal purpose behind export controls.

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11 See Westreich, supra note 6, at 464.
12 See id. at 468.
13 Id.
14 See Hiestand, supra note 8, at 690.
Congress codified this policy of "economic containment" in the Export Control Act of 1949 (ECA). The ECA regulated the export of United States produced goods and technologies having any military use and "vigorously restricted the reexport of such goods." Despite harsh controls that sacrificed American trade and competitiveness for national security concerns, the ECA lasted almost twenty years. The act's duration can be attributed to an intense, almost overwrought fear of communist aggression.

Support for the ECA and its strict controls began to erode by the mid-1960s. First, the need for significant export restrictions over scarce goods was no longer necessary as Europe regained its economic stability. In addition to increased economic competition from Europe, the technological advantage of the West had begun to decline. It has been suggested that insurrection in various Soviet protectorates may have created a perception that the communists posed less of a threat to the United States and a rebuilt Europe. As a result, the importance of American competitiveness and market share in international trade began to weigh heavier against the once controlling national security concerns. Congress responded to these competing interests by scrapping the overly restrictive export controls and developing a new dual-regulatory framework. First, to continue trade reductions in "implements of

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17 Sawchak, supra note 15, at 790.

18 See Westreich, supra note 6, at 468 (noting that "the President ... was empowered to cut off the entire trade of the United States ... and the penalties, both administrative and criminal, were significant").

19 See Hiestand, supra note 8, at 680.


21 See Westreich, supra note 6, at 468-69.


23 See id. at 817-18.

24 See id. at 818. Revolts occurred in East Berlin, Poland, and Hungary. See id.

25 See id. at 817-18.

26 See Sawchak, supra note 15, at 790. The United States "recogniz[ed] the costs of excessive controls" and looked to expand trade. Id.
war," the Foreign Military Sales Act of 1968 (FMSA) was enacted. It was later renamed the Arms Export Control Act. Second, the Export Administration Act of 1969 (EAA) was passed to foster United States involvement in the trade of dual-use goods, which are goods that have both civilian uses and potential for strategic military application. With the passage of this legislation, the United States entered into a new era of arms export controls.

III. THE EXPORT REGULATORY FRAMEWORK: THE ARMS EXPORT CONTROL ACT AND THE EXPORT ADMINISTRATION ACT

A. The AECA: A Regulatory Scheme for Defense Articles and Defense Services

The FMSA established a regulatory framework that served as the statutory foundation for the current scheme of weapons transfer controls, the AECA. The AECA grants the president, as commander in chief of the armed forces, authority to regulate the import and export of defense goods and services "[i]n furtherance of world peace and the security and foreign policy of the United States." Defense goods and services are exports having a primary military function or a strong capability of military use. All other general exports, including dual-use goods and services, are regulated by the EAA (see Part B, infra).

The president's statutory authority to promulgate regulations concerning the export of defense articles and services was delegated to the secretary of state. The International Traffic in Arms Regulations (ITAR) executes this

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27 Westreich, supra note 6, at 470.
31 See Sawchak, supra note 15, at 790.
32 See Westreich, supra note 6, at 469.
33 See U. S. CONST. art. II, § 2, cl. 1.
35 See Hiestand, supra note 8, at 691.
Power to administer these regulations was further delegated to the Director of the Office of Defense Trade Controls, Bureau of Politico-Military Affairs, Department of State (ODTC).\textsuperscript{39}

In accordance with the AECA,\textsuperscript{40} ITAR creates the United States munitions list.\textsuperscript{41} The munitions list is comprised of all defense articles and defense services that are designated by the president as subject to the AECA’s export regulations.\textsuperscript{42} Items on the munitions list are those which:

(a) [are] specifically designed, developed, configured, adapted, or modified for a military application, and (i) [do] not have predominant civil applications, and (ii) [do] not have performance equivalent to those of an article or service used for civil application; or (b) [have] significant military or intelligence applicability such that control under this subchapter is necessary.\textsuperscript{43}

Intended use of the article or service after its export is not relevant in determining placement on the munitions list.\textsuperscript{44}

\textsuperscript{38} International Traffic in Arms Regulations, 22 C.F.R. §§ 120-130, 120.1(a) (1999) [hereinafter ITAR].

\textsuperscript{39} See id.

\textsuperscript{40} See AECA, 22 U.S.C. § 2778(a)(1).

\textsuperscript{41} See ITAR § 120.2.

\textsuperscript{42} See id.

\textsuperscript{43} Id. § 120.3. The munitions list includes firearms; artillery projectors, including guns over .50 caliber; ammunition and ammunition manufacturing machines; launch vehicles, including guided missiles, ballistic missiles, rockets, torpedoes, bombs, and mines; explosives, propellants and incendiary agents; vessels of war and special naval equipment; tanks and military vehicles; aircraft and associated equipment; military training equipment; protective personnel equipment; military electronics, including underwater sonar, radar, and radio equipment; fire control, range finder, optical and guidance control equipment; auxiliary military equipment, including military cameras and cryptographic systems; toxicological agents and equipment and radiological equipment; spacecraft systems and associated equipment such as satellites and global positioning systems; nuclear weapons design and test equipment; classified articles, technical data and defense services not otherwise enumerated; submersible vessels, oceanographic and associated equipment; and miscellaneous articles not enumerated which have a substantial military application and which have been specifically designed or modified for military purposes. See id. § 121.1.

\textsuperscript{44} See id. § 121.1.
Any manufacturer or exporter of munitions list articles in the United States is required to register with the ODTC. This registration requirement aids the United States government in tracking those involved in the manufacture and export of munitions list items and is generally a precondition to the issuance of any license or other approval.

In addition to registering, and before the export of any munitions list article, the AECA requires that the exporter obtain either a temporary or permanent export license from the ODTC. The license application must indicate the "country of ultimate destination" for the defense article that is being exported. In addition, the application must include an end-user certificate, whereby the foreign person or country receiving the export agrees not to re-export or resell the munitions list article without prior written approval from the ODTC.

45 See id. § 122.1(a). This even includes manufacturers who do not export their products. See id. The only exemptions are for (1) officers and employees of the United States acting in an official capacity, (2) producers of unclassified technical data, (3) manufacturers and exporters licensed under the Atomic Energy Act of 1954, and (4) those who produce articles for experimental or scientific purpose. See id. § 122.1(b).

46 See id. § 122.1(c).

47 See id. § 123.1(a). A copy of a purchase order, letter of intent, or other appropriate document must accompany applications for a license for the permanent export of defense articles. See id. § 123.1(a)(4). Temporary export licenses are valid only if the article will be exported for a period of less than four years, will be returned to the United States, and the transfer of title will not occur during the period of temporary export. See id. § 123.5(a). A renewal of the license must be obtained from the ODTC if the article is to remain outside the United States beyond a period for which the license is valid. See id.

48 See id. § 123.1(a). There are a number of exceptions, however, to this export license requirement. Approval is not required for the transfer of unclassified defense articles to any public exhibition or trade show. See id. § 123.16. A license is not required for the temporary export of not more than three non-automatic firearms and ammunition for personal use. See id. § 123.17. Also, an export license is not required for shipments originating in Mexico or Canada that incidentally transit the United States en route to the delivery point in the same country in which the shipment originated. See id. § 123.19.

49 Id. § 123.9(a). The exporter must determine the specific end user and end use prior to submitting an application to ODTC.

50 See id. § 123.10(a). This requirement is specifically for the export of significant military equipment and classified articles, but the ODTC may require the end-user certificate for the export of any defense article or defense service. See id. § 123.10(b). Moreover, if the export is designated for a non-governmental foreign end-user, the ODTC may require that the appropriate authority of the government of the importing country also execute the end-user certificate. See id. § 123.10(c).
The AECA explicitly prohibits the export and sale of munitions list items to certain countries. As such, it is the policy of the ODTC to deny export licenses and other approvals for the shipment, sale, or proposed sale of any defense article or service bound for any of these particular countries. This policy reflects the American motivation to keep militarily significant articles and services away from states that are communist or terrorist supporting.

Any attempt to export or re-export a munitions list article or furnish a defense service without first obtaining the required license or written approval from the ODTC is a violation of the AECA. The ODTC has wide latitude to impose penalties for export regulation violations. Possible penalties include seizure and forfeiture, debarment, civil penalties, and the denial of export licenses based on violations of criminal statutes.

Seizure of defense articles may result whenever there is knowledge or probable cause that a defense article is, is going to be, or has been exported or removed from the United States in violation of the AECA. The defense article, and any vessel, vehicle, or aircraft involved in the illegal export attempt, is subject to seizure, forfeiture, and disposition. Debarment occurs when a person is prohibited from direct or indirect participation in the export of defense articles or is prohibited from furnishing defense services for which a license or approval is required by the ODTC. This is generally for a period of three years. The ODTC is also authorized to impose a civil penalty for...

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51 See id. § 126.1. The countries currently include Afghanistan, Armenia, Azerbaijan, Belarus, Cuba, Iran, Iraq, Libya, North Korea, Syria, Tajikistan, Ukraine, and Vietnam. In addition, licenses are denied for export to countries against which the United States maintains an arms embargo (Burma, China, the Federal Republic of Yugoslavia [Serbia and Montenegro], Haiti, Liberia, Rwanda, Somalia, Sudan, and Zaire) or wherever an export would not otherwise be in furtherance of world peace and the security and foreign policy of the United States. See id. § 126.1(a).

52 See id. § 126.1(a). The Director of the ODTC, however, may order a temporary suspension or modification of any or all of the regulations in the interest of the security or foreign policy of the United States. See id. § 126.2.

53 See id. § 127.1. Misrepresentation, false statements, or omission of material facts in order to facilitate exports is also considered a violation. See id. § 127.2.

54 See id. § 127.6(a).

55 See id. § 127.7.

56 See id. § 127.10.

57 See id. § 127.11(a).

58 See id. § 127.6(a).

59 See id.

60 See id. § 127.7.

61 See id.
each violation of the AECA, but the penalty may not exceed $500,000. Finally, the ODTC may deny export licenses to persons who have been convicted of violating particular United States' criminal statutes. The ODTC applies a presumption of denial to all persons convicted of a previous export violation or who are deemed ineligible to receive an export license from any United States agency. There is an exemption, however, for persons who demonstrate they have (i) dealt with the causes that resulted in the violation and (ii) taken appropriate steps to mitigate any concerns of the ODTC.

The export regulations concerning the transfer and proliferation of significant military goods and services, while important, are but a small part of the United States export control regime. Additionally, there are regulations dealing with dual-use and civilian technologies. It is important to examine the controls affecting these particular goods because there is significant overlap and confusion surrounding their regulation. Moreover, the number of persons affected by both sets of regulations is significant.

B. The EAA: A Regulatory Scheme for Dual-use Goods

In 1969, Congress enacted the EAA to regulate exports that made "strategic military contributions" and could harm national security. The EAA acknowledged that extensive export regulations could be detrimental to the domestic economy, and traditionally, the EAA has had a more economic focus than the AECA.

62 See id. § 127.10.
63 See AECA, 22 U.S.C. § 2778(e).
64 See 22 C.F.R. § 127.11(a) (1999). The United States criminal statutes include: The Arms Export Control Act; the Export Administration Act; the Trading with the Enemy Act; Title 18, U.S. Code §§ 793, 794, and 798 (relating to espionage); the International Emergency Economic Powers Act; the Securities Exchange Act; Chapter 105 of Title 18, U.S. Code (relating to sabotage); the Internal Security Act; the Atomic Energy Act; the National Security Act; the Comprehensive Anti-Apartheid Act. See id. § 120.27.
65 See id. § 127.11(a).
66 See id. § 127.11(b). This exception does not apply to persons debarred pursuant to § 127.6 while the debarment is in place. See id. § 127.11(c).
67 See Hiestand, supra note 8, at 693.
68 See id., supra note 8.
73 See EAA, 50 U.S.C. app. § 2401(2).
By the mid-1970s, the technological advantage of the United States over the Soviet Union and its satellite states had diminished significantly.\textsuperscript{73} Congress was urged to retain and, in some cases, increase export controls over research and manufacturing information, so as to maintain or improve the United States' advantage.\textsuperscript{74} The result was the EAA of 1979, which replaced the EAA of 1969 to become the current export control regime for dual-use goods and technologies.\textsuperscript{75}

The policy goals articulated in the EAA resemble those of the AECA: preserving national security, enforcing and supporting various foreign policy goals, and maintaining the United States' supply of scarce materials necessary for strategic technologies.\textsuperscript{76} Similarly, the EAA grants the president the authority to regulate exports.\textsuperscript{77} Here, though, the scope of items regulated is significantly broader and more encompassing than in the AECA.\textsuperscript{78} The EAA controls the export and re-export of dual-use items, which are items that have civil or commercial uses but can easily be put to use in military applications or are items considered to have strategic significance.\textsuperscript{79} Generally, the term "dual-use" is used to distinguish EAA controlled items that have both civil and military applications from those that are weapons or have a military-related use or design and thus are subject to the stricter controls of the AECA.\textsuperscript{80}

The president delegated the authority over dual-use and civil application goods to the Commerce Department,\textsuperscript{81} which in turn issued the Export

\textsuperscript{73} See Tarlowe, supra note 71, at 965.


\textsuperscript{76} See id. § 2402(2).

\textsuperscript{77} See id. § 2405(a)(1) (stating that "the President may prohibit or curtail the exportation of any goods, technology, or other information subject to the jurisdiction of the United States or exported by any person subject to the jurisdiction of the United States").

\textsuperscript{78} See Commerce Control List, 15 C.F.R. §§ 738, 774 (1999).


\textsuperscript{80} See Export Administration Regulations, 15 C.F.R. §§ 730-799, § 730.3 (1998) [hereinafter EAR]. Whereas the shorthand term "dual-use" may be used to refer to the entire scope of the EAR, the EAR also applies to some items that have only civil uses. See id.

Administration Regulations (EAR) to implement the regulations of the EAA.\textsuperscript{82} In addition, the Commerce Department created the Bureau of Export Administration (BXA) to administer the EAR.\textsuperscript{83}

The BXA is divided into two branches, Export Administration and Export Enforcement.\textsuperscript{84} Export Administration implements and administers the export controls designated in the EAR.\textsuperscript{85} Export Enforcement implements the enforcement provisions of the EAR and administers outreach programs to promote the public’s understanding of their obligations under EAR.\textsuperscript{86} The BXA also oversees several Technical Advisory Committees (TACs) which consist of representatives from industry and government that advise and assist the BXA in the development and implementation of export controls.\textsuperscript{87}

The items subject to the EAR are substantial: all items in the United States, all “U.S. origin” items wherever located, “U.S. origin” parts, components, or materials incorporated abroad into foreign-made products, certain foreign-made direct products of “U.S. origin” technology or software, and certain commodities produced by any plant or major component of a plant located outside the United States that is a direct product of “U.S. origin” technology or software.\textsuperscript{88} The BXA, however, does not require a license or other authorization for all exports or re-exports, just those for which the EAR affirmatively states a requirement.\textsuperscript{89}

\textsuperscript{82} See EAR, 15 C.F.R. § 730.3.
\textsuperscript{83} See id. § 730.1.
\textsuperscript{84} See id. § 730.9.
\textsuperscript{85} See id. § 730.9(a). Export Administration consists of five offices: Office of Nuclear and Missile Technology Controls, Office of Chemical/Biological Controls and Treaty Compliance, Office of Strategic Trade and Foreign Policy Controls, Office of Exporter Services, and Office of Strategic Industries and Economic Security Implements. See id. § 730.9(a)(1)-(5).
\textsuperscript{86} See id. § 730.9(b). Export Enforcement is organized into three offices under the supervision of the assistant secretary for export enforcement: Office of Export Enforcement, Office of Enforcement Support, and the Office of Antiboycott Compliance. See id. § 730.9(b)(1)-(3).
\textsuperscript{87} See id. § 730.9(c). TACs include: Information Systems TAC, Materials TAC, Materials Processing Equipment TAC, Regulations and Procedures TAC, Sensors and Instrumentation TAC, and Transportation and Related Equipment TAC. See id. § 730.9(c)(i)-(vi).
\textsuperscript{88} See id. § 734.3. The only items not subject to the EAR are those that are exclusively controlled by the following departments and agencies of the United States government: State Department, Treasury Department’s Office of Foreign Asset Control, United States Nuclear Regulatory Commission, Energy Department, and the Patent and Trademark Office. See id.
\textsuperscript{89} See id. § 736.1.
There are four general ways to fall within the licensing requirement for exports, re-exports, and other activities. If the item being exported or re-exported is listed on the commerce control list and the country chart indicates that a license is required to export to that country, the EAR may require a license. The commerce control list comprises all commodities, software, and technology controlled by the Department of Commerce and resembles the United States munitions list in the State Department. The country chart is a list of all countries charted against various "Reasons for Control" that show whether a license is necessary to ship to a particular country. Second, a license may be required based on the end-use or end-user in a transaction. There is also a license requirement for all exports to embargoed nations. Finally, one may not violate any orders, terms, or conditions under the EAR nor commit a transaction while knowing of a violation.

Within the EAR, there are many exceptions to the licensing requirements. The exceptions allow for the export or re-export of items subject to the EAR

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90 See id. § 730.8(a)(4). This simplifies the "ten general prohibitions" that describe certain exports, re-exports, and other conduct as "subject to the EAR": (1) export and re-export of controlled items to listed countries; (2) re-export and export from abroad of foreign-made items incorporating more than a de minimis amount of controlled United States content; (3) re-export and export from abroad the foreign-produced direct product of United States technology and software; (4) engaging in action prohibited by a denial order of the EAR; (5) export or re-export for prohibited end-uses or to prohibited end-users; (6) export or re-export to embargoed destinations; (7) support of certain activities by United States persons; (8) in transit shipments and items to be unloaded from vessels or aircraft; (9) violation of any order, terms, and conditions of a license or license exemption; and (10) proceeding with transactions with knowledge that a violation has occurred or is about to occur. Id. § 736.2(b)(1)-(10).

91 See id. § 730.8(a)(4)(i).

92 See Commerce Control List, 15 C.F.R. §§ 738, 774 (1999). The CCL is divided into ten categories, numbered as follows: (0) nuclear materials, facilities, and equipment, (1) materials, chemicals, "microorganisms," and toxins, (2) materials processing, (3) electronics, (4) computers, (5) telecommunications and information security, (6) lasers and sensors, (7) navigation and avionics, (8) marine, and (9) propulsion systems, space vehicles, and related equipment. See id.

93 Id. § 738.3(b).

94 See id. § 730.8(a)(4)(ii). This is primarily for proliferation reasons. See also id. § 744.

95 See id. § 730.8(a)(4)(iii). These include Cuba, Libya, North Korea, Iran, Iraq, and Rwanda. See id. § 746.1(a)-(b). Comprehensive embargoes and supplemental controls implemented by BXA under EAR usually involve controls on items and activities maintained by the ODTC in the State Department. See id.

96 See id. § 730.8(a)(4)(iv).

97 See id. § 740. Some exceptions include shipments of limited value, shipments to certain countries designated as "Country B" countries, temporary imports and exports, and shipments for the servicing and replacement of parts and equipment. See id.
that would otherwise require a license. A licensing exception may not be used if authorization has been suspended or revoked or if the intended export does not qualify for an exception. Moreover, BXA may revise, suspend, or revoke all licensing exceptions without notice.

As with the AECA, there are prescribed sanctions for EAR and EAA violations. The BXA has the authority to impose administrative sanctions such as civil penalties, denials of export privileges, and exclusion from practice. Additionally, United States courts may impose criminal sanctions under the EAR for willful violations of the export regulations. Such illegal conduct may also be prosecuted under other criminal statutes, with the items to be exported subject to seizure and forfeiture. Finally, the BXA strongly encourages voluntary self-disclosure of EAR violations and considers any such disclosure as a mitigating factor in determining what administrative sanctions, if any, will be imposed.

In summary, the first unilateral export controls in the United States aimed to contain the spread of aggressive communist and totalitarian ideology during the Cold War. This initial regulatory scheme emphasized foreign policy

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98 See id. § 740.1(a). The exceptions apply to exports that require a license under General Prohibitions One, Two, and Three, and there are no licensing exceptions for General Prohibitions Four, Seven, Eight, Nine, or Ten. See id.
99 See id. § 740.2(a)(1).
100 See id. § 740.2(b).
101 See id. § 764. Violations include engaging in prohibited conduct; causing, aiding, or abetting a violation; solicitation and attempt; conspiracy; acting with knowledge of a violation; and possession with intent to export illegally. See id. § 764.2.
102 See id. § 764.3(a)(1) (declaring that a “civil penalty not to exceed $10,000 may be imposed for each violation”).
103 See id. § 764.3(a)(2). An order denying export privileges may be imposed to restrict the ability of a violator to engage in the export or re-export of items subject to EAR regulation. See id.
104 See id. § 764.3(a)(3). Persons acting in a representative capacity (e.g., attorneys, accountants, consultants, freight forwarders) in any matter before BXA may be excluded from any or all such activities by BXA. See id.
105 See id. § 764.3(b)(1). Under the EAR, a violator “shall be fined not more than five times the value of the exports or re-exports involved, or $50,000, whichever is greater, or imprisoned not more than five years, or both.” Id.
107 See id. § 764.3(c)(2)(i). This includes seizure and forfeiture of the vessels, vehicles, and aircraft carrying such items. See id.
108 See id. § 764.5(a). Voluntary disclosure does not, however, prevent transactions from being referred to the Department of Justice for criminal prosecution. See id. § 764.5(b)(4).
issues, often at the expense of domestic economic competitiveness and global market share in many commodities and technologies. By the mid-1960s, it became obvious that the export controls of the 1940s were no longer realistic as they had the potential to threaten the economic vitality of the country. In response, the AECA and EAA were enacted, establishing a new regulatory framework to balance competing national security and economic concerns. While the United States has continually supported a policy of firm export restrictions to reduce the likelihood of weapons transfers to threatening countries, globalization of the world economy and the collapse of the Soviet Union have encouraged a loosening of export control laws. In an attempt to balance two conflicting goals, the State Department has created a loophole in the United States' export regulations. An examination of the many amendments to both the AECA and EAA that have loosened export restrictions illustrates the conflict between arms control and economic marketshare.

IV. THE LOOSENING OF EXPORT CONTROLS: A PARADOX EMERGES

A. Modifications of the AECA

In the early 1990s, the State Department made two significant changes to arms export control policies in an attempt to narrow export restrictions and promote the export of military goods and technologies. First, the State Department dramatically shifted its role from a controller of exports to a promoter of exports. It began encouraging the foreign sale of weapons and weapon technology to maintain profits following a downsizing of the military and the resulting decline in domestic sales.

Second, the State Department modified the definitions of "defense article" and "defense service" to exclude dual-use items. While the original AECA based inclusion on the munitions list upon whether a particular item was "inherently military in character," the changed regulations consider whether an item lacks a civilian application or if it has a predominantly military or intelligence application. This is an important change because it permits an item with a civilian application to escape the AECA weapons controls that

109 See Burkemper, supra note 9, at 149-50.
110 See Westreich, supra note 6, at 487.
111 See id. at 488.
112 See id. at 492-93.
113 Id. at 490.
114 Westreich, supra note 6, at 490-91.
former may have applied to items with both significant military and civilian uses.\textsuperscript{115}

This change is best illustrated with an example. Glass-fiber technology is used in the manufacture of boats and golf clubs.\textsuperscript{116} Glass fiber can also be used in the construction of nuclear weapons and to replace metal in missile casings and airplane fuselages because of the strength and heat resistance of the fibers.\textsuperscript{117} Since the definition of “dual use” has been narrowed, this particular glass fiber technology would not be subject to the export restrictions of the AECA because it has a possible civilian use, even though it is an essential component of numerous weapons systems and nuclear weapons.\textsuperscript{118} The result of this change is that a greater quantity of articles and services with strategic military potential are now subject to less restrictive controls and thus are available for sale on the international market. This change clearly contradicts the AECA’s policy of reducing the trade in “implements of war.” The State Department defends these changes, asserting that such changes minimize the regulatory burden on exporters and simply shift the control of weapons exports to the Commerce Department.\textsuperscript{119}

An additional justification can be found in the enormous profits to be made for domestic producers of weapons and weapons technology on the international market. In 1991, the United States sold sixty-three billion dollars worth of weapons and weapon technology on the international market, with over one hundred countries receiving American made weapons.\textsuperscript{120} The State Department adjusted its arms control policies to promote the foreign sale and transfer of United States produced weapons and technologies,\textsuperscript{121} signaling a decline in the commitment to the regulation of defense articles and technology. This clearly conflicts with the purpose of the AECA: to reduce the international arms trade.\textsuperscript{122} A similar loosening of export controls is evident in the EAA.

\textsuperscript{115} See id.
\textsuperscript{116} See id. at 491-92.
\textsuperscript{117} See id. at 491.
\textsuperscript{118} See id. at 492.
\textsuperscript{120} See Westreich, supra note 6, at 493.
\textsuperscript{121} See id. at 492.
\textsuperscript{122} See AECA, 22 U.S.C. § 2751 (declaring that “[i]t shall be the policy of the United States to exert leadership in the world community to bring about arrangements for reducing the international trade in implements of war”).
B. Amendments to the EAA

The Commerce Department has twice modified the EAA to streamline licensing procedures and encourage exports. In the EAA Amendments of 1985, the Commerce Department expanded the scope of the "foreign availability exceptions" by shifting the burden of proof of foreign availability to the Commerce Department. Previously, the exporter was required to show that a particular good or technology was freely available on the international market in order to qualify for an exemption. These changes removed restrictions on exports that hindered United States trade because many of these goods and technologies were already available on the international market. Additionally, the 1985 modifications relaxed export controls for shipments to countries with comparable arms control regimes.

Another move toward loosening export controls was seen in the Omnibus Trade and Competitiveness Act of 1988. This EAA modification "help[ed] to level the playing field for United States exporters." The number of countries subject to export controls was further reduced, and the policy changes implemented in 1985 were expanded.

The loosening trend in export regulations is significant. It evidences a distinct policy shift by the State and Commerce Departments. Because export controls hinder the trade and competitiveness of the United States and the financial gain from weapons sales is substantial, it appears as though a balance between national security and competitiveness is no longer the ultimate goal. Maintaining a global market share is now at the forefront of United States arms policy. From this shift in policy, a legal paradox emerges. The AECA's regulatory framework was first established to curb the flow of weapons

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123 See Hiestand, supra note 8, at 696-99.
125 Hiestand, supra note 8, at 696-97. An exception to certain export regulations is based on whether a good or technology is widely available on the international market from sources other than the United States. See id.
126 See id. at 698.
127 See Burkemper, supra note 9, at 171.
128 See Hiestand, supra note 8, at 698. This included countries within the COCOM regime, a multilateral export control agreement among most of the NATO countries, Japan, and Australia. See id. at 685.
130 Hiestand, supra note 8, at 698.
131 See id.
transfers in an attempt to reduce the likelihood of hostility and armed conflict among nations. The loosening of export restrictions to facilitate the trade in weapons is obviously at odds with this policy goal. The inconsistency between policy and reality has not only spawned a loophole in the arms export regulations, but also has encouraged State Department officials to ignore the loopholes existence. As a result, United States-made weapons may be purchased, exported, and then re-exported to terrorist-supporting and embargoed countries. Such exports contradict the purpose of the AECA and serve primarily to increase the profits of the American defense and technology industries.

V. THE CANADIAN LOOPHOLE IN THE AECA

In May 1998, a joint investigation by the New York Times and CBS News unleashed evidence that "a significant portion of the American-made weapons and parts that Iran buys illicitly move through Canada."\(^{132}\) Iranian arms dealers are apparently circumventing American arms export controls and the United States-imposed Iranian arms embargo by utilizing a Canadian exemption in the arms export regulations.\(^{133}\)

The United States and Canada have historically shared a close relationship. As peaceful democratic neighbors, the two countries have cooperated to reduce border restrictions and encourage trade. Both Canadian and American customs officials have acknowledged that "because of the closeness of the two countries' relationship, the same sort of export permits necessary to ship [high-technology products, including many with military applications] to other countries are not needed."\(^{134}\)

The foundation of the Canadian exemption rests on a long established agreement between the United States and Canada. The agreement requires that Canada, instead of developing its own military industry, purchase major arms systems from the United States.\(^{135}\) The Canadian exemption in the AECA grew out of the flow of defense articles and services from the United States into Canada and reflects the "relaxed border situation" between the United States and Canada.\(^{136}\)

\(^{132}\) DePalma, supra note 1, at 3.
\(^{133}\) See id.
\(^{134}\) Martin, supra note 10, at 6.
\(^{135}\) See DePalma, supra note 1, at 3.
\(^{136}\) Id.
A. The Canadian Exemption

The Canadian exemption is found in section 126.5 of the International Traffic in Arms Regulations (ITAR), the regulations promulgated by the State Department to enact the policies of the AECA.\footnote{137} The Canadian exemption permits the permanent or temporary export of any unclassified equipment or unclassified technical data to Canada for end use by Canadian citizens \textit{without a license.}\footnote{138} The statute states that the Canadian exemption does not apply to “defense articles, defense services, or related technical data,”\footnote{139} and it specifically excludes nuclear weapons,\footnote{140} fully automatic firearms for end use by anyone other than a provincial or municipal government of Canada,\footnote{141} and defense articles and services for use by a foreign national other than a Canadian.\footnote{142}

The Canadian exemption can be interpreted broadly or narrowly. A broad interpretation would exclude all defense articles and services, including the ones listed. In contrast, a narrow interpretation would construe the statute to specifically apply only to the enumerated defense articles and services. Since the definitions of “defense article” and “defense services” were narrowed in the early 1990s to exclude any and all dual-use goods, it makes little difference which interpretation is used.\footnote{143} A broad interpretation of the Canadian exemption would likely include little more than what is specifically listed in the statute as exempt and would still leave room for many articles and services with substantial military application potential. As a result, the Canadian exemption applies to civilian-use items with significant military capabilities. Consequently, a greater quantity of strategic military articles and services can now be sold to Canada and then shipped to terrorist-supporting or embargoed nations.

Another pitfall of the Canadian exemption is that by eliminating the license requirement, it allows exporters to ship weapons without indicating a country of ultimate destination and without including an end-user certificate, both of

\footnote{137} See ITAR, 22 C.F.R. § 126.5.
\footnote{138} See id. § 126.5(a).
\footnote{139} Id. § 126.5(b).
\footnote{140} See id. § 126.5(b)(2)-(4) (stating that nuclear weapon strategic delivery systems and all components, parts, accessories and attachments, nuclear weapon design and test equipment, and nuclear naval propulsion equipment are included).
\footnote{141} See id. § 126.5(b)(1).
\footnote{142} See id. § 126.5(b)(7).
\footnote{143} See Westreich, supra note 6, at 490.
which are typically required to secure an export license under the AECA.\textsuperscript{144} The ODTC, the licensing agency that supervises exports, now lacks the authority to deny export licenses and other approvals for the sale and shipment of articles or services when they are bound for Canada.\textsuperscript{145} Thus, it is more difficult for the United States to monitor the shipment of militarily significant dual-use articles and services exported to Canada and nearly impossible to keep such items from then being exported to terrorist-supporting or arms-embargoed states. Because a license is not issued, "there's no trail to follow . . . and [the United States Customs Service] can't tell how much is leaving Canada en route to other countries."\textsuperscript{146}

Canada explicitly states that it is neither a part of the United States embargo against Iran, nor is it obligated to enforce United States foreign policy.\textsuperscript{147} Canadian officials assert that, although their efforts are limited, they do try to ensure that Canada is not used to thwart American export restrictions.\textsuperscript{148} Canadians are "taking very responsible and strong steps to deal with the problem" but admit that these steps are not "100 percent effective."\textsuperscript{149}

The recent arrest in Vancouver brought to light by the \textit{New York Times/CBS News} investigation is not the first time the United States has uncovered Iranian arms deals involving Canada. In February 1998, an American man was arrested by United States customs agents after attempting to deliver F-14 fighter plane engines and parts to Iran by routing them through Canada.\textsuperscript{150} A Canadian businessperson was indicted for shipping embargoed aviation parts through Canada to Iran in 1998.\textsuperscript{151} And in 1994, an Irish man plead guilty to charges of attempting to smuggle military night-vision goggles to Iran by way of Canada.\textsuperscript{152} The CIA reported as early as 1986 that Canadians were involved in the financing of arms sales to Iran,\textsuperscript{153} and a United States

\textsuperscript{144} See ITAR, 22 C.F.R. §§ 123.9(a) (country of ultimate destination); 123.10(a) (end user certificate).
\textsuperscript{145} See id. § 120.1(a).
\textsuperscript{146} DePalma, \textit{supra} note 1, at 3 (quoting John Hensley, the former head of enforcement for the United States Customs Service).
\textsuperscript{147} See id. "It's not our embargo, and it's not our job to enforce a U.S. embargo," asserts Lynda E. Watson, director of the export controls division in the Canadian Ministry of Foreign Affairs and International Trade. \textit{Id.}
\textsuperscript{148} See id.
\textsuperscript{149} \textit{Id.}
\textsuperscript{150} See id.
\textsuperscript{151} See id.
\textsuperscript{152} See id.
\textsuperscript{153} See Martin, \textit{supra} note 10, at 6 (taken from testimony given by William J. Casey, the then Director of Central Intelligence, before a House panel in 1986).
customs official has been quoted as saying that a Canadian connection has been present "in roughly half the American arms and technology smuggling cases to Iran since 1981."\textsuperscript{154} The man arrested in May 1998 in Vancouver reportedly told undercover agents that "Canada is Iran's free-trade zone."\textsuperscript{155}

Iran is not the only destination for embargoed American-made military equipment going through Canada, nor is Iran the only country utilizing the Canadian exemption to circumvent American arms export controls. Several Americans and Canadians were arrested in August 1997 for an attempted sale to Iraq of American manufactured military helicopters that Canada had labeled surplus.\textsuperscript{156} Only a few months later, a Toronto man pled guilty to selling six million dollars worth of militarily significant jet parts to Libya.\textsuperscript{157} These many examples are a testament not only to the presence of a loophole in the regulations, but also to the State Department's reluctance to remedy the loophole. As a result, the Canadian exemption in ITAR has permitted, and probably even promoted, a "Canadian connection" for arms dealers to evade American export restrictions and embargoes.

\textbf{B. Closing the Canadian Loophole}

Despite repeated instances of arms transfers to embargoed countries through Canada since the 1980s, neither lawmakers nor officials in the State Department have taken the steps necessary to alleviate this ongoing problem. After the results of the \textit{New York Times/CBS News} joint investigation were made public, James P. Rubin, spokesperson for the State Department, said only that the United States was "considering tightening [the] loophole."\textsuperscript{158} This evasive and non-committal response, when combined with the continued inaction of State Department officials, demonstrates the conflict between policy and reality in current arms export regulations.

Theoretically, the United States broadly promotes a policy aimed at restricting the distribution of potentially destructive weapons and technologies to unstable terrorist-supporting countries. This is the purpose of the AECA. But in reality, the United States aspires to maintain a share of the profitable global market in weapon and technology transfers. Ignoring the Canadian

\textsuperscript{154} \textit{Id.} This statement is from Ralph Lopez, the Chief of the Munitions Branch of the United States Customs Strategic Investigations Division. \textit{See id.}

\textsuperscript{155} \textit{DePalma, supra} note 1, at 3.

\textsuperscript{156} \textit{See id.}

\textsuperscript{157} \textit{See id.}

loophole allows international arms dealers to indirectly purchase United States-made weapons, thereby significantly benefitting the United States defense industry afflicted by the downsizing of the American military after the Cold War.\(^{159}\)

The State Department could close the Canadian loophole by reinstating the license requirement for exports to Canada or by reinstituting the original "dual-use" definition. Such unilateral actions, however, are neither realistic nor beneficial to the United States. The longstanding peaceful relationship between the United States and Canada and the relaxed border situation make it unlikely that the United States would revert back to an export license requirement for shipments to Canada. Moreover, Canada is somewhat cooperating with the United States to “prevent the misuse of this exemption to divert items to third countries."\(^{160}\)

Altering the definition of "dual-use" to exclude items with substantial military capabilities would significantly harm American manufacturers and exporters. By excluding civilian use items that also have a strategic military application from the less regulated "dual-use" category, the number of dual-use items available for export would be reduced. For example, the glass fiber technology previously mentioned would not be eligible for export, despite its legitimate use in the manufacture of boats and golf clubs. Thus, not only would the United States defense industry be hurt by such a change, but also the many other domestic industries that manufacture goods or provide services with possible military applications. Additionally, changing the "dual-use" definition would shrink the United States' share of the international market in such items and technologies as a decreased number of goods and services would be available for export.

What about Canada’s role in the regulatory loophole? It would be easy if the United States could simply compel Canada to enforce the United States’ embargo of Iran and other terrorist-supporting countries. This, of course, is not feasible. Canada’s government, like the governments of other sovereign states, is the sole power over Canadian territory and citizens. The United States can only ask that Canada support the United States’ embargo, and Canada has unequivocally stated that it will not.\(^{161}\)

The State Department is caught between the longstanding policy to reduce arms transfers and the arms trade’s substantial economic benefits. Given the

\(^{159}\) See Westreich, supra note 6, at 493.

\(^{160}\) Lekic, supra note 158 (quoting State Department spokesperson James Rubin).

\(^{161}\) See DePalma, supra note 1, at 3.
State Department's inability to resolve the Canadian loophole, an alternative means to remedy this conflict should be examined.

C. Multilateral Arms Trade Agreements: Can the Wassenaar Arrangement Resolve the Paradox?

The United States has regularly utilized bilateral and multilateral agreements between and among states to achieve policy objectives unattainable through unilateral action alone. This is especially true in the area of arms control. At the beginning of the Cold War, for example, the United States and its NATO allies devised a multilateral export control system to prevent communist acquisition of Western military goods and technology. Called "COCOM," the Coordinating Committee for Multilateral Export Controls successfully controlled arms exports for over forty years. COCOM was the "most important and influential international export control regime." COCOM was disbanded when the dissolution of the Soviet Union dramatically changed the global environment such that it was no longer able to meet new post-Cold War demands. Because the State Department is reluctant to act unilaterally to prohibit exporters from taking advantage of the Canadian exemption, a multilateral agreement may allow the United States to attack the problem from the other side: the purchaser. Instead of tying the hands of domestic manufacturers and exporters by limiting what can be exported out of the United States, a multilateral agreement could effectively limit the items that can be purchased by foreign buyers. An example of such a multilateral agreement is the Wassenaar Arrangement.

D. The Wassenaar Arrangement

Officially titled the "Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies," the Wassenaar

163 See id. at 1080.
164 Hiestand, supra note 8, at 684.
165 See Dursht, supra note 162, at 1081. COCOM was disbanded on March 31, 1994.
167 Id. at 25.
Arrangement was established on July 12, 1996, at Wassenaar, a suburb of The Hague, Netherlands.\textsuperscript{168} Formally approved by thirty-three states,\textsuperscript{169} it aspires to be a "global mechanism for controlling transfers of conventional armaments and sensitive dual-use . . . technologies."\textsuperscript{170}

The goal of the Wassenaar Arrangement is to prevent the destabilizing acquisition of significant military goods and technologies that could harm international and regional stability and security.\textsuperscript{171} It attempts to achieve this end by promoting transparency and responsibility in global arms and technology transfers.\textsuperscript{172}

A "transparent" goods and technologies transfer system, in theory, allows countries concerned with the potential development of weapons from exported technologies to effectively track sensitive or dual-use technology transfers so as "to assess the threat posed by [the] unfriendly elements which import these items."\textsuperscript{173} The idea is that transparency can simplify enforcement of export controls among participating nations by improving negotiating opportunities and countermeasures to prevent further arms transfers to threatening states or unstable regions.\textsuperscript{174} Wassenaar members meet regularly and voluntarily exchange information to identify "acquisition patterns and clandestine projects" and to ensure that weapon transfers and dual-use transfers are carried out responsibly.\textsuperscript{175} There is hope that such exchanges will "foster common and consistent export policies" while reducing unintentional undercuts by other Wassenaar members.\textsuperscript{176}

\textsuperscript{168} See Dursh, supra note 162, at 1106.
\textsuperscript{169} See The Wassenaar Arrangement Home Page (last modified June 7, 1999) <http://www.wassenaar.org/docs/index1.html>. Participating states of the Wassenaar Arrangement are: Argentina, Australia, Austria, Belgium, Bulgaria, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Japan, Luxembourg, Netherlands, New Zealand, Norway, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Slovak Republic, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom, and United States. See id.
\textsuperscript{170} Id. at 1107; see also Lynn E. Davis, The Wassenaar Arrangement: Address by Under Secretary of State for Arms Control and International Security Affairs, U.S. Dep't of State Dispatch, Jan. 29, 1996, at 19 (discussing the formation of the Wassenaar Arrangement as a framework created to promote conventional arms transfer policies).
\textsuperscript{171} See Dursh, supra note 162, at 1107-08.
\textsuperscript{172} See id. at 1108.
\textsuperscript{173} Hiestand, supra note 8, at 720-21.
\textsuperscript{174} See id. at 721.
\textsuperscript{175} Dursh, supra note 162, at 1108.
\textsuperscript{176} Id.
Participation in the Wassenaar Arrangement is non-discriminatory.\footnote{See id. at 1109.} Membership is available to any state that meets the specified criteria and is supported by a consensus of the members.\footnote{See id.} Eligibility is based upon whether the state "1) is a producer or exporter of arms or dual-use goods and technologies; 2) has an effective national export control policy; 3) adheres to the appropriate major multilateral non-proliferation regimes and conventions; and 4) maintains a responsible national export policy towards the four ... pariah countries-Iran, Iraq, Libya, and North Korea."\footnote{Id. (footnotes omitted).}

Although Wassenaar is not directly aimed at any country or group of countries, the "pariah" states of Iran, Iraq, Libya, and North Korea have been singled out for their "questionable commitment to regional and global stability, ties to terrorist activities, attempts to amass weapons of mass destruction, and suspected designs on territorial expansion."\footnote{Id.} Wassenaar members are therefore compelled to prevent these countries from acquiring arms and sensitive dual-use goods and technologies for military applications.\footnote{See id. at 1110.}

The Wassenaar Arrangement derives its force from the voluntary political commitment of its members.\footnote{See id.} As it is not based on a legally binding international agreement or treaty, a breach of the arrangement does not violate international law.\footnote{Id.} All Wassenaar policies and resolutions are determined by a consensus, with each individual member then responsible for incorporating the measures set forth by Wassenaar. This arrangement provides individual states with the discretion to finalize the decision to permit a particular arms or dual-use transfer.\footnote{See id.} Additionally, there is no obligation for members to consult other members before granting an export license, even a license previously denied to an exporter by another Wassenaar member.\footnote{See id. at 1111.} Members have, however, agreed to a "no-undercut" provision that obligates each state to notify all other member states of a license approval "which has been denied by another Participating State for an essentially identical transaction."\footnote{See id. at 1110-11. The issue of whether to include a prior notification provision was a major point of contention in the Wassenaar negotiations. See id.} Through the use of this transparent transfer system, the arrangement attempts
to create a "disincentive for inadvertent undercuts" that would prevent members from acting in conflict with the Wassenaar Arrangement's goals.\textsuperscript{187}

\textbf{E. Structural Weaknesses Inherent in the Wassenaar Arrangement}

There are several structural weaknesses inherent in the Wassenaar Arrangement that hinder its ability to be an effective multilateral arms control regime. First, the large number of member states increases freeloader opportunities for the smaller and/or weaker member states.\textsuperscript{188} It may be easier for these states to violate an arrangement obligation because their transfers are fewer in frequency and number and their "transgressions are more difficult to recognize."\textsuperscript{189} Second, the unanimity requirement for decision making increases the likelihood of holdout problems.\textsuperscript{190} Because all decisions must be reached by a consensus, there is less of an incentive to participate in the information exchanges imperative to Wassenaar's success. Why consult and coordinate if it only takes one member, no matter how small or weak, to disrupt Wassenaar's policies and procedures and become an obstacle to progress? Moreover, the arrangement lacks any veto provisions, which further hinders Wassenaar's ability to be effective against illegal and dangerous arms transfers.\textsuperscript{191} A third weakness in the arrangement is that it fails to include a prior notification requirement that would obligate members to consult one another before issuing export licenses.\textsuperscript{192} It is nearly impossible for Wassenaar to achieve a truly transparent transfer system without such a notification requirement.

A reliance on the discretion of each member state in a consensus system, without a veto mechanism or a prior notification requirement, reflects the flexible and unstructured framework of the Wassenaar Arrangement. Although this framework aims to be responsive to advancements in technology and crises that develop, the lack of accountability causes the Wassenaar Arrangement to fall short.

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\textsuperscript{187} \textit{Id.}
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\textsuperscript{188} See \textit{id.} at 1112-13. At thirty-three members, the Wassenaar Arrangement is nearly twice the size of COCOM, the previous multilateral regime. See \textit{id.}
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\textsuperscript{189} \textit{Id.} at 1113.
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\textsuperscript{190} See \textit{id.}
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\textsuperscript{191} See \textit{id.} In COCOM, "veto privileges... had been key to COCOM's enforcement." \textit{Id.}
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\textsuperscript{192} See \textit{id.} at 1113-14.
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F. Why the Wassenaar Arrangement Fails to Remedy the Canadian Connection Problem

The United States is making an effort to utilize the Wassenaar Arrangement's transparent transfer system to remedy the Canadian connection problem. The United States hopes that by coordinating efforts with Canada and the other Wassenaar states, a system of mutual disclosure can be established that will eliminate the need for the supply-side regulations that are so damaging to domestic producers and exporters. If this could be achieved, it would no longer be significant if Canada or another state refused to support a United States embargo because there would already be a cooperative effort to reduce transfers of sensitive weapons and technologies to such terrorist-supporting or "pariah" states.

The Wassenaar Arrangement, however, does not have enough bite to be a solution to the "Canadian connection" problem. The structural weaknesses inherent in the arrangement are too numerous and too serious for Wassenaar to be an effective solution. Efforts at transparency are not enough to address the "disparate levels of national export controls" that may give particular members an advantage over other members. Any state that pursues a "strict domestic policy . . . will be at a distinct commercial disadvantage" if other states do not follow the same policies. Moreover, the arms and technology industries are competitive, which only fosters an environment where cooperation is difficult. The paradox presented by a commitment to reducing the trade in military weapons and technologies and the tremendous economic benefits to be gained on the international market is unfortunately a dilemma facing all the Wassenaar states.

VI. CONCLUSION

The first unilateral export controls in the United States were enacted after World War II in an attempt to contain the spread of communism during the Cold War. Foreign policy issues dominated this period of American history as economic competitiveness took a back seat to national security concerns. By the mid-1960s, however, strict export controls fell by the wayside as America's economic vitality grew in prominence.

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193 See Hiestand, supra note 8, at 721.
194 See Dursht, supra note 162, at 1114-15.
195 Id.
The Arms Export Control Act and Export Administration Act were enacted to create a new regulatory framework, balancing competitive national security and economic concerns. These acts enabled the United States to continue supporting export restrictions that reduced the likelihood of weapons transfers to threatening countries while acknowledging the globalization of the world economy.

At the end of the Cold War, the United States loosened American export control laws in an attempt to capture a global market share of the lucrative international arms and technology markets. The ever-present conflict between national security and economic competitiveness yielded an inconsistency in United States export policy, and the potential for economic gain began to outweigh the policy commitment to reduce arms transfers. From this inconsistency, a loophole in the regulatory framework was created. Arms dealers, once cut off from American defense and technology markets, discovered that they could use the Canadian exemption in ITAR to circumvent United States' arms export controls. The United States State Department, caught between national security and economic competitiveness, has been reluctant to correct the loophole despite numerous instances and mounting evidence of a "Canadian connection."

The recent discovery by a New York Times/CBS News joint investigation brought this loophole in the Arms Export Control Act to the public's attention. State Department officials, however, have hesitated in closing the loophole. The United States cannot infringe on territorial sovereignty and compel other states to enforce United States' embargoes. Moreover, the United States relies on and profits from the sale of American-made defense products and services on the international arms market.

Although it may be easy for State Department officials to close the Canadian loophole, such action is unlikely in the face of the severe political and economic consequences that could result. Trade relations with Canada and other states could be undermined, and the substantial harm to domestic producers of defense goods and dual-use items make unilateral action to correct the loophole undesirable for State Department officials.

Multilateral agreements with other nations, and the Wassenaar Arrangement in particular, may be the only avenue for the United States to ensure that American-made weapons and technology do not reach embargoed and terrorist-supporting states. Efforts at transparency have the potential to open lines of communication between trading countries and make it easier for states like Canada to track shipments of goods and technologies with the potential for military use. In addition, multilateral agreements spread the burden of export controls among participating states. This can facilitate trade while
simultaneously serving to monitor and prohibit the flow of significant military equipment to terrorist-supporting or embargoed states. An effective multilateral arms and dual-use agreement seems to be the only way for the United States to finally resolve the paradox with which it has been plagued since the days of the Cold War.

The Wassenaar Arrangement, however, does not seem to hold the answers for the United States with its “Canadian connection” problem. The structural weaknesses inherent in the arrangement make it unlikely that the United States will be able to utilize Wassenaar to close the loophole. Although the world community is reaping the benefits of an open global marketplace, it is difficult to enforce the corresponding duty to monitor transfers of weapons and other items that may be used in the development of dangerous weapons. Only when the State Department and the Wassenaar Arrangement participants act in concert to stop the flow of weapons and technologies to threatening states and regions can the loophole finally be closed.