CANADIAN GOVERNMENT INTERVENTION IN EXPORTS OF AEROSPACE TECHNOLOGY: LEGAL AND ECONOMIC IMPLICATIONS

by

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"CANADIAN GOVERNMENT INTERVENTION
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RÉSUMÉ

Le but de ce mémoire de maîtrise est essentiellement de présenter, dans une perspective juridique et économique, les diverses manifestations de l'intervention gouvernementale dans les exportations de technologie aérospatiale, et de vérifier si cette intervention est bénéfique pour l'industrie aérospatiale canadienne. Dans le premier chapitre, les divers mécanismes d'aide fédéraux et québecois à la promotion des exportations sont décrits. Par ailleurs, l'impact d'accords commerciaux multilatéraux ou bilatéraux sur la liberté des gouvernements de subventionner à leur guise les exportations est examiné. Dans le deuxième chapitre, le second volet de l'intervention gouvernementale, celui du contrôle des exportations, est étudié. L'auteur examine le mécanisme canadien de contrôle des exportations en analysant les lois et règlements applicables et en expliquant la politique du gouvernement fédéral à ce sujet. Puis, mention est faite des efforts effectués à l'échelle internationale dans le cadre du COCOM qui regroupe généralement les pays de l'OTAN. Finalement, la question délicate de l'application en sol canadien de la législation américaine sur le contrôle des exportations est étudiée. Dans le dernier chapitre, l'auteur tente de vérifier si un équilibre existe, pour l'industrie aérospatiale canadienne, entre ces

deux priorités des gouvernements: promotion et contrôle des exportations.

ABSTRACT

The purpose of this thesis is to describe, in legal and economic terms, the various manifestations of government intervention in exports of aerospace technology, and to find out if this intervention is beneficial to the Canadian aerospace industry. The first component of government intervention concerns export promotion and in the first chapter, the various federal and provincial facilities are examined as well as the impact of bilateral or multilateral commercial treaties. In the second chapter, the second component of government intervention, dealing with export controls, is described. The applicable Canadian laws and regulations are examined, and the federal government's policy on the subject is explained. Then, international efforts involving most NATO countries in an organization known as COCOM are examined. Finally, the sensitive question of the extraterritorial application of American export control legislation on Canadian soil is considered. In the last chapter, the author attempts to determine whether an equilibrium exists, for the Canadian aerospace industry, between these two priorities: export promotion and export control.

FOREWORD

This thesis deals, as its title suggests, with the role played by the federal and provincial governments in the management of Canada's exports of aerospace goods and technology. In particular we shall look into the activities and programmes designed to facilitate exports, as well as those mechanisms intended to restrain them for national security or other purposes. Thus the thesis is divided into three parts. The first two chapters are essentially descriptive and deal with export promotion and export control, while the third constitutes an assessment of those programmes and policies.

While the methodology for the first two chapters was rather traditional, the third involved a more unorthodox procedure, that of the survey. Since the views of the aerospace industry concerning the effectiveness and usefulness of government policies are essential to a realistic study of the matter, questionnaires were sent to most of the member companies of the Aerospace Industries Association of Canada (AIAC). Only those not involved in the export business were not approached, for obvious reasons, since this thesis deals with exports. We were very encouraged by the response to our queries and our findings, along with more details on the methodology, are found in Chapter three.

In trying to explain what the thrust of this thesis is, we may proceed by telling what it is not. It is not a comparative study of government policies in various countries, as it is purely Canadian in scope; nor is it an assessment of all government programmes having an impact on the export performance of aerospace companies, since such thesis-worthy subjects as research and development subsidies, tariff and non-tariff barriers and currency exchange rates have been left out. Rather, only those policies having a **direct** bearing on aerospace exports, both positive and negative, will be dealt with.

Similarly, a thesis devoted to trade in aerospace goods would not seem to be complete without at least saying something about one of the hot subjects of the day: the newly implemented Free Trade Agreement. However important this document may be, it will not be dealt with in detail for two simple reasons. First the focus of this study rests on government programmes designed to foster exports and not the various international agreements that would affect international trade. Second, free trade, i.e. the absence of tariffs on goods imported, already exists in most areas of aerospace commerce. For civil aircraft and aircraft parts this is provided by the Agreement on Trade in Civil

Aircraft of GATT of 1979[1] and for military goods the same result is achieved through a series of understandings between Canada and the United States termed the Defence Development and Defence Production Sharing Arrangements which we will study further in Chapter one. Therefore beyond the general effect of providing greater market access to Canadian companies in the United States, and providing for a new dispute settlement mechanism which will prove useful in trade disputes, the Free Trade Agreement will not greatly affect our aerospace trade.

While the idea behind this thesis is rather unique and consequently little if any work has been done previously on the same topic, various aspects or subjects contained therein have been examined before, including export promotion programs, GATT law and the Free Trade Agreement, and extraterritoriality.

One last thought before we begin. Many people have provided me with valuable information and guidance over the past few months, but my two thesis supervisors, Drs. Nicolas M. Matte and Ram S. Jakhu of the Institute of Air and Space Law both stand out for their commitment and patience. I thank them sincerely. I also wish to thank Marie, for without her support, this thesis would not have been possible.

Now let us start.

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1. General Agreement on Tariffs and Trade: Trade in Civil Aircraft, TIAS 9620; 31 UST 619, entered into force January 1, 1980.

INTRODUCTION

Canada as an industrial nation has always been preoccupied with air and space technology. This was borne out of necessity since the Canadian territory is so vast that ever more efficient means of communication were required. Indeed the history of aerospace activity in Canada is characterized by evolving expertise shaped by the challenges facing a country with a large geographical area, scattered population centres and a rugged northern landscape.

It can be said that the birth of the aerospace industry in this country goes back to February 23, 1909. It is on that day that a plane built by Alexander Graham Bell and named the Silver Dart took off from a frozen lake in Nova Scotia, becoming the first aircraft to fly in Canada. This project, which heralded the arrival of powered flight in this country, lead to the formation in July 1909 of the first aerospace firm in Canada, the Canadian Aerodrome Company.[2]

Others followed suit and it was only inevitable that these challenges would inspire industrialists,

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2. AEROSPACE INDUSTRIES ASSOCIATION OF CANADA, "Canada's Aerospace Industry: Committed to the Future", 1987, p. 5.

inventors and entrepreneurs from all over to turn seemingly utopian dreams into reality. The two world wars had a major impact on Canada's aviation industry. During the 1914-1918 conflict, aircraft production reached impressive proportions and our aviators distinguished themselves for their skill and bravery. In 1920 the first cross-Canada flight was completed by three converted bombers. The participation of the Royal Canadian Air Force in the second world war was so important that U.S. President Franklin D. Roosevelt referred to Canada as "the aerodrome of democracy". By 1946, more than 16,000 aircraft of all types had been produced in Canada for the war effort[3] and we have never stopped since then. Indeed Canada itself is home to the second largest civil aircraft fleet in the world.[4]

Today Canadian companies are involved in the design and manufacture of hundreds of aerospace products and the "made in Canada" symbol can be found in 120 countries around the world on products ranging from aircraft windshields to the Space Shuttle "Canadarm". Moreover Canada was the third nation in space with the launch of Anik A, and the first to launch its own domestic telecommunications system using the

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3. Id.

4. DEPARTMENT OF INDUSTRY, TRADE AND COMMERCE, "Canadian Aerospace Manufacturing Industry: A Discussion Paper", 1978, p. 6.

Alouette satellites geostationary orbit.

From the start it has been the federal government's policy to support the development of the aerospace industry in order to foster the growth of a high-tech domestic industrial base of world-class status.[5] This has been achieved through close consultation,[6] capital expenditures such as defence procurement and research and development allocations, and through export promotion programmes. In this context the government is both a partner and major customer of the industry.

The result of this partnership is an industry that ranks fifth in the western world, preceded only by the United States, Great Britain, France and West Germany.[7] In 1988 annual sales reached $6.25 billion and employment attained the 61,583 jobs plateau. By 1992 it is expected

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5. Prime Minister Brian Mulroney once stated that "One of our top priorities was to ensure that Canada maintained and advanced its position as a leading figure on the international high technology scene, especially in aerospace". See AEROSPACE INDUSTRIES ASSOCIATION OF CANADA, 24th Annual Report, 1986, p. 6.

6. Such cooperation recently took on a more concrete form as the Department of Regional Industrial Expansion and the Aerospace Industries Association of Canada signed on May 29, 1985 a "Memorandum of Understanding for Industry Development Planning" which provides essentially for a continuing dialogue on issues of common interest.

7. Supra, note 2, p. 3.

that these figures will reach $8.9 billion and 69,149 jobs respectively, an indication of the extraordinary growth the industry has enjoyed for the past 20 years.[8] Along the way many companies and their products have become household names here and abroad. Indeed the Canadair CL-215 amphibian aircraft is simply known in France as "Le Canadair", an everyday term meaning waterbomber and the company recently landed a major contract to design and manufacture airframe components, to the French firm Aérospatiale. More than 70% of all turboprop aircraft are powered by engines produced by Pratt & Whitney Canada in Longueuil. For its part, De Havilland Aircraft Canada has enjoyed great success with its latest passenger jet the Challenger, while many commercial and military pilots have been trained on flight simulators built by CAE Electronics.[9] Of course there are scores of other examples of export successes since the aerospace industry is made up of roughly 200 companies, big and small.

The aerospace industry in Canada is essentially

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8. AEROSPACE INDUSTRIES ASSOCIATION OF CANADA, Annual Report, 1988, p. 6.

9. See Canada's Aerospace Industry: A Capability Guide 1987-88, Maclean Hunter, Toronto, 1987, p. 3. See also "Nos ventes décollent en Europe", CanadExport, October 3, 1988, p. 1. See also B. Dunn, "On a Jet Plane", Québec Business, February 1989, p. 18.

export dependent and therefore always turned to the outside, looking for new markets. In 1987, up to 70% of total production was exported,[10] a direct result of the very small domestic market for aerospace goods. Indeed most of our output goes to the United States (about 60%), the rest being scattered mainly throughout the Third World and Europe. Precisely because of this limited domestic demand, the industry has not been able to develop a sufficient industrial capacity to systematically compete head to head with the giant foreign corporations. Therefore it has had to create for itself specialized areas of expertise in which the major players do not have a monopoly.[11] These include surveillance drones, small gas turbines and short-take-off-and-landing (STOL) aircraft.[12]

Since the industry lacks the means to sustain major research efforts, it is dependent upon imported technology,

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10. See AEROSPACE INDUSTRIES ASSOCIATION OF CANADA, Annual Report 1988, p. 2. Comparatively speaking, this figure is quite high if we consider that Canada is the only country in the world with a space industry that exports more each year than its government spends on space programmes. See supra, note 2, p. 16.

11. Supra, note 4, p. 1.

12. DEPARTMENT OF INDUSTRY, TRADE AND COMMERCE AND REGIONAL ECONOMIC EXPANSION, "Aerospace in Canada: Outlook and Strategy - Report of the Advisory Committee on Aerospace Development", 1983, pp. 1-3.

mostly from the United States. It is not surprising then that a good portion of all aerospace firms, especially the large ones, are foreign-owned. In fact some 60% of Canadian firms have American owners.[13] However some important firms such as Spar Aerospace Ltd. and Canadair, as well as a good many smaller ones, remain in Canadian hands.

The heart of the Canadian aerospace industry lies along the Montreal-Toronto axis, a fact that becomes obvious as we consider the following figures.[14] Together Quebec and Ontario in 1985 accounted for 45.2 and 46.9% of gross sales respectively, with the western provinces at 7.0% and the Atlantic at 0.9%. As far as employment is concerned, Ontario again led the pack with 48.2% of all jobs, followed by Quebec at 41.9%, the West at 8.4% and the Atlantic provinces at 1.4%. Such regional disparity is by no means exclusive to the aerospace industry and is a telltale sign

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13. For example Boeing of Canada's de Havilland Winnipeg and Arnprior divisions make it the second largest aerospace employer in Canada behind Pratt & Whitney, a division of U.S.-based United Technologies Corp. See D. HUGHES, "Growth in Canadian Aerospace Sales Will Continue, But at Slower Pace", Aviation Week & Space Technology (hereinafter referred to as AW&ST), March 14, 1988, p. 77.

14. DEPARTMENT OF REGIONAL INDUSTRIAL EXPANSION AND AEROSPACE INDUSTRIES ASSOCIATION OF CANADA, "Survey 1986: Aerospace Industries Annual Survey", December 31, 1986, pp. 83-84.

of the concentration of industrial power in our country's two most populous provinces.

Wherever they may be located, East or West, North or South, the classical capitalist theory is clear on one point: such enterprises should be left alone to compete amongst themselves on the domestic and international markets, with no governmental intervention. It is the law of the jungle concept: "Only the strong survive". But in reality international commerce, and in particular that of aerospace goods and services, bears the mark of government involvement in all phases of the selling process.

This intervention is particularly evident at two levels. On one hand we are talking about government financial assistance for the research and development of new products, the marketing of those products and the financing of international sales, such assistance being intended primarily to boost exports. On the other hand, Parliament has passed laws and regulations whose purpose it is to control exports of sensitive technology mostly for national security or foreign policy reasons.

The simple fact that one form of intervention seeks to promote exports while the other intends to restrict them highlights the fact that two fundamental national priorities seem to be in conflict. The choice as we shall see is real, and it is difficult: shall we promote our prosperity (by

selling abroad), our security (by not selling in many cases), or both? Is a compromise between these two seemingly incompatible necessities possible? Can an equilibrium be attained? Are the policies appropriate? Are changes necessary? These are precisely the questions this thesis will try to answer.

CHAPTER ONE: GOVERNMENT PROMOTION OF EXPORTS OF AEROSPACE TECHNOLOGY

Introduction

Canadians have little or no knowledge of the importance of exports to the Canadian economy and yet Canada is a major trading nation, one of the world's leading exporters.

Indeed in 1986 we exported some 30% of our Gross National Product and among OECD countries only West Germany is more export oriented.[15] As for Quebec, the province exported more than 45% of its industrial production in 1986 and has enjoyed a spectacular 7% growth in that domain, far above the 1% experienced by the other provinces.[16] Overall, more than three million Canadian jobs depend upon exports, nearly one quarter of the total work force. In the manufacturing sector alone, about 1.5 million jobs are

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15. See H. OVERGAARD, "More Export Education Vital to Economic Growth", International, August 1987, p. 6.

16. P. MACDONALD, "Innovation technologique et exportation sont les fondements de l'essor économique du Québec", Les Affaires, September 5, 1987, p. 2.

directly or indirectly related to export activity.[17]

As we suggested earlier, the reason for this extraordinary export performance is simple: we do not have much choice; this country has an industrial capacity far in excess of the needs of the Canadian market. The domestic market being too small to support significant growth in the economy, Canada has to concentrate on the penetration of foreign markets in order to maintain job opportunities and upward pressure on the standard of living. Of course, the main foreign market for Canadian products is that of the United States, where more than 70% of exports wind up.

As a country, Canada was once assured of prosperity because of its privileged position as a major world supplier of raw natural materials. However today there is a global oversupply of many primary resources because of diminishing demand in the industrialized countries and increased production in developing countries. So our traditional comparative advantage can no longer be counted upon to guarantee our national wealth and it is no coincidence that our reliance on manufactured exports has been increasing

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17. R. SERINGHAUS, "Promoting Exports: What Role Do Government Programs Play?", Business Quarterly, Summer 1987, p. 57.

steadily.[18]

One of the major beneficiaries of this shift in export strategy has been the high-tech industry. Through a flurry of government initiatives, efforts have been made to capitalize on Canada's new found strengths in such fields as robotics, artificial intelligence, telecommunications, electronics, biotechnology and laser optics, among others. Obviously, the aerospace industry is a major player in the new high technology export game and federal and provincial governments have shown a willingness to assist these companies in exporting their products through a variety of programmes.

But an important question then arises: why should governments help the aerospace industry to export? Beyond the above-mentioned fact that a shift to manufactured goods is desirable, several reasons can be offered to justify the significant amounts of money and energy devoted to promoting this industry's sales abroad. Here are the most significant ones:

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18. DEPARTMENT OF EXTERNAL AFFAIRS, "Competitiveness and Security: Directions for Canada's International Relations", 1985, p. 19. See also SCIENCE COUNCIL OF CANADA, "Winning in a World Economy: University-Industry Interaction and Economic Renewal in Canada", Report No. 39, April 1988, p. 5.

1. Other countries do it: While often deploring the distorting effects of export promotion programmes and subsidies on international trade, Canadian officials point out that the aerospace industry throughout the world is one of the most highly subsidized. In the United States for example both Boeing and McDonnell Douglas benefit from large research grants and procurement purchases from the U.S. government, especially the Department of Defence. Across the Atlantic the dispute continues concerning the funds provided by European governments to the highly successful Airbus Consortium. This is in addition to the export promotion programmes adopted by most industrialized countries. These measures effectively reduce the amounts of money and risk necessary to bring a project to completion and, in the absence of comparable Canadian initiatives, would give our competitors an unfair advantage. The philosophy is thus that "if others do it, so do we".

2. The aerospace industry is a symbol of national prestige: This is rather self-explanatory. To be strong and innovative in aerospace technology, to develop products that capture the imagination, enhances the prestige of Canada among the peoples of the world and creates added confidence in our technological and industrial strength. Added exports fuel this drive for innovation and competitiveness.

3. The aerospace industry is a highly competitive one: There are scores of companies involved from many different countries, all courting precious few buyers. Success or failure often depends on the terms offered by the company to the purchaser and that is where government financing or insurance of transactions becomes essential.

4. The continued prosperity of the aerospace industry depends on increased exports: As we suggested earlier, domestic markets are not adequate to support such a large aerospace industrial base. Many jobs are on the line and Canadian companies need to export.

So mainly for these reasons the federal and provincial governments have been committed to helping Canadian aerospace companies sell their products and services abroad. We shall now look at how this is done.

Section 1: Description of Canadian Government Export Promotion Mechanisms

An impressive array of services has been devised over the years to help Canadian industry better export its products. The following comments, intended to describe the various government services in this area, apply to all companies willing to export, not just to aerospace firms as there are no specific programmes created for them. However, aerospace companies do use these services regularly and some examples will be provided as we go along. One should also keep in mind that while it was possible to present each government programme in great detail, we have tried to spare the reader undue effort by retaining the essential elements that appropriately describe the programme's purpose and working mechanism.

As both the federal and Quebec governments provide some form of assistance to exporters, this section will be divided in two subsections, each devoted to one level of government. Also we have, in the following pages, made a distinction between export finance and insurance programmes (those designed to facilitate sales by direct intervention in credit terms and the extension of protection to exporters) and export marketing programmes (those devoted to encouraging firms to export by helping them to find markets

for their products). It will be useful to keep this in mind.

Sub-section 1: Federal Export Promotion Assistance

There are a multitude of services offered to Canadian exporters by the federal government, more specifically the Department of External Affairs and the Department of Regional Industrial Expansion (DRIE). Various publications and market profiles are published to increase awareness of export opportunities and directories of potential purchasers or venture partners are compiled and made available. However the bulk of the government's active involvement consists of a handful of programs and agencies which essentially offer financing and insurance and marketing assistance, and which we will examine in the following pages.

A. Export Finance and Insurance Services

Two federal agencies will assist the exporter by getting involved directly in the transaction, either by putting up the money for the amount of the sale, or by insuring the risk inherent in the transaction: the Export Development Corporation (EDC) and the Canadian International

Development Agency (CIDA). The basic difference between the two is that CIDA finances transactions using its own money (or rather that of the tax payers) in the form of development assistance which is not reimbursed, whereas EDC functions on a self-sustaining basis, much like a bank or insurance company. So essentially where CIDA will in effect buy Canadian goods and services as a form of development assistance to Third World nations, EDC will offer loans, guarantees and insurance coverage on a profitable basis.

a) The Export Development Corporation

Since 1944 official support for Canadian exports has been available through a semi-autonomous Crown Corporation. The Export Development Corporation, which was created by the Export Development Act[19] and commenced operations in 1969, succeeded the Export Credit Insurance Corporation, its predecessor.[20] The fundamental objective of the EDC is to promote Canadian exports, and it seeks to work in cooperation with private financial institutions in order to

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19. The Export Development Act, R.S.C. 1970, c.E-18.

20. For the history of the Export Development Corporation, see J.M. DUFOUR, D. RACETTE and A. RAYNAULD, Government Assistance to Export Financing, Ottawa, Canadian Government Publishing Centre, 1983, pp. 1-8.

offer exporters the most competitive terms of assistance. EDC must function on a self-sustaining basis, in accordance with sound commercial principles.[21]

The Corporation is managed by a Board composed of five directors from the private sector and seven from the public service, all named by the Governor in Council.[22] The head office is in Ottawa and regional offices are located in Halifax, Montreal, Toronto and Vancouver.

EDC offers broad programmes to facilitate and develop Canadian export trade, provided that certain initial conditions are satisfied. In general terms, the Corporation will offer assistance if

1. a Canadian company requests help;
2. an export sale is involved;
3. the transaction is economically sound;
4. the purchaser is trustworthy;
5. the goods or services have a Canadian content

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21. The Corporation actually made a profit of $1.5 million from all of its activities in 1987. Therefore, the Government did not have to underwrite the EDC's activities. The same year, over 1560 firms used EDC's services, 14% from 1986. See the Export Development Corporation's Annual Report 1987, p. 4.

22. See section 4 of the Export Development Act.

of at least 60%;[23] and

6. the purchaser's country is not on EDC's black list.[24]

Of course, specific conditions will apply for each individual EDC programme, and there is no minimum value required to qualify.

In order to fulfill its obligation to promote the exports of Canadian products and services, the corporation offers services in three broad categories: financing, insurance and guarantees. We shall now review each of them separately.

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23. This refers to the portion of the value of the goods and services exported from Canada that is spent and retained in Canada. In 1986 the EDC's Canadian content target was 85%, but according to the Annual Report 1986 at page 4, the actual figure was closer to 88%. Insisting on a high percentage of Canadian content ensures that the Corporation will not be subsidizing exports of products made elsewhere, thus not contributing significantly to the Canadian economy.

24. EDC, when evaluating whether or not it should participate in any given transaction, will ask the exporter for details about the sale and the buyer of the goods. This information, coupled with EDC's own experience, allows it to prepare credit ratings for each country. Ratings range from "excellent without restrictions" to "off cover" and recent examples of the latter include Guatemala, Iraq, Nigeria, Peru and Syria. See the EDC Economic Summary reports, October 1987.

1. Export Financing

The EDC provides financing[25] for up to 85% of the contract value of an export transaction. It will most often finance sales on a medium and long-term basis, leaving the short-term to the banks. However the participation of the private financial institutions is encouraged in order to more effectively share the burden of assistance.

Export financing is big business at the EDC. In 1987 one hundred export transactions were underwritten for a total amount of nearly $859 million in exports facilitated.[26] Funds are disbursed directly by EDC to Canadian exporters on behalf of the borrower, in effect providing the exporter with a cash sale. The Corporation offers five basic financing facilities:[27]

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25. Sections 29 to 32 of the Export Development Act.

26. See EXPORT DEVELOPMENT CORPORATION, Annual Report 1987, p. 30.

27. They are described summarily in "Export Financing Services", EDC Information Circular No. 81-1, revised in January 1987, pp. 2-3.

Loans

The EDC provides loans to foreign buyers of Canadian goods or services at fixed or floating interest rates. Each arrangement is negotiated directly between the Corporation and the purchaser, who is normally required to make a 15% down payment against the contract price. The term of the loan is normally for more than 5 years.

Lines of Credit

An EDC line of credit is an umbrella financial arrangement where a foreign bank borrows money from the Corporation for a multiplicity of transactions for which neither the exporters nor the buyers have been determined. So instead of lending directly to the foreign purchaser, EDC lends it to a bank in his country who will then re-lend it to the buyer. The EDC has established lines of credit with banks and public agencies in many countries and since in most cases the interest rates, terms and disbursement procedures have already been established, the transaction

can proceed more quickly than with a conventional loan.[28]

Multiple Disbursement Agreement Loans

A multiple disbursement agreement loan is a credit facility extended to a single buyer to finance the purchase of goods or services to be supplied by a number of Canadian exporters in connection with a particular project. Like lines of credit, the terms and conditions are often pre-arranged.

Note Purchase Programme

This programme consists of three facilities, each involving the purchase by EDC of promissory notes issued by foreign buyers to Canadian exporters for the purchase of Canadian goods and services. The "simplified note purchase" facility is appropriate for sales having a value of less than one million dollars and a credit period of between one and five years. If the EDC is not satisfied with the

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28. On October 27, 1988, the EDC signed a line of credit agreement with the Bank of China worth $2 billion. See "Promotion des exportations en Chine", CanadExport, November 30, 1988, p. 3. More information on EDC lines of credit is available in "Lines of Credit", EDC Information Circular No. 81-2, revised in November 1983, pp. 1-3.

buyer's credit worthiness, it will require the notes to be guaranteed by a bank, in which case the facility is known as "forfeiting". If the credit risk is even greater, a full bank guarantee would be required and the forfeiting facility would apply.[29]

Specialized Credits

The Corporation extends specialized credits directly to Canadians who purchase goods for use outside Canada or for lease to another person for use outside Canada.

The EDC obtains funds for financing export sales by borrowing directly from the Consolidated Revenue Fund of the federal government and, for short-term borrowing, in the capital markets.[30] Of course, the Corporation must pay an interest rate to the lender of those funds and this charge will be passed on to the borrower once this money is re-lent by the EDC.

The interest rate charged by the EDC, like any of

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29. More information on the EDC Note Purchase Program can be found in "The Note Purchase Program", EDC Information Circular No. 83-2, revised in July 1985, pp. 1-3.

30. ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, "Export Credit Financing Systems in OECD Member Countries", 1976.

the terms and conditions of the loan agreement, is negotiated directly between EDC and the borrower, purchaser of Canadian goods. Obviously, the temptation exists for the Corporation to offer the borrower interest rates as low as possible so that the entire sale package of the Canadian exporter will look too attractive to resist (we must remember that EDC is often in direct competition with like agencies in foreign countries which also act to promote their companies' exports). EDC may even be tempted to lend "below cost", that is at a rate below that which EDC itself has to pay for the borrowed funds.

There are, however, certain internationally agreed upon rules that govern the interest rates which national lending agencies may charge foreign borrowers. In the mid-1970's, eighteen major creditor countries formally sat down and reached an understanding on the basic terms under which export loans may be granted. This arrangement, conceived in July 1976, is appropriately called the CONSENSUS and provides rules on the minimum down-payment to be made by the borrower, the minimum interest rates to be charged, the maximum contribution of the lending agency and the maximum

term of the loan.[31]

The primary motive behind this singular meeting of the minds among competitors was that they could hardly afford not to arrive at some sort of understanding. Since it is very seldom that a product sells itself, the terms of the loan, and in particular the credit terms, are among the exporter's best assets. More often than not many exporters from different countries, assisted by their government lender, are courting a single buyer. The competition is fierce and it often happens that success or failure is determined by the loan package accompanying the sale agreement. To avoid an all-out war among the lending agencies in which each one seeks to undercut the others by offering the best terms, a situation that is very costly to the governments and benefits no one except of course the purchaser of the goods, some form of cooperation was necessary to achieve a measure of stability in the market; hence the CONSENSUS. At present, CONSENSUS rates for U.S. and Canadian dollars range between 7.5% and 9.80% depending on the term and OECD

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31. The original CONSENSUS Agreement was renewed in the first of April 1978 (with 22 participating countries) and this new understanding, termed the Arrangement, was subsequently amended. For the history of CONSENSUS and the Arrangement, see supra, note 20, p. 21 and C. SERDET, Promotion des exportations en France et au Canada: assurances et financements, Master's thesis, Institute of Comparative Law, McGill University, Montreal, December 1982, pp. 71-3.

country classification. The rates are adjusted semi-annually in line with movements in the commercial interest rates of the major currencies.[32]

Obviously the success of such an understanding rests on scrupulous compliance by all the member countries. However, due to the fact that there has been less demand for big projects around the world and therefore more competition on the credit terms, some countries have dreamed up imaginative ways to offer bargains to the purchasers of goods or services. Among the most notorious evaders we find France, Japan and Canada; their favorite weapons are the rescheduling of loans for longer periods than those allowed, and a mix of development aid grants from development agencies such as CIDA with the regular loan package, a practice referred to as "credit mixte".[33]

So as we can see the Corporation is very much involved in the provision of financing assistance to Canadian exporters, and the aerospace companies of this

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32. See D.B. MODIN, "Project Financing by EDC", speech to the Canadian Major Projects Association, June 9-10, 1987, Calgary, p. 9.

33. For more details on these evasion schemes, see P. SLAYTON, "International Trade Law: Financing Trade", (1985) 4 Business and the Law, p. 25; A. DUNN and M. KNIGHT, Export Finance, Bath, Euromoney Publications, 1985, pp. 48 and 65.

country have benefitted a great deal in the past from this help. For example, the De Havilland Aircraft Company of Canada in 1987 delivered with EDC financing of US $17.8 million three Dash-8 aircraft and related space parts to the Chancellor Asset Corporation of Boston, Massachusetts. As well in 1988, De Havilland benefitted from nearly US $6 million to sell Dash-7 series 102 aircraft to the Carbocol corporation of Bogota, Colombia.[34] Again in 1987, Pratt & Whitney Canada of Longueuil sold PW125 aircraft engines to Fokker Aircraft of Amsterdam with financing support of up to US $57 million.[35] That same year, a west coast company, MacDonald Dettwiler, succeeded with EDC involvement in selling its satellite earth stations to the Australian government, the European Space Station and recently to the government of Ecuador.[36] In 1986, Spar Aerospace Ltd.,

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34. See "DHC Sells to the U.S. Through EDC", Aerospace News, July-August 1987, p. 3. See also "De Havilland Dash-7 First Sale Under New EDC Financing Agreement in Colombia", Aerospace News, March-April 1988, p. 9.

35. See "Pratt & Whitney Sells to the Netherlands with Financing Support from EDC", Aerospace News, September-October 1987, p. 9.

36. See "Canada Export Award Winners", EDC Today, October-November 1987, p. 7; and "Ecuador Buys Ground Station", Space, March-April 1988, p. 55. See also "Ground Station in Ecuador", Aerospace and Defence Technology, March-April 1988, p. 4.

facing stiff competition from a French rival, scored an upset by selling, with an EDC loan package, a complete satellite communication system to the government of Brazil.[37] Finally, on August 15, 1988, Trade Minister John Crosbie announced that CAE Electronics would benefit from up to US $12.6 million to sell an Airbus A-320 simulator to Indian Airlines.[38]

2. Export Insurance

There are risks inherent in any sale of goods or services, but they are maximized if the purchaser is a national of a foreign country. The added risks may arise from the increased difficulty of transporting the product, from the financial situation of the buyer, from the politico-economic situation in his country, and so on, and they must be taken into account by the Canadian exporter who will usually mark-up the price by a certain percentage to cover his potential losses.

The Export Development Corporation has responded to the concerns and needs of Canadian exporting companies by

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37. Supra, note 13, p. 77.

38. See "Contrats stimulants pour nos simulateurs", CanadExport, October 17, 1988, p. 3.

providing a wide variety of insurance services to suit almost any type of situation.[39]

The EDC will insure almost any type of transaction involving the export of goods or services, again provided a minimum Canadian content of 60%, and the risks covered will be either political or commercial. The commercial risks include insolvency and default of the buyer, and repudiation or termination of the export contract by the purchaser due to any cause except a breach of contract committed by the Canadian exporter. As for the political risks, they include the freezing of funds or transfer difficulties, cancellation or non-renewal of import or export permits and war or revolution in the purchaser's country.[40]

Many insurance policies are available, depending on the term of the export transaction.[41] For instance Canadian companies engaged in short-term deals (not exceeding 6 months) have a choice of three insurance policies,

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39. Sections 24 to 28 of the Export Development Act. In 1987, 1,487 firms were covered by some form of EDC insurance, and $23,4 million in indemnity payments were made. See "La SEE sert bien les exportateurs", CanadExport, June 15, 1988, p. 1.

40. Supra, note 29, p. 30.

41. All EDC policies are described in "What is EDC", EDC Information Circular No. 80-1, revised in May 1987, pp. 1-2.

each normally covering 90% of the loss. **Global Comprehensive Insurance**[42] covers all of the exporter's sales against both commercial and political risks. **Global Political Insurance**[43] again covers all of the company's foreign sales but only for political risks. **Selective Political Insurance**[44] allows the exporter to choose the countries for which it wants cover and then only political risks are insured.

As of October 1, 1985 two new policies are available for exports to the United States on short-term credit. The **USA Commercial Risk (Small Business) Policy**[45] has been devised for Canadian companies with gross annual sales of under five million dollars and is therefore easier to administer. Like the second one, the **USA Commercial**

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42. See "Global Comprehensive Insurance Services", EDC Information Circular No. 80-6, revised in July 1986, pp. 1-5.

43. See "Global Political Insurance Services", EDC Information Circular No. 81-5, revised in February 1985, pp. 1-3.

44. See "Selective Political Insurance Services", EDC Information Circular No. 81-6, revised in February 1985, pp. 1-3.

45. See "United States of America Commercial Risk (Small Business) Insurance", EDC Information Circular No. 85-2, pp. 1-4.

Risk (Deductible) Policy,[46] only commercial risks are insured. The latter policy was conceived for larger firms and provides more flexibility in determining the ultimate cost of coverage. A deductible may be chosen and the higher it is, the lower the premiums.

That takes care of the policies available for short-term export transactions. If the sale is made on medium-term credit, normally between one and five years, the exporter can obtain **Specific Transaction Insurance.**[47] Both commercial and political risks are insured, either from the effective date of contract or the shipment of the goods until payment is received. Finally, in cases where the Canadian exporter needs to insure himself against a particular event, he can rely on such policies as Loan Pre-Disbursement Insurance, Foreign Investment Insurance, Performance Security Insurance, Bid Security Insurance, Consortium Insurance and Surety Bond Insurance, Equipment (Political Risk) Insurance and Subsupplier Insurance. All EDC policies are available by contacting the Corporation

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46. See "United States of America Commercial Risk (Deductible) Insurance", EDC Information Circular No. 85-3, pp. 1-4.

47. See "Specific Transaction Insurance and Related Guarantees", EDC Information Circular No. 80-7, revised in April 1987, pp. 1-3.

directly or through insurance brokers.[48]

As we noted earlier, the Corporation will generally insure an export transaction for up to 90% of its value only. The reason is simple: EDC deems it desirable that the exporter retain a personal stake in the success of the transaction, as an added incentive to ensure its success. Similarly, the Corporation will not indemnify if the loss was occasioned or was avoidable by the insured company.

The Corporation's premium rates vary according to the type of policy chosen, the purchaser and his country of origin, and the terms and conditions of the export contract.[49] However, the average premium for all exporters and all countries is less than one percent,[50] payable on the invoiced value of the goods exported.

Aerospace companies regularly use these insurance services in the day to day management of their export transactions and the premiums they pay become part of the cost of the product and are passed on to the purchaser. Among the companies that have benefitted from these policies

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48. See "Pour couper court aux assurances: les courtiers", CanadExport, November 16, 1987, p. 3.

49. Supra, note 42, p. 1.

50. Supra, note 20, p. 15.

we find MacDonald Dettwiler of Vancouver.[51]

3. Export Guarantees

In certain circumstances, the Corporation will issue guarantees to banks and other financial institutions[52] making loans to finance export sales by Canadian companies. The basic difference between insurance policies and guarantees is that the former are available to the exporter itself to cover all or certain of the risks involved, while the latter intend to protect the private lenders who participate in the financing of an export transaction against the risk of non-payment by the debtor. This is done to encourage the private financial markets to assist Canadian exporters in their efforts to sell abroad. As was the case with insurance services, the foreign buyer may have to default because certain political or economic factors in his own country make it inevitable, or simply because the financial burden created by the purchase is too important and cannot be withstood. The beneficiary of the guarantee does not have to be a person carrying on business in Canada.

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51. Supra, note 36.

52. Section 24(1) of the Export Development Act.

The guarantee agreement, for all practical purposes, contains an unconditional undertaking by the Corporation to pay to the bank or financial institution any sum not paid by the purchaser as agreed. This service is provided for a fee and the underlying commercial contract itself must be insured by EDC, so that if the foreign buyer defaults on his payments, EDC will simply indemnify the lending institution, and the Canadian supplier will be protected from any recursory action.

There are several types of guarantees.[53] **Specific Transaction Guarantees** provide unconditional cover to banks on financing related to particular export sales. **Performance Security Guarantees** provide cover to banks against a call of security, usually in the form of an international letter of credit, issued to a foreign buyer on behalf of the Canadian exporter. **Bid Security Guarantees** provide coverage to banks against a call of security, most often in the form of a letter of guarantee, issued by a bank or financial institution on behalf of the Canadian exporter bidding on an export contract. **Loan Guarantees** are issued to banks and financial institutions providing loans to buyers of Canadian goods and services. Finally **Short-**

53. All guarantee facilities are described in supra, note 41, p. 2.

Term Line of Credit Guarantees provide coverage to institutions extending lines of credit to foreign banks which in turn finance purchases of Canadian goods sold on short-term credit.

An interesting example of what a guarantee is all about is provided by the De Havilland Aircraft Company's already mentioned sale of three Dash-8 planes to the Chancellor Asset Corporation of Boston.[54] In that case the purchaser Chancellor had leased the aircraft to another company, America West Airlines of Phoenix, Arizona, for use in the South West United States in commuter service. In this instance not only did EDC provide financing to support the sale but it also agreed to guarantee a portion of America West Airlines' lease payment obligations, in support of a leveraged lease financing structure. This reveals that the Corporation will not only guarantee the banks for payments made by the purchaser of the Canadian goods, but also for payments made by other parties if such amounts will help the purchaser fulfill its payment obligations.

This concludes our discussion of the Export Development Corporation's services to the export community. It is important to recall that very often a single transaction will involve financing, insurance as well as guarantee

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54. Supra, note 34, p. 3.

facilities and it is on the overall attractiveness of this package that rests the success of the sale. This is why EDC is such an important partner to so many Canadian companies, and why it always strives to remain competitive. Now let us look at the other participant in the export financing game, CIDA.

b) The Canadian International Development Agency's Tied-Aid Program

The Canadian International Development Agency (CIDA) operates Canada's programme of official international development assistance in some one hundred countries around the world. As such its mandate is very different from that of the EDC, since CIDA's primary purpose is not really to promote Canadian exports but rather to assist in the restructuring and expansion of the economies of Third World countries. However, because CIDA seeks to involve Canadian companies in the development process, the indirect result will be that Canadian exports of goods and services to those nations will be increased.

The Agency acts as a development partner with Canadian exporters in two ways. First through the Industrial Cooperation Programmes which, as export marketing tools, will be studied in the second part of this section;

second through an impressive "tied aid" programme.

As we explained earlier, "tied aid" refers to the CIDA practice of giving foreign development aid grants, primarily in the form of lines of credit, to less fortunate nations with the obligation that this money, which is not reimbursable, will be used to purchase Canadian goods and services likely to contribute to the development process.[55] Hundreds of Canadian corporations have benefitted from this bilateral (government to government) facility since its inception. To give an idea of the scope of this program, approximately eighty percent of all bilateral aid in 1985-86 (about $900 million) funds purchases of Canadian products in such fields as food, agriculture, energy, human resources, transportation, communications, health, water supply and related commodities. This means that more than $720 million was given abroad but spent right here in Canada in the form of exports. The result of all this is increased sales for Canadian companies and the acquisition of much-needed new technology for the recipient countries, a situation truly beneficial to every

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55. For more details on CIDA's bilateral tied-aid programme as well as all relevant statistics, consult the excellent CIDA brochure entitled "The Business of Development", 1987, pp. 87 et seq. See also P.J. JOHNSON, Government Financial Assistance Programs in Canada, Scarborough, Price Waterhouse, 1984, p. 73 et seq.

participant.[56]

Because aerospace companies generally manufacture very specialized and sophisticated high-tech products that are often used in military systems, not many of them have found that they can participate in CIDA's tied-aid bilateral programmes, for the simple reason that developing countries are often not ready or cannot afford to use them. However, both Spar Aerospace Limited and Microtel Ltd. have participated in this initiative in the past. Moreover a small company named Met-Chem Canada Inc. received nearly $3 million in CIDA funds to participate in an important civil aviation project in Guinea.[57]

This brings to a close the first part of this subsection devoted to federal export finance and insurance mechanisms, where we saw that both the Export Development Corporation and the Canadian International Development Agency were actively involved in the provision of funds to

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56. It is important to note that CIDA will only deal with developing countries that appear on its eligibility lists. There is one for the Americas, one each for francophone and anglophone Africa, and one for Asia. For the eligible nations, see "The Business of Development", id.

57. Supra, note 55. The involvement of Spar Aerospace and Microtel is documented in the answers provided by these firms to the survey which will be discussed in chapter three.

promote exports of Canadian firms, including aerospace companies. It is now time to consider those federal programmes designed to allow the exporter to gain a better understanding of potential markets, appropriately called export marketing programmes.

B. Export Marketing Services

Even if a Canadian aerospace firm has spent huge sums of money on research and development, and even if it has the best product in the world, all that is meaningless unless that company can find buyers, in Canada and elsewhere, for those products. Exports are the lifeline of most companies in this industry and so the federal government has devised various programmes to provide badly needed information and to facilitate the exploration of new markets for our goods and services.

In general terms, these export marketing facilities are designed to meet the needs of Canadian exporters by providing:

1. specific sales or representation leads;
2. hard intelligence of the most promising markets; and
3. opportunities for personal contact with prospective customers.

This will take the form of information directories and advisers, as well as market visits, trade fairs and the like. In the following pages we shall examine the different programmes conceived to provide these services to Canadian exporters.

a) The Trade Commissioners

Trade commissioners are Canadian public servants stationed in our embassies and consulates in foreign countries. There are over 400 of them at 100 missions around the world and their tasks are to:[58]

1. identify market opportunities in their territory;
2. identify local importers, distributors and buyers who could be recommended to Canadian exporters;
3. create a positive trading environment by developing good working relations with local governments and corporations;

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58. For more details on the duties of Canadian Trade Commissioners, see the Canadian Exporter's Handbook 1987-88, K.M. KEOUGH, ed., Renfrew, Samara Publications, 1987, p. 57. See also "Les délégués commerciaux: un bon atout à l'exportation", CanadExport, October 3, 1988, p. 6.

4. give advice to Canadian exporters on how to obtain import permits and how to deal with duties, taxes, foreign exchange and complex regulatory procedures;
5. make representations and negotiate removal of non-tariff barriers on behalf of Canadian companies and ensure that international trade roles are observed; and
6. provide marketing assistance, market analysis, receive client calls and follow-up, and report on activities of the local competition.

Trade commissioners are working as the agents of all Canadian exporters. They are there to assist and very often will provide information that cannot be obtained elsewhere, due to their presence and experience. They cannot however sell the products for the exporter. They must be contacted directly at their foreign post but for specific occasions in a given year will be recalled to meet representatives from interested companies and answer their questions.

b) The Programme for Export Market Development

The Programme for Export Market Development (PEMD) is the main marketing assistance instrument of the federal

government. Administered jointly by the Department of External Affairs and the Department of Regional Industrial Expansion, its objective is to offer Canadian businesses the opportunity to undertake new and often risky export activities that they could not, or would not, normally undertake on their own. There is thus a sharing of the costs as well as the risks involved in new export ventures between the government and the beneficiary companies, and the Programme was originally conceived to help firms get into the exporting business for the first time.[59]

The Programme covers projects initiated by industry, as well as projects initiated by the government that businesses participate in by invitation.

Government-initiated Projects

1. **Trade Missions**: Either for Canadian companies who wish to participate in missions outside Canada, or for foreign business officials who plan to visit Canada or attend trade shows where Canadian business participation is substantial;

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59. All details concerning the Program for Export Market Development are contained in the following document: DEPARTMENT OF EXTERNAL AFFAIRS, "Guide to PEMD", April 1987. See also P.J. JOHNSON, supra, note 55, pp. 60-71.

2. **Trade Fairs:** For firms who plan to attend fairs abroad in specific industrial sectors or for specific types of products.

Industry-initiated Projects

1. Participation by potential exporters in recognized **Trade Fairs** outside Canada;

2. **Visits** outside Canada to identify new markets and visits of foreign buyers to Canada;

3. **Project bidding** for particular projects outside Canada involving international competition;

4. The establishment of **export consortia** for companies for whom it would be easier to exploit export opportunities by pooling their resources and sharing costs and risks with other firms;

5. The setting-up of **permanent sales offices abroad**, excluding the United States, to be better able to undertake sustained marketing efforts, and

6. **Marketing agreements** which allow companies to undertake a combination of the above activities.

We can see that all these activities are designed to make it easier for the exporter to make the first step in the export process. Whether it is sponsored by the government or private industry, the activity in which a company

wants to participate will lead to PEMD assistance if

1. it is consistent with the marketing strategy of the company;

2. it has reasonable chances of success;

3. it will result in substantial benefits for Canada in terms of increased exports and jobs;

4. it will likely lead to increased sales in the future; and

5. it is not financed by another export promotion programme in a proportion exceeding 50%.

As for the companies considered eligible for this Programme, the following conditions apply: the firm must be registered with government export promotion services and must be either an incorporated company (in Canada), a firm made-up of professionals such as engineers or lawyers, or a national non-profit organization. Crown corporations and their subsidiaries will not be considered. Also if a company has in the past received PEMD funds and has not generally been successful in its export attempts, chances of rejection are increased.[60]

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60. Statistics reveal that the manufacturing sector, with 61% of total applications approved in 1986, remains the largest group of PEMD users. Most of these companies had annual sales volumes of under $2 million and were based in Ontario, Québec, British Columbia and Alberta. See DEPARTMENT OF EXTERNAL AFFAIRS, "PEMD Annual Review 1985-86", pp. 3-4.

PEMD's contribution will vary according to the type of activity and depending on who organized it. For instance the Programme will normally cover, in the case of government sponsored trade missions, the full cost of round-trip air fare to and from Canada, as well as local transportation costs and other related expenses. If government organized trade fairs are involved, PEMD will pay for the exhibition material required (tables, kiosks, etc.), the advance reservation of space and at least 50% of such costs as round-trip airfare, promotional material and the like. For activities organized by industry itself the same variations in levels of funding are observed.[61] It is important to note that due to severe budget restraints the government had to cut PEMD funds by more than 30% in 1985-86. This had a direct impact on the export activity of many firms and whereas participating companies were previously restricted to four projects per year and a maximum contribution of $500,000 per project, now the limits are halved to two projects per year and a maximum of $250,000 per

61. For more information on this subject, consult the official PEMD guidelines, supra, note 59.

project.[62]

In general the PEMD programme has been reported to be one of the most successful export promotion programmes around. Reported sales as a result of PEMD assisted activities, since the start of the Programme in 1971 to the end of 1986, totalled $6.5 billion. North America, the Pacific region and Western Europe remain the primary target markets.[63]

The PEMD programme has been very beneficial to aerospace companies and scores have participated so far. Among those who have received funding, we note Aeronautique Canada, NAVTEL, Godfrey Howden, Hëroux, Outils Coupants International, Précisystèmes International and Tech-Rep Electronique. All these firms attended for the first time the prestigious Le Bourget air show in France in 1987 and got the opportunity to present their products directly to potential customers.[64] Other more established companies

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62. See CANADIAN EXPORTERS ASSOCIATION, "Minutes of the Export Promotion Government Liaison Committee Meeting, March 27, 1986, pp. 2-3; and DEPARTMENT OF EXTERNAL AFFAIRS, Annual Review 1986-87, 1987, p. 26. The issue of PEMD budget cuts will be explored further in the third chapter of this thesis where we will assess the impact of this decision and suggest corrections.

63. See "Guide to PEMD", supra, note 59, pp. 2 and 4.

64. F. CÔTÉ and C. RIOUX, "L'aërospatiale aux oiseaux", Commerce, November 1987, p. 63.

have also benefitted such as Indal Technologies Inc., Garrett Canada, Raytheon Canada Ltd., CAE Electronics and MBB Helicopter Canada Ltd., and PEMD is probably the most widely used export promotion programme as far as the aerospace industry is concerned.[65]

c) The Canadian International Development Agency's Industrial Cooperation Programme

Established in 1978, CIDA's Industrial Cooperation Programme (ICP) is designed to provide development assistance to rapidly industrializing nations of the Third World by promoting mutually profitable business relationships between Canadian companies and their developing country counterparts.[66] In this context Canadian industry becomes a partner in the development of less fortunate nations and the tool is foreign investment. As was the case with the Tied-Aid facility, it is not the primary purpose of

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65. In fact, the wide majority of companies who responded to our survey had used PEMD in the past, if only occasionally. The results of this survey will be analysed in chapter three.

66. All details pertaining to the Industrial Cooperation Program of CIDA are to be found in the two following documents: "The Business of Development", supra, note 55; and supra, note 58, pp. 36-39.

the ICP to increase Canada's export trade to these nations, but that is nevertheless a by-product of the assistance given. This Programme aims to assist Canadian firms in assessing long-term business opportunities in developing countries, not merely to facilitate fast sales.

The ICP is administered by the Business Cooperation Branch of CIDA. To date it has enabled more than 1,500 companies from all parts of Canada to gain access to new markets and explore business cooperation possibilities in some 90 nations, while providing developing countries with the benefits of Canadian expertise and technology. In 1986-87 for example, just over $40 million was allocated for this purpose, and in general expenditures are evenly divided between Latin America and the Caribbean, Asia and Africa.

The ICP programme is divided into two sections, each with different services and purposes:

1. <u>The Long Term Business Collaboration Section</u>:

The first section is designed, as its title suggests, to support Canadian manufacturers interested in exploring long-term business collaboration possibilities with partners in developing countries. The facilities offered are:

Starter Study

This involves a preliminary analysis by the Canadian company of all the factors that are relevant to the establishment of any form of long-term cooperation arrangement. This is truly the first step in the process and before applying for ICP assistance, the firm must have identified specific opportunities for collaboration as well as potential partners. Assistance of up to $15,000 is available for each project, covering return airfare for approved personnel, living expenses and reasonable support services.

Viability Study

This facility is intended to follow through on the starter study. If positive results were obtained, this ICP funded viability study should enable the Canadian company to have a clear idea of the benefits and costs of industrial cooperation and should lead to the conclusion of joint-venture agreements.

In principle, up to $100,000 is available per project. This money will cover 100% of round trip airfare and living expenses, as well as 50% of consultant and legal fees, testing expenses and return airfare for personnel from the developing country.

Adaptation/Testing Facility

The ICP programme, through the Canadian Technology Transfer Facility, can contribute financial assistance in support of adaptation and testing needs. Canadian manufacturers which receive these funds are then able to adapt and demonstrate their technology in a specific developing country in support of a joint-venture arrangement. The assistance normally covers 75% of the incurred costs.

Project Support

Once the joint-venture has been signed and implementation has started, certain problems peculiar to the business environment of the particular developing country may arise. This facility is available to compensate for the costs involved in solving these problems and will cover the creation of special training programmes for local personnel, legal and other professional services and special equipment that may be required.

2. The Project Definition Studies Section

The purpose of this section is to enable Canadian companies to provide pre-feasibility studies to developing countries, before a major capital project is undertaken. The objective is to accelerate these nations' industrializa-

tion and to facilitate eventual Canadian participation in the project's implementation, the rationale being that if a Canadian firm was involved in the planning stages of the venture, it might well be selected to carry it out. As a general rule up to $350,000 is available per project but the Canadian participant must be able to demonstrate a strong possibility that the project will be realized and that Canadian goods and services will be supplied.

In general, the Industrial Cooperation Programme is available to companies which are established in Canada; which have a proven track record in the field of proposed cooperation involved; which have sufficient technological and managerial resources to do the job; and which are financially stable.

In order to obtain ICP funds, the company must show that the project will entail social, economic and industrial benefits for the host country and for Canada. Advantages for the developing country would include the creation of jobs, improvements in technical skills, access to new technology and earnings of foreign exchange. As for Canada, such cooperation projects should lead ultimately to increased exports and the opening of new foreign markets.

Many aerospace firms have found that it was good business to participate, through the Industrial Cooperation Programme, in the development of the Third World. Examples

include Litton Systems Canada Ltd., SNC Inc., Raytheon Canada Ltd. and Spar Aerospace Ltd.[67] A lot of the participants are now engaged in long-term partnerships with their counterparts in developing nations and interest in this programme is widening, for good reason: less developed countries will likely constitute one of the dominant markets for Western goods and services in the coming decades.

d) The World Market Trade Development Programme

This new programme was announced in September 1988 by John Crosbie, federal Minister for International Trade.[68] It was designed to turn the opportunities created by the Canada-U.S. Free Trade Agreement and Canada's participation in the multilateral GATT talks into actual market successes. It focuses on the American, Asian and European markets and concentrates on small- and medium-sized businesses. The government committed $57 million to this

67. Information obtained through the survey questionnaire sent to Canadian aerospace firms.

68. See "Des millions accordés pour mieux exporter", CanadExport, October 3, 1988, p. 1. See also J. KOHUT, "Ottawa to Add $57-Million to Trade Promotion Budget", The Globe and Mail, September 30, 1988, p. B-8.

new facility.[69]

This programme basically expands existing trade services and offers new ones for each of the target markets. In the United States, for instance, additional trade missions, trade fairs and instruction courses on U.S. customs procedures will be organized. As well, sectoral studies to identify new market opportunities will be undertaken, and increased assistance in the penetration of the large U.S. government procurement market will be provided. Finally, new trade offices in major American cities will be opened.

As far as Asia and Western Europe are concerned, the programme offers the New Exporters to Overseas Markets service, which will identify companies currently exporting only to the United States and assist them in selling to overseas markets. Workshops conducted by business executives themselves will also be organized in order to advise potential exporters on how to successfully cater to new markets. As well, more frequent trade fair visits and meetings with Canadian trade commissioners stationed abroad will take place. Another interesting feature is the

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69. For all relevant information about the World Market Trade Development Programme, see MINISTER FOR INTERNATIONAL TRADE, "Information Kit for Canadian Exporters", September 1988, pp. 2-12.

National Enterprises Global Procurement Programme, which will assist the suppliers of Canadian operations of multinational corporations to enter export markets by utilizing corporate linkages to parent or sister companies in other countries. This should prove very helpful since intra-corporate transfers among multinational corporations account for approximately 30 percent of worldwide trade and over 60 percent of Canada-U.S. trade.

The World Market Trade Development programme is the last federal export promotion facility to be examined in this study. Before we move on to the province of Quebec's own mechanisms, we must take a look at a series of understandings between the United States and Canada that pertain to the defence industrial base, and without which no thesis devoted to the aerospace industry would be complete.

C. The Defence Development and Defence Production Sharing Arrangements

The Defence Development and Defence Production Sharing Arrangements (DDSA and DPSA) are not export promotion devices per se. Rather they are a collection of declarations, memoranda, understandings and even notes that have been exchanged over the years between the U.S. and Canada, and whose basic purpose is to ensure the creation

and preservation of a strong, healthy defence manufacturing capacity throughout North America. In this context there is but one North American defence industrial base, and should a major world conflict erupt, both Canada and the United States must have the ability to produce military material to defend themselves and their allies.

These arrangements date back to the early forties, when both countries realized that cooperation on North American defence matters was in their mutual interest. With the onset of hostilities in Europe, the United States and Canada established in 1940 the Permanent Joint Board of Defence, allowing the then neutral Americans to give military assistance to their western allies. In 1941 this collaboration was crystallized in the Hyde Park Declaration providing for free trade in defence material and encouraged shared production of such material. These principles were reaffirmed subsequently in the Statement of Principles of Economic cooperation of October 26, 1950 and many times thereafter.[70] In 1958, Canada made the commitment that from then on it would buy its major weapons systems from the

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70. For the complete history of the DDSA and DPSA, see DEPARTMENT OF EXTERNAL AFFAIRS, "The Canada-United States Defence Development and Defence Production Sharing Arrangements", November 1983, pp. 1-3. See also D.H. BUNKER, The Law of Aerospace Finance in Canada, Montreal, Institute and Centre of Air and Space Law, McGill University, 1988, p. 335, note 8.

United States. In exchange, Canadian companies would gain greater access to the domestic procurement purchases of the American Department of Defence, and this trade-off was to form the basis for the signing, that same year, of the Defence Production Sharing Agreement (DPSA).

The DPSA essentially creates an exception to American protectionist and duty legislation in favor of Canadian defence manufacturers. It provides that Canadian firms shall be considered as "domestic suppliers" for the purposes of the Buy American Act, an Act of Congress which stipulates that only domestic, i.e. American, sources may sell goods to the American government.[71] The result is that Canadian companies will be considered like their U.S. counterparts in the bidding process for government purchases, and will not be subject to the restrictive conditions applicable to other countries. Also Canadian defence products sold in the United States will be exempt from American import duties, effectively removing a major barrier to the free flow of defence products across the frontier.[72] Finally, a direct result of this partnership

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71. See the Buy American Act of 1960, Pub. L. 86-624, 528, 74 Stat. 419.

72. For details concerning the relationship between the DPSA and the Buy American Act of 1960, see supra, note 70, pp. 3-4.

is that Canadian suppliers do not need export licenses to ship military goods to the United States, eliminating additional red tape.[73]

For its part the Defence Development Sharing Arrangement (DDSA) is a parallel programme borne of the same cooperation spirit. It began in 1963 with the signing of the "Memorandum of Understanding in the Field of Cooperative Development", which superseded earlier agreements with individual U.S. military services.[74] It was reaffirmed at the 1985 Quebec summit in the "Declaration by the Prime Minister of Canada and the President of the United States of American Regarding International Security".[75] Basically it provides for joint Canada-United States government

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73. This is specified in the Export Control List which will be examined in chapter two. Some constraints on two-way defence trade do remain however. They are identified in the U.S. Federal Acquisition Regulations Defence Supplement and the annual United States Appropriations Act. The major restrictions concern trade in ships, food, textiles, construction material and small business "set-asides", i.e. American government purchases restricted to small U.S. companies. See DEPARTMENT OF EXTERNAL AFFAIRS, "Canadian Industry and the U.S. Defence Market", 1987, p. 8.

74. For historical background and other details on the DDSA, see supra, note 70, p. 4.

75. See AEROSPACE INDUSTRIES ASSOCIATION OF CANADA, "Canadian Aerospace Industry: Presentation to the United States Air Force", January 26, 1987, p. 1.

funding of research and development projects for the future needs of the U.S. military where the prime contractor is a Canadian company and the Canadian share of the venture is funded by a government R & D grant programme called the Defence Industry Productivity Programme (DIPP).[76]

A wide variety of such projects have been undertaken since 1963, with some 95 ventures having a total programme value of over $200 million completed or underway.[77] Costs for projects are usually shared equally, but a split other than 50%-50% will be considered depending on the nature of the programme and the availability of funds in either country. In either case, the minimum contribution of one of the partners cannot go below 25%. To date such important developments such as airborne navigation systems, Vertical Take-Off and Landing (VTOL) and Short Take-Off and Landing (STOL) aircraft, air cushion vehicles,

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76. The Defence Industry Productivity Program is basically a research and development facility administered by the federal government and its goal is to ensure the creation and preservation of a strong defence industrial base in Canada. It is not an export promotion tool and as such will not be analysed in detail in this study. Nevertheless, it is absolutely vital to a good portion of the aerospace industry and widely used. For more details, see DEPARTMENT OF REGIONAL INDUSTRIAL EXPANSION, "The Defence Industry Productivity Program: Terms and Conditions", 1985.

77. See DEPARTMENT OF EXTERNAL AFFAIRS, supra, note 62, p. 19.

gas turbine engines, submarine detection equipment, off-road military vehicles and communications equipment have been produced under the DDSA umbrella.[78]

The evolution of the numerous documents that comprise the DPSA and DDSA marked a rare occurrence where two nations reached agreement on such-sensitive matters[79] and since their inception, these arrangements have proved extremely beneficial to both partners. Indeed the United States has profited from the increased competition and capability brought about by the Canadian suppliers, while Canada gained better access to an important pool of poten-

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78. DEPARTMENT OF EXTERNAL AFFAIRS, "The United States-Canada Defence Development Sharing Program", 1983, p. 2. It is interesting to note that, because of the increasing costs associated with conceiving and manufacturing sophisticated defence systems, a Pentagon official recently predicted that the trend towards increased sharing will continue at a faster pace. See K. Romain, "Pentagon Seeking Technology Sharing", The Globe and Mail, October 31, 1988, p. B-11.

79. Canada has concluded other similar agreements with other countries over the years. Eight Research, Development and Production (RDP) Agreements have been negotiated since the first was signed with the Federal Republic of Germany in 1964, and the other partners are Denmark, France, the Netherlands, Italy, Norway, Sweden and Britain. These agreements were strongly influenced by the DPSA and DDSA. See DEPARTMENT OF EXTERNAL AFFAIRS, supra, note 62, pp. 21-22.

tial customers.[80] This has had a dramatic impact on the ability of Canadian defence manufacturers to compete in the North American market and elsewhere, and is certainly one of the major factors behind the continued health and success of the industry in Canada. For these firms, the DPSA and DDSA effectively opened the door to the huge American defence procurement market, and made it easier for government export promotion programmes to increase their foreign sales. In fact, all the aerospace companies who have sold military wares in the United States in the past four decades, such as Spar Aerospace Ltd., Canadian Marconi, Litton Systems and scores of others, can be said to have benefitted from the DPSA and DDSA.

It is interesting to note that government statistics show, for the period 1959 to 1986, that Canada has bought more in military products from the United States than

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80. A major player in the effort to open up the American defence procurement market to Canadian companies has certainly been the Canadian Commercial Corporation (CCC). A Crown Corporation owned by the government of Canada, the principal function of the CCC is to act as contracting agent to foreign governments and international agencies who wish to purchase goods or services from Canada on a government to government basis. The CCC's involvement adds credibility to the efforts made by Canadian manufacturers to sell abroad. For more information on the CCC, see H. OVERGAARD, "The Opportunities Are There", International, May 1986, p. 18. See also J.J. Blais, "The Canadian Commercial Corporation", Aerospace and Defence Technology, May-June 1988, p. 17.

the U.S. has bought from us, resulting in a defence trade deficit of 2.4 billion.[81] This could have been expected since Canada buys virtually all of its major weapons systems from the United States. However, it was recently pointed out that this deficit figure is based only on industrial production trade and does not take into account the money spent by the United States on Dewline, North Warning, Goose Bay and other components of the northern defence system.[82] A rough balance probably exists there. Nevertheless efforts are now being made to improve the situation by boosting the performance of Canadian aerospace firms under these arrangements.[83]

It is obvious from the preceding comments that the Defence Development and Production Sharing Arrangements,

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81. See DEPARTMENT OF EXTERNAL AFFAIRS, supra, note 62, p. 21. Recent trends indicate that this deficit is getting bigger; in 1982 it was only $547 million and as recently as 1983, it totalled $1.2 billion. This shortfall has thus doubled in only three years.

82. See the "Letter to the Editor", by H.S. RUSSELL, President of Howland Russell Consultants Ltd., in Aerospace News, March-April 1988, p. 6.

83. Schedule "A" of the Memorandum of Understanding between the Department of Regional Industrial Expansion and the Aerospace Industries Association of Canada, concluded on 29th May 1985, notes that trade imbalance exists and proposes collaboration to correct the problem by increasing our exports of military material to the United States.

even though they do not intend to promote exports, are truly the lifeline of a significant part of the aerospace industry in Canada; they are a guarantee of continued capacity to develop new products on the leading edge of technology and to sell them abroad and without them, the Canadian defence industry would be confined to the production of relatively simple items of foreign design.

However, recent developments in the United States had raised concerns on this side of the border about the continued viability of this partnership. In November 1987, U.S. Senator Alan Dixon introduced legislation that would strip foreign defence manufacturers, including Canadian companies, of their status as "domestic suppliers" under the Buy American Act, effectively shutting them out of government defence procurements.[84] This bill, designed to help strengthen an American industrial base besieged by foreign competitors, would have been very damaging to the Canadian aerospace industry. After intense pressure from the Canadian government, Senator Dixon presented on March 28, 1988, several revisions that went a long way towards correcting the prejudicial elements in the original version,

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84. See D. HUGHES, supra, note 13, p. 77; and "A New Fortress America: U.S. Congress Protectionism in Defence Procurement", Aerospace News, January-February 1988, pp. 2 and 7.

and even this proposal failed to receive the assent of the Senate.[85] Therefore, Canadian defence suppliers are still considered for most situations, as domestic sources for U.S. government purchases.

This brings to a close our discussion of federal government initiatives to increase the aerospace industry's export trade. Several programmes such as the trade commissioners and PEMD, as well as the efforts of CIDA and the Export Development Corporation have been analysed and we have seen that the services offered do indeed cover the whole range of export assistance needs, from financing and insurance to marketing help. It is now time to consider what the Quebec government has done in this regard. The choice of the province of Quebec stems in part from the fact that the author is a Quebecer, and also because the programmes in question are representative of what is being done elsewhere in the other provinces.

Subsection 2. Quebec Government Export Promotion Assistance

The Government of Quebec, like all the other provinces, has assistance programmes designed to aid exporters

85. See "Dixon Bill Fails to Receive Necessary Senate Support Following Committee Hearings", Aerospace News, March-April 1988, p. 1.

in the penetration of new, or the expansion of existing, export markets for goods and services originating in this province. These facilities are designed not to duplicate federal services (although a certain amount of duplication does occur) but to be complementary. Also these programmes, since they were devised and are implemented in the province and are therefore "closer" to the companies themselves, usually present greater flexibility and attention to the firms' needs.

The involvement of the government in export promotion runs along the same lines as federal efforts and both financing and marketing assistance are available to Quebec-based firms.[86] The export loan facility is administered by the Société de Développement Industriel du Québec, which also handles part of the export marketing aid programme; other marketing services are provided by the Ministère du Commerce Extérieur et du Développement Technologique, especially in the form of the APEX Programme. The following text is divided into two parts, the first dealing with export finance, the other with export marketing.

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86. Ontario is the only other province that will extend loans to finance export sales. This is done through the Export Support Loan Program of the Ontario Development Corporation. See Canadian Exporter's Handbook 1987-88, supra, note 58, p. 111.

A. Export Finance Services: The Société de Développement Industriel du Québec

The Société de Développement Industriel du Québec (SDI) is the only provincial entity to provide financing services, unlike the federal level where both EDC and, to some extent, CIDA were engaged in this activity. The SDI is an organization established by an Act of the National Assembly of the province.[87] Created in 1971, its stated objective is to promote the economic development of Quebec by encouraging the growth of its industries, of its exports and of its research and development efforts. Accordingly it offers Quebec businesses a wide variety of programmes dealing with capital investment, research and development, investment in Quebec enterprises, financing of special projects, tourism development and aid to exports. Due to the narrow scope of this thesis, only the latter programme shall be considered.[88]

This export promotion facility was introduced in

87. See Loi sur la Société de développement industriel du Québec, L.R.Q. c.5-11.01.

88. More details regarding the different services of the SDI can nevertheless be found in the publication "Un soutien capital à vos projets", available from the SDI upon request. See also J.P. JOHNSON, supra, note 55, pp. 449 et seq.

1975[89] and is divided into three parts: creation of consortia, identification and establishment of new markets and financing of exports. Each of these facilities shall be dealt with but since the purpose of this paragraph is to analyse the efforts of the Quebec government to finance foreign sales, we will deal with the financing part first.

Depending on the nature of the export transaction and the particular needs of the manufacturer, financing may take the form of either a loan at market rates, or a loan guarantee. In the former case, the SDI behaves much like a bank and in many cases will act when a bank will not for risk or other reasons; a yearly fee is imposed. On the other hand, loan guarantees extended to private institutions who have lent money to the exporter resemble those offered by the EDC, and here again a user fee, as well as a management charge of 10% of the total amount of the loan will be assessed.[90]

Whatever the nature of the service, be it financing or marketing, some general eligibility conditions must be met by applicant companies:

1. The firm must have its principal place of

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89. Supra, note 20, p. 26.

90. All details about the financing activities of SDI are contained in supra, note 88.

business in Quebec;

2. It must have at least 50% of its employees located in Quebec;
3. It must demonstrate that it has the financial and organizational resources to ensure the completion of the project;
4. It must show that there is a reasonable chance that the project will be profitable;
5. It must ensure that the exported goods have a Quebec content ratio of at least 50% or that the services sold will be carried out by persons who are residents of Quebec in a proportion of at least 50%.

On top of these general criteria, other conditions must be satisfied before the SDI will provide either loans or loan guarantees. Specifically, any financial intervention on the part of the Société must be both necessary to ensure the realization of the transaction and complementary with assistance provided by other financial institutions. The latter case envisions the possibility of joint financing of an export sale by the SDI and a bank or the EDC, or the instance where the SDI would guarantee a loan made by a bank. Finally, as a last condition, the Société will not intervene without adequate security to minimize the risk incurred.

In fiscal year 1986-87, the SDI participated in the financing of seven export sales, and although no actual loans were granted, loan guarantees totalling nearly $4 million were extended.[91]

Due to limited resources, the existence of alternate sources of credit in the traditional financial markets, and the presence of the EDC, it was to be expected that the lending activities of the provincial government, through the SDI, would be limited in scope and the small amounts involved are testimony to this. As we shall see the bulk of provincial export promotion activities is concerned with marketing efforts, and it is this aspect which we shall now consider.

B. Export Marketing Services

As noted in our discussion of federal export promotion efforts, export marketing refers to those facilities designed to allow the manufacturer to discover new and promising markets for its products and to meet potential purchasers or joint venture partners, the ultimate goal being increased foreign sales. In the province of Quebec

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91. SOCIETE DE DEVELOPPEMENT INDUSTRIEL DU QUEBEC, "Annual Report 1986-87", June 1987, p. 17.

this task is undertaken by two entities: the Société de Développement Industriel du Québec which we have just seen, and the Ministère du Commerce Extérieur et du Développement Technologique.

a) The Société de Développement Industriel du Québec

Apart from its financing services, the SDI offers Quebec exporters two other facilities devised to facilitate their sales abroad: one deals with the creation of consortia and the other with the identification and establishment of new markets. In both cases the standard eligibility criteria outlined in the preceding section apply, and other specific conditions may also have to be met.[92]

Creation of Consortia

The purpose of this facility is to encourage Quebec companies to team up and sell their products elsewhere under the banner of one corporation. This allows them to pool their resources, minimize the risks involved and limit

92. All details concerning either the creation of consortia or the investigation of new markets facilities can be found in supra, note 88.

individual investments.

The SDI will participate as a partner in such consortia thus allowing the provincial government to share the financial risks with private enterprise. Its financial assistance will take the form of either an acquisition of shares in the companies involved, a loan convertible into these companies' shares, or cash advances as a shareholder. It is interesting to note that the Société's interest in any such company can only be of a minority nature (it will not hold a controlling interest) and on a temporary basis: SDI will withdraw when its participation is no longer required.

To obtain help in establishing a consortium, a group of companies must establish that the results that they will obtain working as a group will be superior to those that would have been reached had they been operating individually. Moreover these businesses must show that they are capable of working together and integrating their capabilities, and that the Société's help is indeed needed to make it work.

In 1986-87, the SDI participated in the creation of twelve new consortia and its participation was in the form of share purchases in the amount of $470,000.[93]

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93. Supra, note 91.

Investigation of New Markets

Before a company may even think of the most appropriate way to finance or insure an export sale, it must have completed the crucial step of determining which foreign markets would be receptive to its products and making the initial contact with a potential purchaser. Government assistance to facilitate this process is given, as we now know, by the PEMD programme at the federal level and in Quebec by the SDI.

To help Quebec businesses gain a foothold in new foreign markets, the Société will advance funds covering 80% of eligible expenses incurred. This aid will take the form of an unsecured loan repayable over a maximum of 5 years at market rates. In addition, upon expiry of the repayment term, the SDI may at its discretion forgive up to 50% of the remaining balance on the principal of the loan. The maximum amount of the loan per project may not exceed the lesser of $1 million or 75% of the net worth of the enterprise, and eligible expenses include:

1. feasibility studies, legal costs and consultants' fees;
2. travelling expenses;
3. salary of personnel working on export projects outside Quebec;

4. cost of models and samples;
5. rental of offices and warehouses outside Quebec;
6. manufacturing agents' expenses;
7. advertising expenses; and
8. interest costs on the Société's loan.

In order to obtain assistance from the SDI, the potential exporter must establish that no significant sales have been made in the past in the country targeted for help. Also there is a management fee of 1% of the total amount of the loan to be paid by the company.

For the year 1986-87, 94 such loans were granted to Quebec businesses, representing more than $7 million.[94]

b) The Ministère du Commerce Extérieur et du Développement Technologique

It is the role of the Ministère du Commerce Extérieur et du Développement Technologique (MCEDT) to provide assistance to Quebec firms wishing to export, to promote foreign investment in this province and to stimulate technological development in Quebec companies though

94. Id.

exchanges with foreign countries.[95] Within Quebec, it can help firms to assess potential export opportunities, identify desirable foreign markets and determine the appropriate method of reaching possible buyers. In short, the Ministère provides export marketing assistance and this help can take many forms. Some facilities seek to encourage Québec businesses to participate in trade fairs, trade missions, consortia, industrial agreements and this assistance is generally geared toward group participation.[96] Then there is the APEX programme which contains some of the elements just enunciated but is designed for individual firms.

Trade Fairs

The Quebec government offers groups of companies the possibility of participating in trade fairs which offer promising business opportunities. Believing that this is an effective way for firms to increase their exposure in international markets and generate export sales, the government gives funding for group trade fairs organized by the MCEDT

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95. See MINISTÈRE DU COMMERCE EXTÉRIEUR ET DU DÉVELOPPEMENT TECHNOLOGIQUE, "The Export Connection", 1986, p. 42.

96. Id.

as well as for individual firms which present their own projects. In the case of group fairs, this assistance covers the costs of constructing, renting or purchasing an exhibit stand, of renting exhibit space, of providing the facilities with the necessary furniture and equipment, and of shipping the company's products to the exhibition. For individual firms presenting their own projects, funding will generally cover up to 50% of the costs applicable for group fairs, as well as limited living expenses while participants are outside Canada.

Trade Missions

The Ministère will organize group missions to foreign countries where Quebec companies will meet potential customers. This is designed to promote export sales and facilitate the negotiation of distribution agreements and technology exchanges. The government will assume the cost of organizing the missions and part of the travel costs of the participants. Also, assistance may be provided to bring foreign purchasers of products or services to Quebec. This aid may be organizational as well as financial, and the Ministère will pay the cost of the visitor's airfare.

Creation of Consortia

Establishing a consortium with a foreign firm is a good way for a Quebec company with limited resources and knowledge to reduce the financing, shipping and storage costs associated with export sales. This makes it easier to diversify in as yet unknown markets and achieve greater financial growth without paying the full cost of going it alone. Thus the Ministère will provide financial and technical assistance to help Quebec companies find potential partners.

Industrial Agreements

Another form of collaboration with a foreign partner which can enable a Quebec firm to remain competitive in ever-changing markets is the signing of industrial agreements. Many goals can be achieved through this cooperation; for instance the Quebec company can: 1) manufacture a foreign product under license; 2) assemble, label or package products on the North American market; 3) purchase a trademark; and 4) establish joint ventures. Thus the firm benefits from the assistance of a partner in reducing the costs of bringing out new products and introducing them to potential customers. The Ministère encourages such agree-

ments and has set up a computerized system to match the capabilities of Quebec manufacturers with the needs and requirements of foreign firms.[97]

Financial Assistance: The APEX Programme

The Quebec government's "Programme d'Aide à la Promotion des Exportations", widely known as the APEX Programme, is a comprehensive export promotion tool designed to assist Quebec firms in seeking out new markets for their goods and services. It was substantially revised and modified recently to take into account the services rendered by the SDI, as there was concern that APEX and SDI programmes were overlapping in certain respects. As of the 1st of April 1988 a new APEX facility became available. The

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97. Another government department, the Ministère de l'Industrie et du Commerce du Québec, is also involved in this activity. It has been engaged for the past three years in a search for European aerospace companies interested in doing business with Quebec firms. To date thirty potential partners have been found and a few concrete examples of this cooperation have already materialized. For example Aviatech of Ville St-Laurent has signed a collaboration agreement with the French firm Queutelot of Toulouse. Also Tech-Rep Electronique and Air LB pooled their efforts to create a new company Air LB Canada. Similarly CP Technologies and Mecaéro of France invested $5 million and created Mecaéro Canada, a source of 60 new jobs. See D. FROMENT, "Trente entreprises aérospatiales européennes cherchent des partenaires au Québec", Les Affaires, April 30, 1988, p. 8.

Programme is now divided into six parts representing each step of the export process: participation in a trade mission, in a trade fair, undertaking of market studies and strategies, market adaptation, bid preparation and finally the employment of a person specialized in international marketing.[98] These services can make the difference between the success and failure of an export transaction and are targeted mainly at small- and medium-sized companies which have not had extensive experience in the export business and which do not have the resources to be self-sufficient.[99] In all cases, requests for assistance must be submitted about four weeks in advance of the implementation of a particular project.

1. Individual Trade Missions

If a particular company desires to visit a prospective new market to investigate the potential for future

98. The new APEX Program is described in MINISTERE DU COMMERCE EXTERIEUR ET DU DEVELOPPEMENT TECHNOLOGIQUE, "APEX: pour ceux qui visent les sommets", 1988, pp. 5-15.

99. The same is true of course of all export marketing facilities in general, such as the federal PEMD and CIDA programs and those of the SDI and Ministère du Commerce Extérieur et du Développement Technologique at the provincial level.

sales or to conclude an industrial agreement[100] with a foreign firm, APEX can help. Subject to a maximum contribution of $8000 per project, APEX will cover the following expenses associated with the mission:

1. 100% of round-trip airfare for one or two persons or the utilization cost of an automobile on the basis of an allocation for each kilometre travelled;
2. an amount of $300 per person for living and other expenses;
3. 50% of the cost of translation services up to a maximum of $1500, not including French to English and vice-versa.

2. Exhibitions and Fairs

In order to help Quebec exporters participate as exhibitors in trade fairs and other such events, APEX is ready to offer financial assistance and will reimburse the following expenses:

1. 100% of return airfare for one or two persons

100. An industrial agreement is basically a contact between two parties whereby one will sell to the other industrial property rights or unpatented know-how in order to ensure their commercialization in a given market.

or the utilization of an automobile with an allocation for each kilometre travelled;

2. 60% of rental costs of exhibition space;
3. an amount of $1000 per project covering miscellaneous expenses such as the rental, construction, maintenance and decoration of the exhibition stand;
4. 50% of publicity costs to advertise the activity, up to a maximum of $1500; and
5. 50% of translation costs up to $1500, excluding French to English and vice-versa.

There is a maximum APEX contribution of $10,000 per activity. This facility would be particularly appropriate for the aerospace industry as there are quite a few famous and well-attended air shows such as Asian Aerospace in Singapore, Fairborough in Britain and Le Bourget in France.

3. Market Study and Strategy

Before a company will commit important sums of money and a lot of energy on an export venture, it will always conduct an assessment of the prospective new market and will devise on that basis its export strategy. This can be a time-consuming and expensive process and to make it more affordable, APEX is willing to pay 50% of professional

fees charged by outside consultants for the preparation of a market study and formulation of a corresponding strategy. There is a maximum contribution of $15,000.

4. Market Adaptation

Foreign markets are naturally in a constant state of change and the farther away they are, the more difficult it becomes for the exporter to adapt to those changes. APEX recognizes this problem and provides help to allow the company to modify its promotional literature as needs dictate, as well as to obtain the necessary approvals and certification from the local authorities for the products concerned. Therefore, APEX is willing to reimburse the firm for 50% of the following expenses, with a maximum contribution of $20,000 per project:

1. preparation and translation, except in French or English, of promotional material;
2. production and translation, except in French or English, of new audio-visual aids;
3. the cost of conceiving and printing publicity ads, up to a maximum of $10,000; and
4. the fee charged by a foreign organization to ensure local certification of the firm's products.

5. Bid Preparation

When applying for a government contract or for subcontract work for the main contractor in a major project, it is customary for a company to submit a bid, i.e. a proposal to do the prescribed work under certain conditions and specifications, and for a given price. This is extremely common in the aerospace industry where, aside from the major companies (Spar Aerospace, Pratt & Whitney, CAE Electronics, Canadair, De Havilland), there is a large group of firms who specialize in subcontracting work such as providing temperature control systems for airplanes (Garrett Canada) or fixed and mobile air traffic control towers for airports (LNS Systems Inc.). These companies do business in Canada but also in foreign countries and to support their bidding efforts, APEX is prepared to pay 50% of the professional fee of an expert who counsels on such matters, at a maximum of $250 per person per day, up to a limit of $15,000.

To obtain this assistance, the Quebec exporter must show that a bidding procedure is involved, that goods or services of Quebec origin will be exported, that financing and a time-table for realization of the project have been arranged, that the contract is to be awarded in the six

months following the request for assistance and finally that no other Quebec company is involved (the government does not want to promote one firm at the expense of another).

6. Employment of Specialists

When starting out on the long road to export success, companies may feel lost in an alien world. It is not easy, initially at least, to find one's way in the maze of government programmes and regulations and it can be just as difficult to sell to foreign purchasers or governments with which one has never dealt before. Sometimes the firm's own personnel will not be up to the task due to lack of experience and outside help will be required. To facilitate the hiring of international marketing advisers, APEX is ready to defray 60% of the candidate's salary for the first year, and 40% for the second. The request for APEX aid in this regard must be submitted before the expert is actually hired.

The APEX programme is designed to help small firms with little export experience, but more established exporters also use it regularly. The aerospace industry is a regular client of this facility and among the aerospace firms that have requested its services in the past, we find Spar Aerospace Ltd., Indal Technologies, LNS Systems and

Vac-Aero International Inc.[101]

This concludes our discussion of the province of Quebec's export promotion tools, and of government programmes in general. We have seen that whether federal or provincial facilities are involved, they generally follow parallel lines and fall into two camps: export financing insurance (EDC, CIDA and SDI), and export marketing (PEMD, APEX, and again CIDA and SDI). With so many services designed to make the exporter's job easier, the problem becomes one of avoiding undue duplication and avoiding confusion; this is an issue that will be explored in Chapter Three, along with the general effectiveness of each of these programmes. In this chapter we have been content so far to describe each of them in sufficient detail so that the reader may have a clear understanding of the first parameter in the "government intervention in exports" equation, the second being of course export control, to be considered in

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101. As reported in the answers to the survey questionnaire sent by the author. It is interesting to note that a few Quebec-based aerospace companies declared never having used the APEX program in the past. This could be due to many factors ranging from bad information on Quebec's export services to the simple reality that they did not need this facility in light of similar services offered by the federal PEMD, because they already had all the necessary internal resources or also because they exported to a market such as the U.S. where no assistance was required. Among the Quebec non-users were the SNC Group and CAE Electronics Ltd., two rather large firms.

the next chapter. In so doing, we have purposely ignored one vital element which conditions all government export promotion efforts: the constraints imposed upon them.

Indeed the government does not have a completely free hand in determining what services it will provide and how far it will go in making an exporter's job easier. For example, there are economic barriers, since there is a limit to the public funds that can be committed to this task, especially when other priorities need to be addressed. There is also the question of overlapping, which can occur between programmes of the same government, of the federal and provincial governments and between government and the private sector. This must be avoided at all costs for the sake of cooperation and complementarity and this factor may dictate what services may be offered at a particular level.

But if limits can come from within a country's system, they can also come from without, and such is the case with the constraints imposed on most trading nations by the GATT system. We are mostly talking about legal guidelines stemming from numerous agreements and protocols, but these can also have a definite political echo if we consider that the legality under international law of a given export subsidy will often determine the political response to it by other countries. We now propose to take a look at the legal limitations placed by the GATT on the export initiatives of

national governments.

Section 2. Constraints on Canada's Ability to Promote Exports: International Agreements and National Laws on Subsidies and Countervailing Duties

Canada is no stranger to the General Agreement on Tariffs and Trade (GATT).[102] It was a founding member in 1948 and through continuous participation has helped make it the important organization it is today. It was originally created as an interim arrangement, pending the entry into force of the more comprehensive Havana Charter and the establishment of the proposed International Trade Organization. The Havana Charter never came into force, largely because of opposition in the U.S. Congress, and for the past 41 years, the General Agreement has stood as the embodiment of the multilateral trading system.[103] Since its creation, it has been instrumental in laying down agreed rules for international trade and has also functioned as the

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102. General Agreement on Tariffs and Trade, 55 UNTS 187 (in force January 1st, 1948).

103. For the complete history of the GATT agreement and organization, see F. STONE, Canada, the GATT and the International Trade System, Montreal, The Institute for Research on Public Policy, 1984, pp. 18-21.

principal international body conceived with negotiating the reduction of trade barriers and other measures which distort competition, and in general with trade relations between member countries. As a code of rules, GATT has evolved constantly. To the original text have been added numerous so-called "codes" or agreements, the result of seven successive rounds of negotiation. The most important round of all was certainly the Tokyo Round, which was concluded in 1979 and produced important new guidelines on export promotion.

In the preceding pages, we have seen that Canadian companies benefit from a wide selection of government services designed to facilitate exports. Every day firms from every sector of the economy, and particularly the aerospace industry, use these facilities to the point where they have certainly had a positive impact on this country's export trade. However what is plainly a significant advantage to Canadian businesses can be perceived as an unjust competitive practice by foreign competitors who will raise the often-heard objection that they are victims of "unfair subsidies".

One can easily understand the reason behind their anger: through export promotion facilities, be they of a financing or marketing nature, the government generally covers part of the expenses and assumes part of the risk

incurred in a particular foreign sale. The direct consequence of this assistance is that the Canadian firm can then charge a lower cost for its products or services to a potential foreign customer. Suppose however that a supplier of the same country as that of the customer is capable of providing the same product or service. This second company, because no export sale will be involved, will not benefit from any government help and can only rely on private financial institutions. Often that is not enough and since the price advantage is so important in the success or failure of any transaction, the Canadian company is placed in a very favorable position to complete the sale. The conclusion thus becomes that because of a country's export promotion services, its businesses enjoy a significant advantage over local suppliers in foreign markets, and that is the root of the problem. A national government, faced with strident protests from a given industry, may determine that the situation is unfair and decide to retaliate, leading to conflicts which can quickly become unmanageable.

Objection to these export services or "subsidies" as they are generally referred to, is not new. As early as the 18th century, Adam Smith condemned the artificial stimulation of exports in his classic treatise on the wealth of nations:

> The effect of bounties, like that of all the other expedients of the mercantile

> system can only be to force the trade of a country into a channel much less advantageous than that in which it would naturally run of its own accord.[104]

This comment obviously did not have a great impact since export subsidies are now commonplace in all industrial nations and quite a few disputes have arisen as a result. A recent example is the famous Bombardier case. In 1982 the Canadian firm struck a deal with the Metropolitan Transport Authority of New York City for the sale of 825 subway cars. The contract, valued at one billion dollars was financed in part with a low interest loan from the Export Development Corporation. A local rival, the Budd Company, claimed that the only reason Bombardier was awarded the contract was because of unfair assistance from the EDC and demanded that the U.S. Treasury Department open an investigation into the matter. Neither this inquiry, nor a subsequent one by the Commerce Department, eventually found in Budd's favor and the sale was carried out, but the echo of this dispute still lingers.[105]

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104. A. SMITH, An Inquiry into the Nature and Causes of the Wealth of Nations, Harmondsworth, Penguin Books Ltd., 1979, p. 80.

105. "La voie est libre pour Bombardier", Le Devoir, July 14, 1982, p. 1.

Sub-section 1. GATT Rules on Subsidies Prior to the Tokyo Round

It is precisely this kind of problem that the framers of GATT sought to prevent when they assembled in 1947. Realizing that overly generous export subsidies, much like dumping,[106] creates distortions in the international trade environment, they fashioned a set of rules to govern their use and devised a redress mechanism.

There is no definition of export subsidies in the GATT agreement itself, a surprising fact considering the importance of the treatment, given to the subject. The interpretation notes to article 16 do identify certain measures that are not to be considered as subsidies,[107]

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106. Dumping refers to the sale of an imported product at a price lower than that at which it is sold within the exporting country or to third countries.

107. The notes provide for instance that the exemption of an exported product from taxes assessed on a similar product when destined for domestic consumption or the remission of such taxes, shall not be deemed to constitute a subsidy.

but that is hardly useful or sufficient.[108] Nevertheless, the Agreement does contain provisions, namely articles 6, 16 and 23, that have served as guidelines for member countries to follow in their export promotion activities. While article 16 lays the ground rules of what is permissible, articles 6, 22-23 and 19 deal with the remedies that may be adopted by the injured importing country.[109]

Article 16 of the GATT

Paragraph 2 of article 16 serves as the cornerstone of the GATT rules on subsidies:

> 2. The contracting parties recognize that the granting by a contracting party of a subsidy on the export of any product may have harmful effects for other contracting

108. Many authors have attempted to define the notion of subsidy but one of the most accurate and comprehensive definitions was offered by Professor Harald Malmgren. He described it as "any government action which causes a firm's, or a particular industry's, total net private costs of production to be below the level of costs that would have been incurred in the course of producing the same level of output in the absence of the government action". This would include the export financing and marketing facilities described in Section 1. Professor Malmgren is cited in C. PESTIAU, Subsidies and Countervailing Duties: The Negotiating Issues, Montréal, C.D. Howe Research Institute, 1976, p. 9.

109. For general information rules relating to subsidies in the original General Agreement, see supra, note 103, pp. 35 et seq.

> parties, both importing and exporting, may cause undue disturbance to their normal commercial interests, and may hinder the achievement of the objectives of this Agreement.

Having declared outright that subsidies are bad for member countries and disruptive of world trade, the framers then proceeded to try to limit their use and provide injured parties with remedies. Paragraph 3 of article 16 declares that subsidies on primary products[110] should be avoided but if granted should not result in the exporting country having more than an equitable share of world export trade on that product. For all other products, including manufactured goods, the parties to the Agreement intended to ban completely any form of subsidy, but could not agree on the way to do it. Accordingly, paragraph 4 specifies that negotiations shall be held between them to achieve this result, but the deadline of 1957 was passed and nothing came out of these efforts.

Perhaps the most interesting, and important, provision of article 16 is paragraph 1 which imposes conditions on the use of subsidies by any contracting party. If a particular government insists on granting a subsidy to a

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110. The note to paragraph 3 of article 16 specifies that a primary product is understood to be any product of farm, forest or fishery origin, or any mineral, in its natural form or which has undergone such processing required to prepare it for marketing.

given industry on its territory, it must notify the other GATT members of the nature and extent of the support, of the effect of such support on the concerned exports, and of the circumstances making the subsidization necessary. This means that a government may not subsidize as it pleases and must follow certain guidelines. There is also a subtle reference to a justification requirement, forcing the government to explain what national priorities are to be achieved by this subsidy. Paragraph 1 further provides that if such export support causes, or is likely to cause, serious prejudice to the interests of other contracting parties which may be affected, the country granting the subsidy shall, upon request, discuss with the parties concerned the possibility of limiting the subsidization.

What is the practical effect of article 16? A simple glance will reveal that it is not a particularly binding or very strict set of provisions. The only thing clear is that the framers intended to outlaw subsidies but could not do so because they were already widely used by everybody. They therefore set out to limit their use by outlining the conditions to be satisfied. But while the government granting the export support had a better idea of what was permissible, the authorities in the importing country still had no means to protect their local industry. This is where articles 6, 23 and 19 come into play.

Article 6 of the GATT

The purpose of article 6 is to give the country which feels injured by government-supported exports a tool to defend its domestic suppliers: the countervailing duty. A comprehensive definition is offered at paragraph 3:

> 3.(...) The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly or indirectly, upon the manufacture, production or export of any merchandise.

Paragraph 3 further provides that the countervailing duty that is imposed shall be of an amount equal to the estimated value of the subsidy that has been granted.

These provisions reveal many interesting details, so let us take them apart. First, a countervailing duty is a special charge in the form of a tariff or duty. It can only be used in retaliation for export subsidies granted by a foreign government that are determined to be unfair, and its purpose is to **compensate** for this support. Indeed the value of the duty cannot exceed the estimated amount of money allocated by the other party in the form of the subsidy. Another noteworthy point: the definition of countervailing duty employs a particularly expansive conception of a subsidy which can be direct or indirect, and be applied to the manufacture, production or export of any product. This

means that such forms of government assistance as research and development grants and tax abatements, as well as the more direct export promotion tools such as financing insurance and marketing services, would be subject to a compensatory duty.

While paragraph 3 outlines how a countervailing duty may be imposed, it does not say under what conditions it would be justified. After all such duties cannot be applied by the government of an importing country every time a form of subsidy is involved, because then countervailing duties would become the norm and not the exception. The answer is found in paragraph 6a) of article 6 which says that a contracting party may only levy a countervailing duty on the importation of a product from another country if it is determined that the subsidy will cause **material injury** to its domestic industry, or will retard materially the establishment of a domestic industry. This is what is often referred to as the "material injury test" which requires that an actual or likely prejudice be shown before a compensatory duty may be imposed.

The article does not precisely define "material injury". One could conceive it to mean any prejudice suffered by local suppliers, however small, in the form of lost sales, but the framers probably did not intend it that way, otherwise they would not have added the word "material" to

the requirement for an injury. A more tangible prejudice was certainly intended and we shall see later how an individual country, the United States, interpreted this provision.

Whatever their precise legal tenure, countervailing duties are a rather belligerent means of redress. They are the trade equivalent of "an eye for an eye, a tooth for a tooth" and are precisely the type of measure that invites retaliation by the affected exporting country, leading to trade wars.[111] The GATT framers foresaw the need for a more conciliatory self-help mechanism and hence drafted articles 22 and 23.

Articles 22 and 23 of the GATT

Under these articles there are two stages of procedure beyond which the adversely affected contracting party could make a request for permission to take retaliatory action. As a first step, article 22 provides for **consultation** between the injured importing country and the other party whose subsidies are causing or threatening to cause

111. Canada is no stranger to such trade disputes. Indeed in 1985, U.S. President Reagan imposed a special tariff of 35% on imports of Canadian cedar shakes and shingles. This tariff has been only partially removed since then. See K. NOBLE and E. GREENSPON, "Punitive Cedar Tariff to Remain, U.S. Says", The Globe and Mail, December 7, 1988, p. B-1.

injury.[112] If no satisfactory solution is reached as a result of this bilateral consultation procedure, the complaint can be referred to a **conciliation** panel which will study the matter and make the appropriate recommendation.[113] After the panel's report is given legal effect through the Contracting Parties' acceptance of the recommendation, the exporting party in violation is required to give the formulated solution "sympathetic consideration".

A similar procedure is written into article 23 which gives a contracting party who believes that another

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112. Various complaints have led to consultations between the parties and here are a few examples:
a) Italian and South African complaint against the U.S. export subsidy on oranges in 1953;
b) Danish complaint against British subsidy on eggs in 1957;
c) British complaint against French rebate on French-made agricultural machinery in 1957;
d) Australian complaint against Italian export subsidy on flour in 1958; and
e) U.S. complaint against British royalty rebate on steel in 1967.
See B. SEYOUM, Export Subsidies Under GATT and the Multilateral Trade Arrangement: An Analysis With Particular Reference to Developing Countries, Master's thesis, Institute of Comparative Law, McGill University, Montréal, 1983, pp. 70-71.

113. Here are some of the complaints referred to a panel:
a) Australian complaint against French export subsidies on wheat in 1959;
b) The EEC's complaint against U.S. tax legislation on Domestic International Sales Corporations in 1976;
c) Brazilian complaint against EEC refunds on exports of sugar, in 1981. Id.

country by its actions is nullifying benefits guaranteed by the General Agreement (such as would be the case with the use of subsidies), the right to make written representations to the offending member country. If such representations do not lead within a reasonable time to a compromise, the matter may be referred to the Contracting Parties themselves to be investigated. The Contracting Parties will render a decision as appropriate and if they consider that the circumstances of the subsidy-related offense are serious enough, they may authorize the injured party to suspend the application to the offending exporting country of such concessions as tariff reductions or other advantages previously granted under the Agreement. However, the retaliation is not to be greater than necessary to re-establish the balance of advantages.[114]

Article 19 of the GATT

A similar alternative remedy available to the importing country could be article 19. Under this provision

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114. For a good general description of dispute settlement under articles 22 and 23, see C. FULDA and W. SCHWARTZ, Regulation of International Trade and Investment: Cases and Materials, New York, The Foundation Press, 1970, pp. 260-266. See also supra, note 103, pp. 38-40.

a contracting party is authorized to suspend or withdraw its tariff concessions, or impose other restrictions, if as a result of subsidization, a product is being imported in such vast quantities as to cause or threaten **serious injury** to a domestic industry. Although such emergency action appears to be based on subjective considerations again because no precise definition of "serious injury" is offered, it has special relevance to countries which are genuinely faced with repetitive disruptive competition which endangers domestic businesses.

Before the self-help mechanism of article 19 can be utilised, a notice to the contracting parties must be given, after which bilateral consultations can take place and a showing of injury can be made by the importing country.

It is clear from the preceding comments that a country faced with subsidized imports that cause a prejudice to its domestic industries is not devoid of the means with which to defend itself. To put all of the above-mentioned remedies into perspective, the injured party has two basic choices beyond simple diplomatic pressure. It can go the consultation and conciliation route of articles 22, 23 and 19 and only impose retaliatory sanctions if necessary, or it can, as provided by article 6, subject the offending party to countervailing duties right away without having to discuss or justify its actions to anyone.

However useful these remedial measures may be on paper, the truth is that they are laced with weaknesses which may help explain why they had not been used very often prior to 1979. The most obvious weakness, and one that we referred to occasionally, is that such important notions as "equitable share of world trade" in article 16, "material injury" in article 6, "serious injury" in article 19 and "export subsidy", all key terms in the application of these provisions, are not precisely defined in the Agreement, leaving individual countries to fashion their own interpretations.[115] Moreover the method of calculating the amount of the subsidy is not specified, leaving the importing country in the dark on this vital point.

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115. The GATT's failure to precisely define export subsidies was partly corrected in 1960 when an illustrative list of measures considered to be subsidies was developed. Eight practices are mentioned:
a) currency retention schemes;
b) provision by governments of direct subsidies to exporters;
c) remission of direct taxes;
d) exemption of taxes other than charges in connection with importation;
e) the granting of raw materials below world prices;
f) the charging of premiums at rates inadequate to cover long-term operating costs and losses of the credit insurance institutions;
g) the granting of export credits at rates below those that the government itself has to pay; and
h) the government bearing all or part of the costs incurred by exporters in obtaining credit.
See Basic Instruments and Selected Documents, 9 (1961) pp. 186-187.

Another issue is that the GATT framers, faced with the omnipresence and inevitability of subsidies, did not entirely make up their minds on what to do with them and thus failed to send a clear message to all member countries. Instead of banning export subsidies entirely from the world trade environment, they allowed them to stand, subject to notification obligations imposed on the exporting country and the possibility of retaliatory action by the importing country.

As it stands now, export subsidies are permitted as long as they do not cause "material" or "serious" injury to a domestic industry of the importing contracting party. Only if a prejudice is occasioned can the offended nation defend itself. We are then talking about a test of intensity or generosity of the export support, and the despised "unfair subsidy" will exist or not depending on the extent to which the exporting nation is prepared to go in facilitating the foreign sale, as well as on the relative strength of the affected industry in the importing country. If the subsidy is so considerable as to leave domestic businesses of the importing party no chance to compete and thus lose sales and market share, then we are faced with prohibited subsidies. On the other hand, if the local industry is strong enough to withstand the competition, however generous the subsidy may be, no "material injury" will result and

hence, no subsidy-related problem. The very relativity of the test is indicative of the confusion that can arise when these matters are examined.

But perhaps the biggest problem of the GATT countervailing duty provisions was that the world's largest trading nation, the United States, was exempt from its key element, the "material injury" test. Because the Protocol of provisional application of the GATT allowed member countries to maintain restrictions required by domestic legislation that predated the signing of the Agreement, the U.S. countervailing duty law at the time did not require that injury be caused to a domestic industry before a compensatory duty could be imposed. All that was needed was a clear showing that a foreign subsidy was involved in the import of a foreign product.[116] The fact that such an important player on the international commercial scene and frequent user of countervailing duties did not respect the "material injury" requirement speaks volumes about the strength of article 6 of the Agreement.

Clearly something needed to be done and it is to deal with this situation and a few other issues that the

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116. See the Tariff Act of 1930, 46 Stat. 687, 19 U.S.C. A. S 1303, section 303.

GATT members convened the famous Tokyo Round in 1973.[117] In all, ninety-nine countries participated and by the time the negotiations were concluded in November 1979, important agreements on tariff reductions, trade in dairy products, bovine meat, civil aircraft, as well as government procurement and an improved legal framework for the conduct of world trade were reached. On the issue of non-tariff measures, participating nations adopted binding agreements, or codes, aimed at reducing and bringing under more effective international discipline such practices as technical barriers to trade, import licensing procedures, government procurement, customs valuation and anti-dumping measures. Perhaps more importantly for our purposes, a code was also adopted to deal with the issue of subsidies and countervailing duties with the clear objective of filling the gaps in the original GATT agreement, in effect picking up where the framers had left off. We shall now take a look at this important agreement.

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117. Declaration of Ministers approved at Tokyo, on 14 September 1973, reprinted in BISD, 20th Supplement, 1974, p. 19.

Sub-section 2. The Tokyo Round and the Code on Subsidies and Countervailing Duties

Seven rounds of trade negotiations have so far been conducted under the auspices of the GATT to combat the various trade distorting practices of member countries. Until recently, these multilateral gatherings focused entirely on the reciprocal lowering of tariffs pursuant to the famous "most favored nation treatment clause", a corner-stone of the General Agreement.[118] But beginning with the Kennedy Round of the mid-60's, negotiators recognized that as tariffs were gradually being eliminated, the more subtle "non-tariff barriers" began to take their place as significant obstacles to world trade.[119] The same concern was shared by the parties present at the Tokyo Round and one of the issues they had to cope with was the question

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118. See article 1 of the GATT. The most favoured nation treatment clause is a commitment that a country will extend to another the lowest tariff rates it applies to any third country. This principle has provided the foundation of the world trading system since the end of World War II.

119. M. MARKS and H. MALMGREN, "Negotiating Non-Tariff Distortions to Trade", (1975) 7 Law and Policy in International Business, pp. 327-328.

of subsidies and countervailing duties.[120]

Many countries representing all regions of the world participated and, as could be expected, different factions each had varying interests to promote.[121] What the large and powerful group of developing countries wanted most of all was United States acceptance of the "material injury" test and special rules allowing them more freedom to subsidize their exports. Their rationale was that since their economies and output capacities were still at an infant stage compared with those of their more developed competitors, they simply had no choice but to subsidize their exports and should not be bound by the same rules as the others. Consequently, they felt that because U.S. trade law did not require evidence of any form of injury, they were much too vulnerable to countervailing duty action on

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120. Participating countries also achieved agreement on the elimination of tariffs with regard to trade in complete aircraft and aircraft part, by adopting the Agreement on Trade in Civil Aircraft. See supra, note 103, pp. 187-8.

121. An excellent discussion of the various parties involved and their bargaining positions is provided in supra, note 112, pp. 89-100. See also R. GREY, "Some Notes on Subsidies and the International Rules", in Interface Three: Legal Treatment of Domestic Subsidies, Washington, International Law Institute, 1984, p. 61.

the part of the U.S.[122] Canada, Japan and the European Economic Community (EEC) also worked as an unofficial group in these negotiations. Although these countries have liberal economies based on the free market system, they all accept the need for government intervention in the export business. In view of their generally common policies toward export industries, their negotiating objectives were often identical. These included the development of a countervailing duty code which would be applicable to all parties and would commit the United States to complying with the "material injury" test.[123] They also pressed for further elaboration of consultation requirements and procedures for domestic subsidies, and opposed unilateral countervailing duty action in favor of the consultation-conciliation process.

For its part, the United States adopted a completely different approach. Relying on the conviction that subsidies have trade distorting effects, it advocated the prohibition of all subsidization which tends to promote

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122. See B. BALASSA and M. SHARPSTON, Export Subsidies by Developing Countries, London, Trade Policy Research Centre, 1977, pp. 19-20.

123. These countries have often encountered difficulties with respect to their exports to the United States and have had to deal with countervailing duties. See MARKS and MALMGREN, supra, note 119, p. 346.

exports, regardless of whether or not injury is caused to the domestic industry. If a nation were to contravene this ban, the U.S. was in favor of the unilateral right of an importing country to impose compensatory duties without the need for prior discussions.

The Tokyo Round negotiations took place in a decade characterized by worldwide economic disturbances and had to deal with very complex problems. It is perhaps for this very reason that participating nations were able to overcome apparently incompatible differences and agree on a comprehensive package of rules on the use of subsidies and countervailing duties. The new code,[124] signed in 1979, clarifies and better defines the issues touched upon by the original GATT agreement and is very important in the sense that now trading nations have a clearer idea of how far they can go in promoting their export trade without being faced with retaliatory action.

The Code essentially follows the same fundamental principle that underlies the original GATT provisions, as expressed in article 16 of the Agreement: that subsidies are used every day by governments to further important

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124. Code on Subsidies and Countervailing Duties, formally known as the Agreement on Interpretation and Application of Articles 6, 16 and 23 of the General Agreement on Tariffs and Trade as rectified by the Procesverbal of December 17, 1979, TIAS 9619; 31 UST 513, entered into force January 1, 1980.

national objectives but nevertheless have trade distorting effects and should only be used in accordance with the newly-created rules.[125] In setting forth guidelines on how governments may proceed, it seeks to reaffirm the three basic tenets of the relevant GATT provisions: the need for sharing of information on subsidies, the use of countervailing duties and the consultation method of settling disputes. We shall now take a look at how each of these obligations has been defined.

The Sharing of Information on Subsidies

Article 7 of the code stipulates that any signatory may make a written request for information on the nature and extent of any subsidy granted by another nation which would increase exports into its territory. When a government receives such a request it shall supply the required information as quickly as possible. If it should happen that a member country considers that any export facility of another signatory having the effect of a subsidy has not been notified in accordance with art. 16 of the Agreement, it could then bring the matter to the attention of the government concerned.

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125. See article 8, paragraphs 1 and 2 of the Code.

This is of course a modification of the notification requirement of article 16 of the GATT and represents a marked change in who may take the initiative. Under article 16(1) of the General Agreement, the subsidizing party had the obligation to notify the other nations, while in the case of article 7 of the code, it is the affected party that can take the first step. This improvement apparently stems from a conviction on the part of the drafters of the code that those who granted subsidies would not be keen on sharing the information of their own volition, and had to be given little choice.

The Imposition of Countervailing Duties

This is clearly the cornerstone of the Code. The provisions dealing with countervailing duties are elaborate and go into great detail to establish the procedure according to which these duties may be imposed. The rules set forth in articles 2, 3 and 4 are the result of a compromise between different factions with diverging views. The United States again stood alone in demanding that participating countries be granted the unilateral and unconditional right to slap countervailing duties in all cases where subsidies were involved. For their part, Canada, Japan and the European Economic Community nations proposed a more concili-

atory process whereby the parties to a dispute would first undertake bilateral consultations, followed, if unsuccessful, by multilateral consultations with all member countries, and that as a last resort only should the injured nation be allowed to levy compensatory duties.[126] The end-result indicates that the U.S. was not as persuasive as its partners and goes a long way towards bringing American trade practice into the mainstream of the world economy.

First and foremost, the debate over whether or not some proof of prejudice had to be offered before retaliatory action could be taken was finally settled. Article 1 of the Code states that countervailing duties may only be imposed in conformity with article 6 of the GATT. This in effect means that the "material injury" test provided for in the original Agreement, as well as the principle that duties cannot exceed the amount of the subsidy, are retained and must be observed by all signatories, without exception. As we recall, that was the extent of the GATT's involvement with countervailing duties under the 1948 Agreement. But the Code imposes a major new obligation on the importing country: the initiation of an investigation.

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126. Supra, note 110, p. 98.

1. The Investigation Procedure

According to article 2 of the new Code, compensatory duties may only be imposed after an investigation has been conducted to determine the existence, degree and effect of any alleged subsidy.[127] Such investigation shall normally be initiated at the request of the affected domestic industry and, except in special circumstances, should be concluded after one year.[128] Before any investigation may take place, however, there is a requirement that both the importing and exporting countries enter into consultations aimed at clarifying the situation and arriving at a mutually agreed solution. These consultations may also continue throughout the investigation period.[129]

Before the investigation can proceed, the responsible national authorities must be satisfied, based on information supplied by the affected industry, that there is sufficient evidence of the existence of a subsidy, of a

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127. Article 2, paragraph 1.

128. Article 2, paragraph 14.

129. Article 3. See also article 4, paragraph 5 which stipulates that countervailing duty proceedings will be suspended or terminated if an agreement is reached before their conclusion.

material injury and of a causal link between the two.[130] If the authorities of the importing nation are convinced that such evidence exists, the exporting country and all other interested parties shall be notified and a public notice shall be given.[131] In the interest of fairness, the affected parties are to be given all relevant and non-confidential information about the case at hand and may subsequently present their views in writing to the investigating authorities.[132]

Once all the arguments have been presented and all the parties have been heard, the authorities shall consider the evidence before them and try to verify if indeed material injury to a local industry can be attributed to a foreign subsidy. In so doing they may issue preliminary findings which, if affirmative, would allow them to impose provisional countervailing duties pending a final determination of the case. In any case, these provisional measures are not to last more than four months.[133] When a final decision has been made, countervailing duties can be imposed for as long as the subsidy inflicts damage to the domestic

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130. Article 2, paragraph 1.

131. Article 2, paragraph 3.

132. Article 2, paragraph 5.

133. Article 5, paragraphs 1 and 3.

industry.[134] Again, such duties cannot be levied in excess of the amount of the subsidy found to exist. Does the new code provide more details on the appropriate method of calculating the amount of the subsidy? Absolutely not. All it does is specify that such amount is to be assessed in terms of subsidization per unit of the exported product, a rather nebulous proposition.[135]

2. Determination of Injury

The Code does give more information on a key criterion in the assessment of whether or not to impose compensatory duties: the determination of injury. Article 6 specifies that material injury to a domestic industry will be evaluated according to three factors: the volume of subsidized imports, the effect of these imports on prices of similar products in the domestic market of the importing country, and the impact of these imports on domestic manufacturers of similar goods.

With regard to the first element, the investigating authorities shall consider whether there has been a significant increase in subsidized imports either in absolute

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134. Article 4, paragraphs 4 and 9.

135. Article 4, paragraph 2.

terms or relative to production or consumption in the importing country. As far as the second element is concerned, they shall consider whether these imports have resulted in a significant price undercutting as compared with the price of a like product in the importing country. Finally, the examination of the impact on the domestic industry concerned shall include an evaluation of all relevant economic factors having a bearing on the state of the industry. These include a decline in output, sales, market share, profits, productivity, reduced cash flow, inventories, employment and growth. In effect, an effort is made to compare the state of the domestic industry without foreign competition to the situation where competition is involved.[136]

To make this assessment easier, paragraph 5 of article 6 stipulates that "domestic industry" shall be interpreted as referring to the domestic producers of similar products in the importing country.

The provisions of articles one to six truly represent a major improvement over the situation prevailing under the original Agreement because now the process of determining whether a countervailing duty should be imposed is made so much easier. Under article 6 of the GATT, the

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136. Article 6, paragraphs 2 and 3.

authorities of the importing country were only told that they had to verify if foreign subsidies were responsible for material injury to the domestic industry. We are still a bit in the dark as to what constitutes an export subsidy, but now we know how to conduct the "material injury" test, what "domestic industry" refers to and that all these factors must be assessed in the context of an open and fair investigation. The countervailing duty self-help mechanism thus becomes at once more concrete and less discretionary. No longer can an importing country pretend to use it unilaterally without first discussing the issue and offering the affected parties a chance to state their case.

The Consultation and Conciliation Process

For a variety of reasons, ranging from diplomatic motives to the fear of retaliation, a given importing country may not feel comfortable in imposing countervailing duties on the subsidized exports of another and may look for another, less hostile, redress mechanism. In this respect the Code on subsidies follows the general idea of a discussion procedure between the parties to a dispute as set out in articles 19, 22 and 23 of the GATT agreement. The new rules however are much more elaborate than their predecessors, providing a step-by-step approach to dispute

settlement.

When a signatory country suspects the existence of a subsidy practice that is inconsistent with the rules of the Code or causes injury to a domestic industry, nullification of benefits under the GATT or a serious prejudice to its interests, it may according to article 12 request **consultations** with the subsidizing party.

If after a certain period[137] consultations have failed to lead to a mutually agreed resolution of the problem, either country can refer the matter to a newly-created Committee on Subsidies and Countervailing Measures, composed of representatives from all signatory nations,[138] for **conciliation.** Such a procedure provides an opportunity for the parties to a dispute to exchange information, argue their case and arrive at a satisfactory solution.[139]

Should the conciliation method result in failure, proper dispute settlement proceedings are undertaken. They are conducted before an **arbitration** panel composed of qualified representatives from three to five GATT signa-

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137. In the case of inconsistency with Code rules, that period is 30 days of injury. If nullification or serious prejudice is involved, it becomes 60 days. See article 13, paragraphs 1 and 2.

138. Article 16, paragraph 1.

139. Article 17.

tories. After reviewing the collected evidence, the panel offers the concerned countries one last chance to negotiate a settlement. If no such agreement can be reached, the panel will submit its decision in the form of a finding to the Committee which will consider it when making a recommendation to resolve the controversy. If the recommendation is not followed, the Committee may authorize appropriate countermeasures that could include the withdrawal of GATT concessions and the imposition of compensatory duties.[140]

As can be seen from the preceding comments, the fundamental nature of the GATT process, based on negotiation and compromise, does not seem to have changed. The new legal procedures under the Code are meant only to increase the credibility and effectiveness of the dispute settlement process and are not intended to replace the search for a diplomatic solution to trade problems.

What kind of assessment could we offer on the new rules of the Code on Subsidies? As in all situations, there are positives and negatives but all in all, this document is a major improvement over the original GATT rules and represents a good compromise between various factions with differing interests. On the plus side, we find that the

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140. Article 18. These compensatory duties would resemble in every way countervailing duties.

trading nations of the world generally have a better idea of what their rights and obligations are with respect to their export promotion activities. They know how far they can go in subsidizing exports without incurring retaliatory action in the form of countervailing duties or being engaged in a conciliation procedure and that is very important because it will determine, to a significant degree, the extent of their export promotion services. This positive result is achieved through a more elaborate description of such fundamental issues as dispute settlement and compensatory action, as well as more details on key notions like "equitable share of world trade" and "material injury".

Another positive development is that there are special rules for developing countries which, since their economies and export industries are not strong enough, badly needed a more favorable treatment and more freedom to subsidize.[141] Also for the first time the important issue of domestic, as opposed to export, subsidies is addressed, only to say that the signatories can do what they want as long as they do not have a prejudicial effect on the domes-

141. Article 14 of the Code.

tic industry of another country.[142] But perhaps the biggest success story of the Tokyo Round was that the United States finally agreed to include the "material injury" test in its countervailing duty law. This was done in the Trade Agreements Act of 1979,[143] but it may be noted that the injury requirement adopted by the U.S. Congress is softer than the one provided in either article 6 of the GATT or article 1 of the Code. Indeed the American law defines "material injury" as harm which is not inconsequential,

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142. Article 11 of the Code. Domestic subsidies refer to research and development grants, government practices and tax preferences. Many authors have wondered why a more lenient treatment was granted to domestic subsidies when they basically have the same effect, albeit indirectly, as the more obvious export subsidies: to reduce the effective cost of exporting for the manufacturer. See S.J. MARCUSS, "Understanding Direct and Indirect Subsidies: Are the Problems Negotiable or Incurable?", in Interface Three: Legal Treatment of Domestic Subsidies, supra, note 121, pp. 51-54. Indeed domestic subsidies have landed Canada in trouble with the U.S. in the past in the famous Michelin Tire case. Cash payments, tax credits and low interest rates were furnished by federal provincial and local governments to the Michelin Tire Corporation in order to stimulate the growth of economically depressed Nova Scotia. This triggered complaints from U.S. competitors and the U.S. Treasury determined that subsidies were indeed involved and countervailing duties were imposed. See R. GUIDO and M. MORRONE, "The Michelin Decision: A Possible New Direction for U.S. Countervailing Duty Law", (1974) 6 Law and Policy in International Business, pp. 237-266.

143. Trade Agreements Act of 1979, 19 U.S.C.A. S. 1677(7) A.

immaterial or unimportant", an interesting amalgam of double negatives to say the least.[144]

Finally, the applicability of the "material injury" test being limited to products imported from signatories of the Code, the old American rules requiring only evidence of a subsidy before countervailing duties could be imposed would still apply to non-signatories who are members of GATT.

On the minus side, however, one may deplore the Code's failure to provide a formula for calculating the amount of the subsidy involved, a necessary pre-condition to the imposition of countervailing duties. Another shortcoming is certainly the absence of precise definitions of such important notions as "nullification and impairment" in articles 8(3), 11(1), 13(4) and 14(7), "material" price

144. Restraints on America's power to impose countervailing duties are very important to Canada and the significant progress achieved during the Tokyo Round may be undermined by recent developments in the U.S. Congress. A mammoth Omnibus Trade Bill was recently passed by both the House of Representatives and the Senate to toughen American law against unfair trade. It seems that the Bill would broaden the definition of illegal subsidies and make it easier for foreign countries to be charged with unfair trading practices. See "Change in U.S. Trade Bill a Victory for Canada: Lawyer", The Gazette, April 17, 1988, p. B-4.

undercutting in article 10(2) and "export subsidy".[145] It is submitted that this lack of definition of an allowed subsidy is partly responsible for every trade dispute since 1948.

If the international community cannot agree on such a definition in the multilateral GATT context, perhaps it may be easier under different circumstances, when fewer parties are negotiating a sectoral arrangement dealing with only one area of state intervention. Indeed, various countries have been involved in negotiations over the past few years to try to clarify the "rules of the road" with regard to acceptable state subsidies for a particular class of products. For instance, U.S. companies have complained for years that the European Airbus airplanes are marketed

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145. However the Code does include a list of examples of export subsidies. The list contains twelve items and can be found in the Annex to the Code. It is similar to the 1960 illustrative list on which it is based, and adds a few new elements. A particularly interesting development is the inclusion in paragraph k) of export credits. It is specified that as long as a government grants export credit at interest rates identical or below those agreed in a multilateral export credit undertaking, such credit facilities will not be considered as subsidies. That is an obvious reference to the already mentioned CONSENSUS agreement and it means that if member nations comply with the agreed terms of credit, no subsidy will be involved.

unfairly in the United States.[146] Of course, European officials charge that major U.S. aerospace firms are also heavily subsidized through research and development grants and the formally "buy-American" procurement practices of the American government. Consequently, the parties agreed to see if they could settle on the type of subsidies that may be allowed. No result has been achieved as of yet.

Similar talks are also being held with regard to the international marketing of launch services. After complaints from domestic carriers,[147] the American government opened discussions with other European governments over the subsidies being granted to the European launching operator Arianespace.[148] Again, the parties have not yet been able to reach an agreement. However, in similar discussions with the Chinese government over the long March series of launchers, the American authorities

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146. See B. BARNARD, "US and EC Tackle Bilateral Disputes", The Journal of Commerce, November 16, 1988, p. 5-B. See also J. LENOROVITZ, "Europeans Criticize U.S. Subsidy Charges at Airbus A-320 Rollout", AW&ST, February 23, 1987, pp. 30-31.

147. See "Houston Power Company Invests in Space Services Inc.", AW&ST, February 23, 1987, p. 59.

148. See "Ambitious Marketing Goal Set for Ariane Despite Growing International Competition", AW&ST, September 5, 1988, p. 117.

were able to obtain quick approval of certain conditions to be followed by the Chinese in the international marketing of launch services.[149] Ostensibly, this was done to limit unfair competition from abroad for domestic American carriers. European governments, for their part, did not understand how the United States could proceed so vigorously in dealing with the Chinese, and drag its feet in the Ariane case.[150]

Similar discussions to search for a better understanding of subsidies which may be allowed under the GATT system were held during the negotiations over the Canada-U.S. Free Trade Agreement. These talks, as we know, produced significant results, which we shall now examine.

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149. See M. SERRILL, "The Rockets' Red Glare", Time, November 7, 1988, p. 54. See also, C. COVAULT, "China Agrees to Limit Marketing of Long March Booster in U.S.", AW&ST, January 2, 1989, p. 37.

150. See "ESA Faults U.S. Handling of Chinese Commercial Launch Talks", AW&ST, November 21, 1988, p. 23. Even the Soviet Union was unhappy with such negotiations since it did not understand why a fellow socialist State should get better treatment than the USSR itself was getting in the marketing of the Proton rockets which, due to export restrictions, could not fly U.S. payloads. See J. LENOROVITZ, "USSR Persists in Challenging American Position on Soviet-launched U.S. Payloads", AW&ST, October 24, 1988, p. 43.

Sub-section 3. Subsidies Under the Free Trade Agreement

The idea of a free trade deal between Canada and the United States is hardly new.[151] Even before Canada became a nation, the U.S. and Britain tried to promote the free flow of goods across the 49th parallel and the first such agreement was signed in 1854. Unfortunately, it did not survive the hostilities between the United States and Britain during the American Civil War and was abrogated by the U.S. in 1866. A similar fate awaited the comprehensive accord negotiated in 1911 by Canadian Prime Minister Laurier whose electoral defeat that same year prevented him from going ahead with the deal. Widespread protectionism followed and ever higher barriers to trade between the two countries were erected until 1935 when both nations signed a modest but historic most-favoured-nation agreement. Three years later it was enlarged and improved and eventually served as a model for the multilateral GATT agreement in 1947.

In later years, a few sectorial arrangements, such as the Auto Pact in 1965 and the Defence Production Sharing

151. Details on the historical background of the Free Trade deal can be found in DEPARTMENT OF EXTERNAL AFFAIRS, "The Canada-U.S. Free Trade Agreement: Synopsis", December 1987, pp. 3-4.

Arrangements from 1941 onwards, were negotiated. The idea of a single comprehensive free trade deal between the two nations did not die however and in March 1985 Prime Minister Mulroney and President Reagan agreed during the famous "Shamrock Summit" in Quebec City to find "mutually acceptable means to reduce and eliminate existing barriers to trade...".[152] The actual bargaining commenced six months later and culminated in the historic accord signed on October 4, 1987. It was ratified thereafter both in the United States and Canada and entered into force on January 1st, 1989. After a long and often acrimonious election fought in Canada over the issue.[153]

The Free Trade Agreement is of obvious economic importance, given that two-way trade between nations is worth about $160 billion annually.[154] The text of the Agreement is immense. It consists of over 1,100 pages, divided into eight parts with twenty-one chapters and many

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152. "PM, Reagan Would Halt Protectionism", Globe and Mail, March 19, 1985, pp. 1-2.

153. See "U.S. Takes Final Step as Reagan Puts Name on Free Trade Accord", The Globe and Mail, September 29, 1988, p. A-10. See also, M. JANNARD, "Feu vert au libre-échange", La Presse, December 31, 1988, p. A-1.

154. See J. LEWINGTON, "U.S. Senate Ratifies Free-Trade Deal with Canada", The Globe and Mail, September 20, 1988, p. A-1.

annexes and schedules. The heart of this treaty lies in the final removal of tariffs, fees, quotas and many other restrictions on the sale of goods and services across the border.

Since the United States is the most frequent user of countervailing duties and Canada, because of its proximity and widespread subsidy support, is often the victim,[155] one might be forgiven for assuming that the Free Trade deal represented a perfect opportunity for both countries to step out of the GATT shadow and agree to some common ground rules to govern their conduct in this respect. In fact one Canadian author, Professor Quinn of Osgoode Hall Law School, theorized while the negotiations were going on as to what should be done to lessen the chances of conflict

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155. Indeed between 1980 and mid-1987, Canada and the United States each launched forty-four investigations into trade issues involving the other country. Canada took defensive action twenty-six times, the U.S. nineteen. Among the U.S. actions was a countervail case against large Canadian lumber exports, so that the total value of Canadian exports affected by U.S. reprisals was $6.2 billion, compared with only $403 million for the other side. See "What the Referee Can Do", The Globe and Mail, November 8, 1988, p. A-7. See also J. KOHUT, "Free Trade Not Seen as Panacea Ending Trade Disputes", The Globe and Mail, November 28, 1988, p. B-4.

on this issue.[156]

He suggested that each nation should agree to give up some or all of its power to impose countervailing duties in return for clear, objective and enforceable constraints on the subsidy policies available to national, state and provincial governments. As we know, this did not happen. Because the subsidy practices of each country are so different,[157] and because there was so little time to deal with this complex problem, no common ground could be found on permissible subsidies and the United States refused to relinquish its ability to impose compensatory duties as a matter of national sovereignty. Thus on that point, the status quo prevails and the GATT rules on subsidies still apply. The parties did agree however to negotiate with a view to replacing their individual subsidy and countervailing duty laws over a five to seven year period with common

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156. See J.J. QUINN, "Canada-U.S. Free Trade and the Regulation of Unfair Trading Practices", Trade Law Topics, April 1986, pp. 2-4.

157. Canadian subsidies tend to take the form of direct grants to specific firms, while the U.S. government provides aid to domestic industries through more indirect means such as tax benefits and defense expenditures which generate new commercial technologies. Ibid., p. 3.

rules.[158]

Professor Quinn also said that a good strategy for reducing the protectionist impact of countervailing duty laws would be to shift their enforcement from national administrative bodies to some new intergovernmental body established by the Agreement. He proposed the creation of a standing tribunal to adjudicate on countervailing duty complaints originating from industry groups in either country. Again, history has not been kind on Professor Quinn's suggestion. While Canada ardently sought complete exemption from U.S. countervailing duty law and the creation of a tribunal with binding powers to settle disputes on the basis of mutually-agreed rules, it did not get its wish. No

158. Supra, note 151, p. 51. See also J. KOHUT, supra, note 155.

exemption was created and the bilateral panel[159] that was eventually established will not apply its own rules on subsidies and countervailing duties. Instead, each country remains free to apply its national laws to adjudicate on subsidy complaints by its local industries, and if one nation believes that the other did not apply its laws in a fair or legally correct manner, it can bring the matter to the attention of the bi-national panel which will review the situation and render a binding decision. So in effect the tribunal will be verifying if the authorities of each coun-

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159. Panels will be composed of five members, each country choosing two and both choosing the fifth. Lists of available and qualified candidates will be kept by both sides and rules of procedure designed to ensure a speedy and fair resolution of disputes have been formulated. Supra, note 151, pp. 52-53. It must be noted that while a bilateral panel was created to deal with purely legal disputes arising over dumping or subsidy practices, other dispute settlement mechanisms were established to resolve other issues. Indeed a Canada-U.S. Trade Commission, with equal representation from each side, will supervise the Agreement in action and if operational disputes arise, including debate over new measures that might affect the implementation of the Agreement, consultations will occur. If they fail, the matter will be sent to arbitration for a ruling. A similar process occurs if political conflicts are involved. If either country passes new trade laws covering dumping or subsidies, the other must be specifically included; otherwise, it is exempt. If it is to be included, such trade law must be consistent with the spirit of liberalization of trade between the two countries as embodied in the Agreement. See supra, note 155.

try properly applied the national laws on the subject.[160]

A lot of criticism has been levelled at the Free Trade Agreement from all sides for what it failed to accomplish, but few people pause to see what the accord did achieve. An issue often raised is that the dispute settlement mechanism is too weak to guarantee secure access to the U.S. market for Canadian goods in the sense that Canadian firms will still be subject to compensatory duties imposed on their exports to the United States. A quick look at other free trade deals or economic treaties elsewhere in the world suggests however that the Canada-U.S. procedure is not so bad after all. A study by the Ottawa law firm of Fraser and Beatty even maintains that it is the best in the world, better than the findings of GATT panels, and more advantageous than any similar mechanism in the European Free Trade Association, the U.S.-Israel Free Trade Agreement, the

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160. In Canada such task is performed by Revenue Canada and the Canadian International Trade Tribunal. In the United States, the International Trade Commission is involved. See J. KOHUT, supra, note 155, pp. B-1 and B-4.

Australia-New Zealand accord and many others.[161] Moreover the panel procedure is certainly an improvement over the status quo. Before the Free Trade deal, if Canada wanted to contest a U.S. decision to impose countervailing duties on imported Canadian products it had to press its case before the Court of International Trade, a tribunal with American judges, applying U.S. law.[162] The bi-national panel and other mechanisms provided for in the Free Trade deal require the active involvement of both countries in dispute settlement, thereby ensuring a fairer, more objective procedure.

Opponents also complain that the Panel's decisions will not really be binding because if the United States does not comply with a finding, all Canada can do is retaliate or pull out of the deal.[163] These critics are overlooking

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161. See D. STEGER, "An Analysis of the Dispute Settlement Provisions of the Canada-U.S. Free Trade Agreement", from the law firm of Fraser and Beatty, Ottawa, November 18, 1987; P. HADEKEL, "Dispute Settlement Mechanism Ranked Best in World", The Gazette, November 26, 1987, p. E-1. See also D. JENISH, "Winning the Trade Battle", Maclean's, September 19, 1988, p. 34.

162. See Current Legal Aspects of International Trade Law, F.J. MACRORY and P.O. SUCHMAN (eds.), Washington, American Bar Association, 1982, p. 83.

163. See M.J. BOWKER, On Guard for Thee: An Independent Review of the Free Trade Agreement, Hull, Voyageur Publishing, 1988, p. 71.

the fact that the Free Trade Agreement is a deal between two countries and cannot function for any length of time unless both partners cooperate. Short of going to war with the U.S., an unlikely alternative, there is little Canada can do to enforce the treaty's provisions except retaliate or simply abrogate the Agreement, which can be done on six months notice.

Various other concerns have been voiced in opposition to the Agreement's dispute settlement mechanism. For instance, Mr. Mel Clark, ex-deputy head of the Canadian negotiating team during the GATT Tokyo Round, asserts that the Free Trade Deal will take Canada and the U.S. out of the GATT dispute settlement system and that Canadian companies will be subject to rulings of a bilateral panel limited to applying American law correctly, whereas under the General Agreement, uniform rules were applicable to all parties.[164] On that point, we do not agree. First of all, the Agreement provides for the negotiation, over a period of time, of a set of uniform rules on dumping and subsidies which will eventually replace national laws on this issue. As well, we do not believe that the Free Trade Agreement creates an exception to the application of GATT

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164. See "We Lose GATT Defences Under Free Trade: Expert", The Gazette, November 12, 1988, p. C-2.

rules on dispute settlement. Indeed, while nothing in the treaty explicitly provides for such applicability, nothing excludes it as well. The point can then validly be made that as long as Canada and the United States remain parties to the GATT, they will continue to enjoy the rights and privileges as provided in the General Agreement.

It is true that the Agreement in general, and the dispute settlement mechanism in particular, could theoretically be improved. For instance both nations may someday succeed in their efforts to settle on some mutually-agreed ground rules to govern their export subsidy practices and then they may find it possible to restrain or eliminate their discretionary power to impose countervailing duties on each other's exports. Such is not the case at the present time and under the circumstances the author believes that Canada got the best deal it conceivably could have.

Conclusion

In the preceding pages we saw that the trading nations of the world had to walk a thin line and make hard choices. On one hand they recognized that subsidies had a disruptive effect on trade between them and were costing their national treasuries huge amounts of money. On the other they still felt compelled to use them domestically to

foster the growth of fledging industries and externally to promote exports in the face of ever increasing competition and similar practices by their competitors. As we now know, they finally decided to allow some forms of subsidies and tightly control their use. A distinction was made between primary and non-primary products, as well as between developed and developing countries, the latter being entitled to more freedom to subsidize. To provide for the situation where the local industry of one nation suffers injury as a result of the subsidy of another, two self-help mechanisms were created: the countervailing duty and the conciliation procedure.

It is important to realize that these notions are a part of everyday life for countries involved in international commerce and that government export promotion facilities have been fashioned to comply, and cope, with the rules of the GATT and the Code on Subsidies.[165] This was evident in the description of federal and provincial export facilities that constitutes the first part of this chapter. We saw for example that some programmes such as PEMD and the Export Development Corporation avoided giving outright

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165. For an example of how governments are always concerned about possible retaliation when they grant subsidies, see J. KOHUT, "Pipeline Plan Raising Fears of U.S. Countervailing Duties", The Globe and Mail, September 30, 1988, p. B-9.

grants and granted repayable loans instead. We also noted that important details of financing packages such as the interest rate and the duration of the loan were agreed to multilaterally to comply with GATT requirements on export credits. Finally, notice was made of the fact that user fees are assessed in order to pay for the cost of providing some of these services.

One last thought before we move on to the next chapter. Canada is a major trading nation whose economic well-being depends on international commerce. Accordingly Canadian businesses have come to rely on a variety of export promotion facilities designed to make their job easier. It is vital to realize however that no amount of government help can ever compensate for hard work, discipline, a good product and a strong marketing team, all fundamental strengths of a successful exporter. This being said, let us now examine the second component in the government intervention equation and one whose aim is the complete opposite of promotion efforts: export control.

CHAPTER TWO: GOVERNMENT RESTRICTIONS ON THE EXPORT OF AEROSPACE TECHNOLOGY

Introduction

Most countries in this modern age depend on the sale of goods and services abroad for their economic development and prosperity. In this context, the imposition by governments of restrictions on exports may seem oddly inappropriate, an anachronism that is out of place, and out of pace with the reality of today. But this simple proposition ignores the fact that the world today is still, despite recent improvements in the political climate, divided along the lines of the East-West struggle. The Iron Curtain, which is both the symbol and the result of the ideological and political chasm that followed the end of World War II, stands as a brutal frontier between two worlds: the West, led by the United States, and the East, dominated by the Soviet Union. Both were intended to evolve in parallel but hermetic fashion and the extent of contacts between them, be they political, economic, cultural or scientific, varies according to the temperature of the cold war.

At the heart of this dispute lies not only the fundamental struggle between two conflicting philosophies on the nature of man, the structure of society and the role of

government, but also the inevitable clash in the geopolitical interests of both superpowers. This confrontation gave rise to a military rivalry that persists to this day and has grown to alarming proportions. In this context, technology is power. It can be used to achieve military goals and what is loosely called "national security" has been the rationale behind the efforts of both camps to put up complex legal and administrative barriers to the transfer of sensitive technology to the adversary.

Technology can also serve as an economic tool and in today's global economy where no dominant market position is ever secure, it could only be expected that the same restrictions would be used to prevent foreign commercial competitors from gaining access to advanced designs that ought not to be shared. These export controls may also be used for foreign policy purposes such as participating in international trade embargoes or simply taking a stand on moral grounds against a particularly disreputable regime. Finally, such legislation may be useful to preserve and manage scarce natural resources vital to a nation's economic or security interests.

By virtue of the particular nature of this military and commercial competition and of its dependence on applied science, aerospace technology is often mentioned in these export control regulations because of the strategic and

military value of such items as satellites, rocket components, aircraft, missiles and the like. This has largely reduced the development of aerospace systems to an East-West framework and it is with a strong sense of naiveté that we read article 1 of the 1967 Outer Space Treaty which speaks of space as the "province of all mankind".[1] How can there be cooperation, we ask, when the necessary technology will not be shared?

Depending on the national priorities and the technological sophistication of local industries, various countries have proceeded in different ways in the drafting of their legislation restricting exports. Some like the United States have gone to extraordinary lengths to control exports to protect their national security while others have been more liberal, placing more emphasis on increased trading. This is ultimately a political question to be debated in the appropriate forum in each country, and the choice is a difficult one. In this chapter we will examine the decision made by Canada in this respect. We will take a look at the export control mechanism and at the policies involved. We will also deal with Canadian participation in

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1. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, 610 UNTS 205; 18 UST 2410. See the preamble.

the all-important COCOM organization, to close out the chapter with a discussion of a very sensitive and complex problem, the issue of the extraterritoriality of American export control laws on Canadian soil.

Section 1. The Canadian Export Control Mechanism

A wide variety of laws are involved in the federal government's effort to regulate exports out of Canada.[2] Some deal with taxation and quality controls, some establish the need for export declarations and export duties and others provide special rules for the export of specific goods.[3] However, the main instrument to control the movement of goods and services out of Canada is the Export

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2. By virtue of section 91 of the Constitution Act, 1867, the regulation of international commerce falls under the federal government's exclusive constitutional jurisdiction.

3. The various laws involved are: Cultural Property Export and Import Act, S.C. 1974-75-76, c.50; Customs Act, S.C. 1986, c.1; Atomic Energy Control Act, R.S.C. 1970, c.A-11; Excise Tax Act, R.S.C. 1970, c.E-13; Income Tax Act, S.C. 1970-71-72, c.63; Oil Export Tax Act, S.C. 1973-74, c.53; National Energy Board Act, R.S.C., 1970, c.N-6; Gold Export Act, R.S.C. 1970, c.G-5; Canadian Wheat Board Act, R.S.C. 1970, c.C-12; Game Export Act, R.S.C. 1970, c.G-1; Narcotics Control Act, R.S.C. 1970, c.N-1 and the Export Act, S.C. 1970, c.E-16.

and Import Permits Act.[4] Passed by Parliament in 1954 in its present form, it was scheduled for repeal eight times before it became permanent in 1974. It was originally intended as a temporary measure giving the government broad discretionary powers to control the export of arms, ammunition and metals susceptible to be used for war purposes. Numerous amendments followed and its scope has been enlarged so that today both the import and export of a wide selection of goods are regulated.[5]

Basically the Act empowers the government to control the export of Canadian goods, depending on the nature of the products, their destination and, in some cases, their utilization within the country of destination. For this purpose the Act sets up an elaborate export control mechanism, based on the regulations pursuant to section 12, that rests on three pillars: an Export Control List, an Area Control List and a government bureaucracy to enforce

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4. Export and Import Permits Act, R.S.C. 1970, c.E-17.

5. For the history of the Export and Import Permits Act, see F. BLASER, "The Export and Import Permits Act: A Review", Trade Law Topics, December 1985, p. 9; and Y. BERNIER, "La vente à l'exportation: les obstacles internes et externes", in New Developments in the Law of Export Sales, Meredith Memorial Lectures, McGill University, Richard de Boo Publishers, 1982, pp. 18-19. See also D.H. BUNKER, The Law of Aerospace Finance in Canada, Montreal, Institute and Centre for Air and Space Law, McGill University, 1988, p. 332.

them. The idea behind this mechanism is quite simple: export permits will be required for all exported goods that appear on the Export Control List and for all exports going to countries on the Area Control List. If neither list is involved in a foreign sale, the transaction can go through without government intervention. Because aerospace technology is by nature so sophisticated and militarily sensitive, most Canadian aerospace firms are quite familiar with the various components of the export control process, which we will now examine.

Sub-section 1. The Export Control List

The Export and Import Permits Act authorizes the Cabinet to establish an Export Control List (ECL) to govern the export from Canada of any article which the government believes should be controlled for a number of purposes, namely: a) to ensure that arms and military or strategic goods will not be supplied to any destination if such sale could endanger Canadian security; b) to ensure the processing in Canada of our natural resources; c) to limit the export of materials when world markets are depressed; d) to implement an intergovernmental agreement to restrict the export of certain goods; and e) to guarantee an adequate

supply in Canada of the goods in question.[6]

Items on the List change from time to time following governmental review and are divided into ten groups, each dealing with a different category of goods.[7] These include animals, agricultural and wood products, industrial machinery and electronic devices, transportation equipment, metals and minerals, chemical and petroleum products, arms, munitions and aviation stores, and atomic energy materials. The ECL is of obvious interest to the aerospace community as groups 4 and 7 deal specifically with military products and aerospace transport systems, and others contain various elements related directly or indirectly to the industry.

For each ECL group there is a mention of the destinations to which these particular goods are controlled. In general export permits will be required in these cases: a) All destinations, including the United States; b) all destinations excluding the United States; and c) for specified countries. Since most items of concern to the aero-

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6. Section 3 of the Act. In this respect Canadian legislation does not go as far as U.S. export controls which cover intangible data, even in the form of knowledge, of individuals, and restricts what may be said at international meetings and conferences.

7. Export Control List, C.R.C., c.601 as amended. The government is due to issue a revised ECL shortly. See Aerospace Industries Association of Canada, Annual Report 1988, p. 13.

space industry fall within groups 3, 4 and 7 for which permits are required for all destinations except the U.S. and since most of the industry's exports go south of the border, it follows that a significant number of firms, especially those involved in the manufacture of aircraft and military systems, do not have regular recourse to the export control process.[8]

Because the Export Control List is very detailed and lengthy, companies usually have little difficulty identifying the goods that require export permits. Problems may arise however because of another provision which specifies that "technical data in material form" relating to groups three to nine will be regulated as well. This means that for these categories not only the actual goods themselves but the very information pertaining to them will be controlled. The Act does not provide a clear definition of "technical data" but it is specified under heading 10003

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8. It should be noted however that if the Canadian exporter is aware at the time of application that the United States is not the country of final destination, i.e. that the goods will be re-exported elsewhere, it is required to obtain the proper export permits prior to shipping from Canada. Moreover in the case of shipments of military equipment to the United States to be re-exported later, the Canadian exporter, through a U.S. agent, must also obtain a document termed Intransit License from the American government. See DEPARTMENT OF EXTERNAL AFFAIRS, Notice to Exporters No. 21, July 18, 1984, p. 12.

that it shall include, without being limited to, technical drawings, photographic negatives and prints, recordings, design data, technical and operating manuals and computer software, with an exception being created for data readily available to the public in the form of published books and periodicals. Although there has been no definitive ruling on this point, it appears that this provision does not cover the export of technical data in non-tangible forms such as electronic media or communication devices, or even simple thought.[9]

On top of regulating goods that belong in specific groups because of their characteristic nature, the ECL also controls products that fall within a very broad category: those of U.S. origin.[10] This means that any item that crosses the American border into Canada cannot be re-exported without an export permit, whether or not the item appears elsewhere on the ECL. That is a natural result of the close cooperation, especially in defence matters under the Defence Production and Development Sharing Arrangements, that occurs between the two countries. To implement these

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9. See J.-G. CASTEL, A.L.C. de MESTRAL and W.C. GRAHAM, International Business Transactions and Economic Relations: Cases, Notes and Materials on the Law as it Applies to Canada, Toronto, Emond Montgomery Publications Limited, 1986, p. 158.

10. Group 9, item 9001 of the Export Control List.

arrangements, it was necessary to provide for considerable freedom of movement for high technology products across the Canada-United States border. Often no U.S. permit is required for the initial export out of the U.S. if the goods are to stay in Canada. To ensure that Canada did not become a conduit for the re-export of American military goods to undesirable destinations, the Canadian government decided to extend the reach of its export control regulations to cover items of American origin.[11]

Canadian practice in this respect is to consult American officials to determine if U.S. origin goods may be re-exported from Canada. This raises an interesting problem since a difference of opinion can conceivably arise from time to time concerning American goods that have been incorporated into another product in Canada, an airplane for example. In such a case the Canadian decision is, of course, binding within Canada. The possibility of double jeopardy therefore exists since the government of Canada is solely empowered to decide on the right to export out of its territory, but U.S. laws may also apply to the transaction. So in the case of a policy disagreement, the Canadian exporter might find itself in violation of American laws

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11. J.E.A. KINGSTON, "Treaties and Laws Affecting International Transfers of Technology", in Technology Transfer Agreements, Insight, April 1986, p. 8.

even though it is complying with Canadian requirements.[12] This is but one facet of the very complex problem of the extraterritoriality of American export control legislation which will be addressed further along in this chapter. It is now time to consider the second tier of the export control machinery.

Sub-section 2. The Area Control List

Under section 4 of the Export and Import Permits Act, cabinet is authorized to establish an Area Control List (ACL) for the purpose of controlling the sale of goods and services to specified nations by requiring an export permit. This is done regardless of the nature of the product and whether or not it appears on the Export Control List, the rationale being that these countries present a grave threat to Canada's security and all commerce with them must be closely scrutinized.

The List is prepared by the Department of External Affairs and is revised periodically. As it stands today, it includes the Soviet Union, a number of its eastern bloc satellites such as Albania, Bulgaria, Czechoslovakia, Hungary, Poland and Romania, as well as the Democratic

12. Supra, note 9.

People's Republic of Korea, the German Democratic Republic, Lybia, Mongolia and the Socialist Republic of Vietnam. The People's Republic of China was removed from the List in 1981.[13]

During a substantial review of Canadian export control policy in September 1986, the proper role of the ACL was evaluated. At that time the government reiterated its commitment to encourage trade in peaceful goods with all countries, even enmical ones, and it was decided to place specific emphasis on the control of military and strategic goods. Therefore existing restrictions on trade in peaceful, i.e. non-sensitive, goods to the Soviet Union and its allies will be lifted. This will be done by removing these countries from the Area Control List, thereby eliminating the requirement for export permits for civilian non-threatening products which would have been granted anyway under the old procedure. However, controls on military and strategic equipment and technology to these destinations will continue under the Export Control List for national security purposes.[14]

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13. Area Control List, SOR/81-543.

14. DEPARTMENT OF EXTERNAL AFFAIRS, Communiqué on the Export Controls Policy No. 155, September 10, 1986, p. 3. This policy decision has not been implemented fully at this time. For the time being, the ACL remains in use.

Sub-section 3. The Application Procedure

Since the Department of External Affairs was reorganised in January 1982, the Secretary of State for External Affairs is the Minister responsible for the implementation of the Export and Import Permits Act.[15] This power is exercised by the Export Controls Division of the Department, which also advises Canadian exporters on the requirements to be fulfilled. In all, about 20,000 applications are reviewed every year by a staff of six people who have the double duty of advising the exporting community and rendering decisions on applications after extensive research on the merits. The enforcement of these decisions occurs at the port of exit from Canada where a copy of the export permit must be left with the collector of customs.[16]

To obtain an export permit, the prospective exporter must submit an application form supported by the relevant information on the nature of the concerned product, the appropriate ECL number, the country of destination, the address of the consignee, the name of the applicant, the

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15. Canadian Exporters' Handbook 1987-88, K.M. KEOUGH (ed.), Renfrew, Samara Publications, 1987, p. 48; see also section 7 of the Act.

16. Sections 24 and 25 of the Act.

quantity, weight and value of the goods, the port of exit in Canada and finally the percentage of the total value of the transaction consisting of goods of U.S. origin within the meaning of item 9001 of the ECL. Only Canadian citizens may apply and after careful review the Department may grant the request, deny it or subject it to limitations on the quantity and quality of the goods to be exported. Depending on the nature of the products involved, the Department may issue several types of permits, including permits that are valid for multiple shipments, countries and consignees. This is done to save the exporter and the government from the repetitive costs and work associated with handling many similar applications.[17]

The time required to obtain an export permit can vary considerably. For instance if goods listed on the Export Control List are to be sold to a destination other than ACL countries or China, the complete process will normally last at least six weeks. However, in the case of any goods identified on the ECL and destined for an Area Control List country or China, a minimum of eight weeks is required for review if the products are not of a highly sensitive nature. Otherwise, a period of three additional

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17. Supra, note 8, pp. 8-17. All the relevant information on the application requirements is found in the Regulations Respecting Export Permits, SOR/54-200.

months will be necessary. Most permits are valid for twelve months from the date of issuance and may be renewed.[18]

To make the exporter's job easier, the Department also provides an "approval in principle" service whereby a company will request preliminary approval of an export permit even before the product has been developed. This is very useful because the company has a vested interest in knowing if its product will be fit for export before it commits large amounts of money for its design and production. This is done by supplying the Department with all the relevant information on the product itself and its destination. There is no time limit attached to the decision, but, if affirmative, it is subject to conditions as may be determined by the Department.

The Department will also issue what is called "general permits" for the benefit of all exporters. They act as exceptions to the regular export control process by in effect providing that, for specific types of goods going to certain enumerated destinations, no export permit will be needed if certain conditions are met, whereas one would be required under the normal procedure. These general permits, which are found in the regulations pursuant to the Act, cover a wide range of products such as sugar, softwood

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18. Supra, note 8, pp. 18-19.

lumber, scrap iron, and many others.[19]

Finally, any person convicted of violating the Act or the regulations at any stage of the export process is liable to a fine of up to $5,000 or up to twelve months imprisonment or both in the case of a summary conviction offense, and to a fine of up to $25,000 or up to 5 years imprisonment or both in the case of any indictable offense.[20] Directors and officers of corporations who knew an offending act or omission was occurring or failed to use due diligence to prevent it, can likewise be convicted.[21] The same penalties can also be imposed on any Canadian citizen who obtains a permit on behalf of a non-resident who commits an offense, regardless of whether the latter has been convicted or not, where the permit applicant knew of the offense or failed to use due diligence to prevent it.[22]

It must be noted that in order to be covered by the Act and possibly entail penalties, a transaction must effectively be considered an **export** sale. Indeed, in

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19. Section 6 of the Regulations Respecting Export Permits.

20. Section 19 of the Act.

21. Section 20 of the Act.

22. Section 21 of the Act.

Regina v. Maunder,[23] the court decided that the delivery of certain goods to the embassy of the Soviet Union in Ottawa, for obvious shipment to the USSR at a later date, was not an export per se, and rejected the argument that physical delivery to the embassy was in fact delivery to the territory of the Soviet Union. It follows that only the actual shipment out of the territory of the country will be deemed an export.

Sub-section 4. Judicial Review of DEA Decisions

Our purpose here is to find out if, and under what conditions, an exporter not satisfied with a decision by the export controls division of the Department of External Affairs can seek and obtain a revision of such decision. Let us say for example that the exporter is denied an export permit, or that after having been granted the permit, the latter is then cancelled. Is such determination final or are there means available to the manufacturer so that the case may be re-examined and the permit issued?

It is apparent from a simple reading of the Export and Import Permits Act that Parliament did not intend to provide exporters with a right of appeal to a higher

23. Regina v. Maunder, [1966] 1 C.C.C. 328, at 363-365.

instance for a decision made by civil servants at the Department. Indeed no provision providing for such review has been included. This does not automatically mean, however, that the exporter is left without recourse, since the Department of External Affairs, representing the Crown in such matters, is subject, like all governmental bodies, to the principle of the rule of law and of judicial supervision.[24] This fundamental precept, on which our society is based, is enshrined in the common law[25] as well as in certain provincial legislations.[26] Historically, judicial oversight of all government and administrative bodies has been exercised by the so-called superior courts in each

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24. According to Professor H.W.R. Wade:
> "Every act of governmental power, i.e. every act which affects the legal rights, duties or liberties of any person, must be shown to have a strictly legal pedigree. The affected person may always resort to the courts of law, and if the legal pedigree is not found to be perfectly in order the court will invalidate the act, which then cannot affect them. That is the principle of legality."

See H.W.R. Wade, Administrative Law, 4th ed., Oxford, Clarendon Press, 1977, p. 23.

25. See for instance Three Rivers Boatman Ltd. v. Canadian Council on Labour Relations, [1969] S.C.R. 607; and Seminary of Chicoutimi v. City of Chicoutimi, [1973] S.C.R. 681.

26. See for instance section 33 of the Quebec Code of Civil Procedure.

province as part of their inherent jurisdiction.[27] In Québec, this role is fulfilled by the Superior Court, under article 33 of the Code of Civil Procedure.

In order to ensure that judicial review of federal acts was exercised in a uniform fashion across the country, and mindful of the fact that courts in one province could make rulings inconsistent with decisions in another, the government introduced the Federal Court Act[28] which was adopted by Parliament and came into force in 1971. This Act entrusts to one Federal Court the task of reviewing all decisions of the federal government, thereby creating an exception to the general jurisdiction of provincial courts in these matters.[29] It is thus to the Federal Court Act that we must look to determine if decisions made by the Department of External Affairs with regard to export permits can be reviewed judicially.

The operative provisions of the Act are sections 18 and 28, which allow the trial and appeals divisions of the

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27. See Vachon v. Attorney General of Quebec, 1 S.C.R. 555, at p. 562. Also Three Rivers Boatman Ltd. v. Canadian Council on Labour Relations, supra, note 24.

28. The Federal Court Act, R.S.C. 1970, c.10 (2nd Supp.).

29. If the relevant provisions of the Act should be repealed, the task of judicial review would again fall on provincial courts.

court to hear cases involving the review of government decisions or acts. Both sections specify that they only apply if a "federal board, commission or other tribunal" is concerned. This expression is further defined in section 2 which provides:

> "2. "Federal board, commission or other tribunal" means any body or any person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of the Parliament of Canada, other than any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the British North America Act, 1867".

It is manifest from reading this provision that decisions made by a minister are reviewable in principle under sections 18 and 28, since a Minister, as a representative of the government, is clearly included in this definition.[30] The question which remains to be considered is whether the decisions made by the Minister, i.e. the Secretary of State for External Affairs, under the Export and Import Permits Act may be reviewed, since other conditions pursuant to sections 18 and 28 may apply.

Let us start with section 28. This provision is peculiar in that it gives the appeals division of the

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30. The applicability of sections 18 and 28 of the Act to decisions made by a minister has been confirmed in Lazarov v. The Secretary of State, [1973] 2 F.C. 927.

Federal Court jurisdiction to hear in the first instance cases involving the review of certain governmental decisions. Section 28 reads in part:

> "28. (1) Notwithstanding section 18 or the provisions of any other Act, the Court of Appeal has jurisdiction to hear and determine an application to review and set aside a decision or order, other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis, made by or in the course of proceedings before a federal board, commission or other tribunal...."

The text goes on to enumerate the various motives justifying review, including disregard for rules of natural justice, abuse of power, error of law or of fact. It is thus apparent that only decisions of a judicial or quasi-judicial nature will be reviewable under section 28 of the Act. Is this the case for a ruling by the Minister under the Export and Import Permits Act? Section 7 of the Act provides that the Minister may issue to any resident of Canada a permit to export certain goods to certain destinations. Does the Act attach specific conditions on procedural matters so that the granting or refusal of a permit may be deemed to have a judicial or quasi-judicial character? Many authors have experienced considerable difficulty in categorizing the various decisions made by governmental departments, persons and agencies, but in the case of the rulings by the Secretary of State for External Affairs, the

answer is quite straightforward. This is apparent when we consider the text of the Export and Import Permits Act itself and the way the Minister is directed to make his decisions.

Indeed, it is significant to note that the Secretary of State, in deciding whether or not to grant a permit, enjoys considerable freedom of action. Nowhere in the Act is it provided that the decisions shall be published, motivated, preceded by representations by the exporter or based on certain specified criteria. As we have already noted, the department's civil servants will base their decision on policy directives issued by the Secretary of State for External Affairs. Moreover, under section 10(1) of the Act, the Secretary of State may amend, suspend or cancel any permit, certificate or other authorization issued or granted. In virtue of section 10(3) of the Act, there are some restrictions on the Secretary of State amending, suspending or cancelling an import permit, but there are no such restrictions where export permits are concerned. All this means that the Minister has complete and unfettered discretion to grant, deny, amend, suspend or cancel export permits under the Export and Import Permits Act.[31]

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31. See D.H. Bunker, supra, note 5, p. 337. See also Maple Lodge Farms Limited v. Government of Canada, [1982] 2 S.C.R. 2.

Under these conditions, is it possible to hold that decisions made by the Secretary of State under the Export and Import Permits Act possess a judicial or quasi-judicial character so that they may be reviewable under section 28 of the Federal Court Act? Many authors have had considerable difficulty in defining the judicial and quasi-judicial exercise of authority, and distinguishing it from so-called "administrative" decisions.[32] Despite these difficulties, however, a certain number of criteria have been retained by the courts to describe judicial or quasi-judicial acts of authority. They include the nature of the deciding body, the definitive character of the decision, the fact that the decision is based on statutory norms or rules, the fact that individual rights will be affected, the rules of procedure followed and the underlying public policy aspects. Generally speaking, the more the decision and the process behind it resemble those of a tribunal, the greater their chances of being described as judicial or quasi-

32. Indeed a particular decision is often classified as judicial or quasi-judicial because it cannot be considered administrative, and vice-versa. See G. Pépin and Y. Ouellette, Principes de contentieux administratif, 2nd ed., Cowansville, Les Éditions Yvon Blais inc., 1982, p. 143. See also R. Dussault, Traité de droit administratif canadien et québecois, Québec, Les Presses de l'Université Laval, 1974, p. 1221.

judicial.[33] Inversely, administrative decisions are usually characterized as those where the deciding body enjoys considerable discretion and freedom of action in determining not only the decision-making process but also its eventual outcome.[34]

If we apply these guidelines to the decisions made by the Secretary of State pursuant to the Export and Import Permits Act, we come to the conclusion that the granting or denial of export permits can only be classified as an administrative, rather than judicial or quasi-judicial, decision.[35] It thus follows that section 28 of the Federal Court Act may not be used to obtain judicial review of the Secretary of State's decisions.

Can the same be said of section 18 of the Act which, as noted above, may also be used to contest acts of government bodies or agencies before the trial decision of

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33. See G. Pépin and Y. Ouellette, supra, note 32, pp. 152-176.

34. Ibid., p. 177.

35. Indeed courts have often held that the granting or renewal of permits by bodies which enjoyed wide discretion to decide could only be considered as administrative acts. See Paquin c. Cité de Montréal, [1968] B.R. 34; Voghel c. Procureur Général du Québec, [1975] C.S. 253; Ecole Commerciale Bluteau Inc. c. L'Hon. J.Y. Morin, [1978] C.A. 186 and R. v. Gaming Board for Great Britain, ex parte Benaim, [1970] 2 W.L.R. 1009.

the Federal Court? Section 18 reads as follows:

> "18. The Trial Division has exclusive original jurisdiction
> (a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and
> (b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal."

Since it is apparent that section 18 does not impose any restrictive condition on the type of decision to be judicially reviewed, it follows that, a priori, a decision by the Secretary of State for External Affairs under the Export and Import Permits Act can be contested before the trial decision of the Federal Court. For that to happen, however, one or many of the procedures enumerated in section 18 must be applicable. All of them are used to seek remedy when the government has acted ultra vires, i.e. outside of the limits allowed by law, but each has its own purpose and particular requirements. It has generally been considered that, in cases such as when an exporter is dissatisfied with a decision by the Secretary of State under the Export and Import Permits Act and has reason to believe that a serious breach of legality was involved, the only

remedy available may be that of the declaratory action.[36] Often in such cases, it will be argued that the government was guilty of abuse of power, i.e. that it acted for purposes or according to principles or considerations other than those provided in the relevant statute.[37]

One of the most spectacular cases involving administrative abuse of power must surely be that of Roncarelli v. Duplessis.[38] In this action for damages against the Prime Minister of Quebec, Mr. Duplessis, Judge Rand of the Supreme Court of Canada dealt with the question of the limits to governmental discretion. In his words,

> "In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator... "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective in which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption".[39]

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36. See G. Pépin and Y. Ouellette, supra, note 32, p. 180.

37. On the abuse of power, see for example Padfield v. Minister of Agriculture, Fisheries and Food, [1968] A.C. 997 and City of Prince George v. Payne, [1978] 1 S.C.R. 458.

38. Roncarelli v. Duplessis, [1959] S.C.R. 121.

39. Ibid., p. 140.

The end result is thus that if an exporter is dissatisfied because the Department of External Affairs has denied its permit application, refused to renew it or cancelled it outright, due to possible disregard for the letter or spirit of the Export and Import Permits Act, such exporter may then seek relief before the Federal Court, trial division, pursuant to section 18 of the Federal Court Act. It is suggested, however, that due to the very wide discretion available to the Department's civil servants, and to the cloak of anonymity and secrecy under which they operate, it may be very difficult if not impossible in most cases to prove any wrong doing which could be described as an abuse of power. Unless such conclusive evidence can be produced, the consequence is that for all practical purposes, decisions made by the Department regarding export permits are not open to challenge.

The practical effect of this conclusion on exporters is minimal, however, since in the vast majority, if not the totality, of cases they will be dissatisfied with the government's decision for policy rather than legal motives. Indeed in the answers provided to our survey, which will be analysed in chapter three, aerospace exporters often complained about having to comply with specific regulations, never mentioning the possibility of any wrong doing on the part of the Department. Should they wish to contest the

government's decision based purely on policy arguments, they would find, as we have shown, that this would be impossible under either section 18 or section 28 of the Federal Court Act. Moreover, even when courts have had the opportunity of reviewing government decisions for reasons allowed by law, they have been quite reluctant to deal with policy issues, preferring to leave such matters to the supervision of more appropriate authorities such as elected officials.[40] A further obstacle can be found in the presumption of validity of governmental acts.[41]

So far we have described the procedure and requirements for obtaining export permits. We saw that if a transaction involves goods on the Export Control List or whose final destination is an Area Control List, the Canadian manufacturer must apply for an export permit and we also explained in which circumstances the government's decision may be reviewed. But how does the exporter know in advance if its application will be granted or denied? This is a very important question and the answer very much depends on

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40. See Commission des relations de travail du Québec v. Association unie des compagnons et apprentis de l'industrie de la plomberie et tuyauterie des États-Unis et du Canada, [1969] S.C.R. 466, at p. 470.

41. See City of Vancouver v. Simpson, [1977] 1 S.C.R. 71 and Landry c. Chabot, [1963] C.S. 227.

the policy choices of the government of the day. That is the issue we shall now examine.

Sub-section 5. The Government's Export Control Policy

Canadian exporters certainly have a considerable interest in knowing with at least a reasonable degree of certainty whether or not the export permit request will be allowed. Often these companies have invested large sums of money for the research and development of new products designed in foreign markets and their capacity to honor prior contractual commitments is at stake. For many firms, especially in the aerospace industry, exporting is a sine qua non ingredient of commercial success and it is vital that they have a good idea of the outcome of the permit application process.

In truth, it is not in most cases easy to divine the ultimate decision of the Department, for three basic reasons: a) the process is totally discretionary and the government officers do not have to publish or motivate their decisions; b) the export control machinery is shrouded in secrecy and it is very difficult, if not impossible, to get detailed information on the exact guidelines being followed; and c) the decision procedure rests on an inherently political process whereby the basic rules are determined by the

office of the Secretary of State for External Affairs and the Cabinet and these policy choices are subject to change.

Because of the particular nature of the goods involved or their ultimate destination, it may be possible in certain cases to foresee the outcome of a permit request. For example, the sale of wood products to France would almost certainly be allowed, but the export of contemporary nuclear technology to the Soviet Union would not, for obvious reasons. But between these two extremes lies a vast grey area where administrative discretion reigns supreme.

As we suggested earlier, the federal government may choose to restrict exports for various reasons including national security, the preservation and processing of natural resources, the management of world markets and the implementation of international agreements. Because such information is strictly confidential and cannot legally be obtained, we cannot provide the reader with actual examples of export permits that were denied in the past for each of these motives. We may however imagine certain situations where this might occur. For instance, if there were a shortage of a rare metal such as uranium in Canada, it is conceivable that a company that wished to export this

commodity would see its application denied.[42] As well, if gold prices were severely depressed all over we find it possible that the government would choose to turn down permit applications until world markets stabilized. These are just hypothetical examples of what might happen and several others may be imagined.

As far as involvement in international export control efforts is concerned, we know of two instances when Canada participated in trade embargoes during the past few years. The first in February 1967 was through the adoption of the United Nations Rhodesia Regulations following the unilateral declaration of independence of that country and which, until their repeal in 1980, prohibited virtually all commercial transactions between Canada and Rhodesia, now Zimbabwe.[43] The second concerned the Iranian Economic Sanctions Act[44] which authorized the restriction of

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42. In the Free Trade Agreement, at article 907, there is a pledge that Canada will not use its export control mechanism to cut off access to energy resources in times of short supply to existing American customers.

43. The United Nations Rhodesia Regulations, C.S.C. 1978, c.1577 were adopted under the authority of the United Nations Act, R.S.C. 1970, c.U-3 as am. R.S.C. 1976-77, c.28, s.49F.

44. The Iranian Economic Sanctions Act, S.C. 1980-81, c.39. This Act is no longer in force.

economic relations between Iran and Canada following the hostage taking at the U.S. Embassy in 1980.

Things become a bit more difficult when we consider the question of the export of arms and other high-technology items, where government intentions have not always been so clear. It is only natural that these items be denied to certain categories of countries and to deal with this issue, government policy operates a distinction between military and strategic goods. While there is no agreed definition of military equipment, it is understood to refer to the goods appearing in group 7 of the Export Control List.[45] In addition to arms and munitions, the List includes equipment designed specifically for military purposes such as military vehicles, telemetry devices and certain types of electronic materiel. Strategic goods, on the other hand, are civilian high technology products recognized by western nations as representing a potential danger to their security if they were to fall in the hands of possible adversaries, because they have the capacity to strengthen the adversary's industrial base.[46]

There have been quite a few policy changes in this

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45. Supra, note 14, p. 3.

46. Canada, Debates, House of Commons, April 14, 1987, p. 5164.

area over the years, the last occurring during the often mentioned policy reviews which took place in 1985 and 1986. To illustrate the results of this review which dealt specifically with military and strategic goods, it may be useful to compare the old guidelines with the new ones.

Before March 1985, Canadian policy dictated that exports of both military and strategic technology would be "closely controlled" - meaning that in most cases the permit would be refused - to the following destinations: a) to nations which represented a threat to Canada's security such as the Warsaw Pact countries; b) to countries under United Nations Security Council sanctions such as South Africa;[47] c) to countries involved in or under imminent threat of hostilities such as Iran and Iraq; and d) to regimes considered to be wholly repugnant to Canadian values and especially where such equipment could be used against civilians.[48]

In March of 1985 these guidelines were amended and the human rights restrictions were dropped. The stated reason was that a number of nations had in the past been identified as having records of serious human rights

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47. Canada's decision to limit export of military and strategic technology to South Africa was made pursuant to UN Security Council Resolution 418 (1977).

48. Supra, note 46, p. 5162.

violations, but none could be categorized as "wholly repugnant to Canadian values". Therefore the denial of export permits was on an ad hoc basis and this criterion appeared useless.[49]

Shortly thereafter, however, evidence surfaced that Canada had been allowing the export of military equipment such as tank and aircraft spare parts worth millions of dollars to such human rights violators as Chile, Syria, Indonesia and Pakistan.[50] These revelations led to public protests and paved the way for the overhaul of export control policy that occurred in September of 1986.[51]

The main thrusts of this important policy review were threefold: first, to rationalize and clarify the export control process, eliminating the ambiguities; second, to promote the international commerce in peaceful goods and restrict only those exports that represented a genuine threat to our security; finally, to fill the gap left by the

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49. Supra, note 14, p. 2.

50. Supra, note 46, p. 5162. For instance for the period from January 1st to November 28, 1986, the government authorized military exports worth $6,111,150 to Chile, $441,000 to Syria, $2,056,734 to Pakistan and $2,156,107 to Indonesia. See Canada, Debates, House of Commons, March 27, 1987, p. 4639.

51. The new export control policy is explained in detail in supra, note 14, pp. 1-8.

removal of the human rights restrictions.

Accordingly, significant changes were made to existing policy. As stated earlier, the intention was announced to retain the Area Control List as an instrument but remove all the countries that were listed on it. Although this decision has not yet been fully implemented, it signaled the government's determination to promote peaceful international trade with Warsaw Pact nations. Of course sensitive shipments will still be controlled through the Export Control List.

Also for the first time military and strategic goods were accorded different treatment and all restrictions on trade in strategic products were lifted, except those regarding the Soviet Union and its allies as well as South Africa. By contrast, existing controls regarding national security, United Nations sanctions and nations engaged in hostilities were retained for military technology, and a fourth category was added: countries whose governments have a persistent record of serious violations of human rights. There is one exception however: the permit will be granted if the exporter can demonstrate that there is no reasonable risk that the goods might be used against the civilian population. It is impossible to know what nations are classified as human rights violators since the list is kept secret. We can only guess that it would include countries

like Chile, Guatemala and some particularly repressive African regimes.[52]

The new policy went further by recognizing that the Canadian defence industry, an important part of the aerospace community, simply must sell abroad to remain competitive and that most exports go to the United States and our European allies. Therefore the government decided to maintain an open approach to the export of military goods and technology to NATO and other friendly countries. In addition, firms will be authorized to export sub-assemblies and components of large systems where there is a bona fide joint venture between the Canadian and the foreign manufacturer and where Canada has a government-to-government research or production agreement.

The overall impact of the policy review of September 1986 can be assessed as follows: a) more trade will be conducted with the Warsaw Pact nations as a result

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52. A fifth category was added in 1987, when countries belonging to the so-called G-7 group (U.S., Canada, Britain, France, West Germany, Italy and Japan) decided to amend their regulations to tighten export restrictions on technologies and missile systems that developing countries could use to develop nuclear weapon launch systems. See D.M. NORTH, "Seven Nations Curb Nuclear Weapon Launch System Exports", AW&ST, April 20, 1987, p. 28. See also, L. SURTEES, "High-Tech Exporters May Be Hurt by Controls Aimed at Halting Spread of Ballistic Missiles", The Globe and Mail, July 13, 1987, p. B-4. For the text of the Agreement, see 26 (1987) Int'l Leg. Mat. 599.

of their removal from the ACL; b) military technology may now be exported to countries with bad human rights records if a demonstration is made that there is no reasonable risk of use against civilians, whereas before an ad hoc, discretionary process prevailed; c) trade in defence equipment with our NATO allies is facilitated; and d) strategic goods can now be exported to more destinations than ever before without the need for an export permit. There has been an intense and lively debate in Canada and elsewhere concerning this last point. Some argue that trade in strategic goods should be completely liberalized while others claim that such products represent a real security threat and should be tightly controlled. This issue will be addressed further in chapter three.

In the preceding pages we examined under what circumstances exports will be "controlled", meaning that export permits are required, and when they shall be "closely controlled", referring to the high probability that the permit will be refused for various reasons. We hope that our analysis sheds some light on what is often a muddy and byzantine procedure. We may note, however, that absolute certainty can never be attained, for obvious reasons, and that a good dose of discretion still pervades the process.

We have now finished our presentation of the national laws and regulations pertaining to export control,

leaving out intentionally the international dimension that is so vital to the success of such efforts. Because the military threat of the Warsaw Pact does not confront only Canada but its American and European allies as well, it was perhaps inevitable that cooperative efforts to stench the flow of sensitive technology to the East would be undertaken, giving rise to the COCOM organization created for this purpose.

Section 2. Canadian Participation in COCOM

Since the end of World War II, a notion of "collective defence" has gradually emerged, binding Western Europe to its North American partners, the U.S. and Canada, in a joint effort to protect their mutual security. Under this concept, a threat against one member was deemed a threat against all and cooperation was necessary to check the Warsaw Pact's steady military and technological advances. Such cooperation was needed for common defence forces and paved the way for the creation of NATO in 1948. It was also required for the establishment of strong defence industrial bases in each country and this led to the signing of many bilateral development and production sharing arrangements of the type discussed in Chapter One. Finally, it also became evident that a common effort was needed to protect sensitive

technological secrets and to prevent the Soviet Union and its satellites from acquiring information that could be used against the collective security. Therein lies the reasoning behind the establishment of the Paris-based Coordinating Committee on Multilateral Strategic Export Controls, or COCOM.

Basically, COCOM is a coordinating arrangement between Japan and the NATO member-countries (except Iceland) whose aim is to harmonize the approach taken by its members in controlling exports of strategic and military goods to the Warsaw Pact nations and China.[53] Informal meetings started in 1947 at the height of the Marshall Plan assistance programme, and by 1949 a consultation group of seven nations (the United States, Great Britain, France, Italy, the Netherlands, Belgium and Luxembourg) set up a Committee to discuss the embargo and control lists that the members were to apply in their trade with Eastern European countries. In 1951 this system of coordinating controls was

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53. See J. GORDON, "Three Agencies Will Cooperate to Cut Export License Delays", AW&ST, May 6, 1985, pp. 107-108.

formally established by an Act of the U.S. Congress.[54]

COCOM's basic tasks are to develop lists of technologies and products that are to be controlled and to ensure that its regulations are enforced. This is achieved by a Consultative Group which sits at intervals to coordinate strategic trade controls policy, and two subordinate committees which oversee continuing implementation. To date, three international embargo lists have been established by consensus through a negotiation process: a) the Munitions List which includes all military items; b) the Atomic Energy List; and c) the Industrial Commercial List, which covers strategic items, i.e. industrial goods that could be used for military purposes.[55]

In addition, each COCOM member country maintains its own national control lists which, to a great degree, are based on these international lists. For example, in Canada groups three to eight of the Export Control List are

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54. For the history of COCOM, see V. LEISTER, Space Technology: From National Development to International Cooperation, Doctoral Thesis, Institute of Air and Space Law, McGill University, August 1982, pp. 145-147. Note also that the Warsaw Pact nations have a similar arrangement in the COMECON organization. Ibid., p. 221.

55. Ibid., p. 48.

modelled on COCOM regulations.[56]

When the government of a member country receives an export permit application concerning a product that appears not only on the domestic list but also on one of COCOM's international lists, the request must in principle be referred to COCOM. Depending on the nature of the technology involved, the article may be subjected to varying degrees of control:[57]

1. **General embargo**, covering items that are the object of a maximum trade restriction. The export may only be allowed by a special unanimous vote of all the members;

2. **Favourable consideration**, for articles falling below the general embargo standard. The export will be considered on a case-by-case basis if certain conditions specified in the regulations are satisfied;

3. **One-time review and listing.** This procedure allows the export of a product to be carefully examined by COCOM and if it is approved, all subsequent sales of goods

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56. In fact, the United States is the only country whose national lists are more restrictive than those of COCOM. The USA's Commodity Control List included in 1987 27 more dual-use items than COCOM's Industrial Commercial List. See T. STRUICK VAN BEMMELIN, Draft Interim Report of the Sub-Committee on Advanced Technology and Technology Transfer of the North Atlantic Assembly, DOC. STC/AT 87, September 1987, p. 14.

57. Ibid., pp. 13-14.

falling in the same category will be submitted either to minimal controls, or no controls at all;

4. **Notification**, for items that have been approved by the originating country for export and for which COCOM must be given a 30 day pre-shipment notice, even though no formal COCOM approval is required; and

5. **Administrative exception procedure**, for products that may be exported at the discretion of the concerned national government, with only the requirement to report statistics to COCOM on a monthly basis.

In practical terms, the COCOM export control process can be explained as follows: there is a dichotomous procedure and particular export transactions will be either subject to the national government's discretion or to the full Committee's mandatory approval, depending on the critical nature of the technology involved. If the goods can be considered as less sensitive, i.e. roughly half of the strategic items on the Industrial Commercial List, they will be deemed eligible for the Administrative exception procedure, which means that the individual government will have the final say about whether the transaction should go through or not. This is done for convenience purposes and above a certain quantity or value, governments have the obligation to notify the sales to COCOM. Such notification will include information on the use and destination of the

product and whether it has been downgraded to reduce its military potential. Other goods at the bottom of the COCOM scale may be licensed for export without reference to the Committee in Paris. For more sensitive goods however, meaning the other items on the three international lists, the permit applications must be forwarded to COCOM and all member countries have the right to object to the sale.[58]

Once every three years COCOM conducts an in-depth review of its embargo lists and its control procedures. Extensive revisions were proposed between 1971 and 1972, and as a result the coverage was reduced and clarified. This occurred again in 1974-1975, and in the fall of 1978 an overhaul of some 149 items on the lists was undertaken, with the emphasis being placed on controls over computers and semi-conductors, and on technology rather than on the finished products.[59] While there is usually little disagreement on the appropriate content of the Munitions and Atomic Energy Lists because they are relatively straightforward and uncontentious, dual-use technologies on the Industrial Commercial List are more problematic. As we

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58. Ibid., p. 14.

59. Supra, note 36, p. 149. Less extensive reviews of the lists also occur on an annual basis. See J. GORDON, "Export Controls Hampering Sale of US High-Technology Products", AW&ST, December 15, 1986, p. 89.

mentioned earlier, a debate in individual countries as well as within COCOM rages on as to whether or not strategic goods should be controlled and if so, to what extent. There have been many policy shifts in this regard but we are now experiencing a tightening of controls on these and other listed items at the instigation of the United States, the principal player in this process.[60]

An essential feature in the success of any cooperative arrangement such as COCOM is the close coordination between its members. Such unity of action and purpose is absolutely vital, for without it the process is ultimately ineffective and invariably does not stand the test of time. That is why all participants must agree to scrupulously enforce uniform guidelines. If one member country should by-pass, even once, the mutually agreed-upon rules, this would not only be unfair in a commercial sense to the other partners because they were not competitive in a transaction that should not have occurred, but it is also detrimental to the collective security of all concerned.[61]

Indeed a single instance of carelessness by

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60. See "COCOM Tightening High Technology Export Controls", AW&ST, August 3, 1987, p. 33.

61. On this point, see S. VON WELCK, "The Export of Space Technology: Prospects and Dangers", Space Policy, August 1987, p. 228.

one member may have dramatic long-term consequences, as was aptly demonstrated by the recent so-called "Toshiba Scandal". It involved two companies, Toshiba Machine Corp. of Japan and Kongsberg Vapenfabrikk, a state-owned computer and weapons manufacturer in Norway. Between 1981 and 1984 these firms falsified export documents and secretly supplied the Soviet Union with computer-controlled lathes used to manufacture state-of-the-art propellers for submarines and aircraft carriers. Concerned by apparent advances in the U.S.S.R.'s capacity to manufacture submarines that slip quietly through the depths, the U.S. Department of Defence in 1986 launched an investigation that uncovered the sales.[62]

Responding to perhaps the most obvious violation of COCOM rules to date, the United States applied immediate pressure on the Japanese and Norwegian governments. Top executives of both firms resigned and in the summer of 1988, President Reagan signed a trade bill banning government purchases of goods from Toshiba and its subsidiary Toshiba

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62. See G. BOCK, "Run Silent, Run to Moscow", Time, June 29, 1987, p. 45 and "Making Amends: Top Toshiba Executives Resign", Time, July 13, 1987, p. 42.

Machine for a period of three years.[63] This serious security breach may also carry a heavy price tag since the United States was concerned that the only way to compensate for the Soviet technological gains would be to acquire many new advanced submarines, an option that could cost as much as $30 billion according to some experts.[64]

This is but one example of what can happen if any

63. See "Toshiba's Half-Year Profit Jumps by 203 Per Cent", The Globe and Mail, December 1, 1988, p. B-24. See also "Toshiba Units Stop Exports Prior to Ban", The Journal of Commerce, December 19, 1988, p. 4-A.

64. Supra, note 62. This scandal also led to the tightening of export control regulation in Japan. See "Japanese to Tighten COCOM Export Controls", The Journal of Commerce, November 23, 1988, p. 5-A.

COCOM member lowers its vigilance.[65] As the saying goes, "a chain is only as strong as its weakest link". In this export control game, all participants must play together as a team.

With this description of COCOM, the picture is now complete: we have terminated our exposé on the Canadian export control mechanism. We saw that it rests on a national effort relying on laws and regulations, as well as on international cooperation within the COCOM organization. One might think that this Canadian mechanism would be the sole preoccupation of Canadian aerospace firms engaged in the export business, that it would be the only one they would have to deal with. As always the reality is not so

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65. There have been numerous other instances of violations of COCOM rules, real or alleged. For example, two Japanese companies were charged in 1988 of filing false documents in order to export to the USSR 860 tons of a solution which may be used as a coolant to stabilize the course of guided missiles, in violation of COCOM regulations. See A.E. CULLISON, "Japanese Police Raid Two Firms Suspected of Export Violations", The Journal of Commerce, December 8, 1988, p. 1-A. That same year a U.S. company cost its export privileges when it was suspected of planning to ship computer parts to a subsidiary in Australia. It was discovered that the subsidiary was only a front and that diversion to a Warsaw Pact country was likely. See "Libra Electronics Loses U.S. Export Privileges", The Journal of Commerce, January 9, 1989, p. 5-A. Finally, four Europeans were suspected of scheming to export computer chip test equipment worth $1.4 million to Bulgaria. See "Four Europeans Face Charges in Scheme to Export Computer Chip Test Gear", AW&ST, January 2, 1989, p. 35.

simple and we now turn to a very complex and sensitive problem: the issue of the extraterritorial application of U.S. laws and regulations on export control in Canada.

Section 3. Extraterritoriality of American Export Control Legislation

It is no secret that the United States exerts a great degree of influence on Canadian society. This is due to a variety of factors not the least of which is the reality that our southern cousins are economically and demographically ten times stronger. Over the years a high level of integration and cross-pollinization has been achieved in cultural matters, the management of natural resources, commercial and economic efforts and of course foreign policy, to the point where many Canadians wonder if they truly have complete control over their own affairs.

The same can be said of the Canadian export control process, which truly bears the U.S. stamp of approval. Indeed the United States is the acknowledged leader and driving force behind the multilateral COCOM organization. Moreover, Canadian export control laws and regulations were modelled after their American counterparts and, as we noted in section 2, the Canadian government follows a practice of consulting American authorities before granting a permit

application for goods of U.S. origin which are controlled under American Law. So there is no doubt that Canada closely follows the U.S. lead in all matters pertaining to export control, but this goes beyond mere influence: in some instances, American export control legislation will actually be applied and enforced on Canadian soil. Whether or not this is legal or even desirable, it is part of a wider phenomenon referred to as the extraterritoriality of state jurisdiction.

Extraterritoriality is defined as the unilateral imposition of legislation by one state which directly clashes with the ability of another to enforce its own laws or implement its policies over those resident within its territory.[66] Generally speaking, such clashes occur because the principle of territoriality, though important, is not, as we shall later see, the only basis on which state jurisdiction may be exercised. Others, such as nationality, are also recognised by international law. Therefore when one country acts outside its borders according to the nationality or some other principle and the affected state follows a different course according to the territoriality

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66. See R. MACINTOSH, "The Impact of Extraterritoriality on World Banking", (1986) 11 Canadian Business Law Journal, p. 275. See also Privy Council of Canada, Foreign Ownership and the Structure of Canadian Industry, January 1968, p. 310.

principle, conflicts are inevitable.

Extraterritoriality is not confined to export control and is commonly practiced in such areas as criminal, tax, securities and anti-trust law.[67] Although the United States is the most frequent and influential proponent of extraterritoriality, it is by no means the only one. Even the European Community, a most vocal opponent of extra-territoriality, has developed a body of business law based on the principle of entreprise unity that has major trans-border applications.[68]

In this section, we shall deal exclusively with the export control dimension of extraterritoriality as it applies to the Canada-U.S. relationship, to show that not only do our aerospace firms have to observe the Canadian legislation, but they must also frequently contend with American rules as well. Obviously this leads to uncertainly in the business community, to lost sales for Canadian firms, and to occasional friction between the two countries. Before we delve into the legal context of extraterritoriality, it

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67. See A.E. GOTLIEB, "Conflicting Assertions of National Jurisdiction over Multinational Entreprises, in Extraterritoriality and Foreign Investment, Ottawa, Canadian Council on International Law, 1983, pp. 40-42.

68. See P.H. SUTHERLAND, "Extraterritoriality and Export Controls", ibid., p. 103.

exports from foreign countries of the following items:[70]

1. Re-exports of commodities and technical information of U.S. origin;
2. Exports of foreign-origin products made from U.S. parts and components;
3. Exports of foreign-origin products made with U.S. technical information or under license from a U.S. firm; and
4. Exports of goods produced domestically but supplied by a foreign subsidiary of an American company.

In simple terms this means that the U.S. government has the power to control the export, from a foreign country such as Canada, of any products of American-related origin and of any commodity supplied by a U.S. firm even though it is incorporated elsewhere. Therefore a Canadian company whose transactions fall within one of these situations is theoretically obliged to apply for export permits not only from the Canadian government, but also from the American authorities. The American government usually proceeds by

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70. See S.E. BENSON, "U.S. Government Regulation of High-Technology Trade with Canada", in A.R. SZIBBO (ed.), Technology Transfer and the Canadian Business Enterprise: Current Laws and Evolving Policies Affecting Technology Transfer, Toronto, Law Society of Upper Canada, 1984, p. 39.

requiring the mandatory inclusion in purchase contracts between U.S. firms and their Canadian counterparts of clauses which stipulate that the purchaser of the technology agrees to observe U.S. legislation and agrees to require future buyers to do the same.[71]

The penalties available to ensure compliance with these laws and regulations are often severe. They involve fines or imprisonment, often to be enforced by means of consent decrees negotiated between a U.S. administrator and the violator. The most serious economic penalty is of course the future denial of export rights. They may be refused to the U.S. exporter and any related company in or outside the United States. Similarly shipments to a foreign exporter who has violated U.S. laws may also be prohibited. It is widely known that the Department of Commerce maintains a "black list" of firms which are absolutely prohibited from receiving imports from the U.S., and a "grey list" of companies whose commercial relations with the United States are subject to very close scrutiny.[72] Although the individual penalties are most severe, the economic sanction of denial of export privileges can be devastating, even for large businesses and may well lead to bankruptcy in the case

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71. Supra, note 9, p. 180.

72. Id.

of firms which totally depend on U.S.-origin goods to carry on business.

This is certainly the most controversial aspect of U.S. export control policy and has led to widespread criticism from that country's commercial partners, especially France, the United Kingdom and Canada. Such interference takes on a very concrete meaning for the Canadian aerospace industry since many of its most important members such as Pratt & Whitney, de Havilland Canada and McDonnell Douglas Canada are subsidiaries of U.S. firms and therefore subject, in principle, to American controls. Many other companies, even if entirely Canadian-owned, rely on imported U.S. technology and are thus in the same situation. Actual examples of instances where an aerospace firm based in Canada would have refused to sell abroad because of U.S. pressure are not available, but the industry has certainly been exposed to this influence.[73]

To illustrate just how such control is exercised, a few examples taken from past events may be useful. The

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73. It is generally difficult to assess the impact of such export restrictions on Canadian export trade since in the vast majority of cases clear evidence of obvious foreign government pressure is not available. Indeed the American government can put invisible pressure on a Canadian manufacture proposing to export goods with U.S. components, and such company may claim that its refusal to sell abroad was motivated by other factors having to do with economics.

United States, contrary to other countries such as the United Kingdom, has always felt that economic sanctions were an effective and proper way to show displeasure toward a foreign power and to bring about a desired solution to the perceived problem. Hence over the years numerous embargoes have been imposed, lasting for various lengths of time, and in many instances Canadian companies were involved.

One such case was the embargo on trade with Cuba which occurred in the mid-70's. Against the wishes of the United States, Canada maintained diplomatic ties and Canadian firms continued to do business with Cuba. To enforce its sanctions, the U.S. tried to block exports from Canada of locomotives, certain parts of which were produced by subsidiaries of American corporations, even though such sales were perfectly legal under Canadian law. To make sure that Canadian firms observed domestic, and not American laws, Canada took legislative countermeasures by adopting, in 1975, amendments to its anti-trust legislation giving governmental authorities the power to prohibit the implementation in Canada of foreign laws and directives which would adversely affect competition, efficiency or trade. The United States, however, did not wish a confrontation and in January 1976 announced that all such permit applications would receive almost automatic approval. While avoiding a direct conflict, the U.S. seemed to have succeeded nonethe-

less in exercising control over Canadian exports to Cuba by requiring long delays in granting permit applications to the American parent corporations of these subsidiaries. This had the expected result that these firms tended to veto any trade deals with Cuba proposed by their Canadian subsidiaries.[74]

We turn now to a still earlier example of American interference, this one involving trade with China. Bowing to American government pressure, the Ford Motor Company of Canada, an affiliate of a U.S. parent company, in December 1957 reportedly refused to ship trucks to China even if a contract of sale had already been concluded. This touched off a political firestorm and during the ensuing months, charges were laid against Ford and other firms which had acted similarly. A joint Canadian-American probe was launched to investigate the matter and Canada received assurances from the United States that such problems would be avoided in the future.[75]

Nevertheless six months later, the Aluminum Company

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74. See A.H. HERMANN, Conflicts of National Laws with International Business Activity: Issues of Extra-territoriality, London, British-North American Committee Publications, 1982, p. 33.

75. See I.A. LITVAK, C.J. MAULE and R.D. ROBINSON, Dual Loyalty: Canadian-U.S. Business Arrangements, Toronto, The McGraw Hill Company of Canada, 1971, p. 24.

of Canada admitted that it had declined a possible sale to China because it feared an adverse political reaction from the American government which might endanger its U.S. market.[76] This highlighted the fact that American influence on the Canadian export control process was alive and well, and since then it is public knowledge that other American-owned firms in Canada have shied away from doing business with such U.S.-proscribed nations as Vietnam and North Korea.[77]

Perhaps the most famous instance of U.S. meddling in foreign commercial policy is the recent Siberian Pipeline case. On December 13, 1981, the regime of General Jaruzelski imposed martial law in Poland, following the Solidarity-led popular uprisings. The labor union was banned and mass arrests were conducted. President Reagan denounced both the Polish government for reneging on its human rights commitments and the Soviet Union for inciting, if not supporting, the crackdown. On December 29, he unveiled a series of economic sanctions which included the suspension of licenses for the export or re-export to the Soviet Union of equipment and technology for transmission and refining of natural gas and petroleum. On June 8, 1982, the sanctions were further

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76. Ibid., p. 25.

77. Ibid., p. 26.

extended to prohibit any such exports by American subsidiaries or licensees of U.S. technology abroad. At that time, the U.S.S.R. was actively building its Siberian pipeline and major contracts had already been awarded to western firms.[78]

A major dispute ensued between the United States and its most important allies over the effect and legality of the measures, which were finally lifted on November 12, 1982. Although Canadian companies were less affected by the Siberian pipeline embargo than their counterparts in Europe, there is evidence that at least some firms factored the existence of the sanctions into their marketing decisions and decided not to get involved rather than act in conflict with U.S. regulations.[79] Some of the European companies that failed to observe the U.S. orders and elected to honour their contracts were charged and fined, and their export

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78. See M. LEIGH, "The Long Arm of Uncle Sam - US Controls as Applied to Foreign Persons and Transactions", in C.J. OLMSTEAD (ed.), Extraterritorial Application of Laws and Responses Thereto, Oxford, ESC Publishing Ltd., 1984, pp. 50-52; and R. ERGEC, La compétence extraterritoriale à la lumière du contentieux sur le gazoduc euro-sibérien, Bruxelles, Éditions de l'Université de Bruxelles, 1984, pp. 5-10.

79. Supra, note 67, p. 39.

privileges were revoked.[80]

These few examples aptly demonstrate the American belief that, for export control purposes, borders between nations are irrelevant and that ultimately the end justifies the means. Therefore the U.S. is prepared to go to great lengths, incur great expense and face much criticism from its allies to enforce its regulations abroad. Why does the United States deem it necessary to behave in such a way? Simply because as a superpower with commensurate responsibilities, it feels obligated to lead the Free World in all dealings with the Warsaw Pact and unfriendly nations generally. However, what is perfectly natural for the United States is perceived as gross interference by the concerned nations which do not appreciate this disregard for their sovereignty and independence. Is this application of American export control regulations beyond the U.S. territory legal? That is the issue we shall now consider.

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80. These included DRESSER (France) SA, Creusot-Loire SA, John Brown Engineering Ltd. and Nuovo Pignone SPA. Of this group, only DRESSER was a wholly-owned subsidiary of an American Corporation. The other three were allegedly subject to sanctions because they were licensees of technology from US sources. See M. LEIGH, supra, note 78, p. 51.

Sub-section 2. Extraterritoriality and State Jurisdiction in International Law

The question to be discussed here is whether the action of a state in applying its laws extraterritorially gives another state a claim for the violation of its rights. More generally, does international law impose limits on the foreign reach of a nation's laws in the field of economic regulation?

Put simply, international law does not forbid the extraterritorial assertion of state jurisdiction but it does impose certain conditions and limits. In the famous S.S. Lotus case,[81] the Permanent Court of International Justice stated that restrictions upon the right of a state to exercise its jurisdiction are not to be presumed in the absence of a clear showing that they exist. The court did not accept the French contention that a nation must find justification for its actions in international law. On the contrary, the onus was held to lay on the state claiming such exercise to be unjustified. The Court further stated that all that can be required of a state is that it should not overstep the limits which international law places upon

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81. The Case of the S.S. LOTUS, (1927) PCIJ, Ser. A., No. 10.

its jurisdiction; within these limits it can act as it pleases.[82]

Similarly, in the Barcelona Traction case, Judge Sir Gerald Fitzmaurice held:

> It is true that under present conditions, international law does not impose hard and fast rules on States delimiting spheres of national jurisdiction...but leaves to States a wide discretion in these matters. It does however: (a) postulate the existence of limits, though in any given case it may be for the tribunal to indicate what these are with regard to the facts of that case; and (b) involve for every State an obligation to exercise moderation and restraint as to the extent of jurisdiction assumed by its courts in cases having a foreign element and to avoid undue encroachments on a jurisdiction more properly pertaining to, or more appropriately exercised by another State.[83]

These two decisions read together lead us to conclude that a state has a wide measure of discretion to exercise its jurisdiction in the manner it deems most appropriate, within the limits set by international law which we

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82. For comments on the S.S. Lotus decision, see J.G. CASTEL, "The Bases of National Jurisdiction over Multinational Enterprises", in supra, note 67, p. 7; see also supra, note 9, p. 443.

83. The Barcelona Traction case, (1979) I.C.J. Reports 3, at p. 43.

shall examine later.[84]

Accordingly, over the years various principles have been devised to justify the exercise of criminal jurisdiction and since no a priori restriction applies, there is no reason why these principles should not serve as bases for economic and commercial legislation or generally for any form of assertion of sovereign jurisdiction. Here are the most important:

1. Territoriality: This principle, which has long been recognized in international law, holds that a state has exclusive authority to exercise jurisdiction within its own territory. Indeed at the basis of international law lies the notion that a state occupies a definite part of the surface of the Earth within which it normally asserts its jurisdiction over persons and objects to the exclusion of

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84. Some authors have held the contrary view that, pursuant to the principle of non-interference, a fundamental postulate of international law which provides that a State may not interfere with the sovereignty of another, any extraterritorial manifestation of State jurisdiction is not permitted by international law. For discussion of the non-interference principle, see D. GERBER, "Beyond Balancing: International Law Restraints on the Reach of National Laws", (1985) 10 Yale J. Int'l L., pp. 209-220. See also D. GERBER, "International Discovery After Aerospatiale: The Quest for an Analytical Framework", (1988) 82 Am. J. Int'l L., pp. 534-535. However, since the S.S. Lotus and Barcelona cases deal specifically with the issue of foreign application of national legislation, we are inclined to consider them as more definitive and authoritative on this point.

the jurisdiction of other states. This idea is closely tied to the fundamental principles of sovereignty and equality of states so that if any nation seeks to apply its laws to reach within another's territory, it is thereby challenging and infringing that country's sovereignty and violating international law.[85]

2. Nationality: According to this principle, which also enjoys wide recognition in international law and practice, a continuing legal relationship and genuine bond exist between a state and an individual related to it. By virtue of this relationship a person has certain rights and duties wherever he or she may be and indeed it can be said that the law of that particular country travels with this person. In return for this continuing protection, a citizen of a state has the corresponding duty to conform to the laws of that state and that is why the nationality principle is mostly used in the context of jurisdiction to regulate the conduct of nationals abroad.[86]

3. The protective principle: This notion stipulates that when a state feels that its security, territorial

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85. See J.L. BRIERLY, The Law of Nations, London, Oxford University Press, 1963, p. 94; supra, note 82, pp. 13-14; and supra, note 9, pp. 447-448.

86. J.G. CASTEL, supra, note 82, pp. 13-14; and supra, note 9, pp. 447-448.

integrity or political independence are threatened by acts taking place abroad, it may exercise its sovereign jurisdiction and legislate to prevent such occurrence. This principle is justified on the ground of self-defence as it is universally acknowledged that a State has the legitimate right to protect itself from harmful conduct taking place elsewhere. It can be argued that this would cover actions taken by a nation to protect its own economy, hence the economic laws having extra-territorial effects adopted by many countries.[87]

4. The effects or impacts doctrine: A derivative of the protective or self-defence principle, this notion holds that a state has jurisdiction to enact legislation with extraterritorial reach if it feels that acts committed outside its territory have, or are likely to have, detrimental effects within its territory.[88] This idea was considered by the Permanent Court of International Justice in the above-mentioned S.S. Lotus case and it was stated that:

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87. R. HIGGINS, "The Legal Bases of Jurisdiction" in C.J. OLMSTEAD (ed.), supra, note 78, p. 12; and supra, note 67, p. 101.

88. W.M. KNIGHTON and D.E. ROSENTHAL, National Laws and International Commerce: The Problem of Extraterritoriality, London and Boston, Routledge and Kegan Paul, 1982, p. 12.

> ...the courts of many countries, even of countries which have given their criminal legislation a strictly territorial character, interpret criminal law in the sense that offenses, the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offense, *and more especially its effects*, have taken place there[89] (emphasis added).

Again there is no reason why this notion should not apply to the exercise of economic jurisdiction and this case has been relied upon as a justification for the principle that any state may impose liability even upon persons not within its allegiance for conduct outside its territory that has harmful consequences within its territory.

These are the justifications most frequently used by nations to exercise their sovereign jurisdiction. We have seen that all these principles are allowed, or rather not prohibited, by international law as long as they remain within certain limits prescribed by the law of nations. The question then becomes: are these principles mutually exclusive or can a combination be adopted by a state, and what happens when a country asserts its jurisdiction within the borders of another in contravention of the will of that country? This issue is central to the entire problem of extraterritoriality because it is conceivable, and indeed

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89. Supra, note 81, p. 23.

quite frequent, that conflicts surface between two different nations seeking to apply their legislation within the same territory.

This explains the friction that has often arisen in the past few years between the United States and its major trading partners, including Canada. As a matter of principle, Canada is not opposed to the extra-territorial exercise of state jurisdiction, as evidenced by the foreign reach of its criminal and securities legislation.[90] However, where export control is concerned, it believes that such policies should be confined, and only be enforced, within a nation's own territory, without interference from other states. We are led to this conclusion by the fact that section 15 of the Export and Import Permits Act does not extend to acts committed elsewhere and only applies to actions committed in Canada with a view to violating the Act abroad. Therefore, acts committed abroad by Canadians, Canadian corporations or their foreign subsidiaries do not in themselves offend against the Act.

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90. Indeed the government of Canada recognized that the extent of international movement of persons, assets and businesses requires in certain cases foreign intervention and cooperation with foreign authorities if domestic laws are not to be frustrated. See GOVERNMENT OF CANADA, Foreign Direct Investment in Canada, 1972, p. 254. See also W.C. GRAHAM, "The Foreign Extraterritorial Measures Act", (1986) 11 Canadian Business Law Journal, pp. 435-436.

The United States for its part adopts the completely opposite position that a nation seeking to enforce its export control provisions is not confined to its borders and may legitimately and legally exercise its jurisdiction within the territory of another State. It is this attitude which has led to the much publicized disputes over trade with Cuba, China and the Soviet Union. The U.S. rests its claim to extra-territoriality on three pillars; two concern the already mentioned principles of nationality and the effects doctrine, and the third can be referred to as the "American technology link". According to this notion, which flows from the legislative authority, pursuant to the Export Administration Act, to control "exports subject to U.S. jurisdiction",[91] the United States would have the right to regulate the export or re-export from foreign countries of goods or technology of U.S. origin or manufactured according to American technical information. This would apply regardless of the identity of the owner of such commodities, of the number of transactions involved and of the

91. Supra, note 69.

final configuration of the U.S.-related goods and technology.[92]

The sum total of these claims is that the United States feels free to apply its export licensing legislation to export sales in foreign countries when such transactions involve U.S.-origin goods, U.S.-related persons or corporations or when such sales are likely to have a detrimental effect on American security or economic health. The practical consequence of this is that the borders or distances that separate the United States from other countries become irrelevant. These States in effect become extensions of American territory for purposes of export control. It is this perception more than any other factor that has contributed to discord between the U.S. and its commercial partners, and Canada, by virtue of its close proximity and general empathy toward the U.S., has often been the affected party, not to say victim.

As stated earlier, states have a wide discretion in

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92. Supra, note 88, p. 60. A good example of this is the recent insistence on the part of the U.S. Commerce Department that, in an effort to tighten the re-export of American technology, certain foreign firms importing U.S. goods and technology supply to the American government with the complete list of their foreign customers. This decision, which applied to many companies not considered subsidiaries of American corporations, elicited protests over its extraterritorial implications, see P. MANN, "Europeans Oppose U.S. License Shift", AW&ST, January 30, 1984, p. 22.

the conduct of their sovereign affairs as long as they remain within the limits set by international law. This means that a priori such notions as the effects and U.S. technology link doctrines as well as the nationality principle invoked by the United States are perfectly permissible, but a final verdict depends on their compliance with the law of nations.

We will not attempt to make a definitive statement on the legality of the American measures since many experts more familiar with the subject remain in complete disagreement on this precise question as evidenced by the abundant literature available. We shall however, for the sake of argument, point out and discuss certain ambiguities in the American argument.

First of all, the United States claims that by virtue of its legislative power to regulate "persons subject to U.S. jurisdiction",[93] it has the authority to control the export transactions of Americans abroad, including foreign subsidiaries of U.S. corporations. Although seemingly allowed by the nationality principle, some questions have been raised as to whether these subsidiaries, simply because of the control exercised by the parent office, are really U.S. persons after all. Indeed inter-

93. Supra, note 88, p. 60.

national law seems to reject such an expansive conception of the nationality link and holds that, as a basic rule, a corporation is a citizen of the country of its place of incorporation. This was stated clearly in the Barcelona Traction case[94] and even confirmed by the U.S. Supreme Court in the 1982 Sumitomo affair.[95] It thus follows that the American attempt to regulate foreign subsidiaries of U.S. corporations solely on the basis of their link with the parent corporation finds no basis in international law.[96]

What about the U.S. argument that it can rightfully regulate all transactions involving American-related goods and technology, whoever the owner may be and whatever the country of export? Suppose for example that a wholly Canadian-owned company wanted to sell some U.S.-developed computer technology to East Germany. Would the United States have the right to regulate or even prohibit such a transaction? The U.S. says yes and its claim is apparently based on a belief that American law runs with the goods. Many authors agree however that there is no principle of

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94. Supra, note 83.

95. Sumitomo Shoji America Inc. v. Avogliano, 77 L. Ed. 2d 547 (U.S. Supreme Court 1982).

96. Supra, note 88, pp. 58-59.

international law which could justify the subjection to U.S. jurisdiction of companies that have no ties to the United States and are completely foreign-owned.[97]

This indeed was one of the focal points of the objections made by the European Community to the American government in the context of the Siberian pipeline dispute, as evidenced from this extract from a note presented to the U.S. State Department:[98]

> Goods and technology do not have any nationality and there are no known rules under international law for using goods or technology situated abroad as a basis of establishing jurisdiction over persons controlling them.

It is perhaps to circumvent this shortcoming that the United States authorities seek to get each participant in a succession of contracts to undertake to his predecessor in the chain that he will observe the U.S. regulations and that he will obtain similar undertakings from anyone to whom he sells goods or technology of U.S. origin. But can this contractual obligation on the part of the exporter create any direct rights for the American government to regulate any future transactions? As the contract only binds the parties to it and since the government is not directly

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97. Ibid., p. 61.

98. Reprinted in I. SINCLAIR, "Conflicting Assertions of Jurisdiction over Multinational Enterprises", in supra, note 67, p. 35.

involved in such contract, the answer is clearly no. However, it may be held that the test is not whether the technology link doctrine is specifically allowed in domestic or international, but whether it is, as stated in the S.S. Lotus case, expressly forbidden. This is not the case to our knowledge and it follows that the United States may have a valid claim to jurisdiction over goods or technology of U.S. origin situated abroad.

Having summarily dealt with two of the United States' arguments in favour of the extraterritorial reach of its export control legislation, we are now faced with the third and last one: the effects doctrine. Although many authors question the legality of this notion,[99] there appears to be no clear principle of international law which could, in the spirit of the S.S. Lotus decision, strike it down. On the other hand this doctrine appears to be a rather strenuous extrapolation of the universally recognized principle of self-defence. Can we really hold that any actions committed abroad that would have an impact, however minimal, on the economy of a nation would trigger this right to act in self-protection? The answer is far from obvious and ultimately, we think the issue will be settled when the trading nations of the world finally decide whether or not

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99. See for example, supra, note 88, p. 16.

the notion of extraterritoriality is acceptable. If so, then such theories as the effects doctrine will provide convenient vehicles. If not, they will not stand up to the test of time and political opposition.

Having considered all three justifications advanced by the United States to defend its right to exercise its jurisdiction on foreign soil, we must conclude that such right may indeed exist since only the nationality principle, as applied by U.S. authorities, is disallowed by international law. It must be recognized that this conclusion hinges on the particular test which is applied to determine the legality of such actions. Indeed if one believes that the non-interference principle[100] should be adopted instead of the test proposed by the S.S. Lotus and Barcelona cases, then of course, the result would be entirely different and any form of extraterritorial intervention would be prohibited.

However we characterize the legal status of the U.S. claims to extraterritoriality, the fact is that they have had a very significant, and negative, impact on that country's relations with its trading partners, as we shall now see.

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100. See Brierly, supra, note 84.

Sub-section 3. The Disruptive Effects of Extraterritorial Claims

Disputes over conflicting exercises of state sovereignty generally arise only when there is disagreement between the countries involved as to what policy should be followed to deal with a particular problem. To illustrate this, let us suppose that the United States decided to boycott all exports of military materiel to Syria, not only from its own domestic corporations but also from their foreign subsidiaries based in other countries, including Canada. If the government of Canada agreed with this political decision, both nations would act in parallel fashion and would even cooperate toward the achievement of the common goal. However, if Canada decided, as it did in the cases involving China and Cuba, that it would not follow such a course and that Canadian firms would still be able to sell arms to Syria, then a dispute would ensue, pitting one national will against the other.

We have sufficient experience with these economic and political disputes to know that they have no redeeming virtues whatsoever and only have detrimental effects on the parties involved. Such conflicts as the trade boycotts of China, Cuba and especially the Soviet Union have done considerable damage to the reputation of American corporations

as reliable suppliers of commodities and technology as well as to the U.S. claim that it respects the principle of sanctity of contracts. Indeed there is evidence that entire U.S. industrial sectors have lost significant sales and world market shares simply because potential purchasers became convinced that U.S. firms could not be trusted to deliver the goods.[101] The recent insistence of the U.S.S.R. to include in its agreement to purchase grain from the United States a clause to the effect that future embargoes would not be imposed is also indicative of this prevalent perception.[102] This can only add uncertainty to a world economy that is already fast changing and slightly confused.

For the most part however, conflicts over extra-territoriality are not inspired by legal or economic considerations but rather by the simple and vital notion of sovereignty. This may help explain the level of emotion that is often poured into this debate, because at the very heart of statehood lies the capability of a government to enforce, exclusively of all others, its own legislation and priorities. This implies the unchallenged right to determine all matters affecting the destiny of a nation and its

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101. Supra, note 88, p. 82.

102. Supra, note 9, p. 181.

people. Therefore, when the United States attempts to apply its export control laws, or any other legislation, on Canadian territory, Canadians feel that their sovereignty and dignity is threatened.[103] This may be difficult for the Americans with their "follow the leader" attitude to understand, but no affected country particularly enjoys feeling like the 51st state of the Union. These nations may well agree with the end result that the American initiatives are intended to achieve, but they intensely resent this attempt by the United States to impose its will. This sort of situation can lead, as was demonstrated by the notorious Siberian Pipeline case, to discord and disunity in the Western Alliance, therefore defeating the very purpose that these export controls are to effect.

Over the years the governments of Western Europe have been the most frequent and vocal opponents of American extraterritorial measures, claiming that they are illegal and insulting. Canada holds a similar view, although in practice the Canadian position is less rigid and more conciliatory. In principle the Canadian government considers itself the sole arbiter of commercial conduct relating to the export of goods of whatever origin from Canadian terri-

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103. See GOVERNMENT OF CANADA, supra, note 71, p. 253. See also Privy Council of Canada, supra, note 47, p. 27.

tory and on many occasions diplomatic meetings or exchanges have taken place to impart that view to the American authorities. However, the government prefers to deal with these situations through cooperative measures based on prior consent.[104]

There are times of course when such collaboration will not lead to a satisfactory solution simply because the problem is too intractable, the issues too sensitive. In those cases a contest of wills will ensue and many nations have found it quite difficult to deal with the all-powerful United States, especially in the area of control over the subsidiaries of U.S. parent companies. Some of them apparently felt that they needed extra ammunition and consequently adopted what are known as "blocking statutes". These pieces of legislation generally deal with all aspects of extraterritoriality such as anti-trust and securities, and not solely with export control. Their purpose is to prevent the foreign state from effectively exercising its jurisdiction within the territory where these laws are in effect, thereby staking a territorial claim to exclusive

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104. Indeed the government of Canada has stated the opinion that the accommodation of the interests of a foreign State on national territory is itself an exercise of the Canadian government's right to control activities within its borders. The condition, however, is that both countries agree to pursue the same goal. See GOVERNMENT OF CANADA, supra, note 90, p. 254.

jurisdiction.

Generally speaking, these statutes prohibit the disclosure of information or other forms of obedience to foreign directives, provide for the unenforceability of certain foreign judgments and, in some cases, for the recovery of awards made by foreign courts. To date, some seventeen nations including Australia, France and South Africa have adopted such defensive measures[105] and although American initiatives are never expressly mentioned, they certainly were more often than not the intended target. In 1980, the United Kingdom enacted the Protection of Trading Interests Act[106] which at that time was the most comprehensive statute of its kind. It later served as a model for the adoption in December of 1984 of the Foreign Extraterritorial Measures Act by the Parliament of

105. See W.C. GRAHAM, supra, note 90, p. 427.

106. The Protection of Trading Interests Act 1980, c.11, 50(1), 258.

Canada.[107]

Like its title suggests, this particular piece of legislation does have a very sweeping effect on the way all issues related to the foreign exercise of jurisdiction are handled in Canada. It signals a new determination to cope with these problems from a position of strength and is intended to send a message to our commercial partners with extraterritorial designs that Canada is ready and willing to act. It does not mean that the government will automatically avail itself of the powers pursuant to the Act, but rather that these are options at its disposal should the need arise. This initiative is in line with the government's determination to safeguard not only the appearance, but also the reality of Canadian sovereignty, as stated by the Minister of Justice when introducing the Act to the House of Commons:

> So what does the Bill do? It sets out a framework for Canadian governmental responses to foreign governmental measures

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107. The Foreign Extraterritorial Measures Act, S.C. 1984, c.49. This Act does not represent the first attempt by Canada to resist the extraterritorial impulses of foreign nations. Indeed in 1976 the Combines Investigation Act was amended to provide that a regulatory tribunal could issue prohibitory orders if it found that a decision was made in Canada as a result of foreign pressure and if this had the effect of adversely impacting on Canada's foreign trade. See S. APRIL, "Blocking Statutes as a Response to the Extraterritorial Application of Law", in C.J. OLMSTEAD (ed.), supra, note 78, p. 229.

> or decisions by foreign courts which have unacceptable extraterritorial scope. Yes we want foreign investment. Yes, we want a better relationship, and we have a better relationship with the United States of America as an example. However that does not mean to say that we are not going to defend our own vital national interests or our own Canadian sovereignty, and that is what the Bill does.[108]

In this era of the Free Trade Agreement and of GATT efforts to closely regulate non-tariff barriers such as export control procedures, the Foreign Extraterritorial Measures Act is a protective, rather than protectionist, instrument. This statute contains four basic elements. First, it allows the Attorney-General, when he is convinced that a foreign tribunal is exercising jurisdiction in such a way that "significant Canadian interests in relation to international trade or commerce" are likely to be effected, or that Canadian sovereignty is likely to be infringed, to prohibit the submission of documents before that foreign tribunal in response to orders to supply such information.[109] This is known as a "gag" provision.

The law also permits the Attorney-General, if the above-mentioned conditions involving Canadian interests or sovereignty are satisfied, to prohibit persons from comply-

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108. Canada, Debates, House of Commons, December 13, 1984, p. 1182.

109. Section 3 of the Act.

ing with foreign governmental or court orders.[110] If a foreign tribunal has rendered a judgment in a case involving an anti-trust statute, the Minister may, if the same conditions are met, declare that such ruling is not enforceable in Canada or, in the case where money was awarded, reduce the amount enforceable in Canada.[111]

Finally, this Act contains a provision borrowed from the British legislation which enables a Canadian individual or corporation to sue in Canada and to recover from a party who has obtained an anti-trust judgment abroad the whole or part of the monetary award as may be determined by the Minister.[112]

It is evident even from this brief description that this statute was intended to deal with all aspects of the extraterritoriality debate. With regard to export control, obviously the most significant provision is that of section 5 which would allow for the nullification on Canadian territory of foreign orders or policy decisions such as would be involved in boycotts and embargoes.

As could have been expected, this Act and others of its kind in foreign countries did not please the United

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110. Section 5 of the Act.

111. Section 8 of the Act.

112. Section 9(1) of the Act.

States at all. Government leaders and academics in particular displayed a sense of shock mixed with a good dose of surprise that such normally good friends of the U.S. would feel compelled to act this way.[113] In any case, one has to recognize that these laws, however clear a statement they make, do not and cannot provide an answer to all problems involving extraterritoriality. They may indeed serve to escalate already mounting tensions and lead to more conflicts. Where then does the solution to the problems created by conflicting exercises of national jurisdiction lie?

Sub-section 4. Toward an Agreeable Solution to Extraterritoriality Disputes

One can easily understand why disputes over extraterritoriality arise at all. The economies of the major trading nations are increasingly interrelated and interdependent, a fact which produces powerful pressures in favour of the application of a concurrent jurisdiction approach. The areas of economic activity of one country overlap those of the others and in this context, domestic legal systems are incapable of fully protecting national

113. See S. APRIL, supra, note 78, pp. 232-233.

economic, social and political interests without some degree of extraterritorial impact.[114]

This does not however address the question which is central to the whole debate over extraterritoriality: in cases of conflicts of jurisdiction between two nations, how will such disputes be settled and, in the end, who shall prevail?

Several authors have pondered this problem and various solutions have been advanced. First it was suggested that disputes be managed on a case by case basis by balancing the interests of competing jurisdictions. Invoking the concept of comity between nations, some experts advocate that national authorities practice restraint in asserting jurisdiction when the balance of interests lies with another State.[115] In order to determine which party's position must be given greater weight, Professor Lowenfeld has proposed an illustrative list of factors which should be

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114. S.M. BOYD, "Remarks by an American Lawyer", in J.P. GRIFFIN (ed.), Perspectives on the Extraterritorial Application of U.S. Antitrust and Other Laws, Washington, American Bar Association, 1979, p. 53.

115. Supra, note 68, p. 104.

considered by national courts in any such evaluation.[116] The list includes such criteria as the character and likely effects of the activity to be regulated, the country where that activity will take place, the basic policies underlying the regulation, the link between the state and the regulated persons or companies and, of course, the potential conflicts between the regulation in question and the exercise of legislative jurisdiction by another state. This suggestion is of course tailored for judicial consideration involving for example anti-trust or the forced submission of foreign documents, but it may still be useful in the case of export controls where no courts are involved. This would mean in effect that the concerned nations would meet to decide which one of them had the most intimate and direct link to the regulated parties, and therefore which one had the most legitimate claim to exclusive jurisdiction.[117]

Then it was proposed that the ideal way to avoid disagreements would be to seek to harmonize national poli-

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116. See A.F. LOWENFELD, "Public Law in the International Arena: Conflict of Laws, International Law and Some Suggestions for their Interaction", 163 Recueil des Cours, 1979, pp. 328-329.

117. The balancing of interests test has been adopted in the past by American courts. See Timberlane Lumber Co. v. Bank of America, 549 F. 2d 597 (8th Cir. 1976) and Mannington Mills Inc. v. Congoleum Corp., 595 F. 2d 1287 (3rd Cir. 1979).

cies by diplomatic means, thereby removing the potential for discord.[118] Indeed if all like-minded countries agreed on the course to be followed with regard to export control for instance, there would be no need for any one of them to try to apply its legislation in an extraterritorial manner, since the end result-would be the same.

Still another solution was advanced, that of the establishment of an arbitral tribunal to hear evidence and settle disputes. This could be done either in a multilateral way through the GATT process or bilaterally between Canada and the United States as proposed by a joint panel of the Bar Associations of both countries.[119]

Then some authors proposed that the most effective and appropriate way to settle and even prevent disputes over extraterritoriality would be for the international community to reach common ground by negotiating a treaty. Professor Hermann even suggested that this could be achieved in three steps. First, the most concerned and affected nations such as Australia, Britain, Canada and the United States would meet and lay down the basic procedural and substantive rules amongst themselves. This process would then be widened to include the full membership of the European community.

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118. Supra, note 68, p. 104.

119. See M. LEIGH, supra, note 78, p. 57.

Finally, a complete agreement package could be presented for all countries to sign.[120]

All these propositions have in common a determination to avoid a head to head confrontation between nations with conflicting jurisdictional claims. Although interesting and imaginative on paper, they all are unrealistic to a certain degree. For instance it seems highly improbable that an effort to integrate the export control policies of all the nations of the western alliance would meet with the level of success required to prevent disagreements over conflicting exercises of jurisdiction. The reason is plain: this is a highly contentious issue, not so much with regard to national security control since a general consensus exists among the allies as to what policies should be pursued, but rather where foreign policy issues are concerned. Thus, it is unlikely that all states will be in complete agreement over the course to be followed every time a boycott or embargo is envisaged. Moreover, we do not see how governments could conceivably determine and agree in advance on how they would react to particular situations when the appropriate response usually depends on a variety of legal, economic and political factors which can change constantly.

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120. Supra, note 74, p. 69.

As far as the arbitral tribunal is concerned, its inherent weakness lies in the fact that as a new instrument, it would have to be created by an agreement between the concerned countries. The prospects for such a solution seem to us highly dubious since this would involve some form of relinquishing of the sovereign prerogative to exercise jurisdiction by all the nations involved, a proposition that the United States is certain to dislike. Moreover, the chances for such an outcome, slim as they are in a bilateral context, would probably evaporate if the whole international community was involved such as would be the case within the GATT framework. For the same reasons, we doubt that an international agreement laying down commonly-agreed rules for the settlement of disputes will ever be reached.

The basic problem of the ad hoc process of balancing the interests of the disputing countries is that this idea was proposed in the context of court-ordered submission of documents in foreign jurisdictions. In this context, its success ultimately depends on the capacity of national courts to weigh all the relevant factors in a fair, equitable and non-partisan way. However, where export control issues are concerned, only governments are involved in making decisions and it is doubtful if governmental authorities of the nations involved will agree to follow a prescribed list of factors to be weighed when deciding on a

case. Moreover, there is no guarantee that the criteria considered as important by the authorities of one nation will be the same as those in another jurisdiction, and in such matters, uniformity is crucial.

Despite these shortcomings, one or a combination of these solutions may yet be adopted in the foreseeable future. In the meantime, we are left to ponder the basic issue that a country may well have national interests that it can legally assert on foreign territory, and the affected State may in turn decide that such exercise of jurisdiction is against its vital interests and thus block its execution, again legally according to many. In this context, where no consensus exists as to the permissibility of extraterritorial gestures and as to the rules to be followed to settle disputes, it follows that any solution to such problems can only come from mutual cooperation and comity between the involved parties.

What this means essentially is that a pragmatic approach must be followed. For instance before a foreign State may decide to apply its export control legislation in Canada, discussions should be held between the two countries to determine if their respective policies and interests on this case cannot be reconciled and if a compromise may be

achieved.[121] If so, then Canada may decide to follow the course intended by the foreign State, thereby circumventing the need for that country to act unilaterally on Canadian soil and preserving the nation's sovereignty. If a compromise is not possible and no agreement on a common purpose can be reached, the State proposing to apply its legislation extraterritorially should decline to do so, since this would only complicate matters and history has shown that the ensuing disputes are always blown out of proportion and are eventually settled politically anyway, the intended results not being achieved most of the time. Should the foreign State decide to proceed with the assertion of its jurisdiction, Canada should defend its sovereignty and independence by using whatever legal and administrative means at its disposal to prevent the implementation of the foreign order. It is submitted that only such dissuasion may in the end convince proponents of the abusive use of

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121. A framework for arriving at a common understanding of the proper way to handle issues of extraterritoriality was set up thirty-one years ago, when Canadian Prime Minister Diefenbaker and U.S. President Eisenhower issued a Joint Statement on Export Policies, dated July 9, 1958. This Statement recognized that the export policies and laws of the two countries may not always be in complete harmony and called for "full consultation between the two governments with a view to finding through appropriate procedures satisfactory solutions to concrete problems as they arise". Such discussions take place annually. See PRIVY COUNCIL OF CANADA, supra, note 66, p. 320.

extraterritoriality to relinquish this option.

Whatever formula is eventually adopted in a given case, the very fact that we are faced with the issue of extraterritoriality is testimony to the reality that sovereign power, in spite of all the lofty principles of international law, is not equally distributed. If we lived in a world where all nations were equal, such problems would not arise as no one country would feel entitled to tell the others what to do. But to employ an Orwellian phrase, some nations are surely more equal, and sovereign, than others.

Conclusion

It was Lenin who said: "The West will sell us the rope with which we shall hang them", implying that Canada and its allies would be naive enough to provide the U.S.S.R. with the means to ensure its ultimate victory. The West has been trying very hard for the past half-century to prove this prediction wrong and we have described in this chapter the extensive efforts made to control the flow of technology to the Warsaw Pact. We saw that the success of this mission depends as much on international cooperation in COCOM as on national initiatives in individual member countries. Canada, for one, has put up a complex licensing system designed to allow the government to determine what can be exported and

...rocedure, as we noted, rests on ...Control List of sensitive tech- ...ist of prohibited recipients and ...it government policy. We also ...it feature of the Canadian export ... Canadian law, far from being the ...tor, will often apply concurrently ...n and this has led to considerable ...an business sector as well as to a ... the two governments.

... the introductory remarks, our dis- ...trol deliberately presented a clear- ...k and white picture of a world divided ...he West against the East; us vs. them. ... to better describe the mechanisms in- ... not accurately reflect the reality that ... from being an end in itself, is a simple ...ot to changing circumstances. It can be ... zealously depending on the prevailing ... the temperature of the cold war.

...rovements in the East-West dialogue have ...o witness the relaxation of export con- ...eased sharing of ideas and technology. ...of the fundamental changes at the core of ...rbachev's policies of Perestroika (eco- ...snost (increased freedom of ...ities for increased economic ...en the U.S.S.R. and the West ...rious western central banks ...viet Union to assist in its ... joint venture agreements ...or increased trade.123 ... the People's Republic of ...ty of the export control ...ne military threat level. ...R.C. has not appeared on ... Canada and the United ...rolled, but to a lesser ... is testimony to the ... and western States, ... recent agreement with

... Soviet Loans", The ... 1988, p. 12-A. See ...mmission Chief", The ... 1988, p. 7-A.

... Hotel Complex", The ... 1988, p. 5-A. See ... Auto Venture", The ... 1988, p. 5-A. See ...ish Hotel Venture ...ember 6, 1988, p. ...et Trade Continues ...e, Special Adver- ... pp. 3 and 13.

the United States clearing the way for the launch on Chinese Long March 3 rockets of American satellites.[124]

This highlights the fact that export licensing procedures are intrinsically an insurance policy, ready to be employed to ensure that truly damaging technology will not be shared with the adversary. They cannot guarantee peace and security; only strong political leadership can ever achieve that.

Whatever happens to this closer relationship between East and West, export controls are certain to be used in other foreign policy situations such as boycotts mandated by the United Nations and embargoes of human rights violators and of pariah regimes generally. Moreover, one can still foresee the possibility of their utilization in instances of short supplies of vital natural resources such as would be the case in an oil crisis for example.

From an economic point of view, it is a truism that the lower the controls are, the better the export performance. It is thus easy to perceive the imperative for lowering export controls, within reasonable limits, and this is part of the often heard argument in favour of frequent

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124. See "U.S. May Allow Satellite Exports to Aid Chinese", The Globe and Mail, September 10, 1988, p. B-3. See also C. COVAULT, "China Agrees to Limit Marketing of Long March Booster in U.S.", AW&ST, January 2, 1989, p. 37.

revisions of the lists of controlled items. Another reason, however, may be advanced to justify the relaxation of such restrictions on trade in high technology aerospace goods: it is necessary to fulfill the promise of space as the province of all mankind. The fiction, mentioned and illustrated in grandiose terms in Article I of the Outer Space Treaty as well as in countless publications, is that space is to be used with participation, and for the benefit, of all countries, regardless of their level of economic or technological advancement. The fact is that only those States with powerful economies, and increasingly their private corporations, have been able to afford the often staggering costs necessary to reap benefits from space activities. It is submitted that space unites all mankind and that increased transfers of technology, of course bearing in mind security issues, coupled with better international cooperation in various space ventures can only lead to greater integration of the space policies of all nations, thereby promoting greater international stability and world peace.

However they are applied, licensing procedures will always be a significant part of the way aerospace firms do business. After all, it is this industry, perhaps more than any other by virtue of the sophisticated and often military related technology involved, which is primarily affected by restrictions on the sale of sensitive civilian and defense

goods. Is the aerospace community satisfied with the export control process and, more generally, with the government's intervention in its export trade? Are the policies adequate? Are improvements necessary? These are the basic questions we shall try to answer in the following pages.

CHAPTER THREE: THE EFFECTIVENESS OF EXPORT PROMOTION AND EXPORT CONTROL PROGRAMS: IN SEARCH OF AN EQUILIBRIUM

Introduction

We have examined in the first two chapters the policies and mechanisms devoted to export promotion and export control in Canada. We saw that the government will do its utmost to improve foreign trade through a wide variety of facilities and services, while simultaneously exercising control over these sales through the licensing procedure, even vetoing some of them. It is universally recognized that increased export sales mean a better utilization of our industrial capacity, more revenues and therefore more jobs for Canadian workers as well as an improved capacity for Canadian businesses to expand and innovate. In other words, exports are vital to our economic growth and well-being. On the other hand, the very same goods we try so hard to peddle abroad contain, in some instances, inherent strategic or military capabilities that would constitute a genuine security threat if they should fall into the wrong hands, thereby creating the need for a careful review procedure.

The fact is that these two seemingly incompatible

priorities, commerce and security, are not necessarily mutually exclusive and remain in a state of uneasy "co-habitation". Indeed, if we adopt a wide interpretation of the oft-mentioned concept of national security, one that would include any contribution to our collective well-being, it becomes obvious that as a country Canada needs both a strong economy and a strong defence, not only to survive but to grow and compete. There is a synergy between these two factors, since each contributes to the success of the other. Inversely, if one should fail, the other would be endangered.

It is at this crossroads of convergent national goals that we appropriately find the aerospace industry. As the darling of successive governments committed to expanding our foreign trade in high-technology goods, it is intimately familiar with the various export promotion facilities available. However, by virtue of the sophisticated and sensitive nature of the products involved, the industry is also acutely aware of the government procedures devised to screen out undesirable transactions.

For the system to function properly, not only for the good of the aerospace community but for Canadian industry in general, a compromise must be sought, an equilibrium must be achieved, between these two priorities. This country must answer for itself these questions: to what

extent can it promote exports without jeopardizing national security? To what degree can it restrict exports without unduly affecting domestic industry? These are the questions that this thesis set out to answer and that is what we will endeavour to do in this last chapter.

Focussing on the aerospace industry as a microcosm of the Canadian business sector, we will submit proposals for national priorities and then try to find the appropriate combination of export control and promotion programs to match them. Our purpose essentially will be to assess whether or not the various facilities and mechanisms involved are appropriate for aerospace firms. We will examine export promotion and export control policies separately, in both cases offering comments and constructive criticism on what is adequate and what should be improved.

As in the past two chapters, traditional sources of information have been used but for the first time a less orthodox method of gathering information has been employed: the survey. Because this thesis directly addresses the question of whether government policies are appropriate for the aerospace industry, we had to go straight to the companies involved, as no public document would provide an answer. We believe this is an important issue and indeed many firms have expressed an interest in the results of this study, stating that few had attempted to deal with this

question before.

The methodology adopted for this survey was very conventional. We drafted a questionnaire loaded with queries about both export promotion and export control policies as perceived through practical experience. We asked the respondents to rate the different facilities and mechanisms used by them in the past and to comment on ways to improve the system.[1] Then the survey was sent to all the members of the Aerospace Industries Association of Canada (AIAC), a trade organization comprising at that time about 150 companies. In all, thirty-three firms sent back a completed questionnaire, for a response rate of 22%, well above the usual 10 to 15% required to claim valid results.[2] Many other companies wrote back to say that they were not engaged in the export business and therefore were not qualified to answer any questions. Only one aerospace firm, Pratt & Whitney, flatly refused to take part in the survey claiming that the information required was confidential in nature and not suitable for public knowledge.

The companies which did respond represented a broad

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1. The reader can find a copy of this questionnaire in Annex A.

2. For a list of all the companies which answered the survey, see Annex B.

cross-section of the industry in Canada. Most were based in Ontario and Québec, the acknowledged centres of gravity for the aerospace community in Canada, and their products covered everything from communication systems and avionics to aircraft parts, satellites and engineering services. Some firms were quite big with sales volumes above twenty million dollars a year, but most were small- and medium-sized. Despite their differences, they all shared one important characteristic: a desire to succeed in the export business. Their participation was most appreciated and the results of the survey are exposed in the following pages.

The analysis and proposals presented in this chapter have all the unavoidable shortcomings of a first attempt. In order to obtain a reasonable response rate from Canadian aerospace firms, we had to keep the questionnaire as short and easy to answer as possible and ask only general questions, a format that does not lend itself well to detailed answers on complex topics. Moreover, as this thesis addresses a specific part, however important, of the every day life of a particular industry, very little published material could be gathered to support our findings. However, we believe that our results are valid and speak eloquently about the relationship between government and industry in our society. These firms are used to listening to officials outlining new policies and programs designed to

help them; this survey represented an opportunity for them to talk back and as we go along some of their comments will be shared with the reader.

Section 1. Priorities for Canada

Before we set out to verify whether or not the government's efforts at export promotion and export control are appropriate for the aerospace industry, it is necessary to establish the basic criteria which will guide our analysis and determine our verdict. This will be done by outlining the goals which we feel should be part of the national agenda.

We have stated many times that the aerospace industry is very important to Canada, an integral part of its vibrant business sector. It is a mainstay of this country's high-technology industrial base, a source of jobs, revenue and prestige. It is partly responsible for giving Canada the means to defend itself and its allies, and to participate in collaborative space projects such as the International Space Station led by the United States. Simply put it is a guarantee of Canada's continued prosperity and security and therefore, we submit that no effort should be spared by the government to provide a supportive regulatory environment conducive to the industry's develop-

ment and, more specifically, to foster an increase in its export trade. Export promotion facilities should thus be geared toward a maximum positive impact on these firms' foreign sales; that is priority number one.

As far as export control is concerned, everybody, including the aerospace industry, agrees that some sort of review and licensing process is required to ensure our national security. Theoretically speaking, if no control was exercised, Canadian industry would surely register higher sales and expand into new, and as yet forbidden, markets. That is irrelevant in the real world and Canada, like its allies in the western hemisphere, must do its best to prevent potential adversaries from gaining access to sensitive goods and technology.

On the other hand, Canada has historically been in a different position than the United States where export control was involved. The U.S. has traditionally considered itself the leader in the effort to restrict exports of strategic or military goods to the Soviet bloc. Consequently, it has maintained a tight grip on COCOM, and its own laws and regulations, which are regularly applied extraterritorially, have consistently been more restrictive than those of its allies. If the U.S. insists on carrying the

torch, CDN has always had more liberal policy.[3] Accordingly, we submit that Canada, in implementing its own policy, should simply honour its COCOM commitments and maintain controls in line with what the other partners are doing. The goal should be to do only what is necessary to guarantee our national security as well as our ability to act effectively in foreign policy situations, no more and no less. Canada does not need to set a standard for others to follow and overly restrictive controls could stifle the industry's capacity to compete on the world scene. On the other hand, an excessively permissive procedure would surely lead to security breaches of major proportions and Canada could conceivably become a conduit of sophisticated technology to the Warsaw Pact. Therefore, a balance must be sought and the yardstick should be the minimum required in line with what the other COCOM partners are doing.

It follows that the premise which underlies the following assessment of the government's policies is twofold. Firstly, the export promotion facilities must be effective enough to satisfy the needs of the aerospace industry and optimize its foreign sales. Secondly, the export control mechanism, as far as it is necessary to

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3. See PRIVY COUNCIL OF CANADA, "Foreign Ownership and the Structure of Canadian Industry", 1968, p. 319.

fulfill government policies, must be effective, but not too much. This means that emphasis should be placed on efficiently restricting only the export of those items that represent a genuine security threat or those which would be involved in the fulfillment of foreign policy initiatives. Now let us look at the mechanisms and procedures involved and see if the reality meets the challenge. We will start with the government's export promotion programs and will later deal with export control initiatives.

Section 2. An Assessment of Export Promotion Facilities

In the first chapter, we examined the various federal and provincial programs set up to increase the foreign sales of Canadian businesses. We saw that some were intended to facilitate exports by offering financing or insurance services, while others were geared toward helping firms break into new markets by providing counselling and financial assistance for trade missions, joint ventures and the like. Aerospace companies are frequent and enthusiastic users of these facilities and it is now time to see what they think of them. As stated earlier, the survey we conducted with the aerospace industry will be a major factor in our analysis. However, since these companies are part of the larger Canadian business community, other sources of

information will also be tapped and the conclusions reached will also apply to the aerospace industry.

What follows is not an assessment of the economic and financial costs of these export promotion facilities, or of their profitability; rather, it is a study of their suitability for the aerospace community. This will be done in two parts. First, we will consider the general impressions of the aerospace industry concerning the facilities available to its members, then we will offer detailed comments on specific promotion programs.

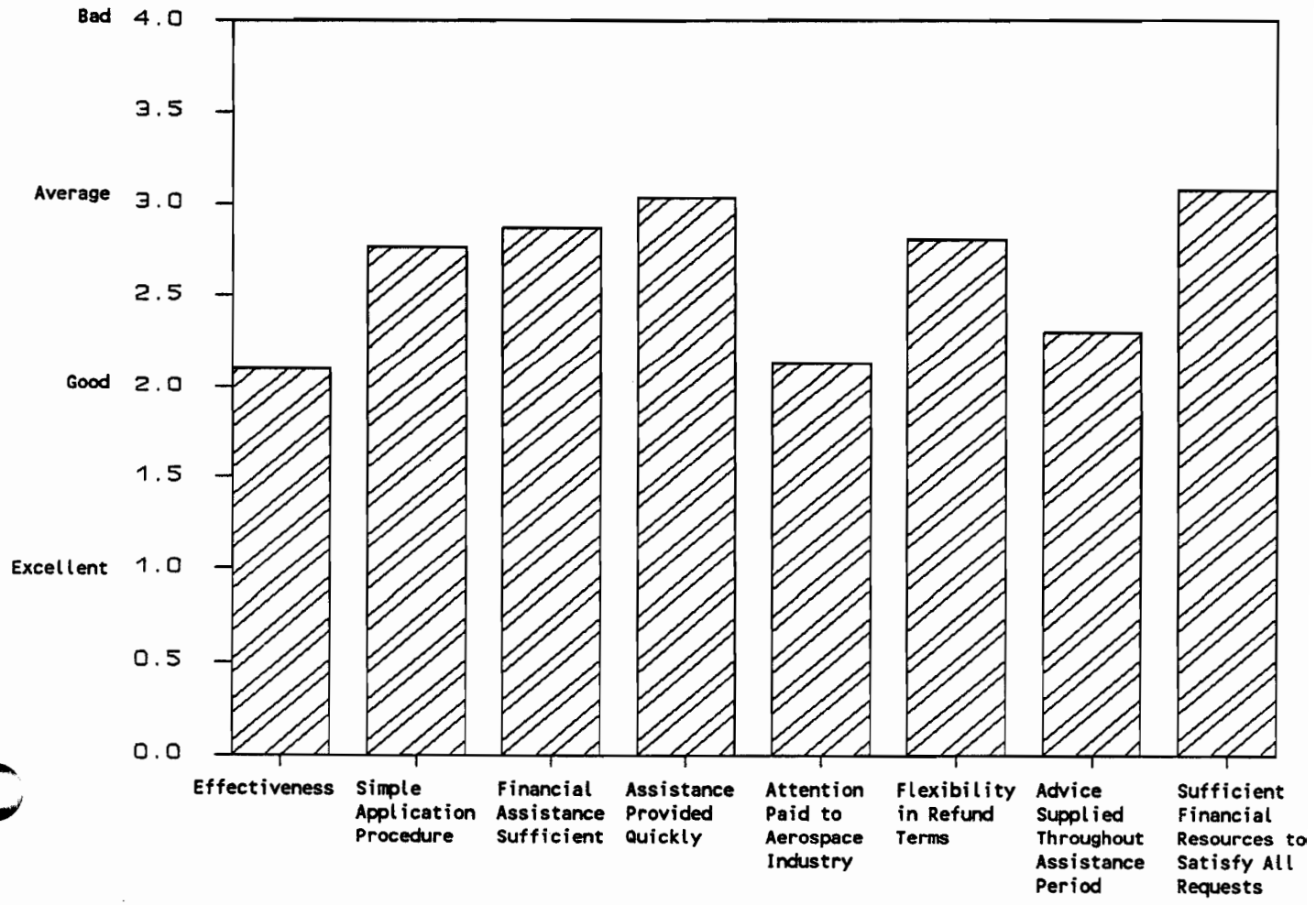
Sub-Section 1. General Comments on Export Promotion Services

The basic challenge for public policy-makers is to understand the aerospace industry's needs relative to export involvement and to meet them effectively with the appropriate assistance programs. This means providing the right services to the right firms at the right time. The various facilities devised for this purpose have existed for the past two decades but it is only recently that efforts have been made to measure their effectiveness. That is why the opinion of the officials running the aerospace companies is so important and why their participation in our survey is so valuable. These people were not asked to rate individual programs but rather to express their opinion in general

terms on whether the services are adequate and improvements are required. What this lacks in specificity it makes up for in cohesiveness and sense of purpose. Respondents were asked to answer questions on the application process, the amount of help provided and so on not by a simple vote of yes or no, but rather by rating the government's performance from "excellent" to "bad". The results, translated into numbers from one to four, can be found in Table I and will be useful for later discussion.

TABLE I

ASSESSMENT OF EXPORT PROMOTION SERVICES BY AEROSPACE FIRMS



As we can plainly see, there is a general level of satisfaction within the aerospace industry with regard to the government's export promotion efforts. For each question, the score ranges from average to good, avoiding the extremes. Of course, that is only an overview of the situation and a more detailed discussion is required on certain topics of concern to the industry.

On the Application Procedure: Before a company may receive any assistance from the government, it must fulfill the eligibility requirements of the chosen program, fill out application forms and submit all sorts of information about its products, projected activities, potential customers and markets, etc. It is then of obvious importance that the application procedure be kept as simple and expeditious as possible to minimize the energy, time and overhead costs required to satisfy all the conditions. However, as we can see, the industry is not particularly impressed with the government's performance in this respect, handing out average scores of 2.76 for the simplicity of the application procedure itself, and 3.03 for the celerity with which the authorities provided help. While this is definitely not a bad rating, it does not spell good news for a government which spends enormous sums of money on managing export promotion programs.

A number of firms in their answers to our survey

expressed disappointment on this point. Both Indal Technologies Inc. and Airtech Canada wrote that the application process was very long and suffered many unnecessary delays. To quote the latter, "For the relatively small amount of money requested and the smaller amount received, it is questionable whether the amount of time spent was justified in our case". Mr. Byron Cavadias, President of CAE Electronics Ltd., was so incensed about this that he publicly decried the decentralized, complicated, slow and cumbersome export promotion procedure administered by the Canadian government. To correct the situation, he suggests a formalized fast track central authority so that companies may have ready access to all the assistance facilities they require.[4]

The problem seems compounded for small-sized businesses. Indeed, three respondents, ADGA Group, Gehring Research Corp. and Bolriet Technologies Inc., have expressed the feeling that because they do not have the vast human and financial resources of their larger competitors, it is more difficult for them to deal with complex and time-consuming application procedures. That is ironic since such programs as PEMD at the federal level and APEX at the provincial

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4. See B. CAVADIAS, "A Fast Track for High-Tech Exports", Aerospace Canada, July-August 1987, p. 13.

level are intended precisely to cater to small firms that are just starting out in the export business. Anything less than easy access for these companies would indeed be self-defeating for the government.

On the Assistance Provided: When a firm applies for assistance under any of the government programs, it is usually because it has identified new potential customers or promising new markets. In the case of financing or insurance services, a transaction with a foreign purchaser may even have been concluded. Of course, these companies count on sufficient government assistance to help them achieve their objectives and the alternative can mean the loss of sales and the squandering of precious opportunities. The question may then be asked: is the government doing enough to promote the industry's exports? The respondents to our survey answered by giving the government 2.87 and 3.07 scores, which is very close to average on our scale. This suggests that although he firms can get by on what financial assistance is available, there is not enough to allow them to fully pursue every promising lead, or get a favorable answer on each request for help. This of course is as much a commentary on the tight budget constraints of the government as it is on the vitality of an aerospace industry constantly looking for new customers and new markets.

Quite a few companies in their answer to our questionnaire complained about the lack of sufficient resources, among them Microtel Ltd., Heli-Fab Ltd. and Litton Systems Canada Ltd. The avionics firm Raytheon Canada Ltd. was even more specific, stating that the assistance offered by Canadian agencies, more specifically the Export Development Corporation, was not adequate to fully compete with the predatory financing practices of the Japanese and French authorities. Finally the de Havilland Aircraft Company of Canada, an important aircraft manufacturer, explained that part of the reason for the shortage of funds was that the aerospace industry has unusually high requirements because of airlines' fleet re-equipment programs.

Over the past few years, a debate has been raging within the aerospace industry on the most suitable way to allocate the limited resources that are available. Larger firms such as CAE Electronics Ltd. of Montreal have been spear-heading the argument that providing assistance to small companies inexperienced in the export business is basically a waste of money and that only the established exporters are suited to use the limited funds to their maximum potential. They hold that Canadian businesses face extremely tough competition from abroad and that this is no time to try to foster the growth of smaller contenders at

the expense of companies with proven track records.[5] This of course is an argument against competition which, pushed to its logical conclusion, would stifle the growth of start-up companies and ultimately of the aerospace industry in general. Moreover, governments as a matter of public policy will never agree to act as reverse Peter Pans, taking away from the less affluent to give to the well-off. To our mind, the basic eligibility criteria should remain export potential and need rather than previous experience.

Another item of concern to the industry is the relative flexibility in the refund terms of promotion programs. Some of them like the federal government's PEMD and APEX at the provincial level provide for reimbursement by the company of the funds used once the activity is terminated, generally subject to the condition that export sales did indeed occur. Because the sums involved may be quite large, depending on the circumstances, such issues as the period of repayment, the proportion that must be reimbursed and the interest rate, if any, take on major importance. On that point, the industry again gave the government a noncommittal 2.80 rating, signaling that they

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5. Id. See also B. RIDEN, "Defence Contracting Irritants", Aerospace and Defence Technology, March-April 1988, p. 15. See also T.J. McGUIGAN, "Canada Needs an Aerospace Policy", Aerospace and Defence Technology, January-February, 1988, p. 15.

would appreciate a little more leniency and understanding on the part of the authorities.

Since export promotion programs usually offer a variety of different services depending on the circumstances, it is often difficult for small and inexperienced companies to know if they are eligible for help, what form the assistance will take, what paperwork to fill out and what the terms and conditions are. Because these firms will often be asked to contribute some of their own money to a particular project, they are most interested in knowing how they can optimize the efficiency of the assistance provided and get a maximum return on their investment, either in the form of sales or business contacts. It is then vital that the government department or agency responsible for the program be available to supply all the necessary information to guide the company into what is often a new and worrisome endeavour. This advice is important not only at the outset of the firm's involvement in export promotion but also throughout the assistance period and, in this respect, the aerospace industry appears fairly satisfied with the government's performance, giving it a 2.30 score.

On the Complementarity Between the Various Promotion Facilities: We now propose to verify if the available government programs complement one another or if indeed a

certain amount of overlapping occurs. There are many ways of looking at this issue. On one hand, it can be argued that duplication means more resources devoted to a certain type of promotion activity, but on the other, this leads to the inescapable result that resources are wasted and that less funds are allotted for other purposes. Over the years, many attempts have been made by governments to reorganize their existing services to avoid precisely such a situation.

Are we to conclude that all these efforts have led to a situation where no duplication takes place between the various facilities either at the federal or provincial level or between the two? At first glance, the answer seems to be no. For instance, both the PEMD program and the Canadian International Development Agency provide similar export marketing services, such as helping Canadian businessmen travel to foreign markets to assess potential opportunities. As far as the provincial government is concerned, the situation is not much different. Indeed, both the Ministère du Commerce Extérieur et du Développement Technologique and the Société de Développement Industriel du Québec (SDI) offer services aimed at the creation of consortia, participation in trade missions and the conduct of market studies. This duplication occurs despite the efforts made in April 1988 to modify the APEX Program to better take into account the facilities offered by the SDI.

Finally, some overlapping does take place between the federal and provincial programs. They are so similar in fact, that we are left to wonder whether the Quebec government made a conscious effort to emulate the initiatives of its federal counterpart. For instance, both the Export Development Corporation and the SDI provide financing and guarantees to facilitate foreign sales, the only basic difference being that the EDC is also involved in insurance services. Moreover, it is plain to see that the various facilities offered by the Ministère du Commerce Extérieur et du Développement Technologique carry a striking resemblance to those of the federal PEMD Program since both are involved in trade fairs, trade missions, project bidding and the establishment of consortia. This amounts to almost a mirror image of federal promotion efforts.

It can be argued, however, that this whole issue of complementarity is to a certain extent really a matter of definition. Indeed, can we really hold that the services offered by CIDA to help Canadian industry participate in the development of the Third World by supplying goods and technology are duplicating those of the PEMD program when both are intended for different foreign markets and, in many cases, different domestic client firms? As stated in Chapter One, the purpose of the Industrial Development Program of CIDA is to assist less fortunate countries and

not really to promote exports of Canadian businesses, so in this respect, CIDA becomes an instrument of foreign policy and should perhaps not be placed in the same category with the same export promotion facilities.

This question of the complementarity between the various services available begs another: instead of having many government agencies involved in export promotion, why not concentrate all existing facilities into one department with overall responsibility for both financing and marketing assistance? As it stands now, many different entities are entrusted with this duty. At the federal level, we find the Export Development Corporation in charge of providing financing, insurance and guarantee services and CIDA with its tied-aid and Industrial Cooperation Programs. Moreover, the Canadian Commercial Corporation is heavily involved in helping Canadian firms bid on foreign projects and the PEMD Program is administered jointly by the Department of External Affairs (DEA) and the newly created Department of Industry, Science and Technology (DIST). According to the Canadian Exporters Association, this creates problems between the two ministries because apparently DIST does not have a clear idea of its mandate and is not sure if it should work on providing sectoral knowledge on regional expansion or trade promotion. Even a Memorandum of Understanding drafted to clarify relations between the depart-

ments did not succeed in settling difference.[6]

As far as the Quebec government is concerned, we already stated that the APEX Program is overseen by the Ministère du Commerce Extérieur et du Développement Technologique, while the Société du Développement Industriel du Québec also assists exporters with financing packages and marketing advice.

In its answer to our survey, the firm Honeywell Limited complained about this state of affairs. Claiming that the presence and interaction of many players led to confusion about the proper role of each and to an inefficient use of available funds, it advocated the integration of existing promotion services under a single government office.

This concludes our general discussion on export promotion programs. We saw that there was a general level of satisfaction regarding the government's efforts in this regard, as evidenced by the fact that the firms we surveyed reserved their most favorable rating for the effectiveness of promotion services, a 2.10 score. The industry also seemed particularly pleased with the attention accorded by the government to aerospace companies, judging it a 2.13.

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6. See CANADIAN EXPORTERS ASSOCIATION, Minutes of the Export Promotion Government Liaison Committee Hearing, Ottawa, September 30, 1986, p. 2.

MIL Systems Engineering Inc. even went so far as to state that export promotion programs are more geared to support aerospace endeavours than other industries.

Of course, this is good news for the government, but recent events may yet jeopardize these achievements. Last year the Standing Committee on External Affairs and International Trade decried what it considered an alarming trend involving severe cutbacks in the human and financial resources devoted to export promotion.[7] Indeed, although the Department of External Affairs' total budget was estimated to grow by 6% in 1987-88, the funds committed to international trade development actually declined for the second consecutive year by 12.5%. Since 1985, many foreign posts in Rio de Janeiro, Philadelphia, Hamburg and Perth, to name a few, have been closed down. Moreover, the Department plans on eliminating a full 10% of its personnel by 1990. These austerity measures are taking place in an international environment in which Canada's export performance, though generally impressive overall, is in fact in relative decline in most regions of the world except the United States and the Pacific Rim. In the Committee's view,

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7. Minutes of Proceedings and Evidence of the Standing Committee on External Affairs and International Trade, House of Commons, Second Session, 33rd Parliament, 1986-87, pp. 4-6.

adequate funding for official trade promotion activities is vital to Canada's long-term economic prosperity and these services should not be considered an appropriate target for deficit reduction. We fully support these conclusions. Canadian aerospace exporters must be sufficiently supported with accurate, up-to-date economic analyses and market information, on-site expertise, risk spreading programs and competitive financing if they are to capitalize on new commercial opportunities in the face of stiff competition from abroad. If our survey demonstrated that aerospace companies in Canada were generally satisfied with the government's initiatives in this respect, it also shows that some shortcomings need to be addressed: lack of funding, a complicated application procedure, greater flexibility in the refund terms and an end to the overlapping between the various government departments involved. If these flaws were corrected, what was already very satisfactory would undoubtedly become better, to the benefit of all exporters.

Sub-Section 2. Some Comments on Particular Promotion Programs

Having formulated these general comments about export promotion facilities as they apply to the aerospace industry, it is now time to discuss some programs in more

detail. Various voices, from the government, industry or academe, have expressed their opinions and criticisms concerning certain promotion facilities over the last few years, and as a result, we shall consider in the following pages possible improvements to the Export Development Corporation, the PEMD program, as well as the Canadian Commercial Corporation, among others.

A. The Export Development Corporation

As outlined in Chapter One, the EDC offers financing, guarantee and insurance services to its customers in the industrial community. Used by a full 42% of the firms which responded to our survey, the Corporation certainly figures as one of the most useful export promotion tools that the federal government has to offer. In 1983, professors Raynauld, Dufour and Racette went on record as saying that the EDC was very effective in fulfilling the tasks entrusted to it by the government.[8]

A number of problems, however, have been raised

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8. See A. RAYNAULD, J.-M. DUFOUR and D. RACETTE, Government Assistance to Export Financing, Supply and Services Canada, 1983, p. 67. The authors, however, questioned whether the tasks assigned to the Corporation were appropriate, considering the social cost of the assistance provided and the particular challenges facing Canada as a trading nation.

concerning the EDC's operations and the services it provides. It has been asserted that the Corporation needs to offer more export facilities if Canadian firms are to remain competitive on world markets, and that the EDC suffers somewhat in comparison with its counterparts in other countries. Specifically, it has been argued that the insurance coverage offered is lacking since it does not cover such important risks as increases in production costs due to inflation[9] and foreign exchange fluctuations.[10] Moreover, the Canadian Export Association expressed some years ago its opinion that the burden of exposure fees, i.e. the incidental fees borne by the exporters, as well as the lending rate charged by the EDC, should be reduced.[11]

It has also been questioned whether the application procedure is simple and fast enough to allow the Corporation to serve its clients quickly. In the export trade business,

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9. This risk is covered by government sponsored agencies in such countries as France, Italy, Great Britain and Sweden. See Canada's Trade Challenge, Report to the Special Committee on a National Trading Corporation, 1981, p. 57.

10. This risk is insured by government agencies in most industrialized countries except Canada, Australia and the United States. See id.

11. See CANADIAN EXPORTERS ASSOCIATION, "Export Financing", Paper No. 038, March 24, 1983. See also, supra, note 9, p. 58.

time is of the essence and success or failure in a transaction often hinges on the response time of the actors involved. To correct this perceived shortcoming, a number of solutions have been proposed. For instance, the Canadian Export Association recently advocated streamlining the decision-making process for specific financing transactions, and suggested that general approval criteria should be developed by Cabinet to eliminate the requirement for individual approval by every Cabinet member for each transaction.[12] As well, it was argued that the EDC should grant assistance to Canadian exporters on a conditional basis and at a much earlier stage of the process.[13]

Overall, we would certainly agree with the following assessment of the EDC by McDonald Dettwiler, a prominent British Columbia aerospace firm:[14]

> We are very positive about the assistance EDC has given in terms of the export financing, insurance and guarantees that we need in order to compete in the international marketplace. For someone export-

12. See CANADIAN EXPORTERS ASSOCIATION, "Annual Report 1986", p. 14.

13. See ADVISORY COMMITTEE ON AEROSPACE DEVELOPMENT, "Aerospace in Canada: Outlook and Strategy", 1983, p. 4, section 7.

14. See "Les lauréats du prix d'excellence à l'exportation canadienne", Actualités de la SEE, October-November 1987, p. 7.

ing on an ongoing basis, it is extremely important.

We suggest, however, that, in light of the previous comments, serious efforts be made to ensure the continuing evolution of the Export Development Corporation. As a vital export promotion tool of the Canadian government, the EDC should be flexible enough to change with the markets it must cater to.

B. The Program for Export Market Development

The PEMD program is the main export marketing instrument of the Canadian government, providing funds for government- or industry-sponsored activities such as trade visits, trade fairs and the like. It is widely known to the aerospace industry and, indeed, 82% of the firms which responded to our survey claim to have used it in the past.

Like other government export promotion facilities, PEMD was the object of controversy some time ago as a result of the requirement for budget cuts in this era of deficit reduction. Indeed, the funds allocated to this program were cut by some 30% in 1986 and 1987, so that last year actual

outlays were smaller than 1984 and 1985 levels.[15] This makes little sense when one considers the government's own calculations which show that the export sales generated by this program seem to imply a net positive return in terms of tax revenue alone, and that for each dollar the government spends on PEMD, it collects four in taxes.[16] As a result, these cuts have been widely unpopular and have led to calls for a full restoration of allocated funds to normal levels.[17]

Despite its general success, various criticisms have been leveled over the years at the PEMD program. Some have argued that the program is badly administered; that applications are not adequately reviewed and that important delays are often involved.[18] Another complaint, voiced by Memotec Data Inc. in its answer to our questionnaire, is that the record keeping and general reporting procedure undertaken by a beneficiary company vis-à-vis the government

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15. See the Minutes of Proceedings and Evidence of the Standing Committee on External Affairs and International Trade, House of Commons, Second Session, 33rd Parliament, 1986-87, pp. 6-7.

16. Supra, note 12, p. 7.

17. Supra, note 15, p. 7.

18. See CANADIAN EXPORTERS ASSOCIATION, "The Auditor General Evaluates Export Promotion", Paper No. 394, November 1986, pp. 2-3.

constitute a very cumbersome process that does not encourage the pursuit of risky export opportunities. Some firms are in effect saying that any benefit from this program is far outweighed by the problems encountered. This may help explain why the program is used primarily by medium to large-sized firms, a remarkable occurrence since it is generally considered that it is the small companies, with their limited resources and generally low level of export expertise, which stand to benefit the most from such marketing assistance.[19] The question can then be asked whether or not PEMD is adequately fulfilling its mandate.

In this context, it is argued that PEMD should be considered for what it is, a vital export promotion instrument widely used by the industrial community. As such, it should be funded properly and every effort should be made by the government to ensure an effective and flexible application procedure adequate to answer to the needs of all exporters, large or small.

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19. See R. SERINGHAUS, "Promoting Exports: What Role Do Government Programs Play?", Business Quarterly, Summer 1987, p. 60.

C. The Canadian Commercial Corporation

Briefly mentioned in Chapter One in the context of the Defense Development and Production Sharing Arrangements (DD/DPSA), the CCC cannot accurately be described as an export promotion program, although it is a key player in the effort to expand Canada's foreign sales. Basically, the Corporation is an official agency of the Canadian government whose task is to represent domestic exporters in their dealings with foreign governments interested in purchasing Canadian goods and services. As such, the CCC has played a significant role in securing foreign markets for Canadian firms, especially small and medium-sized.

The Corporation was created in 1946 by the legendary C.D. Howe whose aim was both to provide much needed materiel to the Canadian Armed Forces during wartime and to allow Canadian firms to sell more abroad, especially to the United States.[20] In a typical transaction, the CCC will agree to purchase from the Canadian supplier the goods to be exported and will then sell them back to the foreign government acting as purchaser. This is of great help to domestic exporters since foreign government purchasing agents

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20. See J.J. BLAIS, "Canadian Commercial Corporation", Aerospace and Defence Technology, May-June 1988, p. 17.

often feel more comfortable when the full authority of the Canadian government is behind a particular transaction, thus providing an added element of security. Since its creation, the Corporation has mostly been involved in transactions involving foreign government procurement of defense materiel and since many aerospace companies are also involved in defense contracting or sub-contracting, it follows that the aerospace industry is very familiar with the CCC.

It might have been expected that the Corporation would not escape the deficit-cutting ax of the federal government, since almost all export promotion facilities suffered at one time or another from cutbacks. Indeed, while $21 million were appropriated three years ago, that figure fell to $16 million in 1987 and less than $12 million last year. This move has severely hampered the Corporation's ability to effectively assist Canadian exporters.[21]

In another move designed to lower the cost of export promotion, the government decided a few years ago to impose a user fee of 2% on the services of the CCC.[22] This decision was widely criticized by various sectors of Canadian industry on the grounds that such a levy would automatically result in a 2% increase in the price of the

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21. Supra, note 15, p. 5.

22. Supra, note 20.

goods to be exported as manufacturers pass on the surcharge to the customer. Since success or failure in the highly competitive export game usually hinges on a price differential of as little as 1%, this would mean that Canadian suppliers would be put at a significant disadvantage vis-à-vis their foreign competitors. However, the public outcry that followed the user fee eventually produced results, as the levy was rescinded by Trade Minister Pat Carney on December 23, 1987.

Other criticisms leveled at the CCC involved the fact that the Corporation was rather slow in handling applications for assistance due to the cumbersome approval procedure requiring full cabinet assent, and that its activities were concentrated in defense markets, mostly to the United States.[23]

In our opinion, the Canadian Commercial Corporation has already demonstrated its ability to effectively assist domestic firms, including aerospace companies, in the pursuit of export opportunities. Of course, its involvement is not required in all cases of export transactions since a significant percentage of contracts do not involve government procurement. However, in those instances where its participation has been necessary, the CCC has shown to be

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23. Id.

particularly helpful. In this context, we recommend that the federal government endow the CCC with the means, financial or otherwise, necessary to carry out its mandate adequately. More specifically, allocated funds should be restored to appropriate levels commensurate with the role the Corporation is asked to play. Also, the application procedure should be streamlined so that the entire approval process becomes more flexible and quicker as well. Since the CCC has been quite helpful in promoting Canada's defense trade, particularly with the United States, we see no reason why it should not get involved in opening up new markets for domestic exporters.

With respect to the user fee issue, we hope that the federal government has learned the very valuable lesson that export promotion services evolve in a very price-sensitive environment where even a small markup can make the difference between success and failure. Such initiatives as the 2% surcharge should always be avoided wherever possible, for the CCC or other facilities.

D. The Trade Commissioners

We have already noted that Canadian trade commissioners posted in foreign embassies and consulates assume an important part of the task of peddling Canadian goods and

services in their home markets. Indeed, as they are closer to the customers and are thus more aware of their requirements, it may be said that they act as the front line for the Canadian assault on foreign markets. The commissioners come back to Canada on occasion to meet with potential exporters at government-sponsored affairs, and the reaction to their services appears to be very positive.[24]

This is not to say there is no room for improvement. The Auditor General recently pointed out that there were no uniform established guidelines for trade officers regarding the type and extent of services to be provided so that there was considerable inconsistency between the services offered at various trade posts abroad.[25]

Moreover, we reported earlier that the Department of External Affairs, for budgetary reasons, decided last year to shut down many foreign trade offices. While it is recognized that only the less active posts were closed, the end result nevertheless remains that access to those markets is reduced and one is left to wonder how many deals concluded as a result of their assistance would have been necessary to cover the costs of each of these operations.

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24. See R. SERINGHAUS, "The Use of Trade Missions in Foreign Market Entry of Industrial Firms", (1987) 2 Industrial Marketing and Purchasing, p. 58.

25. Supra, note 18, p. 1.

There is no doubt that a serious effort should be made to correct these shortcomings, but all in all, these commissioners perform their job very satisfactorily.

Sub-section 3. Conclusion on Export Promotion in Canada

Having concluded our review of export promotion facilities in Canada, our final assessment of the government effort in this important area is pretty straightforward: congratulations on a job well done. Canada could not be the trading nation that it is, standing second in line behind West Germany among OECD nations in terms of dependence on exports as a proportion of Gross Domestic Product,[26] if its export promotion apparatus was not in good working order. This is reflected in the generally appreciative grades awarded by the aerospace firms which responded to our survey as well as by the other sources we have analyzed.

Further evidence of this success is that the British publication Business rated Canada's export promotion effort third in the world, saying that exceptional support was being provided to Canadian companies.[27] The aerospace

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26. See DEPARTMENT OF EXTERNAL AFFAIRS, "Competitiveness and Security: Directions for Canada's International Relations", 1985, p. 18.

27. Supra, note 12, p. 8.

industry, as a leading export-oriented sector, is of course a big client of government-sponsored facilities and that is certainly part of the reason why Canada, while being the seventh largest industrial power in the western world, nevertheless claims the fifth largest aerospace industry in terms of sales. Since a large proportion of these sales are to foreign customers, this suggests that the considerable financial and human resources committed to expanding Canada's foreign markets are bearing fruit.

As the preceding sub-sections indicate, however, a significant amount of work remains to be done in order to transform the very good into excellent. We noted that, generally speaking, promotion programs could benefit from more flexibility in refund terms, simpler application procedures and greater complementarity. It will have been noted, however, that the main issue, and the most frequent complaint, is that insufficient resources have been committed by the government to export promotion. There is a lot of talk in this thesis about conflicting priorities, and this is another example where two government objectives, trade expansion and deficit reduction, have been known to clash. This has been evident everywhere, as the already-mentioned cutbacks in PEMD, the number of trade commissioners and the overall resources devoted to export promotion demonstrate.

The Minister for International Trade, the Hon. John Crosbie, agrees. He recently noted that even if the newly created World Market Trade Development Program brings the total federal allocations for trade promotion, not counting PEMD, to $120 million a year (an increase of 11%), that was still not enough considering the intensity and variety of the challenges faced on all fronts by Canadian companies.[28] A senior trade official even noted that $100 million is about what a major company as Colgate-Palmolive spends each year to advertise its products on television.[29] That says it all.

We readily recognize that deficit reduction is a task which should be accorded top priority by the government, because as this country sinks deeper and deeper into debt, its ability to effectively manage its own economic future is increasingly cast into doubt. Nevertheless, we believe that export promotion should not be the target of continuous and rather severe cutbacks, and the reason is simple: Canada, given its small domestic market, simply must export and existing facilities have shown to be useful in the pursuit of this goal, generating in some cases more

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28. See J. KOHUT, "Ottawa to Add $57 Million to Trade Promotion Budget", The Globe and Mail, September 30, 1988, p. B-8.

29. Id.

revenue, dollar for dollar, than expenditures. It is thus profitable not only to export, but to assist in the effort to export. Consequently, we strongly recommend that all necessary steps be taken to bring actual outlays for export promotion closer to the needs of aerospace firms, the goal being, of course, the penetration of new markets.

It will be noted that however considerable the government effort may be, it should never be considered as a panacea for the trade challenges faced by Canadian firms. It is true that other factors, including worldwide economic health and demand for Canadian products and services, as well as the relationship between Canadian currency rates and those of other trading nations, do play a significant role in determining the success or failure of the drive to export. Similarly, the only true guarantee of a company's success in the export game is the quality of its management and its product, and the attractiveness of its price.

This being said, government does indeed have a significant role to play, to be described appropriately as that of "facilitator". While it cannot ensure that a particular type of merchandise will be available for export, it can certainly help to make the foreign sale happen if the product does indeed exist. The export game is thus one characterized by a partnership between industry and government, both sharing the same interest. As we have tried to

show, the performance of the government in this respect has been very satisfactory.

Thus to return to the question we asked at the beginning as to whether or not the export promotion mechanism was effective enough, the answer must be yes. As noted, however, improvements to the system are in order.

Section 3. An Assessment of the Export Control Mechanism

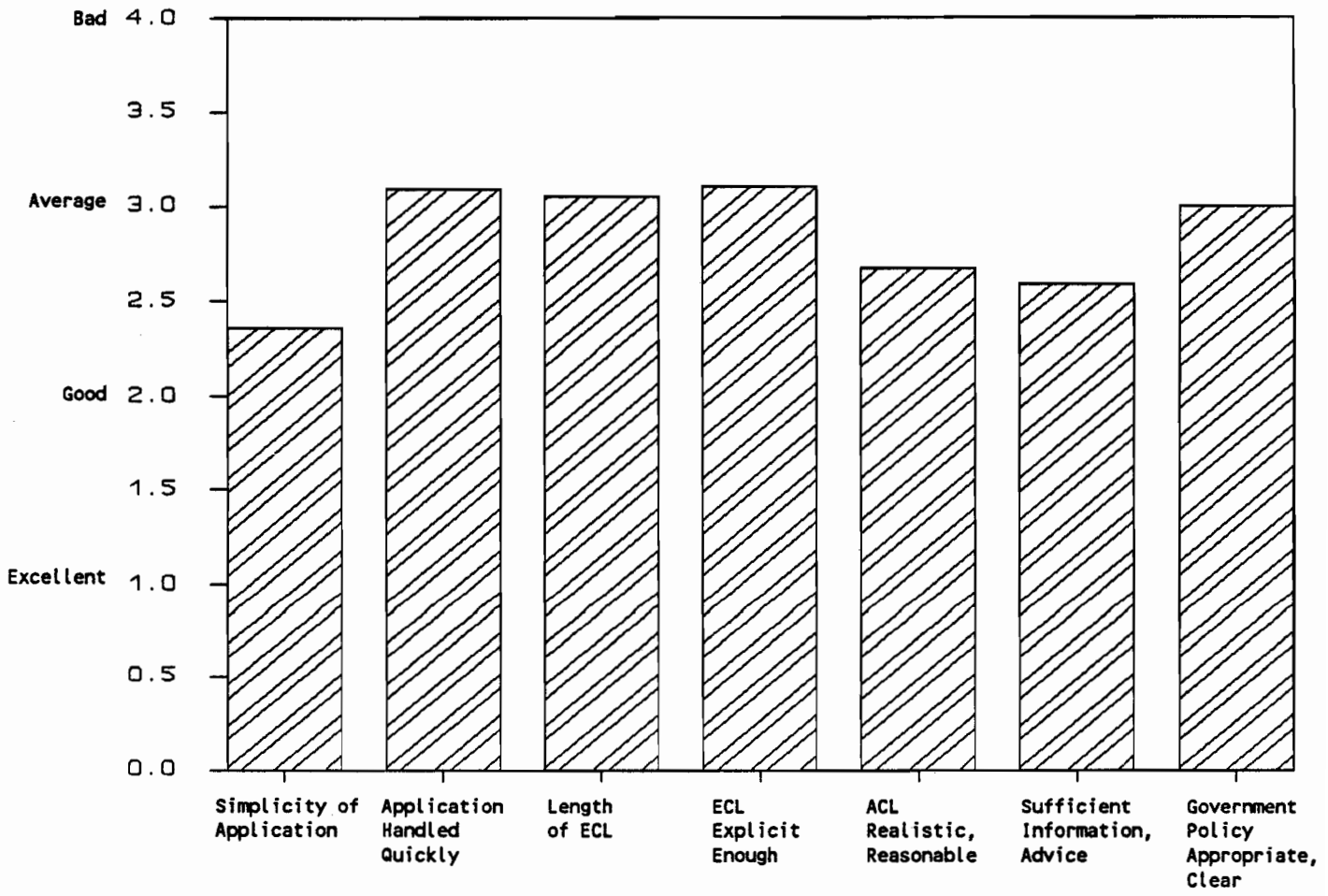
It is now time to consider the second facet of the government's intervention in exports of aerospace technology: export control. Our purpose is to find out if the priorities we suggested for Canada at the outset of this chapter regarding export control are fulfilled by present efforts. It will be recalled that we were of the opinion that the mechanism, based on national and COCOM regulations, ideally had to be effective and efficient without being unduly restrictive, so that only those sales in contravention of an important government objective would be stopped. We shall try, in the following pages, to verify if these goals are satisfied.

As was the case in the preceding section, the results of the survey sent to aerospace firms across Canada will be particularly useful. These companies were asked a variety of questions directly relevant to their everyday

experience with the export control process. Some respondents, either because their products do not figure in the export regulations or because their clients are in the U.S.A. and therefore not subject to controls, would not provide definite answers as they had no experience in this area. The majority of companies, however, had been involved on a more or less frequent basis with the government on this issue and could thus give us an idea of the industry's reaction to the government's initiatives. Their assessment is translated into numbers in Table II and these results will be useful for further discussion.

TABLE II

ASSESSMENT OF THE EXPORT CONTROL MECHANISM BY AEROSPACE FIRMS



Sub-section 1. Efficiency of the Export Control Mechanism

A necessary criterion in the evaluation of the government's success in its export control efforts is the efficiency of the process itself, i.e. the capability of the mechanism to rapidly and adequately collect and process the information from the interested exporters.

A good way to start is to look at the application procedure. A number of questions in the questionnaire dealt with this issue. For example, the firms were asked about the simplicity of the procedure. This refers of course to the permit application and supporting documents which must be submitted to obtain an export license, and on this point the industry gave the government a mark of 2.36, easily the best score, thus indicating general satisfaction. Indeed a quick look at the application form reveals that the information required is quite limited. As mentioned in Chapter Two, only general details about the exporter, the importer, the port of shipping, the country of origin, value and nature of the exported goods and the percentage of American-made components are required. The form is therefore relatively easy to fill out, which is of great help to companies already burdened with excessive paperwork. It allows them to forward their permit requests to the export control section of the Department of External Affairs as early as

possible.

The permit cannot be granted, however, until it is processed by the civil servants at the Department. Their celerity in this process is of course of the utmost importance since the successful conclusion of export transactions often hinges on quick reactions from the regulatory authorities, allowing the exporter to honor its contractual commitments. For the firm, the stakes are high since sales and ultimately market shares hang in the balance. As may be seen in Table II, aerospace firms are not too impressed by the government's performance in this respect, handing it their second to worst score of 3.09, just below average. This could have been expected, given the long delays of up to 9 months in certain cases required to obtain a decision on a permit application from the Department.[30]

The Department tries to explain this situation by pointing out that the export control division is chronically understaffed and is therefore hard pressed to handle its

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30. Of course this is a general assessment which may not be in conformity with the experience of some companies. CAE Electronics Ltd., for instance, is one of the respondent companies which voiced criticism over the long delays it had experienced. However, another firm, Héroux Inc., expressed nothing but satisfaction over the "excellent service" it had been accorded.

usual load of 1800 permit applications every year.[31] We submit, however, that the real problem lies elsewhere, in the limited computerization of the review process.[32] It is no secret that the widespread use of computers considerably shortens the time required to consider a permit application. Canada's commercial partners, notably the United States, have understood this and have moved aggressively in this direction. Indeed, the U.S.A. has been leading the way by proceeding toward increased automation of the review process, an idea which has already cut down the processing time period from sixty days in certain instances to fourteen.[33] Therefore, we submit that better equipment and more manpower are necessary to redress the situation.

Various other ways have been suggested to speed up the process. In its answer to our survey, CAE Electronics

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31. See AEROSPACE INDUSTRIES ASSOCIATION OF CANADA, "Annual Report 1987", 1987, p. 14.

32. This opinion was mentioned by Mr. Brian Smith of the Aerospace Industries Association of Canada, in a conversation with the author in Ottawa on 16th of November 1987.

33. See R. LAWRENCE, "Commerce to Speed Export Licensing", The Journal of Commerce, November 4, 1988, p. 1-A. See also, J. GORDON, "Three Agencies Will Cooperate to Cut Export License Delays", AW&ST, May 6, 1985, p. 106.

suggested that the Department of External Affairs train and deputize an officer in large exporting companies to take care of routine transactions on the spot, thus reducing processing time considerably. Another firm, Memotec Data Inc., pointed out that there was a need for an emergency permit review procedure to accommodate special cases where a particularly competitive situation mandates quick action. Admittedly, the government had made considerable progress with the initiation in 1986 of the so-called "fast track" approach whereby routine and problem-free applications are dealt with first on a priority basis and the more troublesome ones are set aside for further consideration.[34] Judging however from the answers to our questionnaire, more remains to be done.

Another way of dealing with the question of the efficiency of the application process is by looking at it from the applicant firm's side as it tries to cope with the relevant regulations. When asked whether they could count on the government to provide sufficient and adequate information and advice during the application process, the firms which answered our survey said yes, expressing, with a mark

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34. See CANADIAN EXPORTERS ASSOCIATION, "Minutes of the Export Promotion Government Liaison Committee Hearing" Ottawa, March 27, 1986, p. 3 and September 30, 1986, p. 5.

of 2.59, general satisfaction. They were not happy at all, however, with the Export Control List which they must necessarily peruse through to check if the particular product slated for export is indeed subject to export controls. On this point, they gave the Department their worst grade, a 3.10, suggesting that the ECL is not explicit enough to allow for easy reference and identification of controlled products.[35]

It may then be said, by way of conclusion, that the government still has a lot of work to do in order to make the application procedure as smooth and quick as is required under the highly competitive market conditions faced by aerospace firms. Better human and material resources are needed, but one also senses the requirement for a strategy in reviewing the many applications received. The "fast track" approach is certainly a good start, but more can be done in this regard by further liberalizing, for instance, trade with Canada's military allies in COCOM and political allies elsewhere.

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35. This is rather surprising, considering the fact that the ECL is a rather long and detailed document, comprising hundreds of items in 10 broad categories. The descriptions of products contained therein seem adequate at first glance to allow for easy identification.

Sub-section 2. Adequacy of the Government's Export Control Policy

Once the efficiency of the export control working mechanism has been examined, it is certainly legitimate to ask whether the policy behind it is appropriate. In other words, is the export of various products controlled only in those cases where significant national interests are involved? The answer to this question undoubtedly bears some importance since, as we explained earlier, export controls are a potential hindrance to export sales and must be applied in only those instances where it is justified in the pursuit of valid governmental objectives. It is thus our task to determine if the reasons given by the government for restricting the sale of certain goods to certain destinations are acceptable.

In the survey, aerospace firms were asked to evaluate the adequacy of the government's export control policy. This task, however, was not facilitated by the fact that many companies deemed that policy to be quite nebulous. Indeed when asked whether or not the Department's policy was clear and easily understandable, the industry handed a score of 3.00, indicating an average performance.

A. The Area Control List

In Chapter Two we noted that the Department's export control efforts rest mainly on two pillars: the Export Control List and the Area Control List. It will be recalled that the ECL comprises those goods whose export requires a permit for certain specified destinations. For its part, the ACL includes those countries belonging to the Soviet bloc to which all exports must be controlled. As stated by the government, these controls are applied to fulfill four basic objectives: to ensure the national security; to implement international embargo agreements and other foreign policy goals; to preserve and manage natural resources; and to intervene on world markets to influence prices for various commodities.

Is the aerospace industry in agreement with these objectives and the roles of the ACL and the ECL, or does it believe that changes are in order? As far as the Area Control List is concerned, the respondent firms answered the question of whether the ACL was realistic and reasonable with a grade of 2.67, which is satisfactory. It could have been expected that this list would not spark a heated debate since it is made up of Warsaw Pact nations long considered to bear enmical intentions toward Canada and its western allies.

B. Export Controls for Foreign Policy Purposes

Similarly, there is widespread agreement that the government should use export controls in the pursuit of foreign policy objectives when embargoes or other such measures are called for. When asked about this, aerospace companies overwhelmingly supported the government, by a margin of 85% in favor to 15% against. In its answer to our questionnaire, SNC Inc. represented the majority of the industry when it stated that it had to be recognized that the political and economic processes evolve independently in some cases. Therefore, it had to be expected that political considerations would, from time to time, take precedence over purely economic concerns.

Many firms were not ready to give a blank check to the government in this area, however, and felt that the use of export controls for foreign policy purposes had to satisfy certain conditions. Microtel Ltd., for instance, was willing to accept such restrictions as long as the foreign policy goals are valid and important and the restrictions are consistent from case to case. For its part, Leigh Instruments Ltd. was of the opinion that any export controls motivated by foreign policy objectives must not have the effect of promoting the sale of competitive

products from foreign manufacturers. While these concerns are certainly legitimate, they may be hard to satisfy, the former being rather subjective and the latter inevitable. Finally, Unisys Canada Ltd. held that foreign policy controls should only be imposed as short-term tactical moves and not for extended periods of time.

Other companies like AMTEK Management Inc. are not ready to compromise so easily and feel that since politics are the art of the possible, the government should only impose restrictions when the intended objective is achievable. In other words, controls should never be used just to appease special interest groups or to take a stand on a particular issue with no other goal in sight. Finally, there are firms who would simply refuse to allow the government to restrict their foreign transactions for foreign policy reasons, saying that such curbs hurt the economy of both countries and rarely work anyway. According to such companies as Heli-Fab Ltd. and MBB Helicopter Canada Ltd., a pious, "holier-than-thou" attitude is to be avoided.

Without even being asked about the issue of trade with South Africa, some companies mentioned it in their answers to our questionnaire, indicating that it remains a controversial and divisive topic. Spar Aerospace Ltd., for instance, stated its opinion that South Africa was the only African country which did not receive development assistance

from CIDA and that politically motivated sanctions such as those already in place would only result in a deterioration of the South African economy, leading to that country's eventual dependence on foreign aid. According to the company, the government should mind its own business and let other states solve their own problems. Another firm, AMTEK Management Inc., echoed these same sentiments.

It is obvious that when the Department of External Affairs blocks a foreign transaction, a sale is lost by a Canadian manufacturer. While most firms, in the case of controls for foreign policy motives, seem to accept that eventuality, some others, including Heli-Fab Ltd. and Hēroux Inc., maintained that the government should compensate the companies affected for the lost revenue. In effect, they are saying that Canadian industry is the real victim of such trade sanctions and that every effort must be made to minimize their impact. The government, however, does not seem to agree and no compensation is presently considered.

C. Controls on Military and Strategic Goods

It will be recalled from chapter two that there is a significant difference in the way exports of military and strategic, or dual-use, goods are handled. Indeed, while prior to 1986 both categories were given roughly the same

treatment, the Department of External Affairs undertook three years ago to liberalize trade in less sensitive products and this loosened controls on strategic goods.

The result is that today strategic products, those considered to have civilian as well as military potential, are controlled to the Warsaw Pact nations as well as to South Africa. These controls also apply to the sale of military goods, which are also restricted to countries affected by UN sponsored sanctions, countries involved or under the imminent threat of hostilities and nations with records of serious violations of human rights, except if it can be demonstrated that the civilian population will not be adversely affected. Finally, rocket launching systems in particular are restricted to Third World countries to prevent them from delivering nuclear weapons.

Are these trade restrictions appropriate in the context of Canada's national security and foreign policy interests? Let us start with military goods. Insofar as these products should only enhance our security and that of our allies, not that of our enemies, there is no doubt that restrictions on trade with eastern bloc countries should be implemented. As well, since Canada has for decades followed a policy of promoting international peace through contributions to United Nations peacekeeping forces primarily, it is accepted that military goods should not be sent to warring

parties so as not to fuel existing conflicts.[36] For the same reason, this country should take part in UN-sponsored sanctions against pariah regimes and apply controls when required.

As far as the restriction of exports to countries which have demonstrated a willingness to commit or tolerate serious human rights abuses, the matter is not so simple. Before the last policy review, the criterion referred to states whose values were "wholly repugnant to Canadian society". It was a nebulous concept indeed and no country was ever so identified, controls being applied on a case by case basis. Consequently, in 1986 the formula was changed to its present form. It is submitted that serious problems remain in the implementation of this test. First of all, its formulation is not much clearer than the original version, leaving a lot of room for bureaucratic discretion in deciding which nations are affected. Moreover, the list is kept secret, ostensibly not to insult foreign states. The problem is that this only adds to the government's discretion while making the job of exporters more difficult, since it is hard in some cases to divine if the intended destination is prohibited. Finally, it will be especially

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36. An obvious exception to this rule, pointed out by MBB Helicopter Canada Ltd., is where Canada is legally or morally bound to support one of the belligerents.

hard for exporters to successfully invoke the escape clause to the effect that if proof is submitted that the military goods involved will not be used against the civilian population, then the sale will be allowed. It is legitimate to wonder by whom such demonstration is to be made, by the exporter alone or with the help of the purchasing government? If the latter is involved, it may be wondered under what circumstances a government will ever admit to using products of a military nature against its own population. The natural reluctance to do so may well defeat the Canadian government's policy in this respect, except in the most obvious cases where the goods in question are of such type that no conceivable harm may result from their use, or when the purchasing government obviously has other reasons for buying the said goods.

Many Canadian aerospace firms manufacture military as well as purely civilian products, and clearly there is room for military exports from Canada when the intended use is purely defensive. Generally speaking the government's policy in this regard is appropriate, but since these goods are extremely sensitive, every effort must be made to ensure that they do not fall into the wrong hands.

If the industry readily recognizes that military goods must be closely controlled, there is little consensus regarding the sensitive issue of trade in strategic prod-

ucts. Indeed, while some firms accept the inevitability that dual-use goods will be controlled, others question that premise and argue instead for more liberalized trade. Others still would not agree with their product even having military potential. MBB Helicopters Canada Ltd. is a good example of the latter group. The company recently began marketing the BO-105LS helicopter, an unarmed aircraft which took three years to complete. When it tried to sell the helicopter to Iraq in 1985, as reported in the firm's answer to our survey, the export permit was denied by the government, putting the company and its product in a precarious situation. It is clear that these controls may seem unnecessary to some firms, especially when the product in question is clearly intended for civilian use and when important sales are lost as a result.

However one party or the other may feel about this particular issue, there is general agreement that the Export Control List, comprising both military and strategic goods, is too long and should be reviewed with a view towards the removal of certain items. When addressing this question in their answers to our questionnaire, aerospace firms branded the length of the ECL more or less average, with a score of 3.05. Many firms, including Andrew Antenna Company Ltd., complained about this state of affairs. Calls for action also came from Parliament itself in 1987, when MP Nelson

Riis advocated relaxed controls for some strategic goods.[37]

Judging from the chorus of complaints, there is no doubt that more frequent and thorough revisions of the list are called for. The reason is simple: such controls tend to limit the competitivity of domestic aerospace companies and should therefore only be applied when it is absolutely necessary. However, certain items on the list, military or strategic in nature, should not be subject to restrictions either because they no longer represent any form of threat to Canadian interests because of obsolescence, or because of foreign availability. It follows that such goods should be removed from the list, so that controls may be tightened on the most sensitive products or technologies while being relaxed on the least sensitive. As well, every effort should be made to cope with the issue of foreign availability by urging Canada's allies to enter into negotiations to bring about more uniformity in the controls being applied, so that more or less the same goods will be controlled in each country.

By way of conclusion, it may be said that the aerospace industry is generally satisfied with the government's

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37. See Canada, Debates, House of Commons, April 14, 1987, p. 5167.

export policy. While this has the effect of restricting their export marketing efforts, they recognize that higher priorities relating to the national welfare are involved and willingly submit to such controls. These firms are quite content with the make up of the Area Control List, with the use of export controls for foreign policy reasons and with restrictions applied to military and strategic goods to certain destinations. They point out, however, that much remains to be done in order to rationalize the system. In particular a more open, less secretive policy should be adopted, one that lets manufacturers clearly know where they stand in a particular transaction. This could be done by making the list of violators of human rights public, for instance, or clarifying what standard of proof must be met before military goods will be shipped to such countries. Finally, the ECL should be revamped so that only those items truly sensitive in nature are subjected to controls. In so doing, Canada would be following a trend towards liberalization felt in many countries, including the United States.[38]

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38. See M. MECHAM, "Congress Readies Trade Bill to Ease Export Controls", AW&ST, June 15, 1987, p. 315.

Sub-section 3. Effectiveness of the Export Control Mechanism

It is our purpose now to assess whether the government's export machinery is leak-proof, i.e. whether it can effectively prevent the implementation of prohibited transactions while allowing for regular exports. We are talking about the enforcement part of the process and the work of the civil servants both in the export control section of the Department of External Affairs and in the ports of exit. Their involvement is crucial as they ensure that the export control policy and the various interests it embodies will not be defeated.

A measure of the government's success in this regard is the relative lack of published accounts of violations of export regulations. Of course, there have been some discrepancies, as documented in Chapter Two, involving the sale of helicopter parts to Iran and to El Salvador and of arms to Vietnam during the Vietnam War.[39] But by and large these are isolated incidents.

Many other countries have experienced similar problems and recently we heard about the sale of Japanese blade-shaping tools to the Soviet Union and of West-German plant equipment to Libya for possible assistance in the

39. Supra, note 37, pp. 5162-3 and 5165.

manufacture of chemical weapons.[40] This only highlights the fact that no safety net is a hundred percent foolproof and that, considering the staggering number of shipments occurring daily and the determination of some people to evade the rules, such incidents are bound to take place. Vigilance is the name of the game and every effort should be devoted to making sure that export control laws are observed. Considering the fact that many sensitive military and strategic technologies are ardently sought by pariah regimes and shadowy figures, the consequences of a serious breach in the process could be disastrous. Consequently, there is cause for concern and for ensuring that the enforcement arm of the Department, meaning the customs officers scattered throughout the country, are supported with adequate staff and equipment.

Sub-section 4. The COCOM Mechanism

COCOM is the watchdog organization composed of most NATO member nations whose sole task is to coordinate the national export control policies of participating countries and to prevent the shipment of sensitive technologies to

40. See "German Prosecutors Open New Probes in Widening Scandal Over Libyan Plant", The Globe and Mail, January 19, 1989, p. A-9.

certain proscribed nations, those of the Warsaw Pact.

A number of problems have been outlined by observers of the organization:[41]

1. The items included on the control lists appear not because of their intrinsic military potential but simply because they represent advances in technology;
2. Member countries feel that COCOM rules are too strict and therefore encourage lax enforcement, which undermines the entire process;
3. Many countries, notably in the Third World, supply goods identical to those controlled by COCOM, thereby defeating the effort;
4. Even with accelerated reviews of the control lists, it is difficult to keep up with rapid technological progress;
5. Some COCOM nations apply the rules more rigorously than others due to disagreements over a given product's technical characteristics;
6. The entire process is shrouded in too much secrecy, which fosters distrust;
7. Administrative delays of over three months are

41. See S. VAN BEMMELEN, Draft Interim Report of the North Atlantic Assembly Sub-Committee on Advanced Technology and Technology Transfer, September 1987, pp. 19-21.

required in some cases to grant an export license, which is unacceptable; and

8. COCOM regulations impose a large administrative burden on the exporting companies affected.

It has also been suggested that COCOM is staffed in large part by academicians who have little feel for the real world of international commerce and strategic policy.[42] Finally, some aerospace firms like Spar Aerospace Ltd. and Andrew Antenna Company Ltd. have complained that Canadian interests are not adequately represented at COCOM gatherings due to lack of vocal involvement on the part of Canadian authorities, and that the entire process has been dominated from the start by the United States.[43]

All of these shortcomings are indeed important and need to be addressed, but perhaps the most significant problem in the long run is the inability of the system to be completely leak-proof. The failure of the Japanese government in the Toshiba-Kongsberg scandal, one example out of many, is also the failure of the COCOM in that even if this transaction had cleared the national authorities, it should have been blocked at the international level. Certainly

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42. Supra, note 32.

43. These opinions are expressed by these two firms in their answers to our survey.

such situations can be expected since the enforcement problems encountered in the national context are magnified many times over at the COCOM level, but the consequences of a mistake like that run into the billions of dollars, not to mention the increase in the security threat.

COCOM has recognized many of these flaws and recently took steps to redress the situation. In 1987, the NATO Assembly passed a resolution inviting member governments and their domestic legislative bodies to allow for closer participation by representative industrial groups in the formulation of the control lists. The resolution also called for a renewed effort to ensure that only those items of a truly sensitive nature, as opposed to outdated technologies, be controlled, and suggested that effective sanctions be applied to violators. Finally, a new initiative to better harmonize national laws and regulations was recommended.[44]

Obviously a better job of rationalizing the control lists and the proscribed destinations must be made if the considerable delays experienced by exporters are to be reduced. For instance, it has been suggested that COCOM

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44. J. CROSS, "Les parlementaires des pays de l'alliance débattent de la maîtrise des armements, des relations est-ouest et de la sécurité du nord", Revue de l'OTAN, Octobre 1987, p. 11.

respond to the diminishing threat arising from trade with the People's Republic of China by loosening controls to that country. Indeed, in 1984 COCOM processed 3,200 permit applications and a full 2,036 of those were for sales to China.[45] Liberalizing trade to this destination would certainly go along way toward clearing up the backlog of cases.

Another worthy effort in this regard is the so-called "third-country initiative" begun last year by COCOM. Under this plan, which is aimed at twenty-two European and Asian nations, COCOM countries have agreed to adopt accords reached by the other COCOM members with third countries which are not a part of the Committee. These agreements would deal with re-exports of high-technology goods to the Soviet bloc or China, with the result that sensitive products coming from a COCOM nation would not wind up in the hands of a proscribed country via a third state. The United States has taken the lead in promoting this scheme, but support has been said to be limited and unenthusiastic.[46]

In the final analysis, COCOM's ultimate success or failure will be determined by whether or not it was effect-

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45. See J. GORDON, supra, note 33.

46. See J. GORDON, "Export Controls Hampering Sale of U.S. High-Technology Products", AW&ST, December 15, 1986, p. 89.

ive in preventing the flow of sensitive military and strategic technology to the Warsaw Pact. Clearly COCOM has frustrated Eastern bloc nations from acquiring many sought after products, but such controls have also had the undesirable but unavoidable effect of forcing these countries to resort to other, more clandestine, means to get what they require. Indeed, the United States Secretary of Defence estimated some time ago that sixty-six percent of the research and development information acquired by the Soviet Union has been bought or stolen from other countries. Its savings through the use of such methods have been placed at over a hundred billion dollars over the years.[47]

It is thus no secret that considerable resources have been devoted to this effort. In the early 1980's, approximately US $1.4 billion was set aside by the USSR for purchases of one-of-a-kind western hardware and documents through diversions and espionage. It is estimated that each year, between three and five thousand new, amended and re-approved requirements for specific goods and documents are issued and form the basis of the Soviet "shopping list"

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47. See R. WEEKS, "Countering Soviet Industrial Espionage", in Guns and Butter: Defence and the Canadian Economy, B. MacDonald (ed.), Toronto, Canadian Institute of Strategic Studies, Toronto, 1984, p. 95.

of western technology.[48] Another indication of the scale of these efforts is the fact that between 1981 and 1987, American customs officials seized over five thousand pieces of equipment worth a total of US $430 million in an operation baptized "Exodus".[49]

In view of the Soviet Union's success in obtaining sensitive technology notwithstanding the myriad of controls designed to prevent such transfer, one might be forgiven for harboring a certain sense of hopelessness as well as doubts about the long-term viability of a mechanism such as COCOM. The prescription to deal with this problem is rather straightforward. First, rationalize national and COCOM control lists by restricting only those items the acquisition of which would enhance the military potential of the adversary to the detriment of the collective security of the Alliance; second, tighten up the enforcement effort, to make sure that no leaks occur. As long as the superpower military rivalry exists, pitting entire groups of nations joined in alliances one against the other, there will be a need for

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48. Supra, note 42, p. 6. Concerning the origin of the technology acquired by the USSR, 61.5 percent came from the United States, 10.5 percent from West Germany, 8 percent from France, 7.5 percent from England and 3 percent from Japan. See supra, note 41, p. 9.

49. Ibid., p. 8.

an organization such as COCOM.

Sub-section 5. Conclusion on the Export Control Mechanism

Ever since the introduction of export controls, there have been debates over which items should be restricted, to what destinations and for what purposes. In recent years, for instance, the argument has often been made that there is an urgent requirement to liberalize international trade and loosen up export controls, of strategic goods in particular. No one, however, has questioned the need for at least limited restrictions on the most sensitive technologies. Export controls are a part of everyday reality for many industrial sectors, including the aerospace industry, and throughout their answers to our questionnaire, these firms argued for a better system instead of no system at all.

The need for export controls is clear. That, however, does not answer the question we asked at the outset of this section. We wanted to know if the government's efforts in this regard were adequate in that they effectively screened out undesirable exports while still allowing the industry enough room to successfully peddle its products. When asked this question in the survey, the industry responded affirmatively, in a proportion of 65% in favour of

the government's performance to 35% against.

Our own findings support this assessment. In this section, we have tried to outline some of the shortcomings of the mechanism in both its national and international manifestations, and to suggest possible solutions. Of course, uniformity among national laws must be promoted, delays reduced and backlogs cleared up, controls on low-technology or readily available items removed, restrictions on trade with friendly nations simplified and the administrative burden of dealing with these regulations lessened. It remains, however, that despite the need for such improvements, the system is functioning in a satisfactory manner. As in other domains of government activity, especially dealing with international commerce and security issues, particular care must be taken to ensure that the mechanism is constantly kept up to date and in tune with the reality it is designed to respond to. In the case of export controls, the stakes are especially high. It is our opinion that the government, and the COCOM alliance, have displayed a readiness, if sometimes in slow motion, to react to these changes and thus we agree that the export control mechanism, if improved somewhat with the changes suggested above, is appropriate to satisfy the needs of both the nation and the aerospace industry.

Conclusion

We have reached the point where a final verdict on government intervention in exports of aerospace technology is called for. The premise underlying this thesis was that the development of the aerospace industry was a priority for Canada; jobs are created, economic growth is promoted and this country acquires important technological capabilities which can only be helpful as Canada contemplates national or international ventures. Because of the small domestic market, Canadian firms simply must export to continue to develop. This zeal born out of necessity has placed Canada among the world's leading exporters, and the aerospace industry is an important contributor to this trend, with a full 70% of its output going abroad. The federal and provincial governments have long recognized the priority which must be given to developing aerospace exports and accordingly have made available a variety of export promotion tools, both of a financing-insurance and marketing nature, to the firms involved. At the same time, the Canadian government, committed to preserving this country's national security and other interests, has been applying restrictions on the flow of certain types of technologies to various destinations, including some of the goods produced by the aerospace industry.

Because export promotion and the preservation of national security are two fundamental objectives of any government, they simply must co-exist. It must be recognized that these policies are not necessarily mutually exclusive since each, in a way, is a necessary condition for the success of the other. In other words, without a strong and vital economy, the national well-being is endangered, and without the successful management of the external threat, industrial growth is stifled. Thus, it follows that the real issue is whether or not there is an equilibrium between these two necessities as far as the aerospace industry is concerned.

To answer this question, we must decide if the government has been successful in promoting both priorities without, through the use of the export control mechanism, stifling the growth of aerospace exports in this country. Throughout this thesis, we have presented the various tools at the government's disposal and evaluated their effectiveness as well as the adequacy of the policies underlying them.

In the preceding chapter, with the help of information directly supplied by aerospace companies, we expressed our opinion that the government's export promotion efforts were appropriate in general, but that improvements were required, especially in terms of money spent, variety and

complementarity of services offered, and simplicity of application procedures. Similarly, we concluded with regard to the export control mechanism that, although there were cracks in the system and that it could benefit from increased vigilance, lesser administrative hassles, streamlined regulations and more uniformity, the process itself was effective and not too burdensome so as to choke the growth of exports. The conclusion must therefore be that there is indeed, as far as the aerospace industry is concerned, a de facto balance between these two fundamental goals.

Will this equilibrium be maintained in the years to come? That depends on a variety of factors. Some are internal and deal with industry performance and government response to the two national priorities discussed. Other changes, coming from abroad, are also susceptible of upsetting the balance of things, requiring appropriate compensatory gestures. Indeed, it is rather obvious that the export control mechanism is designed, in part, to meet a certain threat from the Soviet Union and its alliances. Should that threat be reduced, as is possible and even likely in light of the revolution of openness taking place in the USSR and between that nation and the West, then the export control machinery would have to respond. Inversely, if the menace to Canada's national security should increase,

controls might have to be tightened.

The same is true of export promotion, since very successful and prolonged market penetration by Canadian companies, including aerospace firms, may signal the call for a re-assessment by the government of its involvement in this area.

This only highlights the fact that we are truly living in an interdependent world where there are no natural borders to technology and scientific knowledge, and where every act by a state influences another. We know that, for the time being, the sought-after equilibrium exists. We also know that this country has the means to effectively react to change. That is enough.

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F. CASES

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Maple Lodge Farms Ltd. v. Government of Canada, [1982] 2 S.C.R. 2.

Paquin c. Cité de Montréal, [1968] B.R. 34.

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Roncarelli v. Duplessis, [1959] S.C.R. 121.

Seminary of Chicoutimi v. City of Chicoutimi, [1973] S.C.R. 681.

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Voghel c. Procureur Général du Québec, [1975] C.S. 253.

2) United States:

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Sumitomo Shoji America Inc. v. Avogliano, 77 L. Ed. 2d. 547 (US Sup. Ct. 1982).

Timberlane Lumber Co. v. Bank of America, 549 F. 2d. 597 (8th Cir. 1976).

3) United Kingdom:

Padfield v. Minister of Agriculture, Fisheries and Food, [1968] A.C. 997.

Regina v. Gaming Board for Great Britain, ex parte Benaim, [1970] 2 W.L.R. 1009.

4) International:

The Case of the Barcelona Traction, Light and Power Company Ltd., (1979) I.C.J. Reports, 3.

The Case of the S.S. Lotus, (1927) P.C.I.J. Ser. A., No. 10.

ANNEX A

SURVEY

Your answers to these few questions are very important to the success of my master's thesis. While not asking you to disclose any commercial secrets, I would appreciate it if you could provide as many details as possible, especially in the sections where you are asked to comment. I thank you very much for your cooperation and patience.

1. Name of your company:

2. Products exported by your company:

3. Customers of these products and their destination:

4. Volume in Canadian dollars of your annual exports:

5. Have you ever used Canadian government export promotion services? If yes, which one(s)?

   ___ CIDA
   ___ Export Development Corporation
   ___ Programme for Export Market Development (PEMD)
   ___ Defense Industries Production Programme (DIPP)
   ___ Export Promotion Assistance Programme (APEX) (in Quebec only)

   If not, why?

6. Do you rely on these programmes on a

   ___ regular basis?
   ___ occasional basis?

7. Can you estimate the economic impact that these government programmes have had on your enterprise, in terms of jobs created, export growth, new markets penetrated, etc. Please be as specific as possible:

8. Can you express your opinions on the export promotion programme(s) on which you have relied in the past, according to the following criteria and following this table:

   Excellent = 1 Good = 2 Average = 3 Bad = 4

   . effectiveness
   . simple application procedure
   . financial assistance is sufficient
   . assistance provided quickly
   . attention paid to your industry
   . flexibility in refund terms (if required)
   . advice and information supplied throughout assistance period
   . sufficient financial resources to satisfy all requests

9. In general terms, do you believe that these export promotion programmes are adequate to satisfy the needs of the Canadian aerospace industry? Comment:

10. Can you express your opinion on the export control mechanism administered by the Department of External Affairs under the Export Import Permit Act, according to the following criteria and following this table:

    Excellent = 1 Good = 2 Average = 3 Bad = 4

    . simple application procedure
    . permit application handled quickly
    . the Export Control List is not too long
    . the Export Control List is explicit enough to allow identification of products to be exported
    . the Area Control List is realistic and reasonable
    . sufficient information and advice supplied before permit application made
    . the Government's policy on export control is clear and appropriate

    Please comment:

11. Do you believe that the government's export control mechanism is capable of effectively screening out exports for national security or other policy purposes without **unduly** restricting the exports of the Canadian aerospace industry? yes ___ no ___

    Please comment:

12. Do you agree that export control measures should be used to restrict exports for economic or foreign policy objectives such as trade sanctions or embargoes? yes ___ no ___

    Please comment:

13. Do you have any further comments or opinions about the subjects raised in the above questions, or any suggestions for improvements to both the export control and export promotion mechanisms?

I thank you very much for your patience and kindness. Your answers to these questions will help me greatly in the writing of my thesis.

Stéphane Lessard

ANNEX B

LIST OF AEROSPACE COMPANIES THAT ANSWERED THE SURVEY

Here is a list of the respondent firms by alphabetical order. Following each name is a series of three letters. This is designed to provide information about the location, sales volume and products of the firms involved, and the reader can find out the meaning of each letter by consulting the legend below.

1. ADGA Group DBA
2. Airtech Canada BAA
3. AMTEK Management Inc. DBA
4. Andrew Antenna ABA
5. Bolriet Technologies Inc. ABA
6. CAE Electronics AEB
7. de Havilland Aircraft Company of Canada B-A
8. Garrett Canada BDA
9. Gehring Research Corp. AAA
10. General Systems Research Inc. BAD
11. Godfrey Howden Inc. BBB
12. Haley Industries Ltd. BDA
13. Héli-Fab Ltd. BAD
14. Héroux Inc. BDB
15. Honeywell Ltd.-Sperry Aerospace Division ABA
16. Indal Technologies Inc. BDA
17. Innotech Aviation Enterprises B-B
18. Leigh Instruments Ltd. ADA
19. Litton Systems Canada Ltd. AEA
20. LNS Systems Inc. ACB
21. MBB Helicopter Canada Ltd. BCA
22. Memotec Data Inc. A-B
23. Menasco Aerospace Ltd. ADA
24. Microtel Ltd. CCA
25. MIL Systems Engineering Inc. D-A
26. Novatronics of Canada Ltd. ABA
27. Price & Knott Manufacturing Co. Ltd. BAA
28. Raytheon Canada Ltd. ADA
29. SNC Inc. DDB
30. Spar Aerospace Ltd. CEB
31. Unisys Canada Inc. AEA
32. Vac Aero International Inc. B-A
33. Varian Canada Microwave Division ADA

LEGEND

First Letter: Products - Services of Company

A. Communication Systems - Avionics
B. Aircraft - Aircraft Parts
C. Satellites - Space
D. Engineering Consulting

Second Letter: Sales Volume per Year

A. $ 0 to $ 1 Million incl.
B. $ 1 to $ 5 Million incl.
C. $ 5 to $ 20 Million incl.
D. $ 20 to $100 Million incl.
E. $100 Million and over.

Third Letter: Region Where Company is Established

A. Ontario
B. Quebec
C. Eastern Canada
D. Western Canada

(-): Not Available