Aerospace Export and Domestic Controls Review

Final Report

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1.0 Scope of Report

This report assesses the impact of Canada's export and domestic controls regimes on the competitiveness of its aerospace industry.

In order to determine common elements and how other countries have struck a balance between maximizing access to global markets for its exporters and its own national security interests, the report also compares Canada's export and domestic control regimes to that of the following countries: the European Union (EU), the United Kingdom (UK), Australia and the United States (US). While attempting to strike the right balance, many countries also attempt to ensure its export and domestic controls are stringent enough to enable its exporters to benefit from more relaxed US export controls.

Where possible, the report makes recommendation to lessen the impact of Canadian export and domestic controls in order to improve the global competitiveness of the Canadian aerospace industry while at the same time recognizing the important role of Canada's export controls to protect certain national security interests of Canada.

Please see Annex I for definitions of key terms and phrases used throughout this document.

2.0 Executive Summary

Canada has put in place a system of export and domestic controls to ensure that controlled goods and technology (including technical assistance) that are strategically significant do not fall into the wrong hands where their use might be detrimental to Canada's national security. These controls also implement intergovernmental arrangements or commitments and ensure that exports from Canada are consistent with Canada's foreign and defence policies.

Like most countries with military and defence exports, Canada's export controls are not intended to hamper legitimate trade. Instead, Canada's export controls try to seek a balance between the legitimate commercial interests of Canadian exporters and the national interests of Canada. While attempting to strike the right balance, Canada also attempts to ensure its controls are stringent enough to enable its exporters to benefit from more relaxed US export controls. Canada's export controls are administered by the Department of Foreign Affairs and International Trade (DFAIT).

Nonetheless, the impact on Canadian industry and the Canadian economy are still very significant. Compared to many other countries, Canadian exporters of controlled goods and technology incur higher compliance costs and opportunity costs (e.g. lost sales). In many other countries (including the US, the EU, and the UK), an extensive list of general export authorizations or license exceptions have been put in place in order to reduce these costs. General export authorizations and license exceptions allow all exporters to export certain goods to certain destinations almost immediately eliminating the administrative delays associated with applying for regular export authorizations and waiting for the government to issue them.

In order to put Canadian exporters on a more level playing field with their foreign competitors, one of the key recommendations of this report is for the **Canadian government to consider adding general export authorizations (called GEPs in Canada)** and **update the existing GEPs,** many of which are outdated. In consultation with DFAIT, industry should prioritize which GEP's it would like to see first implemented. In the short term, this recommendation is not revenue neutral since GEPs cost the Canadian government money to implement.[1] However, in the long term, GEP's may actually save the Canadian government money since fewer export permit applications will need to be processed by DFAIT. In addition, Canadian industry should be able to increases its sales and the Canadian government should be able to collect additional income tax revenue.

In order to reduce the compliance and opportunity costs, some countries (including the US) also issue global export authorizations in more circumstances than Canada does. Since global export authorizations allow the export of certain goods and technology to multiple countries, they reduce the number of regular individual export authorizations that need to be applied and maintained by exporters. As a result, it is also recommended

[1] One estimate of the cost to DFAIT to implement each GEP is approximately $25,000 but this estimate has not been independently verified.

that **Canada consider offering exporters the ability to apply for more global export authorizations (called Multi-Destination Export Permits in Canada) in more circumstances.**

Unlike most countries that have export controls, Canada has also put in place domestic controls to control the examination, possession and transfer of certain goods and technology within Canada to help ensure that certain goods and technology are not accessed by people within Canada who may wish to harm the interests of Canada, its citizens or its allies. Canada's domestic controls are administered by Public Works and Government Services Canada (PWGSC).

Canada's domestic controls are some of the most stringent, if not the most stringent, in the world. Canada's domestic controls apply to more goods and technology than many, if not most, countries in the world and apply to transfers to not only foreigners but also to Canadian citizens.

At minimum, it is recommended that the **Canadian government consider reducing the scope of goods that are subject to domestic controls by removing certain dual-use goods that most countries do not control domestically.**[2] It is also recommended that PWGSC maintain its own list of goods and technology that are subject to domestic controls instead of cross-referencing Canada's ECL.

For more details on the impact of controls on Canadian industry, please see section 3 of this report entitled "Rationale and Impact of Canadian Export & Domestic Controls".

For more in-depth analysis and additional recommendations, please see section 4 of this report entitled "Assessment and Recommendations".

[2] For example, unlike the domestic controls administered by the US Department of State, the Canadian domestic controls also apply to dual-use items found in Group 6 of Canada's Export Control List (ECL). Dual-use items are items that can be used for both military and civilian end-use.

3.0 Rationale and Impact of Canadian Export & Domestic Controls

Canada has put in place export controls to control the export of certain goods and technology (including technical assistance) from Canada to various foreign destinations. These controls are administered by the Department of Foreign Affairs and International Trade (DFAIT).

One of the principal objectives of Canada's export controls is to ensure that all exports from Canada are consistent with Canada's foreign and defence policies. Among other objectives, Canada's export controls seek to ensure that exports from Canada:

- Do not undermine national or international security
- Do not cause harm to Canadian Armed Forces or its allies
- Do not contribute to national or regional conflicts or instability
- Do not contribute to the development of nuclear, biological or chemical weapons of mass destruction or to their delivery systems
- Are not used to commit human rights violations

Canada is a member of the United Nations and of all the major multilateral export control regimes including the Wassenaar Arrangement, the Nuclear Suppliers Group, the Missile Technology Control Regime and the Australia Group. Many of Canada's export controls are intended to meet Canada's commitments and obligations under the UN (such as UN Embargoes) and under these multilateral export control regimes.

Canada's export controls are not intended to hamper legitimate trade. Instead, Canada's export controls try to seek a balance between the legitimate commercial interests of Canadian exporters and the national interests of Canada. While attempting to strike the right balance, Canada also attempts to ensure its controls are stringent enough to enable its exporters to benefit from more relaxed US export controls.

Nonetheless, the impact on Canadian industry and the Canadian economy are still very significant. Canada's export controls impact Canadian industry in two very significant ways through:

- Compliance costs; and,
- Opportunity Costs.

In order to comply with Canada's export controls, all exporters (both individuals and Canadian companies) must incur various compliance related costs including:

- Costs associated with gathering information (including obtaining End-Use Assurances from end-users in foreign countries) needed for Export Permit Applications;
- Costs associated with preparing and submitting Export Permit Applications;

- Costs associated with putting into place any internal company controls to ensure that goods and technology are not exported without a valid Export Permit;
- Costs associated with all necessary record keeping for exports of goods and technology subject to export controls;
- Costs associated with preparing and submitting semi-annual or quarterly reports for issued Export Permits;
- Costs associated with complying with any other conditions attached to issued Export Permits;
- Costs associated with also complying with Canada's Controlled Goods Program (if the goods and technology are also subject to that program);
- Costs associated with keeping track of expiry dates of Export Permits and ensuring that Export Permits are not over-utilized; and.
- Costs associated with keeping up with all the regular changes to Canada's export controls.

For example, with respect to the costs associated with preparing and applying for export permits, the Australian government predicts that it takes typically 4 hours to prepare a simple application to obtain an export authorization to legally export goods from Australia. (Of course, the actual amount of time will depend on the nature of goods being exported and the number of goods being exported). The Canadian export permit application form is very similar to Australia's, if nor more complicated. Not surprisingly, companies who prepare applications on behalf of others, routinely charge a minimum of $1000 or more to prepare a simple export permit application. (More complicated export permit applications can cost many thousands of dollars more). If a Canadian company routines exports goods subject to Canada's export controls, the costs associated with just preparing and applying for export permits can quickly add up.

Export controls also present Canadian exporters with "opportunity costs". In some cases, it may take months before a Canadian business can obtain an export permit from the Canadian Government that is needed before the goods can be legally exported from Canada. If the buyer does not want to wait that long for the goods and can obtain them elsewhere from another country (which may process export permits or licenses faster or have more liberal export controls), the buyer will often obtain the goods elsewhere and the Canadian business will lose a sale. Lost sales impact not only Canadian industry but also the Canadian economy as a whole.

Canada has also put in place domestic controls to control the examination, possession and transfer of certain goods and technology within Canada administered by PWGSC through the Controlled Goods Program (CGP). The main goal of the CGP is to strengthen Canada's security by helping to ensure that certain goods and technology are not accessed by people who may wish to harm the interests of Canada, its citizens or its allies.

Canada's domestic controls are some of the most stringent, if not the most stringent, in the world. Canada's domestic controls apply to more goods and technology than many, if

not most, countries in the world and apply to transfers to not only foreigners but also to Canadian citizens.

In order to comply with Canada's domestic controls, all Canadian businesses who deal with certain goods and technology must incur various compliance related costs including:

- Costs associated with ensuring that all their facilities and all the controlled goods are secure;
- Costs associated with security clearances (and renewing these security clearances) for all their employees and contractors who need to access controlled goods;
- Costs associated with regular audits by PWGSC; and,
- Costs associated with keeping records for all transfers of controlled goods within Canada.

4.0 Assessment and Recommendations

4.1 Export Controls

In order to properly asses and compare the impact of export and domestic controls on the competitiveness of the aerospace industry in various countries, four important questions must be addressed:

1. What is controlled?
2. How are the goods and technology being controlled?
3. What are the compliance (and opportunity) costs? and,
4. How long does it take to obtain an export authorization (or an export license) from the government?

4.1.1 Scope of Controls

4.1.1.1 Traditional Controls

Background:

- The goods and technology which are subject to export controls differ significantly from country to country. (see Annex VIII for details)

- Most countries have implemented "traditional export controls" that regulate the export of specific items (or types of items) to specific or all foreign destinations. The items (or types of items) that are controlled are typically placed on a list created by the country (such as Canada's Export Control List (ECL));

- Some countries control the export of ALL goods to certain embargoed destinations. (Typically this is done by placing the countries on a list such as Canada's Area Control List (ACL));

- With respect to conventional aircraft and missiles (not designed for outer space), Canadian industry has a competitive advantage since, on balance, Canada controls fewer of these items[3] (except US Origin Goods[4]) than most other countries.

[3] On balance, Canada's ECL lists the bare minimum of conventional aircraft and missiles (not designed for operation in outer space) and related equipment and components (except US Origin Goods) in accordance with Canada's commitments and obligations under various multilateral export control regimes. Other countries control more items.

[4] Canada's control on U.S. Origin Goods**:** Unlike the vast majority of countries, Canada also controls all US origin goods, not controlled elsewhere on the ECL. (See ECL item 5400). This ECL 5400 control captures a huge number of goods including US made clothing, US made toys and US aerospace related goods that are not controlled by any of the multilateral export control regimes. However, Canada has General Export Permit 12 (GEP 12) in place that allows exporters to export these US Origin goods immediately without delay to most destinations (except for a handful of countries that are subject to US

Challenges:

- It is impossible for Canadian exporters to quickly supply replacement parts, repaired parts and service to aircraft grounded due to equipment failure in countries on Canada's ACL since a Permit needs to be obtained from DFAIT

- For example, one of the countries on Canada's ACL is an eastern European country, Belarus. Canadian aerospace companies cannot quickly supply parts and service to grounded aircraft in Belarus but European exporters can.

- With respect to space related goods (e.g. spacecraft, related equipment and ground stations), Canada's ECL lists more items[5] than most countries (except the US) in accordance with an agreement with the US. This agreement with the US benefits Canadian industry with more relaxed US export controls on certain items exported from the US into Canada. Nonetheless, for Canadian exports, Canadian industry is at a competitive disadvantage against other countries with respect to space related items.

Recommendations:

- Canada consider implementing a GEP to allow the export of replacement parts, parts repaired in Canada and service to aircraft grounded in ACL countries where the aircraft is not registered in that country.

- Even though the scope of Canada's export controls on space related goods puts Canadian industry at a competitive disadvantage over exporters in many other countries, it is not recommended that Canada change its scope of controls. Changing the scope would put Canada's agreement with the US for relaxed US export controls for exports to Canada at risk.

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embargos or other sanctions). In other words, ECL 5400 and GEP 12 were put in place by Canada to help the US enforce its embargos and sanctions against certain countries. Since goods can be exported immediately under GEP 12 to most destinations, the impact of ECL item 5400 control on the export of US Origin goods is minimal.

[5] See ECL item 5504

4.1.1.2 Other Types of Controls

Background:

- Canadian industry has a competitive advantage since, on balance, Canada has not implemented many of the following additional types of export controls and none of Canada's export controls under the EIPA are extra-territorial in nature:

    - End-use Controls
    - Transit (or trans-shipment) export controls
    - Brokering controls

  (See Annex VIII for details)

Challenges:

- None

Recommendations:

- DFAIT consult industry before implementing any additional types of export controls.

4.1.2 Types of Export Authorizations and Exceptions

4.1.2.1 Multi-Destination Permits

Background:

- Most countries, including Canada, control the export of certain goods through licensing and offer three types of export authorizations (commonly called export licenses or export permits):

    - individual export authorizations;
    - global export authorizations; and,
    - general export authorizations and/or license/permit exceptions.

- Individual export authorizations allow the export of certain goods by a specific exporter to a single specified country. Global export authorizations allow the export of certain goods by a specific exporter to multiple specified countries.

- One global export permit replaces multiple individual export permits.

- Canada has started to issue Multi-Destination Permits but only for certain dual-use goods in Group 1 of the ECL.

- As late as 2005, DFAIT offered a Project Development Permit (PDP) to allow industry to quickly respond to Requests for Information (RFI) / Requests for Proposal (RFP) but no longer offers it.

Challenges:

- Overall, Canadian exporters are at a competitive disadvantage against exporters in other countries that offer global export authorizations for exports of dual-use goods in Group 6 and military goods in group 2 of the ECL since the compliance costs for the Canadian exporters will be significantly higher than their non-Canadian competitors in most cases.

- Canadian exporters are at a competitive disadvantage against exporters in other countries (such as UK and US) that offer licenses similar to the Project Development Permit (PDP) that DFAIT used to offer to Canadian exporters.

Recommendations:

- In consultation with industry, DFAIT introduce Multi-Destination Permits for certain dual-use goods in Group 6 and military goods in Group 2 of the ECL.

- In consultation with industry, DFAIT reintroduce the Project Development Permit (PDP).

- DFAIT consult industry before removing Permit types or introducing new export permit types.

4.1.2.2 General Export Authorizations (or GEPs in Canada)

Background:

- Exporters must prepare and submit applications for individual export authorizations and global export authorizations to the government and wait for the government to issue the authorization (or issue a denial).

- In contrast, general export authorizations are and license/permit exceptions are granted by a country to ALL exporters for exports of certain dual-use goods to certain foreign destinations (and in some cases to all foreign destinations). Exporters do not need to apply for a general export authorization just claim it before exporting.

- Exporters in a country who can use general export authorizations or license/permit exceptions to export their goods to their customers have a significant competitive advantage over exporters in another country who cannot since they allow exporters to ship almost immediately eliminating the administrative delays and costs associated with applying for individual or global

export authorizations and waiting for the government to issue export authorizations.

- Canada has both general export authorizations (or GEPs in Canada) and Export Permit exceptions.

- Canada has put in place a broad Export Permit exception for the exportation of most goods and technology (including most military and aerospace goods and technology) to the US. Most countries do not have a similar broad exception for exports to the US.

Challenges:

- As a whole, Canadian exporters are at a competitive disadvantage since many other countries (including the UK and the EU) have a more up-to-date and a more extensive set of general export authorizations and license exceptions available to their exporters. For the export of many goods and technologies (except to the US), Canadian exporters often have to prepare and submit and export permit applications and then wait, sometimes for months, before exporting; whereas, exporters in other countries can export these same goods and technologies almost immediately under a general export authorization or a license/permit exception.

- Many of Canada's GEP's (including GEP 1, 29 and 30) are rather outdated and refer to an ECL that is almost 20 years old (the April 1994 ECL). Since the 1994 ECL is not readily available on the website of the DFAIT, it is very difficult for many Canadian exporters to even use these GEP's.

Recommendations:

- In consultation with industry (including the aerospace industry), DFAIT update its outdated GEPs and introduce new one to ensure that Canadian industry is on a level playing field with its foreign competitors;

- DFAIT publish the 1994 ECL on its website and provide better guidance to assist exporters with the determination on whether or not an existing GEP can be used (until new updated GEP's can be put into place);

- DFAIT follow a simple rule: If an exporter in a foreign country can use a general export authorization or license exception to export certain goods to certain destination(s), Canadian exporters should have a similar Canadian GEP available to them to put them on a level playing field unless the use of the GEP would threaten Canada's national security interests or hamper its foreign policy;

- The aerospace industry prioritize the GEP's it wants to see first implemented, all in consultation with DFAIT and in particular consider prioritizing the following GEPs:

- A GEP for the export of certain dual-use aircraft replacement parts & components listed in Group 6 of the ECL and the return after repair in Canada of the same items;
- A GEP for the export of certain aircraft replacement parts listed in Group 2 (Munitions List) of the ECL and the return after repair in Canada of the same items;
- Broadening the scope of GEP 1[6] to include the export of certain replacement helicopter parts and components (currently excluded from the scope of GEP 1) and the return after repair of the same items.
- A GEP to allow the export to any country of equipment and spare parts for permanent use on an aircraft, when necessary for the proper operation of such aircraft, where the aircraft is registered in certain countries.

Note: There are short-term fiscal implications to changing or updating the system of GEP's. GEP's are regulations under the EIPA. In the short term, they are not revenue neutral since they cost the Canadian government money to implement. However, in the long term, some GEP's may actually save the Canadian government money since fewer Export Permit Applications will need to be processed by DFAIT. In addition, Canadian industry should be able to increases its sales and the Canadian government should be able to collect additional income tax revenue.

4.1.3 Compliance and Opportunity Costs

Background:

Many, if not most countries in the world (including Canada, the UK, Australia and the US) do not charge a fee for applications for export authorizations (or export licenses). However, the costs for industries (including the aerospace industry) to comply with a country's export controls can be substantial. Typical compliance costs include:

- Costs associated with gathering information (including obtaining End-Use Assurances from end-users in foreign countries) needed for applications for an export authorizations;
- Costs associated with preparing and submitting applications for an export authorizations;
- Costs associated with putting into place any internal company controls to ensure that goods and technology are not exported without a valid export authorization;

[6] GEP 1 currently allows the export of most dual-use items in Group 1 that have been previously exported from Canada under a valid export permit and have been subsequently returned to Canada for repair, overall or testing and allows the export of most replacement parts for the same items to all destinations (except to countries on Canada's ACL).

- Costs associated with all necessary record keeping for exports of goods and technology subject to export controls;
- Costs associated with preparing and submitting semi-annual or quarterly reports for issued export authorizations;
- Costs associated with complying with any other conditions attached to issued export authorizations;
- Costs associated with also complying with domestic controls (if the goods and technology are also subject to domestic controls);
- Costs associated with keeping track of expiry dates of export authorizations and ensuring that export authorizations are not over-utilized; and.
- Costs associated with keeping up-to-date with all the regular changes to the country's export (and domestic) controls.

If an exporter routinely exports goods subject to export controls, the costs associated with preparing and applying for export authorizations (i.e. export permits) can quickly add up.

Export controls also create "opportunity costs". In some cases, it may take months before an exporter can obtain an export authorization (i.e. an export license) from the respective government before the goods can be legally exported. If the buyer does not want to wait that long for the goods and can obtain them elsewhere from another country (which may process applications for export authorizations faster or have more liberal export controls), the buyer will often obtain the goods elsewhere and the exporter will lose a sale. Lost sales impact not only the local industry but also the country's economy as a whole.

Many of these compliance and opportunity costs can be significantly reduced (and some of them can be eliminated altogether) if the exporter is able to export the controlled goods and technology under a general export authorization (such as Canada's GEP) or under a license exception. Reduced compliance and opportunity costs will make industry more competitive and more profitable.

Challenges:

- Overall, Canadian exporters are at a competitive disadvantage to exporters in many other countries since Canadian exporters typically incur higher compliance costs and opportunity costs. The compliance and opportunity costs are lower in many other countries (including the EU, the EU and the US) since governments of these countries have made available to their exporters a more extensive and more up-to-date set of general export authorizations or license exceptions.

Recommendations:

- DFAIT update its outdated GEPs and implement additional GEP's in order to reduce the compliance and opportunity costs incurred by Canadian industry. (See the recommendations in the previous section above for more details).

4.1.4 Processing Times

Background:

- Other than applications for exports that involve US ITAR defence articles, Canada has one of the fastest application processing times compared to many other countries (including the UK, Australia and the US) for exports to non-sensitive destinations (which Canada calls Open Policy Countries (OPC)). Canada will typically process these applications within 10 business days from the receipt of a complete application.

- For exports to more sensitive designations (which Canada calls non-OPC countries), Canada's estimated application processing time is typically the same as the processing times estimated by governments in many other countries (including UK and Australia). It typically takes the Canadian government 8 weeks to process these applications from the receipt of a complete application. Canada is typically much faster than the US which often takes many more months to process applications for exports to more sensitive destinations.

- However, for applications for re-exports of US ITAR defence articles or goods that incorporate US ITAR defence articles, Canada has one of the slowest processing times. Canadian exporters must wait until they have obtained an US re-export license from the US Department of State before submitting an application for an export permit to the Canadian government. Since it often takes many months to obtain a US re-export license, Canadian exporters must delay the submission of their Canadian applications for many months. Once submitted, the Canadian exporter must typically wait up to two more months before the Canadian export permit is issued.

Challenges:

- The slow processing times for applications for exports of US ITAR defence articles or goods that incorporate US ITAR defence articles puts Canadian exporters at a competitive disadvantage against exporters in most other countries that do not require a US re-export authorization attached to the original application for an export authorization.

- Since Canada does NOT publish a list of OPCs, it is rather difficult for Canadian exporters to tell which countries are OPCs and which are not. (e.g. some countries (like Russia) which are members of various international control regimes are not typically considered by DFAIT to be an OPC).

  To be clear, this issue also exists in many other countries. Presumably, other nation states do not want to list countries as "Non-OPC" or "sensitive" destinations for fear of negatively impacting foreign relations with that country.

Recommendations:

- DFAIT allow exporters to submit applications without the US re-export authorization attached and start processing and reviewing the applications as soon as possible. Of course, DFAIT would only be able to issue an Export Permit once a copy of the US re-export license has been obtained and submitted by the exporter.

- Alternatively, DFAIT should process applications on an expedited basis once the US re-export authorization as been received.

- DFAIT stop using the misleading terms "OPC" and "non-OPC" and use language such as "expedited processing countries" and "regular processing countries".

- DFAIT should publish the countries where it will expedite processing of Export Permit Applications.

Note: These recommendations have some financial implications. The first recommendation is not revenue neutral. DFAIT would likely need to modify their online licensing system, called EXCOL, to ensure that the statistics for service delivery are not distorted by accepting incomplete applications. These modifications would likely be expenditures against DFAIT's budget. If more applications are to be expedited, DFAIT may need to hire additional staff.

4.2 Domestic Controls

Background:

- A few countries (including Canada, US, EU, the UK and soon Australia) control military and/or dual-use items (including many aerospace related items) within their borders. Many, if not most, countries do not have domestic controls on military goods and dual-use items (with the possible exception of controls (or licensing) on light arms (e.g. firearms)).

- Canada's program to implement domestic control is called the Controlled Goods Program (CGP) and is administered by Public Works and Government Services Canada (PWGSC).

- In 2001, The CGP was created after Canada reached an agreement with the US whereby the US agreed to relax US licensing requirements for these US defence articles being exported from the US to Canada. This relaxation provides many benefits to Canadian industry including:

    - A significant reduction in administrative delays associated with the existing export control systems;

- reduced delivery times for new defence projects; and,
- improved business opportunities for Canadian companies to participate in US contracts.

- Since the inception of the CGP, many dual-use items in Group 6 of Canada's ECL have been subject to Canadian domestic controls (and continue to be controlled), whereas these same times have been subject to domestic controls by the US Department of State.

- The CGP controls the examination, possession and control of certain goods and technology (called "controlled goods") within Canada. CGP Controlled goods include military goods, space-related goods and some dual-use goods.

Challenges:

- Canada's domestic controls are some of the most stringent in the world. Canada's domestic controls apply to more goods and technology than most other countries and apply to transfers to both foreigners and its own citizens. (see Annex X)

- Unlike other countries, Canada's CGP does not maintain its own list of items that are subject to domestic controls. Instead, the CGP defines "controlled goods" as all items enumerated in Group 2 and Group 6 of the Canadian Export Control List (ECL) and ECL item 5504. Many of these goods and technology are aerospace related. This cross referencing by the CGP of Canada's ECL often creates problems. If an item gets added to Group 2 or Group 6 (often as the result of changes at one of the multilateral export control regimes), the item is automatically subject to domestic controls. In some cases, it may not be appropriate for an item to be subject to domestic controls but it may be appropriate to have the items subject to export controls.

Recommendations:

- the dual-use items in Group 6 that are not subject to domestic US ITAR controls by the US Department of State be removed from Canada's domestic controls.

- The CGP create and maintain its own list of items that are subject to domestic controls instead of cross-referencing Canada's Export Control List (ECL).

More extensive changes to the CGP are not recommended at this time since they will likely require renegotiation with the US of the previous agreement reached in 2001.

5.0 Comparative Study of Export Controls in Other Countries

5.1 Introduction

For national security and foreign policy reasons, many nations including Canada, the United Kingdom, Australia and the United States have put in place export controls to control the export of certain goods and technology from their borders. Export controls are also used to enforce UN embargoes. Typically, an export authorization (typically called an export license in most countries) needs to be obtained from the Government in which the exporter is located before goods and technology subject to export controls can be legally exported.

Canada, the United Kingdom, Australia, the United States are also members of all the major multilateral export control regimes including the Wassenaar Arrangement, the Nuclear Suppliers Group, the Missile Technology Control Regime and the Australia Group. Many of the export controls in these countries are also intended to meet their commitments and obligations under these multilateral export control regimes.

Even other nations who are not members of these multilateral export control regimes recognize the importance of export controls and have put in place some export controls for national security and foreign policy reasons.

It should be noted that the European Union is not a member of these multilateral export control regimes but many of the EU Member States are members of at least one (and in some cases all) of these regimes.. Nonetheless, the EU has put into place legislation to control the export of certain goods and technologies from any EU Member state to any destination outside the EU.

But please note that most goods and technologies are exported (or transferred) within the EU license free. (In the EU, the movement of goods from EU Member State to another EU Member State is technically called by the EU a “transfer” not an “export”). However, the EU does control the export (or “transfer”) of a small number of goods and technologies from one EU Member State to another EU Member State.

The EU Member States may add additional export or transfer controls but if there is a conflict between the EU controls and the national controls, the EU controls prevail.

In some cases, an EU Member State may issue an export authorization (commonly called an Export License in most EU Member States) for the export from the EU of certain dual-use items not only located in the EU Member State where the authorization was issued but also located in other EU Member States. The export authorization is valid throughout the EU and binds all EU Member States.

Export controls typically distinguish between two types of goods:

- Military goods

- Dual-Use Goods

Military goods are goods that are specially designed or modified for military use. (E.g. Tanks, military aircraft etc).

Dual-Use Goods are goods that can be used for both military and civilian end-use. (E.g. certain high speed computers, certain GPS units, etc).

Canada, the United Kingdom, Australia, the United States and many other countries control the export of not only certain military goods but also certain dual-use goods. The European Union through EU law only controls certain dual-use goods. But many, if not all, EU Member States also have their own national export controls on military goods.

5.2 Legislative Framework

5.2.1 Canadian Legislation

In Canada, the primary statutes and regulations imposing export controls are the following:

1) The *Export and Import Permits Act* (EIPA) and regulations;
2) The *Nuclear Safety and Control Act* and regulations;
3) The *Customs Act*; and,
4) The *Criminal Code*.

The EIPA and regulations require all exporters to obtain an Export Permit from DFAIT before exporting from Canada a wide variety of goods and technology (including many aerospace related goods and technology) enumerated on Canada's ECL to any foreign destination (except the United States in most cases).

The EIPA and regulations also require all exporters to obtain an Export Permit from DFAIT before exporting ANY goods and technology from Canada to any country listed on Canada's Area Control List (ACL).

The *Nuclear Safety and Control Act* and regulations require all exporters to obtain an Export License from the Canadian Nuclear Safety Commission before exporting from Canada certain nuclear and nuclear related items to any foreign destination.

Many of these nuclear items and nuclear related items are also enumerated on the ECL under the EIPA. In other words, for many nuclear and nuclear related items, the exporter must obtain BOTH an Export Permit from DFAIT and an Export License from the Canadian Nuclear Safety Commission before exporting from Canada.

The EIPA, the *Nuclear Safety and Control Act* and related regulations also control the import of certain goods into Canada.

From time to time other Canadian Government Departments may impose additional import or export controls on certain goods. The Department of Foreign Affairs may even enact additional legislation to put in place additional export controls on certain goods to certain countries to comply with multilateral economic sanctions typically agreed upon at the United Nations.

The EIPA provides penalties for non-compliance. The *Customs Act* also provides penalties for non-compliance and powers for enforcement (including the power to seize goods). In some cases, it is a criminal offense under Canada's *Criminal Code* to export goods without a Permit (e.g. where there is criminal intent to evade Canada's export control laws).

5.2.2 European Union Legislation

The following is the main EU legislation for the control of exports and transfers within the EU of certain goods and technology:

- The EU Dual-Use Goods Regulation (also known as the Council Regulation No. 428/2009 as amended by Regulation (EU) No. 1232/2011 and Regulation (EU) No. 388/2012)
- The EU Regulation on Torture (also known as Regulation No. 1236/2005)

These regulations apply to all EU Member States and override any national laws and regulations. But in some cases, the individual Member States need to pass their own national legislation to implement some of the provisions of these export control related EU regulations (such as enforcement and penalties for non-compliance).

The EU Regulation of Torture controls the exports and transfer of certain capital punishment and torture related goods. None are aerospace related.

The main export control EU regulation is the EU Dual-Use Goods Regulation (i.e. Council Regulation No. 428/2009). This regulation implements various controls on dual-use goods and technology and creates various Union General Export Authorizations which allow exporters in the EU to easily export certain dual-use goods and technology from the EU to certain destinations outside the EU.

The EU has not passed any legislation to control military goods (unless one considers certain capital punishment and torture related goods to be military in nature). However, many of the EU Member States are also members of the Wassenaar and MTCR regimes. In order to meet of commitments and obligations under these regimes, many of the EU Member States have at minimum implemented export controls to control military goods and technology listed on the Wassenaar Munitions List and the MTCR control list. Even if an EU member is not a member of these multilateral export control regimes, the EU member likely controls the export of some military goods (e.g. military firearms etc).

5.2.3 United Kingdom Legislation

In the UK, the Export Controls Organization, part of the Department for Business, Innovation and Skills (BIS), administers export controls.

As an EU Member State, the UK abides by EU law including all the EU law relating to export controls.

The UK also put in place its own legislation on export controls including:

- *Export Controls Act (2002)*
- Various Orders made under the Act including:
  - *Export Control Order 2008*
  - The *Export of Radioactive Sources (Control) Order 2006*

Where there is a conflict between EU law and UK law, the EU law typically prevails.

The *Export Controls Act (2002)* and the associated Orders provide the main legal framework to control the export of certain goods from the UK.

After an extensive review of the *Export Controls Act (2002)* in 2007-2008., the *Export Control Order 2008* was put into place which amends and consolidates all the previous Orders. The *Export Control Order 2008* is now the main Order controlling:

- The export of strategic goods;
- the export and transfer of technology and the provision of technical assistance;
- Trade in military goods between countries where any part of the activity takes place in the UK (e.g. brokering); and,
- Trade with countries subject to non-binding sanctions and embargoes issued by United Nations, the European Union and the Organization for Security and Co-operation in Europe (OSCE) and implemented by the UK.

5.2.4 Australian Legislation

In Australia, the Defence Export Control Office (DECO), part of the Department of Defense, administers export controls.

5.2.4.1 Current Legislation (Australia)

Australia has enacted the following legislation to control the export, import and transfer of certain goods:

- *The Customs Act (1901)*
- *The Customs (Prohibited Export) Regulations 1958, Regulation 13E* (establishes the Defense and Strategic Goods List (DSGL))
- *Charter of the United Nations Act 1945*
- *Customs (Prohibited Exports) Regulations 1958*
- *Customs (Prohibited Imports) Regulations 1956*
- *The Weapons of Mass Destruction Act (Prevention of Proliferation) Act 1995*
- *Criminal Code Act 1995*

Section 112 of the Customs Act 1901 and the associated regulation provides the main legal framework to control the export of certain goods from Australia.

The Charter of the United Nations Act 1945 provides the main legal framework to implement UN Sanctions against UN Sanctioned countries. .

The Criminal Code 1995 provides criminal penalties in some cases. (e.g. for providing false or misleading statements when applying for an Export Permit or License).

5.2.4.2 Pending Legislation (Australia)

Australia has introduced the following legislation to strengthen its export and domestic transfer controls:

- *Customs Amendment (Military End Use) Bill 2011*
- *Defense Trade Controls Bill 2011*

Both pieces of legislation were passed by Australia's House of Representatives on November 2, 2011 and are now before the Senate. The *Defense Trade Controls Bill 2011* has been referred to a Senate Committee which has recommended that the Department of Defense undertake further consultation with the academic sector. The Senate Committee is due to report back to the Senate by August 15, 2012.

It should be noted that many of the new controls in the *Defense Trade Controls Bill 2011* are extra-territorial in nature.

5.2.5 US Legislation

In the US, main different government Departments involved with export controls are:

- The Department of Commerce
- The Department of State.

The Department of Commerce regulates the export and re-export of dual-use goods and some purely civilian goods. And the Department of State regulates the export and re-export of military goods.

5.2.5.1 Current Legislation (US)

5.2.5.1.1 Department of Commerce

The US has implemented various pieces of legislation to regulate the export and re-export of dual-use items and some purely commercial items including the following:

- *Export Administration Act* (EAA)
- *Export Administration Regulations* (EAR)

The Bureau of Industry and Security (BIS), part of the US Department of Commerce, administers export (and re-export) controls on dual-use items.

5.2.5.1.2 Department of State

The US has implemented various pieces of legislation to regulate the export and re-export of military items including the following:

- *Arms Export Control Act* (AECA)
- *International Traffic in Arms Regulations* (ITAR)

The Directorate of Defense Trade Controls (DDTC), part of the Department of State, is charged with controlling the export (and re-export) and temporary import of defense articles and defence services covered by the United States Munitions List (USML).

5.2.5.2 Upcoming Legislation (US)

In August 2009, President Obama initiated a comprehensive interagency review of the current US export control system, calling for fundamental reform.

The US Government has determined that fundamental reform of the US export controls system is needed. In particular, the US Government has determined that the current system needs to be transformed to a:

- Single Control List;

- Single Primary Enforcement Coordination Agency;
- Single IT system;
- Single Licensing Agency.

As a result, in the future, it is expect that the US legislation related to export controls will undergo a fundamental (and likely drastic) change.

5.3 Scope of Controls

The following lists the various types of export controls:

- Traditional export controls (Non End-Use based controls)
- End-Use Controls
- Transit (or trans-shipment) Export Controls
- Brokering controls
- Intra-community controls (for EU Member States only)
- "US Treaty Based Export Controls"

"Traditional Export Controls" regulate the export of specific items (or types of items) to specific or all foreign destinations. The items (or types of items) are typically placed on a list (such as Canada's ECL). Many of the items are controlled based on certain technical characteristics of the items. Traditional export controls are often used to implement embargoes on countries (e.g. prohibit the export of all goods to a certain destinations, like North Korea).

"End-Use Controls" regulate the export of all items that are being used for a certain end-use (such as Weapons of Mass Destruction or their delivery systems (e.g. missiles)).

"Transit Export Controls" regulate the export of goods entering and passing through the country with a destination outside the country.

"Brokering Controls" regulate the export of brokering services where a broker arranges to have certain items located in a third country exported to another third country.

"Intra-Community Controls" regulate the export (technically called a "transfer" in the European Union) of items from one EU Member State to another EU Member State. These controls only apply to EU Member States.

"US Treaty Based Export Controls" are controls created to meet obligations under a Treaty with the US. US Treaties provides a framework to trade in certain US ITAR related defence articles license-free. US ITAR defence articles that trade outside the framework of the Treaty are subject to the additional treaty based export controls.

Not all nations have implemented all of these types of export controls. Canada has ONLY implemented traditional export controls, one end-use based control and transit controls (but the current legal status and effectiveness of its transit controls

are unclear). The EU, the UK, Australia and the US have implemented more types of controls. As a result, Canadian industry has a competitive advantage since, on balance, Canada controls fewer items than other countries.

5.3.1 Traditional Export Controls

5.3.1.1 Canadian Traditional Export Controls

The EIPA and regulations require all exporters to obtain an Export Permit from the DFAIT before exporting the following goods and technology from Canada**:**

- Any and all goods and technology being exported to a country on Canada's Area Control List (ACL); and,

- Goods and technology enumerated on Canada's ECL being exported to ANY foreign destination (except the United States in most cases).

Canada's Area Control List (ACL) and ECL are regulations under the EIPA.

The ECL is updated regularly to keep up with the fast pace of innovation.
The ECL was recently amended in 2011 to reflect the decisions made in 2009 and 2010 by the various multilateral export control regimes.

The ACL changes from time to time to reflect Canada's changing foreign policy towards certain "problem" countries.

Please note that EIPA and regulations control exports of technology being exported not only by tangible means (e.g. shipping, courier etc) but also by intangible means including Phone calls, Emails, Faxes, Secure FTP servers, Livelink, etc.

Canada's ECL lists not only military items but also dual-use items. Many of these goods and technology listed in the ECL are aerospace related. The ECL is broken up into the following Groups:

- Group 1 – Dual-Use List
- Group 2 – Munitions List
- Group 3 – Nuclear Non-Proliferation List
- Group 4 – Nuclear Related Dual-Use List
- Group 5 – Miscellaneous Goods and Technology
- Group 6 – Missile Technology Control Regime List
- Group 7 – Chemical and Biological Weapons Non-Proliferation List

Unlike the EU, UK and Australia, Canada does not have one consolidated list of dual-use items. Exporters often need to look at multiple groups within the ECL to determine if its goods are subject to Canadian export controls.

Unlike the vast majority of countries, Canada also controls all US origin goods, not controlled elsewhere on the Export Control List, "other than goods or technology that have been further processed or manufactured outside the United States so as to result in a substantial change in value, form or use of the goods or technology or in the production of new goods or technology". (see ECL 5400). This ECL 5400 control captures a huge number of goods including US made clothing, US made toys and US aerospace related goods that are not controlled by any of the multilateral export control regimes. However, Canada has GEP 12 in place that allows exporters to re-export these US Origin goods immediately without delay to most destinations (except for a handful of countries that the US subject to US embargos or other sanctions) by simply claiming GEP 12 before exporting. In other words, ECL 5400 and GEP 12 were put in place by Canada to help the US enforce its embargos and sanctions agonist certain countries.

With respect to conventional aircraft and missiles (not designed for operation in outer space) and related equipment and components, Canada controls the bare minimum in accordance with Canada's commitments and obligations at the multilateral export control regimes (with the exception of US Origin Goods noted above). Other countries (like US, EU, UK and Australia control more items than Canada in this area). As a result, Canadian industry has a competitive advantage since, on balance, Canada controls fewer conventional aircraft related items than most other countries (with the exception of US Origin Goods noted above).

With respect to space related goods (e.g. spacecraft, related equipment and ground stations), Canada controls more items than most countries (except the US) in accordance with an agreement with the US. (See Canadian ECL 5504). This agreement with the US benefits Canadian industry with more relaxed export controls on certain items being exported from the US to Canada. Canadian industry is at a competitive disadvantage since, on balance, Canada controls more space related items than most other countries (except the US).

5.3.1.2 EU Traditional Export Controls

As noted earlier, the EU does not have any export controls on military goods and technology. However, many (if not all) EU Member States have their own export controls on military goods and technology.

The EU does have export controls on certain dual-use goods and technology that apply to all EU Member States and override any national laws. Many of these controls are aerospace related. In particular, the EU Dual-Use Goods Regulation (i.e. EU Council Regulation No. 428/2009 as amended) implements the following traditional export controls on dual-use goods and technologies throughout the EU:

- Controls on the export of all dual-use goods and technologies listed in Annex I (typically called the EU Dual-Use List) of the EU Dual-Use Goods Regulation from any EU Member State to any destination outside the EU. (Article 3 of the EU regulation); and,

- Controls on the export (technically called a "transfer") of all dual-use goods and technologies listed in Annex IV of the EU regulation from any EU Member State to any other EU Member State. (i.e. intra EU community transfers) (Article 22).

It should be noted that EU Dual Use List will be amended very shortly in order to reflect the decisions made in 2009 and 2010 by the various multilateral export control regimes. The new EU Dual Use List will come into force on July 15, 2012. (See EU Regulation (EU) No. 388/2012 amending Council Regulation No. 428/2009).

At its discretion, individual EU Member States may impose additional controls on the export of dual-use goods not listed in the EU Dual Use List for reasons of public security and human rights considerations. (Article 8). When an EU Member States implements additional export controls on dual-use items, it must notify the EU Commission of the measures and the reasons for the measures. (Article 8)

The EU Dual-Use List is one consolidated list that incorporates controls on dual-use goods provided by the Wassenaar Arrangement, the Missile Technology Control Regime (MTCR), the Australia Group, the Nuclear Suppliers Group and the Chemical Weapons Convention.

The EU Dual-Use List is further subdivided into 10 categories –

- Category 0 – Nuclear Materials;
- Category 1 – Materials, Chemicals, Micro-organisms and Toxins;
- Category 2 – Materials Processing;
- Category 3 – Electronics;
- Category 4 – Computers;
- Category 5 – Telecommunications and Information Security
- Category 6 – Sensors and Lasers;
- Category 7 - Navigation and Avionics;
- Category 8 – Marine;
- Category 9 – Aerospace and Propulsion

The categories that affect the aerospace industry the most are category 3 (electronics), Category 5 (Telecommunications), Category 6 (Sensors and Lasers), Category 7 (Navigation and Avionics) and Category 9 (Aerospace and Propulsion).

Unlike Canada which has separate lists within its ECL for the various regimes (such as the Wassenaar and MTCR regimes), the EU Dual-Use List provides one consolidated list of dual-use items.

The EU approach of a consolidated list of goods has advantages over Canada's approach of separate lists of goods (for each regime). It is often easier for an exporter to use a consolidated list of dual-use goods to determine whether goods are subject to export controls. On the other hand, it is very difficult to properly consolidate the different lists of goods from the various regimes. And the EU Consolidated list end up controlling more items than using separate lists for each multilateral export control regime. (E.g. The EU Dual-Use List does not include the MTCR definition for "specially designed" which limits of the scope of certain MTCR related controls).[7]

However, the Canadian Export Control List controls more space related goods than the EU Dual Use List (due to an agreement with the US).

5.3.1.3 UK Traditional Export Controls

Through export licenses, the United Kingdom (UK) controls the export of the following goods and technologies:

1) goods and technology enumerated on the UK's Strategic Export Control Lists; and,

2) goods and technology that are destined to certain destinations or to certain people subject to UN, EU or OSCE Sanctions implemented by the UK.

The UK's Strategic Export Control Lists embodies the export control guidelines developed by the multilateral non-proliferation and export control regimes of which the UK is a member. The List covers both dual-use and military goods and technology (including both dual-use and military aerospace related goods and technology):

The UK's Strategic Export Control Lists consists of the following lists:

1) the UK Military List
   (schedule 2 to Export Control Order 2008);
2) the UK Dual-Use List
   (Schedule 3 to the Export Control Order 2008)
3) The European Union (EU) Human Rights List (or the List of Capital Punishment and Torture Goods)
   (Annexes II and III of Council Regulation (EC) No. 1236/2005 as Amended by Regulation (EU) No. 1352/2011);
4) The UK National Security and Paramilitary List
   (Article 9 to the Export Control Order 2008);

[7] It also takes longer to propagate changes that are advantageous to the exporter in the EU system, compared to the Canadian approach of incorporating by reference that propagates any changes that loosen the controls immediately upon the regimes approval.

5) The UK Radioactive Sources List
   (Schedule referred to in Article 2 of the Export of Radioactive Sources (Control) Order 2006);
6) The EU Dual-Use List
   (Regulation (EU) No. 388/2012 amending Annex I to Council Regulation (EC) No. 428/2009); and,
7) Annex IV to the EU Dual-Use Regulation 428/2009.

The UK Military List incorporates the Wassenaar Arrangement Munitions List and includes some UK specific controls on certain military goods (such as para-military police goods). These UK specific controls can be easily identified by the PL prefix in the control number.
These UK specific controls generally do not control aerospace related goods with the possible exception of PL5017. PL5017 controls all equipment and test models (not controlled elsewhere on the UK Military List) that are specially designed for the "development" or "use" of goods that are both specially designed for military use and listed on the UK Military List. (e.g. Equipment and test models that are specially designed for the "development" or "use" of military aircraft would appear to be controlled under PL5017).

The UK's Military List is fairly up to date. The last amendment to the list was made on June 16, 2009.

The UK Para-military List enumerates certain para-military goods that are not covered by any of the International export control regimes. None appear to be aerospace related.

The UK Dual-Use List contains goods and technology not enumerated on the EU Dual-Use List. In particular, it provides additional controls on specific types of the following goods:

- Explosive Related Goods and Technology (Applies to certain destinations only);
- Materials, Chemicals, Micro-Organisms and Toxins (applies to all destinations);
- Telecommunications and related technology (applies to Iran only)
- Detection Equipment (applies to Afghanistan and Iraq);
- Vessels and related software and technology (applies to Iran only)
- Aircraft and Related Technology (applies to Iran only)

Arguably, the only additional aerospace related control in the UK Dual-Use List is the last one listed above but it only applies to exports to Iran.
The European Dual Use List that is part of the UK's Strategic Export Control Lists is self-explanatory. The European Dual Use List controls certain dual-use items throughout the EU. It incorporates the Wassenaar Arrangement, the Missile Technology Control Regime, the Australia Group and the Nuclear Suppliers Group.

Very shortly, the EU Dual-Use List that is part of the UK Strategic Export Control Lists will be up-to-date with the most recent EU Dual-Use List published by the EU (that will come into force on July 15, 2012).. The UK amendments also will come into force on July 15, 2012.

In some respects that EU Dual Use List (adopted by the UK) controls more dual-use goods than Canada since the EU Dual-Use List does not include the definition for "specially designed" which limits of the scope of certain MTCR related controls.

Annex IV to Dual-Use Regulation 428/2009 is also part of the UK Strategic Export Control List. Annex IV lists all the dual-use goods and technologies that require an Export License to all foreign destinations (including all EU Member States).

With respect to the UK's Strategic Export Controls Lists, it would appear that the UK have gone beyond its international obligations and commitments by controlling additional items (including aerospace related items) that are not controlled by the EU or the multilateral export control regimes (such as the Wassenaar and the MTCR). As a result, Canadian industry has a competitive advantage over UK industry with respect to these additional items controlled in the UK but not in Canada.

5.3.1.4 Australian Traditional Export Controls

5.3.1.4.1 Current Traditional Controls

Prior to exporting goods and technology from Australia, an Export Permit or an Export License needs to be obtained from the Department of Defense in the following two situations:

1) Where the goods and technology are enumerated on Australia's Defense and Strategic Goods List (DSGL); and,

2) Where the goods and technology are destined to certain destinations or certain people subject to UN Sanctions implemented by Australia.

In the case of UN sanctions, an Export License also needs to be obtained from the Department of Foreign Affairs. (In other words, there is a dual licensing requirement for goods subject to UN Sanctions).

Australia's Defense and Strategic Goods List (DSGL) embodies the export control guidelines developed by the multilateral non-proliferation and export control regimes of which Australia is a member. The DSGL covers both dual-use and military goods and technology (including both dual-use and military aerospace related goods).

The Defense and Strategic Goods List (DSGL) consists of two parts:

1) the Munitions Lists (Part 1)
and,
2) the Dual-Use List (Part 2).
.

Part 1 or the Munitions List incorporates the Wassenaar Arrangement Munitions List and is further broken up into two parts (or sub-parts):

> Military Goods, that is, those goods or technology that are designed or adapted for military purposes including parts and accessories thereof; and,
>
> Non-Military Lethal Goods, that is, equipment that is inherently lethal, incapacitating or destructive such as non-military firearms, non-military ammunition and commercial explosives and initiators.

Part 2 or its Dual Use List is almost identical to the European Dual Use List. The only controls from the EU Dual-Use List that Australia did not include in its own Dual-Use List were the controls on uranium and certain fissile materials (0C001 and 0C002). (These nuclear-related items are controlled by another Government Department, the Australian Department of Resources). Australia also added some chemicals to its Dual-Use list that are not found on the EU Dual-Use List. (See 1C350.64 and 1C350.65 of the DSGL).

Australia's Munitions List (Part 1 of the DSGL) is fully aligned with the Wassenaar Arrangement Munitions List revised as at the end of 2010. Australia's Dual-Use List (Part 2 of the DSGL) is fully aligned with the European Union Dual-Use List revised up to the end of 2008 (with the exception of the small omissions noted above)..

In some respects, that the Australian Dual Use List (which is based on the EU Dual-Use List) controls more dual-use goods than Canada since the EU Dual-Use List does not include the definition for "specially designed" which limits of the scope of certain MTCR related controls.

As a result, Canadian industry has a competitive advantage over Australian industry with respect to theses goods and technologies (including some aerospace related items) controlled in Australia but not controlled in Canada.

With respect to Australia's Munitions List, it would appear that Australia also goes beyond its international obligations and commitments by controlling additional goods that are not listed on the Wassenaar Munitions List. In particular, the goods that are listed in the Non-Military Lethal Goods section of Australia's Munitions List are not included on the Wassenaar Munitions List. (e.g. non-military firearms). However, these goods and technologies are not generally considered to be aerospace related.

5.3.1.4.2 Proposed New Traditional Controls

Australia has introduced the *Defense Trade Controls Bill 2011* to strengthen its export and domestic controls. This Bill passed by Australia's House of Representatives on November 2, 2011 and has been referred to a Senate Committee which has recommended that the Department of Defense undertake further consultation with the academic sector. The Senate Committee is due to report back to the Senate by August 15, 2012.

When enacted, this bill will add the following traditional export control:

- controls on the export of all dual-use and military technology listed on Australia's Defence and Strategic Goods List (DSGL) by an foreign person in Australia to a foreign person located outside Australia (see Subsection 10(1) of the Bill); and
- controls on the export of all defence services for all goods and technology listed on Australia's Defence and Strategic Goods List (DSGL) by an Australian person located anywhere in the world to a foreign person located outside Australia (see Subsection 10(2) of the Bill).

It should be noted that under subsection 4(1) of the Bill, "technology: is defined as to include software. However, under subsection 4(2) of the Bill, the Minister of Defence may, by legislative instrument, limit the definition of "technology". It is quite possible that the Minister may exclude executable software from the definition of "technology" since executable software is not typically considered to be "technology". But at this time, it is unclear whether this will happen.

It should also be noted that under subsection 4(1) of the Bill, the definition of "defence services" is NOT limited to services relating to military goods or technology. It would appear that Australia wishes to control both all services (including commercial or dual use services) relating to all goods and technology listed on Australia's Defence and Strategic Goods List (DSGL). In my view, the term "Defense Services" may be misleading to some.

Canada already controls the export of goods and technology from a foreign person in Canada to a foreign person located outside Canada. But Canada does NOT control the export (or transfer) by a Canadian located outside Canada.[8] When Australia enacts this legislation, Australia will have stronger traditional export controls than Canada since they will be extra-territorial in nature.

5.3.1.5 US Traditional Export Controls

In the US, the responsibility for implementing export controls falls on three Departments:

- The US Department of Commerce;
- The US Department of State

[8] From time to time, Canadian legislation may be enacted to implement UN resolutions (for embargoes) that may be extra-territorial in nature.

- The US Treasury Department

The Bureau of Industry and Security (BIS), which is part of the US Department of Commerce, administer export controls on dual-use items and some purely civilian items.

The Directorate of Defense Trade Controls (DDTC), part of the Department of State, administers export controls on certain military goods.

The Office of Foreign Assets Control (OFAC), which is part of the US Treasury Department, administers and enforces economic and trade sanctions against targeted foreign countries, terrorism sponsoring organizations, and international narcotics traffickers. It maintains the "Specially Designated National and Blocked Person List". Exporters are required to obtain an Export Permit before exporting any goods to entities or persons on this list.

If an exporter is uncertain whether US government department has jurisdiction over the export in question, the exporter can submit a Commodity Jurisdiction (CJ) Request to DDTC in the US Department of State. DDTC will determine who has jurisdiction.

5.3.1.5.1 US Department of Commerce

An Export License needs to be obtained from the US Department of Commerce prior to exporting items from the US in any of the following situations:

1) the items are enumerated on the US Commerce Control List (CCL); and, if they are, whether the particular items are also controlled to the particular destination (by cross referencing the Commerce Country Chart);

2) the items are destined to certain entities (or companies) located abroad or in the US (regardless of whether the items are enumerated on the US Commerce Control List (CCL); or,

3) The items are destined to certain people either located abroad or in the US (regardless of whether the items are enumerated on the US Commerce Control List (CCL).

To determine 2) and 3) above, the exporter must look at the following lists:

a) The Entity List

   This list specifies the license requirements that apply to each listed party. These license requirements are in addition to any other license requirements by other provisions of the Export Administration Regulations (EAR);

b) The Treasury Department Specially Designated National and Blocked Person List

This list is maintained by the Department of Treasury's Office of Foreign Assets Control which administers and enforces economic and trade sanctions against targeted foreign countries, terrorism sponsoring organizations, and international narcotics traffickers.

c) The Unverified List

This list specifies entities (i.e. companies) for which the US Department of Commerce was unable to complete an end-use check. If an entity is on the unverified list, the exporter has a duty to inquire about before making an export to them.

d) Denied Person List

This list specifies firms and individuals whose export privileges have been denied. Note that some denied persons may be located within the United States.

The traditional export controls administered by the US Department of Commerce are much more complicated than the export controls in other countries. Unlike most countries, the fact that an item is enumerated on the Commerce Control List (CCL) does not necessary mean that the item is subject to export controls by the US Department of Commerce. One must also look at the destination and the entity or the person receiving the goods.

In addition, all exporters (even if they are not US citizens) are also required to obtain an export license from the US Department of Commerce prior to re-exporting any controlled dual-use items of US origin from a foreign country to another foreign country (except back to the US). In addition, re-exports of certain foreign made items incorporating US controlled item(s) also require an export license from the US Department of Commerce. (See Section 5.4.6 on extra-territoriality for more details).

Like the EU Dual-Use List, the **US Commerce Control List (CCL)** is divided into ten broad categories:

0 = Nuclear materials, facilities and equipment (and miscellaneous items)
1 = Materials, Chemicals, Microorganisms and Toxins
2 = Materials Processing
3 = Electronics
4 = Computers
5 = Telecommunications and Information Security
6 = Sensors and Lasers
7 = Navigation and Avionics
8 = Marine
9 = Propulsion Systems, Space Vehicles, and Related Equipment

The US Commerce Control List (CCL) lists many more items (including many more aerospace items) than is required by the multilateral export control regimes. For example, the CCL includes the following aerospace related items in Category 9 of the list which are not covered by any of the multilateral export control regimes:

- Diesel engines, n.e.s., and tractors and specially designed parts therefor, n.e.s. (see 9A990)
- All other aircraft, gas turbine engines, parts and components not controlled elsewhere on the CCL (see 9A991)
- Complete canopies, harnesses, and platforms and electronic release mechanisms therefor, except such types as are in normal sporting use (see 9A992);
- Vibration test equipment and specially designed parts and components, n.e.s. (see 9B990)
- Certain specially designed equipment, tooling or fixtures, not controlled by elsewhere, as follows, for manufacturing or measuring gas turbine blades, vanes or tip shroud castings:
    - Automated equipment using non-mechanical methods for measuring airfoil wall thickness;
    - Tooling, fixtures or measuring equipment for the “laser”, water jet or ECM/EDM hole drilling processes controlled by 9E003.c;
    - Ceramic core leaching equipment;
    - Ceramic core manufacturing equipment or tools;
    - Ceramic shell wax pattern preparation
    - Ceramic shell burn out or firing equipment.

  (see 9B991)

- "Software", n.e.s., for the "development" or "production" of equipment controlled by 9A990 or 9B990. (See 9D990)
- "Software", for the "development" or "production" of equipment controlled by 9A991 or 9B991. (See 9D991)
- "Technology", n.e.s., for the "development" or "production" or "use" of equipment controlled by 9A990 or 9B990. (See 9E990)
- "Technology", for the "development", "production" or "use" of equipment controlled by 9A991 or 9B991. (see 9E991)
- Other "technology", not described by 9E003, as follows:
    - Rotor blade tip clearance control systems employing active compensating casing "technology" limited to a design and development data base; *or*
    - Gas bearing for turbine engine rotor assemblies.

  (See 9E993)

With respect to the Commerce Control List (CCL), it would appear that the US Department of Commerce has gone beyond its international obligations and commitments by controlling additional items (including aerospace related items) that are not controlled by the multilateral export control regimes (such as the Wassenaar and the MTCR). As a result, Canadian industry has a competitive advantage over the American industry with respect to these additional items controlled in the US but not in Canada.

Note: The US has many license exceptions will allow exporters to export certain controlled items to certain destinations under certain circumstances. The existence of a license exception does not technically decontrol the item.

5.3.1.5.2 US Department of State

All exporters need to obtain an export license from the US Department of State prior to exporting any items enumerated on the USML from the US. The USML is a list of articles, services, and related technology designated as defence and space-related.

In addition, all exporters (even if they are not US citizens) are also required to obtain an export license from the US Department of State prior to re-exporting any items enumerated on the USML of US origin from a foreign country to another foreign country (except back to the US). In addition, re-exports of certain foreign made items incorporating US ITAR controlled item(s) also require an export license from the US Department of State. (See section 5.4.5 on extra-territoriality for more details)

In accordance with Executive Order 11958, the State Department, with the concurrence of the Department of Defense, determines what commodities are covered by the USML. An article or service may be designated as a defence article or service if it:

1. Is specifically designed, developed, configured, adapted or modified for a military application and
    1. Does not have predominant civil applications, and
    2. Does not have performance equivalent (defined by form, fit, and function) to those of an article or service used for civil applications, or
2. Is specifically designed, developed, configured, adapted or modified for a military application, and has significant military or intelligence applicability such that control is necessary.

5.3.2 End-Use Bases Export Controls

"End-Use Controls" regulate the export of all items that are being used for a certain end-use (such as Weapons of Mass Destruction (WMD) or their delivery systems (e.g. missiles)).

5.3.2.1 Canadian End-Use Based Controls

Canada has implemented the following WMD related end-use control:

- Controls on the export of all goods and technology (whether or not they are listed in the ECL if the exporter has any information would which lead a reasonable person to suspect that the goods and technology will be used for WMD, their delivery systems or in a facility used for any of these WMD related activities; and,

- Controls on the export of all goods and technology (whether or not they are listed in the ECL) if the Minister of Foreign Affairs as determined that the goods and technology (whether or not they are listed in the ECL) will be used for WMD, their delivery systems or in a facility used for any of these WMD related activities.

The first control does NOT apply where the goods and technology are intended for end-use in Argentina, Australia, Austria, Belgium, Bulgaria, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Poland, Portugal, the Republic of Korea, Spain, Sweden, Switzerland, Turkey, Ukraine, the United Kingdom or the United States (and the final consignee and any intermediary consignees (if any) are also located in one of these countries).

(For more details, see ECL 5505).

Unlike other countries (including the EU, UK and US), Canada has only enacted one type of end-use control – the WMD related end-use control. Australia has introduced legislation to implement additional end-use controls (beyond WMD-related end-use controls). In other words, many other countries control more goods and technology (including more aerospace related goods and technology) through

their end-use controls than Canada does. As a result, Canadian industry has a competitive advantage over industries in many other countries that have additional end-use controls.

5.3.2.2 EU End-Use Based Controls

Article 4 of the EU Dual-Use Goods Regulation (i.e. EU Council Regulation No. 428/2009) implements the following end-use related export controls on dual-use goods and technologies throughout the EU:

1) Controls on the export of all dual use goods (not listed in the EU Dual Use List) if the exporter has been informed by the EU Member State that the dual use goods are or may be intended for use in connection with WMD or their delivery systems;
2) Controls on the export of all dual use goods (not listed in the EU Dual Use List) if the destination country is subject to a arms embargo decided by the EU Council, the Organization for Security and Cooperation in Europe (OSCE) or the United Nations and if the exporter has been informed by the EU Member State that the dual-use goods are or may be intended for a military end-use; and
3) Controls on the export of all dual use goods (not listed in the EU Dual Use List) if the exporter has been informed by the EU Member State that the goods are or may be intended for use as parts or components of military items listed in the national military list of the Member State which have been exported from the EU Member State without a proper export authorization (i.e. export license) or in violation of an authorization prescribed by national legislation; and,
4) Controls on the export of all dual use goods (not listed in the EU Dual Use List) if the exporter is aware that the dual use goods are intended for use in any of the purposes listed in 1), 2) or 3) above.

The EU Dual-Use Regulation also allows EU Member States to implement the following controls (at the discretion of the EU Member States):

- controls on the export of all dual use goods (not listed in the EU Dual Use List) if the exporter suspects that the dual use goods may be intended for use in any of the purposes listed in 1), 2) or 3) above (Article 4).

The EU end-use controls control more goods than Canada's end-use controls. Canada only has only implemented WMD related end-use controls. The EU has not only WMD related end-use controls but also Military end use controls. As a result, this situation provides Canadian industry with a competitive advantage.

5.3.2.3 UK End-Use Based Controls

As part of the EU, the UK has automatically adopted all the mandatory end-use controls created in the EU Dual-Use Goods Regulation. For more details on these mandatory end-use controls, please see the section above on EU End-Use Controls.

The UK has also enacted national legislation to implement the following optional EU End-Use export controls:

- End-use controls on the export of all dual use items (goods, software or technology) not listed in the EU Dual-Use List where the exporter suspects that the dual use items may be intended for use in connection with WMD or their delivery systems (see Article 6 o f The Customs Order 2008).

The UK has also enacted the following additional WMD related End-Use Export controls:

- Controls on the export by "non-electronic means" of all software and technology where the exporter has been informed by the UK Government that the software and technology are or may be intended for use in connection with WMD or their delivery systems or where the exporter is aware that the software and technology are intended for such use (See Article 12 of the Customs Order 2008);
- Controls on the export by all technical assistance where the exporter has been informed by the UK Government that the technical assistance is or may be intended for use in connection with WMD or their delivery systems or where the exporter is aware that the technical assistance is intended for such use. (See Article 19 of the Customs Order 2008)

The two additional WMD related controls above appear to apply to both military and dual-use items.

The UK has more extensive end-use controls than Canada. Canada only has only implemented WMD related end-use controls. The UK has not only WMD related end-use controls but also Military end use controls and other EU end-use controls. As a result, Canadian industry is at competitive advantage since fewer end-use controls apply in Canada.

5.3.2.4 Australian End-Use Controls

5.3.2.4.1 Current End-Use Controls

Australia's *Weapons of Mass Destruction (Prevention of Proliferation) Act 1995* provides various end use controls for WMD programs and their delivery systems including:

- Controls on the export of all goods (not listed in Australia's Defence Strategic Goods List (DSGL) if the exporter has been informed by the Australian Minister of Defence that the goods are or may be intended for use in connection with WMD program or missiles capable of delivering such weapons; and,

- Controls on the export of all goods (not listed in Australia's Defence Strategic Goods List (DSGL) if the exporter suspects that the goods are or may be intended for use in connection with WMD program or missiles capable of delivering such weapons.

Australia's WMD related end-use control is broader than Canada's since it applies to all destinations. (Canada's WMD-related end-use control only applies to certain destinations). As a result, Canadian industry is at competitive advantage since Canada's WMD related end-use controls are narrower in scope than Australia's.

5.3.2.4.1 Proposed End-Use Controls

Australia has introduced the *Customs Amendment (Military End Use) Bill 2011* which will introduce a new military end-use control. The Bill was passed by Australia's House of Representatives on November 2, 2011 and is now before the Senate.

The *Customs Amendment (Military End Use) Bill 2011* amends the Customs Act 1901 in order to provide a power to the Minister of Defense to prohibit the export of "non-regulated" physical goods to a particular destination or person. "Non-regulated" physical goods are physical goods that are NOT enumerated on Australia's Defense and Strategic Goods List (DSGL).

The Minister can only exercise this new power if he (or she) suspects that the goods will be or may be used for a 'military end-use' that may prejudice Australia's security, defence or international relations. When the Minister forms such a suspicion, the Minister may issue a prohibition notice preventing the export.

Under subsection 112BA(13), goods are or may be for a 'military end-use' if the goods are or may be for use in operations, exercises or other activities conducted by an armed force or an armed group, whether or not the armed force or armed group forms part of the armed forces of the government of a foreign country.

When enacted, Australia will have more extensive end-use controls than Canada. Australia will have not only WMD related end-use controls but also military end use controls. Canada only has only implemented WMD related end-use controls. As a result, this situation provides Canadian industry with a competitive advantage over their competitors in Australia.

5.3.2.5 US End-Use Controls

The US has more extensive end-use controls than Canada. Canada only has only implemented WMD related end-use controls. The US has not only WMD related end-use controls but also other end use controls. Some of these additional end-use controls are aerospace related. As a result, Canadian industry has a competitive advantage since fewer end-use controls apply in Canada.

5.3.2.5.1 US Department of Commerce

The US Department of Commerce has implemented various end use controls including:

- Controls on certain Nuclear end-uses (§ 744.2);
- Controls on certain rocket systems (including ballistic missile systems and Space launch vehicles and Sounding rockets) and unmanned air vehicles (including cruise missile Systems, target drones and reconnaissance drones) End-uses (§ 744.3);
- Controls on certain chemical and biological weapons end-uses (§744.4);
- Controls on certain maritime nuclear propulsion end-uses (§ 744.5);
- Controls on certain exports to and for the use of certain foreign vessels or Aircraft (§ 744.7);
- Controls on certain exports and re-exports of certain cameras (§ 744.9).
- Controls on certain exports and re-exports of general purpose microprocessors for "military end-uses" and to "military end-users" (§ 744.17)
- Controls on certain military end-uses in the People's Republic of China (PRC) (§ 744.21)

The US Department of Commerce has implemented various end user controls including

- Controls on certain activities of U.S. persons (§ 744.6);
- Controls on exports and re-exports to persons designated pursuant to various executive orders (§ 744.8, § 744.12, § 744.13, § 744.14, § 744.18);
- Controls on certain entities in Russia § 744.10

5.3.2.5.2 US Department of State

It would appear that the US ITAR does not add any other end-use controls.
(But more research in this area needs to be done).

5.3.3 Transit Controls

"Transit Export Controls" regulate the export of goods entering and passing through the country with a destination outside the country.

5.3.3.1 Canadian Transit Controls

All goods (and technology) listed on Canada's ECL that transit through Canada to a destination outside Canada (other then the US) require an Export Permit unless the goods (and technology) are in transit on a through journey on a billing that originates outside Canada. (see ECL item 5401). The goods also must not be unloaded or removed from the means of transportation by which they came into Canada (e.g. they must remain on board a vessel or aircraft for the entire period that they remain in Canada).

In combination with ECL 5400, Canada's transit controls in ECL 5401 also prevent the transshipment through Canada of U.S. origin goods and technology.

Canada also has controls on transshipments (were goods have been unloaded or removed from the means of transportation by which they came into Canada). Section 4 of the *Transshipment Regulations* under the EIPA prohibits any person from transshipping, assisting in the transshipment or accepting for transshipment any goods unless an authorization certificate has been issued by the exporting country or by the country of residence of the exporter and presented to Canada customs or an approval has been given by the Minister of Industry, Trade and Commerce (or his or her delegate). .

Please note that portions of these regulations are outdated. As a result, they are under review by the Canadian Government

It would appear that Canadian industry is at a competitive advantage with respect transit controls since other countries appear to have broader transit controls that Canada.

5.3.3.2 EU Transit Controls

The EU does not have any mandatory transit controls that apply to all the EU Member States. However, the EU does offer some optional transit controls that may be adopted by EU Member States (at their discretion).

Article 6 of the EU Dual-Use Goods Regulations allows EU Member States to implement any or all of the following optional transit controls (at their discretion):

- transit controls on dual use goods listed in the EU Dual-Use List that are or may be intended for use in connection with WMD or their delivery systems;
- transit controls on all other dual use goods not listed in the EU Dual-Use List that are or may be intended for use in connection with WMD or their delivery systems; and,
- transit controls on dual-use items listed in the EU Dual Use List where the destination country is subject to a arms embargo decided by the EU Council, the Organization for Security and Cooperation in Europe (OSCE) or the United Nations and where the exporter has been informed by the EU Member State that the dual-use goods are or may be intended for a military end-use.

If an EU Member State adopts any of these optional EU transit controls, Canadian industry will have a competitive advantage. Canada does not have WMD related transit controls but EU member states who adopt these optional EU controls will.

5.3.3.3 UK Transit Controls

The UK has adopted transit controls on dual-use goods. Like Canada, the UK transit controls typically do NOT apply where:

- the goods remain on board a vessel or aircraft for the entire period that they remain in Canada or are goods on a through bill of lading or through an air waybill;
- the final destination has not changed from the final destination originally determined at the time of the original exportation; and,
- the goods were exported from the originating country in accordance with the laws and regulations relating to the exportation of goods applying there at the time of the original exportation

(See Article 17(4) of the Export Control Order 2008).

But unlike Canada, the UK transit controls always apply even if they meet the criteria listed above (e.g. on a through bill of lading etc) on the following goods:

- certain dual use goods listed in the EU Dual-Use List (see Articles 8 and 17 of the Customs Order 2008);
- dual-use goods where the exporter has been informed by the UK Government that the goods are or may be intended for use in connection with WMD or their delivery systems or where the UK person is aware that the goods are intended for such use. (See Articles 8(2), 8(3) and 17(3) of Customs Order 2008).

The first transit control listed above ONLY applies to certain goods and in some cases to certain destinations. **But some of these goods are aerospace-related.** (For more details, see 17(2) of the Export Control Order 2008).

The UK has implemented transit controls that control the transport of certain dual-use goods (including certain aerospace related goods) entering and passing through the UK with a destination outside the UK even if the goods are on a through bill of lading or air waybill etc.

This situation likely presents Canadian industry with a competitive advantage. Canada's transit controls appear to be narrower in scope since they do not apply when the goods are on a through bill of lading or air waybill etc that originated outside Canada.

5.3.3.4 Australian Transit Controls

In practice, goods travelling in transit from the a foreign country through Australia to another foreign country under a legal bill of lading or air waybill do not require export permits from the Australian Government.

However, under section 203DA of the Customs Act, goods in transit may be seized by Customs in certain limited circumstances including the following:

- where the goods are connected with the carrying out of a terrorist act, or,
- Where their existence may prejudice Australia's defence and security interests or international peace and security.

Australia has implemented transit controls that control the transport of certain dual-use goods (including certain aerospace related goods) entering and passing through Australia with a destination outside the Australia even if the goods are on a through bill of lading or air waybill etc.

This situation likely presents Canadian industry with a competitive advantage. Canada's transit controls appear to be narrower in scope since they do not apply when the goods are on a through bill of lading or air waybill etc that originated outside Canada.

5.3.3.5 US Transit Controls

It is unclear whether the US any controls on the transit of goods. It appears it does not. (More research needs to be done in this area).

But the US does prohibit the transshipment of goods (unless proper authorization has been obtained).

5.3.4 Brokering Controls

"Brokering Controls" regulate the export of brokering services where a broker arranges to have certain items located in a third country exported to another third country.

5.3.4.1 Canadian Brokering Controls

Canada has NOT implemented any controls to control brokering services.

As a result Canadian exporters have a competitive advantage over exporters in certain other countries (like the EU, the UK and soon Australia) who have implemented controls on brokering services.

5.3.4.2 EU Brokering Controls

In the EU, brokering services is defined as follows:

- the negotiation or arrangement of transactions for the purchase, sale or supply of dual-use items from a third country to any other third country; or
- the selling or buying of dual-use items that are located in third countries for their transfer to another third country.

Article 5 of the EU Dual-Use Goods Regulation implements the following controls on the brokering of dual-use goods and technologies throughout the EU:

- controls on brokering services for dual use goods listed on the EU Dual Use List where the broker has been informed by the EU Member State that the dual use goods are or may be intended for use in connection with WMD or their delivery systems;
- controls on brokering services for dual use goods listed on the EU Dual Use List where the broker is aware that the dual use goods are intended for use in connection with WMD or their delivery systems;

At its discretion, an EU Member State may extend these controls on brokering services through national legislation to include the following:

- Brokering controls on dual-use goods not listed in the EU Dual Use List where the broker has been informed by the EU Member State that the dual use goods are or may be intended for use in connection with Weapons of Mass or their delivery systems; and,
- Brokering controls on dual-use items listed in the EU Dual Use List where the destination country is subject to a arms embargo decided by the EU Council, the Organization for Security and Cooperation in Europe (OSCE) or the United Nations and where the broker has been informed by the EU Member State that the dual-use goods are or may be intended for a military end-use; and,
- Brokering controls where the broker suspects that the dual use goods may be intended for use in connection with WMD or their delivery systems.

Unlike Canada, the EU has implemented some controls on brokering services of certain dual-use goods. In other words, this situation presents Canadian industry with a competitive advantage since Canada does not have any controls on brokering.

5.3.4.3 UK Brokering Controls

As part of the EU, the UK has automatically adopted all the mandatory EU controls on brokering created by the EU Dual-Use Goods Regulation.

These controls apply where any part of the activity takes place in the UK For more details on these mandatory controls on brokering, please see the section above on EU Brokering Controls.

In 2008, the UK implemented one of the EU optional controls on brokering (and expanded its scope) and implemented some of its own controls on brokering. In particular, the UK introduced the following additional brokering controls:

- Brokering controls on all goods (both military and dual-use) subject to UK trade controls where the destination country is subject to an embargo;
- Brokering controls on all Category A goods where the broker knows or has reason to believe that the goods will or may be removed from one third country to another third country
- Brokering controls on all Category B goods where the broker knows or has reason to believe that the goods will or may be removed from one third country to another third country;
- Brokering controls on all Category C goods where the broker knows or has reason to believe that the goods will or may be removed from one third country to another third country

Category A and B goods are defined in Schedule 1 of the Export Control Order 2008. Category A goods are certain security and para-military police goods. (Many of these goods can be used for torture). None are directed related to the aerospace industry.

On the other hand, Category B goods are certain specified small arms, light arms, ammunition, MANPADS and long range missiles and all specially designed components for any of these goods. Many are aerospace related.

Category C goods are defined in the Export Control Order 2008 as all other goods on the UK Military List and certain other chemicals and equipment for riot control. Category C would control all other aerospace goods specially designed or modified for military use (e.g. military aircraft).

Unlike Canada, the UK has adopted the EU controls on brokering services and implemented additional controls on brokering services on certain military and dual-use goods (many of which are aerospace related). In other words, this situation presents Canadian industry with a competitive advantage since Canada does not have any controls on brokering.

5.3.4.4 Australian Brokering Controls

Australia has introduced the *Defense Trade Controls Bill 2011* to strengthen its export and domestic controls. This Bill passed by Australia's House of Representatives on November 2, 2011 and has been referred to a Senate Committee which has recommended that the Department of Defense undertake further consultation with the academic sector. The Senate Committee is due to report back to the Senate by August 15, 2012.

When enacted, this Bill will add the following new controls for the brokering of certain dual-use and military goods.

- controls on brokering activities where the broker arranges for another person to supply goods, where the goods are listed in the Defence and Strategic Goods List (DSGL) and the supply is, or is to be, from a place outside Australia to another place outside Australia;
- controls on brokering activities where the broker arranges for another person to supply technology relating to goods, where the technology is listed in the Defence and Strategic Goods List (DSGL) and the supply is, or is to be, from a place outside Australia to another place outside Australia;
- controls on brokering activities where the broker arranges for another person to provide defence services in relation to goods, where the goods are listed in the Defence and Strategic Goods List (DSGL) and the defence services are, or are to be, received at a place outside Australia; and,
- controls on brokering activities where the broker arranges for another person to provide defence services in relation to technology relating to goods, where the technology is listed in the Defence and Strategic Goods List (DSGL) and the defence services are, or are to be, received at a place outside Australia.

The controls do NOT apply when a broker arranges have another person located in a foreign country that is a Participating State of the Wassenaar Arrangement to supply goods, technology or defence services within the same country.

Brokers must apply to the Minister to become registered brokers and when necessary obtain permits for all controlled brokering activities listed above.

When the Bill is enacted, Australia will have stronger export controls than Canada on brokering since Canada does NOT have any controls in place on brokering.

5.3.4.5 US Brokering Controls

5.3.4.5.1 US Department of Commerce

To date, it would appear that the US Department of Commerce has not introduced brokering controls on dual-use goods.

5.3.4.5.2 US Department of State

The US Department of State has implemented brokering controls on arms. The Arms Export Control Act (AECA) was amended in 1996 to cover brokering activity by all persons (except officers/employees of the US Government acting in an official capacity) with respect to the manufacture, export, import, or transfer of any defence articles or defence service on the U.S. Munitions List of the ITAR.

Brokers must register with the US Department of State. In addition, with limited exceptions, brokers must obtain approval for all arms transfers and exports from the US Department of State to ensure that any brokering activities of arms do not contribute to international insecurity and weapons proliferation.

A broker is defined as "any person who acts as an agent for others in negotiation or arranging contracts, purchases, sales, or transfers of defence article or defence services in return for a fee, commission, or other consideration."

Under US law, arms brokering includes but is not limited to, activities by U.S. persons located inside or outside the United States or foreign persons subject to U.S. jurisdiction involving defence articles or defence services of U.S. or foreign origin located inside or outside of the United States.

Any person required to register as an arms broker must provide an annual report to the Office of Defense Trade Controls (DDTC) enumerating and describing those approved activities and any exemptions used for other covered activities.

5.3.5 Intra-Community controls (for EU Member States only)

"Intra-Community Controls" regulate the export (technically called a "transfer" in the European Union) of items from one EU Member State to another EU Member State. These controls only apply to EU Member States.

These "intra-community controls" provide neither a competitive advantage nor a competitive disadvantage to Canadian industry.

5.3.5.1 Intra-Community Controls Created by the EU

Most items (including most dual-use items enumerated on the EU Dual-Use List) trade within the EU license-free. But the commercial documents relating to all intra-community transfers of dual-use items listed on the EU Dual-Use List must clearly indicate that these items are subject to export controls if exported from the EU. (see Article 22(10)).

However, the EU does implement some controls on the export (technically called a "transfer") from any EU Member State to any other EU Member State of a small subset of dual-use items listed on the EU Dual-Use List. All EU intra-community transfers of dual-use items listed n Annex IV of the Dual-Use Regulation are controlled. (See Article 22 of the EU Dual-Use Goods Regulation (i.e. EU Council Regulation No. 428/2009)).

For the most part, the EU implemented these controls on intra-community transfers to allow the individual EU Member States that are part of the various multilateral export control regimens (such as Wassenaar) to meet their commitments and obligations under these regimes.

The EU Dual-Use Goods Regulation allows an EU Member State to extend these intra-community transfer controls on dual-use goods, at its discretion, in cases where at the time of transfer:

- The exporter (or transferor) knows that the final destination is outside the EU;
- The dual-use goods are listed on the EU Dual-Use List or on the national Dual-Use List, if any, of the EU Member State from which the goods are to be transferred and the dual-use goods are not covered by a general authorization (or license) or global authorization (or license); and,
- No processing or working is performed on the goods in the EU Member State to which the goods are to be transferred.

(See article 22 of the EU Dual-Use Goods Regulation)

5.3.5.1 Intra-Community Controls Created by the UK

The UK controls the export of all military goods, software and technology to all destinations including other EU Member States.

As part of the EU, the UK also controls the export (technically called a "transfer" within the EU) from the UK to any other EU Member State of all dual-use items enumerated in Annex IV of the EU Dual-Use Regulation. Annex IV is a small subset of dual-use items listed on the EU Dual-Use List. (See Article 22 of the EU Dual-Use Goods Regulation).

The UK has also implemented the some of the optional EU Intra-Community transfer controls including:

- controls on the export or transfer from the UK to other EU Member States of dual-use goods, software or technology subject to EU dual-use controls where the exporter (or transferor) knows that the final destination is outside the EU and no further processing or working is to be performed on the goods, software or technology. (See Article 7 of the Export Control Order 2008); and
- controls on the export or transfer from the UK to other EU Member States of dual-use goods, software or technology subject to UK specific dual-use controls where goods, software or technology is controlled to a specific destination (e.g. Iran) rather than any destination and where the where the exporter (or transferor) knows that the final destination is outside the EU and no further processing or working is to be performed on the goods, software or technology. (See Article 5 of the Export Control Order 2008);

5.3.6 Decontrols and License Exceptions

5.3.6.1 Canadian Decontrols and Permit Exceptions

In Canada's Export Control List, there is a license exception for the vast majority of goods and technology being exported to the US. Only certain nuclear related items and

certain light arms (e.g. firearms) are export controlled to the US. In other words, exporters can export the vast majority of goods (including aerospace related items) to the US immediately without delay.

This license exception provides Canadian industry with a significant competitive advantage since most other countries have more extensive export controls in place for exports to the US.

Canada has also adopted the decontrols found in the multilateral export control regimes including the following which would apply to aerospace related software and technology:

- decontrols on technology which is the minimum necessary for the installation, operation, maintenance (checking) and repair of those items which are not controlled or whose export has been authorized
- decontrols on technology "in the public domain" or which is considered to be "basic scientific research";
- decontrols on technology which is the minimum necessary for patent applications. (only applies in some cases);
- decontrols on software that does not employ cryptography which is considered retail general purpose mass market in nature;
- decontrols on software that employs cryptography which is considered retail general purpose mass market in nature and meets some other criteria; and,
- decontrols on software "in the public domain"

In Canada, it should be noted that commercial aircraft (that have not been modified for military use or equipped with weapons) are not enumerated on Canada's Export Control List. (i.e. they are NOT export controlled in Canada). (But certain system, equipment and components for commercial aircraft are subject to export controls). As a result, the export of a commercial aircraft from Canada is typically not controlled (unless it is of US origin).

And as a matter of policy, it would appear that Canada does NOT control the export of military aircraft on scheduled journeys that have not undergone any repairs or modifications in Canada or change in registration and have been approved to operate in Canadian airspace by the Minister of Defence. (i.e. It does not require Export Permits in these cases). But the export of most systems, equipment and components for military aircraft is typically export controlled.

(see "Policy and Procedures for the Operation of Foreign Military Aircraft in Canadian Airspace" issued by Transport Canada)

5.3.6.2 EU Decontrols and License Exceptions

The EU has also adopted the decontrols found in the multilateral export control regimes including the following which would apply to aerospace related software and technology:

- decontrols on technology which is the minimum necessary for the installation, operation, maintenance (checking) and repair of those items which are not controlled or whose export has been authorized
- decontrols on technology "in the public domain" or which is considered to be "basic scientific research";
- decontrols on technology which is the minimum necessary for patent applications. (only applies in some cases);
- decontrols on software that does not employ cryptography which is considered retail general purpose mass market in nature;
- decontrols on software that employs cryptography which is considered retail general purpose mass market in nature and meets some other criteria; and,
- decontrols on software "in the public domain"

Article 7 of the EU Dual-Use Goods Regulation (i.e. EU Council Regulation No. 428/2009) provides one decontrol. Article 7 explicitly states that the EU dual-use controls "do not apply to the supply of services or the transmission of technology if that supply or transmission involves cross-border movement of persons".

At minimum, the EU does not control the export of technical information and technical assistance on dual-use goods where people leave with the necessary information only in their heads and intend to provide the information or services to another person at a foreign destination.

In contrast, Canada controls the all exports of technical information and technical assistance, enumerated on Canada's ECL, where people leave Canada with the necessary information ONLY in there heads and intend to provide the information or services to another person (e.g. training course) at a foreign destination.

This EU decontrol provides the EU exporters with a competitive advantage over Canadian industry.

5.3.6.3 UK Decontrols and License Exceptions

Since the UK has adopted the EU Dual-Use List, the following EU decontrols are available to exporters when exporting certain dual-use software and technology:

- decontrols on technology which is the minimum necessary for the installation, operation, maintenance (checking) and repair of those items which are not controlled or whose export has been authorized
- decontrols on technology "in the public domain" or which is considered to be "basic scientific research";
- decontrols on technology which is the minimum necessary for patent applications. (only applies in some cases);
- decontrols on software that does not employ cryptography which is considered retail general purpose mass market in nature;

- decontrols on software that employs cryptography which is considered retail general purpose mass market in nature and meets some other criteria; and,
- Software "in the public domain"

The UK has also adopted these same decontrols for software and technology listed on the UK Military List and the UK Dual-Use List. (See Article 18 of the Export Control Order 2008).

Canada has adopted the same decontrols for the same software and technology.

The UK Export Control Order 2008 also provides a number of additional export license exceptions or decontrols including:

- Exceptions of Aircraft (under certain circumstances)
- Exceptions for certain Software and Technology

The UK exception for aircraft makes it clear that the UK specific dual-use controls do NOT control the export of aircraft in the following situations:

1) the aircraft leaves the UK on a scheduled journey (see Article 13(3) of the Export Control Order 2008);
2) the aircraft was imported into the UK on a scheduled journey and intended to leave the UK on a scheduled journey. (see Article 13(1) of the Export Control Order 2008); or,
3) the aircraft leaves the UK temporarily on trials (see Article 13(4) of the Export Control Order 2008).

It should be noted that the UK Exception for Aircraft does not apply to goods, software and technology controlled by the EU Dual-Use Goods Regulation.

The UK exception for aircraft also makes it clear that that UK controls on military goods do NOT control the export of aircraft in the following situations:

1) the aircraft was previously temporally imported into the UK and:
    - There was no change in ownership or registration since the importation;
    - No military goods have been incorporated into the aircraft since the importation other than by way of replacement for a component essential for the departure of the aircraft; and,
    - the destination of the aircraft is not one listed in Part 1, 2 or 3 of Schedule 4.

    (see Article 13(2) of the Export Control Order 2008)

or,

2) the aircraft leaves the UK temporarily on trials.

(see Article 13(4) of the Export Control Order 2008)

As a matter of policy, Canada also does not typically require Export Permits for the export of aircraft on scheduled journeys. On balance, it is hard to say whether Canadian industry or the UK industry has the competitive advantage.

5.3.6.4 Australian Decontrols and License Exceptions

Since Australia has adopted the EU Dual-Use List with only slight modifications, the following EU decontrols are available to exporters when exporting certain dual-use software and technology:

- decontrols on technology "in the public domain" or which is considered to be "basic scientific research";
- decontrols on technology which is the minimum necessary for patent applications. (only applies in some cases);
- decontrols on software that does not employ cryptography which is considered retail general purpose mass market in nature;
- decontrols on software that employs cryptography which is considered retail general purpose mass market in nature and meets some other criteria; and,
- Software "in the public domain"

Canada has adopted the same decontrols for the same software and technology.

Like Canada, it would appear that commercial aircraft (that have not been modified for military use or equipped with weapons) are not enumerated on Australia's Defense and Strategic Goods List (DSGL) . (But certain system, equipment and components for commercial aircraft are subject to Australian export controls). As a result, the export of a commercial aircraft from Canada is typically not controlled

It is unclear whether how Australia controls the export of military aircraft on scheduled journeys.

5.3.6.5 US Decontrols and License Exceptions

5.3.6.5.1 Decontrols and License Exceptions (US Department of Commerce)

The US Department of Commerce has also implemented an extensive set of license exceptions which allow exporters to ship certain goods to certain destinations almost immediately without having to wait for an individual export permit to issue.

One of the license exceptions available is the TSU license exception which authorizes exports and re-exports of the following under certain conditions:

- operation technology and software;
- sales technology and software;
- software updates (bug fixes);

- "mass market" software subject to the General Software Note; and
- encryption source code (and corresponding object code) that would be considered publicly available

"Operation technology" is the minimum technology necessary for the installation, operation, maintenance (checking), and repair of those commodities or software that are lawfully exported or re-exported under a license, a License Exception, or No License Required (NLR)

Instead of using license exceptions, Canada has implemented decontrols for similar software and technology.

The US has also implemented the AVS license exception which authorizes various types of exports relating to aircraft and vessel including the following:

1. The departure from the United States of foreign registry civil aircraft on temporary sojourn in the United States;
2. The departure from the United States of U.S. civil aircraft for temporary sojourn abroad; and.
3. The export of equipment and spare parts for permanent use on a vessel or aircraft (when necessary for the proper operation of such aircraft).

For information on the remaining license exceptions, please see Section 5.5.1 on "Export Authorizations Issued by the US Department of Commerce". (The additional license exceptions were placed in section 5.5.1 since the US uses license exceptions instead of general export authorizations (like most other countries)).

5.3.6.5.1 Decontrols and License Exceptions (US Department of State)

The US Department of State has implemented various decontrols and license exceptions which allow exporters to ship certain items to certain destinations almost immediately without having to wait for an individual export permit to issue.

These decontrols and license typically release the following from control in most cases:

- Technical data in the form of basic operations, maintenance, and training information relating to a defence article lawfully exported or authorized for export to the same recipient (see § 125.4 (b))
- Technical data in the "public domain"
  Note: The definition for "technical data" excludes "general scientific, mathematical or engineering principles" (see § 120.10)
- Technical data which is the minimum necessary for patent applications. (see § 125.2)

For information on the remaining license exceptions, please see Section 5.5.2 on "Export Authorizations Issued by the US Department of State".

5.3.7 New US Treaty Based Export Controls

"US Treaty Based Export Controls" are controls created to meet obligations under a Treaty with the US. US Treaties provides a framework to trade in certain US ITAR related defence articles license-free. US ITAR defence articles that trade outside the framework of the Treaty are subject to the additional treaty based export controls.

US Defence articles in countries that have not signed a Treaty with the US typically do not have national controls to control the re-export of US ITAR defence articles. But since US law is extra-territorial in nature, the US requires exporters in other countries to obtain a US re-export license from the US Department of State before re-exporting the goods.

The scope of these Treaties varies. But overall due to the social relationship Canada has with the US, US export controls on certain US defence articles to Canada are more liberal than most other countries (even countries that have entered into a Treaty with the US).

5.3.7.1 Canada

Canada has not entered into a Treaty for export controls. However, Canada did reach an agreement in 2001 with the US whereby Canada agreed to put in place domestic controls on the transfer within Canada of certain goods and technology (which also happen to be controlled by the US Department of State) and agreed to enforce US re-export license requirements for the re-export of US ITAR defence articles from Canada. In exchange, the US agreed to relax US licensing requirements for these US Defence articles being exported from the US to Canada. Many of these US defence articles can now be exported from the US to Canada without any US export licenses. (As noted earlier, Canada already allows the export of the vast majority of goods to the US through a Canadian license exception).

In order to ensure that Canada's ECL was synchronized with the US Department of State control list, Canada added a number of items to its ECL including many space related items not controlled by the multilateral export control regimes. (see ECL 5504).

As a result, Canada controls more space related goods than most countries (except the US) in accordance with an agreement with the US. (See Canadian ECL 5504). Canadian industry is at a competitive disadvantage when exporting from Canada to destinations (other than the US) since, on balance, Canada controls more space related items than most other countries (except the US).

In accordance with its agreement with the US, Canada now requires exporters to supply a copy of the US re-export license authorization when re-exporting US defence articles (or goods that incorporate US defence articles) from Canada to any foreign destination (other than the US).

For more details, please see the section 6.1 below on Canadian domestic controls".

5.3.7.2 US-UK Defence Trade Co-operation Treaty

Just recently, on April 13, 2012, a Treaty between the US and the UK concerning Defence Trade Cooperation (hereinafter referred to as the "US-UK Treaty") came into force. The US-UK Treaty provides a framework to trade in certain US ITAR related defence articles between approved entities in the UK and the United States, known as the Approved Community, without the need to apply for export licenses or permits from the US and UK. All other US ITAR related exports and transfers are controlled.

(For more details, please see the Section 6.3 below on UK domestic controls)

To meet it obligations under the Treaty, the UK has implemented the following controls:

- Controls on the export from the UK of all US ITAR related goods and technology subject to the Treaty to a person in the US who is outside the Approved Community; and,
- Controls on the export from the UK of all US ITAR related goods and technology subject to the Treaty to any foreign destinations (other than the US to the US Community)

Exporters must apply and obtain approval from the Minister of Defense and apply and obtain an Export License from the Export Control Organization (ECO) (which is part of Business, Innovation and Skills (BIS)) when exporting goods and technology in the two circumstances listed above.

Before one can apply for the necessary approval from the UK Minister of Defence, the exporter must obtain a US re-export authorization (or US re-export license) from the US Department of State.

Technically, the UK STILL controls all exports from the UK of all US ITAR related goods and technology subject to the Treaty from the UK Community to the US Community. But an Open General Export Licence can be claimed and used.

5.3.7.3 US-Australia Defence Trade Co-operation Treaty

Australia has introduced the *Defense Trade Controls Bill 2011* which was passed by Australia's House of Representatives on November 2, 2011 and has been referred to a Senate Committee which has recommended that the Department of Defense undertake further consultation with the academic sector. The Senate Committee is due to report back to the Senate by August 15, 2012.

The *Defense Trade Controls Bill 2011*, when enacted, will also implement the *Treaty between the Government of Australia and the Government of the United States of America Concerning Defense Trade Cooperation* (which was concluded in September 2007). The Treaty provides a framework to trade in certain US ITAR related defence articles between approved entities in Australia and the United States, known as the

Approved Community, without the need to apply for export licenses or permits from the US and Australian governments. All other US ITAR related exports and transfers are controlled in the Bill.

(For more details on the Treaty related domestic transfer controls, please see the section 6.4 below on Australian domestic controls).

The US ITAR related defence articles that are subject to the Treaty are listed in the Defence Trade Cooperation Munitions List (DTCML). This is a separate list from Australia's Munitions List (part of its Defense and Strategic Goods List (DSGL)).

The Bill proposes the following new export controls for exports and transfers that take place outside the Treaty provisions:

- controls on the export of all US ITAR related goods and technology subject to the Treaty to a place that is outside Australia and the US
- controls on the export of all US ITAR related defence services on goods or technology subject to the Treaty to a place that is outside Australia and the US
- Controls on the export from Australia to the United States of all US ITAR related goods and technology subject to the Treaty to a person who is none of the following: the Commonwealth of Australia, an Australian Community facility, an Australian Community Member, a member of the US Community;
- Controls on the export from Australia to the US of all US ITAR related defence services on goods and technology subject to the Treaty to a person who is none of the following: the Commonwealth of Australia, an Australian Community Member, a member of the US Community

Before exporting in any of the circumstances above, exporters must apply and obtain not only permits from the Australian Minister of Defense but also US Export Licenses from the US Department of State.

5.4 Extra-Territoriality

5.4.1 Extra-Territoriality (Canada)

The EIPA is not extra-territorial. It only applies to persons in Canada. However, legislation enacted from time to time to implement UN resolutions (for embargoes) may be extra-territorial in nature).

As a result, Canadian industry has a competitive advantage over industries in other countries that have extra-territorial export controls.

5.4.2 Extra-Territoriality (EU)

The EU does not implement any re-export controls on goods that have been previously exported from the EU (other than certain controls on brokering).

By their very nature, the EU controls on the brokering of certain dual-use goods are extra-territorial in nature.

If one considers the EU as one big territory, the EU controls on the export, transfer within the EU and transit of certain dual-use goods and technology are not extra-territorial in nature

On the other hand, one may consider the EU intra-community controls to be extra-territorial in nature. It really depends on one's perspective. (As Noted earlier, All EU intra-community transfers of dual-use items listed n Annex IV of the Dual-Use Regulation are controlled. (See Article 22 of the EU Dual-Use Goods Regulation)).

In addition one might consider that certain export authorizations (or export licenses) issued by an EU Member State to be extra-territorial in nature. For example, an EU Member State may issue an export authorization (or an Export License) for the export of certain dual-use goods not only located in the EU Member State where the authorization was issued but also located in other EU Member States. The export authorization is valid throughout the EU and binds all EU Member States. (Articles 11 and 9). The EU export authorizations (or Export Licenses) for brokering services are also valid throughout the EU. (Article 9)

5.4.3 Extra-Territoriality (UK)

As part of the EU, the UK abides by the EU export control law on certain dual-use goods. Some of this EU law is extra-territorial in nature. (see the section on "Extra-Territoriality (EU)" above for more details).

At this time, the UK does not implement any re-export controls on goods, software or technology that have been previously exported from the UK (other than certain controls on brokering).

By their very nature, the UK controls on the brokering of goods, software and technology are extra-territorial in nature.

The UK has also adopted some controls on software, technology and technical assistance intended for WMD purposes which are extra-territorial in nature since they apply to a UK person located anywhere in the world!. These extra-territorial controls include:

- controls on the export or transfer of software and technology by a UK person located in a place outside the EU to either:
    - A destination outside the EU

- A destination inside the EU where the UK person knows that the final destination is outside the EU and no further processing or working is to be performed on the software or technology within the EU

And where the UK person has been informed by the UK Government that the software and technology are or may be intended for use in connection with WMD or their delivery systems or where the exporter is aware that the software and technology are intended for such use.
(see Article 11 of the Export Control Order 2008)

- controls on the provision (or export) of technical assistance, directly or indirectly, by a UK person located in a place outside the EU to any person or place outside the EU where the UK person has been informed by the UK Government that the technical assistance is or may be intended for use in connection with WMD or their delivery systems or where the UK person is aware that the technical assistance is intended for such use.
(see Article 19(2) of the Export Control Order 2008)

Canadian industry has a competitive advantage over industries in the UK since Canada's export controls are NOT extra-territorial in nature under the EIPA and some of the UK's export controls are.

5.4.4 Extra-Territoriality (Australia)

5.4.4.1 Current Situation

For export of at least some military goods, Australia asks exporters to obtain an End- Use Certificate where the end-user must certify that it "will not sell or otherwise dispose of the goods to another country, or another person for supply to another country, without the permission of the Australian Minister for Defence or his/her delegate". See DEC04 form).

This form gives the impression that Australia has re-export controls. But a representative of the Australian government confirmed to me that Australia has no legal authority to enforce re-export controls.

5.4.4.2 Proposed Legislation

Australia has introduced the *Defence Trade Controls Bill 2011* which if enacted will impose additional re-export controls and new export and transfer controls by an Australian person located outside Australia. Many of these new controls apply to both military and dual-use goods listed on the Defense and Strategic Goods List (DSGL). In particular, the Bill proposes new controls on the following:

- controls on the export and the transfer within a country of all dual-use and military technology listed on Australia's Defence and Strategic Goods List

(DSGL) by an Australian person (located anywhere in the world) to a foreign person (located anywhere in the world) (see Subsection 10(1) of the Bill).

- controls on the export of all defence services for all goods and technology listed on Australia's Defence and Strategic Goods List (DSGL) by an Australian person located anywhere in the world to a foreign person located outside Australia (see Subsection 10(2) of the Bill)

It should be noted that under subsection 4(1) of the Bill, "technology: is defined as to include software. However, under subsection 4(2) of the Bill, the Minister of Defence may, by legislative instrument, limit the definition of "technology". It is quite possible that the Minister may exclude executable software from the definition of "technology" since executable software is not typically considered to be "technology". But at this time, it is unclear whether this will happen.

It should also be noted that under subsection 4(1) of the Bill, the definition of "defence services" is NOT limited to services relating to military goods or technology. It would appear that Australia wishes to control both all services (including commercial or dual use services) relating to all goods and technology listed on Australia's Defence and Strategic Goods List (DSGL). In my view, the term "Defense Services" may be misleading to some.

The Bill also proposes the following new controls for the brokering of certain dual-use and military goods. Any by their nature, brokering controls are extra-territorial in nature. (See the section above on "Australian Brokering Controls" for more details).

When the Australian legislation is enacted, Canadian industry will have competitive advantage over industries in Australia since Canada's export controls are NOT extra-territorial in nature under the EIPA and some of the Australia's export controls will be.

5.4.5 Extra-Territoriality (US)

US export control law is extra-territorial in nature. It applies to US persons no matter where they are located in the world.

In addition, the US controls all items (including goods, software and technology) subject to US export controls from "cradle to grave". In other words, the US controls the re-exports of all controlled US origin items from a foreign country to certain other foreign countries (except back to the US). It does not matter whether the goods are controlled by the Department of Commerce or the Department of State.

All exporters (even if they are not US persons) are required to obtain a US re-export license from the US government (or, if possible, take advantage of a license exception) before the controlled US origin items are re-exported from a foreign country to certain other foreign countries (except back to the US).

The US also controls certain foreign made items that incorporate US origin controlled items. However, the Department of Commerce re-export controls treats foreign made items differently than the US Department of State re-export controls.

Under the US Department of Commerce re-export controls, only the following foreign made items are controlled:

- foreign made items that incorporate more than 25% (or 10% for certain destinations) of US "controlled content" that are being exported to certain foreign destinations, end-uses or end-users;
    - Note: US "controlled content" is content that would require a US license if it were to be re-exported as separate parts or components to the country of ultimate destination.
- foreign made items based on certain US origin technology or software and where the foreign made items are being exported to certain foreign destinations, end-uses or end-users;
- foreign made items produced in a plant or a major component of a plant located outside the US where the plant or major component of the plant is the direct result of certain US technology or software and where the foreign made items are being exported to certain foreign destinations end-uses or end-users.

If the foreign made items incorporate 25% or less (or 10% or less for certain destinations) of US origin "controlled content" then the export qualifies for the de minimis exception offered by the US Department of Commerce. No re-export license is required in these circumstances.

The US Department of State US ITAR does not include a *de minimis* rule under the US ITAR. All defence articles, wherever manufactured, that contains any US ITAR component is subject to US ITAR export controls.

In other words, all exporters (even if they are not US persons) are required to obtain a US re-export license from the US government (or if possible, take advantage of a license exception) before re-exporting a foreign made item that incorporates a US ITAR item from a foreign country to certain other foreign countries (except back to the US).

For example, if a Canadian defence contractor builds a military helicopter that incorporates a US ITAR component, even if the value of this US ITAR component is minimal compare to the overall value of the helicopter, the Canadian made military helicopter would be subject to US ITAR export controls (and Canadian export controls).

These US re-export requirements by the US Department of Commerce and the US Department of State place a heavy burden on all exporters around the world of US origin items (and certain foreign made items that incorporate controlled US origin items or are made from certain US technology or are made in certain plants).

Not surprisingly. Many manufacturers avoid using US origin controlled items when another item of equivalent quality is available from another country that does not impose re-export controls.

5.5 Export Authorizations (or Licenses)

Many countries (including Canada, EU and the UK) offer three types of export authorizations (commonly called export licenses in most countries):

- individual export authorizations;
- global export authorizations; and,
- general export authorizations (or license/permit exceptions).

An "individual export authorization" is an authorization granted by a country to one specific exporter for the export of one or more items to one or more end users or consignees in a foreign destination.

A "global export authorization" is authorization granted by a country to one specific exporter for the export of certain goods (or a type or category of items) to one or more specified end users and/or one or more specified third countries.

A "general export authorization" is an export authorization granted by a country for exports of certain dual-use goods to certain foreign destinations (and in some cases to all foreign destinations) that is available to all exporters who respect its conditions.

As a whole, Canadian exporters are at a completive disadvantage since many other countries have a more up-to-date and more extensive set of general export authorizations (or license/permit exceptions) available to their exporters. For the export of many goods and technology, Canadian exporters often have to prepare and submit and export permit applications and then wait, sometimes for months, before exporting; whereas, exporters in other countries can export almost immediately under a general export authorization or a license/permit exception.

5.5.1 Export Authorizations (Canada)

5.5.1.1 Types of Export Authorizations (Canada)

Canada offers three types of export authorizations:

- Individual Export Permits
- General Export Permits (GEP's)
- Multi-Destination Export Permits

The standard Individual Export Permit authorizes the export of certain goods and/or technology to one of more consignees all located in one country until the export permit expires or until the export permit is utilized (i.e. as long as the cumulative total of the

quantity or value of items exported does not exceed the quantity or value stated on the Export Permit).

If exports to consignees located in multiple countries, an exporter can apply for multiple standard Individual Export Permits, one per country, before exporting.

However, the Department of Foreign Affairs and International Trade are slowly introducing Multi-Destination Export Permits that authorize the export of certain goods and/or technology to one of more consignees located in multiple countries until the export permit expires or until the export permit is utilized (i.e. as long as the cumulative total of the quantity (if any) or value of items exported does not exceed the quantity or value stated on the Export Permit).

One must apply to the DFAIT for an Individual Export Permit or a Multi-Destination Permit. Upon meeting certain requirements, the DFAIT will issue a Canadian Export Permit completely at its discretion (or issue a denial).

In contrast, GEP's are issued generally to all residents of Canada by the Minister of Foreign Affairs. Each GEP permits the export of certain goods and technology to certain eligible foreign destination under specified terms and conditions.

An exporter does not need to apply for a GEP. Instead, an exporter needs to just claim the GEP on all relevant CBSA custom forms (e.g. B13A form) and export in compliance with the terms and conditions of the regulation. General Export permits are simply regulations under the EIPA.

In other words, GEPs allow the exporter to export certain goods to certain destination almost immediately eliminating the administrative delays associated with applying for an Individual Export Permit or a Multi-Destination Export Permit and waiting for the permit to issue.

5.5.1.2 General Export Permits

Canada offers the following GEPs available to all exporters inn Canada:

GEP 1 -- *Export of Goods for Special and Personal Use Permit*

GEP 3 - *Export of Consumable Stores Supplied to Vessels and Aircraft Permit*

GEP 5 - *Export of Logs Permit*

GEP 12 - *United States Origin Goods*

GEP 18 - *Portable Personal Computers and Associated Software*

GEP 27 - *Nuclear-Related Dual-Use Goods*

GEP 29 - Eligible Industrial Goods

GEP 30 - Certain Industrial Goods to Eligible Countries and Territories

GEP 37 - *Toxic Chemicals and Precursors to the United States*

GEP 38 - *CWC Toxic Chemical and Precursor Mixtures*

GEP 43 – *Nuclear Goods and Technology to Certain Destinations*

GEP 44 - *Nuclear-related Dual-use Goods and Technology to Certain Destinations*

Each General Export Permit allows the export of certain specified goods to certain specified destination under certain specified conditions.

GEP 1 is a multi-faceted Export Permit that authorizes that export of various types of exports to all destinations (except to countries on Canada's Area Control List (ACL) including:

- Exports of certain low value shipments;
- Exports of certain dual-use goods after they have been repaired in Canada;
- Exports of certain dual-use parts and components for the repair of certain dual-use goods that were previously legally exported from Canada; and
- Exports of certain dual-use goods back to the original manufacturer for repair.

For information on all the aerospace related GEPs, please see Annex II attached to this report.

Many of Canada's GEP's (including GEP 1, 29 and 30) are old and refer to an ECL that is almost 20 years old (the April 1994 ECL). Since the 1994 ECL is not readily available on DFAIT's website, it is very difficult for many Canadian exporters to use these GEP's.

As a whole, Canadian exporters are at a completive disadvantage since many other countries have a more up-to-date and more extensive set of General Export Authorizations available to their exporters. For the export of many goods and technology, Canadian exporters often have to prepare and submit and export permit applications and then wait, sometimes for months, before exporting; whereas, exporters in other countries can export almost immediately under a general export authorization or a license/permit exception.

5.5.2 Export Authorizations (EU)

5.5.2.1 Types of Export Authorizations

Article 2 of the EU Dual-Use Goods Regulation (i.e. EU Council Regulation No. 428/2009 as amended recently by EU regulation No. 1232/2011), defines four types of export authorizations:

- individual export authorizations
- global export authorizations
- Union General Export Authorizations (previously called Community General Export Authorizations); and,
- National General Export Authorizations

In each EU Member State, the first three types of export authorizations exist but the availability will vary depending on the goods being exported and the destination(s). At its discretion, each EU Member State may implement its own National General Export Authorizations.

An EU "individual export authorization" is an authorization granted by an EU Member State to one specific exporter for the export (or transfer) of one or more dual-use items to one end user or consignee in a third country. An "individual export authorization" is similar to Canada's Individual Export Permit.

An EU "global export authorization" is authorization granted by an EU Member State to one specific exporter for the export (or transfer) of a type or category of dual-use items to one or more specified end users and/or one or more specified third countries. A "global export authorization" is similar to Canada's Multi-Destination Export Permits. According to Article 9(5) of the EU Dual Use Goods Regulation, all EU Member States "shall maintain or introduce in their respective national legislation the possibility of granting a global export authorization".

A "Union General Export Authorization" is an export authorization granted by the EU for exports of certain dual-use goods to certain countries outside the EU that is available to all exporters in the EU who respect its conditions. (It is similar to Canada's GEPs).

A "National General Export Authorization" is an export authorization granted by an EU Member State for exports of certain dual-use goods to certain countries outside the EU that is available to all exporters in the EU Member State who respect its conditions. (It is similar to Canada's GEPs).

Applications need to be prepared and submitted for EU individual export authorizations or EU global export authorizations to the EU Member State where the exporter is located.

In contrast, Applications for Union General Export Authorizations or a National General Export Authorizations do NOT need to be prepared and submitted to the EU Member State. Instead, the exporter just typically claims the Union General Export Authorization number(s) or the National General Export Authorization number(s) on the appropriate customs form prior to exporting

In other words, Union General Export Authorizations and National General Export Authorizations allow the exporter to export certain goods to certain destination almost immediately eliminating the administrative delays associated with applying for individual export authorizations or global export authorizations and waiting for the authorizations to issue.

In some cases, an exporter may need to wait up to ten (10) business days before using a Union General Export Authorization. An EU Member State may require that exporters register with it prior to first use of a Union General Export Authorization. However, registration shall be automatic and acknowledged without delay (and in any case within ten business days) by the EU Member State.

5.5.2.2 Union General Export Authorizations

Article 9 of the EU Dual-Use Goods Regulation (i.e. EU Council Regulation No. 428/2009 as amended recently by EU regulation No. 1232/2011) creates five Union General Export Authorizations (previously called Community General Export Authorizations) which are valid and available to all exporters in the EU.

However, a recent amendment to Article 9 of the EU Dual-Use Goods Regulation allows EU Member States to prohibit the use of Union General Export Authorizations by an exporter if the EU Member State has a reasonable suspicion about the ability of the exporter to comply with such authorizations or with a provision of the export control legislation.

Each Union General Export Authorization allows the export of certain specified goods to certain specified destination under certain specified conditions.

Annex III, attached to this document, summaries the five Union General Export Authorizations available to all EU exporters at this time: Many apply to aerospace related items.

It is important to note that EU001, EU003 and EU004 explicitly exclude a wide variety of dual-use items including many aerospace related dual-use items. The aerospace related items that are excluded include:

- 1A102 - Resaturated pyrolised carbon-carbon components designed for space launch vehicles specified in 9A004 or sounding rockets specified in 9A104;
- 7E104 – “Technology” for the integration of flight control, guidance and propulsion data into a flight management system for optimization of rocket system trajectory;
- 9A009.a – Hybrid Rocket propulsion systems with a total impulse capacity exceeding 1.1 MNs
- 9A117 – Staging mechanisms, separation mechanisms and interstages usable in “missiles”.

EU003 and EU004 explicitly exclude additional aerospace related dual-use items including:

- Certain optical detectors (including certain space qualified solid state optical detectors) in 6A002a;
- 6A008l3 - Certain Radars
- 9A001 – All ramjet, scramjet and combined cycle engines (and all specially designed components);

None of the Union General Export Authorizations can be used in the following circumstances:

- if the goods fall under any of the end-use controls (including the WMD) end use controls and the military end-use controls);
- If the goods are destined to a customs-free zone or a free warehouse located in the destination covered by the Union General Export Authorization;

There are additional conditions and prohibitions of use which vary depending on the Union General Export Authorization.

As a whole, Canadian exporters are at a completive disadvantage since the EU has a more up-to-date and more extensive set of general export authorizations available to their exporters.

5.5.2.3 National General Export Authorizations

The EU Dual-Use Goods Regulation also allows individual EU Member States to put in place their own National General Export Authorizations. (Article 9).

Just like Union General Export Authorizations, applications for National General Export Authorizations do NOT need to be prepared and submitted. Instead, the exporter just typically claims the National General Export Authorization number(s) on the appropriate customs form prior to exporting.

In other words, National General Export Authorizations allow the exporter to export certain items to certain destination almost immediately eliminating the administrative delays associated with applying for individual export authorizations or global export authorizations and waiting for the authorizations to issue. (But in some EU Member States (like the UK), the exporter must first register with the EU Member State before first using the National General Export Authorization in question. Registration will introduce a small administrative delay for the first export under the National General Export Authorization).

The majority of the EU Member States have not put into place National General Export Authorizations. But France, Germany, Greece, Italy, Sweden, the Netherlands, and the UK have put into place National General Export Authorizations.

The EU prohibits EU Member States from putting into place National General Export Authorizations that would allow the export of:

1) Certain dual-use items (including certain aerospace related items) listed in Annex IIg of the Dual-Use Goods Regulation (see below for more details);
2) all dual use goods (even if not listed in the EU Dual Use List) if the exporter has been informed by the EU Member State that the dual use goods are or may be intended for use in connection with WMD or their delivery systems;
3) all dual use goods (even if not listed in the EU Dual Use List) if the destination country is subject to a arms embargo decided by the EU Council, the Organization for Security and Cooperation in Europe (OSCE) or the United Nations and if the exporter has been informed by the EU Member State that the dual-use goods are or may be intended for a military end-use;
4) all dual use goods (even if not listed in the EU Dual Use List) if the exporter has been informed by the EU Member State that the goods are or may be intended for use as parts or components of military items listed in the national military list of the Member State which have been exported from the Member State without a proper export authorization (i.e. export license) or in violation of an authorization prescribed by national legislation; and,
5) All dual use goods (even if not listed in the EU Dual Use List) if the exporter is aware that the dual use goods are intended for any of the purposes listed in 2), 3) or 4) above.

(For more details, see Article 9(4) of the EU Dual-Use Goods Regulation).

It is important to emphasize that National General Export Authorizations cannot authorize the export of the goods listed in Annex IIg of the Dual-Use Goods Regulation which includes the following aerospace related goods:

- 1A102 - Resaturated pyrolised carbon-carbon components designed for space launch vehicles specified in 9A004 or sounding rockets specified in 9A104;
- 7E104 – "Technology" for the integration of flight control, guidance and propulsion data into a flight management system for optimization of rocket system trajectory;
- 9A009.a – Hybrid Rocket propulsion systems with a total impulse capacity exceeding 1.1 MNs
- 9A117 – Staging mechanisms, separation mechanisms and interstages usable in "missiles".

For the dual-use items listed above, the exporter must obtain an individual or global export authorization from the EU Member State prior to exporting.

5.5.3 Export Authorizations (UK)

5.5.3.1 Types of UK Export Licenses

In the UK, there are four main types of licenses:

- **the Standard Individual Export Licence (SIEL);**
- **the Open Individual Export Licence (OIEL);**
- **the European Union General Export Authorization; and,**
- **the Open General Licence.**

A Standard Individual Export License (SIEL) is similar to Canada's Individual Export Permit. SIEL's are company and consignee specific and for a set quantity and/or value of goods. One must prepare and submit an application for a SIEL. Supporting documentation including end-user undertakings also need to be submitted with the application

An Open Individual Export Licence (OIEL) is similar to Canada's Multi-Destination Export Permit. OIEL's are designed to cover exports for long-term contracts, projects and repeat business. The licence is company specific, but not necessarily consignee specific. Typically, the license does not specify set quantities or values of the goods (although conditions setting quantities and values may be set on the licence). One must prepare and submit an application for an OIEL. Before an exporter can apply for an OIEL, the exporter will need to establish a track record of properly exporting controlled items. An exporter may also need to establish that an OIEL will replace at least 20 Standard Individual Export Licenses (SIELs). Once the OIEL is issued, the UK Government will conduct regular compliance audits against the license to ensure compliance.

European Union General Export Authorizations are issued by the EU and are available for use by all persons located in the EU (including the UK). (For ore details, see EU Export Licenses in the EU section above).

UK Open General Licences are issued by the UK and are available for use by all persons located in the UK. Many of the UK General Licenses can also be used for exports of certain dual-use items from other EU Member States by a UK Person (i.e. a person established in the United Kingdom)..

Exporters do NOT need to apply for Union General Export Authorizations or UK Open General Licenses. Instead, the exporter just typically claims the Union General Export Authorization number(s) or UK Open General License(s) on the appropriate customs form prior to exporting

Union General Export Authorizations and UK Open General Licenses allow the exporter to export certain goods to certain destination almost immediately eliminating the administrative delays associated with applying Standard Individual Export Licenses (SIELs) or Open Individual Export Licences (OIELs) and waiting for the licenses to issue.

But in the UK, the exporter must first register with the UK Government before first using a Union General Export Authorization or a National General Export Authorization. Registration is done online and is quick. But it will introduce a small administrative delay for the first export under a Union General Export Authorization or a National General Export Authorization.

In the UK, there are various types of Open General Licences:

Open General License Type	**Description**
Military Goods OGELs	Open General License for the export of certain specified controlled military items
Dual-Use OGELs	Open General License for the export of certain specified controlled dual-use items (having both military and civilian applications)
European Union General Export Authorizations (EU GEAs)	EU General License for the export of certain specified controlled dual-use items to specified non-EU destinations
Transshipment (or Transit) OGLs	Open General License for the export of controlled items to be exported from one country to another via the UK.
Trade Control OGLs (or brokering OGL's)	Open General License for the export or transfer of certain specified controlled items from one third country to another where the transaction or deal is brokered in the UK or by a UK person
Other OGLs	This category includes various OGLs which do not fit neatly into the other categories, including the Radioactive Sources OGEL, the Sporting Goods OGEL, the Iraq Pre-Export OGL and the Sierra Leone OGEL to Communicate.

As a whole, Canadian exporters are at a completive disadvantage since the UK has a more up-to-date and more extensive set of general export authorizations available to their exporters.

5.5.3.2 Military OGEL's

The UK offers the following 19 Military Goods Open General Export Licences (OGELs), which allow the export of specified controlled military items by any UK exporter to certain destinations under certain conditions:

- OGEL (Access Overseas to Software and Technology for Military Goods:

- Individual Use Only)
- OGEL (Export After Exhibition or Demonstration: Military Goods)
- OGEL (Export for Exhibition: Military Goods)
- OGEL (Export After Repair/replacement under warranty: Military Goods)
- OGEL (Export For Repair/replacement under warranty: Military Goods)
- OGEL (Exports or transfers in Support of UK Government Defence Contracts)
- OGEL (Exports under the US-UK Defence Trade Co-operation Treaty)
- OGEL (Historic Military Goods)
- OGEL (Historic Military Vehicles and Artillery Pieces)
- OGEL (Military Components)
- OGEL (Military Goods)
- OGEL (Military Goods: Collaborative Project Typhoon)
- OGEL (Military Goods: For Demonstration)
- OGEL (Military Goods: Government or NATO End-Use)
- OGEL (Military Surplus Vehicles)
- OGEL (Objects of Cultural Interest)
- OGEL (Software and Source Code for Military Goods)
- OGEL (Technology for Military Goods)
- OGEL (Vintage Aircraft)

Annex IV summarizes the main Open General Export Licences (OGELs) for military related goods, software and technology that apply to the aerospace industry. Please note that each OGEL has additional terms and conditions not shown in the table. Please refer to the each specific OGEL for more details.

5.5.3.3 UK Dual-Use and Military OGEL's

The UK also offers the following 3 Open General Export Licences (OGELs) which allow the export of specified controlled military and dual-use items by any UK exporter to certain destinations under certain conditions

- OGEL (Exports of non-lethal military and Dual-Use goods: To UK Diplomatic Missions or Consular Posts)
- OGEL (Military and Dual-Use Goods: UK Forces deployed in embargoed destinations)
- OGEL (Military and Dual-Use Goods: UK Forces deployed in non-embargoed destinations)

Canada's GEP 1 is very similar in scope to the UK's OGEL for "Exports of non-lethal military and Dual-Use goods: To UK Diplomatic Missions or Consular Posts".

Since Canada does NOT have any GEP's for exports to its forces deployed overseas, Canadian industry may be at a competitive disadvantage.

5.5.3.4 UK Dual-use OGEL's

The UK offers the following 16 Dual-Use Open General Export Licences (OGELs) which allow the export of specified controlled dual-use items by any UK exporter to certain destinations under certain conditions.

- OGEL (Chemicals)
- OGEL (Cryptographic Development)
- OGEL (Export After Exhibition: Dual-Use Items)
- OGEL (Export After Repair/replacement under warranty: Dual-Use Items)
- OGEL (Export For Repair/Replacement Under Warranty: Dual-Use Items)
- OGEL (Dual-Use Items: Hong Kong Special Administrative Region)
- OGEL (International Non-Proliferation Regime De-controls: Dual-Use Items)
- OGEL (Low Value Shipments)
- OGEL (OIL and GAS Exploration Dual-Use Items)
- OGEL (Technology for Dual-Use Items)
- OGEL (Turkey)
- OGEL (X)
- OGEL (Military and Dual-Use Goods: UK Forces deployed in embargoed
- destinations)
- OGEL (Military and Dual-Use Goods: UK Forces deployed in non-embargoed
- destinations)
- OGEL (Exports of non-lethal military and Dual-Use goods: To Diplomatic Missions or Consular Posts)

Annex V summarizes the main Open General Export Licences (OGELs) for dual-use related goods, software and technology that apply to the aerospace industry. Please note that each OGEL has additional terms and conditions not shown in the table. Please refer to the each specific OGEL for more details

5.5.4 Export Authorizations (Australia)

Australia does NOT offer any General Export Permits or General Export Licenses. Exporters must apply for either an Export Permit or an Export License when exporting goods subject to controls. Each Application is reviewed on a case-by-base basis on its merits.

For military and Non-Military Lethal military goods, Australia offers the following types of Export Licenses or Export Permits:

Description	Acronym	Type of Approval (Permit/Licence)	Validity Period

For exporters to market DSGL Part 1 Goods to potential customers **(is not a permission to export goods)**.	MIP	Military in-Principle	12 months
For a **specified quantity** of DSGL Part 1 Goods to **specified consignee/s.**	MEA	Military Export Permit	12 months
For **unspecified quantities** of DSGL Part 1 Goods to **specified consignee/s.**	MEL	Military Export Licence	24 months
For DSGL Part 1 Goods **which will be returning to Australia** (e.g. overseas demonstrations or trials)	MTT	Military Temporary Export Permit	12 months
For the **return** of DSGL Part 1 Goods to **overseas manufacturer/s** (e.g. for repair or modification)	MRM	Military Return to Manufacturer	12 months
For the **return** of DSGL Part 1 Goods to **overseas owner/s** (e.g. after repair or modification)	MRO	Military Return to Owner	12 months

For dual-use goods, Australia offers the following types of Export Licenses or Export Permits:

Description	Acronym	Type of Approval (Permit/Licence)	Validity Period
For exporters to market DSGL Part 2 Goods to potential customers **(is not a permission to export goods).**	AIP	Approval in-Principle	12 months
For a **specified quantity** of DSGL Part 2 Goods to **specified consignee/s**.	IEP	Individual Export Permit	6 months
For **unspecified quantities** of DSGL Part 2 Goods to **specified countries**.	GEL	General Export Licence	12 months
For **unspecified quantities** of DSGL Part 2 goods to **specified consignee/s**.	EDL	Export Distribution Licence	24 months
For the **return of** DSGL Part 2 goods to **specified consignee/s** after repair, or to **specified consignee/s for repair**.	MRR	Maintenance Return and Repair Licence	24 months

Canada has a competitive advantage over exporters in Australia since Canada offers general export authorizations (called GEP's) to its exporters while Australia does not.

5.5.5 Export Authorizations (US)

5.5.1 Export Authorizations Issued by the US Department of Commerce

The US Department of Commerce offers various individual export licensees and some global export licenses including Special Comprehensive Licenses and Encryption Licensing Arrangement Licenses.

The US Department of Commerce has not implemented general export authorizations. Instead, it has put in place various license exceptions. Each license exception authorizes the export and re-export of certain items to certain destinations under certain conditions.

Like general export authorizations, applications for license exceptions do not need to be prepared and submitted to the government. Instead, the exporter typically claims the license exception on the appropriate customs form prior to exporting. And for some license exceptions, the exporter does not need to claim anything.

And like general export authorizations, license exceptions allow exporters to ship almost immediately eliminating the administrative delays and costs associated with applying for individual export licenses or global export licenses and waiting for the licenses to issue.

Currently, the US Department of Commerce offers the following license exceptions under Part 740 of Title 15 of the EAR:

License Exception	Title
LVS	Shipments of a Limited Value
GBS	Shipments to Country Group B countries
CIV	Civil End-users
TSR	Technology and software under restriction
APP	Computers
TMP	Temporary imports, exports and re-exports
RPL	Servicing and replacement of parts and equipment
GOV	Governments, international organizations, international inspections under the Chemical Weapons Convention, and the International Space Station
GFT	Gift parcels and humanitarian donations
TSU	Technology and Software - unrestricted
BAG	Baggage
AVS	Aircraft and Vessels
APR	Additional permissive re-exports
ENC	Encryption commodities, software and technology
AGR	Agricultural commodities

CCD	Consumer Communications Devices
STA	License exception – Strategic Trade Authorization

The license exceptions that are typically used for exports of aerospace related goods are: LVS, TMP, RPL, GOV, TSU, AVS, APR and STA. Please see Annex VI attached to this report for a summary of these license exceptions.

As a whole, Canadian exporters are at a completive disadvantage since the US has a more up-to-date and more extensive set of license exceptions available to their exporters for the export of dual-use goods.

5.5.2 Export Authorizations Issued by the US Department of State

The US Department of State offers various individual export licensees and some global export licenses including:

- export license approving a Technical Assistance Agreement (TAA)
- export license approving a Manufacturing License Agreement (MLA)

The US Department of State has not implemented general export authorizations. Instead, it has put in place various license exceptions. Each license exception authorizes the export and re-export of certain items to certain destinations under certain conditions.

Like general export authorizations, applications for license exceptions do not need to be prepared and submitted to the government. Instead, the exporter typically claims the license exception on the appropriate customs form prior to exporting. And for some license exceptions, the exporter does not need to claim anything.

And like general export authorizations, license exceptions allow exporters to ship almost immediately eliminating the administrative delays and costs associated with applying for individual export licenses or global export licenses and waiting for the licenses to issue.

Annex VII summarizes the various license exceptions (excluding firearm related license exceptions) offered to exporters by the US Department of State.

Before a US exporter can apply for a license or use a license exception, the US exporter must first register with the US Department of State.

As a whole, Canadian exporters are at a completive disadvantage since the US has a more up-to-date and more extensive set of license exceptions available to their exporters for the export of military goods.

5.6 Processes for Applying for an Export Authorization

Typically, applications need to be prepared and submitted for individual export authorizations (such a Canadian Individual Export Permits) and global export

authorizations (such as a Canadian Multi-Destination Export Permits) to the Government of the country in which the exporter is located.

If the goods and technology are also subject to another country's re-export controls, an application will also need to be prepared and submitted to the Government in the country from which the goods and technology were originally exported. (E.g. for re-export of US ITAR items, the exporter must also obtain a US re-export license from the US Department of State).

Some countries (including Canada, UK and US) allow applications to be submitted online. (Canada and the US also allow paper applications).

Other countries (like Australia) only allow paper applications. But in many countries, the application can be faxed.

Canadian industry has a competitive advantage over countries that do not offer an online licensing system (like Australia) since it is often a lot easier to prepare and submit applications online.

5.6.1 Application Requirements

The application requirements for individual export authorizations (such a Canadian Individual Export Permits) and global export authorizations (such as a Canadian Multi-Destination Export Permits) vary from country to country.

Typically, at minimum, the following documents must be attached to each application:

- End Use Assurance
- Technical Information on the controlled item(s) being exported

Arguably, Canada has one of the most demanding application requirements since it requires exporters to supply the following information for each controlled item being exported (not typically found on applications in other countries):

- **country of manufacture**
- **% of US content in the good**

It is often difficult for exporter to determine the % of US content especially when re-exporting goods made by other manufacturers. And often the original manufacturers do not readily know how much US content is in its goods.

Canada also requires exporters to attach US Re-Export Authorizations when re-exporting US goods subject to US ITAR with their applications to the Canadian government. Most countries do NOT have this requirement.

5.6.2 Government Review and Consultations

Once an application for an individual or global export authorization has been submitted, the Government that received the application typically consults other government departments (such as its military and foreign affairs departments). For applications submitted in the EU, the EU Member State that received the application may need to consult other EU Member States in some cases before issuing or denying the export authorization:

Once the Government has properly reviewed the application and completed its consultations, it either issues the export authorization or issues a denial.

5.7 Processing Times

5.7.1 Canadian Processing Times

Whenever possible, DFAIT makes every effort to process a complete Export Permit Application to an "Open Policy Country" **within 10 business days** of submission and to process a complete Export Permit Application to other destinations **within 8 weeks** of submission.

"Open Policy Countries" are like minded countries and belong to the same export control regimes as Canada (and have effective export controls).

Incomplete applications may take longer to process and may be returned to the applicant without action.

It should be noted that Canada does NOT publish a list of "Open Policy Countries". It would appear that some countries (like Russia) which are members of various international control regimes are not considered to be "Open Policy Countries". It is difficult for Canadian exporters to tell which countries are "Open Policy Countries" and which are not.

However, these processing times can be very misleading when the applications are for re-exports of US ITAR defence articles or goods that incorporate US ITAR defence articles. (Many aerospace exports are of this nature). Canadian exporter must wait before they have obtained an US re-export license from the US Department of State before submitting an Application for a Individual Export Permit or a Multi-Destination Export Permit to the Canadian Government. Since it often takes many months to obtain a US re-export license from the US Department of States, Canadian exporters must delay the submission of their Canadian applications many months.

This additional delay puts Canadian exporters at a competitive disadvantage over exporters in other countries who do not need to have the US re-export authorization attached to the original application for an export authorization.

When exports do not involve US ITAR defence articles, Canada has one of the fastest application processing times. This puts Canadian exporters at a competitive advantage over exporters in many other countries.

Ideally, exporters should be allowed to submit their Applications without the US re-export authorization in order for the Canadian government to start processing and reviewing the application s soon as possible. Of course, the Canadian Government would only issue a Permit once a copy of the US re-export license has been received from the exporter.

5.7.2 EU Processing Times

Processing times for applications for individual export authorizations or global export authorizations vary from EU Member State to EU Member State.

The EU does not set service standards for processing of Applications. Article 9 of the EU Dual-Use Goods Regulation simply states:

> "Member States shall process requests for individual or global authorizations within a period of time to be determined by national law or practice."

5.7.3 UK Processing Times

Processing times for applications vary depending on the type of application.

5.7.3.1 Processing Time for Standard Individual Export Licenses (SIEL's)

Most applications for Standard Individual Export Licenses (SIEL's) are processed and issued within 20 working days of submission.

The UK Government has set goals to process 70% of all applications SIEL's **within 20 working days** and 95% of all such applications processed **within 60 working days**.

In 2011, the Export Control Organization (ECO) did not meet the first goal. Only 65% of all applications SIEL's were processed within 20 working days but it did process 95% of all such applications within 60 working days.

5.7.3.2 Processing Times for Open Individual Export Licenses (OIEL's)

Most applications for Open Individual Export Licenses (OIEL's) are processed and issued within 60 working days of submission. The UK Government has set goals to process 60% of all applications for OIEL's within 60 working days

5.7.4 Australian Processing Times

Other than in exceptional circumstances, applications for the export of goods and technology to **non-sensitive destinations** are processed with **15 working days** (commencing from the date a **complete** application, with all supporting documentation, is received).

Applications for the export of goods and technology that require referral to other Government Departments (i.e. SIDCDE members) such as exports to sensitive destinations, the processing time is typically up to **35 working days**. The Defense Export Control Office (DECO) of the Department of Defense will inform applicants of the referral.

If the destination and/or goods are **very sensitive** the time frame can be **3 months or longer.**

Unlike Canada, Australia does not officially distinguish between "Open Policy Countries" (OPC) and "Non-Open Policy Countries"(Non-OPC) when providing processing times. Instead, it makes a distinction between "non-sensitive destinations", "sensitive destinations" and "Very Sensitive destinations" when providing processing times.

5.7.5 US Processing Times

5.7.5.1 US Department of Commerce

Under the executive order on license processing, the Commerce Department is supposed to issue (or deny) licenses within 90 days. Typically, the average processing time is about 60 days.

5.7.5.2 US Department of State

The US Department of State has not published a service standard with respect to application processing times. However, the Directorate of Defense Trade Controls does publish a monthly update of the DDTC's processing times. Lately, it takes on average 20 calendar days to process an application. But for some applications, it may take many months to process and issue n a license.

5.8 How Permits are Issued and Used

Countries with online systems (like Canada, UK and US) issue export authorizations electronically. In some countries (including Canada), the exporter must also print off the export authorization (delivered via the internet) and sign and date it prior to using it.

Other countries (like Australia) do not issue export authorizations electronically via the Internet. The export authorization is printed on paper and mailed to the applicant. (Some countries like Australia will also fax the paper export authorization).

Prior to exporting goods and technology subject to export controls, typically the exporter completes the appropriate customs form and indicates the issued export authorization number. Failure to do so typically leads to penalties (such as fines).

5.9 Reporting Requirements and Auditing

Many countries (including Canada, UK, Australia and US) impose conditions, including quarterly or semi-annual reporting conditions, on many export authorizations for exports of not only military and but also dual use goods. The frequency of the reports (i.e. quarterly or semi-annual) typically depends on the type of goods being exported.

Reports are typically just mailed or EMAILED to the respective Government. If the Government has an online permit system, exporters can typically submit their reports through the online system (such as Canada's EXCOL system).

In most countries (including Canada, UK, Australia and US), exporters are also required to keep records of all of each exports and transfers of goods subject to controls.

In most countries, certain authorities are given the power to audit exporters for compliance with the countries export controls.

Some countries (like the UK) regularly conduct audits on exporters. Other countries, like Canada does not. This difference in policy and practice could be seen as a competitive advantage to Canadian Incisory since it does not need to spend as much time preparing and assisting the Government with regular audits.

5.10 Enforcement and Penalties

The level of enforcement and the penalties for breaching export controls vary from country to country.

Powers for enforcement typically include detaining the goods and seizing the goods.

Penalties for breaching a country's export control laws typically range from fines (which can be substantial) to periods of imprisonment.

In many countries (like Canada, UK, Australia and US), it is also a criminal offence to violate a country's export control laws (e.g. where there is criminal intent to knowingly evade a country's export controls).

6.0 Comparative Study of Domestic Controls in Other Countries

A few countries (including Canada, US, EU, the UK and soon Australia) control military and/or dual-use items (including many aerospace related items) within their borders. Many, if not most, countries do not have domestic controls on military items and dual-use items (with the possible exception of controls (or licensing) on light arms (e.g. firearms)).

Canada's domestic controls are some of the most stringent, if not the most stringent, in the world. Canada's domestic controls apply to more goods and technology than many, if not most, countries in the world and apply to transfers to not only foreigners but also to Canadian citizens.

The Canadian domestic controls apply to both physical goods and technology; whereas, the US domestic controls only apply to technology (including services and source code). Unlike domestic controls administered by the US Department of State, the Canadian domestic controls also apply to dual-use items found in Group 6 of Canada's ECL.

With the possible exception of some Weapons of Mass Destruction (**WMD) related domestic controls, the domestic controls in the UK apply to only US ITAR defence articles, not to all military goods. In contrast, the Canadian domestic controls apply to all military items regardless of whether they are of US origin. And unlike the domestic controls in the UK, the Canadian domestic controls also apply to dual-use items found in Group 6 of Canada's ECL.**

With the possible exception of some WMD related domestic controls and special US Treaty based domestic controls[9] (which only apply to some people within the country that is a party to the US Treaty), some countries (including the US, the UK and soon Australia) only have domestic controls which regulate the transfer of certain items to foreign persons. These domestic controls do not regulate the transfer of the same items to their own citizens. In contrast, Canada's domestic controls regulate the transfer of certain items to not only foreigners but also to Canadian citizens within Canada.

6.1 Canada

6.1.1 Introduction – Controlled Goods Program (CGP)

In 2001, Canada reached an agreement with the US (called the Canada - U.S. agreement on defence trade controls) whereby Canada agreed

[9] **The UK and Australia have signed Treaties with the US. The US-UK Treaty provisions have been recently implemented in the UK. The legislation to implement the US-Australian Treaty provisions is before the Australian Senate. These two Treaties require the UK and Australia to implement some additional domestic controls that will regulate the transfer of US ITAR defense articles to not only foreigners but also to their own citizens in some cases. These new additional domestic controls do NOT apply if the UK or Australian company elects not to participate under the Treaty framework.**

- to put in place domestic controls to safeguard certain military and dual-use goods and technology (including many aerospace related goods and technology) and prevent these goods and technology from being accessed by unauthorized people in Canada and;
- and agreed to enforce US re-export license requirements for the re-export of US ITAR defence articles from Canada.

In exchange, the US agreed to relax US licensing requirements for these US defence articles being exported from the US to Canada. Many of these US defence articles can now be exported from the US to Canada without any US export licenses. (As noted earlier, Canada already allows the export of the vast majority of goods to the US through a Canadian license exception). The two-way license free movement of certain goods and technology provides many benefits to Canadian industry including:

- A significant reduction in the administrative delays associated with the existing export control systems;
- reduced delivery times for new defence projects; and,
- improved business opportunities for Canadian companies to participate in US contracts.

To administer domestic controls in Canada, the Controlled Goods Program (CGP) was established in 2001 to safeguard certain military and dual-use goods and technology (including many aerospace related goods and technology) and prevent these goods and technology from being accessed by unauthorized people in Canada. The CGP helps prevent the proliferation of certain military and dual-use goods including weapons, satellite global positioning systems and communications equipment, military equipment, spacecraft and related technology. Many goods and technology specially designed or modified for aerospace use are controlled under the CGP. The CGP is administered by Public Works and Government Services Canada (PWGSC).

6.1.2 Legislation

The following legislation creates the framework of Canada's domestic controls on certain military and dual-use goods:

- *Defence Product Act*
- *Controlled Goods Regulations*
- The Regulation under the *Export and Import permits Act* that creates the ECL.

6.1.3 Scope of Domestic Controls

The Controlled Goods Program controls the examination, possession and control of certain goods and technology (called "controlled goods") within Canada.

It is important NOT to confuse the term "controlled goods" under the Controlled Goods Program with all the goods and technology on Canada's ECL, which may also be called

"controlled goods". "Controlled goods" under the Controlled Goods Programs is actually a small subset of all the goods that are exported controlled on Canada's ECL. In particular, controlled goods for the Controlled Goods Program are all goods (and technology) enumerated in Group 2 and Group 6 of the Canadian ECL and ECL item 5504. Many of these goods and technology are aerospace related. Hereinafter, the term "CGP controlled goods" will be used when referring to "controlled goods" subject to the Controlled Goods Program.

As part of this agreement with the US, Canada added a number of items to its ECL including many space related items not controlled by the multilateral export control regimes (see ECL 5504) to better "synchronize" the Canadian ECL with the US Munitions List (USML) administered by the Department of State. These additional items are subject not only to domestic controls under the CGP but also to export controls.

6.1.4 Registration

It is mandatory for all Canadian who possess, examine, and/or transfer "CGP controlled goods" to register with the CGP. In addition, registration with the CGP is a pre-requisite before DFAIT will issue an Export Permit for exports of "CGP controlled goods" from Canada.

Companies must submit an application for registration with PWGSC. Typically, PWGSC will only register a company once the company has established:

- certain security requirements (including a security plan)
- passed certain security clearances

Companies must also appoint a Designated Official (DO) to help administer the Controlled Goods Program within the company. DOs must be employees of the company, Canadian citizens or permanent residents who usually live in Canada and must consent to a security assessment. Once they have been accepted by PWGSC, DOs are responsible for:

- conducting security assessments of employees, officers and directors;
- determining the risk of transfer posed by employees, officers and directors;
- performing and maintaining security evaluations;
- submitting applications for exemptions to the CGP for temporary workers and/or visitors.

6.1.5 Auditing and Record Keeping

Registered companies under the Controlled Goods Program must keep certain records and agree to regular audits by the Government for compliance.

6.2 European Union

For the most part, the European Union (EU) (as one big territory) has very few domestic controls on the export or transfer of military and dual-use goods from one EU Member State to another EU Member State.. Most dual-use items (including most dual-use items enumerated on the EU Dual-Use List) trade within the EU license-free. However, the commercial documents relating to all intra-community transfers of dual-use items listed on the EU Dual-Use List must clearly indicate that these items are subject to export controls if exported from the EU. (see Article 22(10) of the Dual-Use Goods Regulation).

But the EU does control exports and transfers of certain goods between EU Member States. The following is the main EU legislation that controls exports or transfers of certain dual-use goods between EU Member States:

- The EU Dual-Use Goods Regulation (also known as the Council Regulation No. 428/2009 as amended by Regulation (EU) No. 1232/2011 and Regulation (EU) No. 388/2012)
- The EU Regulation on Torture (also known as Regulation No. 1236/2005)

All EU transfers between EU Member States of dual-use items listed in Annex IV of the Dual-Use Regulation are controlled. (See Article 22 of the EU Dual-Use Goods Regulation). An authorization (or license) from is required from the EU Member State where the exporter is located before such goods can be exported (or "transferred") to another EU Member State.

For the most part, the EU implemented these controls on intra-community transfers to allow the individual EU Member States that are part of the various multilateral export control regimens (such as Wassenaar) to meet their commitments and obligations under these regimes.

The EU Dual-Use Goods Regulation allows an EU Member State to extend these intra-community transfer controls on dual-use goods, if it so desires, to control dual-use goods where at the time of export:

- The exporter (or transferor) knows that the final destination is outside the EU;
- The dual-use goods are listed on the EU Dual-Use List or on the national Dual-Use List, if any, of the EU Member State from which the goods are to be transferred and the dual-use goods are not covered by a general authorization or global authorization in that EU Member State; and,
- No processing or working is performed on the goods in the EU Member State to which the goods are to be transferred.

(See article 22 of the EU Dual-Use Goods Regulation)

The EU also recently amended the EU Dual Use Goods Regulation to allow the EU to negotiate agreements with third countries "providing for the mutual recognition of export controls of dual-use items covered by this Regulation and in particular to eliminate authorization requirements for re-exports within the territory of the Union". (See Article 25a of the Dual-Use Goods Regulation).

Since the US is the main country that imposes re-export requirements on its goods, it would appear that the EU plans to enter into negotiations with the US to reach an agreement to eliminate US re-export requirements for all EU Member States (like Australia and the UK successfully accomplished through their respective Defense Co-Operation Treaties).

Many, if not all, EU States also have domestic laws in place to control the transfer of certain items (such as firearms) within their borders. These laws vary from EU Member State to EU Member State.

6.3 United Kingdom

The United Kingdom has implemented domestic controls to control the transfer of certain military and dual-use goods within its borders. These domestic controls cover not only certain light arms (e.g. firearms) but also other dual-use goods and military goods.

There are two types of domestic controls:

- Non-Treaty based domestic controls; and,
- Treaty based domestic controls.

6.3.1 Non-Treaty Based UK Domestic Controls

In some circumstances, the UK controls the transfer of WMD related software and technology within its borders. In particular, the UK controls the transfer within its borders of all military and dual-use software and technology where:

- the transferor has been informed by the UK Government that the software and technology are or may be intended for use in connection with WMD or their delivery systems or where the transferor is aware that the software and technology are intended for such use; and,

- the transferor knows that the software and technology may be or is intended for use outside the EU or has been informed by the UK Government that it may be or is intended to be so used. (See Article 10 of the Customs Order 2008);

The UK also controls the transfer of certain light arms (e.g. firearms) within its borders.

6.3.2 Treaty Based UK Domestic Controls

6.3.2.1 Introduction

Just recently, on April 13, 2012, a Treaty between the US and the UK concerning Defence Trade Cooperation (hereinafter referred to as the "*US-UK Defense Trade Co-Operation Treaty")* came into force. This Treaty provides a framework to trade in certain US ITAR related defence articles between approved entities in the UK and the United States, known as the Approved Community, without the need to apply for export licenses or permits from the US and UK.

In other words, the Treaty should remove the current administrative delays associated with the existing US and UK export control and licensing systems while ensuring that sensitive military goods and technology are appropriately protected.

The Treaty should provide the following benefits to the UK industry:

- significantly reduce the administrative delays associated with the existing export control systems;
- improve sustainment by permitting certain transfer within the Approved Community without further US or UK Government approvals;
- provide reduced delivery times for new defence projects; and,
- improve business opportunities for Australian companies to participate in US contracts that are eligible under the Treaty.

Applying for membership in the Approved Community will be a voluntary commercial cost-benefit decision based on the level of business a company is likely to undertake with the US Government or with US Defense companies. The implementation costs will vary depending on the organizational structure of the company and the level of security within the company. Typically, companies will incur additional implementation costs for security, marking and handling requirements and regular audit and compliance obligations.

Companies who choose not to be part of the Approved Community can continue to operate within the existing UK and US export controls.

The UK has put into place procedures for the establishment and management of an UK Community, providing offences for individuals and companies who fail to comply with the Treaty obligations, establishing monitoring powers and record keeping requirements.

6.3.2.2 Scope of the Treaty

License free trade is only permitted if all of the following is satisfied:

1) The trade must by between members of the Approved Community. The Approved Community includes:

a. Companies and non-government entities that have been approved by the US or UK governments as members of the Approved Community
b. Government agencies

2) The trade must be in support of the following eligible projects, programs and operations:

- Certain combined military and counter-terrorism operations;
- Certain cooperative security and defence research, development, production, and support programs;
- Certain Mutually agreed security and defence projects where the end-user is the Government of the United Kingdom or the Government of Australia; or
- Certain U.S. Government end-use.

The United States and the UK, and the U.S. and Australia must jointly agree on which projects, programs and operations qualify for processing under the terms of the treaties.

3) The articles being traded must be US Defence articles listed on the Munitions List of the US International Traffic in Arms Regulations (US ITAR) and NOT listed in the list of exempt US Defence Articles (as identified in the Implementing Arrangements under the Treaty)

Unlike Canada, the UK does NOT use its national Export Control Lists (called the Strategic Export Control Lists) for these new domestic controls. This approach is much more flexible.

6.3.2.3 Application for Admission into the Approved Community

Both companies and individuals can become members of the Approved Community. Typically, a company applies for membership into the Approved Community and all its contractors and employees of the company who need access to US ITAR Defence articles apply separately for membership into the Approved Community.

The Approved Community consists of:

- The United Kingdom Community; and,
- The United States Community

After his or her review, the Minister of Defence (or delegate) will make a decision as to whether a company may be eligible for UK Community membership.

Under certain circumstances, the Minister of Defence (or his or her delegate) may suspend or cancel a company's membership into the UK Community.

In addition, once the company is been admitted into the UK Community, only contractors and employees for the company who have also been approved as members of the UK Community will have legal access to US ITAR controlled defence articles. Contactors and employees must apply separately to the Minister of Defence for admission into the Australian Community.

6.3.2.4 New Controls

The US-UK Treaty provides for two-way license free exports and transfers of certain goods and technology between members of the Approved Community. All other exports and transfer are controlled.

In particular, the UK has implemented the following new domestic transfer controls:

- Controls on the transfer within UK of all US ITAR related goods and technology subject to the Treaty to a person who outside the approved Community;
- Controls on the transfer within the UK of all US ITAR related goods and technology subject to the Treaty but for an activity that falls outside the Treaty to a person who is in the Approved Community;

Exporters must apply and obtain approvals from the Export Policy and Assurance (EPA), part of the Ministry of Defense (MoD), when transferring goods and technology within the UK in the circumstances listed above.

Canada's ITAR related domestic controls are MUCH stronger than the UK's domestic controls. Canada's domestic controls control the transfer within Canada of ALL goods and services listed on its Munitions List, ALL goods and services listed in Group 6 (MTCR related) and all goods in ECL item 5504 of its Export Control List -- not just ITAR related goods. In addition, Canada controls the transfer of some goods and services listed in Group 6 (MTCR related) of its Export Control List which are considered dual-use goods NOT military goods.

6.3.2.5 Auditing and Record Keeping

The US-UK Treaty also requires the establishment of monitoring powers and record keeping requirements.

Members of the UK Community must keep certain records pertaining to the export and transfer within the UK of US ITAR related goods covered by the Treaty and agree to regular audits by the Government..

The UK Government has the power to appoint officers who have the power to audit members of the UK Community for compliance.

This is very similar to Canada, where officer of the Controlled Goods Program regularly audit companies for compliance.

6.3.2.6 Penalties and Enforcement

The UK has established additional offences and penalties for exporting or transferring US ITAR related goods subject to the Treaty without an Export Licence from the Department for Business, Innovation and Skills (BIS) or an authorization from the Minister of Defence respectively.

6.4 Australia

6.4.1 Current Domestic Transfer Controls

With the exception of certain light arms (e.g. firearms), it would appear that Australia has not implemented any domestic transfer controls to control the transfer of military or dual-use goods and technology within Australia at this time.

Australia has far fewer domestic transfer controls than Canada but that will likely change fairly soon (see next section below).

6.4.2 Proposed New Domestic Transfer Controls

Australia has introduced the *Defense Trade Controls Bill 2011* to strengthen its export controls and introduce new domestic transfer controls (to control the transfer of certain goods within Australia).

The *Defense Trade Controls Bill 2011* was passed by Australia's House of Representatives on November 2, 2011 has been referred to a Senate Committee. The Senate Committee has recommended that the Department of Defense undertake further consultation with the academic sector. The Senate Committee is due to report back to the Senate by August 15, 2012

When enacted, the *Defense Trade Controls Bill 2*011 will:

1) add new controls on the export, re-export and transfer of certain technology and the provision of certain services;
2) add new controls on the brokering of certain goods, technology and services; and,
3) implement the *Treaty between the Government of Australia and the Government of the United States of America Concerning Defense Trade Cooperation* (which was concluded in September 2007).

1) and 3) above will add new domestic transfer controls.

6.4.2.1 Proposed Non-US ITAR Related Domestic Controls

In addition to new export and re-export controls (discussed earlier), the *Defence Trade Controls Bill 2011* also proposes the following domestic transfer controls on certain military and dual-use goods:

- controls on the transfer within a country (including Australia) of all dual-use and military technology listed on Australia's Defence and Strategic Goods List (DSGL) by an Australian person (located anywhere in the world) to a foreign person (located anywhere in the world) (see Subsection 10(1) of the Bill); and,

- controls on the transfer of all defence services for all goods and technology listed on Australia's Defence and Strategic Goods List (DSGL) by anyone (Australian or foreign) in Australia to a foreign person also located in Australia (see Subsection 10(2) of the Bill).

It should be noted that under subsection 4(1) of the Bill, "technology: is defined as to include software. However, under subsection 4(2) of the Bill, the Minister of Defence may, by legislative instrument, limit the definition of "technology". It is quite possible that the Minister may exclude executable software from the definition of "technology" since executable software is nit typically considered to be "technology". But at this time, it is unclear whether this will happen.

It should also be noted that under subsection 4(1) of the Bill, the definition of "defence services" is NOT limited to services relating to military goods or technology. It would appear that Australia wishes to control both all services (including commercial or dual use services) relating to all goods and technology listed on Australia's Defence and Strategic Goods List (DSGL). In my view, the term "Defense Services" may be misleading to some.

Under the Bill, the Minister of Defence can review applications and issue Permits to authorize transfers of technology (which includes software) subject to these new controls.

6.4.2.2 Proposed US ITAR Related Domestic Controls

6.4.2.2.1 Introduction

The *Defence Trade Controls Bill* 2011also implements The *Treaty between the Government of Australia and the Government of the United States of America Concerning Defense Trade Cooperation*. This Treaty provides a framework to trade in certain US ITAR related defense articles between approved entities in Australia and the United States, known as the Approved Community, without the need to apply for export licenses or permits from the US and Australian governments.

In other words, the Treaty should remove the current administrative delays associated with the existing US and Australian export control and licensing systems while ensuring that sensitive military goods and technology are appropriately protected.

The Treaty should provide the following benefits to the Australian industry:

- significantly reduce the administrative delays associated with the existing export control systems;
- improve sustainment by permitting certain transfer within the Approved Community without further US or Australian Government approvals;
- provide reduced delivery times for new defence projects; and,
- improve business opportunities for Australian companies to participate in US contracts that are eligible under the Treaty.

Applying for membership in the Approved Community will be a voluntary commercial cost-benefit decision based on the level of business a company is likely to undertake with the US Government or with US Defense companies. The implementation costs will vary depending on the organizational structure of the company and the level of security within the company. Typically, companies will incur additional implementation costs for security, marking and handling requirements and regular audit and compliance obligations.

Companies who choose not to be part of the Approved Community can continue to operate within the existing Australian and US export controls.

The Bill creates provisions for the establishment and management of an Australian Community, providing offences for individuals and companies who fail to comply with the Treaty obligations, establishing monitoring powers and record keeping requirements.

6.4.2.2.2 Scope of the Treaty

License free trade is only permitted if all of the following is satisfied:

4) The trade must by between members of the Approved Community. The Approved Community includes:
    a. Companies and non-government entities that have been approved by the US or Australian governments as members of the Approved Community
    b. Government agencies
5) The trade must be in support of eligible projects and programs included in one of the following lists:
    a. Combined Operations and Exercises List
    b. Cooperative Programs List
    c. Australian Government End Use List
    d. United States Government End Use List

6) The articles being traded must be enumerated in Part 1 of the Defence Trade Cooperation Munitions List (DTCML) and NOT enumerated in Part 2 of the DTCML. (Part 2 is based on the Exempted Technology List currently available from the US Department of State). The DTCML is part of the Bill.

Unlike Canada, Australia has a have separate control list for use with many of its new proposed domestic controls. This is much more flexible and industry friendly.

6.4.2.2.3 Application for Admission into the Approved Community

Both companies and individuals can become members of the Approved Community. Typically, a company applies for membership into the Approved Community and all its contractors and employees of the company who need access to US ITAR Defence articles apply separately for membership into the Approved Community.

The Approved Community consists of:

- The Australian Community (approved by the Australian Government); and,
- The US Community (as defined under the Treaty).

When reviewing the application for admission by a company into the Australian Community, the Minister of Defence (or delegate) will assess the following:

- whether the Australian company has access to a facility accredited by the Government of Australia for Treaty purposes;
- the Australian company's ability to meet set standards that will include those for physical and information security;
- extent of foreign ownership or control (whether direct or indirect);
- whether the company has significant ties to countries proscribed by the US Government;
- relevant offence history, if any, of the company;
- whether the company's admission into the Australian Community would prejudice Australia's security, defence or international relations;
- whether the application for approval contains information that is false or misleading;
- whether the manager of the company is an Australian citizen;
- the relevant offense history, if any, of the manager of the company; and,
- any other matters that the Minister consider appropriate.

After his or her review, the Minister (or delegate) will make a decision as to whether a company may be eligible for Australian Community membership. **However, it should be noted that the Minister must not approve membership until the US Government has agreed to the company becoming a member of the Approved Community**.

Under certain circumstances, the Minister (or his or her delegate) may suspend or cancel a company's membership into the Approved Community.

In addition, once the company is been admitted into the Australian Community, only contractors and employees for the company who have also been approved as members of the Australian Community will have legal access to US ITAR controlled defence articles. Contactors and employees must apply separately to the Minister of Defence for admission into the Australian Community.

When reviewing the application for admission by a contractor or employee into the Australian Community, the Minister of Defence (or delegate) will assess the following

- Whether the contractor or employee has met the following pre-requisites:

    1) the person must be an Australian person (unless the US and Australian government have both agreed to waive this requirement); and,

    2) the person must hold a current security clearance issued by the Australian government.

- Whether the person is suitable to access US ITAR Defence articles on the basis of whether the person has significant ties to a proscribed country

According to the draft regulations, a person has significant ties to a proscribed country if the person's access to US ITAR defence articles presents a significant risk that it may be diverted to the proscribed country because of the person's ties to that country. (Those who have obtained a minimum BASELINE Australian Government security clearance will include an assessment for significant ties to countries proscribed by the US Government).

If the Minister of Defence is unsure whether a contractor or employee has significant ties to a proscribed country, the Minister of Defence may refer the assemment to the United States Government under certain circumstances

6.4.2.2.4 New Controls

The Bill provides for two-way license free exports and transfers of certain goods and technology between members of the Approved Community. All other exports and transfer are controlled in the Bill.

In particular, the Bill proposes the following new domestic transfer controls:

- Controls on the transfer within Australia of all US ITAR related goods and technology subject to the Treaty to a person who is none of the following: the Commonwealth of Australia, an Australian Community facility, an Australian Community Member, a member of the US Community;
- Controls on the transfer within Australia of all US ITAR related defence services on goods and technology subject to the Treaty to a person who is none of the

following: the Commonwealth of Australia, an Australian Community Member, a member of the US Community

- Controls on the transfer within Australia of all US ITAR related goods and technology subject to the Treaty but for an activity that falls outside the Treaty to a person who is any of the following: the Commonwealth of Australia, an Australian Community facility, an Australian Community Member, a member of the US Community;
- Controls on the transfer within Australia of all US ITAR related defence services on goods and technology subject to the Treaty but for an activity that falls outside the Treaty to a person who is any of the following: the Commonwealth of Australia, an Australian Community Member, a member of the US Community.

Exporters must apply and obtain not only Permits from the Minister of Defense but also US re-export licenses from the US Department of State when exporting or transferring goods and technology in the circumstances listed above.

Canada's ITAR related domestic controls are MUCH stronger than those proposed by Australia (under its Treaty with the US). Canada's domestic controls control the transfer within Canada of ALL goods and services listed on its Munitions List and ALL goods and services listed in Group 6 (MTCR related) of its Export Control List -- not just ITAR related goods. In addition, Canada controls the transfer of some goods and services listed in Group 6 (MTCR related) of its Export Control List which are considered dual-use goods NOT military goods.

6.4.2.2.5 Auditing and Record Keeping

The Bill also creates provisions for the establishment of monitoring powers and record keeping requirements.

Under the Act, members of the Australian Community must keep certain records pertaining to the export and transfer within Australia of US ITAR related goods covered by the Treaty and agree to regular audits by the Government.

The Secretary of the Department of Defence has the power to appoint officers who have the power to audit members of the Approved Community for compliance.

This is very similar to Canada, where officer of the Controlled Goods Program regularly audit companies for compliance.

6.4.2.2.6 Penalties and Enforcement

When enacted, the *Defence Trade Controls Bill 2011* will introduce additional offences and penalties for exporting, re-exporting or transferring certain technology without a Permit, for brokering without a permit and for exporting or transferring US ITAR related goods subject to the Treaty without a permit. If convicted of these new offenses, the offender can face imprisonment of up to ten (10) years and/or 2,500 penalty units.

6.5 US Domestic Controls

6.5.1 US Department of Commerce

The US Department of Commerce controls the transfer of certain dual-use technology and source code within its borders through “deemed exports”. An export of technology or source code (except encryption source code) is "deemed" to take place when it is released to a foreign national within the United States.[10]

Technology and source code are "released" for export in any of the following situations:

- when it is available to foreign nationals for visual inspection (such as reading technical specifications, plans, blueprints, etc.);
- when technology is exchanged orally; or,
- when technology is made available by practice or application under the guidance of persons with knowledge of the technology.[11]

Assuming that the goods are controlled and no license exception is available, U.S. entities must apply for an export license under the "deemed export" rule when both of the following conditions are met:

1. they intend to transfer controlled technologies or source code (except encryption source code) to foreign nationals in the United States; and;
2. the transfer of the same technology or source code (except encryption source code) to the foreign national's home country would require an export license.

The “deemed export” rule does not apply to foreign nationals who:

- are granted permanent residence, as demonstrated by the issuance of a permanent resident visa (i.e., "Green Card");
- are granted U.S. citizenship; or,
- are granted status as a "protected person" under 8 U.S.C. 1324b(a)(3).

The “deemed export” rule also does not apply to encryption source code.

In addition, with the exception of light arms (e.g. firearms), the US government does not have any domestic controls to regulate dual-use and military physical goods within the US.

[10] See §734.2(b)(2)(ii) of the Export Administration Regulations (EAR)
[11] See §734.2(b)(3) of the Export Administration Regulations (EAR)

6.5.2. US Department of State

The US Department of State controls the transfer of all technology and defense services on the USML to foreign nationals within its borders. The US Department of State typically does not use the term "deemed export" but the same concept is involved. For more information, see the definition for "export" in the US ITAR.[12]

[12] See § 120.17 of the US ITAR.

7.0 Impact of US ITAR Re-Export Controls

US export control law is extra-territorial in nature. It applies to US persons no matter where they are located in the world.

In addition, the US controls all US ITAR items (including goods, software and technology) subject to US export controls from "cradle to grave". Because the US ITAR does not include a *de minimis* rule, any defence article, wherever manufactured, that contains any US ITAR controlled component is also subject to US ITAR export controls.

In other words, all exporters (even if they are not US persons) are required to obtain a US re-export license from the US government (or if possible, take advantage of a license exception) before re-exporting a US ITAR controlled item (or a foreign made item that incorporates a US ITAR controlled item) from a foreign country to certain other foreign countries (except back to the US).

For example, if a Canadian defence contractor builds a military helicopter that incorporates a US ITAR controlled component, even if the value of this US ITAR component is minimal compare to the overall value of the helicopter, the Canadian made military helicopter would be subject to US ITAR export controls (and Canadian export controls).

This US re-export requirement places a heavy burden on all exporters around the world of US ITAR controlled items (and foreign made items that incorporate controlled US ITAR controlled items).

Not surprisingly. Many manufacturers avoid using US ITAR items when another item of equivalent quality is available from another country that does not impose re-export controls.

8.0 Disclaimer

This report is provided for general information only. Before exporting or re-exporting any particular item from any country or possessing, examining or transferring any particular item within ant country, please contact a professional knowledgeable in export and domestic controls in the appropriate jurisdiction.