

January 1988

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Recommended Citation

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

Available at: <https://scholarlycommons.law.case.edu/cuslj/vol14/iss/13>

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Competitive Impact of Canadian and U.S. Export Control Regulations: The Canadian Dimension

*Jonathan T. Fried**

As a member of the Department of External Affairs, I will take a general perspective on the subject of export controls. In the bureaucracy of the foreign service, whether a lawyer or not, one does have to deal with issues such as export controls from various perspectives. I recall when I was called into the Siberian pipeline discussion in External Affairs, I wondered if lawyers be handling the problem. It seemed to be an economic regulation on the American side. It was also a foreign policy issue, full of political aspects, but it really ended up being a legally complex set of regulations. I finally concluded that the measure used legal tools to apply economic leverage for political purposes.

The subject chosen for us today indeed has legal, political and economical aspects, particularly respecting extraterritorial jurisdiction. "Extraterritoriality" may be understood as the application of one country's laws to persons or conduct in another country. More precisely, it refers to the application of American law outside the United States to persons or conduct in any other country.

Let us turn to the political side to give the lay of the land, and to suggest some direction for the future. We must look at the purposes to which export controls are put, in Canada as well as in the United States. As John Ellicott suggested, the first and foremost purpose for applying export controls is to protect national security. Canada administers these controls through a system of identification of goods and of destination. We have a separate set of controls over atomic energy, for obvious reasons. The ability or authority to control oil, gas or even electricity is often justified on the basis of needing to preserve supplies in case of emergency or shortage. Canada has had controls over the export of coins, and has had controls on gold when gold was still a currency standard.

A second purpose of export controls is to support government objectives in domestic economic policy, such as to assure a domestic supply of certain products, raw or processed, to promote domestic industry, or to respond to foreign restrictive trade measures. Let me give some examples of each. In Canada we control the export of foodstuffs under the Canadian Wheat Board Act. We extend our controls to include oil, gas and electricity, supervised by the National Energy Board. In terms of

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promoting the competitiveness of Canadian industry, British Columbia benefits from controls on unprocessed logs, and we have, at present, export controls on unprocessed uranium.

All of which is to say that, in addition to the broad range of national security controls, export controls are used for economic and trade purposes as well. Is it legitimate? Is it justified? Respecting national security, Canada and the United States share a common philosophy. Both Canadian and U.S. national security controls, reflected in a list of goods and area control lists of destination, are based on a multilateral agreement through COCOM. Accordingly, at the national security level, Canada expects U.S. controls to be consonant with ours, with both countries acting in accordance with our shared international obligations and goals.

Where is the international authorization for trade and economic controls? The answer is the General Agreement on Tariffs and Trade ("GATT"). GATT has grown into a institution, reflecting a philosophy of market principles. The first principle is national treatment. Once goods leave one country and enter another, they should, in all respects, whether relating to charges or royalties or taxes, be treated no differently than domestic products. Second, says the GATT, the standards set for products of one country must be equally applied to goods from other countries — the principle of most-favoured-nation treatment. Third, says the GATT, if legitimate tariffs or other trade barriers are imposed for domestic economic or social policy reasons, they should be done in a transparent manner; in other words, in a manner so that other countries understand what is being done and why — the principle of transparency. A tariff is very transparent. Any business and any exporter, when crossing the border with goods, knows exactly what is to be paid, or finds out shortly thereafter. Nontariff barriers, licensing formalities, technical standards and so on, are hidden barriers, and the GATT tries to discipline their use.

That having been said, however, the GATT does permit certain forms of export and import controls which otherwise might be considered barriers to trade. There are three relevant articles of the GATT here. Article XI of the GATT, which is entitled General Elimination of Quantative Restrictions, says, in effect, that while generally countries should stop controls on import or export, it is recognized that there will be occasions of shortage of foodstuffs or of other products essential to the exporting country, or occasions when grading or classification standards will need to be instituted. Thus, consistent with GATT, Canadian controls on wheat, on energy, and on uranium are all defined to prevent shortages.

Articles XX is the second article which deals with export measures. It is called General Exceptions, and it says we, the trading nations of the world, recognize that some tariff and nontariff barriers are necessary and therefore need not be disciplined. Some of these barriers are related to

public safety, and public health. Some, however, are more related to conservation. A Canadian example is the exercise of controls over the export of logs or in controlling fish harvesting: the Government is endeavoring to conserve an exhaustible natural resource in each instance.

There are short supply exceptions in article XX. There are also other exceptions, such as to protect national treasures or intellectual property. Canada does exercise its rights under this exception to control cultural property, indigenous people's products and the like. One caveat to any of these exceptions is that they must not be applied in a manner which would constitute an arbitrary or unjustifiable discrimination among countries where the same conditions prevail or a disguised restriction on international trade. All of which is to say that in exercising a trade related export control, it must not constitute a disguised measure really designed to protect domestic industries.

The GATT gives a bow in the direction of COCOM. In article XXI, which is called the National Security Exception, national security is defined as limited to matters related to nuclear energy, matters related to nuclear arms and implements of war, and to matters related to United Nations directed sanctions.

To this point, I have sought to show that Canada and the United States, not only for national security reasons, but for a range of trade related and economic reasons as well, are acting for the most part consistently within the multilaterally agreed framework: COCOM and the GATT.

Let me turn to the bilateral framework. John Ellicott made mention of the Hyde Park Agreement between MacKenzie King and Franklin Roosevelt. As Roosevelt said, "It was a glorious day in April, 1941." Roosevelt and the Canadian Prime Minister acknowledged that for the purpose of war production, North America should be considered as a single defense industrial base, in order to allow each country to provide the other with the defense articles which it was best able to produce, and to produce quickly, in order to get production up to speed for World War II. Obviously at that time this notion of a single defense industrial base was thought to be a temporary structure for a single purpose, but succeeding arrangements and commitments have expanded the concept. In 1942, an agreement was signed, committing both countries to continue the principles of Hyde Park for the remainder of the war and affirming that this same spirit of cooperation between the two countries should continue through the process of reconversion. An Exchange of Notes in 1945 reaffirmed and gave formal effect to the Hyde Park Declaration. In 1956, Canada and the United States signed an administrative arrangement confirming joint defense production sharing arrangements. In 1963, another memorandum of understanding on defense development sharing was signed. Most recently, in 1985 at the Quebec Summit, the two countries issued a Security Declaration, which once again reaffirmed

and committed them to remove all remaining barriers to trade in essential products necessary to the defense of North America.

A single defense industrial base is a wonderful concept. How far is it implemented in practice? If the notion is a single defense production base or assured second source suppliers, these agreements certainly suggest that the concept is fully implemented, at least in the area of defense and of strategic goods across the border. There should not, for this purpose, be any export controls between Canada and the United States for goods used in each country and not used for trans-shipment.

However, if Canada and the United States have an open border, the possibility of foreign use or further production in either country suggests the need for a common regime, in which goods are prevented from being trans-shipped via, for example, Canada as a back door for states to whom the United States would not authorize export directly. What Canada did in 1949, and has done ever since, is to add an item of control into its regulations for all U.S. origin goods not covered elsewhere in Canada's export control regime. Aside from the COCOM list of goods, and aside from the prescribed destinations on our area control list, Canada will control the export of any U.S. origin good. We will apply controls on behalf of the United States, in accordance with its licensing regime otherwise applicable. However, if that U.S. origin good has been further manufactured by combining it with other goods so as to result in a substantial change in value, form or use of the goods, or in the production of new goods, then it is not considered an American good anymore; it is a Canadian good. The control that will be applied in that instance, therefore, is not because it is an U.S. origin good, but because it is a strategic good elsewhere on the list.

On the U.S. side, there is not a perfect implementation of this bilateral regime. As John Ellicot clearly illustrated, the United States continues to maintain and to control reexports from Canada of U.S. goods and technologies, including under Canadian law those goods or technologies that are considered to be Canadian by reason of transformation.

Thus, many goods are not only in theory, but in practice, subject to both Canadian and U.S. controls. That is the bilateral framework on the national security side. What about on the trade side?

Up until the Free Trade Agreement ("FTA"), there was no special bilateral framework except with respect to certain commodities. A memorandum on softwood allowed Canada to impose an export tax on the export of lumber that would otherwise fall under the FTA, and it wiped softwood lumber out of the agreement. The United States maintains a sugar quota, so Canada maintains export controls on sugar to respect the U.S. quota on sugar. That is pursuant to an understanding. This brings us to the free trade negotiations and the FTA.

U.S. interests and objectives in the negotiations are reflected in section 108 of the Trade Act of 1974. A principal U.S. negotiating objective

is to enter into trade agreements with foreign countries to assure the United States of fair and equitable access, at reasonable prices, to supplies important to U.S. economic requirements. Thus any agreement entered into under this authority may include provisions which assure to the United States the continued availability of important articles at reasonable prices, and provide reciprocal concessions or comparable trade obligations by the United States. In other words, the United States does and did bring to the table an interest in assured access to raw materials and supplies of Canadian goods, particularly those which it is unable to develop in domestic production. On the other hand, there was very little interest shown by U.S. negotiators in discussing national security related controls which may have an impact on access to materials or goods.

Canada, with a smaller economy and an interest in developing its domestic market, has long been concerned with American national security controls, which have, as I described, caused some competitive disadvantage to industries. Canada had less of an interest than the United States in a full discussion of trade related export measures in the negotiations.

What is the result? Article 2003, based on GATT article XXI, allows either country to exempt itself from obligations of the agreement for national security reasons. Procurement has its own national security exception in article 1308, which is like the exception of the GATT Procurement Code, and article 907 provides a national security exemption from otherwise free trade in energy goods. Thus, only on very narrow grounds can either country stop the importation or exportation of goods covered by the FTA.

When compared to other free trade areas, however, significant advances were made. Respecting quantitative restrictions and other export controls, article 407 of the FTA has the effect, not only of confirming GATT obligations, but as well of requiring the remodeling of a number of existing quantitative restrictions unless they are specifically permitted under the GATT or grandfathered by the FTA. The two areas that were grandfathered, by virtue of article 1203, were provincial laws governing the export of unprocessed fish caught off the east coast of Canada, and the right of both countries to control log exports. Regarding uranium in particular, article 902 restricts Canada and exempts the United States from the Canadian uranium upgrading policy, thus recreating a truly open market and open trade.

Export taxes, which are acquiesced in the GATT, are disciplined by the FTA in article 407, which is really a confirmation of existing practice in both countries. The article specifically prohibits export taxes or duties on bilateral trade unless the same tax is applied on the same goods consumed domestically.

Article 409 confirms short supply reasons for imposing other export measures, and chapter 9 on energy reflects the same principle for real or potential shortages regarding energy trade. Is this a good deal or a bad

deal? Ultimately, we have made a marginal improvement in confirming article XXI of the GATT in the free trade area; more attention may be paid to the limitations on invocation of national security than might otherwise be possible in a GATT forum. The FTA lightens GATT disciplines on trade related export measures, albeit again only marginally.

Finally, regarding the extraterritorial enforcement of U.S. law, particularly on the basis of corporate nationality, subjecting persons to the U.S. jurisdiction may, in fact, be inconsistent with the same principle of national treatment that we talked about earlier, particularly in regard to foreign investment in Canada. If Canada has promised under the agreement to allow U.S. investment into the country, and to facilitate U.S. investment and to treat the U.S. corporation exactly as a Canadian corporation for all purposes. It is inconsistent with this obligation if the corporation continues, at the same time, to be treated as a U.S. corporation by the United States. Application of U.S. export controls to the corporation would mean that the U.S. corporation carries different rights and obligations with it into Canada than a Canadian corporation would have respecting its Canadian activities. Canada, for its part, may have to treat it differently in order to respond to the U.S. authority.

I would conclude by suggesting that the FTA does mark a marginal improvement in the bilateral situation, and I share John Ellicott's assessment that we may continue to face some irritation in the future when foreign policies differ between our two countries.