

Comments by Peggy Mason, President of the Rideau Institute
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Introduction: Hard Legal Limits on the Minister's Discretion

There has been much discussion in these hearings of the “balancing” of commercial interests and broader Canadian values. But it is important to understand that international law permits no such trade-offs when it comes to our fundamental legal obligations not to commit or to facilitate serious violations of international humanitarian or human rights law. The Arms Trade Treaty catalogues these obligations in Articles 6 and 7. Article 6 contains absolute prohibition if there is knowledge at the time of the authorization that the arms or items would be used in the commission of genocide, crimes against humanity or grave breaches of the Geneva Conventions of 1949.

Article 7 of the ATT requires an assessment of the risk that the transferred arms would undermine peace and security, or could be used to commit or facilitate serious violations of international humanitarian or human rights law. If the assessment determines there is an overriding risk of any of these negative consequences that cannot be mitigated, then the exporting Party “shall not authorize the export”.

In other words, there is no discretion to approve the transfer *for other reasons* if the Article 6 or 7 negative criteria are met.

It is therefore with great satisfaction that we commend the government for their amendment of Bill C-47 at the Committee stage in the House of Commons to include a new Article 7 which provides that the Minister “shall not issue a permit” if there is a “substantial risk” that the export would result in the commission or facilitation of serious violations of international humanitarian or human rights law (and that substantial risk cannot be mitigated).

In our view, this new provision imposes hard legal limits on the hitherto unduly broad Ministerial discretion, is firmly in line with Canada's existing legal obligations under international humanitarian and human rights law and will allow the Courts to exercise an appropriate judicial oversight role.

Proposed amendments to Bill C-47 to ensure it complies with the requirements of the Arms Trade Treaty

I now want to review the possible wording of some of the specific amendments to Bill C-47 that are still needed to ensure that Canada's accession legislation actually meets the fundamental requirements of the ATT.

(1) Amend the Export Control List to specify "All Destinations"

I start with the most important change needed to close the glaring gap between what the ATT requires and what Bill C-47 provides. I refer of course to the exemption of most of Canada's exports of military goods and technology to the USA, despite the clear Treaty requirement that *all* conventional weapons to *all* destinations be included.

The government has argued that ending this exemption would unduly hamper defence trade between the Canada and the USA. But you have heard testimony from Martin Butcher, an expert on defence trade within the European Union, that there are very workable "light touch" mechanisms that enable full treaty compliance on the one hand and deep defence trade integration on the other. And note also that the Government of Canada would not be starting from scratch because there is already a mechanism in place under the Export and Import Permits Act for its application to a small category of US-destined military exports where export permits are required. More on that in a moment.

You have also heard from the government that the legislative rule, the Parent Act rule, only allows amendment to those provisions of the Export and Import Permits Act that have been “opened up” by the government through Bill C-47. Therefore, they argue that, even if they wanted to, they cannot amend Bill C-47 to include all military exports to the USA.

With the greatest respect to that legal argument (and I am a lawyer too), it seems to me that the inclusion of all military exports to the USA can indeed be accomplished through a further amendment to a provision of the Export and Import Permits Act that has been “opened up” by Bill C-47.

Consider first how the EIPA currently handles those US-destined military exports where a permit is required. To explain this, I turn to a most useful document in navigating the highly complicated EIPA, and that is what is known as the [Export Permits Handbook](#), last revised in 2017. Here is what it tells exporters:

“D.5. Exports to the United States

Export permits are not required for many of the goods and technology listed in the Export Control List if they are destined to a consignee in the United States.

Items that do require an export permit to the United States are defined on the Export Control List (there is a statement that the control applies to “All Destinations”). Those items that require individual permits to the United States, at the time of writing, are listed in the table below for reference convenience. “ [Emphasis added.]

[end of excerpt]

Thus, an amendment to the Export Control List to specify “ALL Destinations” for all of Canada’s military exports, would thereby include all US-destined exports.

But what about the Parent Act rule? Can the Export Control List be amended by Bill C-47? In other words, is there already a proposed amendment relating to the Export Control List?

The answer is yes.

If you turn to Section 6 of Bill C-47, it reads as follows:

1991, c. 28, s. 3

6 Section 6 of the Act is replaced by the following:

Amendment of lists

6 The Governor in Council may revoke, amend, vary or re-establish any Area Control List, Automatic Firearms Country Control List, Brokering Control List, Export Control List or Import Control List.

This means that, by regulation, the Export Control List can be amended to specify “All Destinations” for all Canadian military exports.

We therefore urge the Senate Committee to recommend to the government that they make a formal commitment to this Committee and to the House of Commons to amend the regulation relating to the Export Control List to specify “All destinations” for all of Canada’s military exports.

(2) Ensuring regulatory power to grant exemptions is subject to new Article 7 “substantial risk” criteria

As already noted, the new Article 7 (of Bill C-47) provides that the Minister “shall not issue a permit” if there is a “substantial risk” that the export would result in the

commission or facilitation of serious violations of international humanitarian or human rights law (and that substantial risk cannot be mitigated).

Bill C-47, paragraph 12 (2) expands the EIPA regulatory power to grant exemptions to the operation of any or all provisions of the EIPA.

Export and Import Permits

Regulations

Section 12

Regulations

12 The Governor in Council may make regulations ...

(e) exempting any person, goods or technology or any class of persons, goods or technology from the operation of any or all of the provisions of this Act;

Bill C-47:

(2) Paragraph 12(e) of the Act is replaced by the following:

(e) exempting any person or organization, any goods or technology or any class of persons or organizations, goods or technology from the operation of any or all of the provisions of this Act;

In order to ensure that this exemption power does not conflict with, or undermine the clear intent of the new Article 7, we propose a further amendment to Article 12 (2) as follows:

(2) Paragraph 12 (e) of the Act is replaced by the following:

(e) exempting any person or organization, any goods or technology or any class of persons or organizations, goods or technology from the operation of any or all of the provisions of this Act with the exception of Article 7 and bearing in mind the Arms Trade Treaty obligation to control all conventional arms to all destinations.

(3) Ensuring that DND and crown agencies act in full compliance with the EIPA

Absent the legislative drafting restrictions pursuant to the Parent Act rule, the basic and fundamental democratic goal of ensuring that all departments and agencies of government act in full accordance with Canadian export control law and regulations as set out in the EIPA, would be easily accomplished by a simple provision in Bill C-47 as follows:

“Any contract or agreement for the export from Canada of military goods and technology included in the Export Control List is expressly subject to the EIPA.”

(This amendment of course presumes that the Export Control List will also be amended to specify All destinations.)”

We urge the Committee to recommend that the Government of Canada make a formal commitment to take whatever measures are necessary, in parallel to Bill C-47, to achieve this goal.

(4) Promoting transparency and preventing the abuse of “commercial confidentiality”

The Civil Society Top Concerns brief outlines the need for parliamentary oversight and that has been discussed by other witnesses before me. I want to focus on the narrower issue of preventing the abuse of commercial confidentiality.

One of the key stated purposes of the ATT is “promoting cooperation, transparency and responsible action by States Parties in the international trade in conventional arms”.

Canadians have had a front-row seat in the exact opposite of transparency and responsible action; namely, the misuse of “commercial confidentiality” in the contract(s) for the sale of Canadian LAVs to Saudi Arabia to keep secret from the public and parliament most of the provisions of the contract. This undue secrecy has made democratic oversight and accountability by either Parliament or the Canadian public virtually impossible.

The best possible way to address this serious democratic deficit would be a new provision of Bill C-47 that restricts the use of commercial confidentiality in contracts or agreements for the sale or purchase of conventional arms to the narrowest limits necessary to protect sensitive proprietary and related information.

If this amendment cannot be achieved through the current Bill C-47, because of the Parent Act rule, then once again we urge the Committee to recommend that the government make a formal commitment to develop other measures, in parallel to Bill C-47, to ensure this outcome.

Thank you.