INQUIRY OF MINISTRY

ISSUE:
Based on issues raised in the testimony received by the Standing Committee on Foreign Affairs and International Development (FAAE) in relation to its study on arms export permits, the Committee requested the Department to provide further information on the following issues:

1. The definition and interpretation of "substantial risk";
2. The definition and interpretation of "re-export" and "diversion";
3. Any government policy or guidelines related to post-shipment monitoring;
4. The scope of the permit cancellation announced on April 12th;
5. The number of employees within the department whose work is focused on arms export permit analysis and processing, and whether that number has changed significantly in recent years;
6. The proportion of permit applications received in a year that are typically sent to consultation partners for risk assessment, and whether that proportion has changed significantly in recent years.

RESPONSE

1. The definition and interpretation of "substantial risk";

The term "substantial risk" is not defined under the *Export and Import Permits Act* (EIPA). Based on the practice of other States Parties to the Arms Trade Treaty (ATT) and relevant Canadian and international jurisprudence, Global Affairs Canada's position is that this concept requires a direct and foreseeable risk that the specific good or technology proposed for export would result in one or more of the negative consequences specified in subsection 7.3(1) of the EIPA. In order to establish "directness", there must be a rational connection between the good or technology proposed for export, on the one hand, and one or more of the negative consequences referred to in subsection 7.3(1), on the other hand. This should involve an assessment of the end-use and end-user of the good or technology, as well as the identification of a specific negative consequence.

In terms of "foreseeability", the risk must be well-grounded in the evidence and must be based on something more than mere possibility, theory or suspicion. In most cases, the threshold of "substantial risk" will be satisfied when it is more likely than not that the export would result in any of the negative consequences specified in subsection 7.3(1) of the EIPA. However, the risk does not need to be highly likely. In assessing risk, Global Affairs Canada considers whether the intended end-user of the proposed export has previously used the same or similar weapons to commit or facilitate a "negative consequence". However, the absence of evidence of prior misuse does not mean that there is no "substantial risk".

2. The definition and interpretation of "re-export" and "diversion";

Re-export

At the outset, it should be noted that the EIPA and its regulatory framework do not apply extra-territorially (except in the limited context of brokering). Rather, the EIPA is intended to regulate the movement of controlled goods and technology from Canada. As such, Global Affairs Canada does not have the legal authority to control the re-export of Canadian-made strategic goods and technology from one foreign country to another foreign country. That said, Global Affairs Canada does have the authority to request assurances from the consignee of the proposed export, including an assurance that the controlled good or technology will not be "re-exported" to a foreign country.

The term "re-export" is not defined under the EIPA or the *Export Permits Regulations*, nor is this term defined elsewhere in Canadian law. Nevertheless, the concept of "re-export" has been interpreted internally in a similar fashion as the definition developed by the United Nations Statistics Division for trade statistical purposes: "*Re-exports are exports of foreign*

goods in the same state as previously imported; they are to be included in the country exports. It is recommended that they be recorded separately for analytical purposes. This may require the use of supplementary sources of information in order to determine the origin of re-exports, i.e., to determine that the goods in question are indeed re-exports rather than the export of goods that have acquired domestic origin through processing".

This understanding of the concept of "re-export", which implies that an imported product that undergoes domestic processing should not be considered a "re-export", is reflected in some of Canada's export control restrictions. For example, under Item 5400 of the Export Control List, Canada controls the export of U.S.-origin goods and technology, as follows:

> *United States Origin Goods and Technology*
> *5400 All goods and technology of United States origin, unless they are included elsewhere in this List, whether in bond or cleared by the Canada Border Services Agency, 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. (All destinations other than the United States)*

Although Item 5400 does not expressly use the term "re-export", this provision effectively controls the re-export of U.S.-origin goods and technology from Canada – unless the U.S.-origin good or technology has been substantially modified outside of the United States. In other words, the export from Canada of a U.S.-origin item that has undergone a substantial change in Canada would not be considered a "re-export" of the U.S.-origin item for purposes of Item 5400.

In sum, in order for the export of a Canadian-made product to be considered a "re-export", that Canadian-made product would need to be exported from a foreign country in the same state as previously imported from Canada. By contrast, if the Canadian-made product is further processed or manufactured in the foreign country so as to result in a substantial change in value, form or use of the product, then the export of the transformed product from the foreign country would not be considered a "re-export".

Diversion

Similar to the term "re-export", the term "diversion" is not defined under the EIPA, nor is there an agreed-upon legal definition of this term at the international level.

For the purpose of the Final Report: Review of Export Permits to Turkey, the Department indicated that diversion would occur when military goods and technology are used in a manner that is inconsistent with their authorized end-use or used by actors other than the authorized end-users. If the consignee provides false assurances regarding the final end-user, or uses the item in a manner contrary to the specified end-use, then diversion has taken place. In reviewing proposed exports, Global Affairs Canada specifically considers whether the destination country exercises effective control over arms imported into its jurisdiction and whether there are concerns that imported items will be diverted to an unauthorized destination, end-use, or end-user.

3. <u>Any government policy or guidelines related to post-shipment monitoring;</u>

At present, the EIPA does not provide Global Affairs Canada with the authority to conduct post-shipment verification. Under section 10.1 of the EIPA, the Minister has the authority to designate "inspectors" for purposes of the EIPA but these inspectors are only allowed to "inspect, audit or examine the records" of the permit applicant (i.e., the Canadian company), not those of the end-user (EIPA, section 10.2). This means that under the EIPA, GAC inspectors do not have the authority to investigate whether the end-user of a controlled good or technology is using that good or technology in a manner consistent with the End-Use Statement – even if that good or technology was exported from Canada under the authority of a permit issued by the Minister of Foreign Affairs. Therefore, if GAC inspectors wanted to conduct an inspection abroad, they would only be allowed to inspect the records of a permit applicant. Furthermore, it would be necessary to obtain the consent of the host State before such inspection could take place.

Currently, GAC officials review the documentation that a Canadian applicant/company provides in their permit application, as well as any other relevant information with regard to a proposed transaction. Once a permit is issued, the applicant/consignee can only export the items that are specifically listed on the permit, and subject to the Terms and Conditions outlined on that permit.

The Canada Border Services Agency (CBSA) has the authority to examine goods or technology that are tendered for export from Canada. As such, shipments can be detained and examined to confirm whether export controls apply to such shipments and if the necessary export permits have been obtained, and remain valid. However, the CBSA does not have authority to examine goods or technology abroad, after they have been exported from Canada.

Global Affairs Canada is aware of post-shipment verification initiatives being developed and established by other like-minded countries (e.g. Germany and Switzerland). The Trade and Export Controls Bureau of Global Affairs Canada has undertaken research and bilateral engagement to learn more about these programs. Within the context of the ATT, Canada has also been engaging with other States Parties to build a greater understanding of national controls and to foster discussion on this important topic.

4. The scope of the permit cancellation announced on April 12th

On April 12th 2021, the Minister of Foreign Affairs announced the cancellation of 29 export permits to Turkey, which had been suspended in the fall. At that time, affected Canadian companies were advised that their suspended permits had been cancelled. Once a permit is cancelled the exporter cannot legally export controlled items under that permit.

5. The number of employees within the department whose work is focused on arms export permit analysis and processing, and whether that number has changed significantly in recent years

Budget 2017 invested $13 million over five years to allow Canada to implement the Arms Trade Treaty and to further strengthen its export control regime. This allowed Global Affairs Canada to increase the staff working on export controls – not only permit processing but also policy, regulations and technical support – by 11 full time employees, from 25 to 36.

At the moment, there are 25 full-time employees working **directly** on the processing, technical assessment, review and compliance of permit applications. This number does not include the various consultation partners in Global Affairs Canada who are consulted on complex applications, and which include geographic, human rights, international security and defence industry experts, as well as missions abroad and other departments and agencies.

The Export Controls and Trade Bureau is comprised of three sections:
- **Export Controls Operations Division** responsible for the processing, review and assessment of permit applications, as well as enforcement and compliance of permits issued;
- **Export Controls Policy Division** involved in policy development and outreach, regulations, technical assessments and engineering, and;
- **Technology and Administration Services** responsible for the administration of the web-based application used by clients, GAC and consultees from other government departments.

In 2021, the government announced it would take steps to bolster its system of trade controls to ensure that Canada effectively manages the cross-border flow of sensitive goods. Budget 2021 proposed to provide $38.2 million over 5 years, and $7.9 million per year ongoing for human resources to strengthen, among other trade controls, Canada’s oversight of the movement of prohibited firearms and arms exports.

6. The proportion of permit applications received in a year that are typically sent to consultation partners for risk assessment, and whether that proportion has changed significantly in recent years.

All permit applications for controlled items are reviewed under Canada's risk assessment framework, including against the Arms Trade Treaty criteria which are enshrined in Canada's *Export and Import Permits Act* (EIPA). For proposed exports to low-risk destinations, a permit officer will assess the application through an analysis of the destination country against the ATT criteria.

For exports to other destinations, or if concerns are identified for a permit to a low-risk destination, the application is sent for wide-ranging consultations. Consultation partners can include geographic, human rights, international security and defence industry experts at Global Affairs Canada, our missions abroad, the Department of National Defence, and other departments and agencies, as necessary.

In recent years, the number of permit applications sent for consultations has been constant with roughly one application out of five being sent for wide-ranging consultations. See Table below for a full list, by year.

Year	Permit Applications Received	Permit Applications Sent to Consultation Partners	Percentage (%)
2017	7 002	1 320	18.9
2018	6 885	1 198	17.4
2019	6 589	1 453	22
2020	5 300	1 013	19.1

This ratio also seems to be maintained when looking at multi-year data. For example, between September 2019 (Canada's accession to the ATT and implementation of the new risk assessment process) and April 30, 2021, 21% of export permit applications were sent for consultations (1 923 out of the 9 238 applications received).