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THE IMPACT OF U.S. EXPORT CONTROLS ON TRADE BETWEEN CANADA AND THE UNITED STATES**

*by Arthur Downey**

First, I will give you a brief overview of the U.S. statutory and legal basis for export controls, and then Jon Fried will do the same thing from the Canadian side. We will then review the historical context of the U.S.-Canadian relationship in this area. Finally, we will stand together, but not necessarily in agreement, and walk through a series of hypotheticals and express a view from both sides of the border on the results that might occur.

There are a series of statutes in the United States that relate to the control of exports from the United States. It is a confusing system and not as well organized as the Canadian side, which leads to a good deal of confusion in both the United States and Canada.

The main statute for controlling exports is the Export Administration Act of 1979, as amended in July of 1985. It began back in 1949, then called the Export Control Act, and was designed to provide a framework and mechanism for the control of exports that might have military significance to adversaries. It soon got expanded to bring into force the notion of economic warfare. The basic premise is: if an export of product or technology is good for the other side, it must be bad for us. The United States implemented that system fairly well and dominated over it for a good while. However, by 1969, some twenty years later, the U.S. had lost the dominance in the area and the statute was changed to liberalize it significantly.

The change that occurred was a symbolic one, with the term "export control" changing to "export administration." That law, system, and statute, stayed in effect for another ten years, until 1979, at which point there was a fundamental change. Just prior to that time, the basic concept of using these control mechanisms for national security began to be modified by more extensive use of a control system for foreign policy goals, not only national security goals. The statute was amended in 1979, to set up another regime for achieving foreign policy goals. Indeed, that is one of the areas where we still have substantial conflicts between the United States and Canada. Our two national security goals are basi-

** Remarks given at Conference.

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cally the same, but our foreign policy goals are not always the same. The Act was most recently re-visited last year when it was amended in a number of significant ways.

One of the amendments related to the notion of contract sanctity. It essentially provides that the President is not going to interfere with contracts by use of export controls for foreign policy reasons, absent very serious circumstance. The thrust of this statute is a very broad one. The notion is to capture everything and then allow exceptions, rather than a rifle shot from the beginning with specific, narrow controls. The approach is to capture everything: all products, all technology, and all people. It is then in our discretion to dole out the exceptions.

The law relates to all goods and technology. The U.S. law distinguishes between goods and technology separately: those that are of U.S. origin and those with respect to "persons subject to jurisdiction of the United States." The terms are not defined in the law. Every time Congress goes through this law, it gets to that part and cannot make a decision on whether to define them. Everything else is defined except the key jurisdictional base. The reason for this is to allow the law to have a sweep that is as broad as possible, even if that conflicts with other countries, including Canada.

The system operates on the basis of a licensing system. Bureaucratically, the system is controlled by the Commerce Department, coordinated with the Defense Department for national security matters, and coordinated with the State Department for foreign policy purposes. The system of licenses works in such a way that there are general licenses granted broadly in the regulations. This means that, by decree, the government has decided you are permitted to engage in certain exports without requesting approval from the government. Aside from these general licenses, there is an individual validated license. This means that the exporter has to fill out an application for a license which must be approved by the Commerce Department. Once approved, the exporter receives a license that is complete with conditions and restrictions.

There are certain other kinds of general licenses which can be obtained that relate to more than a specific transaction. One of the most controversial of those licenses these days is called the distribution license, which allows an American company to hold such a license and ship freely to certain named consignees abroad for distribution purposes. It is controversial now because it was viewed as an area where there was leakage to adversarial countries through uncontrolled consignees. As a result, recently the government cracked down quite a bit and now requires audits to be conducted and assurances to be given by the consignees abroad. The single basic exception to this general licensing scheme is Canada, for the historical reasons that Jon Fried will discuss. A shipment from the United States to Canada for use in Canada generally requires no license. It is the only country with that possibility.

I will very quickly touch on the other relevant statutes. Another

one is the Arms Export Act which is the statutory basis for our control of munitions. We are not going to discuss this in great detail because it affects a very narrow slice of trade. It is a system where the license control is maintained by the State Department with cooperation from the Pentagon. The Canadian exception is maintained there also. Essentially, if the product or technology is one which has a military use exclusively, it will fit into that system; whereas a dual use or non-military use product will fit under the first system that I described.

We have another statute called the International Emergency Economic Powers Act (IEEPA). It is a product of the late 1970s, where, until that point, the President used emergency authority rather at random and for broad purposes. We had, at that point, some thirty national emergencies still existing, going back for a long time. The Congress said, "If you, Mr. President, want to engage or draw upon emergency economic powers, you must first declare a national emergency. It has got to be serious. It has to relate to something that is rather unusual, and then we will give you these limited authorities to act in the emergency."

Regrettably, in my view, the President in the last year, has declared three national emergencies relating to Nicaragua, South Africa and, in January, to Libya. Because of the Declaration of National Emergency under a different statute, the National Emergency Act, he has the authority to engage in a great deal of control. There is no exception for Canada. The thrust of this statute is not export based. It's not product or technology based, as opposed to the others we have talked about. It is, rather, transaction based and it can have an extraterritorial effect by applying itself to any U.S. person, including a person abroad. It can attempt to control all transactions, imports, exports, negotiations, and all transfers across the border.

The earlier act, the Trading with the Enemy Act (TWEA), is still alive. It is the authority similar to the emergency economic authority, but for use during wartime. Prior to the introduction of IEEPA, it was the sole basis for the emergency authority. Now, it has been confined to wartime; however, several existing controls were grandfathered under that statute and remain in effect. Those relate to U.S. transaction controls with Cuba, Cambodia, North Korea and Vietnam.

So, essentially, those are the four statutes that affect the export control system between the United States and Canada. We will be focusing most of our attention today on the Export Administration Act.

We will touch from time to time on the Cuban controls under TWEA and some of the other controls like Libya under IEEPA. I'll stop now and Jon Fried will discuss the mirror side of the Canadian statutory organization. He will start to run through how you apply these basic principles across the border.

