

March 1993

EXPORT CONTROLS

Issues in Removing Militarily Sensitive Items From the Munitions List



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**National Security and
International Affairs Division**

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March 31, 1993

The Honorable John Glenn
Chairman, Committee on Governmental Affairs
United States Senate

Dear Mr. Chairman:

In response to your request, we reviewed the export control jurisdiction decisions the Departments of State and Defense made regarding certain militarily sensitive items.

This report recommends a reexamination of the decisions in view of other key differences between the two export control regimes that we identified and a resolution of a jurisdictional dispute over jet engine hot section technology.

As arranged with your office, we plan no further distribution of this report until 30 days from its issue date. At that time, we will send copies of this report to the Chairmen, House Committee on Foreign Affairs, Senate Committee on Foreign Relations, House and Senate Committees on Appropriations, House Committee on Government Operations, and House and Senate Committees on Armed Services; the Secretaries of Defense, State, and Commerce; and other interested parties.

Please contact me at (202) 512-4128 if you or your staff have any questions concerning this report. Major contributors to this report are listed in appendix VI.

Sincerely yours,

Joseph E. Kelley
Director-in-Charge, International
Affairs Issues

Executive Summary

Purpose

With the opening up of the former Soviet Bloc, U.S. exporters are pressing to liberalize U.S. export controls to enhance their export competitiveness. In November 1990, the President ordered the removal of dual-use items by June 1, 1991, from the U.S. Munitions List (USML) and its licensing controls, unless significant national security interests would be jeopardized. Concerned that national security interests may not be adequately considered when weighed against the commercial and economic benefits of liberalized export controls, the Chairman, Senate Committee on Governmental Affairs, asked GAO to examine (1) items being considered for removal from the USML and (2) the extent to which national security interests were being considered and protected in the decision process. GAO focused its review on proposals to remove items and technologies deemed sensitive for national security reasons.

Background

The U.S. export control system is divided into two regimes, one for munitions items under the Arms Export Control Act and one for dual-use items (items with both civil and military uses) under the Export Administration Act. The Department of State controls munitions items through its Center for Defense Trade Controls and establishes, with the Department of Defense's concurrence, the USML. The Department of Commerce controls dual-use items and establishes the Commerce Control List (CCL). The CCL consists of dual-use items controlled by the Coordinating Committee for Multilateral Export Controls (COCOM) and those items controlled for U.S. foreign policy reasons. The fundamental difference between the two regimes is that munitions controls are generally more restrictive than Commerce's dual-use controls.

Over time, the two lists began to overlap. Pursuant to the President's November 1990 order, State led an interagency review to determine which overlapping items could be removed from the USML and transferred to Commerce's jurisdiction. This review became known as the rationalization exercise.

Results in Brief

National security interests were adequately considered in the rationalization exercise, and State and Defense identified over two dozen commodities to be transferred to Commerce's jurisdiction. However, despite significant national security concerns, State and Defense also agreed to transfer certain sensitive items such as technical data for nonmilitary inertial navigation systems (INS), and nonmilitary image intensifiers to Commerce's jurisdiction as a result of a compromise. The

compromise requires Commerce to place additional controls on these items because Commerce's existing controls were not as stringent as State's. GAO found no evidence that the compromise took into consideration key differences GAO identified between the two export control regimes.

Defense and State wanted to retain these items on the USML because the United States leads the world in production and/or performance capabilities of these items. This technological lead translates into a combat and performance advantage for U.S. military forces, and, therefore, these technologies need to be protected. Moreover, State and Defense are concerned about the proliferation of these militarily sensitive items and manufacturing technologies.

State has also proposed to transfer another sensitive item, hot section technologies for commercial jet engines, to Commerce's jurisdiction. Hot section refers to areas of an engine that are exposed to hot combustion gases. Because many of the technologies and manufacturing processes, such as cooling techniques and coatings, for both commercial and military engine hot sections are basically the same, Defense opposed the transfer on national security grounds. However, Commerce is already exercising jurisdiction over hot section technologies for certain commercial engines. Although Defense has requested that State assert its jurisdiction, State has not acted on the request. While the agencies debate the issue, companies are obtaining licenses from Commerce to export hot section technology for commercial engines.

Defense argued to retain hot section technologies on the USML because the United States has a lead over the rest of the world and this lead is vital to U.S. national security interests. GAO agrees with that rationale, but believes Defense's current policy to control all hot section technologies on the USML is too broad and the policy has caused manufacturers to obtain licenses from Commerce.

Principal Findings

Sensitive Items Transferred as a Compromise

State and Defense agreed to transfer to Commerce's jurisdiction over two dozen commodities, such as certain Coast Guard vessels and explosives. However, State and Defense also identified several items that they

determined should be retained on the USML for national security reasons. For example, the technical data for nonmilitary INS is the same as for military INS and is particularly sensitive because it enables the licensee to manufacture all or part of the item. Commerce argued that as dual-use items they belonged on the CCL and that Defense and State had to prove why the transfer to the CCL would jeopardize U.S. national security interests.

To break this impasse, State compromised by agreeing to transfer nonmilitary INS technical data and nonmilitary image intensifiers and related technical data to Commerce if Commerce would impose a new foreign policy control to allay Defense's concerns. In March 1992, the three agencies signed a memorandum of understanding detailing conditions for the transfers; a key condition allows State and Defense to review and recommend denial of license applications associated with these items.

GAO's analysis indicates that while the memorandum of understanding addressed some of the differences between the two export control regimes, GAO found no evidence that the compromise took into consideration other key differences it identified. First, under the Arms Export Control Act, State can revoke or suspend licenses it issued at any time for any reason. There is no comparable provision in the Export Administration Act and Commerce's regulations do not clearly provide that it can revoke or suspend licenses at any time for any reason. Second, under the Export Administration Act, Commerce cannot impose a new foreign policy control to curtail or prohibit exports under existing contracts or licenses, unless the President certifies to the Congress that there is a breach of peace that threatens the strategic interest of the United States. There is no comparable "contract or license sanctity" provision in the Arms Export Control Act constraining State's authority. Third, when items are under State's control, Commerce does not participate in licensing decisions for these items; when items are under Commerce's control, Commerce can escalate interagency disagreements to higher levels to seek potential reversals of State and/or Defense's adverse recommendations.

Inconsistent Treatment of Jet Engine Hot Section Technology Licensing

Jurisdiction over hot section technologies for commercial jet engines has been a long-standing problem in that both State and Commerce claim to have jurisdiction. State claims that it has jurisdiction over hot section technologies for both military and commercial engines. Commerce, however, claims that hot section technologies for commercial engines are

under its jurisdiction. Furthermore, while State, in accordance with Defense's policy, has generally denied licenses for exports related to hot section technologies, Commerce has approved such licenses to COCOM members and other friendly countries. Under existing controls, Commerce does not have sufficient basis to deny these licenses to COCOM and other friendly countries unless it has reason to believe that the technology would be diverted to a proscribed country such as China, other communist countries, and most of the former East Bloc countries. Defense recognized this problem and, in 1988, asked State to assert jurisdiction to protect U.S. national security interests. State, however, has not acted on Defense's request.

More recently, State has considered transferring jurisdiction to Commerce if Commerce would impose a global type foreign policy control, but Defense argued that, for national security reasons, jurisdiction should remain with State. State countered that Defense's argument was more to protect the U.S. industrial base. Defense then responded that its primary reason for retaining hot section technologies on the USML was to maintain an air combat advantage for U.S. forces over potential adversaries. While the debate continues, companies are obtaining licenses from Commerce. GAO found that a company whose applications were denied by State subsequently obtained licenses from Commerce for the export of the same technologies to the same destinations.

Currently, for engines under State's jurisdiction, State controls all technologies associated with the design, manufacture, production, development, repair, and overhaul of engine hot sections. One major engine manufacturer perceives these controls as a blanket embargo of hot section technologies. The company told us that, while it understands the need to restrict transfers of certain technologies even to U.S. allies, the restriction should apply to only a specific list of technologies in which the United States maintains a lead. An Air Force engine expert believes that the United States can construct such a list. Additionally, the United States routinely lists specific engine manufacturing processes and know-how to be restricted from disclosure to foreign partners in individual military codevelopment and coproduction programs on a case-by-case basis.

Recommendations

Because of the militarily sensitive nature of the items involved, GAO recommends that the Secretary of Defense direct the Defense Technology Security Agency and the Secretary of State direct the Center for Defense Trade Controls to take the following actions:

- In view of the key differences between the two export control regimes and other concerns identified by GAO, jointly examine the national security implications of transferring to Commerce's jurisdiction the following items: nonmilitary INS technical data, nonmilitary focal plane arrays and second-generation and above image intensification tubes, commercial systems containing such components, and related technical data.
- If the risks to national security interests are determined to be significant, retain the item or items on the USML.

To ensure appropriate and adequate control over only those hot section technologies that Defense considers sensitive and critical to U.S. national security, GAO recommends that the Secretary of State direct the Center for Defense Trade Controls to

- identify, with the assistance of Defense and other agencies as appropriate, specific hot section technologies in which the United States leads the world and which are militarily critical and assert jurisdiction over those technologies and
- transfer jurisdiction over all other hot section technologies for commercial engines to Commerce.

Agency Comments

GAO obtained written comments on a draft of this report from the Departments of Defense, State, and Commerce (see apps. III, IV, and V). Defense generally agreed with the information and recommendations in the report. However, Commerce and State disagreed with GAO's recommendation to reexamine the transfer of the sensitive items to Commerce's jurisdiction in view of the risks GAO identified. Commerce commented that the transfers were not made as a compromise but rather after all agencies had thoroughly studied the risks and accepted the proposed foreign policy controls stipulated in the memorandum of understanding. State presented similar arguments. However, GAO's evidence shows that the transfers were made as a compromise. In fact, State initially drafted a Federal Register notice to retain the items on the USML because of significant national security concerns. It was only after Commerce refused to clear the draft notice that a compromise was developed by State to transfer the items with new foreign policy controls in order to move the rationalization process forward. Furthermore, there was no evidence that the agencies had considered the other key differences and concerns that GAO identified.

Defense agreed with GAO's recommendation to divide control over hot section technologies between Commerce and State, but Commerce argued that the division will only serve to aggravate exporters, with no security benefit. As stated in the report, hot section technologies are controlled to maintain an air combat advantage for U.S. forces over potential adversaries. GAO believes that maintaining an air combat advantage is a significant security benefit and that the recommendation would result in more focused control over the most critical technologies to U.S. security interests. This recommendation should also help clarify U.S. licensing policies for U.S. exporters.

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Abbreviations

CCL	Commerce Control List
COCOM	Coordinating Committee for Multilateral Export Controls
DTC	Defense Trade Controls
D TSA	Defense Technology Security Agency
GAO	General Accounting Office
IL	Industrial List
INS	Inertial Navigation System
USML	United States Munitions List

Introduction

The United States maintains export controls primarily for national security and foreign policy reasons under two laws. The Arms Export Control Act controls munitions items and the Export Administration Act controls dual-use items (items with both military and civilian uses). The controls placed on munitions items are generally more restrictive than those placed on dual-use items. Furthermore, the United States is a member of the Coordinating Committee for Multilateral Export Controls (COCOM), which calls for member nations to assert control over munitions, dual-use items, and nuclear items as agreed to by all members. Where U.S. controls are more stringent than COCOM controls, U.S. exporters feel at a competitive disadvantage. To rectify this situation, in November 1990 the President ordered that by June 1, 1991, the United States remove from the U.S. Munitions List (USML) all items contained on the COCOM dual-use list, known as the Industrial List (IL), unless significant U.S. national security interests would be jeopardized. Pursuant to this directive, the Department of State led an interagency review to identify items that were on both lists and that could be considered for removal from the USML. This review and decision-making process became known as the rationalization exercise.

U.S. Export Controls

The U.S. export control system is essentially separated into two regimes, one for munitions items and the other for dual-use items.¹ The State Department, under the authority of the Arms Export Control Act, controls munitions items and establishes, with the concurrence of the Department of Defense, the USML. The Department of Commerce, under the authority of the Export Administration Act, controls dual-use items, such as communications equipment and certain chemicals, and establishes a Commerce Control List (CCL). If an exporter is unsure which agency has jurisdiction over a particular item, it can ask the State Department to make a commodity jurisdiction determination.

The purpose for controlling munitions items as stated in the Arms Export Control Act is to further world peace and the security and foreign policy of the United States. In comparison, the Export Administration Act states as its purpose:

It is the policy of the United States to use export controls only after full consideration of the impact on the economy of the United States and only to the extent necessary- (A) to restrict the export of goods and technology which would make a significant contribution to the military potential of any other country or combination of countries which would prove

¹The Nuclear Nonproliferation Act of 1978 is another export control regime. It controls products and technologies to many Third World countries that would provide those countries with the capability to produce nuclear weapons.

detrimental to the national security of the United States; (B) to restrict the export of goods and technology where necessary to further significantly the foreign policy of the United States or to fulfill its declared international obligations...

Some State and Defense officials expressed concerns about transferring sensitive items to Commerce's jurisdiction because they believe Commerce's controls are less stringent than those applied to USML items at State. Specifically, they pointed out that the Arms Export Control Act provides controls on exports and reexports to all destinations, while the Export Administration Act provides controls on exports (and to a much lesser extent on reexports) to only a limited number of destinations. Some of the officials also pointed to the numerous licenses approved by Commerce for Iraq prior to the Iraqi invasion of Kuwait. According to Commerce officials, Commerce had no legal basis to deny many of those licenses.

Controls on Munitions Items

State's Center for Defense Trade (formerly Office of Munitions Control) is responsible for administering munitions controls. The Center is divided into two branches, the Office of Defense Trade Controls (DTC) and the Office of Defense Trade Policy. State promulgates the International Traffic in Arms Regulations under the authority of the Arms Export Control Act. The International Traffic in Arms Regulations specify that State, with Defense's concurrence, determines what a defense article or service is. Also, only the article or service itself is relevant in determining if it is "inherently military in character," and the end use is irrelevant in making such determinations.

Items on the USML are controlled to all destinations, meaning that validated licenses from DTC are needed to all destinations, except for certain items to Canada. Any reexport of munitions items must receive prior approval from DTC. Further, DTC has the authority to deny licenses simply with the explanation that it is against U.S. national interests and to suspend or revoke licenses at any time. DTC can also take as long as necessary to approve or deny a license. This authority gives it flexibility on licenses to sensitive countries to which the United States may not want to sell a particular item but also does not want to offend by rejecting the license.

State relies on Defense for technical advice on certain sensitive license applications. The Defense Technology Security Administration (DTSA) is the Defense unit responsible for coordinating Defense's response to State on questions concerning license applications. DTSA also provides Defense's

position to State regarding commodity jurisdiction decisions. Statistics show that for 1988 and 1989 about 70 percent of the items submitted for commodity jurisdictions were decided in favor of Commerce control.

Controls on Dual-Use Items

Commerce's Bureau of Export Administration is responsible for administering controls on dual-use items. The Office of Export Licensing makes licensing determinations and, when necessary, coordinates with other agencies. The Office of Technology and Policy Analysis develops the policies for the licensing of exports and provides technical support in the review of the CCL to determine which items need to be controlled and to which destinations.

In contrast to the global controls placed on USML items, controls on dual-use items are more targeted. Therefore, commodities and technical data under Commerce's jurisdiction are not always controlled to all destinations. Items controlled for national security reasons are controlled to prevent them from reaching the so-called proscribed countries, mainly the former East Bloc and communist nations. Other items are controlled for various foreign policy reasons, such as antiterrorism, regional stability, and nonproliferation reasons. These foreign policy controls must be renewed annually by the President by submitting an annual report to the Congress. The Export Administration Act controls are careful not to inhibit legitimate peaceful trade of dual-use items, while still restricting these items for questionable uses and destinations.

Commerce's authority to regulate exports is constrained by foreign availability, contract sanctity, and other considerations. For example, Commerce may not impose a foreign policy control to curtail or prohibit exports under existing contracts or licenses, unless the President certifies to the Congress that there is a breach of peace that threatens the strategic interest of the United States. License applications for exports of items controlled for national security reasons to nonproscribed destinations can only be denied if Commerce believes that the exports will be diverted to proscribed countries. Further, its authority to control reexports of products incorporating U.S. goods is constrained by the de minimis rules² that require certain minimum amounts of U.S. content. Additionally, Commerce is under a time constraint in licensing decisions; it generally must reach a decision within 120 days. These constraints are deliberately

²Under the de minimis rules, prior written approval from Commerce is not required for the reexport of a foreign-made product incorporating U.S. origin materials if the U.S. content value is less than 10 percent or 25 percent, depending on the destination, of the product.

designed to ensure that U.S. exporters can compete with foreign competitors in the sale of dual-use items.

COCOM Controls

COCOM, created in 1949, controls exports to the former East Bloc and communist countries. COCOM relies on consensus among members to determine what items will be controlled and to decide which countries are proscribed. COCOM maintains three control lists: the International Munitions List for defense articles and services, the IL for dual-use items, and the International Atomic Energy List for nuclear items. These lists are reviewed in 2-year cycles. During these reviews, items may be moved from one list to another, have their controls loosened, or be removed from COCOM controls altogether. Furthermore, in June 1990, COCOM agreed to a major review of the IL, which resulted in not only a new "core list" but also the removal of about 50 percent of the items from the IL.

COCOM has three levels of controls for items on the IL. The first level, general exception, is basically an embargo of items to the proscribed countries, and all licenses are reviewed collectively and only approved by unanimous agreement. The second level, favorable consideration, allows for the export of items to appropriate destinations and end uses. The final level is for items controlled by administrative exception notes, which means that COCOM members believe the items still warrant controls but need not be subject to collective review. Each member nation exercises its own discretion on these items.

The Need for the Rationalization Exercise

Over the years some overlap between the USML and the CCL, which is closely tied to the IL, has developed through a lack of coordination between State and Commerce. When items are added to the IL, they are added to the CCL unless, according to Commerce officials, there is an understanding between Commerce and State not to do so. For example, space launch vehicles were placed on the IL by COCOM, but State and Commerce agreed that they would remain on the USML and not be placed on the CCL. However, in other cases where State and Defense want to maintain an item on the USML that COCOM has moved to the IL, there has not been coordination between State and Commerce, which has resulted in the item being placed on the CCL while being retained on the USML.

State and Defense want to maintain global export controls, such as those found in the International Traffic in Arms Regulations, for militarily sensitive items in which the United States has a technological lead over

the rest of the world. State officials told us, because COCOM decisions are based on consensus, sometimes the U.S. delegation compromises on some issues in order to have its position accepted on other issues. Therefore, the U.S. delegation has approved the movement of items from COCOM's munitions list to the IL at the insistence of other members, even though it has no intention of removing them from the USML.

Other overlap has been caused by a lack of coordination within State. The group that negotiates at COCOM does not always coordinate closely with the group in charge of the USML. Therefore, when the negotiating group agrees with other COCOM members to move a munitions list item to the IL, the decision is not always communicated to the other group at State so that corresponding deletions can be made from the USML.

Due to the more liberal U.S. controls on the commodities on the CCL, industry prefers to have items that are on COCOM's IL to be controlled by Commerce on the CCL. Therefore, the President issued an order in November 1990 to move dual-use items from the USML to the CCL unless national security would be jeopardized.

Objectives, Scope, and Methodology

Our review was conducted at the request of the Chairman of the Senate Committee on Governmental Affairs. Our objectives were to examine (1) items considered by State for removal from the USML and (2) the extent to which national security interests were considered and protected in the decision process. We focused our review on proposals to remove sensitive items and technologies for which Defense has significant national security concerns.

To determine which items were considered for removal from the USML and which items were considered for retention on the USML for national security reasons, we met with officials from the State Department's Center for Defense Trade, the Defense Department's Defense Technology Security Administration, and the Commerce Department's Bureau of Export Administration. For items subsequently transferred, we reviewed Federal Register notices issued by State to verify that the items were actually transferred. For items that were considered for retention on the USML, we reviewed Defense's rationale papers to ascertain that Defense had legitimate reasons to keep the items on the USML. Due to the classification level, we did not review the complete justification for the retention of software with encryption on the USML.

To determine the extent to which national security interests were considered in the decisions reached for sensitive items, we reviewed each agency's working files that contained minutes of interagency meetings, minutes of meetings with industry representatives, internal written communications within each agency, interagency memoranda, and iterations of draft federal registers. To assess whether these items will have the same level of protection under Commerce's controls, we reviewed and compared the Export Administration Act and the Arms Export Control Act provisions and analyzed an interagency memorandum of understanding that discussed the added protection to be given to these items.

We found that jurisdiction over jet engine hot section technologies has been a long-standing problem and that State was considering transferring jurisdiction to Commerce. Thus, although not part of the rationalization exercise, we included it in our review. We met with Defense, State, and Commerce licensing and policy officials to define the jurisdictional problem. We also met with officials from the Air Force's Wright Aeronautical Laboratories, Dayton, Ohio, to discuss specific technical aspects of jet engine hot section technology. In addition, we met with representatives of General Electric and United Technologies, Pratt & Whitney Division, to discuss industry's views on controls on this technology.

We obtained written comments on a draft of this report from the Departments of State, Commerce, and Defense and incorporated their comments where appropriate. We conducted our review from October 1991 through July 1992. Our review was performed in accordance with generally accepted government auditing standards.

Agency Comments and Our Evaluation

Commerce disagreed with our statement that munitions controls are generally more stringent than dual-use controls. It contended that foreign policy controls can be crafted as tightly as necessary.

We recognize that Commerce may be able to craft controls as tightly as necessary; however, as explained in this chapter, munitions controls are comprehensive, basically controlling munitions exports or reexports to all destinations. In addition, State has the authority to deny, revoke, or suspend a license for virtually any national security or foreign policy reason. Dual-use controls, on the other hand, have generally been more targeted. National security controls target the former Soviet Bloc and

other communist countries, while foreign policy controls target specific commodities and specific countries. Therefore, for exports to countries that are not targeted for a particular control, Commerce may not be able to deny licenses. In fact, Commerce officials told us that Commerce did not have the legal basis to deny many of the licenses approved for Iraq during the 1980s. Similarly, until the Congress recently approved a new measure barring all U.S. exports of high-technology goods to Iran, Commerce had no authority to deny licenses for exports to Iran of certain dual-use equipment ostensibly intended for commercial use. In short, dual-use controls are more narrowly defined and limited when compared to munitions controls. Additionally, foreign policy controls are generally subject to various limitations such as foreign availability, contract sanctity, annual renewal, and de minimis rules. There are no such limitations for munitions controls.

Concerns Over a Compromise Reached in the Rationalization Exercise

The rationalization exercise was conducted between December 1990 and April 1992. State was the lead agency among Defense, Commerce, and other agencies. Over two dozen items or categories of items were found to overlap between the USML and the IL. Most of these items were removed from the USML and placed under Commerce's jurisdiction. Additionally, some overlap was eliminated by clarifying the language of the USML. The remaining overlapping items were a source of contention among the agencies on whether they should be removed from the USML.

While Defense initially opposed the transfer of nonmilitary inertial navigation system (INS) technical data, nonmilitary image intensifiers, commercial systems containing image intensifiers, and related technical data to Commerce's jurisdiction, it eventually acceded to a compromise proposed by State. Under State's proposal, these items would be transferred to Commerce and additional controls would be imposed by Commerce. Defense believed the items would then be controlled in a manner similar to those under the USML. However, we found no evidence that State and Defense considered a number of key differences we identified between the two export control regimes.

The Interagency Exercise and Its Results

After the President's directive in November 1990, State took steps to eliminate the overlap between the USML and the IL. First, with the help of DTSA, it identified the overlapping items on the two lists. This process was made difficult because the IL is very specific (e.g., it uses technical specifications) while the USML is more general. Another difficulty was that COCOM was in the process of reviewing the IL and establishing a new "core list." State, however, decided to use the existing IL for the purposes of this exercise. State requested and obtained Commerce's list of items that overlapped. Finally, State, against Commerce's wishes, decided not to include jet engine hot section technical data in this exercise, although there was a de facto overlap, because State wanted to work on this highly contentious item separately (see ch. 3).

State then established working groups comprised of representatives from State, Defense, and other agencies in the 11 areas (see app. I) in which overlap was believed to exist. In January 1991, these working groups began meeting without Commerce representation because State wanted to meet alone with DTSA to understand all the national security concerns before Commerce became involved. State also believed that national security determinations were beyond Commerce's purview. State and Defense determined that most of the overlapping items could be removed

from the USML and placed on the CCL. However, they determined that software with encryption capability; INS technical data; focal plane arrays, second-generation and above image intensification tubes, and their corresponding technical data; and space-related items were to be retained on the USML for significant national security concerns.

State then invited Commerce to the working group meetings to discuss State and Defense's decisions. Commerce believed that none of the items should be retained on the USML except for space launch vehicles, which are similar to ballistic missiles. Commerce also believed that all dual-use items belonged on the CCL and that it could adequately control the items under the Export Administration Act to safeguard national security. Commerce further pressed Defense and State to demonstrate why its controls were not adequate for safeguarding the items. Because the Office of Management and Budget would not publish State's draft Federal Register notices without interagency consensus, the dispute between Commerce and State caused the rationalization process to reach an impasse. To break the impasse, State compromised by agreeing to transfer some of the sensitive items to Commerce with the condition that Commerce impose additional foreign policy controls to allay Defense's concerns. Defense eventually acceded to the compromise. Subsequently, in March 1992, the three agencies signed a memorandum of understanding detailing the additional controls and other conditions for the transfers. The memorandum provides that Commerce shall refer all license applications (covered by the memorandum), with all supporting documentation, to Defense and State for review and concurrence.

The five outcomes of this exercise were (1) in several categories of items where there was no real overlap, State clarified the language of the USML, thus, eliminating any confusion; (2) in the categories of items with overlap, State issued Federal Register notices detailing what items were moving from the USML to the CCL; (3) a few sensitive items were to be transferred as a result of a compromise; (4) software with encryption capability was retained on the USML; and (5) space items were retained on the USML, and a working group was formed to review individual items for transfer to the CCL. The rationalization exercise was essentially completed in the spring of 1992 with the publication of State's final rule in the Federal Register. However, Commerce must still publish a Federal Register notice promulgating the additional controls to allow Commerce to accept the sensitive items being transferred. As of January 1993, Commerce had not done so.

Noncontentious Items

Over two dozen items and categories of items were identified for removal from the USML (see app. II). These items included armored coaxial cable, several types of explosives, support ships (such as tug boats), and other items that did not justify being retained for national security reasons. Defense wanted to retain certain other items, such as submersibles, on the USML. However, after receiving comments from Commerce and industry, DTSa determined that the items could be moved. Federal Register notices of the proposed rule to remove these items were published inviting public comment. However, the final rule containing all the determinations of the rationalization exercise was held up until April 1992 because of the contentious items.

Rationale for Transferring Submersibles

The Navy initially wanted to retain all submersibles, military or commercial, on the USML but agreed to lower the threshold from 1,000 feet to 1,000 meters. Commerce argued that there would still be an overlap between the USML and the IL if submersibles that dive below 1,000 meters were retained on the USML and that the overlap could not be justified for national security reasons because of wide foreign availability. DTSa agreed with Commerce's position and was unwilling to argue that placing these submersibles on the CCL would significantly jeopardize national security. According to Navy officials, the Navy realized that foreign availability made it difficult to effectively control these items. Jurisdiction over commercial submersibles, except those powered by nuclear propulsion, was transferred to Commerce. The Navy was not positive about the transfer but conceded it was reasonable under the circumstances.

Contentious Items

Before Commerce's involvement in the exercise, State and Defense identified several sensitive items that should be retained on the USML due to significant national security concerns. These items were focal plane arrays, second-generation and above image intensification tubes, and their corresponding technical data; technical data for nonmilitary INS; some commercial software with encryption capability; and all space-related items. Technical data is particularly sensitive because it enables the licensee to manufacture all or part of the item. We examined Defense's classified national security justifications for retaining these items on the USML (except for software with encryption capability due to the level of classification), and they appeared sound.

Image Intensifiers
Transferred as a
Compromise

Image intensifiers, as well as their associated technical data, were identified by State and Defense for retention on the USML due to significant national security concerns. According to Defense, image intensifiers are used in a variety of equipment to enable military forces to maintain operations at night and in adverse weather conditions. This capability is central to U.S. warfighting concepts. Image intensification tubes are generally incorporated into night vision devices for use by individuals in battle, while focal plane arrays are used in combat systems such as tank sights. According to Defense, in the recent Gulf War, Iraqi possession of second-generation night vision equipment designed around second-generation image intensification tubes would have seriously eroded Coalition Forces' advantages in nighttime combat.

A few selected foreign firms can manufacture second-generation tubes of comparable quality to U.S. tubes; however, they are unable to do so in production quantities. Uncontrolled proliferation of this technology will assist these foreign firms to increase the quality of night vision devices in the hands of potential adversaries. Finally, the majority of U.S. military night vision capabilities is composed of second-generation systems, and this will hold true for at least the next 10 to 15 years. Therefore, the technology to produce these tubes, as well as the tubes themselves, should remain under the stringent control of the USML.

Commerce did not agree with State and Defense's rationale for retaining these items on the USML and refused to agree to the publishing of the draft Federal Register notice promulgating this decision. Commerce argued that its controls could be strengthened to adequately safeguard these items.

Image intensification tubes are manufactured by only a few U.S. companies. Two of the largest U.S. producers contend that with declining orders from Defense, they need to export their products to maintain their manufacturing base. They also believe that the United States controls this item more stringently than other COCOM nations. A Commerce official stated that about half of all industry's revenues come from the sale of these items for commercial uses. However, some industry comments indicate that the majority of export sales would still be for military or paramilitary purposes.

Under a compromise reached among the agencies, State decided to transfer nonmilitary image intensifiers, commercial systems containing image intensifiers, and related technical data to Commerce's jurisdiction if Commerce would impose an additional foreign policy control, which is

intended to control these items in a manner similar to those under USML controls. Defense eventually acceded to the compromise, and the three agencies signed a memorandum of understanding detailing the conditions for the transfer.

INS Technical Data
Transferred as a
Compromise

Defense and State also argued that technical data associated with nonmilitary INS and components should be retained on the USML for significant national security reasons. The manufacturing technology for the critical components of all INS is essentially the same, regardless of whether the resulting system is military or commercial. The United States is the world leader in advanced INS design, production technology, and high quality systems that are used in or are adaptable to aircraft attack missions and ballistic and cruise missile guidance. Proliferation of such technology, especially to third-world nations, can adversely impact the balance of power within a region and pose a direct threat to the U.S. national security.

Commerce would not agree to the retention of this item on the USML, arguing that a transfer of jurisdiction would not jeopardize national security, and it offered to impose additional foreign policy controls to strengthen existing controls. Industry supported Commerce's position. As in the case of nonmilitary image intensifiers, this item was offered to Commerce as a compromise to move the rationalization exercise forward.

Software With Encryption
Remains on the USML
Because Defense
Considered Commerce's
Controls Inadequate

State and Defense wanted to retain software with encryption capability on the USML so the National Security Agency can continue its current arrangement with industry to review all new software with encryption capability coming to market to determine if the new product should be controlled on the USML or the CCL. One reason for maintaining this item on the munitions list is concern over future encryption developments by software firms being placed on commercial software programs. Additional reasons are classified. The software industry is concerned that it is losing its competitive advantage because software with encryption capability is controlled under the USML.

State later proposed to transfer mass-market software, including software with encryption capability, to Commerce's jurisdiction because it believed that it would be impossible to control such software. Defense, led by the National Security Agency, refused to include this item in any compromise with Commerce, citing the inadequacy of Commerce's control system even

with added foreign policy controls. The National Security Agency was also concerned that foreign policy controls may lead to decontrol. Further, Defense cited administration opposition to a provision in a bill to reauthorize and amend the Export Administration Act as another reason that jurisdiction over this software should not be transferred. The provision, if passed, would have moved all mass-market software from the USML to the CCL, including software with encryption capability. On February 3, 1992, the Acting Secretary of Commerce notified the Congress that including this provision would lead senior advisers to recommend that the President veto the bill. Defense's argument prevailed, and the item was retained on the USML.

Space-Related Items Continue to Be Reviewed

Commerce initially argued that since COCOM controls space-related items as dual-use, the entire category, except strictly military items, should be transferred to its jurisdiction. State and Defense agreed that many space-related items could be transferred from the USML to the CCL, but they insisted that it be decided on an item-by-item basis. Therefore, they retained all space-related items on the USML but assembled an interagency working group comprised of all concerned agencies (State, Defense, National Aeronautic and Space Administration, and others) to conduct an item-by-item review.

The working group first reviewed space items at the system level (e.g., satellites and global positioning systems) and planned to work down to the component level such as radiation hardened chips. At the time of our review, the group had addressed a number of items and published proposed notices of these decisions in the Federal Register. Although space launch vehicles are dual-use, the group agreed to retain the vehicles on the USML because of their similarity to ballistic missiles. Jurisdiction over global positioning systems has been split depending on the types of capabilities, and certain communications satellites have been moved to the CCL. Commerce officials are not satisfied that enough items are being moved but believe this is a good start. According to State officials, the effort to determine the commodity jurisdiction of other space-related items will continue.

Consideration of Other Differences Between Export Control Regimes

Under the March 1992 memorandum of understanding, Commerce is to create a new foreign policy control on nonmilitary INS technical data, nonmilitary image intensifiers, and their corresponding technical data for regional stability reasons. The new control will require an individual validated license for the export of these items to all destinations except Canada. The agreement also stipulates, among other things, that each such license application will be referred to Defense and State for review and concurrence and will prohibit reexport without further U.S. approval.

Our analysis indicates that the memorandum of understanding addressed some of the differences between the two export control regimes. Nevertheless, we found no evidence that the agreement took into consideration other key differences identified below.

First, under the Arms Export Control Act, State can revoke or suspend licenses it issued at any time, without prior notice, whenever State deems such action advisable (22 U.S.C. subsection 2791(2)). We found no comparable provision in the Export Administration Act regarding Commerce's authority. Further, Commerce's enforcement regulations primarily deal with license revocations or suspensions for cause, for example, violation of the regulations (15 C.F.R. part 788). Another Commerce regulation dealing with license revocation—15 C.F.R. 770.3(b)—is not clear on whether Commerce can revoke or suspend licenses at any time for any reason.

Second, under the Export Administration Act, Commerce cannot impose a new foreign policy control to curtail or prohibit the export of items under existing contracts or licenses unless certain requirements are met. Specifically, the President must determine and certify to the Congress that there is a breach of peace that poses a serious and direct threat to U.S. strategic interest (50 U.S.C. App. subsection 2405(m)). This restriction may be applicable in the event Commerce attempts to impose new foreign policy controls or modify existing controls, after items have been transferred to Commerce's jurisdiction. We found no comparable "contract or license sanctity" provision in the Arms Export Control Act constraining State's authority to impose new controls.

Furthermore, once these items are under Commerce's control, when Defense and/or State recommend disapproval of a license application, Commerce can disagree and escalate the dispute to higher level officials for resolution where Commerce's commercial economic interest arguments would be presented along with foreign policy and national

security arguments from State and Defense. This could result in the approval of a license that might have been denied under munitions control. Under State's control, national security and foreign policy are determining factors in licensing decisions, and Commerce does not participate in the decisions.

The Export Administration Act also requires that foreign policy controls be renewed annually by the President by submitting an annual report to the Congress justifying the need for continuing such controls. The justification has to meet certain criteria with regard to foreign availability, reaction of other countries, and impact on U.S. competitiveness. In contrast, the Arms Export Control Act does not require an annual renewal of controls.

Other Concerns

Aside from these differences, the effectiveness of the new foreign policy controls will depend on how well Commerce implements the terms of the memorandum of understanding. There are already indications that Commerce may not be able to refer all applications with supporting documentation to Defense and State for review as required by the memorandum. Because of a statutorily mandated 15-day limit for processing applications to COCOM member countries, applications are often filed electronically by the exporters without supporting documentation. Although the agencies are trying to resolve the issue, it does reveal another problem that was unforeseen when the compromise was struck to transfer the sensitive items.

Even if the 15-day limit and the supporting documentation problems can be resolved, Defense and State are still relying on Commerce's case referral system. Our recently issued report¹ and our ongoing review indicate weaknesses in the Commerce license referral process in that license applications that should have been referred to Defense and State were not referred. Unless Defense and State routinely review Commerce's referral system or have full on-line access to Commerce's licensing data base, they cannot be sure Commerce has referred all the cases agreed to.

Conclusions

We believe the rationale for transferring an item to Commerce's jurisdiction should be based on whether Defense and State have significant national security concerns for placing that item under Commerce's control. Submersibles were a prime example in which such

¹U.S. and International Efforts to Ban Biological Weapons (GAO/NSIAD-93-113, Dec. 23, 1992).

rationale was applied. As discussed previously, Defense initially identified submersibles as items to be retained on the USML because of national security concerns. The concerns were later cleared through interagency discussions, and submersibles were then transferred to Commerce's jurisdiction.

However, nonmilitary INS technical data, nonmilitary image intensifiers, commercial systems containing image intensifiers, and related technical data were being transferred as a compromise to overcome an impasse in the rationalization exercise. The compromise requires Commerce to impose new foreign policy controls on these items. Our analysis indicates while the memorandum of understanding addressed some of the differences between the two export control regimes, we found no evidence that the compromise took into consideration other key differences we identified.

Recommendations

Because of the militarily sensitive nature of the items involved, we recommend that the Secretary of Defense direct the Defense Technology Security Agency and the Secretary of State direct the Center for Defense Trade to take the following actions:

- In view of the key differences between the two export control regimes and other concerns we identified, jointly examine the national security implications of transferring to Commerce's jurisdiction the following items: nonmilitary INS technical data, nonmilitary focal plane arrays and second-generation and above image intensification tubes, commercial systems containing such components, and related technical data.
- If the risks to national security interests are determined to be significant, retain the item or items on the USML.

Agency Comments and Our Evaluation

Commerce and State disagreed with our recommendation to reexamine the transfer of the sensitive items to Commerce's jurisdiction in view of the risks and concerns we identified. Commerce commented that the transfers were not made as a compromise but rather after all agencies had thoroughly studied the risks and accepted the proposed foreign policy controls stipulated in the memorandum of understanding. State presented similar arguments. Our evidence, however, shows that the transfers were made as a compromise. In fact, State initially drafted a Federal Register notice to retain the items on the USML because of significant national security concerns. It was only after Commerce refused to clear the draft

notice that a compromise was developed by State to transfer the items with new foreign policy controls in order to move the rationalization process forward. In a letter from Defense to State objecting to State's proposed transfer of encryption software to Commerce jurisdiction, Defense stated:

We have supported State's effort to meet the requirements of the President's directive - even to the point of compromising by agreeing to shift other technologies of concern to Commerce jurisdiction.

In that same letter, Defense rejected State's argument that encryption software can be adequately controlled by Commerce using the new foreign policy controls. This statement indicates that Defense recognized weaknesses in Commerce's foreign policy controls but agreed to the other transfers as a compromise. In its comments on this report, Defense agreed that the transfers were made as a compromise. Furthermore, there was no evidence that the agencies had considered the other differences and concerns we had identified such as the suspension and revocation of licenses, the dispute escalation process, the annual renewal of foreign policy controls, and Commerce's case referral system.

Commerce's comments indicated that its authority to revoke or suspend licenses was sufficiently broad. It further commented that it has never encountered a problem revoking or suspending export licenses when necessary. However, we asked Commerce officials to provide examples of cases in which licenses were suspended or revoked and the legal citations for the authorities used in those cases, but no evidence was provided. Commerce also listed additional reasons for which it can suspend or revoke licenses, such as changed circumstances or untrustworthiness of a party to the transaction. Based on Commerce's comments, we have made appropriate changes to the report.

Commerce disagreed that annual renewal of foreign policy controls posed a potential risk to controls over the sensitive items. It commented that there has never been a problem regarding renewing foreign policy controls. Regarding Commerce's comment, we point out that the Arms Export Control Act has no annual renewal requirement, and, hence, this is one of the key differences between the two export control regimes that was not considered in the memorandum of understanding. State and Defense also commented that, should the annual renewal fail to materialize, the items will be moved back to the USML. However, there is no provision in the memorandum of understanding for such an action. If

indeed this is the intent of Defense and State, we suggest that the memorandum be modified to include such a provision.

Commerce disagreed that the Berman Amendment could render technical data controlled for foreign policy reasons less controllable. Commerce contended that the Berman Amendment merely precludes export controls on information materials that enjoy First Amendment protection, not on technical data. We recognize the merits of Commerce's views, and we have amended the report accordingly.

Commerce and State also disagreed that the interagency dispute escalation process could make the items transferred less controllable. They believed that escalation is appropriate, and Commerce further believed that staff decision-making should be subject to political level review. Our intent is to point out another of the differences between the two export control regimes, a difference that could result in a license approval that might have been a denial under the munitions licensing process.

Jurisdiction Over Jet Engine Hot Section Technology

Jurisdiction over jet engine hot section technologies has been a long-standing problem. While there is no jurisdictional dispute over jet engines (State controls military engines and Commerce controls commercial engines), there is a basic disagreement between Commerce and State as to which agency has export control jurisdiction over jet engine hot section technologies.¹ State claims that it has jurisdiction over all hot section technologies because they are the same for both military and commercial engines. Commerce, however, claims that hot section technologies for commercial engines are under its jurisdiction. Furthermore, there is a basic difference in their licensing criteria. While State, enforcing Defense's policy, will generally deny most exports of hot section technologies, Commerce—operating under the Export Administration Act provisions—believes it does not have sufficient basis to deny such exports to COCOM and other friendly countries and believes many should be approved. As a result, companies wanting to export hot section technologies for commercial engines to COCOM members and other friendly countries avoid State's control by obtaining licenses from Commerce.

During the rationalization exercise, Commerce raised the jurisdictional overlap in hot section technologies and asked State to address the issue. State, however, wanted to treat this issue outside the rationalization exercise. State has been and is still seeking a solution.

Defense's Policy and Control Mechanism

According to Defense officials, U.S. forces currently maintain a combat advantage over potential adversaries due, in large part, to superior performing and longer lasting engines—a direct result of U.S. hot section technologies. The technologies and manufacturing processes, such as cooling techniques and coatings, applied to the hot sections of military and commercial engines are basically the same. The diffusion of critical hot section technologies for commercial engines will accelerate other countries' abilities to design and manufacture engines, including military engines, of equal capability to those manufactured in the United States. According to Defense, uncontrolled proliferation of these technologies would permit these countries to sell engines with these technologies to countries to which the United States would not sell the same engine or technology and would erode the operational edge U.S. forces currently

¹Hot section is defined as the rotating and nonrotating engine components exposed to hot combustion gases. These components are contained in the combustor, high-pressure turbine, and air-cooled low-pressure turbine, excluding the turbine exhaust case and high- and low-pressure turbine cases. Technology includes technical data (blue prints, specifications, repair manuals, etc.) and know-how (training, engineering assistance, etc.).

have over potential adversaries. Thus, Defense generally will not allow foreign manufacture of hot section parts or transfer of technical data and know-how associated with the hot section; however, exceptions are made if the parts or processes involved are not sensitive.

Defense relies on State to enforce its policy through the licensing process. When State receives a license application to export hot section technologies, it refers the application to Defense for review. Defense generally recommends that State deny or limit the scope of the license. Under the International Traffic in Arms Regulations, State has the authority to deny any license application whenever it deems such action to be in furtherance of world peace, national security, or U.S. foreign policy.

For nearly a quarter century, all aircraft and airborne equipment were controlled under the USML. Recognizing the worldwide expansion of civil aviation in the 1950s, in June 1959, State transferred the jurisdiction over civil aircraft and equipment to Commerce. The transfer, however, did not include developmental aircraft and equipment. It is through the control of developmental aircraft and equipment that State retains its control on hot section technologies. According to State and Defense officials, engine manufacturers know and understand that when a developmental engine is certified by the Federal Aviation Administration, they have to request a commodity jurisdiction determination from State. State then notifies the manufacturers that while the engine and related technical data are under Commerce's control, the hot section technical data remains under State's control. For example, a State official told us that General Electric's CFM-56 commercial engine development program followed this established procedure through the 1970s. The requirement to obtain a commodity jurisdiction determination, however, was not readily apparent in the regulations until April 1988 when State changed the regulation to clearly state the requirement to conform with the practice.

Commerce's Policy and Control Mechanism

Commerce believes that hot section technologies of only those commercial engines that are a derivative of a military engine are under State's control and that hot section technologies of purely commercial engines are under its jurisdiction. As a result, it has assumed *de facto* control over hot section technologies of several classes of commercial engines, including the CF-6 and PW-4000 series, V-2500, and GE-90, and has approved license applications to export hot section technologies associated with some of these engines. State was aware that Commerce is

controlling these hot section technologies, but no action had been taken at the time of our review.

Hot section technologies are currently controlled on the CCL under category 9E03A. They are controlled for national security reasons in accordance with section 5 of the Export Administration Act. Under section 5, Commerce has the authority to deny license applications for exports to proscribed countries whenever it determines, with the assistance of Defense, that such exports would make a significant contribution to the military potential of the proscribed countries. Applications for exports to nonproscribed countries, are generally not referred to Defense for review, and in these cases Commerce can only deny applications if it believes that the exports will be diverted to a proscribed country. Because of this policy, Commerce believes it does not have sufficient basis to deny export licenses for hot section technologies to COCOM members and other friendly countries. Commerce data shows that from September 1991 to April 1992 at least 10 licenses for hot section technologies were issued, mostly to COCOM countries.

Industry's Views and Actions Taken

Engine manufacturers believe that Defense's policy of denying most license applications to export hot section technologies has restricted their abilities to (1) procure certain hot section parts abroad where they can be produced more economically, (2) establish overseas maintenance and repair facilities for their engines, or (3) join international consortia to develop new engines. They also complained that the policy has disadvantaged them when competing with companies of other COCOM countries because they believe the United States is the only COCOM member that restricts exporting hot section technologies to nonproscribed countries. Officials at one company told us that they could not understand the logic behind Defense's national security argument for the restriction. To them, national security controls are applicable only to the proscribed countries, not to U.S. allies. They suspected that the purpose of the restriction has more to do with foreign policy than national security and said that if that is the case, then the foreign policy issue should be debated in the open. Officials at another company told us that while they understand the need to restrict the transfer of certain technologies, even from U.S. allies, the restriction should apply to only a specific list of technologies in which the United States maintains a lead. They also added that their company maintains self-imposed prohibitions on exports of such technologies for competitive reasons. Furthermore, even if a specific list of technologies could be established, they believe that Commerce should

administer the controls because, in their view, Commerce would consider commercial economic interests when it deliberates on license applications.

As explained previously, State retains control over hot section technologies for commercial engines when manufacturers request commodity jurisdiction determinations for their Federal Aviation Administration certified engines. However, companies interpret the USML regulations to mean that the commodity jurisdiction requirement applies only to engines that have significant military applicability and not to purely commercial engines. Thus, for engines such as the CF-6 and the V-2500, manufacturers apply directly to Commerce for licenses without first requesting commodity jurisdiction determinations from State. When Commerce accepts the applications based on the belief that it has jurisdiction, the manufacturers have effectively placed those engines under Commerce's jurisdiction. Hot section technologies of other commercial engines, such as the CFM-56 and PW-2000 series, however, are under State's jurisdiction because manufacturers have requested commodity jurisdiction determinations.

One company said it inadvertently submitted several applications to State during 1986 and 1987 for licenses to export hot section technical data for its commercial engines to foreign firms in Japan and Singapore, and the applications were consistently denied. The company later realized its mistake and Commerce confirmed that all technical data for commercial engines is under Commerce's jurisdiction. The company then sent a letter to State stating that it had submitted the applications in error and requested that the applications be withdrawn. Subsequently, it submitted the same applications to Commerce noting that they were to replace the ones submitted to State in error and that they had been rejected by State. State did not contest Commerce's jurisdictional claim and Commerce approved those applications.

Seeking a Solution

Recognizing that the situation was no longer tenable, in April 1988 Defense asked State to initiate a commodity jurisdiction determination for all engines that were not actually under State's control. However, State did not act on the request. In 1989 State proposed to transfer jurisdiction over hot section technologies for commercial engines to Commerce if Commerce would impose a new foreign policy control on the technologies. Defense objected to the proposal on national security grounds. State countered that Defense's national security argument was

more of a protection of industrial base argument (i.e., an economic interest argument). Defense then supplied a still stronger national security argument and insisted that the technologies remain under State's control. Also, State officials commented that the transfer technically would not involve a change of the USML and, thus, would not require Defense's concurrence. Defense disagreed and sent a legal opinion to State to support its case. The debate continues. In the meantime, Commerce is waiting for the issue to be resolved.

Currently, for those engines that are actually under State's control, State subjects all technologies associated with the design, manufacture, production, development, repair, and overhaul of engine hot sections to its licensing jurisdiction. One major engine manufacturer perceives the current controls as a blanket embargo of hot section technologies. According to an Air Force engineer who provided expertise to the U.S. delegation in COCOM negotiations during the core list exercise, the United States, when pressed by Germany and other COCOM members, drew up a specific list of hot section technologies to be controlled. He told us that the criteria used to list a particular technology were (1) the technology would have provided a strategic capability to the former Soviet Bloc, (2) the technology was not available outside of COCOM, and (3) the former Soviet Bloc countries did not possess the technology. He believes that the United States can construct a list of hot section technologies that are critical to the performance of military jet engines and in which the United States is leading the rest of the world. Additionally, the United States routinely lists specific engine manufacturing processes and know-how that are restricted from being disclosed to foreign partners in individual military codevelopment and coproduction programs on a case-by-case basis.

Recommendation

To ensure appropriate and adequate control over only those hot section technologies that Defense considers sensitive and critical to U.S. national security, we recommend that the Secretary of State direct the Center for Defense Trade to

- identify, with the assistance of Defense and other agencies as appropriate, specific hot section technologies in which the United States leads the world and are militarily critical and assert jurisdiction over those technologies and
- transfer jurisdiction over all other hot section technologies for commercial engines to Commerce.

Agency Comments and Our Evaluation

Defense essentially agreed with our recommendation to divide control over hot section technologies between Commerce and State. Commerce, however, argued that the division will only serve to aggravate exporters, with no security benefit. As stated in the report, hot section technologies are controlled to maintain an air combat advantage for U.S. forces over potential adversaries. We believe that maintaining an air combat advantage is a significant security benefit and that our recommendation would result in more focused control over the most critical technologies to U.S. security interests, which should also help clarify U.S. licensing policies for U.S. exporters. State commented that it has asked the Defense Trade Advisory Group to review the matter and it intends to establish firm and clear guidelines regarding jurisdiction over specific hot section technologies.

Furthermore, Commerce argued that it might be able to use foreign policy controls for the most critical list of hot section technologies. In our view, this approach would be subject to the same risks we identified for transferring the other sensitive items under the new foreign policy control.

Rationalization Working Groups

Group	United States Munitions List category^a	Areas covered by the group
1A	V(a) (c)	Explosives Propellants
1B	IV(c) (f) (h)	Handling/control equipment Ablatives/advanced composites Specifically designed or modified components
2	VI(a)	Surface vessels
3A	IV(b) VIII(b) XI(b)	Launch vehicles Spacecraft Space electronics
3B	VIII(g) XII(a) & (b)	Inertial navigation Inertial and guidance control systems
3C	XII(a)	Lasers and night vision devices
4	IX XI	Training equipment Military electronics
5A	XI(c) XIII(b)	Tempest equipment Encryption hardware and software
5B	XIII(d)	Armor plate and structural materials
6A	XX	Submersible vessels
6B	XVI	Nuclear weapons

^aUSML is comprised of 21 categories that are enumerated I to XXI. Each category consists of subcategories, specific items, and related technology.

Noncontentious Items to Be Removed From the U.S. Munitions List

Fleet support ships (except submarine rescue ships)

Yard tugs, tankers, and lighters

Floating dry docks

Icebreakers

Coast Guard oceanography vessels and tugs

Buoy tenders and light ships

Armored coaxial cable

Eleven explosives (such as Black Powder, Nitrostarch)

All nonnuclear, nonmilitary submersible vessels

Two-dimensional and less carbon-carbon material and metal matrix composites unless specifically designed for military use

Zero and first-generation image intensification tubes and their related technical data

Single element detector nonscanning infrared tracking, detection, and communication devices

Certain cryptographic equipment and software, such as automatic teller machines, civil television equipment, and software designed to protect against viruses

Comments From the Department of Defense

Note: GAO comments supplementing those in the report text appear at the end of this appendix.



POLICY

OFFICE OF THE UNDER SECRETARY OF DEFENSE

WASHINGTON, D. C. 20301-2000

NOV 5 1992

In reply refer to:
I-92/34215

Mr. Frank C. Conahan
Assistant Comptroller General
National Security and International
Affairs Division
U.S. General Accounting Office
Washington D.C. 20548

Dear Mr. Conahan:

This is the Department of Defense (DoD) response to the General Accounting Office (GAO) draft report, "EXPORT CONTROLS: Militarily Sensitive Items Should Remain Under Munitions Control," dated September 28, 1992 (GAO Code 463814/OSD Case 9214). The DoD generally concurs with the GAO findings and recommendations.

The application of foreign policy export controls on dual-use goods and technologies has been delegated to the Secretary of Commerce, not the Congress, to reauthorize such controls. Therefore, the reference to export controls being voided if Congress fails to reauthorize foreign policy controls is incorrect. The procedures in the memorandum of understanding (concerning the transfer of items from State to Commerce jurisdiction), among the Departments of Defense, State, and Commerce remain in effect until rescinded or altered by agreement of the parties or by an Executive Order. If the agreed procedures could not be implemented, control of the covered items would revert to the U.S. Munitions List.

The detailed DoD comments on the report findings and recommendations are provided in the enclosure. The Department appreciates the opportunity to comment on the draft report.

Sincerely,

Peter M. Sullivan
Acting Deputy Under Secretary
Trade Security Policy

Enclosure

See p. 26.

GAO DRAFT REPORT--DATED SEPTEMBER 28, 1992
(GAO CODE 463814) OSD CASE 9214

"EXPORT CONTROLS: MILITARILY SENSITIVE ITEMS
SHOULD REMAIN UNDER MUNITIONS CONTROL"

FINDINGS AND RECOMMENDATIONS TO BE ADDRESSED IN THE
DOD RESPONSE TO THE GAO DRAFT REPORT

* * * * *
FINDINGS

FINDING A: U.S. Export Control System. The GAO observed that the U.S. export control system is essentially separated into two regimes--one for munitions items and the other for dual-use items. The GAO explained that the Department of State--under authority of the Arms Export Control Act--controls munitions items and establishes, with concurrence of the DoD, the U.S. Munitions List. The GAO further explained that the Department of Commerce--under authority of the Export Administration Act--controls dual-use items, such as communications equipment and certain chemicals, and establishes a Commerce Control List. The GAO noted that, if an exporter is unsure which agency has jurisdiction over a particular item, it can ask the Department of State to make a commodity jurisdiction determination.

The GAO pointed out that the purpose for controlling munitions items, as stated in the Arms Export Control Act, is to further world peace and the security and foreign policy of the United States. The GAO noted that, in comparison, the Export Administration Act states as its purpose (in part)--"It is the policy of the United States to use export controls only after full consideration of the impact on the economy of the United States and only to the extent necessary..."

The GAO found that the Department of State and the DoD had expressed concerns about moving sensitive items to the Department of Commerce jurisdiction because the Commerce controls are less stringent than those applied to the U.S. Munitions List items at the Department of State. (pp. 1-2, pp. 10-12/GAO Draft Report)

DOD Response: Concur

FINDING B: Controls on Munitions Items. The GAO explained that the Department of State Center for Defense Trade is

Now on p. 11.

Appendix III
Comments From the Department of Defense

responsible for administering munitions export controls. The GAO further explained that the Department of State promulgates the International Traffic in Arms Regulations under the Authority of the Arms Export Control Act. The GAO pointed out that the International Traffic in Arms Regulations specify that the Department of State--with the DoD concurrence--determines what a Defense article or service is. The GAO explained that only the article or service itself is relevant in determining if it is "inherently military in character"--that the end use is irrelevant in making such determinations.

The GAO found that items on the U.S. Munitions List are controlled to all destinations--meaning that validated licenses from the Office of Defense Trade Controls are needed to all destinations--except for certain items to Canada. The GAO observed that any re-export of munitions items must receive prior approval from the Office of Defense Trade Controls.

The GAO reported that the State Department relies on DoD for technical advice on certain sensitive license applications. The GAO explained that the Defense Technology Security Agency is the DoD unit responsible for coordinating the DoD response to the Department of State on questions concerning license applications. The GAO noted that the Defense Technology Security Administration also provides the DoD position to the Department of State regarding commodity jurisdiction decisions. The GAO further noted statistics show that, for 1988 and 1989, about 70 percent of the items submitted for commodity jurisdiction decisions were decided in favor of the Department of Commerce control. (pp. 12-13/ GAO Draft Report)

DOD Response: Concur

FINDING C: Controls on Dual-Use Items. The GAO reported that the Department of Commerce Bureau of Export Administration is responsible for administering controls on dual-use items. The GAO determined that--in contrast to the global controls placed on the U.S. Munitions List items--the dual-use items and technical data under the Department of Commerce jurisdiction are only controlled for specific reasons to specific destinations. The GAO found that items controlled for National Security reasons are controlled to prevent them from reaching the so-called proscribed countries--mainly the former Eastern Bloc and communist nations. The GAO added that other items are controlled for various foreign policy reasons--such as regional stability and non-proliferation. (pp. 14-15/GAO Draft Report)

DoD Response: Concur

FINDING D: Coordinating Committee for Multilateral Export Controls. The GAO reported that the Coordinating Committee

Now on pp. 11-12.

Now on p. 12.

Now on p. 13.

for Multilateral Export Controls--created in 1949--controls exports to the former Eastern Bloc and communist countries. The GAO found that the Committee relies on consensus among its members to determine what items will be controlled and to decide which countries are proscribed. The GAO also found that the Committee maintains three control lists-- (1) the International Munitions List for Defense articles and services, (2) the International Industrial List for dual-use items, and (3) the International Atomic Energy List for nuclear items. The GAO noted that those lists are reviewed in 2-year cycles, during which (1) items may be moved from one list to another, (2) items may have their controls loosened, or (3) items may be removed from Committee controls altogether. (pp. 15-16/GAO Draft Report)

DoD Response: Concur

FINDING E: The Need for the Rationalization Exercise. The GAO concluded that, over the years, some overlap between the U.S. Munitions List and the Commerce Control List has developed through a lack of coordination between the Departments of State and Commerce. The GAO noted that the Commerce Control List is closely tied to the International Industrial List. The GAO found that when items are added to the International Industrial List, they are added to the Commerce Control List--unless there is an understanding between the Departments of Commerce and State not to do so. The GAO also found that, in other cases, where the Department of State and the DoD want to maintain an item on the U.S. Munitions List that the Coordinating Committee for Multilateral Export Controls has moved to the International Industrial List, there has not been coordination between the Departments of State and Commerce--which has resulted in the item being placed on the Commerce Controls List, while also being retained on the U.S. Munitions List.

The GAO observed that the Department of State and the DoD want to maintain global export controls--such as those found in the International Traffic in Arms Regulations--for militarily sensitive items in which the U.S. has a technological lead over the rest of the world.

The GAO found that other overlap has been caused by a lack of coordination within the Department of State. The GAO explained the group that negotiates at the Coordinating Committee for Multilateral Export Controls does not always coordinate closely with the group in charge of the U.S. Munitions List.

The GAO pointed out that, because of the more liberal U.S. controls of the commodities on the Commerce Control List, industry prefers to see the Coordinating Committee dual-use

Now on pp. 13-14.

List items controlled on the Commerce Control List by the Department of Commerce--as opposed to the State Department U.S. Munitions List. The GAO noted that, in November 1990, the President issued an order to move dual-use items from the U.S. Munitions List to the Commerce Control List unless National Security would be jeopardized. (pp. 18-18/ GAO Draft Report)

DoD Response: Concur

FINDING F: The Interagency Exercise and Its Results. The GAO reported that, after the President's directive in November 1990, the Department of State took steps to eliminate the overlap between the U.S. Munitions List and the Coordinating Committee International Industrial List. The GAO explained that with the help of the Defense Technology Security Administration, the Department of State identified the overlapping items on the two lists. The GAO pointed out that process was difficult because the International Industrial List is very specific, while the U.S. Munitions List is more general.

The GAO noted that the Department of State established working groups in the eleven areas (see Appendix I of the draft report) in which overlap was believed to exist. The GAO reported that, in January 1991, the working groups began meeting without the Department of Commerce representation, because the Department of State initially wanted to meet separately with the Defense Technology Security Administration to understand all the National Security concerns before the Department of Commerce became involved. The GAO observed it was the Department of State position that National Security determinations were beyond the Department of Commerce purview. The GAO found that the Department of State and the DoD determined that most of the overlapping items could be removed from the U.S. Munitions List and placed under the Department of Commerce jurisdiction. The GAO noted, however, that the two Departments determined that such items as software with encryption capability were to be retained on the U.S. Munitions List for significant National Security concerns.

The GAO found that the Department of State invited the Department of Commerce to working group meetings to discuss the Department of State and DoD decisions. The GAO also learned that the Department of Commerce pressed the DoD and the Department of State to demonstrate why its controls were not adequate for safeguarding the items. The GAO reported that, when interagency consensus was not achieved, the rationalization process reached an impasse. The GAO observed that, subsequently, the Department of State compromised by agreeing to transfer certain of the sensitive items to the Department of Commerce with the condition that Commerce impose

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Appendix III
Comments From the Department of Defense

new additional foreign policy controls to allay DoD national security concerns, with the DoD eventually acceding to the compromise. The GAO noted that, in March 1992, the three agencies signed a memorandum of understanding detailing the new control and other conditions for the transfers.

The GAO observed that the rationalization exercise was essentially completed in the Spring of 1992, with the publication of the Department of State final rule in the Federal Register. The GAO found, however, that although Commerce must still publish a Federal Register promulgating the new controls to allow them to accept the sensitive items being transferred, as of August 1992, no such notice had been published. (pp. 21-24/GAO Draft Report)

DoD Response: Concur

FINDING G: Non-contentious items. The GAO found that the over two dozen items and categories of items--not justified for National Security reasons--were identified for removal from the U.S. Munitions List (see Appendix II of the draft report). The GAO reported that the DoD wanted to retain certain other items--such as submersibles--on the U.S. Munitions List. The GAO noted, however, that after receiving Department of Commerce and Industry comments, the Defense Technology Security Administration determined that the items could be transferred.

The GAO explained that the Navy initially wanted to retain all submersibles--military or commercial--on the U.S. Munitions List, but agreed to lower the threshold from 1,000 feet to 200 meters. The GAO reported the Defense Technology Security Administration agreed with the Department of Commerce position--i.e., that there would still be an overlap between the U.S. Munitions List and the COCOM International Industrial List if submersibles that dive below 1,000 meters were retained on the U.S. Munitions List. The GAO further reported that the Defense Technology Security Administration agreed the overlap could not be justified for National Security reasons because of availability as dual-use items from COCOM countries--and was unwilling to argue that placing these submersibles on the Commerce Control List would significantly jeopardize National Security.

The GAO observed that the Navy realized foreign availability made it difficult to justify United States munitions controls on the items. The GAO indicated that jurisdiction over commercial submersibles--except those powered by nuclear propulsion--was transferred to the Commerce Control List. The GAO pointed out that the Navy was not very positive about the transfer, but conceded it was reasonable under the circumstances. (pp. 24-26/GAO Draft Report)

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Now on pp. 17-18.

Now on p. 19.

DoD Response: Concur

FINDING H: Image Intensifiers Transferred as a Compromise.
The GAO reported that image intensifiers--as well as associated technical data--were identified by both the Departments of State and Defense for retention on the U.S. Munitions List due to significant National Security concerns. The GAO found that, in the DoD, image intensifiers are used in a variety of equipment to enable military forces to maintain operations at night and in adverse weather conditions. The GAO noted that this capability is central to U.S. warfighting concepts. The GAO reported that the Department of Commerce did not agree with the Department of State and the DoD rationale for retaining these items on the U.S. Munitions List.

According to the GAO, under a compromise reached among the agencies, the Department of State decided to transfer (1) non-military image intensifiers and related technical data, and (2) commercial systems containing image intensifiers from the U.S. Munitions List to the Department of Commerce jurisdiction if Commerce would impose an additional foreign policy control which would be intended to control those items in a manner similar to the existing U.S. Munitions List controls. The GAO acknowledged that the DoD eventually acceded and the three agencies signed a memorandum of understanding detailing the conditions for the transfer. The GAO concluded, however, that the DoD justification for retaining non-image intensifiers and related appeared sound. The GAO also questioned the rationale for creating new controls just to permit the transfer of an item to the jurisdiction of Commerce. (pp. 4-5, pp. 26-28/GAO Draft Report)

DoD Response: Concur

FINDING I: Technical Data Transferred as a Compromise.
According to the GAO, the DoD and the Department of State argued that technical data associated with non-military inertial navigation systems and components should be retained on the U.S. Munitions List for significant National Security reasons. The GAO explained that the manufacturing technology for the critical components of all inertial navigation systems is essentially the same, regardless of whether the resulting system is military or commercial. The GAO noted the U.S. is the world leader in advanced inertial navigation systems design, production technology, and high quality systems that are used in or are adaptable to aircraft attack missions and ballistic and cruise missile guidance. The GAO asserted that proliferation of such technology especially to third world nations could adversely impact the balance of power within a region and pose a direct threat to the U.S. National Security.

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Now on pp. 20-21.

The GAO found that the Department of Commerce (1) would not agree to the retention of the item on the U.S. Munitions List, (2) argued that a transfer of jurisdiction would not jeopardize National Security, and (3) offered to add new foreign policy controls to strengthen existing controls. The GAO reported that industry supported the Department of Commerce position. The GAO indicated that--as in the case of non-military image intensifiers--the Inertial Navigation System offered to the Department of Commerce as a compromise to move the rationalization exercise forward. The GAO reviewed the DoD national security justifications for retaining the systems and related data and concluded they appeared sound. The GAO pointed out that technical data is particularly sensitive because it enables the licensee to manufacture all or part of the item. The GAO also questioned the rationale for creating a new control to permit the transfer of an item to the jurisdiction of the Department of Commerce. (pp. 4-5, pp. 28-29/GAO Draft Report)

Now on p. 21.

DoD Response: Concur

FINDING J: Software with Encryption to Remain on U.S. Munitions List Because DoD Considers Department of Commerce Controls Inadequate. The GAO reported that the Department of State and the DoD wanted to retain software with encryption capability on the U.S. Munitions List so the National Security Agency can review all new software with encryption capability to determine if it should be placed on the U.S. Munitions List. The GAO explained that one reason for maintaining that information on the munitions list is concern over future encryption developments by software firms being placed on commercial software programs. (The GAO noted the other reasons were classified.) The GAO found that the DoD--led by the National Security Agency--refused to include such items in any compromise with the Department of Commerce, citing the inadequacy of the Commerce control system even with the added foreign policy controls. The GAO indicated that, according to the National Security Agency, foreign policy controls historically have led to decontrol. The GAO further reported that the DoD cited its opposition to a proposed amendment to the Export Administration Act, that would have decontrolled software with encryption, as another reason that software with encryption capability should not be moved. The GAO explained that the provision, if passed, would move all mass-market software from the U.S. Munitions List to the Commerce Control List--including software with encryption capability. The GAO noted that the DoD argument prevailed, and the software with encryption was retained on the U.S. Munitions List. (Because of the classification level, the GAO did not review the full DoD justification for this item.) (pp. 29-30/GAO Draft Report)

Now on pp. 21-22.

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Comments From the Department of Defense

DoD Response: Concur. To more accurately reflect the appropriate scope of encryption matters involved, the report should state that it is addressing products with encryption, not just software.

Also, the State and Defense Departments wanted to retain products with encryption capability--including mass market software--on the U.S. Munitions List because of the sensitive nature of these products and concern that the uncontrolled spread of cryptographic capabilities would undermine U.S. political, military, and economic security. Certain categories of cryptographic products, however, were deemed less critical to National Security and were transferred to Commerce jurisdiction.

Additionally, the control of mass market software with encryption raised particular controversy later in the harmonization process as a result of a provision in the House passed reauthorization of the Export Administration Act that would have moved all mass market software from the U.S. Munitions List and State control to Commerce control. This legislation was strongly supported by the software industry because of concerns that it was losing its competitive advantage due to stringent Munitions List controls. The State Department later proposed to move mass market software with encryption capability to Commerce jurisdiction because of questions over its controllability. The DoD, led by the National Security Agency, refused to include this item in any compromise, citing the inadequacies of Commerce control under the Export Administration Act. Further, the DoD cited Administration opposition to the legislation that would have transferred mass market software with encryption to Commerce. On February 3, 1992, the Acting Secretary of Commerce notified the Congress that including this provision would lead senior advisors to recommend that the President veto the bill. The DoD argument prevailed, and the item was retained on the Munitions List.

FINDING K: Space-Related Items Continue to be Reviewed. The GAO reported that the Department of State and the DoD agreed that many space-related items could be transferred from the U.S. Munitions List to the Commerce Control List, but the Departments insisted that the decision be made on an item-by-item basis. The GAO indicated that all space-related items were retained on the U.S. Munitions List, but an interagency working group comprised of all concerned agencies--the Department of State, the Department of Defense, the National Aeronautic and Space Administration, and others--assembled to conduct item-by-item review. The GAO indicated that, although they are dual-use, the group agreed to retain all space launch vehicles on the U.S. Munitions List because of their extreme similarity to ballistic missiles. The GAO reported that the

Now on p. 22.

Department of Commerce is not satisfied enough items are being moved--although acknowledging a good start has been made. (pp. 31-32/GAO Draft Report)

DoD Response: Concur

FINDING 1: Loss in Control Over Items Transferred as a Compromise. The GAO found that, under the memorandum of understanding reached in March 1992--among the Departments of Commerce, State, and Defense--Commerce is to create a new foreign policy control on non-military inertial navigation systems technical data, non-military image intensifiers, and corresponding technical data for regional stability reasons. As previously indicated, the GAO questioned the rationale for creating a new control just to permit the transfer of items to the jurisdiction of Commerce. In addition, the GAO concluded that, while the new control and the conditions created by the agreement removed some of the inadequacies of the existing Export Administration Act controls, there are other Export Administration Act provisions that could render the items transferred under the compromise less controllable.

The GAO also pointed out that some of the inertial navigation systems data to be transferred to Commerce could be within the prohibition covered by the Berman Amendment to the International Emergency Economic Powers Act--which restricts the President from prohibiting the exportation of informational materials, such as publications and tapes, which are not otherwise controlled under the Export Administration Act--and thus not controllable. The GAO further pointed out that, once such items are under the Department of Commerce control, when the DoD and/or the Department of State recommend disapproval of a license application, the Department of Commerce can disagree and escalate the dispute to higher level officials for resolution. The GAO noted that, on the other hand, for items under the Department of State control, National Security and foreign policy are determining factors in licensing decisions, and the Department of Commerce does not participate in the decisions. The GAO concluded that the new controls negotiated in the memorandum of understanding provide incomplete coverage. The GAO further concluded that non-military inertial navigation systems technical data, non-military image intensifiers, commercial systems containing image intensifiers were being transferred as a compromise to overcome an impasse in the rationalization exercise--not whether the Departments of State and Defense have significant national security concerns for placing those items under Commerce control. The GAO also questioned whether the items may not receive the same level of protection with the new Commerce controls as they do under the Department of State control. (pp. 32-35/GAO Draft Report)

Now on pp. 23-25.

See p. 26.

DoD Response: Concur. Concerning the memorandum of understanding among the Departments of Commerce, State, and Defense on the creation--by Commerce--of a new foreign policy control on non-military Inertial Navigation Systems, non-military Image Intensifiers, and their corresponding technical data for regional stability reasons, the reference to the potential of controls being voided because of the reauthorization requirement of the Export Administration Act, should be deleted because the validity and effectiveness of the memorandum of understanding is completely separate from the Act or foreign policy controls.

See comment 1.

The report is also misleading in discussing the absence of a requirement, under the Arms Export Control Act, for State to assist the applicant. The DoD routinely explains objections on munitions cases to applicants and in many instances is able to then concur with transactions by using provisos that protect national security without harming the potential sale.

See pp. 23-24.

It should be noted that foreign policy and national security interests are considered as well as economic interests under National Security Council guidelines applicable to the review of license requests for export of dual-use items. Also, when Commerce disagrees with the DoD or State Department and an issue is elevated, foreign policy and national security arguments from State and the DoD are considered as well as commercial and economic interests.

See comment 2.

The report gives the impression that State and the DoD have recommended decontrol of technical data that would adversely affect national security. The statement that controls negotiated in the memorandum of understanding are incomplete is incorrect. The narrower scope of items covered are the products and technologies of military concern; the DoD reviewed the remaining products and technologies and current Department of Commerce controls with Missile Technology Control Regime review were considered adequate.

FINDING M: The Department of Defense Policy and Control Mechanism. The GAO observed that U.S. forces currently maintain a combat advantage over potential adversaries due, in large part, to superior performing and longer lasting engines--a direct result of U.S. hot section technologies. The GAO concluded that uncontrolled proliferation of such technologies would permit the receiving countries to sell engines with the technologies to countries to which the U.S. would not sell the same engine or technology, and would erode the operational edge U.S. forces currently enjoy over potential adversaries. The GAO explained that the DoD generally will not allow foreign manufacture of hot section parts or transfer of technical data and know-how associated with the hot section. The GAO explained that exceptions are made if the parts or

processes involved are not sensitive.

The GAO reported that the DoD relies on the Department of State to enforce its policy through the licensing process. The GAO noted that the DoD generally recommends that State deny or limit the scope of the license. The GAO pointed out that State has the authority to deny any license application whenever it deems such action to be in furtherance of world peace, National Security, or U.S. foreign policy.

The GAO reported that, in 1959, the jurisdiction over civil aircraft and equipment went to Commerce--however, the transfer did not include developmental aircraft and equipment. (pp. 6-7, pp. 37-40/GAO Draft Report)

DoD Response: Concur. It should be noted that all hot section technologies are the same for both military and commercial.

FINDING N: Department of Commerce Policy and Control Mechanism. The GAO reported that the Department of Commerce considers that hot section technologies of only those commercial engines, which are a derivative of a military engine, are under the Department of State control and that hot section technologies of purely commercial engines are under its jurisdiction. The GAO found that, as a result, Commerce has assumed de facto control over hot section technologies of several classes of commercial engines, including the CF-6 series, the PW-4000 series, the V-2500 and the GE-90, and has approved license applications to export hot section technologies associated with some of those engines. The GAO also found that, while State was aware that Commerce is controlling such hot section technologies, no action had been taken--at least up to the time the GAO review was completed. (pp. 40-41/GAO Draft Report)

DoD Response: Concur

FINDING O: Industry Views and Actions Taken. The GAO pointed out that engine manufacturers believe that the DoD policy of denying most license applications to export hot section technologies has restricted their abilities to procure certain hot section parts abroad, where they can be produced more economically, establish overseas maintenance and repair facilities for their engines, or join inter-national consortia to develop new engines. The GAO also noted it is the view of the manufacturers that the Department of Commerce should administer the controls because Commerce would consider commercial and economic interests when it deliberates on license applications.

The GAO noted that the effectiveness of the Department of

Now on pp. 28-29.

Now on pp. 29-30.

Now on pp. 30-31.

State control over hot section technologies for commercial engines relies on the manufacturers following the established procedures of requesting commodity jurisdiction determinations for their Federal Aviation Administration certified engines. The GAO concluded that, when manufacturers apply directly to Commerce for licenses to export commercial engine hot section technologies and Commerce accepts the applications based on the belief that it has jurisdiction, Department of State control has been effectively avoided. The GAO cited an example where a company submitted an application to State and it was rejected--and then turned around and re-submitted the same application to Commerce, where it was approved. (pp. 41-43/GAO Draft Report).

DoD Response: Concur

FINDING P: Efforts at Seeking a Solution. The GAO found that the DoD recognized the situation was no longer tenable--and, in April 1988, asked the Department of State to initiate a commodity jurisdiction determination for all engines that were not actually under the Department of State control. The GAO further found, however, that the State Department did not act on the DoD request.

The GAO learned that, in 1989, the Department of State proposed to transfer jurisdiction over hot section technologies for commercial engines to the Department of Commerce if Commerce would impose a new foreign policy control on the technologies. The GAO found that the DoD objected to the proposal on National Security grounds. The GAO further noted the Department of State countered that the DoD argument was more a protection of the industrial base than a National Security issue. The GAO reported that the Department of State maintained that, because the transfer technically would not involve a change of the U.S. Munitions List, it would not require DoD concurrence. The GAO reported that the DoD disagreed with that interpretation and sent a legal opinion to the Department of State to support its case. The GAO reported that the debate continues--and, in the meantime, Commerce is waiting for the issue to be resolved. (pp. 6-7, pp. 44-45/GAO Draft Report)

Now on pp. 31-32.

DoD Response: Concur

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RECOMMENDATION

RECOMMENDATION 1: The GAO recommended that the Secretary of Defense direct the Defense Technology Security Administration and the Secretary of State direct the Center for Defense Trade take the following actions:

- jointly examine the National Security implications due to the loss in control identified by the GAO for the following items--non-military inertial navigation systems technology, non-military focal plane arrays and second-generation and above image intensification tubes, commercial systems containing such components, and related technical data; and
- retain the item or items on the U.S. Munitions List if the risks to National Security interests are determined to be significant; or
- amend the Memorandum of Understanding to ensure complete coverage for non-military inertial navigation systems technical data and possible other critical items, if the risks are determined to be insignificant. (p. 8, p. 36/GAO Draft Report)

DoD Response: Concur. The DoD is studying the recommendation with the Center for Defense Trade and will provide a detailed response to the final report.

RECOMMENDATION 2: The GAO recommended that, to ensure appropriate and adequate control over only those hot section technologies the DoD considers sensitive and critical to U.S. National Security, the Secretary of State direct the Office of Defense Trade Controls to take the following actions:

- identify, with the assistance of the DoD and other agencies as appropriate, specific hot section technologies in which the U.S. leads the world and which are militarily critical, assert jurisdiction over those technologies; and
- transfer jurisdiction over all other hot section technologies for commercial engines to the Department of Commerce. (p. 8, p. 46/GAO Draft Report)

DoD Response: Concur. The DoD will participate in the above actions in accordance with Part 120.2 of the International Traffic in Arms Regulations.

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Now on pp. 6 and 25.

Now on pp. 6 and 32.

The following are GAO's comments on the Department of Defense's letter dated November 5, 1992.

GAO Comments

1. Our point that the Arms Export Control Act has no requirement for State to explain to and assist applicants upon license denials has been deleted.
2. Our point regarding the incomplete coverage of the memorandum of understanding has been deleted.

Comments From the Department of State

Note: GAO comments supplementing those in the report text appear at the end of this appendix.



United States Department of State

Washington, D.C. 20520

10/18

Dear Mr. Conahan:

Thank you for the opportunity to comment on your draft report, "EXPORT CONTROLS: Militarily Sensitive Items Should Remain under Munitions Control" (GAO Job Code 463814). Comments are enclosed.

If you have any questions on this issue, please call Pamela Frazier, PM/DTP, on 647-4231.

Sincerely,


Roger R. Gamble
Associate Comptroller
for Management Policy

Enclosure:
As stated.

Mr. Frank C. Conahan,
Assistant Comptroller General,
National Security and International Affairs,
U.S. General Accounting Office,
441 G Street, N.W.,
Washington, D. C. 20548

**Appendix IV
Comments From the Department of State**

GAO Draft Report: "EXPORT CONTROLS: Militarily Sensitive Items Should Remain Under Munitions Control," GAO Job Code 463814

GENERAL COMMENTS:

The draft GAO report examines several U.S. Munitions List (USML) commodities which have been designated for removal from the USML, regulated by State, to the Commodity Control List (CCL), regulated by Commerce. The premise of the report is that these commodities are militarily sensitive, and cannot be adequately protected under the proposed foreign policy controls.

The Department of State's comments have been primarily directed towards the recommendations and findings of this report. Given that we have some fundamental differences with the thrust of the report, we thought that it was best to address these in broad terms. We therefore have not attempted to provide direct line-in-line-out comments on the body of the report, but have chosen instead to deal with the basic premise presented by GAO. We recommend that the GAO amend its report to reflect these comments.

One of the chief recommendations of the report is that we and DOD "jointly examine the national security implications due to the loss in control identified by GAO." This implies that we, the interagency community, have failed to examine the national security implications of the move. To the contrary, this was studied thoroughly during a nine month review. All agencies involved found the proposed controls, as was reflected in an MOU between the agencies in March 1992, to be acceptable.

As we have told GAO during several meetings, we believe that our move of these items from the USML to the CCL is consistent with the President's directive of November 30, 1990, which directed us to remove from the USML all items contained on the COCOM dual-use list unless "significant national security interests would be jeopardized." These particular items were distinguished by both their civilian characteristics and their unique capabilities. Thus, moving these items to the jurisdiction of the Commerce Department but placing additional foreign policy controls on them would allow these items (1) to be placed on the most appropriate list; and (2) to be controlled under a regime which allows a thorough interagency review for all destinations except Canada.

SPECIFIC COMMENTS

GAO Report (page 3):

"...GAO is concerned that the compromise may result in some loss in control over these items and place U.S. national security interests at risk."

See pp. 25-26.

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Comment:

The loss of control referred to in the draft report appears to be based on the idea that foreign policy controls are less restrictive than munitions controls. The conclusion reached on page 3 is pursuant to the GAO's rationale detailed on pages 32 and 33.

The GAO cites the requirement for an annual report to the Congress on foreign policy controls -- and the Congress' ability to re-authorize these controls. Should the Congress fail to authorize foreign policy controls on the commodities in question, the interagency community would be required to re-examine the placement of these items on the CCL. We have, and will continue to have, the authority to move items to and from these lists.

See p. 26.

The GAO appears to be concerned about the requirement for an "explanation of the reasons for a license denial," and cites this as another example of a lessening of controls. We do not understand how this informational process constitutes a lessening of controls.

See comment 1.

The GAO states that the Berman Amendment to the International Emergency Economic Powers Act allows the expired Export Administration Act to remain in force. They claim that the Berman Amendment restricts the President from prohibiting the export of informational materials such as publications and tapes. We do not agree that technical data for INS systems could be equated to "informational materials such as publications and tapes."

See p. 27.

The GAO notes that Commerce has a license dispute escalation process which culminates in White House decisions. State has a dispute resolution process as well. We favor a system of conflict resolution, and the existence of such a system does not in our view constitute a lessening of controls.

See p. 27.

GAO Report (page 3):

"GAO also questions the rationale for creating new controls and an additional licensing layer to permit the transfer of commodities to Commerce's jurisdiction."

Comment:

An additional review strengthens our ability to monitor sensitive technical data through a more thorough evaluation process. Additionally, we have not heard complaints from industry regarding an additional licensing layer.

See comment 2.

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GAO Report (page 3):

"Defense and State wanted to retain these items on the USML because the United States leads the world in production and/or performance capabilities of these items. This technological lead translates into a combat and performance advantage for U.S. military forces, and therefore these technologies need to be protected."

Comment:

The laws and regulations governing the licensing process do not stipulate international competition as a criterion in the process. In other words, consideration of whether a capability is appropriate to a country or region, and how the introduction of such a capability would enhance U.S. foreign policy and national security objectives is the essence of the licensing process. Using the licensing process to preserve an industrial lead has not been clearly identified as a part of the Arms Export Control Act's definition of "world peace," or the "security and foreign policy of the United States."

- The Department has consistently taken the view that licenses may not be approved or denied "solely" to protect commercial interests (such as the commercial interests of individual industries).
- The Department has taken the position that the extraordinary authority granted by the export laws were designed to protect national security and foreign policy interests and that it would thus be an abuse of these legal authorities to use them for other reasons.
- The Department has taken the position that those seeking to block various transactions on trade or commercial grounds should do so based on other laws.

GAO Report (page 3):

"Moreover, State and Defense are concerned about the proliferation of these militarily sensitive items and manufacturing technologies."

See comment 3.

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Comment:

It is unclear how the Commerce Department's licensing process would result in "a proliferation of ... militarily sensitive items." Export licenses are granted on a case-by-case basis, with a full interagency review. The fear of proliferation of militarily sensitive items and manufacturing technologies should be greatly reduced provided that the established licensing requirements, whether those of State or Commerce (with the agreed upon foreign policy control), are maintained.

See comment 4.

GAO Report (pages 3-4):

"Because many of the technologies for both commercial and military engine hot sections are basically the same, Defense opposed the transfer on national security grounds. However, Commerce is already exercising jurisdiction over hot section technologies for certain commercial engines. Although Defense has requested that State assert its jurisdiction, State has not acted on the request. While the agencies debate the issue, companies are obtaining licenses to export hot section technology for commercial engines from Commerce."

Comment:

The report is correct in that some hot section technology is on the CCL while others are on the USML. The issue of jurisdiction, however, is being addressed in the following ways: (1) the International Traffic in Arms Regulations (ITAR) is currently being revised; while the revisions are not yet final, it should be noted that the proposed language for the policy and criteria for designating and determining defense articles and services takes into account civil applications; (2) State has asked for input on this issue from the Defense Trade Advisory Group (DTAG); and (3) State's intent is to establish firm and clear guidelines that would determine whether Commerce or State has jurisdiction over specific hot section technology.

GAO Report (page 4):

"The basis for Defense's argument to retain hot section technologies on the USML is that the United States has a lead over the rest of the world and that this lead is vital to U.S. national security interests."

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Comment:

As already discussed above, the laws and regulations governing the licensing process do not stipulate international competition as a criterion in the licensing process.

See comment 5.

GAO Report (page 5):

"Moreover, GAO's analysis indicates that the items may not receive the same level of protection with the new Commerce control as they do under State's controls. For example, under State's control, State can revoke or suspend licenses issued for these items at any time; under Commerce's control, Commerce can suspend or revoke only for certain designated reasons such as violation of the regulations."

Comment:

Commerce items requiring foreign policy controls may be suspended at the discretion of that Department and revoked for the same reasons as they would deny.

See p. 26.

GAO Report (page 5):

"Additionally, when the items are under State's control, Commerce does not participate in licensing decisions for these items; when they are under Commerce's control, Commerce can escalate any disagreement it has with State or Defense's licensing recommendations to higher levels for review."

Comment:

In many instances, State Department applications are staffed to other agencies, including Commerce. Other agencies' views are taken into account when making decisions on the disposition of a license or other approval. State does not regard the escalation process as in any way inconsistent with our national security interests. If State maintains its objections throughout the escalation process, the final decision will be made at the White House.

See comment 7.

See p. 27.

GAO Report (page 7):

"The company told us that, while it understands the need to restrict transfers of certain technologies even to U.S. allies, the restriction should apply to only a specific list of technologies in which the United States maintains a lead."

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Comment:

As already discussed above, the laws and regulations governing the licensing process do not stipulate international competition as a criterion in the process.

See comment 5.

GAO Report Recommendations (page 8):

"We recommend that ... the Secretary of State direct the Center for Defense Trade Controls (sic) to take the following actions:

- Jointly examine the national security implications due to the loss in control identified by GAO for the following items...
- If the risks to national security interests are determined to be significant, retain the item or items on the USML..."

Comment:

These actions have already been taken. It has been determined that the items intended for transfer to the CCL will not significantly jeopardize U.S. national security interests. Items for which the national security risk is significant have been retained on the USML.

See pp. 25-26.

GAO Report Recommendations (continued, page 8):

"... -- If the risks are determined to be insignificant, amend the Memorandum of Understanding to ensure complete coverage for nonmilitary INS technical data and possibly other critical items."

Comment:

It is not clear why complete coverage is required if the risk to national security in transferring particular items is determined to be insignificant.

See comment 6.

GAO Report Recommendations (page 8):

"To ensure appropriate and adequate control over only those hot section technologies which Defense considers sensitive and critical to US national security, we recommend that the Secretary of State direct the Center for Defense Trade Controls to:

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-- identify, with the assistance of Defense and other agencies as appropriate, specific hot section technologies in which the United States leads the world and which are militarily critical, and assert jurisdiction over those technologies; and

-- transfer jurisdiction over all other hot section technologies for commercial engines to Commerce.

Comment:

As was stated in our response to pages 3 and 4 of the GAO report, we have asked the Defense Trade Advisory Group to review this question, and we intend to establish firm and clear guidelines that would determine whether Commerce or State has jurisdiction over specific hot sections technology.

The following are GAO's comments on the Department of State's letter dated November 16, 1992.

GAO Comments

1. Our point that the Export Administration Act has a requirement for Commerce to explain to and assist applicants upon license denials has been deleted.
2. The reason State has not heard any complaints about the additional licensing layer is because Commerce has not begun to license these items.
3. We agree that the laws and regulations do not require State to protect commercial interests or international competitiveness in its licensing process. However, we never stated that those were the reasons why Defense wanted to protect these technologies. Instead, we stated that Defense's reason for protecting these technologies is to maintain a combat and performance advantage for U.S. military forces.
4. The proliferation concern is not our position. It is part of Defense and State's initial justification to retain the sensitive items on the U.S. Munitions List. Defense and State's staffs believe that Commerce's controls are not as stringent as munitions controls.
5. Defense's reason for protecting hot section technologies is to maintain an air combat advantage for U.S. forces over potential adversaries, and not for U.S. competitiveness.
6. Our point regarding the incomplete coverage of the memorandum of understanding has been deleted.
7. While it is true that State applications are staffed to other agencies, our understanding is that they are not staffed to Commerce.

Comments From the Department of Commerce

Note: GAO comments supplementing those in the report text appear at the end of this appendix.



UNITED STATES DEPARTMENT OF COMMERCE
Chief Financial Officer
Assistant Secretary for Administration
Washington, D.C. 20230

9 NOV 1992

Mr. Frank C. Conahan
Assistant Comptroller General
U.S. General Accounting Office
Washington, D.C. 20548

Dear Mr. Conahan:

Thank you for your letter requesting comments on the draft report entitled, "Export Control: Militarily Sensitive Items Should Remain Under Munitions Controls."

We have reviewed the enclosed comments of the Acting Under Secretary for Export Administration and believe they are responsive to the matters discussed in the report.

Sincerely,


Preston Moore

Enclosure

**Appendix V
Comments From the Department of
Commerce**



UNITED STATES DEPARTMENT OF COMMERCE
The Under Secretary for Export Administration
Washington, D.C. 20230

November 3, 1992

Mr. Frank C. Conahan
Assistant Comptroller General
General Accounting Office
Washington, DC 20548

Dear Mr. Conahan:

Thank you for your letter requesting the Department's comments on the draft General Accounting Office (GAO) report entitled "EXPORT CONTROLS: Militarily Sensitive Items Should Remain Under Munitions Controls." It is the view of the Bureau of Export Administration (BXA) that this draft reflects an inadequate understanding of the Commerce export control licensing process, and steps taken by State and Commerce since 1990 to improve the quality of each agency regulatory program related to commodity jurisdiction. BXA takes strong exception to the conclusions and recommendations.

General Views

The report does not reflect an understanding of the background of the policy to move dual-use items from the U.S. Munition List (USML) to the Commerce Control List (CCL), unless significant national security interests would be jeopardized. As you may know, Congress passed amendments to the Export Administration Act (EAA) in 1990 to compel the Executive Branch to transfer certain items from the USML to the CCL. Congress acted on this issue because the commodity jurisdiction of certain commercial products is important to U.S. export competitiveness.

Much of what is controlled by Commerce and State is based upon the CoCom International Munitions List (IML) and the CoCom dual-use International Industrial List (IIL). Generally, State's USML includes IML items, while the Commerce Control List (CCL) includes IIL items.

However, the few cases in which IIL items are included on the USML represent a source of frustration for some exporters. Many exporters of IIL items listed on the USML believe they face a competitive disadvantage because, not surprisingly, foreign governments in CoCom control these items as dual-use items, not as munitions. Generally, dual-use items are licensed by the U.S. and foreign countries according to procedures and timeframes more clearly defined than those applicable to IML items.

Although the 1990 EAA amendments were vetoed, the Administration agreed with the thrust of certain provisions, including the provision regarding commodity jurisdiction. Hence the so-called "rationalization exercise" was initiated with a presumption that IIL items should be controlled by Commerce on the CCL, and IML



See comment 1.

See comment 1.

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should be controlled by State on the USML, unless significant national security interests are jeopardized.

Comments on Recommendations

Regarding specific recommendations, GAO recommends that the Secretary of Defense direct the Defense Technology Security Agency and the Secretary of State direct the Center for Defense Trade Controls to take the following actions:

-- Jointly examine the national security implications due to the loss in control identified by GAO for the following items: nonmilitary INS technical data, nonmilitary focal plane arrays and second-generation and above image intensification tubes, commercial systems containing such components, and related technical data; and

-- If the risks to national security interests are determined to be significant, retain the item or items on the USML; or

-- If the risks are determine to be insignificant, amend the Memorandum of Understanding to ensure complete coverage for nonmilitary INS technical data and possibly other critical items.

The GAO report equates the transfer of an item from the USML to the CCL to a "loss in control". The premise that the transfer of an item to the CCL results in an increased vulnerability to U.S. national security is wrong and BXA does not concur with this recommendation.

In fact, Commerce, State, and Defense thoroughly examined the issue of retaining the items listed GAO's recommendation on the USML or moving them to the CCL, including the assessment of any risks. All agencies agreed significant U.S. security interests would not be jeopardized, and signed a memorandum regarding transfer of controls that ensured full review by State and Commerce. All agencies reviewed and concurred with a foreign policy report establishing certain new Commerce controls which was submitted to Congress on May 6, 1992 by Secretary Franklin. I note that nowhere in the GAO's text is the report specifically referenced.

All agencies remain fully cognizant of the provisions of the Export Administration Act and the Export Administration Regulations. It seems pointless, therefore to recommend that agencies review a decision so recently made, especially when no valid reason is presented for doing so.

See pp. 25-26 and
comment 7.

See pp. 25-26.

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Contrary to the assertions made in the GAO report, items can be controlled by Commerce under section 6 of the EAA as tightly as necessary. For instance, Commerce has long imposed trade embargoes against Libya, North Korea, Vietnam, and Cuba. Commerce regulates the export of the world's most powerful supercomputers, and places special restrictions on many supercomputer exports in consultation with other agencies under the authority of section 6 of the EAA.

See pp. 15-16.

The primary difference in the Commerce control system, as compared to that of the State Department, is that, unlike the State Department, there is a specified timeframe for completion of the license review process, and there is an escalation procedure that an exporter may follow to address an adverse licensing action.

This occurs because of long-standing statutory provisions that require predictable processing of applications to export commercial products, such as those found on the CoCom IIL.

This makes sense because in the highly competitive technology marketplace, swift, definitive guidance on whether an item may be exported or not enables U.S. exporters to maximize their sales opportunities within the parameters of U.S. security and foreign policy requirements. Commerce also takes into account the views of all other interested agencies in making licensing decisions, which are freely exchanged in both the license review and escalation process so that all parties benefit from the exchange of views. The report's statement that "Munition Controls are generally more stringent than Commerce's Dual - Use Controls" is simply not supported by the facts. Section 6 of the EAA provides broad authority to craft controls as tightly as necessary, including the imposition of trade embargoes.

See pp. 15-16.

Mindful of these ideas, the three examples in the section "Loss of Control Over Item Transferred As A Compromise" that supposedly demonstrate that Commerce controls are insufficient for controlling certain CoCom IIL items are red herrings:

- revoking or suspending licenses. More than 200,000 license applications have been processed by Commerce during my tenure since 1989; we have never encountered a problem revoking or suspending export licenses when necessary during this period;
- annual reauthorization of foreign policy controls. If this is a concern to the GAO, then of greater concern should be the possible lapse of several trade embargoes and supercomputer controls, among a host of other controls, which also must be annually renewed as part of U.S. foreign policy controls. In reality, there has never been a problem regarding renewing foreign policy controls.

See p. 26.

See p. 26.

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-- explanation and assistance to exporters. Regardless of the provisions of the EAA or the views of the GAO, Commerce believes all exporters deserve an explanation regarding why a transaction was denied, and a process to appeal, as part of the total quality service we provide to tax paying exporters. It is our view that exporters deserve service in the form of policy level attention whenever an application to export commercial products is delayed for any reason. This is another strength, not a weakness, of the Commerce licensing system. Regarding the Berman Amendment, please see the attached explanation about why it does not apply.

See comment 2.

Hot Section Technology

GAO also recommends that to ensure appropriate and adequate control over only those hot section technologies which Defense considers sensitive and critical to U.S. national security, the Secretary of State direct the Center for Defense Trade Controls to:

--identify, with the assistance of Defense and other agencies as appropriate, specific hot section technologies in which the United States leads the world and which are militarily critical, and assert jurisdiction over those technologies; and

--transfer jurisdiction over all other hot section technologies for commercial engines to Commerce.

See p. 33.

BXA does not concur with this recommendation. Dividing control over "hot section" technology between State and Commerce will only serve to aggravate exporters, with no security benefit, by making each and every application submitted to either agency the subject of a commodity jurisdiction decisions.

See p. 33.

If GAO is concerned about possible deficiencies in Commerce's controls with respect to hot sections, GAO should identify with specificity the limitations in Section 6 of the EAA as Section 6 controls might apply to hot sections. Commerce believes there is no deficiency.

Finally, it is interesting to note that the Export Administration Act in 1990, had it become law, would have forced a more sweeping shift of dual-use items from the Munitions List to the CCL than has resulted from the deliberative process undertaken by the Administration. It seems odd that GAO would find fault with the current process, rather than suggest that the Administration did not go as far as the Congress had directed in the EAA.

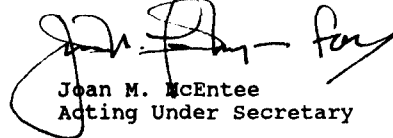
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It is the view of this Department that the draft report is fundamentally flawed and based on the false assumption that Commerce controls are inherently "weaker" than State's controls. I expect the report, in its current form, would be severely criticized by the exporting community. I propose that an informal meeting be held between GAO and BXA staff to address the draft report's premise, resulting conclusions and recommendations before the report is made final.

We have provided additional comments on this report as an attachment. We appreciate this opportunity to comment on the draft report.

Sincerely,



Joan M. McEntee
Acting Under Secretary

Enclosure

ATTACHMENT

Background

- o The description of the Commerce Control List (CCL) fails to mention that in addition to items controlled for national security and foreign policy reasons, the list also controls items for missile technology, chemical and biological warfare, and nuclear nonproliferation reasons.
- o A key difference between the lists is not that the U.S. Munitions List (USML) is "more stringent" than the CCL, but rather that the CCL covers a broad range of commodities with legitimate dual-uses while the USML focuses on a narrow range of items with singularly military end-uses. The USML by definition controls only articles designated by the Department of State as "defense articles" and "defense services" meaning "arms, ammunition, and implements of war".
- o The statement that items are transferred from the USML to the CCL only if State and Defense have "no significant national security concerns" fails to mention the fact the items will continue to be controlled on the CCL for national security reasons. Moreover, certain items to be transferred will be controlled to all destinations for additional foreign policy reasons the Department of State and Defense supports.

Results in Brief

- o The premise that the transfer of items to the CCL "jeopardizes" U.S. national security interests or that exporters "avoid" controls by obtaining Individual Validated Licenses from the Department of Commerce is simply erroneous.

The Department is responsible for licensing some of the most sensitive commodities including;

- supercomputers;
- items that could be used for the design, development, and production of missiles capable of delivering nuclear warheads controlled under the Missile Technology Control Regime;
- items that could be of significance for nuclear explosive purposes identified by the Nuclear Supplier's Group; and,
- chemical precursors and biological agents that can be used in the proliferation of poisonous gasses and bacteriological methods of warfare.

See comment 3.

See comment 4.

See p. 3 and comment 5.

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Sensitive Items Transferred as a Compromise

The draft report states throughout that sensitive items were transferred from State to Commerce jurisdiction as a compromise. That is not correct. Items were transferred only after responsible officials from State, Defense, and Commerce all agreed that the transfers would not jeopardize significant national security interests. National security interests were not compromised by the transfers.

Certain of the transfers can be made because of the imposition of new foreign policy controls that will require a validated license to all destinations and will permit broad discretion to deny exports to any destination. This is not a compromise. Rather, it is the result of State, Defense, and Commerce identifying the export control policies and objectives of the Administration and then carefully implementing those policies under the EAR.

The draft is also inaccurate because it fails to distinguish the previously existing Commerce controls from the scope of new controls. As noted above, certain new controls will be imposed in direct response to the rationalization exercise. In addition, new controls have been imposed since the beginning of the rationalization exercise to implement the President's Enhanced Proliferation Control Initiative.

The draft also criticizes the transfer of certain items from State to Commerce jurisdiction because these items are sensitive for national security reasons. Moreover, GAO reviewed the Defense Department national security justifications. The draft report misses the key point. Commerce agrees the items on the COCOM Industrial List are items that must be controlled for national security reasons. In addition, Commerce controls exports to prevent the proliferation of ballistic missiles, nuclear weapons, chemical weapons, and biological weapons.

The EAR give Commerce great discretion to suspend or revoke licenses. The draft report incorrectly concludes that Commerce may suspend a license only for a violation. To the contrary, Commerce may suspend or revoke a license without notice and may order a shipment enroute for return and unloading in any port. Commerce can suspend and does suspend licenses based upon new information, changed circumstances, untrustworthiness of a party to the transaction, or reason to believe a diversion is about to occur.

See pp. 25-26.

See p. 23.

See pp. 25-26.

See comment 6.

See comment 4.

See p. 26.

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Berman Amendment

At the bottom of page 33 and the top of page 34 of the Draft, GAO states that some of the INS technical data could be within the prohibition of export controls on the exportation of information material and, therefore, is not controllable by reason of the Berman Amendment to IEEPA.

Commerce disagrees with that position. Rather, BXA is firmly of the view that the Berman Amendment to IEEPA merely precludes export controls on information materials that enjoy First Amendment protection. Neither the Export Administration Regulations (EAR) nor the International Traffic in Arms Regulations (ITAR) impose export restrictions contrary to the First Amendment. Therefore, the Berman Amendment to IEEPA presents no obstacle for Commerce to maintain effective, comparable export controls over certain INS technical data to be transferred from State to Commerce. The Commerce legal position was provided to counsel for GAO on June 5, 1992 and on September 11, 1992.

Counsel for GAO has recently informed counsel for BXA that it is the intention of GAO that it will not adopt either the Commerce position or the position taken by one commentator in a recent article. Such an intent is not reflected in the draft.

Commerce escalation

The GAO draft is critical of transfer of dual use items to Commerce jurisdiction because, in the interagency review of license applications, Commerce can "disagree and escalate the dispute to higher level officials for resolution where Commerce's commercial economic interest arguments would be presented. Under State's control, national security and foreign policy are determining factors in licensing decisions, and Commerce does not participate."

First, escalation of disputed license applications within the Administration to higher level officials is perfectly appropriate. Moreover, it would be singularly inappropriate if the U.S. Government were to develop a licensing system that insulates staff decision-making from political level review and accountability. Second, national security and foreign policy factors are determining factors under the Export Administration Regulations administered by Commerce. The regulations do not call for a weighing of commercial interests against national security and foreign policy interests.

See p. 27.

See p. 27.

See p. 27.

The following are GAO's comments on the Department of Commerce's letter dated November 9, 1992.

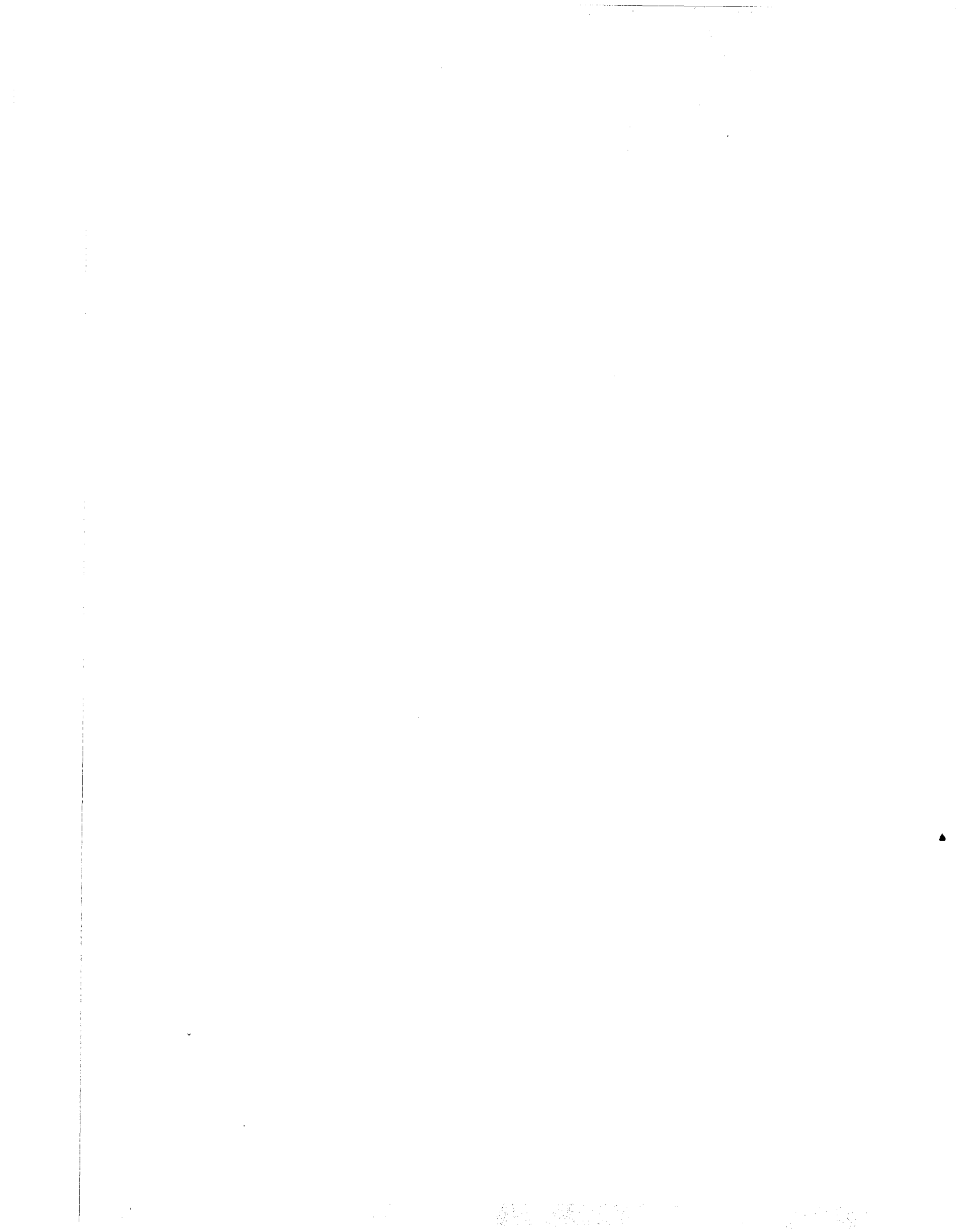
GAO Comments

1. We do understand the background of the rationalization process, which was clearly stated in chapter 1.
2. Our point that the Export Administration Act has a requirement for Commerce to explain to and assist applicants upon license denials has been deleted.
3. Missile technology, chemical biological warfare, and nuclear nonproliferation are all part of the foreign policy controls.
4. National security controls, under Commerce's system, are merely East-West controls. National security concerns, from Defense's perspective, are much broader in scope, which is why Commerce offered to impose additional foreign policy controls to allay Defense's concerns.
5. We have revised our report to more clearly state our concern that the compromise did not take into consideration other differences that we have identified. That is why we recommend that Defense and State reexamine their decision by considering these other differences. We have also modified the report to state the fact that the exporters are obtaining licenses from Commerce and delete the point that they are avoiding State's controls.
6. The President's Enhanced Proliferation Control Initiative gives Commerce the authority to require an individual validated license for any commodity destined for a specific list of projects of proliferation concern. This added control has little bearing on the differences that we have identified, such as Commerce's authority to suspend and revoke licenses, the annual renewal of foreign policy controls, the dispute escalation process, and Commerce's case referral system.
7. Secretary Franklin's letter does not change the fact that the final agencies' decision was the result of a compromise.

Major Contributors to This Report

**National Security and
International Affairs
Division, Washington,
D.C.**

**Thomas J. Schulz, Associate Director
Davi M. D'Agostino, Assistant Director
John P. Ting, Evaluator-in-Charge
Hynek P. Kalkus, Evaluator**



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