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COMPTROLLER GENERAL'S
REPORT TO THE CONGRESS

NO EASY CHOICE: NATO
COLLABORATION AND THE U.S.
ARMS EXPORT CONTROL ISSUE

D I G E S T

The United States has a conflict between its desire for increased NATO collaboration to standardize weapons and the need to maintain control over weapons systems made from U.S. technology. These two policies may not be able to co-exist if the United States is to move forward in standardization. So far the administration has been willing to compromise to some extent on third country sales to achieve cooperation. These compromises may well be worth making. On the other hand, they may allow foreign producers using U.S. technology to sell to countries the United States opposes for political and foreign policy reasons or they may prohibit the United States from selling to its usual customers. This may be one of the prices for cooperation.



The conflict is a real one. It is a product of the new importance of exports to the major European producers; different foreign policies and arms sales exporting patterns of the United States, United Kingdom (UK), France, and the Federal Republic of Germany (FRG); the inability of the UK, France, and FRG producers to compete with the United States; and new methods of collaboration now being tried. For all major producers, exports fill both foreign policy and economic goals. Because transfer of weapons adds to the military capability of the recipient, all the producers treat arms exports as reflections of their foreign policies, and all look to exports to create economic benefits--to lower the unit costs of national purchases, to earn foreign exchange, and to solidify economic relations with the recipients.

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MANIFESTATIONS OF THE CONFLICT

To delineate the extent of the conflict between the two policies--NATO collaboration and control of exported U.S. military technology--GAO analyzed the trading patterns of the major producers and did case studies of

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ongoing collaborative weapons projects at both the production and development stage. GAO found major differences in the customers considered acceptable by the different producers, particularly between the United States and France, which explains French reluctance to accept U.S. restrictions in collaborative projects.

GAO then assessed the competitiveness of European producers who get a license to produce U.S. systems to determine if they would be willing to accept restrictive U.S. export controls. Because of smaller quantitative requirements and less efficient production practices, the UK, France and FRG generally cannot compete with the United States in markets. Thus, they are reluctant to adopt U.S. systems. This limits the potential for NATO collaboration using dual production.

GAO also reviewed the handling of third country sales in new co-development programs. It found diminishing U.S. controls for the sake of cooperation with the largest concessions extracted where the potential standardization benefits and European contributions are the greatest. In one case where U.S. technology was produced for a European firm, the State Department exceeded its own policy guidelines which required that sales territories be confined to NATO. In another, the Department of Defense is proposing an export version where noncritical U.S. technology can be exported without controls over future recipients.

A threshold approach was used in another project where a participant's ability to veto export sales is based on its technology contribution. This approach fails to distinguish between critical and non-critical technology, and also does not identify or define future recipients. Finally, in a cooperative feasibility agreement as well as in other advanced co-development projects, the executive branch put off the decisions on controlling future exports, waiting for the production phase before addressing the issue.

LIMITED CONGRESSIONAL PREROGATIVES

To reach agreements, the United States has modified U.S. sales policy for the sake of collaboration. Despite the importance of these policy decisions, congressional participation is limited because authorization legislation covering arms exports is not designed to deal with the new forms of collaboration. These decisions may require a departure from U.S. sales policy and set the rules governing arms transfers to be made in the next decade or beyond. If arms transfer concessions are to be made for the sake of standardization, the Congress, with its legislative endorsement of both policies, may want to expand its prerogatives in establishing where the line on making concessions should be drawn.

At the same time, GAO recognizes that the administration needs flexibility to negotiate international agreements. For these reasons, GAO proposes a range of legislative alternatives, some of which would enhance the congressional role and may limit administrative prerogative and another which would also give the administration greater negotiating flexibility. Given the importance of the policy tradeoffs, however, the Congress may wish to participate in the reconciliation of the two foreign policies now in conflict.

Under present law, the Congress has disapproval rights over third country transfers of systems made with U.S. technology if U.S. Government foreign military sales channels are used. For commercial licensing transactions, however, the present law provides no explicit guidance to the State Department in establishing what the United States considers acceptable sales territories for foreign producers using U.S. technology in their systems. There is no congressional right to disapprove the transfer of technology through commercial licensing and most, if not all, technology is likely to be transferred through these channels. If the State Department chose to, it could define a sales territory to include the entire non-Communist world and could sanction any export

of U.S. critical and noncritical technology. Or, the State Department could deny foreign producers the right to export any systems made with U.S. technology. The Congress is informed of but has no right of disapproval over commercial licensing agreements and therefore does not rule on the appropriateness of sales territories proposed by companies in export licenses and approved by the State Department.

This inconsistency in the current law enabled the administration to enter into government-to-government agreements based on the threshold concept. The law currently allows the administration to make agreements allowing open-ended transfers of U.S. technology because it is anticipated that the agreement will be implemented using commercial channels.

Although the Congress will receive a certification on threshold and export version types of agreements, it can not disapprove these agreements. Congressional ability to act as a check is limited because the legislation is not designed to deal with the new forms of collaboration. The Congress will be consulted but cannot disapprove the agreement or any future agreement allowing less restricted transfers of U.S. technology.

WAYS TO UPGRADE CONGRESSIONAL PREROGATIVES

Because committees of the Congress have recently expressed concern over the transfer of U.S. technology embedded in collaboratively developed projects, the Congress may want to consider the following actions:

1. Amend the Arms Export Control Act (AECA) to require that all government-to-government collaborative agreements be submitted to the Congress and include a provision explicitly defining the third country sales prerogatives of the participants. This would ensure that co-development agreements are submitted to the Congress, and that rules on future exports are established before the stakes in collaboration were raised. DOD could not then put off

the third country sales issue until the production stage. An early decision on handling future sales would be required, and the Congress would be made aware of all early efforts at collaboration.

2. Give the Congress a right of disapproval over all sales territories beyond NATO for all government-to-government agreements whether implementation is through foreign military sales or commercial channels. Third party transfers through commercial channels could be put under the same controls with the same congressional right of disapproval. This could be done by including commercial transfers in section 3(a) and (d), AECA. This would have stopped the threshold agreement because individual recipients of U.S. technology would have to be identified and transfers could not be made to countries to which the United States would not sell. Congressional decisionmaking prerogatives would have been expanded.
3. Put all government-to-government agreements, under the same controls as Foreign Military Sales, even if agreements are to be implemented commercially but add a new mechanism to allow transfer of technology without identifying the recipient. The Congress could give the administration the authority to transfer noncritical technology but could require that the Secretary of Defense submit to the Congress the criteria for deciding what was noncritical technology for review and/or disapproval. This would allow for an export version but not for a threshold agreement.
4. The Congress could require that the administration submit certifications on transfers of technology for NATO collaborative projects where the recipient is not identified. The certification could include information on
 - the type of technology;
 - its contribution to the system's capability;

- the technology's availability from other sources;
- the impact of a denial on the collaborative project; and
- prospective customers.

This certification could be subject to either congressional review and/or a 30 or 60 day right of disapproval. The Congress could determine on a system-by-system basis whether the type of transfer was appropriate without the recipient being identified. The Congress would have a one-time review right over the individual system. Both threshold and export version types of agreements would be possible unless the Congress disapproved. This would require modifications of current law governing third-country transfers to establish separate criteria for NATO collaborative projects. More importantly, it would establish one set of rules governing these third country transfers.

While the Congress would gain a right of disapproval over all technology transfers in collaborative projects (commercial as well as foreign military sales), the executive branch would have the option of making more broadly structured agreements on exports sales in NATO collaborative programs. The nature of the agreement, rather than the implementation method, would determine congressional and executive review rights.

5. The Congress could couple these increased controls with a new negotiating tool to give the Secretary of Defense greater flexibility in handling the third country sales issue while retaining U.S. controls. The tool proposed is a right to share third country markets including foreign military sales transactions with European participants. This would require changes in section 42 of AECA which prohibits procurement for foreign military sales outside the United States if there are adverse effects on the U.S. economy or industrial base.

AGENCY COMMENTS

Both the Departments of State and Defense considered GAO's description of the policy conflict between fostering NATO arms collaboration and controlling third country transfers generally accurate. However, they did not believe additional congressional controls were justified; in their view more controls would reduce executive branch flexibility in negotiations of collaborative projects and would not harmonize the conflict in the policies.

While the proposed alternatives put forth by GAO may partially reduce executive branch flexibility, GAO believes consideration of these alternatives is appropriate because:

- The existing level of executive branch flexibility creates uncertainty as to where the line will be drawn on further relaxation of U.S. controls over technology for the sake of collaboration.
- The Congress has endorsed both policies and may want to participate in the reconciliation of these policies now in conflict.
- There is a need to establish one set of rules governing the transfer of technology in collaborative projects based on the importance of the agreement rather than on the method of implementation which currently sets both the extent of congressional prerogative and executive branch flexibility.
- Executive branch consultation, at best, is uneven.