BY THE COMPTROLLER GENERAL

Report To The Congress

OF THE UNITED STATES

108716

Export Controls: Need To Clarify Policy And Simplify Administration

The Government does not have an effective policymaking structure to reconcile the conflicting goals of export promotion and export control. Further, the decisionmaking apparatus for determining what technology or products should be controlled is unwieldy and time consuming. On top of these problems, the export licensing system is characterized by delay, uncertainty, and lack of accountability.

The Congress should provide for realignment of the export policy structure, centralization of export licensing management, and certain other processes to facilitate the efficient and timely administration of export controls.

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To the President of the Senate and
the Speaker of the House of Representatives

This report on export controls finds that the administration's control system is overly complex and that there is no effective policymaking structure to clarify export control policies and reconcile them with the need to promote exports.

Many of the recommendations are addressed to the Congress for use in its deliberations on revising the Export Administration Act of 1969, as amended. We believe that the recommendations provide for a system which better pinpoints accountability while effectively controlling exports for national security and foreign policy purposes. Such a system would reduce uncertainty in U.S. industry relationships with overseas buyers and help to improve U.S. participation with other governments to control exports.

Copies of this report are being sent to the heads of executive agencies that participate in the administration of export controls and to the Director, Office of Management and Budget.

Comptroller General
of the United States

COMPTROLLER GENERAL'S REPORT TO THE CONGRESS

EXPORT CONTROLS: NEED TO CLARIFY POLICY AND SIMPLIFY ADMINISTRATION

D I G E S T

The Government does not have an effective policymaking structure to reconcile the conflicting goals of export promotion and control. Both of these important goals are frustrated by an overly complex export control system. Officials in many agencies struggle, without sufficient guidance, to define what should be controlled and then to decide whether an export license should be granted as an exception from control.

Delay and uncertainty in the export control system disrupts U.S. industry relationships with overseas buyers; industry can lose sales if it is considered an unreliable supplier.

If controls are to be effective, they must be applied by other governments whose firms have similar technologies and products available. However, the governments associated with the United States in the 15 nation organization known as COCOM are disturbed with the slow U.S. decisionmaking process and what they consider an inflexible U.S. position on what ought to be controlled.

Steps have been taken to address some of the problems. The Department of Defense is leading an effort to determine what technologies are most critical for control, and in September 1978 the President announced a Government commitment to reduce export barriers.

FOREIGN POLICY CONTROLS

Most controls to support national security goals are jointly administered by COCOM, but foreign policy controls are, for the

most part, unilaterally applied. In such a situation, a purchaser can simply shift to a supplier of comparable products in another country.

The Export Administration Act of 1969, as amended, states that foreign availability of comparable products should be considered when applying national security controls but is mute with regard to foreign policy controls. The Act also requires semiannual reports on export controls but these do not adequately inform Congress or the public about foreign policy controls.

EXPORT POLICYMAKING STRUCTURE

In an October 31, 1978, report, "Administration of U.S. Export Licensing Should Be Consolidated To Be More Responsive To Industry" GAO recommended that export licensing and policymaking functions should be organizationally distinct and that a multiagency Export Policy Advisory Committee should be established to make export control policy that can be applied by the Department of Commerce. This Committee would develop policy alternatives for decisions by an executive director appointed by and accountable to the President. GAO affirms this recommendation.

AVAILABILITY OF COMPARABLE PRODUCTS

Availability of products from foreign sources is to be considered in applying national security controls but no one appears to have been charged with developing and applying a standard for comparability. This should have an independent status under GAO's proposed Export Policy Advisory Committee.

U.S. PARTICIPATION IN COCOM

COCOM member governments request other members to exempt sales from control. The Economic Defense Advisory Committee, chaired by the Department of State and consisting of Commerce, Defense, Treasury, and

Energy, considers requests which are referred to these agencies for technical evaluation and policy review. State's recommendations to COCOM are based on unanimous concurrence of the Committee.

The U.S. Government's overly complex export control system, however, is sometimes slow to respond. COCOM governments complain that this jeopardizes their exporters' reputations as dependable suppliers. Further, the United States is the only COCOM member to require reexport licensing. Other governments feel that this infringes on the COCOM system and implies a distrust of their national control processes.

The Department of State has led an effort to make procedural changes to improve U.S. performance in COCOM, and GAO supports State's recommendations.

REVISING THE CONTROL LISTS

The COCOM governments are now negotiating changes to the international control list which currently contains 105 item categories, excluding munitions and atomic energy items. The United States made proposals to revise 39 items and subsequently made counterproposals on an additional 20 items.

The development of timely and comprehensive U.S. proposals was handicapped by the lack of high priority and the inability of some participating agencies to prepare complete technical positions. The authority to mediate conflicting foreign availability claims was widely diffused and this important issue did not receive sufficient attention

The United States unilaterally controls exports of another 38 industrial item categories. Congress directed in 1977 that these items be reviewed during 1978 to determine their merit but the review was not completed. U.S. exporters are denied sales for these items but other countries have no similar obligation.

EXPORT LICENSING ADMINISTRATION

The export licensing community for industrial items consists of the Department of Commerce and a group of consulting agencies. Consultation with the Department of Defense for national security purposes is required by law. At each agency, license applications may be referred to a number of specialists for technical review.

Commerce, through its Office of Export Administration, makes final licensing decisions unilaterally in some instances; in other instances, decisions are made with the unanimous consent of the consulted agencies through the Advisory Committee on Export Policy's Operating Committee.

GAO's October 31, 1978, report said that Government administration of export licensing is spread among too many agencies. The resulting lack of accountability and the delay and uncertainty in the decision-making process can cause exporters to lose sales even if a license is subsequently approved. GAO recommended that export license management be concentrated in Commerce.

Technical evaluations by the consulting agencies can be unnecessarily delayed due to uncertain priorities and funding. Centralized funding for these technical evaluations, together with defined priorities, should improve licensing reviews.

COMPLIANCE WITH CONTROLS

The U.S. compliance program is administered by the Office of Export Administration. A program that would insure complete compliance with the law would probably be too expensive to administer but better use could be made of the available resources. Some inspection work is done overseas, but the United States can probably do little more regarding worldwide compliance than continue to use diplomatic persuasion.

FUTURE SHAPE OF EXPORT CONTROLS

Some Government officials see the Defense project to clarify the relationship between technology and product controls as resulting in a simultaneous relaxation of many existing product controls; other officials have expressed reservations that technology controls can largely substitute for product controls.

The Export Administration Act of 1969, as amended, expires in September 1979. The major assumption in GAO's October 1978 report is that Congress must involve itself more in defining the decisionmaking structure. Legislation introduced in the 95th Congress would have made Congress an active participant in the export license decisionmaking system by giving it authority to review and veto certain kinds of applications. Such participation would result in greater diffusion of authority.

A Presidential Review Memorandum on East-West technology transfer has been prepared. This memorandum apparently recommends that the National Security Council, the Office of Science and Technology Policy and the Arms Control and Disarmament Agency should review license applications, which will further diffuse export licensing management.

RECOMMENDATIONS TO THE CONGRESS

Most export control agencies apparently prefer diffusion of management which dilutes accountability among them rather than having one office or agency primarily responsible for properly implementing controls. Accordingly, GAO believes needed improvements can best be accomplished at the direction of Congress and that, in its deliberations on the Export Administration Act of 1969, as amended, the Congress should:

--Amend the Act to state that the President shall consider foreign availability when imposing export controls for foreign policy purposes.

--Require that the semiannual report discuss in more detail the uses and reasons for foreign policy controls.

--Require that the foreign availability clause be administered as a separate effort under a "foreign availability evaluator."

--Provide for establishment of a multiagency Export Policy Advisory Committee at an appropriate administrative level.

--Direct that export license application management responsibility be centralized in the Department of Commerce's Office of Export Administration.

--Centralize funding of technical evaluations in the Office of Export Administration.

RECOMMENDATIONS TO AGENCIES

In conjunction with the above, the Secretary of State should abolish the Economic Defense Advisory Committee and the Secretary of Commerce should abolish the Advisory Committee on Export Policy structure and direct the Office of Export Administration to consolidate various activities in its licensing division.

The Secretary of Commerce also should reallocate resources to increase the deterrent capability of the Office of Export Administration's compliance program.

AGENCY COMMENTS

GAO did not request the executive agencies to provide written comments on this report. However, the matters in the report were

discussed with officials of the Departments of State, Defense and Commerce and with the Central Intelligence Agency. Further, the comments which are included in GAO's October 1978 report are applicable to the recommendations on organizational issues.

The agencies' officials continue to believe that consolidation is inappropriate since each agency should have a position on and apply policy to each referred application. They believe that delays and lack of responsiveness can be corrected by reducing the number of referrals through increased delegations of authority to Commerce. Such delegations essentially consolidate licensing in Commerce and are consistent with the general point of view in GAO's recommendations.

The agencies believe that the current international control list review effort, although not without problems, is a considerable improvement over the previous one. Commerce has advised that it is studying GAO's recommendations for improving its operations.

C O N T E N T S

ABBREVIATIONS

ACEP	Advisory Committee on Export Policy
COCOM	Coordinating Committee of the Consultative Group
EDAC	Economic Defense Advisory Committee
OC	Operating Committee
OEA	Office of Export Administration
OST	Office of Strategic Technology and Munitions Control

CHAPTER 1

EXPORT CONTROL POLICY

The Government both promotes and controls trade, twin aspects of a trade policy which are difficult to balance and which have created a dilemma in urgent need of resolution. The Export Administration Act of 1969, as amended, states the problem well--on the one hand noting that:

> "The unrestricted export of materials, information and technology without regard to whether they make a significant contribution to the military potential of any other nation or nations may adversely affect the national security of the United States."

But on the other hand noting that:

> "The unwarranted restriction of exports from the United States has a serious adverse effect on our balance of payments * * *. The uncertainty of policy toward certain categories of exports has curtailed the efforts of American business * * * to improve the trade balance of the United States."

The Government does not have an effective policymaking structure to reconcile the conflicting goals of export promotion and control. Steps are being taken, however, to more clearly define the relationship between these goals. For example, the Department of Defense is currently attempting to more precisely define the relationship between controls of products and critical technology (in the sense of manufacturing know-how). (See ch. 6.)

FOREIGN POLICY PURPOSES

In September 1978, the President announced a number of measures to improve U.S. export performance. To reduce domestic barriers to export, the President said that, among other measures, he is

> "directing the Departments of Commerce, State, Defense, and Agriculture to take export consequences fully into account when considering the use of export controls for foreign policy purposes. Weight will be given to whether the goods in questions are also available from countries other than the United States."

Current export control law requires that foreign availability be taken into account when a decision to disapprove an application is made on national security grounds, but the law is mute with respect to disapprovals on foreign policy grounds.

Since the multinational Export Control Coordinating Committee known as COCOM collectively controls exports for mutual security and not for foreign policy reasons, the probability increases that U.S. exporters will lose sales to exporters from COCOM and other countries when the Government unilaterally ties export controls to foreign policy without considering foreign availability.

We are not suggesting that foreign availability should necessarily invalidate foreign policy-related trade controls. For example, in support of its human rights policy, the Government unilaterally controls the export of such notorious items as leg irons and shackles, among other "crime control" commodities. In such a case, the loss of export sales is not necessarily intolerable regardless of availability. The President's September 1978 announcement should, however, help to resolve what seems to be an omission in export control law.

Generally, the relationship between foreign policy and export control is of considerable concern to U.S. exporters, whose reputation as dependable sources of supply is an important part of international trading relationships. Controlling exports for foreign policy purposes raises an especially complicated regulatory problem. Exporters' reputations for reliability depends in part on candor from their Government and they must know in some predictable way whether or not certain commodities can be exported to certain destinations.

Foreign policy-related trade controls, however, rest in part on a certain amount of secrecy. The Government does not normally publicly announce the targets of such control, since to do so might complicate other aspects of U.S. relations with those target governments. Export control regulation must navigate between a need for candor and a need for secrecy in this area. The Export Administration Act itself, however, is a source of some uncertainty in international trade relationships. The absence of specific language linking foreign policy controls and foreign availability has already been noted. The same law requires a semiannual report to the Congress and President on the administration of export controls. Commerce is responsible for preparing this report. The discussion of controls for foreign policy purposes in the semiannual report is brief

and, we believe, inadequate because it does not discuss (1) the specific foreign policy goals that trade controls are supposedly designed to serve nor whether they are serving those goals well or poorly and (2) the number and value of license applications denied for foreign policy reasons and how long these denial decisions take.

In short, neither Congress nor the public is regularly and systematically informed about how and why foreign policy controls are being used. For example, what is the basis for believing that trade controls do or can support the Government's policy of enhancing human rights in other countries? We well appreciate the special sensitivity such licensing decisions pose in overall relations with particular governments. We are not suggesting that all target governments of foreign policy controls be named or discussed in the semiannual report, but the almost total absence of information on this aspect of trade control can only foster uncertainty in U.S. export trade and, thereby, compromise the intent of the Export Administration Act itself. As mentioned previously, the Act states that "the uncertainty of policy toward certain categories of exports has curtailed the efforts of American business * * * to improve the trade balance of the United States." More detailed discussion of foreign policy-related trade controls in the semiannual report should introduce some needed candor without compromising a need for some secrecy.

NATIONAL SECURITY PURPOSES

Linking the concept of national interest to trade and defining it in terms of a best mix of trade promotion and trade control depends on the policy ends each are intended to serve.

Export controls for national security purposes are designed in part to delay the acquisition of militarily significant technology by potential U.S. adversaries. According to export control officials, the United States has a multi-year lead over the Soviet Union in a number of militarily important technologies. However, whether export control is a major or minor contributor to this alleged lead has not been and perhaps cannot be precisely determined. The assumption inherent to the national security export control goal is that various U.S. technological leads are militarily meaningful. A 1976 report for the Murphy Commission, 1/ however, noted that:

1/ Commission on the Organization of the Government for the Conduct of Foreign Policy.

> "Suprisingly perhaps, the Soviet military seems able to substitute time, labor, other military resources, and doctrine for large computers, producing achievements comparable to those of the West's more computer-intensive defense policy. * * * [T]he import of large computers * * * would apparently not imply capability-enhancing gains * * *."

The report noted, however, that "small, special-purpose machines and specially-designed military software would lead to military results not presently obtainable by the Soviets."

NEED FOR A REVISED POLICYMAKING STRUCTURE

From the point of view of control, balancing the goals of export control and promotion is a Government function consisting of two related activities. Licensing officials daily must decide whether or not to approve export license applications and then make and apply export policy to these decisions. Prevailing wisdom currently holds that export control policy must be made on an application-by-application basis at each agency comprising the export licensing community.

The President's September 1978 announcement did not mention any new organizational arrangements which might better execute export control policy. It did note that the President's Export Council would be reconstituted to "bring a continuous flow of fresh ideas into our government policy-making process."

We believe that fresh ideas, while sometimes important, are not enough. What is needed is an organization specifically responsible for defining a proper relationship between trade control and trade promotion.

Our October 31, 1978, report, "Administration of U.S. Export Licensing Should be Consolidated to be More Responsive to Industry" (ID-78-60), advised that the export licensing and policymaking functions should be organizationally distinct. It recommended that a multiagency Export Policy Advisory Committee be established at an appropriate level and make export control policy sufficiently clear so that it can be applied by licensing teams at the Department of Commerce. The committee should not review individual export license applications except in the most unusual circumstances.

We also believe this committee should be chaired by a representative of the export control agencies on a rotating basis; the chairman should be responsible for transforming policy deliberations into policy alternatives for decision by an executive director appointed by and accountable to the President. If the executive director makes a decision considered unsatisfactory by a committee member, the member could appeal it to the Export Administration Review Board and to the President.

Chapter 3 discusses the various joint Government-industry technical advisory groups and the Government's technical task groups in relation to the current COCOM commodity list review. We believe that these groups should, in effect, become subcommittees of an Export Policy Advisory Committee in order to fully integrate their activities with general export policymaking.

ADMINISTERING FOREIGN AVAILABILITY POLICY

While the presence of foreign availability is a relatively easy assertion to make, it is not nearly so easy to prove. The Government in this area is faced with a dilemma. If the standard by which it judges "comparability" or "adequate" production capability is too strict, the intent of the foreign availability clause in export control law tends to be nullified; if the standard is too loose, the national security clause of the law is similarly voided. Finding a standard that best mediates between the two is the difficult goal of this policy.

We were unable to determine whether such a mediating standard exists or, indeed, whether there is any clear standard at all by which foreign availability is being systematically judged. (See ch. 3.) For the current COCOM commodity list review, no one appears to have been charged with the responsibility of developing and applying such a standard.

Foreign availability analysis should have an independent status under our proposed Export Policy Advisory Committee. Foreign availability is now just one of many concerns competing for the attention of technical evaluators. Its importance is, however, mandated by law, and, further, it is of sufficient complexity to require a separate detailed effort by the export control, intelligence, and exporting communities.

CONCLUSION

An organization needs to be created which will make systematic export and export control policy obtainable. Our proposed Export Policy Advisory Committee would free policymaking from the current licensing routine and permit systematic rather than ad hoc policymaking.

RECOMMENDATIONS TO THE CONGRESS

To clarify the relationship between export controls and foreign policy and to separate export control policymaking from application-by-application review, we recommend that for the Export Administration Act of 1969, as amended, the Congress:

--Amend it to state that the President shall consider foreign availability when imposing export controls for foreign policy purposes.

--Require that the semiannual report discuss in more detail the uses and reasons for foreign policy controls.

--Require that the foreign availability clause be administered as a separate effort under a "foreign availability evaluator."

--Define a decisionmaking structure which will best achieve the policy goals of the Act. In this regard, our October 31, 1978, report recommended that the Congress direct that (1) export license application management responsibilities be centralized in the Department of Commerce's Office of Export Administration and (2) a multiagency Export Policy Advisory Committee be established at an appropriate administrative level.

CHAPTER 2

MULTILATERAL CONTROLS

During the formation of U.S. export controls against Communist destinations in 1948, the Government recognized that action to delay Soviet military modernization would be effective only if other major industrialized countries adopted similar control measures and initiated discussions with Marshall plan aid recipients to enact parallel controls. A list of strategic items was developed and late in 1949 an informal multilateral Consultative Group was formed to implement the controls. The Group members were Belgium, France, Italy, Luxembourg, the Netherlands, the United Kingdom, and the United States. Membership was shortly expanded to include Canada, Denmark, Norway, and West Germany; subsequently, Greece, Japan, Portugal, and Turkey completed what is now a 15 member organization.

A Coordinating Committee (COCOM) developed controls under the direction of the Consultative Group. However, following France's military withdrawal from NATO and refusal to appoint a new chairman, the Consultative Group ceased to exist. COCOM thus assumed full responsibility for coordinating multilateral export controls.

LEGISLATIVE AUTHORITY

The Mutual Defense Assistance Control Act of 1951, as amended, (commonly known as the Battle Act) and the Export Administration Act of 1969, as amended, provide the current legislative authority for controlling U.S. exports to Communist countries for national security. The Export Administration Act also controls exports for both foreign policy and short-supply purposes.

The Battle Act was enacted following a period of Soviet expansion in Central Europe and during the Korean War. It was designed to enlist U.S. allies, aid recipients, and other nations as partners in the U.S. control system established by the 1949 Export Control Act (predecessor of the 1969 Act). The Battle Act defined U.S. export policy as an embargo of military items and commodities of strategic value to any nation or combination of nations threatening the security of the United States. The Secretary of State as administrator was charged with developing a list of controlled items after considering the views of the Departments of State, Defense, and Commerce and any other appropriate agency. The administrator was given authority to terminate all military,

economic, and financial assistance to any government which failed to apply similar controls.

In December 1951, the 61 countries receiving U.S. military, economic, or financial assistance were informed of the provisions of the Battle Act and were given a list of embargoed strategic items. The Battle Act lists were based on the COCOM lists, and the United States continues to use COCOM as its principal means of implementing the Battle Act.

LESSENED U.S. INFLUENCE

The aid termination provisions of the Battle Act were powerful incentives for other governments to adopt U.S. export control proposals. Japan, West Europe, and Canada were then receiving $16.8 billion in Marshall Plan assistance. COCOM, reflecting both economic and security concerns, adopted policies that embodied the then-current U.S. concept of what constituted strategic items and how they should be controlled. The adoption of a decisionmaking rule based on unanimity insured U.S. veto power over any dilution of controls.

The continuing economic recovery of U.S. COCOM partners, however, soon dissipated any U.S. threat to terminate aid. The restoration of historical trading patterns between Eastern and Western Europe, with resulting differences between the United States and its partners as to what constituted strategic items and how they should be controlled, has further eroded U.S. dominance in COCOM. By 1976, these countries trade in manufactured goods with Communist nations had grown to about $19.6 billion, $2.9 billion more than they received in aid during the Marshall Plan years.

One of the earliest examples of these differences occurred in 1957 when a member government unilaterally decided to relax controls for one of the proscribed countries to make them similar with those for other proscribed countries. The other members, believing they had no alternative, concurred despite the fact that the United States was still providing significant levels of aid. Since then members have taken other unilateral actions to relax controls in order to increase their trade with the embargoed countries.

Differing perceptions

The United States and other members have also disagreed about how COCOM should function as an organization.

During testimony in March 1976 before the Subcommittee on International Trade and Commerce, House Committee on International Relations, the Director of State's Office of East West Trade summarized COCOM as:

> "a voluntary organization which * * * coordinates the policies of independent governments. Actions in COCOM are, in effect, recommendations to member governments, and actions by COCOM become effective only as they are carried out by member governments through the individual export control programs under their own national laws and regulations.
>
> "* * * the cement that holds COCOM together is the recognition that unless COCOM members follow the coordinated decisions in COCOM, there will no longer be a common policy, and there will no longer be any purpose in COCOM."

This position was amplified in late 1977 when United States made clear its position that no one participant could impose its view in contradiction to the common perception of others without bringing into question the continued viability of COCOM.

While these statements seemingly reflect an equilateral perspective to COCOM participation, the United States continues to try to impose its control philosophy on others. As mentioned previously, the U.S. embargo list was the major element in the COCOM embargo list. The unanimity principle insured that the United States could control any proposals to change the nature of control. Despite fundamental changes in the economic, military, and political relationships between the United States and other member governments, the U.S. Government continues to see itself as "The conscience of COCOM," a restraining influence against those who might subordinate the U.S. concept of collective security to international trade.

CRITICISMS OF U.S. PERFORMANCE

Many COCOM delegates and foreign government officials involved in export control perceive the United States as being too restrictive. They believe that it is not properly sensitive to the economic and political situations of other members who, in the absence of large internal markets, tend to see trade as part of their national security and not something apart from it. Various delegates and officials believe

that the control list is too long and is outdated in that it contains products and technology that proscribed countries already have. While such assertions may or may not be true, they do reflect an underlying attitude which may slowly erode the COCOM idea; that is, a feeling of "us" against "them" or the U.S. belief that it must somehow save its erring colleagues from themselves lest in their enthusiasm for trade, they damage everybody's military security.

The COCOM members are also critical of U.S. delays in processing their applications and our review of U.S. processing of the exception requests confirmed that the United States takes longer to decide on more requests than any other member. The U.S. effort to define controls as they relate to COCOM is discussed in chapter 3.

Administration of COCOM exception requests

A member government may, in effect, petition other member governments to exempt an item on a one-time basis from international control, thus permitting its sale. Such "exception requests" are reviewed by the members who, in due course, recommend full or partial approval or denial to COCOM. COCOM in turn gives an advisory opinion to the submitting government.

Foreign exception requests reviewed by the U.S. Government are sent from COCOM to State's Office of East West Trade and other interested agencies, such as Commerce, Defense, and Energy. The administration of exception requests within these agencies is substantially the same as it is for U.S. export license applications. (See ch. 4.)

Agency recommendations are returned to State and from there to COCOM. If the consulting agencies disagree among themselves, State may try to reach unanimity on an informal basis or may more formally refer the disagreement to the Economic Defense Advisory Committee (EDAC).

The EDAC is a multiagency committee of assistant secretaries from State, Defense, Commerce, Energy, and the Treasury. State's representative serves as chairman. The Central Intelligence Agency also participates as an intelligence advisor. Consultation is conducted at the staff level by Working Group I or at the office director level by EDAC's Executive Committee. If a common position cannot be reached at this level, a disagreement may be appealed to the deputy assistant secretary level or "sub-EDAC". EDAC itself formally constitutes the next appeal level.

Even though the Secretary of State administers the Battle Act, he does not unilaterally make the Government's recommendations to COCOM without the agreement of the Department of Defense and other relevant agencies.

Processing exception requests

COCOM rules provide for a decision to be made on an exception request 18 days after it has been submitted to COCOM, automatic rescheduling 2 weeks later if no decision is available, and additional weekly extensions at the discretion of the submitting member. The United States participated in negotiations about these procedural rules in 1973 but has adhered to them less than any other member and possibly less than the other members combined. The elaborate U.S. review process isn't designed to provide a response within the required timeframe; indeed, some U.S. export control officials are not aware of these deadlines.

In a February 4, 1976, report on "The Government's Role in East-West Trade--Problems and Issues" we noted that U.S. officials' distrust of other COCOM members enforcing the embargo created a restraining role for the United States in COCOM which led other members to charge the United States with commercial motivation.

In contrast to the past, some COCOM members believe that poor U.S. performance in COCOM, especially inordinate delays in reaching exception request decisions, is due to the structure of the U.S. control system and not to any sinister commercial reason.

U.S. officials at COCOM have also stated their concerns about U.S. responsiveness. For example, in July 1977, the following points were cited.

--During the first 6 months of 1977, the United States was able to decide on only 41 of the 202 requests by their first discussion dates and another 31 within the 2-week extension.

--U.S. reexport licensing of COCOM requests holds up processing; at the time, 31 requests requiring licensing had been with the United States for over 3 months and 18 for over 6 months.

--Proposals to change embargo list definitions were outstanding for long periods.

Analysis of selected cases

We examined the U.S. processing of 76 COCOM exception requests resolved in the latter half of 1977. The test cases included all rejections (12), all withdrawals (16), those approved cases submitted prior to 1977 (6), and a random selection of 20 percent of those submitted during any part of 1977 and approved (42).

Of these test cases, 28 required U.S. reexport licenses since they contained U.S. components. (See p. 15.) The United States could not reach a decision by the scheduled discussion date for at least 25 of the 48 requests, thus "reserving" its opinion for a later meeting. Other members reserved opinions on 4 of these and on one other that the United States did not. Not only did the United States reserve opinion on more requests than other members, it also reserved for longer periods of time, as shown below.

Type	Number of cases (note a)	Average days on U.S. reserve	Average of most days on reserve by any other member
Rejections, withdrawals, and approved cases from 1976	16	85.2	2.1
Approved 1977 cases	29	9.0	.3
Total	45	36.1	.9

a/ Reserve information not available in files for one withdrawal and two approved 1977 cases.

Although the U.S. delegate reserved opinion more often and longer, some responsibility for this situation was shared by other members. In 5 cases which the U.S. delegate held in reserve more than 90 days, U.S. licensing officers said the initial request contained insufficient data for processing and additional information had to be requested from submitting members, who took 85 to 266 days to respond.

The above situation reflects a criticism some U.S. officials have voiced about the performance of other COCOM members. These officials are concerned that other nations might be depending on the United States to perform detailed review efforts for them, thus increasing U.S. response time. In so doing, other members shift the onus of complicating trade relationships from themselves to the U.S. Government.

This view has given rise to the belief among some U.S. export control officials that the U.S. Government is the "conscience of COCOM," insisting on quality technical and policy reviews of exceptions requests.

U.S. inability to provide status

It has been difficult for COCOM members to discover why the U.S. export control system takes so long to reach a decision. The U.S. delegation has on occasion been frustrated and unable to answer members' inquiries. The lack of U.S. responsiveness has had a complicated impact on some members as it is difficult for them to explain the delays to their exporters.

EFFORTS TO IMPROVE U.S. PERFORMANCE

Following the October 1977 COCOM criteria discussions, the State Department called a meeting of the EDAC Executive Committee to take remedial action for improving U.S. performance in COCOM. Without such improvement, the Committee Chairman questioned the survival of COCOM as an effective means of coordinating parallel export controls. Changes that State recommended included

--give the U.S. delegate authority to approve routine requests that have clear precedents,

--give the U.S. delegate substantive comments on each request for the weekly COCOM meeting,

--identify product lines that Commerce could unilaterally review, and

--consider the possibility of substituting a Commerce general license for reexport of U.S.origin components from member countries to COCOM-proscribed destinations.

The adoption of these recommendations was mixed.

Delegate authority

Most of the agencies concurred on giving the U.S. delegate authority to approve routine requests, but further study was recommended. State instructed the U.S. delegation to begin recommending courses of action on exception requests. An analysis of the delegation's recommendations showed they were identical to the subsequent EDAC position in 25 of the 27 test cases.

Concurrent with this test, the agencies gave further study to preparation of guidance to the U.S. delegate on what constitutes "clear precedent". We understand that this matter is still under study.

The proposed delegation of authority is less than that exercised by many other delegates. Although at least one other delegate lacks such authority, most delegates have authority to decide on exception requests, and one even has the authority to decide on list review changes.

Status of requests

According to an EDAC official, implementation of the weekly status of requests has been more difficult than originally envisioned. Nonetheless, improvements have been made in providing members with more information on the status of their requests than was provided in the past.

Unilateral decisions

Following a review of the various product lines controlled by the embargo it was determined that multiagency delegation of authority to Commerce was practical for only four lines. However, the identified lines involved few COCOM exception requests so the impact on U.S. performance in COCOM was minimal. Of more importance was a Defense delegation of authority which established parameters on computers whereby Commerce could unilaterally decide on a request. State found that this procedure allows faster processing of computer requests.

Use of national controls

The recommendation to forego U.S. control over all reexports of U.S. components from members to COCOM-proscribed destinations was not approved. This idea had been considered in 1973 and rejected on the ground that national controls of the COCOM members in many instances were not as effective as U.S. controls. The matter continues under review; one choice would be to use the COCOM review process as the reexport licensing procedure for those U.S. components that are submitted to COCOM.

U.S. REEXPORT LICENSING RESTRICTS TRADE

Over one-quarter of the COCOM exception requests submitted in 1977 by other members included equipment or technology subject to U.S. export licensing. The United States

requires that any U.S.item or technology subject to export licensing must be relicensed each time it is further exported. The relicensing procedure is the same as the original licensing procedure. The United States is the only COCOM member to require reexport licensing.

This practice has been viewed as infringing on the COCOM system, implying a distrust of national control processes, and possibly losing sales of foreign firms due to delays in obtaining U.S. reexport licenses.

A comparison of the 28 exception requests in our sample that required U.S. reexport licensing with the 48 requests that did not, shows that those requiring such licenses incurred longer delays in COCOM, as shown below.

	U.S. license		No U.S. license	
Type	Number of requests	Average days to decision	Number of requests	Average days to decision
Rejections, withdrawals, and approved cases from 1976	17	286.9	17	108.6
Approved 1977 cases	11	36.7	31	28.8
Total	28	188.7	48	57.1

These delays have caused at least three member nations to require their firms to have U.S. reexport licenses before applying for national licenses and COCOM approval. This situation is causing firms to find or develop substitutes for U.S. components as a means of avoiding these delays, thus leading to a loss of U.S. exports.

ADMINISTRATIVE EXCEPTIONS

COCOM procedures allow members to simply notify it that certain types of items have been exported without recourse to the exception request procedure. Such items include spare parts and servicing, small value items, temporary exports for demonstrations, and administrative exceptions. Administrative exceptions are lower parameter items on the control list. While exception requests make up the largest volume of embargoed items exported (approximately $200 million in a year) a substantial volume of trade is also conducted by administrative exceptions (approximately $100 million in a year).

Although each member is supposed to submit monthly reports of these transactions, only major COCOM participants have filed reports since 1972, and these have been irregular in the last few years. Each country has been more than one year behind in reporting, with the average overdue period being 18 months. One country was as much as 30 months late in reporting. The U.S. Government gives only cursory reviews to reports it receives and there is no evidence that it uses them for any reason, such as for making further inquiries to the reporting government.

The United States has proposed to discontinue this reporting requirement if the technology for these items remains controlled. COCOM has not agreed to this proposal.

CONCLUSIONS

Improvement of U.S. performance in COCOM depends on improving the U.S. export licensing process. Our recommendation to consolidate export licensing management in the Department of Commerce (see ch. 4) is designed to increase the efficiency of the process and make it more responsive to exporters and to COCOM partners.

Present agency actions and proposed changes indicate that U.S. performance in COCOM may worsen, since the U.S. licensing system is becoming more, not less, complex. (See ch. 6.) If the United States cannot make decisions more promptly, it is quite possible that other members' dissatisfaction with U.S. performance will increase further, along with considerations to unilaterally decontrol specific items and/or rely less on COCOM and more on national controls. If this should happen, the future of COCOM would obviously be in doubt.

We support the current efforts to give the U.S. delegate limited authority to approve exception requests; this would allow the delegate to swiftly approve requests made routine by clear precedent. Thus, fewer requests would have to be processed by the U.S. export licensing system and its resources could be concentrated on the more significant requests.

We also support the Department of State's proposal to substitute the COCOM review process for the present dual licensing process used to review exception requests containing U.S. components. We believe a single review would still meet U.S. security concerns while eliminating the redundancy

in the present system. Additionally, it could assist U.S. trade-promotion goals by making the United States a more dependable supplier of components and, thus, reverse any trend to use non-U.S. components.

We also support a U.S. proposal to eliminate the reporting of administrative exceptions, provided the manufacturing know-how associated with the items remains controlled.

CHAPTER 3

DETERMINING WHAT SHOULD BE CONTROLLED

The Government's complex system for reviewing and determining commodities that should be controlled is complicated by vague criteria, insufficient funding, and low priorities. As a result, decisionmaking is sometimes inadequate, occasionally slow, or both. Items may remain on the control list and exporters may needlessly lose sales simply for lack of a decision. Other nations that participate in the multilateral control system are also unhappy with this apparent indecision.

The United States controls the export of 143 categories of industrial items, 105 in conjunction with the other 14 COCOM members and 38 on a unilateral basis. In addition, 57 other categories are controlled on a multilateral basis for dual industrial-military or atomic energy use or for U.S. foreign policy reasons.

REVISING COCOM CONTROLS

COCOM members review and revise the international list of industrial items every 2 to 3 years. The last revision occurred in 1976, and the list is now being reviewed again.

The Secretary of State is responsible for submitting and negotiating the U.S. position in COCOM. He is assisted in this task by EDAC, which, in turn, is assisted by Government experts from the EDAC agencies in specially formed Technical Task Groups (TTGs) and by Government and industry experts in Technical Advisory Committees (TACs). The structure of this process is shown in figure 1.

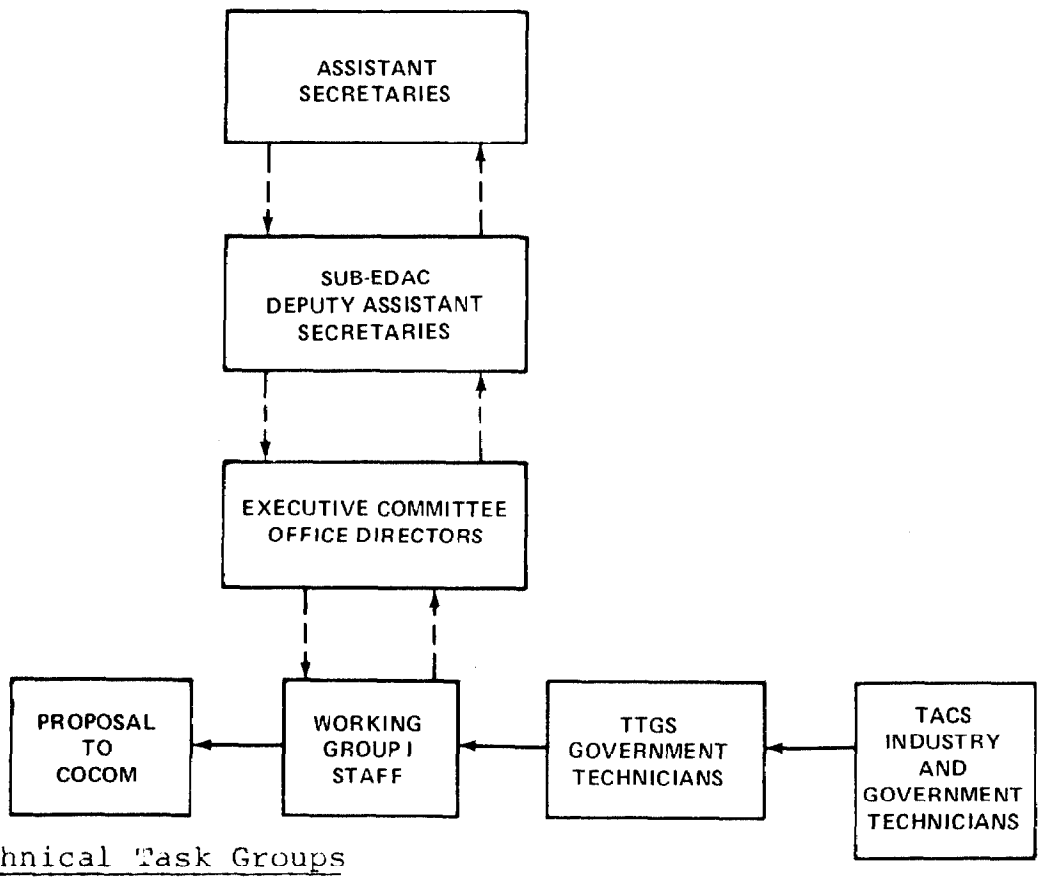
Economic Defense Advisory Committee

The routine list review work is performed by EDAC's Working Group I, guided by the Executive Committee. State's representative is the key member of the Group. He receives TTG reports and adds any appropriate policy considerations, consults with TTG and TAC members, coordinates list proposals with the other EDAC members, and in most cases compiles the U.S. list proposals made to COCOM. The Group does not generally meet together, but attempts to resolve issues are made by frequent phone calls between members.

The Executive Committee is chaired by State's Director of the Office of East West Trade. Between July 1977 and

June 1978, preceding submission of the U.S. list review proposal, the Committee met at least 26 times to discuss the approach to be taken by the TTGs and the positions to be taken by U.S. negotiators at COCOM. Unresolved problems were appealed to the Sub-EDAC during this period; for example, it was asked to resolve conflicting agency viewpoints on the U.S. computer proposal.

FIGURE 1
EDAC



Technical Task Groups

The TTGs are formed to study each category of the multinational control list to determine whether controls should be deleted, retained, or amended or should be imposed on previously unlisted items. The TTGs are also asked to study proposals made by other COCOM members to determine whether the United States should make counterproposals.

For the current list review, the chairman of the EDAC Executive Committee notified the EDAC agencies in mid-August 1977 that Defense would chair six TTGs, Commerce four, and Energy one. Disagreement developed, however, over which agency should chair particular TTGs. Defense wanted to chair

three that were assigned to Commerce; however no changes were made. This disagreement probably delayed the formation and work of some TTGs. Defense did not hold a formal meeting of its chairmen until mid-November 1977. At this meeting, a State representative emphasized the need for well-reasoned, fully documented positions, since in the earlier list review Defense representatives had made last minute major changes on some positions and the United States was strongly criticized for failing to present a unified negotiating position.

In mid-August 1977, the chairman of the Executive Committee established the issues to be addressed in the TTG reports. Reports to the Working Group I chairman were to analyze 12 areas in each controlled category, such as foreign availability, major manufacturer, extent of military and civilian use, and the possibility of extracting manufacturing know-how from the products themselves.

The reports prepared were to represent the majority and, if relevant, minority views of the TTG participants, not the position of their agencies. We noted, however, that in a January 1978 memorandum to Defense TTG chairmen, Defense stated that its representatives should present a uniform agency position on all technical items.

Technical Advisory Committees

The Export Administration Act of 1969, as amended, permits a "substantial segment of any industry" which produces commodities subject to export control to ask the Secretary of Commerce to appoint a TAC. These committees are formed to discuss and to assist the Government with technical matters, worldwide availability, use of production technology, licensing procedures, and proposing revisions to the international control list.

There is no fixed number of TACs; they are formed when there is sufficient industry interest and terminate after 2 years unless extended for a similar period. Administrative support is provided by the Department of Commerce. At the time of our review, there were six committees dealing with computers, computer peripherals, semiconductors, electronic instruments, numerically controlled machine tools, and telecommunications equipment.

REVIEW OF UNILATERAL CONTROLS

Congress directed in 1977 that all unilaterally controlled items be reviewed by December 31, 1978, to determine whether controls were still warranted; but little has been

done to comply with this mandate. As of August 1978, reviews of only 6 of the 38 such categories had been completed and the remaining 32 categories were not expected to be completed by the end of 1978.

Decisions on changing unilateral controls are made by the interagency Operating Committee (OC) of the Advisory Committee on Economic Policy (ACEP). (See organizational diagram on p. 35.) The Commerce Department chairs the OC and the other parts of the ACEP structure. Other OC members are the Departments of State, Defense, Energy, and the Treasury and the National Aeronautics and Space Administration. The Central Intelligence Agency also serves as the intelligence advisor to this Committee.

Items must be sponsored by at least one OC member to be added or deleted from unilateral control. Once sponsored, the item can be subject to a lengthy and rigorous review. Unanimity is the decisionmaking rule in the OC; objections lodged by any member must be resolved through compromise at the OC level or escalated to higher levels until a resolution is reached. The different levels in order of rank are the OC, the Sub-ACEP (deputy assistant secretary level), the ACEP (assistant secretary level), and the Export Administration Review Board composed of cabinet secretaries from the same departments.

From July 1977 to early August 1978, only 10 categories received an initial review by Commerce's Office of Export Administration, Policy Planning Division, and a policy review was completed for only six. In four cases, retention of existing controls was recommended and controls were eliminated for the other two except for shipments to certain embargoed countries, such as Cuba and Rhodesia.

In congressional testimony during June 1978, a Commerce official acknowledged it was unlikely that these reviews would be completed by the end of 1978 because they are affected by the multinational COCOM review (which is not expected to be completed before mid-1979). Revisions to COCOM controls may also change unilateral controls. Nonetheless, more expeditious and continuous review action is needed, as the following example illustrates.

Chemical fluids

These fluids are used in various aerosols, dry cleaning agents, and air conditioners and for uranium enrichment. In 1972, the fluids were deleted from the COCOM atomic

energy list since they are widely produced in Europe, including some Communist countries. Nevertheless, full destination controls for the fluids were added to the unilateral list at the request of the Atomic Energy Commission (now Department of Energy), because they can be used for uranium enrichment.

In July 1976, the items were reviewed by the OC, which recommended retention of full destination controls. The Commerce Department since 1972 has apparently disagreed with controlling the items to all destinations, recommending rather that controls be applied only to a few specifically designated countries. Commerce, however, apparently has not felt sufficiently strong about this to appeal the issue to a higher ACEP level. In justifying continued control, an official of the Energy Research and Development Administration (now Department of Energy) in December 1976 stated that:

> "I believe any reduction of control over these items at this time is inopportune given the fact that the new Administration might wish to institute quite different and possibly more restrictive controls over nuclear-related type exports."

The fluids were scheduled for review by the OC in July 1977, but no action was taken. In the meantime, a concerned segment of the industry cannot obtain a satisfactory response from the Government concerning exports of such items and sales are lost to other nations who do not see the merit in controlling items widely available from many nations.

PROBLEMS IN THE INTERNATIONAL LIST REVIEW

Initial proposals to revise the international list were to be submitted to COCOM by June 2, 1978, and counterproposals by August 18. Formal negotiations began on October 2, 1978, and are scheduled to be completed by August 2, 1979, with a new control list effective in the fall of 1979.

As mentioned previously, the international list contains 105 items or categories. Between June and August 1978 there were

--initial U.S. proposals on 39 items,

--initial proposals by all governments on 82 items, and

--U.S. counterproposals on an additional 20 items.

The United States declined to make initial proposals on 43 categories for which at least one other government made proposals and 23 categories for which no other government made proposals. In addition to its initial proposals on existing items, the United States proposed to add 16 new items.

Representatives from industry, Defense, State, Commerce, Energy, and the intelligence agencies generally spent considerable time reviewing the need for and adequacy of controls on existing items. Their effectiveness was limited, however, because the technical review groups were unable to furnish complete analyses and adequate support for their recommendations at the expected time. The inability of the EDAC committees to reach agreement further hindered their establishment of a U.S. position for some items. The TTGs made recommendations on about 27 items for which proposals by other governments had been made but not by the United States; 6 of these recommendations were for partial or complete deletion. A State official said that, since other governments were expected to submit proposals for these items, the United States deferred. Since no government made proposals for some items, they cannot be discussed in the negotiations and, thus, will remain unchanged on the list.

Limited U.S. proposals

As a result of indecision and tardiness, the number and completeness of U.S. proposals to COCOM was limited.

The initial U.S. proposals recommended decontrol of three categories because of wide foreign availability, obsolescence, or no known strategic application. The proposals for four items recommended their incorporation into three new ones. Two proposals recommended transferring items to the international munitions list. The remaining U.S. proposals either strengthened or relaxed controls on some aspects of the items or more clearly defined items under control.

The United States took advantage of the counterproposal route to submit some proposals for which it had not previously reached a decision. Three counterproposals concurred in deleting items as recommended by other governments. Other counterproposals generally disagreed with easing controls as

proposed by other governments and, in some instances, sought more information on foreign availability claimed by others.

The 11 TTGs had been asked to submit their recommendations to Working Group I by March 1, 1978, but were unable to furnish complete reports at that time. For the most part, their final reports were submitted about 2 months later.

Three weeks before U.S. proposals were due in COCOM, the State Department had received only about 60 percent of the TTG proposals. Efforts to reach mutual positions for submission to COCOM were cited as being handicapped by the (1) inability of the agencies to prepare their technical positions based on the TTG reports, (2) inability to reach definitive agency positions which would enable the preparation of final documents for submission to COCOM, and (3) lack of priority for list review preparations.

A Working Group I official wrote the U.S. COCOM representative on June 6, 1978, that only one proposal was fully agreed to by all agencies and that only a decision by EDAC's Executive Committee on May 26, 1978, permitted the Government to submit proposals to COCOM despite a lack of agency agreement.

The following examples illustrate problems encountered in preparing the U.S. position.

Item #1

The report by the TTG chairman on May 2, 1978, noted that the use for this particular type of item was limited and that some Communist countries could produce it and recommended that it be deleted from the control list.

On May 12, 1978, a draft proposal recommending deletion was prepared; however, the proposal was never submitted to COCOM. According to a State Department representative on Working Group I, there was inadequate time to review the draft and complete the final proposal. Because there were no proposals by other COCOM governments, the item will probably remain on the control list.

Item #2

The item was recommended for deletion by both the TAC and the TTG, but no proposal was submitted by the United States. The TTG submitted a report to Working Group I on April 3, 1978, stating that the item was recommended for

deletion because the technology is widely known by the Eastern European industrial community and also could be purchased from a Western European manufacturer in a non-COCOM country.

The reasons given for not submitting a proposal were that no agreement could be reached in the EDAC structure and that other countries had previously submitted proposals. In July 1978 the TTG again recommended deletion, and in August the United States, supported by two other governments, recommended deletion of the item in a counterproposal.

Item #3

The TTG recommended deletion of the item from the list in early March 1978, because it was available from many manufacturers in both COCOM and non-COCOM countries.

The United States, however, did not submit a proposal on the item. The chairman of the TTG said that Working Group I found the TTG position "unworkable" and that time did not permit the TTG to review the item again. He also said that other countries had submitted proposals on the item and, in the interest of allocating resources efficiently, Working Group I sometimes chose to give attention to more sensitive items for which other countries did not submit proposals.

A Working Group I official said that the TTG report was unworkable and that no agreement on whether or not to submit a proposal could be made within the EDAC structure in view of the TTG report's deficiencies.

Four other governments submitted proposals on the item; none proposed to delete the item, but some sought to ease control. A U.S. counterproposal submitted in August 1978 generally agreed with this view.

Item #4

In an April 18, 1978, memorandum to Working Group I, the TTG chairman stated that, based on intelligence information regarding availability in the Soviet Union, the item should be deleted. He noted that Defense, although it initially disagreed with deletion, concurred after reviewing an intelligence report.

The United States, however, made no proposal on this item because agreement on military uses could not be reached in the EDAC structure. In a counterproposal made in August

1978, the United States did not recommend deletion but, rather, took exception to certain aspects of a proposal by another government which would have eased controls.

Item #5

On April 18, 1978, the TTG chairman reported to Working Group I that the TTG members could not agree among themselves on a recommendation and asked for appropriate guidance. Working Group I asked the TTG to propose an amended item definition and on May 4 the TTG met and agreed in substance to a new definition which was completed on May 10, 1978.

The new definition, according to Defense, was intended to be more specific and, thereby, decrease the number of different interpretations which might result. The new definition was referred to the EDAC Executive Committee, but it decided not to submit it to COCOM because of differences among the members.

There were no submissions by other COCOM members, and thus, the United States could not make a counterproposal in August 1978. Current plans, however, are to submit a new definition proposal in the near future.

Item #6

A sub-EDAC agenda statement for June 5, 1978, noted that this item accounts for about half of all export control cases. The statement said that one of the main reasons for the large number of cases is that the item definition embargoes virtually everything and then, through notes, relaxes embargo coverage. An EDAC official wrote in a June 1978 memorandum to his colleagues that this procedure is inconsistent with the policy directive in the Export Administration Act which, in effect, encourages exports except for items identified as strategically significant. He said they should consider controlling only what has been identified as strategic.

Notwithstanding the item's importance, the TTG did not submit its report to Working Group I until May 8, 1978, and the United States did not make its initial proposal to COCOM until June 26--24 days after the deadline. The U.S. submission contained no proposal for related items but indicated that the United States would like to discuss this subject during the first round of the list review.

The decision to submit the U.S. initial proposal apparently was based on the desire to have a U.S. position in time for the June 26, 1978, congressional hearings. The various options and differing viewpoints were discussed during a June 19 Sub-EDAC meeting which authorized submission of the proposal.

The proposal, however, did not resolve differing viewpoints on the extent of controls that should be applied to the item. At a July 1978 meeting of EDAC's Executive Committee called to consider revisions to the just submitted proposal, the various agency representatives were unable to reach a consensus. Indeed, they could not agree whether to appeal their disagreements to a higher level EDAC committee, the cabinet-level Export Administration Review Board, or the National Security Council, and the meeting adjourned on this inconclusive note.

We discussed some of these problems with personnel from Working Group I and some TTG chairmen. A Working Group I member said that the United States did not make proposals on quite a few items because of late submissions by the TTGs and the cursory review performed by some of them. He stated that he has no leverage over the TTGs except persuasion. A Defense official who was coordinating Defense responses confirmed his views and noted that none of the TTGs chaired by Defense met their deadlines and that the quality of work performed by two of the groups was not good. He attributed this to the fact that the work of the TTG members is not funded separately but is an added assignment, with other duties receiving higher priorities.

Similar views were expressed by TTG chairmen from Commerce and Defense. A Commerce official who was late in many of his submissions said that his regular work had to take priority. A Defense official said his TTG did not cover all items because they started their reviews late and simply ran out of time. He also noted that the list review received a low priority within Defense principally because there was no budget line item against which to charge time for the work performed. The question of funding or directives for Defense participants had been raised with the Deputy Under Secretary for Defense Research and Engineering in January 1978 but had not been resolved.

FOREIGN AVAILABILITY CONSIDERATIONS

The Export Administration Act of 1969, as amended, requires that the foreign availability of comparable items be considered when applying export controls for national

security purposes. The Government obtains information on foreign availability and use from commercial and trade sources and from intelligence agencies.

During the list review, each TTG was instructed by EDAC's Executive Committee to include in their reports for each item (1) availability and major manufacturers in the United States and other COCOM countries and in non-COCOM and Communist countries, (2) quantification, to the extent possible, of civilian versus military use, and (3) identification of civilian and military uses. The reports prepared by the TTGs addressed availability and use, but information in some reports was so limited that it probably had little bearing on many recommendations.

TTG personnel presented with the same information reached different conclusions as to what constitutes comparable foreign availability and its impact on the effectiveness of controls. For example, one TTG report noted wide availability of a sub-item in Western and Eastern Europe, including the Soviet Union. Some Defense representatives, however, felt the item should continue to be controlled because those produced by Communist countries were not as accurate as those available from Western countries. In this case, the minority Defense position did not prevail and deletion of the sub-item was recommended in the U.S. list proposal to COCOM.

Several TTG chairmen indicated to us that more could be done in this area. Some of the problems noted were (1) not enough intelligence personnel were assigned to work with the TTGs, which resulted in slow or inadequate responses, (2) intelligence agencies did not make all information available to all members of the task groups, whose classification level was lower than much of the intelligence information, and (3) the intelligence agencies themselves lacked sufficient information on Communist capabilities for items, such as test equipment which lacks visibility because of its integration in a factory.

An intelligence official said that it is very difficult to obtain all relevant availability information. Industry representatives sometimes state that based on catalogs they see at trade fairs, Communist countries are making items similar to those controlled by COCOM; but on checking further, the intelligence agencies say they can't find anyone who has seen the items.

The official also said that the level of clearance was not a problem and that his agency gave the TTGs whatever

information it had. The problem was that some TTGs did not use the information well or did not distribute it properly. Furthermore, some of the intelligence personnel assigned were not even called upon by the TTGs to participate in the discussions.

Simply put, no single person was in charge of managing the foreign availability analysis. The task groups dealt with the intelligence agencies on differing bases and there was some apparent breakdown in the use of information that was available.

Export control of microprossessors

While each COCOM proposal has its own unique story, the development of the microprocessor proposal is particularly interesting from the point of view of trying to assess the strategic importance of an item which is contained in an increasing number of widely available non-strategic products.

The microprocessor, a tiny computer slightly larger than a fingernail, has the capability of room-sized computers of the past and its manufacture is one of the most significant U.S. technological advances of the 1970s.

For export control, microprocessors are differentiated according to whether they are used by themselves (unembedded), as components of products, such as in sewing machines and microwave ovens (embedded), or in printed circuit boards or assembly form.

Early in 1978, the six Technical Advisory Committees agreed to submit a joint report, since microprocessors have many and diverse applications. The report to several TTGs was not approved by other TACs and disagreement prevailed among the TACs and individuals. The report cited three fundamental assumptions for making recommendations.

1. Products should be judged on overall capability, not on what they contain, such as embedded microprocessors in sewing machines.

2. Products will not be purchased simply to remove the microprocessors.

3. No differentiation should be made between types of users of a product (consumer, commercial,

industrial) due to difficulties in differentiating their use of it.

The TAC report recommended a progressive relaxation of controls relative to the state of the art between list reviews (indexing concept) and the release of less-sophisticated, unembedded microprocessors.

The Technical Task Group partially accepted the indexing concept and recommended release of less-sophisticated, unembedded microprocessors. Defense is concerned that the potential strategic significance of microprocessors is increased when less-sophisticated microprocessors are joined to a printed circuit board or are in assembly form. It believes that products containing some types of microprocessors will be purchased in order to extract the microprocessors; therefore it could not agree with the second assumption in the TAC report. The problem, for example, is whether a sewing machine with an embedded microprocessor should be considered a microprocessor or a sewing machine.

Commerce vigorously dissented from this position, because small computers and microprocessors have become so inexpensive and have almost completely replaced the logic circuits formerly used to perform simple functions, even invading the toy market. It said that adding general-purpose computers or microprocessors to non-strategic items, such as medical x-ray machines or microwave ovens, does not make those devices strategic. Any concern that the Communists would purchase the product to extract the computing element was difficult to believe, since even the most advanced microprocessors are sold over the counter in hobby shops and electronics supply houses throughout the Western world.

In mid-October 1978, a Commerce official stated that Defense agreed to footnote the recommendation, which would permit export without validated license control of such items as microwave ovens, sewing machines, and toys containing embedded microprocessors regardless of their sophistication. However, as late as November 1978, Defense insisted that microprocessors on circuit boards or in assembly form require validated license controls. The Commerce licensing officer contended that microprocessors on boards or in assembly form can be easily obtained separately and are not difficult to assemble.

Unembedded microprocessors currently require validated licenses. The U.S. proposal in COCOM would release less-sophisticated microprocessors and use the indexing concept for more sophisticated ones.

Embedded microprocessors in some kinds of widely available products do not now require a validated license. The U.S. proposal would not change this situation.

The issue of microprocessors on circuit boards or in assembly form still divides Defense and Commerce. Additional discussions of U.S. proposals were to be held to conclude the U.S. presentation on microprocessors and other items which remained unfinished before the November 1978 recess.

CONCLUSIONS

Authority for determining what should be controlled is not adequately pinpointed and responsibility is consequently widely diffused. Thus, decisionmaking is unnecessarily complicated by conflicting priorities and lack of funds. Issues like foreign availability go unattended, because there is no one in authority to weigh conflicting claims and to make a decision on the basis of available evidence as to an issue's importance in specific list review proposals.

The United States has been criticized by other COCOM governments and by its own industry for its inability to make timely decisions. If export control is as important to U.S. national security as the Government asserts, then it is inconsistent to permit such control to wallow for lack of clear authority, priority, or funds.

In chapter 4 we make a number of recommendations to change the method by which export controls are administered, including the management of the Government's participation in COCOM list reviews. These recommendations are designed to centralize licensing management in Commerce and to centralize policymaking, including list reviews, in a multiagency committee under an executive director who is not formally attached to any export control agency.

CHAPTER 4

EXPORT LICENSING ADMINISTRATION

This chapter restates the basic argument and recommendations of our October 1978 report on the administration of U.S. export controls 1/ and contains additional information on Defense's technical evaluation system and additional recommendations concerning the administration of COCOM exception requests. In our October 1978 report, we said the Government's administration of export licensing is characterized by diffused authority and a consequent lack of accountability to the public. The "public" most intimately concerned with export licensing is the exporters themselves. Both buyers and sellers are not sure whether an export license application will be approved and/or will meet deadlines that preserve or break a business relationship.

We are not suggesting that the Government has an obligation to approve an export license application or that there are no legitimate reasons for prolonging a decision. The authority to regulate exports lies absolutely with the Government, and the Government has an obligation to sellers to insure that the decisionmaking process itself does not damage a new or continuing business relationship. If the seller is left in uncertainty about how a decision is being made, then that uncertainty may be transferred to the buyer with damaging results. During the decisionmaking process the seller should be able to ask for and receive a timely and accurate accounting of the status of its export license application. A licensing system which shifts responsibility for managing applications within and between agencies makes it difficult for the Government to provide a meaningful response.

An unintended consequence of the present system is that a time-consuming and uncertain decisionmaking process which results in an approved export license application may ironically have, over time, the force of a denial decision. Although denial decisions have the effect of severing a specific export business relationship, an unaccountable decisionmaking process may erode a business relationship because the dependability of a seller is suspect in the eyes of a buyer, even though the export application is ultimately approved.

1/Administration of U.S. Export Licensing Should be Consolidated to be More Responsive to Industry, Oct. 31, 1978 (ID-78-60).

BACKGROUND

Exports of most commercially available commodities are regulated by the Secretary of Commerce under authority of the Export Administration Act of 1969, as amended, which states that controls may be used to (1) protect the national security, (2) further foreign policy, or (3) prevent excessive drain of scarce materials.

The law, however, diffused licensing management authority by authorizing the Secretary of Defense to review any proposed export of goods or technology to certain countries if such exports will make a significant contribution to the military potential of any such country and prove detrimental to the national security of the United States.

The Export Administration Act was in part amended in 1977 to make the licensing administration more accountable to exporters. The amendments require that if

--a decision to finally approve or disapprove an export license application has not been made within 90 days, the applicant is to be notified in writing of the "specific circumstances requiring * * * additional time and the estimated date when the decision will be made";

--a decision has not been made within 90 days, the applicant shall, to "the maximum extent consistent with the national security of the United States," be notified in writing of "questions raised and negative considerations or recommendations made by any agency * * * and shall be accorded an opportunity to respond to such questions * * * in writing * * *," prior to a final decision. The Government "shall take fully into account the applicant's response";

--an application is referred by the Department of Commerce to another agency, the Government shall provide upon the applicant's request, "any documentation to be submitted * * * in order to determine whether such documentation accurately describes the proposed export"; and

--an application is denied, the applicant "shall be informed in writing of the specific statutory basis for such denial."

The House Committee on International Relations' report on the 1977 amendments noted that "all that is required [by these provisions] is that the administration be to some minimal degree accountable for its actions."

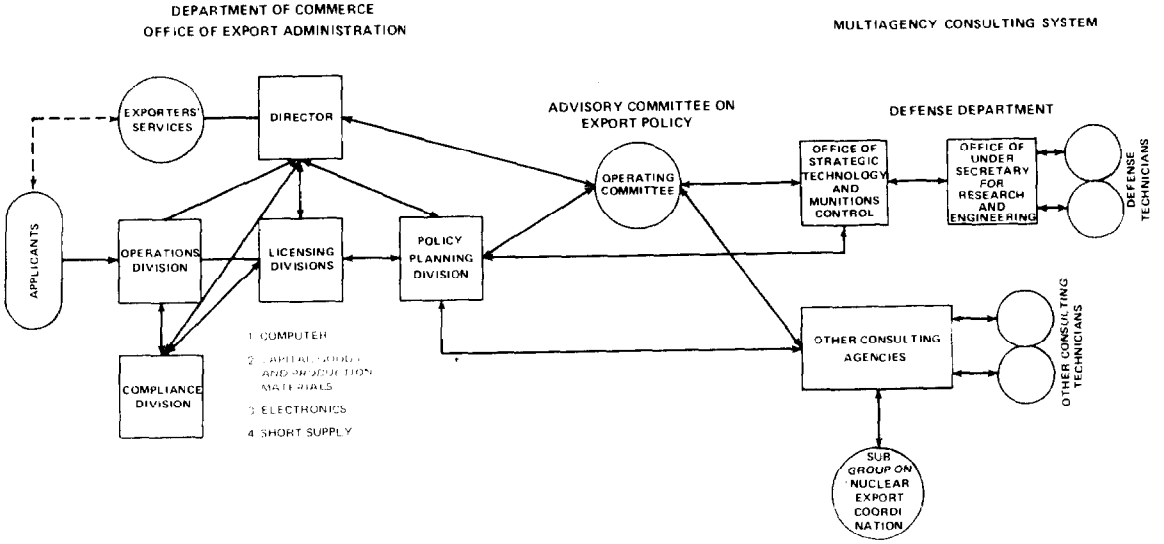
Export licensing agencies

The export licensing community consists of the Department of Commerce and a group of consulting departments and agencies. Commerce makes final licensing decisions unilaterally in some instances; in other instances, decisions usually are made only after the unanimous consent of the consulted agencies is secured directly or indirectly through a multiagency advisory committee.

The principal consultants are the Departments of Defense, Energy, and State and, to a lesser extent, NASA. The CIA serves as an intelligence advisor to the licensing community and, as such, does not normally make formal recommendations on license applications. Any other agency that has special technical knowledge considered pertinent to a particular export license application, including such Commerce agencies as the National Bureau of Standards, also gives technical advice when asked to do so.

Export license applications are managed at Commerce by the Office of Export Administration (OEA). The current structure of OEA and the consulting agency system is shown in figure 2.

FIGURE 2
THE CURRENT EXPORT LICENSING STRUCTURE



Applications referred to Defense are managed by the International Security Affairs' Office of Strategic Technology and Munitions Control (OST). 1/

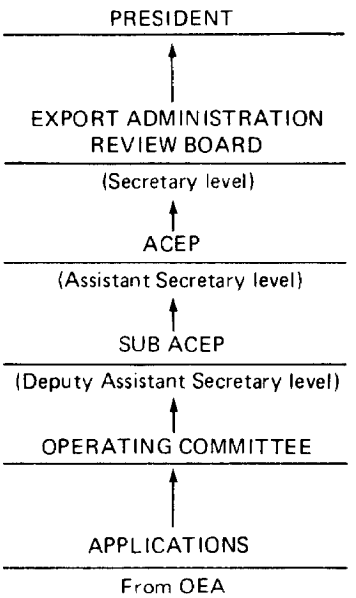
Referrals to Energy are managed by the Office of Politico-Military Security Affairs in the Division of International Security Affairs. Applications involving nuclear-related commodities and technology may also be reviewed by the National Security Council Subgroup on Nuclear Export Coordination, whose membership consists of representatives from Commerce, Defense, Energy, State, the Arms Control and Disarmament Agency, and the Nuclear Regulatory Commission.

Referrals to NASA are managed by the Office of International Affairs. Referrals to State are managed by the Office of East-West Trade, although some types of applications are sent by OEA to State's individual geographic desk officers.

Referrals are also directly sent to the consulting agencies through the Advisory Committee on Export Policy.

FIGURE 3

MULTIAGENCY ADVISORY COMMITTEE ON EXPORT POLICY STRUCTURE



The Operating Committee is the most active part of ACEP and participation in the OC discussions is limited primarily to representatives from Commerce, Defense, Energy, and State. The CIA also regularly sends a representative to the OC, but

1/Formerly the Office of Strategic Trade and Disclosure.

he does not normally make formal recommendations. Treasury is also a member, but does not often participate in discussions of OC referrals.

Interagency disagreements which cannot be resolved at the OC level may be referred to the sub-ACEP. The Export Administration Review Board consists of cabinet secretaries from Commerce, Defense, State, and the Secretary of the Treasury in his capacity as Chairman of the East-West Foreign Trade Board.

OEA DECISIONMAKING

The OEA administers the export controls of most commercially available commodities and technical data through a licensing system. There are two general kinds of export licenses, a "general license" and a "validated license." A general license is a broad authorization which permits certain exports to be made under specified conditions; an exporter shipping under a general license does not need to file an application for a license, so no license document is issued by Commerce. A validated license is a formal document issued to exporters by Commerce based on their applications; it authorizes exports of commodities or technical data within the specific limitations of the license document.

Licensing decisions are made in relation to a commodity control list consisting of a commodity description and the country groups to which controls apply. The control list comprises commodities unilaterally controlled by the U.S. Government as well as commodities voluntarily controlled by unanimous agreement of the COCOM member governments.

Export license applications are generally first received in OEA's Operations Division where they are screened for completeness. If an application is not complete it may be returned to the applicant. Complete applications are referred to the appropriate licensing division or, in some cases, to the Compliance Division for investigation of possible violations of export control regulations.

Referral of applications

All applications for export licenses are submitted to OEA. Most of these applications--generally for exports to "free world" destinations--are approved without referral to another agency. Applications which are referred to one or more of the consulting agencies are first referred from a licensing division to OEA's Policy Planning Division, which in turn refers them directly to the consulting agencies or to them indirectly through the Operating Committee.

The Export Administration Act of 1969, as amended, requires the Secretary of Defense to "review any proposed export of goods or technology" to any country to which "exports are restricted for national security purposes." It also requires the Secretary of Defense, in consultation with OEA, to determine the types and categories of transactions he should review, and many applications for "restricted" exports are not determined to require Defense review. Aside from bilateral referrals to Defense, applications are referred directly to Energy or State if a foreign policy issue is involved.

OEA has some discretion to decide whether or not an application should be referred to the Operating Committee. If OEA believes an application does not warrant formal OC consideration but should be considered by the OC agencies, it can refer the application to these agencies by "waiver memo."

In referring an application, OEA must decide whether to recommend approval or denial. OEA is clearly more than a "mailstop" for applications en route to other agencies, since its recommendations often set the "tone" of the entire decisionmaking process on any given application. After review by the consulting agencies, OEA's recommendations are usually sustained.

Since OEA is the formal licensing authority, it must decide whether or not to accept a recommendation from another agency or from OC. If it decides not to accept a recommendation, the application can be referred first to the sub-ACEP. The tendency is not to make this sort of referral but to seek unanimity at the initial level of recommendation.

CONSULTING AGENCY DECISIONMAKING

Each consulting agency determines whether or not to refer an application for technical evaluation. While authority to manage license applications is diffused between executive branch agencies and departments, it is further diffused within agencies.

At Energy, the Office of Political-Military Security Affairs does not refer all applications to its technicians; for those sent directly to technicians, Security Affairs is responsible for resolving any differences they may have. At State, the Office of East-West Trade makes referral decisions; it may or may not refer an application to geographic desk officers or such offices as the Bureau of Human Rights and

Humanitarian Affairs, the Bureau of Oceans, and International Environmental and Scientific Affairs. Certain types of applications for exports to several countries are sent directly from OEA to State's geographic desk officers for those countries.

Defense's consulting system

The accountability of the licensing system is made particularly difficult by Defense's complex technical consulting system, which is obscure to both U.S. exporters and COCOM governments that submit exception requests for their exporters. The more complex a decisionmaking system, the greater its potential obscurity because of the increased resources needed to understand how its many parts fit together. A complex, and therefore obscure, licensing system can potentially damage an exporter's reputation for dependability, which is a vital part of an export business relationship.

Current technical review system

A 1962 Defense directive assigned the Office of Strategic Technology and Munitions Control responsibility for coordinating Defense's technical advice and guidance, intelligence, and any other data and support appropriate to support its participation in the export control program. This includes COCOM list reviews, U.S. licensing, and COCOM exception request reviews.

U.S. licensing and COCOM exception requests received by OST are sent to the services and Defense agencies selected by OST for technical review. Review results are returned to OST, where any technical differences are resolved, and then combined with available intelligence data and applicable Defense policy to create a Defense position on the request. Once a Defense position is obtained, OST forwards it to Commerce for U.S. licensing cases and to State for COCOM exception requests for incorporation into a U.S. Government position.

Changes in review system

The Secretary of Defense issued an interim policy statement in August 1977 defining Defense's role in controlling exports of "critical" U.S. technology and related products. A key part of this policy was that Defense, together with other departments and agencies, would identify and continuously update a list of specific critical technologies and/or end products whose export should be restricted for national security purposes.

As a result of the interim policy statement, changes were made that separated functions and added new layers of coordination to the processing of license applications and exception requests. Under the reorganization, OST is to be responsible for defense policy aspects of export control only and coordination of technical reviews for applications and exception requests was transferred to the Office of International Programs of the Under Secretary of Defense for Research and Engineering. The services and other Defense components that perform technical reviews were directed to provide OST and the Office of International Programs with a single contact point for reviewing these requests and to coordinate with the Office of International Programs on the identification and assignment of technicians to perform the reviews. Additionally, the Deputy Under Secretary for Research and Engineering (Research and Advanced Technology) was assigned responsibility for identifying critical technologies and the technical aspects of the COCOM list review proposals.

To date, this reorganization has not been implemented. Even before the interim policy statement, identifying critical technologies had been subordinated to formulating the list review proposals as the Defense export control priority. This resulted in less emphasis on performing technical reviews. Initially compounding the problem was a disagreement as to whether the Office of International Programs or Advanced Technology should coordinate technical reviews. Although the decision was made that Advanced Technology should do the coordination, it has been unable to fill the coordinator positions required to do so; thus OST continues to coordinate the technical reviews.

Should these problems be corrected, the technical review process could still suffer from a lack of timeliness. Present plans have OST sending all requests it receives to Advanced Technology for technical review. After a trial period, it would tell OST which requests really require a technical review and which can be decided by OST. Officials in OST, International Programs, and Advanced Technology agree that initially this process will overload the technical review system and thereby probably increase processing delays, to the continued aggravation of U.S. COCOM partners and U.S. exporters.

In addition to the problems at the overall coordinating level of the technical review process, we found similar conditions and problems at the technical level.

U.S. Navy

Export control by the Navy is performed by a three-person section called OP-623. In 1977, it processed 1,200 munitions cases and 151 commercial cases. It had a similar workload in 1978.

OP-623 examines and coordinates exception requests. After receiving a request from OST, it decides whether or not to send it to a laboratory for technical review. If OP-623 decides to process a request internally, it does so in about one week; if it sends the request to a laboratory, it can take between 20 to 120 days or more to complete a technical review. In either situation, OP-623 combines the technical review, intelligence data, and any appropriate Naval policy to create a Navy position on the request. This position goes to OST for incorporation into a Defense position on the request.

While retaining the basic processing system, the Navy is attempting to improve its processing of application and exception requests. Technicians' job descriptions are being amended to include export control technical reviews as a job requirement. Also, coordinators are being designated by the Naval Materials Command and by the Naval Research Laboratories to expedite and coordinate technical reviews.

The military services and Defense civilian agencies, not OST, are responsible for funding technical reviews. OP-623 is specifically funded for export control coordination, but it has no funds for technical reviews, most of which are performed by Navy Industrial Fund activities which must be reimbursed by the contracting organization. Without funds to reimburse their activities, the Fund managers have refused to perform export control work. An exception to this situation occurred when the Secretary of the Navy directed the Fund managers to assist the current COCOM list review despite the fact that they were not reimbursed.

In an attempt to correct this problem, the Navy has requested a $2 million budget for funding technical reviews. Although Defense had rejected prior funding requests due to the low priority assigned to this work, OP-623 expects this request to be approved and once funded, plans to instruct technicians to give technical reviews sufficient priority to perform them in 15 days or less.

U.S. Air Force

Two officers in the Foreign Liaison Division of the Office of the Vice Chief of Staff are responsible for coordinating the Air Force position for export control requests. About 1,800 munitions requests and 200 COCOM requests are handled annually by the Division. Almost all COCOM requests the Air Force receives require U.S. licensing.

Requests received by the Division from OST are forwarded to its technicians for review. Requests are rarely sent out of the Pentagon due to the excessive time involved in getting a response. Also, it is rare for the Air Force to contact non-Air Force technicians on requests since the Air Force believes this would not result in purely Air Force reviews. Following receipt of the technical review and the intelligence assessment, the officers combine them with any appropriate Air Force policy to create an Air Force position on the request. This position is then sent to OST for incorporation into a Defense position on the request. This process generally takes between 2 to 5 weeks, which the Division considers a good response time.

Air Force reviews are made in relation to specific directives, one for munitions requests and another for licensing and exception requests, both of which direct Air Force personnel to support the export control program as one of their functions. According to a Division officer, Air staff support to these directives has precluded the funding and support problems that exist in the other services.

One problem the Air Force has with technical reviews is the current emphasis on moving Defense operations out of the Washington area. As activities and people are moved out of the Pentagon, the Division's pool of technicians is reduced. A Division officer is concerned that this shift will result in less complete reviews being performed due to a lack of technicians at the Pentagon or in more lengthy review if the Division's work is performed at laboratories outside the Washington area.

U.S. Army

An OST official stated that, in contrast to the other services, the Army relies on a decentralized system to provide technical reviews. OST sends requests directly to Army laboratories and receives responses directly from them. Although there is a central contact point in the Army for technical reviews, it has been so long since OST sent a

request anywhere except directly to the laboratories, it is not clear who the Army contact is. The Army subsequently furnished the names of its contacts after we brought this matter to its attention.

CONCLUSIONS AND RECOMMENDATIONS

The Congress expressed its desire to have export licensing be more accountable to exporters. This goal, however, cannot be obtained unless a decisionmaking structure is established which makes greater accountability possible.

With the current licensing system, several organizations within the Office of Export Administration as well as the consulting departments and agencies of the export licensing community share management responsibility for some export license applications. This diffusion of authority makes it difficult for exporters to communicate meaningfully with the Government about export licensing, and this difficulty in turn adds needless uncertainty to the export business.

The export licensing system should be revised to strike a balance between the need for greater accountability and the Government's legitimate responsibility to control exports for national security, foreign policy, and short-supply reasons. The main obstacle to achieving this balance is the management of export licensing by many agencies and offices within the executive branch. Fundamentally, the semiautonomy exercised by some bureaucracies should be reduced by transferring export licensing management responsibility to the Department of Commerce.

This observation does not pertain to commodities licensed by agencies other than the Office of Export Administration, such as State's Office of Munitions Control, the Nuclear Regulatory Commission, or agencies which license particular kinds of commodities, such as tobacco seed and plants.

Accountability needs to be increased by consolidating management responsibility

In making the following recommendation, we are distinguishing between managing export applications and making technical reviews or evaluations. The responsibility for making technical evaluations should rest, as it does now, with technicians in OEA and in each department and agency comprising the consulting system. By "technical evaluations"

we also mean review for foreign policy implications of a proposed export as well as review by the CIA.

We believe, however, that Defense's Office of Strategic Technology and Munitions Control, Energy's Office of Politico-Military Security Affairs, State's Office of East-West Trade, and NASA's Office of International Affairs should not have application review and referral responsibilities. The information about which technicians are best suited to review particular applications is not unique to any one office and could be readily transferred from these offices to OEA. Applications referred for technical consultation should be sent directly to the reviewing technician(s) by OEA's proposed license application management teams. The technical evaluation(s), in turn, would be sent directly from the technician(s) to the same management teams. The Under Secretary of Defense for Research and Engineering should not have responsibility for coordinating Defense's technical evaluations. Coordinating all technical evaluations should be the responsibility of OEA.

An office designated by the Secretary of Defense would be provided with copies of OEA requests for evaluations by Defense technicians and also with copies of the technicians' responses. This would give Defense the means to monitor the activity for applications it is to review pursuant to law. OEA would subsequently provide Defense with the proposed licensing decision to allow for its required response in a designated brief period of time. This procedure would not be part of the direct licensing management system, yet would enable Defense to assure itself that national security interests are properly considered.

Each OEA application management team should also be responsible for applying foreign policy and national security policy issues for applications they are responsible for. Developing these issues, however, should be the joint responsibility of OEA's Policy Planning Division and the above named offices at each consulting agency in conjunction with our proposed Export Policy Advisory Committee.

Some variation in this procedure would be required for COCOM exception requests. Commerce would make and forward recommendations to State after evaluating the requested analyses. While not required to do so by law, Commerce should, as described previously, send its proposed recommendation to Defense for policy review when sending a recommendation to State. State has the authority as Battle Act Administrator to accept or reject Commerce and Defense recommendations and can either forward its own recommendation to COCOM or refer

particularly difficult cases to our recommended Export Policy Advisory Committee.

Recommendation

We recommend that the Congress direct that export license application and COCOM exception request management responsibilities be centralized in the Office of Export Administration.

Funding of technical evaluations needs to be clearly defined

In our October 1978 report, we said that technical evaluations could be given a more certain priority if funded by OEA to be consistent with our recommendation to establish a Commerce-administered technical consulting system even though some technicians may be employees of other agencies. For export control evaluations, these technicians should be responsible to and funded by Commerce.

Recommendation

We recommend that Congress centralize technical evaluation funding in OEA.

Better system for developing export control policy needs to be established

Currently, some applications are reviewed by the multiagency Advisory Committee on Export Policy, particularly by its Operating Committee, while exception requests are reviewed by the Economic Defense Advisory Committee. Our recommendations make these Committees redundant. Our recommended technical consultation system preserves the current multiagency nature of the export licensing structure at the application and exception request review level. The multiagency structure is also preserved at the policy development level by our proposed Export Policy Advisory Committee.

We are recommending that the juncture of technical and policy comment take place within OEA's licensing divisions rather than in the Operating Committee, EDAC, or the consulting agencies.

If OEA's recommendations to the consulting agencies were routinely overturned by them, that fact would reflect adversely on the quality of OEA's licensing staff. OEA's recommended decisions are, however, almost always sustained by the consulting agencies. If it were otherwise, then one

might argue that a continued diffusion of management responsibility would be necessary to balance the inadequacies of the OEA staff.

Our proposed Export Policy Advisory Committee should be responsible for developing and recommending export control policy to the Export Administration Review Board in view of the Government's foreign trade, national security, and foreign policies. It should not review export license applications except in the most unusual circumstances.

We recognize that the distinction between technical and policy issues is not always clear; specific licensing and exception request decisions involve a mixture of these considerations. The question we are raising is whether or not (1) the proposed multiagency Export Policy Advisory Committee can develop sufficiently clear policy guidelines to be useful on a case-by-case basis and (2) technical advice and policy advice must be joined at each of the consulting agencies before referral to OEA or whether this joining can take place for the most part at OEA.

In chapter 3, we discussed the method by which the Government determines product control. We believe that future COCOM and unilateral list reviews should be managed by our proposed Export Policy Advisory Committee under the direction of an executive director, as discussed in chapter 1. Sufficient funds should be specifically appropriated to the Advisory Committee for this purpose. Both the technical advisory committees and technical task groups should, in effect, become subcommittees of this Advisory Committee so that the Committee's policy deliberations would not be conducted in a vaccum, devoid of contending technical issues. By placing the TACs under the jurisdiction of the Export Policy Advisory Committee, exporters would have increased opportunity to work constructively with officials actually charged with making export control policy. Their knowledge and experience is vital if the Government is to have a truly balanced export policy.

Recommendations

We recommend that the Congress direct that a multiagency Export Policy Advisory Committee be established at an appropriate administrative level.

In conjunction with this, we recommend that the Secretary of Commerce abolish the Advisory Committee on Export Policy, consisting of the Operating Committee, sub-ACEP, and ACEP, and that the Secretary of State abolish the

Economic Defense Advisory Committee, consisting of the Executive Committee, sub-EDAC and EDAC.

Problem applications need to be separated from routine applications

Several organizations within OEA have export license application management responsibilities. This responsibility is shared by the licensing divisions and the Policy Planning Division for some applications. Exporters' Services is also responsible for managing information about export control decisionmaking.

The first step in making an export licensing decision needs to be a separation of "routine" from "problem" applications. A Commerce study group report had suggested a "front door" licensing procedure for free world applications, but some so called free world applications are "problems." In our opinion, applications which should be referred to a proposed export license application management team in an OEA licensing division should be separate from those deemed so routine that OEA's Operations Division can approve them without referral to a licensing division.

Recommendation

We recommend that the Secretary of Commerce have the Director of OEA establish a procedure to process routine applications in OEA's Operations Division.

License management responsibility needs to be centralized within OEA's licensing divisions

Export license decisionmaking within OEA needs to be centralized if accountability is to be increased. Each "problem" application should be assigned to a management team under a team manager located in the licensing divisions. These management teams should have the following responsibilities.

--Answer requests for information from applicants and regularly inform applicants about the status of their applications during the decisionmaking process.

--Decide within the constraints of existing law whether or not an application needs to be referred to technicians at other agencies.

--Prepare all necessary documentation to accompany referrals for technical review.

--Make recommendations for applications which do not need technical reviews and forward such recommendations to the directors of their licensing divisions and OEA's Director for review and decision.

--Apply policy guidance from the Export Policy Advisory Committee.

--Coordinate technical evaluations from the consulting agencies.

Recommendation

We recommend that the Secretary of Commerce have the Director of OEA locate all "problem" export license application management responsibility within OEA's licensing divisions. To facilitate this, we also recommend that the (1) Exporters' Services be abolished and its functions transferred to the licensing divisions and (2) Policy Planning Division's application review and referral routing functions be transferred to the licensing divisions.

Exporters need better opportunity to respond to denial recommendations

If an OEA licensing division director recommends that an application be denied, the applicant would be invited to defend his application before a "license application appeal committee" consisting of officials from OEA's Policy Planning and Licensing Divisions. The consulting technician(s) or the OEA application manager who recommended the denial would be directed to support and defend the decision and to answer any rebuttal the applicant might make. The committee would seek a compromise acceptable to both applicant and the dissenting technician(s). If no compromise is possible, the committee would be directed to make a recommendation to approve or deny the application to the OEA Director, who would make the final licensing decision unless the Secretary of Defense appealed the proposed decision to the President under current law.

We recognize that it is not always prudent to discuss with applicants the basis for some denials. For this reason, discussion before the proposed appeal committee might be limited to issues not considered sensitive to the Government.

The ACEP structure, at least theoretically, is a prelicensing decision appeal structure. Our proposed "license application appeal committee" preserves this appeal concept in the decisionmaking process. We believe that the number of possible appeal levels is less important than the creation of a single forum where an applicant can address negative considerations raised by the Government about the technical aspects of a proposed export. The proposed license application appeal committee is a necessary and sufficient prelicensing decision appeal structure.

Recommendation

We recommend that the Secretary of Commerce have the Director, OEA, establish a prelicensing decision "license application appeal committee" in OEA.

Increasing accountability and timeliness of export license decisionmaking

The time it takes to make an export licensing decision depends in part on the structure of the decisionmaking process. It does not make sense, in our opinion, to address decisionmaking timeliness without considering the kind of structure that would make more timely decisions possible.

We cannot say that revising the structure of the export licensing administration will make decisionmaking more timely; strictly speaking, that is an empirical question that would need to be tested. In the absence of such a test, there are several reasons these revisions ought to make decisionmaking more timely.

By fixing management responsibility in OEA and directly linking OEA application management teams with their consulting technicians in other agencies, a number of existing review groups in OEA and in the consulting agencies can be eliminated. This linkage should reduce the paper flow between agencies, since applications which OEA refers to the consulting agencies but which are not now being referred in turn for technical reviews should, under our proposal, remain in OEA. The paper flow within OEA would be reduced, since the Policy Planning Division would not be directly involved in the license application decisionmaking process.

Although several possible sources of delay in the decisionmaking process remain at the technical review level within OEA's licensing divisions and in the proposed license application appeal committee, they would be reduced and should be more identifiable to both Government personnel and exporters.

CHAPTER 5

COMPLIANCE WITH CONTROLS

Various departments and agencies participate in a program to enforce compliance with export control policies and procedures. U.S. enforcement activities are centered in the OEA's Compliance Division and overseas efforts are performed through the Department of State. The enforcement of parallel controls by other governments depends on the voluntary cooperation of the COCOM countries.

Any effort that would be comprehensive enough to insure compliance with controls would probably be cost prohibitive. However, better use could be made of the available resources. Too much effort is spent on after-the-fact documentation reviews that accomplish little; equivalent resources could be better used in preventive investigation work. Moreover the preventive efforts themselves are not allocated on a reasonable geographic nor time basis and reallocation of these efforts might be merited. Insufficient attention has been directed toward determining the effectiveness of the program for monitoring the use of computers shipped to Communist nations, which could be defeating U.S. efforts to incorporate the monitoring program in the licensing agreements.

OEA's COMPLIANCE DIVISION

The Compliance Division has three branches--facilitation, intelligence, and investigations--with personnel in the Department of Commerce and at two locations in New York City. In September 1978, it had 29 employees and, on a reimbursable basis, the services of 25 staff years from the Bureau of Customs.

The Division's major effort is to enforce the licensing requirements for strategic commodities and technology. It also enforces short-supply controls and those made for foreign policy reasons. The Division had been enforcing the prohibition against restrictive trade practices or boycotts, but during 1979 this function is to be transferred to a newly created group.

Prelicensing checks

The intelligence branch helps licensing officers to determine whether or not a validated export license should be issued. To do this, it relies on information furnished

by the Department of State, the intelligence agencies, and trade or industry sources.

Licensing officers refer an application to the Compliance Division if a firm or individual involved is listed on an application screen or on the economic defense list or if they believe the application and supporting documentation provide insufficient details. An application screen contains the names of firms or individuals believed to be involved in illegal export or diversion of controlled commodities. The economic defense list, published periodically by the Department of Commerce, is a comprehensive index of firms and individuals which have been denied U.S. export privileges or have been listed as a precaution on the basis of allegations received.

The application also is compared with other intelligence files and with world trade directory reports which contain business information about foreign firms. If further inquiries on overseas firms are considered necessary, the Department of State is asked to have its overseas post prepare a world trade directory report and/or make a prelicense check. The prelicense check may involve a visit to the designated end user to learn more about the user's financial condition and to confirm its intended use of the commodity. After the information is developed, a recommendation is made for issuance or non-issuance of the license.

Approximately 40 prelicensing checks per month are made. Some additional investigations are made when there is reason to believe diversion or transhipment to proscribed destinations might occur. The investigators also initiate postshipment checks (see p. 56) and perform special reviews of all license applications for particular equipment categories to determine whether further review action should be initiated. In most of these cases, licenses are approved. The extent to which the work of the intelligence branch precludes attempts to ship controlled goods to proscribed countries and end users cannot be accurately determined.

The branch has only one full time investigator working on prelicensing checks. The acting branch chief often works on unrelated administrative duties for the Compliance Division, and the position of branch chief had been unfilled for many months. The extent of the workload problem is illustrated by the fact that during a 6-month period eight investigative cases were received, a similar number were completed, and the backlog continued at a level of 60.

Another problem is that the branch receives limited intelligence information. Some progress has been made, however, as the intelligence agencies are working in conjunction with the State Department on criteria or guidelines to be used by overseas personnel in reporting possible diversions of certain equipment. Also, firms exporting controlled items have been asked to look for signs that overseas customers might be attempting to violate controls and to report these to the Compliance Division.

Physical inspections of cargo shipments

The facilitation branch spot checks cargo at U.S. international terminals for validated licenses and legality of exports.

During a 6-month period, 3,251 physical inspections in 17 cities resulted in 7 cargo seizures and 36 detentions. The branch's office at J.F. Kennedy airport is staffed by three Commerce employees and two Customs inspectors on a reimbursable basis. It made 2,857 of these inspections in New York City and 151 in Boston and Philadelphia. Inspections in the other 14 cities were made by the six personnel in the branch's Washington office. These ranged from a low of one in Norfolk to a high of 87 in Los Angeles.

The high concentration of inspections in New York City compared with other cities and parts of the country may not be warranted. The inspections in New York accounted for about 88 percent of the total, while New York area ports probably account for no more than 55 percent of the onward shipment of controlled items overseas. The ports in California account for about 25 percent of such shipments, but inspections at 3 ports in that area totaled 135 or only about 4 percent of total inspections.

Inspections are not only limited geographically but also are rarely made at night or on weekends, even though many flights leave at these times and at some terminals cargo moves in and out the same day. The branch supervisor in New York stated he would like to make inspections at night or on weekends but lack of overtime funds does not permit such activity .

Six of the seven cargo seizures, all involving shipments to non-Communist countries without validated licenses, occurred at New York City ports and one in Los Angeles. Six shipments were released upon application for validated licenses, and disposition of the seventh was still pending at the

time of our review. One firm was assessed a penalty of 5 percent of the value; penalties were yet to be assessed for the other firms.

In February 1978, the Compliance Division Director instructed that extensive checks be made on detained cargo to insure that validated licenses were required and that the exporters knew, or had reasons to know, about the requirements before formal seizures were made. In New York, 36 shipments were detained and in 3 other cities a total of 10 were detained pending clarification. In 29 cases, no licenses were needed or they had previously been obtained but not shown on the shipping documents. Additional descriptive information was needed to complete the shipping documents for 3 cases, and validated licenses were required and obtained for the other 4. Most of the detained shipments were released the same day, but one took almost 2 months before a validated license was obtained and the shipment released.

Although no major violations were discovered during these inspections, spot checks of cargo can serve as a deterrent to would-be violators and can put shippers on notice who unknowingly violate export controls.

Postshipment document reviews

Three types of postshipment document reviews are made involving examination of the shipper's export declaration, including (1) a review by the Bureau of Customs to see that there is a declaration for every shipment over $250 listed on an outgoing carrier's manifest, (2) a review by OEA of declarations for cargo shipped under a general license, and (3) an examination by OEA of any discrepancies noted in comparing data on approved validated licenses with that contained on the declarations.

Customs review

In fiscal year 1977, OEA reimbursed Customs $254,000 for 18 staff years' service in checking the manifests. This review has been made for years, but the branch chief could recall no cases that assisted enforcement activities.

Discontinuance of this service by Customs has been under discussion since at least November 1977, and in August 1978 Commerce told Customs that it will not fund this service in fiscal year 1979.

General license review

The review is made to ascertain through the descriptive data on the customs declaration whether previous shipments should have been made under validated rather than general licenses.

Each month the facilitation branch requests approximately 5,000 declarations from the Bureau of Census (provided to Census by the Bureau of Customs) that fall into certain consignee country and commodity categories. In a typical situation, about 70 of these are initially questioned but, after additional information is obtained from shippers, only 12 or so are determined to need validated licenses. Warnings are then issued to the exporters, usually by telephone. The shipments generally have a low dollar value and involve firms which probably had no prior knowledge of the need for validated licenses. Occasionally a case is referred to the investigations branch for further examination.

Commerce estimates that review of shippers' export declarations takes 2 to 3 man days a month. There is marginal potential for uncovering serious violations and limited deterrent value, since it depends almost solely on what the exporter reports on his declaration. Therefore, continuation of such reviews should be considered against the overall needs and resources of the Compliance Division.

Validated license comparison

OEA's Operations Division receives information from the Bureau of the Census on shipments made under validated licenses. The information is based on the shipper's export declaration furnished to Census by the Bureau of Customs. The license number and associated information is then compared to OEA's computerized listing of approved license applications, and discrepancies, such as overshipments, are forwarded to the Compliance Division.

A few inquiries are made on possible overshipment violations, but up to 95 percent of total errors noted are either recording mistakes or unintentional errors that do not necessitate punitive action. More than $300,000 is reimbursed to Census for its services, and OEA acknowledged that it is difficult to justify continuance on a cost-effective basis. As a result, in September 1978 the acting Compliance Division Director said it is planned to limit the scope of this comparison to reduce costs.

OVERSEAS POSTSHIPMENT EXAMINATIONS

There are two programs in foreign countries to inspect commodities that have been previously licensed by the Commerce Department. One, called the safeguard program, is under COCOM and is performed by industry representatives in Communist countries. The other is a U.S. program performed by U.S. overseas posts. The purpose of the programs is to insure that critical and strategic commodities are used for the purpose the license was issued. If they are not, future shipments may be denied to the violators and administrative and criminal penalties may be applied to those persons or firms under U.S. jurisdiction.

Safeguard program

The safeguard program went into effect in April 1976 with the new COCOM list requirements for computer systems sold to Communist countries. Under this program, the license is granted pursuant to several conditions, including the stipulation that:

> "Responsible Western representatives of the supplier will have the right of access to the computer facility and all equipment wherever located during normal working hours or at any time when the computer is operating and will be furnished information demonstrating continued authorized application of the equipment."

Each licensing agreement also states the frequency of inspections required by the Western representative, such as (1) monthly for 2 years and quarterly for the next 4 years, (2) quarterly for 6 years, or (3) quarterly for 3 years. A computer printout at Commerce showed a total of 107 such open agreements. However, the licensing officer in charge of the data bank said the computer data base probably doesn't contain all safeguard agreements. As time permits, he is trying to get all the data into the computer from the licensing files. He further stated that the data is used only to see if there is a precedent when a new license application is received. The computer operation has no system for determining whether reports are submitted or if they are on time.

OEA's Computer Division has recently designated a licensing officer to review the reports and the Operations Division has been designated to insure that the reports are forwarded promptly. The licensing officer said he scans the reports to see whether anything appears wrong but so far he

hasn't found anything. He said, however, that he doesn't know if all required reports are sent in and he feels that there is a very poor follow-through on the safeguard program. The Operations Division is attempting to implement a system of controls for determining what firms are required to submit reports and how frequently. Due to staff limitations, the system had been only partially implemented.

We asked to look at the required reports for three transactions. One was for a shipment authorized in early 1977, but as of April 1978 the processing branch had no reports or control sheet set up for the U.S. company. Following our inquiry, the licensing officer contacted the firm and it submitted a report with a letter asking whether the reports are required on a quarterly or yearly basis. In this case, the license conditions require monthly reports for 2 years and quarterly reports for the next 4 years.

In the second case, the processing branch did not have the transaction entered on the control sheet for shipments by the U.S. company. The licensing officer checked the license file and noted that the license conditions provided for the reports to be made to another COCOM country since the main component was manufactured there. This transaction thus should have been excluded or stated separately in the computer data base.

For the third case, the processing branch did not have the transaction on a control sheet but did have a cover letter from the firm dated March 14, 1978, that had quarterly reports attached for December 1976 and April and August 1977. Thus, the reports were not submitted at the time they were required and the two most current reports due had not been submitted.

In addition to these problems, Commerce personnel often do not know when the equipment was installed unless the exporter tells them; therefore, they are uncertain of the due date for the first report.

Inspection by overseas posts

At the request of the Commerce Department, U.S. officials overseas examine some strategic commodities that have previously been licensed for export. The requests are usually based on suspected diversions.

From April 1977 to January 1978, only five such checks were initiated. Two concerned the diversion of a U.S. shipment consigned to a nearby country. In attempting to learn

where the goods may have gone, U.S. officials sought information from two other countries in April 1977. The evidence obtained was not conclusive as to the location of the commodities, but it did indicate that they may have been shipped to an East European country.

The other three checks were made during May, June and July 1977. The first check showed that equipment reshipped from another country was being properly used; the second accounted for the equipment, but there was some question as to how similar equipment managed to get to a Communist country; and the third disclosed that the equipment was not at the consignee's location and probably had been diverted to a Communist country.

A special agreement with regard to postshipment checks was made under a memorandum of understanding signed in January 1977 between the United States and another country. Postshipment checks were then initiated by OEA's Policy Planning Division in February 1978. The requested checks were made in March by a U.S. Embassy official, who was accompanied by an official from the host country. No discrepancies were noted, but difficulty was encountered in those instances where U.S.-origin parts were built into other pieces of equipment.

Although the number of postshipment checks has been limited, a State Department official in the Office of East-West Trade has suggested to Commerce that the number be increased. He said the checks would be a deterrent to diversions and that he did not believe the additional work would place any unusual burden on the Embassies. However, during our visit to three U.S. overseas posts in June 1978, we found that a low priority is assigned to postshipment and prelicensing checks and that often the work is performed by personnel who do not specialize in this type of activity.

INVESTIGATION OF VIOLATIONS

Formal investigations of export control violations are carried out by the Compliance Division's investigation branch and New York field office.

The investigation branch ordinarily receives violation cases from the facilitation and intelligence branches long after the goods have been shipped. Depending upon the nature of the violation, the branch may issue a warning, invoke an administrative penalty, or refer the case to the Office of the General Counsel for possible prosecution. Some cases may be closed for lack of sufficient evidence.

From April through September 1977, the investigation branch recieved 84 new cases involving widely varied export violations for strategically controlled items. Warning letters were sent to some firms for shipping more parts than the licenses authorized, and in other cases the firms were fined. For example, an individual was fined $2,500 and placed on probation for 3 years for conspiring to willfully violate regulations by exporting stragetic equipment to a proscribed country without a validated export license.

ENFORCEMENT BY OTHER GOVERNMENTS

COCOM member nations have agreed to insure that their strategic items and those of other members are not shipped or diverted to proscribed destinations or consignees. However, U.S. officials are concerned about growing diversions by foreign firms and question whether the United States is taking adequate steps to remedy the situation. They said some countries need to apply more strict controls and enforcement activities. United States industry representatives also have expressed concern to the U.S. Government about overseas diversions or shipments from other countries. There is no practical means available to elicit action other than through diplomatic persuasion.

For some cases, the U.S. delegate is asked to obtain additional information from other members on alleged diversions or sales of controlled items to proscribed destinations; however, the other nations do not always respond to such requests.

COCOM nations participate in the safeguard program to control the use of computers. Each individual country manages its own program after COCOM has approved the specific requirement in each transaction. However, required reports are not provided to the other governments or even to COCOM itself. Therefore, the adequacy of such controls as exercised by others cannot be specifically determined by the U.S. Government.

CONCLUSIONS

The Office of Export Administration's Compliance Division acts as a deterrent to would-be violators of U.S. export regulations, uncovers some instances where U.S. export laws have been violated, and assists in providing the basis for criminal or administrative sanctions against violators. However, OEA operations could be improved through:

--Reallocating its resources to give greater attention to preventing illegal exports and diversions and less attention to routine after-the-fact documentation reviews; action has been initiated to stop funding the comparison of shippers' export declarations to the manifest.

--Considering the feasibility of having cargo inspections made geographically according to volume and on a 24-hour, 7-day a week basis.

--Using the safeguard program more effectively; this program has been emphasized in the U.S. review of exception requests to provide a degree of control, but it has been largely disregarded in the final analysis. If the safeguard program is to be an effective tool, OEA must have accurate information on what reports are needed and when and a system for proper review to assure that it is working.

The United States can probably do little more regarding worldwide compliance than continue to use diplomatic persuasion, since COCOM is not based on a formal agreement among the members.

RECOMMENDATIONS

We recommend that the Secretary of Commerce:

--Reallocate the resources of the Compliance Division to increase the amount of prevention work and decrease the amount of postshipment documentation work.

--Consider the merit of making cargo inspections on a more reasonable geographic basis and allowing for these inspections to be made at any time.

--Direct that management of the safeguard program be increased to properly insure its effectiveness.

CHAPTER 6

THE FUTURE SHAPE OF EXPORT CONTROLS

Since 1974, the Government has attempted to systematically clarify the relationship between technology and product control. The first step was to settle on an analytically useful definition of technology, then to specify particular or "critical" technologies and associated products that should be rigorously controlled, and lastly to write a set of guidelines that, hopefully, will prove useful in the export license decisionmaking process.

DEFINING TECHNOLOGY CONTROLS

The importance of controlling the export of technology was asserted in the Defense Science Board Task Force on Export of U.S. Technology's 1976 report, "An Analysis of Export Control of U.S. Technology--A DOD Perspective", otherwise known as the Bucy Report, after the Chairman of the Task Force, J. Fred Bucy.

According to the Bucy Report, "design and manufacturing know-how are the principal elements of strategic technology control" and "products of technology, not directly of significance to the Department of Defense should be eliminated from controls." (Underscoring supplied.) Exports that should receive "primary emphasis" were categorized as

--arrays of design and manufacturing know-how;

--keystone manufacturing, inspection, and test equipment that completes a process line and allows it to be fully utilized; and

--products accompanied by sophisticated operation, application, or maintenance know-how.

The report posed a set of questions about products which it said ought to be asked relative to an export control decision.

--Does the material or product have a significant military utility in itself, based on performance capabilities?

--Does it provide critical manufacturing capability, supportive of strategic products or technologies?

--Does the transaction involve active steps toward the transfer of technology?

An export control official has noted that the Bucy Report seriously underemphasized the importance of controls for strategic items, pointing out that few items covered by the COCOM export control list could not arguably be grounded on one or another of these questions.

Current U.S. export controls cover both technology and the products of technology. Regulations currently define technology in terms of "technical data," meaning "information of any kind that can be used, or adapted for use, in the design, production, manufacture, utilization, or reconstruction of articles or materials". The data may be in tangible form, such as a blueprint, or intangible form, such as a technical service. While most items on the Government's commodity control list are multilaterally controlled to all destinations, validated export licenses are required for technical data only to Communist countries.

Relatively few applications are made to export technology in the form of technical data. In 1977, 299 applications were submitted and only 3 were denied. The total overall export applications approved in 1977 totaled 50,737, only 348 of which were denied.

In August 1977, the Secretary of Defense, drawing on the Bucy Report's recommendations, issued an interim policy statement on export control of critical U.S. technology and related products. Critical technology has been referred to as that "small set of technologies whose acquisition by a potential adversary could make a significant contribution to the military potential of such a country and would prove detrimental to the national security of the United States." The Secretary's statement related the concept of technology control to product control by noting that controlling critical technology also requires controlling associated critical end products that can "contribute significantly in and of themselves to the transfer of critical technology because they (1) embody extractable critical technology and or (2) are equipment that completes a process line and allows it to be fully utilized." Presumably if an end product does not meet this two-part test there would be less reason to deny its export. The policy statement also said that Defense will "request the Department of Commerce to alter existing regulations so as to require a validated license for proposed exports of critical technology to all destinations". To date Defense has not made this request of Commerce.

IMPLEMENTING TECHNOLOGY CONTROLS

After issuing the Bucy Report, Defense began to define in detail the relationship between technology and product control. In successive steps, it separated technologies which are considered critical from those which are not. By mid-1977, three preliminary technology lists and associated end products were being studied.

1. 106 items whose technology is inherent in deployed strategic and tactical systems which ought to be protected.

2. 178 items whose technology the Soviet Union and People's Republic of China was thought to need.

3. 140 items whose technology is considered exploratory but which could have a significant potential for increasing U.S. military capability.

These lists are not mutually exclusive, and Defense has increasingly refined its lists of candidate critical technologies. In the latest list, the nine candidate critical technology areas below have been selected for intensive review by industry experts.

1. Array processor technology

2. Acoustic array technology

3. Computer network technology

4. High energy laser technology

5. Structures, materials, and processes

6. Large-scale integration, integrated circuit production technology

7. Jet engine technology

8. Infrared detection technology

9. Wide-body aircraft technology

A Defense official has characterized this effort as a "refocusing [of] U.S. export control regulations," but also notes that there "will always be some number of products which have to be controlled because they have a large intrinsic military value, or can be readily reverse-engineered". If one agrees with the proposition that products controlled through COCOM are controlled precisely because the United States and other participating governments determined that they have large intrinsic military value, then it is difficult to see how Defense's critical technology exercise constitutes a "refocusing" in the sense of shifting the emphasis from product control to technology control.

Defense is, however, advertising this effort as "strongly enforcing control on the export of selected critical technologies while simultaneously relaxing many existing product controls." The evidence to date is not sufficient to support the view that this is indeed the future shape of export control. Defense's own critical technology analysis is only partially complete. By describing the future shape of export control as a simple tradeoff between technology and products, Defense is running the risk of promising more than it can deliver.

Indeed, as a result of the critical technology analysis, if controls over products are substantially reduced for reasons other than foreign availability, then one might conclude that export control decisionmaking has heretofore been made in the absence of systematically collected data about what should and should not be controlled.

On the other hand, the emphasis on critical technology could result in a data-rich, systematically developed set of guidelines which can serve as the basis for export license decisionmaking. What is important about this analysis is that the Government, and particularly Defense, is attempting to systematically make export control policy that can be applied to any given license application.

In our October 1978 report, "Administration of U.S. Export Licensing Should Be Consolidated to be More Responsive to Industry," we asked whether or not a recommended multiagency Export Policy Advisory Committee can develop sufficiently clear guidelines to be useful on an application-by-application basis by licensing personnel. Defense replied that "export policy is generally determined on a case-by-case review basis where precedents are set which evolve into policy judgements". We continue to believe that policy should be <u>applied</u> to, not "determined" by,

case-by-case review. We believe that policy guidelines can be systematically developed by a designated policy-making group without continuous reference to the application stream. Defense's reply to our previous report was curious, since the critical technology analysis and the prospective guidelines which will hopefully follow from that analysis is the kind of policymaking we had in mind when we discussed the subject.

The critical technology analysis is far from complete, nor can it ever be complete so long as there is technological innovation and creation of new militarily significant products which are not widely available from non-COCOM sources. A Defense-led task force report on critical technologies is due in April 1979, and the current analytical effort will not be fully completed before 1980.

Since multilateral export control is a necessary part of the Government's own control system, the critical technologies analysis must become part of COCOM's control system. Implementing the critical technology approach in COCOM will, however, produce special problems. At least two participating members have no laws to control technology; others have national laws, but they are applied in a variety of ways. The current COCOM list review will involve no major attempt to clarify the relationship between technology and product control for specific items. Since COCOM list reviews are held once every 2 or 3 years, this whole effort cannot be fully implemented internationally until after the next list review.

AMENDING EXPORT CONTROL LAW

The Export Administration Act of 1969, as amended, expires on September 30, 1979. The future shape of export control will thus be partly determined by its successor. The major assumption underlying several recommendations in our October 1978 report and many recommendations in this report is that Congress must involve itself more in defining the kind of administrative or decisionmaking structure it believes will make the policy ends of export control possible. Legislative exhortations to reach licensing decisions in a specified period of time, for example, are not enough if Congress does not state how it expects the executive branch to realize that or any other export control goal. In our previous report, we said that the attainment of policy goals is constrained and can be frustrated by a particular decisionmaking system. Policy goals and administrative systems are thus bound together, and attention must be paid to both when either one is considered.

Legislation introduced in the 95th Congress would, if passed, have made Congress an active part of the export license decisionmaking system by giving it authority to veto certain kinds of applications approved by Commerce.

Aside from the dubious wisdom of further diffusing authority to make licensing decisions, it should be noted that many decisions are currently made on very technical grounds. It is not sufficient to say that the Commodity Control List is simply a list of products; what in fact are controlled are those products defined by specific operating characteristics, such as

> "data communications equipment employing digital transmission with digital input and output * * * designed for operation at a data signalling rate in bits per second * * * numerically exceeding either (i) 4,800; or (ii) 160 percent of the channel (or subchannel) bandwidth in Hertz * * * [where] 'data signalling rate' is as defined in ITU Recommendation 53-36, taking into account that for non-binary modulation, "bauds' and 'bits per second' are not equal * * *."

Congressional involvement in individual licensing decisions would mean sorting through many technical evaluations and arguments in order to determine their competency as a basis for judging the correctness of the Government's licensing decisions.

We believe that, rather than participating in individual licensing decisions, Congress should clearly define the kind of executive branch decisionmaking structure in which it can have confidence and which it believes will faithfully reflect congressional intent.

PRESIDENTIAL REVIEW

Future export controls will also be shaped by Presidential Review Memorandum (PRM 31) on East-West technology transfer. This study has been completed and implementation has begun. Under the PRM 31 action plan, the National Security Council, Office of Science and Technology Policy, and Arms Control and Disarmament Agency now have export control responsibilities. An ad hoc technology transfer group has been created within the National Security Council to deal with broad technology transfer policy issues, while at the export licensing level representatives from the three agencies may participate in interagency operating committee discussions. A participant in the PRM 31 process has written

that "it may also be necessary to create a small central staff unit, affiliated with the NSC, to monitor the broad span of East-West economic relations and to provide the bridge to the foreign policy-making process."

We do not believe the problems associated with diffused management authority can be solved by adding more Government agencies to the licensing process. This is not a regulatory activity which suffers from a lack of bureaucratic attention, and better attention, not more attention, is needed at the licensing level. Like legislative attempts to make Congress a part of the licensing system, the reported thrust of PRM 31 is, we believe, a step in the wrong direction. It is difficult to reconcile PRM 31 with the President's stated objectives in his recent export policy announcement to reduce domestic barriers for exporting; they do not seem wholly harmonious.

CHAPTER 7

SCOPE OF REVIEW

Our review was directed toward determining the problems with and potential for improving U.S. export controls for national security and foreign policy purposes and U.S. participation with COCOM member nations in applying multilateral controls. Since the major dilemma and the subject of most controvery involves control of commercially available commodities which are regulated by the Secretary of Commerce, our review was limited to that aspect of control. The report does not address the other control programs, such as those for munitions items licensed by the Department of State or for nuclear material and production facilities licensed by the Nuclear Regulatory Commission.

We researched papers and reports; examined and analyzed appropriate records and files; interviewed officials in U.S. Government agencies and COCOM member governments, exporters, and officials and members of trade associations; and observed a number of official meetings conducted on the control of commercially available commodities. We also talked with cognizant congressional committee staffs and other interested congressional parties to ascertain their areas of special interest.

The primary agencies contacted were the Departments of Commerce, State, Defense, and Energy. Additional organizations contacted included the National Aeronautics and Space Administration, Central Intelligence Agency, and Executive Office of the President.

Most of our review was conducted in Washington, D.C., but we did talk with industry representatives elsewhere in the United States, with Commerce's Compliance Office in New York City, with the U.S. delegation to COCOM and delegations of other major COCOM nations at COCOM headquarters, and with U.S. Embassy and cognizant foreign government officials in three different member nations.

To facilitate our review of records and files, we selected (1) 119 U.S. export licensing cases at random from those which were denied or were not approved on a timely basis, (2) 34 COCOM exception requests from those which were denied, withdrawn, or not approved promptly, and (3) 42 approved COCOM exception requests at random. We also examined selected cases concerning compliance and the current U.S. efforts to revise the COCOM control list.

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