United States General Accounting Office

GAO

Report to the Chairman and Ranking Member, Subcommittee on Readiness and Management Support, Committee on Armed Services, U.S. Senate

May 2001

EXPORT CONTROLS

Regulatory Change Needed to Comply with Missile Technology Licensing Requirements

GAO-01-530

G A O
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United States General Accounting Office
Washington, DC 20548

May 31, 2001

The Honorable James Inhofe
Chairman
The Honorable Daniel Akaka
Ranking Member
Subcommittee on Readiness and
Management Support
Committee on Armed Services
United States Senate

Concerned about missile proliferation, the United States and several major trading partners in 1987 created an international voluntary agreement, the Missile Technology Control Regime, to control the spread of missiles and their related technologies. Congress passed the National Defense Authorization Act for Fiscal Year 1991 to fulfill the U.S. government's Missile Technology Control Regime commitments.[1] This act amended two governing U.S. export control statutes: the Export Administration Act of 1979, as amended, which regulates the export of dual-use items (those having both military and civilian applications), and the Arms Export Control Act, as amended, which regulates the export of military items. The Department of Commerce licenses most dual-use items, while the Department of State licenses military items. Congress is currently considering the passage of a new Export Administration Act because the current statute is set to expire in August 2001.[2]

Given the current interest in export controls and in missile technology proliferation, you asked us to determine whether regulations for controlling the export of Missile Technology Control Regime items (1) are consistent with U.S. law and (2) provide a consistent U.S. policy on the control of missile technology.

[1] P. L. 101-510, Nov. 5, 1990.

[2] The Export Administration Act of 2001, Senate Bill 149.

Results in Brief

The Department of Commerce's export regulations are not consistent with the National Defense Authorization Act for Fiscal Year 1991 amendment to the Export Administration Act for missile technology controls. That amendment requires an individual export license for all controlled dual-use missile equipment and technology to all countries. However, the Department of Commerce's regulations do not require licenses for the export of controlled missile equipment and technology to Canada. The Department of Commerce did not cite any section of this statute or its legislative history to justify the inconsistency between its regulations and the statutory requirement. Additionally, we found nothing in the legislative history to indicate that Congress intended to allow controlled missile items to be exempt from licensing requirements. According to Department of Commerce officials, Congress is aware of this exemption through an annual report on foreign policy export controls and, to their knowledge, Congress never intended to end the regulatory exemption for missile-related exports to Canada when the law was passed. The Department of State's export regulations are consistent with the National Defense Authorization Act for Fiscal Year 1991 amendment to the Arms Export Control Act. While that amendment did not mandate that the Department of State require licenses for missile technology items, other provisions of the Arms Export Control Act provide the Department discretionary authority to require licenses or provide exemptions.

In implementing the acts as they relate to controlled missile technology, both the Departments of Commerce and State were initially consistent with each other by continuing the long-standing policy of exempting controlled items from licensing requirements if those items were being exported to Canada for use in Canada. This consistent policy toward Canada changed in April 1999 when the Department of State began requiring a license for controlled missile technology, as well as other military items, exported to Canada. The Department of State changed its policy because of concerns about the unauthorized re-export of certain items from Canada to countries of concern. In addition to its concerns about re-exported items, Department of State officials cited, among other reasons, the provisions in the Export Administration Act as evidence that Congress did not intend any licensing exemptions for any controlled missile technology items and technologies.

Because of the inconsistency between the Department of Commerce's regulatory exemption and the Export Administration Act, we recommended that the Department of Commerce revise its regulations or seek a statutory change to specifically allow for licensing exemptions.

Since the Department of Commerce did not agree with our recommendation, we have added a matter for congressional consideration.

Background

In 1987, the United States and six allies founded the Missile Technology Control Regime (MTCR).[3] The Regime seeks to limit the proliferation of rocket and unmanned air vehicle systems capable of delivering nuclear, biological, and chemical weapons of mass destruction and their associated equipment and technology. The Regime is a voluntary agreement among member countries with a shared interest in controlling missile proliferation. Members agree to adhere to a common export policy for items and technologies that are specified in an annex to the agreement, which is updated periodically. These MTCR items range from complete missile systems to missile-related components that may also have civil applications. Member countries also agree to control these items and technologies in accordance with their national legislation.

The United States fulfills its MTCR commitments through its existing export control system and governing statutes. The U.S. export control system, and therefore the U.S. implementation of the Regime's controls, is divided primarily between two departments. The Department of Commerce, under the authority of the Export Administration Act of 1979 controls exports of most dual-use items and technologies.[4] The Department of Commerce controls dual-use items through the Export Administration Regulations and identifies those items on the Commerce Control List.[5] The Department of State, under the authority of the Arms Export Control Act, controls exports of munitions items and technologies, which are those designed, developed, configured, adapted, or modified solely for military applications.[6] The munitions items under the Department of State's licensing jurisdiction are controlled through the International Traffic in Arms Regulations and identified on the U.S.

[3] The other founding members of the Regime are Canada, France, Germany, Italy, Japan, and the United Kingdom. Since 1987, 26 additional countries have become members of the Regime, bringing the total number of member countries to 33.

[4] 50 U.S.C. App. secs. 2401 et seq.

[5] 15 C.F.R. secs. 730-774.

[6] 22 U.S.C. secs. 2751 et seq.

Munitions List, which the Department of State develops with the concurrence of the Department of Defense.[7]

Commerce and State Differ in Their Regulatory Consistency With Export Statutes

The National Defense Authorization Act for Fiscal Year 1991 amended the Export Administration Act of 1979 to require an individual validated license for any export of dual-use MTCR goods or technology to any country. The Department of Commerce implemented the statutory requirements through its Export Administration Regulations by including MTCR annex items in the Commerce Control List and generally requiring a license to export or re-export those items and technologies related to the design, development, production, or use of missiles. However, these regulations provide an exemption to the statutory licensing requirement for MTCR annex items and technologies exported to Canada.[8] Department of Commerce officials did not cite any section of the statute or its legislative history to justify the inconsistency between the statutory requirements and the Department's regulations. In addition, we found nothing in the amended act or its legislative history to suggest that Congress intended to exempt MTCR items exported to Canada from licensing requirements. Department officials said the license exemption predated the amendment and they assumed Congress did not intend to end the licensing exemption. They told us the Department annually reports to Congress on its foreign policy export controls, including the exemption for missile technology exports to Canada, and Congress has not objected to the continuation of this export exemption.

The National Defense Authorization Act for Fiscal Year 1991, as it applied to the Arms Export Control Act, did not mandate that the Department of State require licenses for missile technology items. The Arms Export Control Act, however, provides the Department of State with discretionary authority to determine which items, including missile technology items, require a license, and to create licensing exemptions in its regulations. Because the Department of State has authority to require licenses or to provide exemptions, the Department's regulations are consistent with the National Defense Authorization Act for Fiscal Year 1991.

[7] 22 C.F.R. secs. 120-130.

[8] 15 C.F.R. sec. 742.5(a)(1) and Supplement No. 1 to part 738 of the Export Administration Regulations.

Current Commerce and State Policies on MTCR Export Licensing Requirements Differ

Although the Departments of Commerce and State initially had a consistent policy toward exempting MTCR items exported to Canada from licensing, the Departments' policies now differ. The Department of Commerce continues to exempt MTCR items going to Canada, whereas the Department of State currently requires an export license for MTCR items to Canada. According to Department of Commerce officials, the current regulatory exemption for MTCR items exported to Canada is consistent with the U.S. government's long-standing policy to encourage economic cooperation with Canada. Specifically, the Export Administration Regulations provided an export exemption for Canada prior to the amendment of the Export Administration Act and this exemption has been continued as a matter of policy. Furthermore, Department officials said that after passage of the amendment in 1990, an interagency group discussed whether Congress intended to eliminate the Canadian exemption but did not reach consensus.

Prior to April 1999, the Department of State's regulations also allowed most items on the U.S. Munitions List, including MTCR items, to be exported to Canada for use in Canada without a license. However, the Department of State became concerned about U.S. defense equipment and technology being re-exported from Canada to destinations such as Iran. The Department of State, therefore, issued new regulations in April 1999 that limited the scope of its licensing exemption for exports to Canada.[9] The revised regulations required a license for all MTCR munitions items, as well as other munitions items, to be exported to Canada.[10] As part of its justification for its regulatory revision, Department of State officials cited the provisions in the amended Export Administration Act as evidence that Congress did not intend any licensing exemptions for MTCR dual-use items and technologies. Based on this statutory language, the Department of State concluded that Congress must have intended that licenses be required not only for dual-use items but also for the more sensitive items falling under the Department of State's jurisdiction.

[9] 64 Federal Register 17531, Apr. 12, 1999.

[10] In October 2000, the Canadian government passed legislative changes followed by regulatory changes in January 2001 to strengthen its defense export system. When it made these changes, the Canadian government requested that the Department of State revise its regulations to exempt MTCR items from U.S. export licensing requirements for Canada. While the Department of State has issued new regulations that are effective May 30, 2001, the Department has not restored the MTCR exemption for Canada.

Recommendation for Executive Action

Because the Department of Commerce's regulations are inconsistent with the amended Export Administration Act, we recommend that the Secretary of Commerce

- revise the Export Administration Regulations to comply with the MTCR export licensing requirements contained in the National Defense Authorization Act for Fiscal Year 1991 or
- seek a statutory change from Congress to specifically permit MTCR items to be exempted from licensing requirements.

If the Secretary of Commerce decides to seek a statutory change, he should revise the Export Administration Regulations to comply with the current statute until such time as a statutory change occurs.

Matter for Congressional Consideration

Congress may wish to instruct the Secretary of Commerce on the need to bring the Department's regulations into compliance with the law until such time as Congress has determined that dual-use MTCR items may be exempt from licensing requirements.

Agency Comments

In written comments on a draft of this report, the Department of Commerce said it will consult with other departments and its congressional authorizing committees on the utility of revising its regulations in light of pending legislation. However, neither consultation with other departments nor the consideration of pending legislation changes the basis for our recommendation that the current law requires licenses for dual-use MTCR exports to all countries. Since the Department of Commerce does not agree with our recommendation, we have added a matter for congressional consideration. The Department of Commerce's comments are reprinted in appendix I, along with our evaluation of them.

The Department of State did not provide formal written comments on a draft of this report but provided technical comments, which we incorporated as appropriate.

Scope and Methodology

To determine the consistency between statutory and regulatory language concerning MTCR exports, we compared the MTCR provisions as contained in the National Defense Authorization Act for Fiscal Year 1991 with the Department of Commerce's Export Administration Regulations and the Department of State's International Traffic in Arms Regulations. We also requested and received a written response from the Department of Commerce to explain its regulatory exemption and then interviewed lawyers and other officials about their interpretation of the statutory

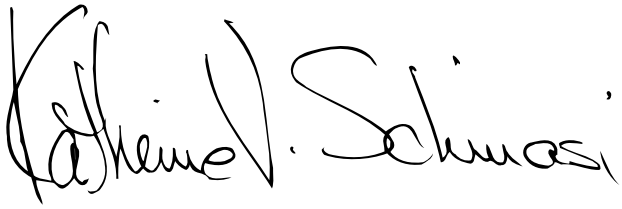
requirements. In addition, we reviewed the legislative history of the MTCR provisions in the National Defense Authorization Act for Fiscal Year 1991.

To determine whether the regulations for controlling the export of MTCR items provide a consistent U.S. policy on the control of missile technology, we discussed with Departments of Commerce and State officials their regulations implementing the MTCR. We also reviewed the Department of State's regulatory revisions and supporting documentation.

We performed our review from November 2000 through March 2001 in accordance with generally accepted government auditing standards.

As agreed with your office, unless you publicly announce the contents of this report earlier, we plan no further distribution of this report until 30 days after its issuance. At that time, we will send copies to Senator Phil Gramm, Chairman, Committee on Banking, Housing, and Urban Affairs; Senator Paul Sarbanes, Ranking Member, Committee on Banking, Housing, and Urban Affairs; Senator Jesse Helms, Chairman, Committee on Foreign Relations; Senator Joseph Biden, Ranking Member, Committee on Foreign Relations; Representative Henry Hyde, Chairman, Committee on International Relations; and Representative Tom Lantos, Ranking Minority Member, Committee on International Relations. We will also send copies to the Honorable Colin L. Powell, Secretary of State; the Honorable Donald L. Evans, Secretary of Commerce; and the Honorable Mitchell E. Daniels, Jr., Director, Office of Management and Budget.

If you or your staff have questions concerning this report, please contact me at (202) 512-4841 or John Van Schaik from our Office of General Counsel at (202) 512-8184. Others making key contributions to this report were Thomas J. Denomme, Anne-Marie Lasowski, and Johana R. Ayers.



Katherine V. Schinasi
Director
Acquisition and Sourcing Management Team

Appendix I: Comments from the Department of Commerce

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

THE SECRETARY OF COMMERCE
Washington, D.C. 20230

MAY 15 2001

Ms. Katherine V. Schinasi
Director
Acquisition and Sourcing Management
United States General Accounting Office
Washington, DC 20548

Dear Ms. Schinasi:

This is in response to your request for comments on the General Accounting Office's (GAO's) draft report on "Export Controls: Regulatory Change Needed to Comply with Missile Technology Licensing Requirements," GAO Code 120053. We appreciate the GAO bringing this issue to our attention.

The Department of Commerce's comments on the GAO's draft report are enclosed. The Department will consult with the other relevant departments and its Congressional authorizing committees on the utility of revising the Export Administration Regulations in light of pending legislation (S. 149, the Export Administration Act of 2001) that will address the issue raised in the GAO report.

Warm regards,

Donald L. Evans

Enclosure

U.S. Department of Commerce
Comments on the General Accounting Office Draft Report
Export Controls: Regulatory change Needed to comply
With Missile Technology Licensing Requirements
(GAO Code 120053)

The Department of Commerce requests that the report be revised to reflect the following points.

See comment 1.

See comment 2.

1. As noted in discussions with GAO representatives, the Canadian exemption is not inconsistent with the Missile Technology Control Regime (MTCR) guidelines. The general exemption for exports to Canada had been in the regulations for many years prior to the enactment of the missile technology provisions of the Export Administration Act. Since the Hyde Park Declaration of 1941, the United States has authorized nearly all dual-use goods intended for consumption in Canada to be exported without a license. When the National Defense Authorization Act of 1991 was enacted, the Department was not in a position to revise the Export Administration Regulations to change this exemption for Canada because there was no interagency consensus.

2. Under the Export Administration Regulations, the reexport of any U.S.-origin item controlled for missile technology reasons from Canada would require a license from the Department of Commerce.

3. The Department of Commerce has notified Congress of the Canadian exemption for MTCR items every year since 1991. The Department's annual foreign policy report to the Congress states, in pertinent part' "The United States requires a license for the export or reexport to all destinations (except Canada) of those dual-use items specifically identified on the Commerce Control List as controlled for missile technology reasons." (See, for example, 2000 Foreign Policy Report Bureau of Export Administration U.S. Department of Commerce, p. VII-83.)

See comment 3.

4. Congress has not included a comparable provision that would end the Canadian exemption in the three most recent bills to re-enact the Export Administration Act (5. 149, the Export Administration Act of 2001, reported out of the Senate's Committee on Banking, Housing and Urban Affairs on April 2, 2001; S. 1712 in 1999; and, H.R. 361 in 1996).

See comment 4.

5. The impact of imposing a license requirement on exports to Canada of dual-use items controlled for missile technology reasons is potentially significant. The U.S. and Canadian industrial base is highly integrated. Imposing such a license requirement would likely result in a significant burden on U.S. industry.

6. The Department of State had an exemption for the export to Canada of MTCR items on the United States Munitions List for eight years following the 1991 enactment of the provision.

Response to recommendations: The GAO recommended either: 1) revising the Export Administration Regulations; or 2) seeking a statutory change and revising the Export Administration Regulations until a statutory change occurs.

Legislation (S. 149, the Export Administration Act of 2001) that would make the statutory change identified by the GAO is pending. The Administration supports this bill. The Department of Commerce will consult with the other relevant departments and its Congressional authorizing committees on the utility of revising the Export Administration Regulations in light of the pending legislation.

GAO Comments

The following are GAO's comments on the Department of Commerce's letter dated May 15, 2001.

1. According to the Department of Commerce, its Canadian exemption is not inconsistent with the Missile Technology Control Regime (MTCR) Guidelines. Nevertheless, this exemption is inconsistent with the current U.S. law governing exports of MTCR dual-use items.

2. As stated in our report, the Department said that it had not revised its regulations when the National Defense Authorization Act for Fiscal Year 1991 was enacted because there was no interagency consensus to do so. However, a lack of interagency consensus does not justify the inconsistency between the Department's regulations and the law. Furthermore, the Department of Commerce was unable to provide documentation or an explanation as to why interagency consensus was not achieved.

3. While there have been extensive discussions and multiple bills to reauthorize the Export Administration Act over the past several years, there have been no changes to the current governing statute that requires export licenses for all MTCR dual-use items to all countries.

4. The question of economic impact may be an appropriate part of the debate on requiring licenses. However, it does not affect the fact that current law requires licenses for dual-use MTCR exports to all countries. Furthermore, in its foreign policy report to Congress, the Department of Commerce stated that the MTCR has limited economic impact on the majority of U.S. exports.

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