THIRD COUNTRY TRANSFERS

by

Larry A. Mortsolf
Associate Professor
Defense Institute of Security Assistance Management

INTRODUCTION

The "third country transfer" concept can perhaps be most easily described by use of a simplified illustration. Country A initially acquires a defense article (e.g., a military vehicle) from the United States. After a period of time, Country A desires to sell, lend, lease, or grant the defense article to Country B. Once this latter transaction is approved and consummated it is know as a third country transfer--with the three countries or parties being: (1) the United States, (2) Country A, and (3) Country B. A transfer to a private party or corporation, instead of to a third country, is also treated as a third country transfer for the purposes of this article.

Simplified illustrations such as the one above have the advantage of being rather straightforward and easy to comprehend. On the other hand, it grossly oversimplifies the reality of the third country transfer process. Accordingly, it is the purpose of this article to address the third country transfer process and, in so doing, identify the primary steps and considerations of this process.

RATIONALE AND MECHANISMS FOR THIRD COUNTRY TRANSFER CONTROLS

Potential and Concern for Transfers

If one were to count the total number of countries in the FY 1983 Congressional Presentation Document (CPD) that the United States has security assistance programs with in one form or another one would find 109 countries listed. Security assistance is a far reaching program and has as its major elements Foreign Military Sales (FMS), International Military Education and Training (IMET), the Military Assistance Program (MAP), commercial sales licensed under the Arms Export Control Act, (AECA) as amended, as well as some other elements. All of these programs just listed could involve potential third country transfers.

When the United States transfers (through sale, grant, lease or loan) defense articles, services, or training to a foreign country, such transfer follows a lengthy decision process. The criteria for approving a transfer are found in both law and Executive Branch policy. In short, a transfer decision is not made lightly. To use an old cliche: selling arms is not like selling grain. Due to the very nature of defense articles, services, and training, the United States has a "continued interest" in the transaction even after the transfer/sale is complete. This is because the United States Government places a number of conditions on such transfers to include the following:

-- the receiving nation shall use the items only for those purposes for which furnished, e.g., internal security, individual self-defense, and/or civic action under certain specified situations;

-- the receiving nation shall preserve the security of such items;

-- the receiving nation will ensure respect for proprietory rights; and

-- the receiving nation shall not make a third country transfer unless the written consent of the U. S. Government has first been obtained.

Statutory Basis

The fundamental statutory basis for third country transfers is found in the AECA, Section 3(a), which states in part:

> No defense article or defense service shall be sold or leased by the United States Government under this Act to any country or international organization unless . . . the country or international organization shall have agreed not to transfer title to, or possession of, [emphasis added] any defense article or related training or other defense service so furnished to it to anyone not an officer, employee, or agent of that country or international organization and not to use or permit the use of such article or related training or other defense service for purposes other than those for which furnished unless the consent of the President has first been obtained [emphasis added]...

In addition to the above basic provision, the AECA, Section 3(d), specifies the instances in which the President must provide third country transfer certifications to the Congress, prior to the approval of such transfer requests. In this regard, Figure 1 represents a decision matrix as to when certain actions are required or may be taken.

The AECA statutory provisions are, of course, binding on U.S. Government personnel--in ensuring, to the best of their ability, that such provisions are implemented. Yet, is the AECA, in and of itself, binding upon a foreign government? This basic issue--the applicability of U.S. law to a foreign government--was addressed in Department of State correspondence (published in a Foreign Affairs Committee Print, Congress and Foreign Policies Series, No. 3, June, 1981, p. 48), from which the following is quoted:

> Actually the laws of the United States are no more binding on foreign governments than foreign laws are binding on the actions of the United States. The precise issue, rather, is whether the foreign country has breached the provisions of an applicable international agreement....

FIGURE 1

THIRD COUNTRY TRANSFER CERTIFICATION REQUIREMENTS

Situation	Requirement for Advance Certification to Congress?	Provision for Concurrent Resolution objecting to transfer?
Transfer to NATO, NATO member countries, Japan Australia or New Zealand:		
-Valued at less than $14 million* (Major Defense Equipment) or $50 million* (other defense articles/services)	No	No
-Valued at more than $14 million* (Major Defense Equipment) or $50 million* (other defense articles/services)		
-Original acquisition source is MAP or FMS [AECA,Sec 3(d)(2)(B)]	Yes (15 Days)	Yes
-Original acquisition source is Commercial (AECA,Sec 3(d)(3)]	Yes (30 Days)	No
Transfers to other Nations or International Organizations:		
-Valued at less than $14 million* (Major Defense Equipment) or $50 million* (other defense articles/services)	No	No
-Valued at more than $14 million* (Major Defense Equipment) or $50 million* (other defense articles/services)		
-Original acquisition source is MAP or FMS [AECA,Sec 3(d)(2)(A)]	Yes (30 Days)	Yes
-Original acquisition source is Commercial (AECA,Sec 3(d)(3)]	Yes (30 Days)	No

[*Value is in terms of its original acquisition cost]

Exceptions:

1. In accordance with AECA, Sec 3 (d)(2), the MAP and FMS notification period (i.e., 15 or 30 days) may be waived if the President states in his certification that an emergency exists which requires that consent to be proposed transfer become effective immediately.

2. In accordance with AECA, Sec 3(d)(4), advance certifications to Congress are not required for:

a. Transfers of maintenance, repair, or overhaul defense services, or of the repair parts or other defense articles used in furnishing such services, if the transfer will not result in any increase, relative to the original specifications, in the military capability of the defense articles and services to be maintained, repaired or overhauled;

b. Temporary transfers of defense articles for the sole purpose of receiving maintenance, repair, or overhaul; or

c. Arrangements among members of the North Atlantic Treaty Organization or between the North Atlantic Treaty Organizations and any of its member countries:

(1) for cooperative cross servicing, or

(2) for lead-nation procurement if the certification transmitted to the Congress pursuant to Section 36(b) of the AECA with regard to such lead-nation procurement identified the transferees on whose behalf the lead-nation procurement was proposed.

3. Transfers of exactly $14 million (Major Defense Equipment), or exactly $50 million (other defense articles/services) are treated in the category of transfers of more than $14 million or more than $50 million.

Role of Documentation

FMS. The above Department of State opinion reinforces why the U.S. Government insists upon incorporating Annex A (General Conditions) to the bilaterally-signed DD Form 1513, which, among other things, addresses third country transfers in paragraph B.9. In essence, once a foreign government accepts the DD Form 1513, it agrees to abide by the incorporated third country transfer requirements.

MAP/IMET. In the instance of U.S. transfers under the Military Assistance Program (MAP) or the International Military Education and Training Program (IMET), the recipient government acknowledges U.S. restrictions on third country transfers through diplomatic agreements or diplomatic correspondence.

Commercial Sales. The International Traffic in Arms Regulations, February 1976, paragraph 123.10(b) states:

> The prior written approval of the Department of State shall be obtained before U.S. Munitions List equipment previously exported from the United States under a license of the Department of State may be resold, diverted, transferred, transshipped, reshipped, or reexported to, or disposed of in any country other than the country of ultimate destination as stated in the export license.

The Munitions Control Newsletter (5/82), page 4, states that for all hardware applications for significant combat equipment, a Non-transfer and Use Certificate, Form DSP-83, must accompany the DSP-5 Application. This document states that the commodity in question will not be transferred to any other party without State Department approval. The Office of Munitions Control, Department of State, further reserves the right to require a Form DSP-83 for any request for export approval.

Memorandum of Understanding (MOU). The subject of third country transfers may also be addressed in a Memorandum of Understanding (MOU) between the United States and other nations, such as the 1978 MOU with Italy for "mutual cooperation in the research, development, production and procurement of defense equipment." This MOU is published in the Defense Acquisition Regulation (DAR), Section 6, Part 14, from which the following is quoted:

> Third party transfers of defense articles or technical data made available under this MOU, and of articles produced with such data, will be subject to the agreement of the Government that made available the defense articles or technical data, except as otherwise provided in particular arrangements between the two Governments. Each Government will base its decisions regarding requests by the other for agreement to third party transfers on its laws, regulations, and arms transfer policy. Each Government will use the same criteria for proposed transfers by the other as it uses for itself, and will not reject, solely in the pursuit of its own national commercial advantage, a request from the other for a third country

transfer of such defense articles or technical data. Consistent with the above, in carrying out its own transfers to third countries, each Government shall take into consideration the extent to which a proposed transfer may damage or infringe upon licensing arrangements whereby commercial firms in the US or Italy have granted to firms in the other country licenses for the manufacture of the articles proposed to be transferred to a third-country.

POLICY REGARDING THIRD COUNTRY TRANSFER APPROVALS

Foreign Policy (Case-by-Case) Review.

In the process of compiling U.S. Government policy with regard to third country transfer requests, it appears useful to initially review U.S. conventional arms sales policy. The AECA, Section 1, states in part:

> It is the sense of the Congress that all such sales be approved only when they are consistent with the foreign policy interests of the United States....

In President Reagan's Conventional Arms Transfer Policy statement of 8 July 1981 (See DISAM Newsletter, Fall 1981, pp. 1-3), the factors that the United States give consideration to in making arms transfer decisions are delineated. Following this list of factors is the sentence "All requests will be considered on a case-by-case basis." Turning to third country transfers, it seems only logical that such requests must also be reviewed in the overall context of broad U. S. Conventional Arms Transfer Policy; that is, on a case-by-case basis. In fact, the requirement for U.S. consent to all third country transfer requests is clearly a case-by-case mode of decision making.

In Department of State Current Policy No. 200, 15 July 1980, the subject of "Arms Coproduction" was addressed. With regard to U.S. policy on third country sales resulting from coproduction agreements, the policy statement indicated: "It is not our [U.S.] policy to permit European sales to countries to which we could not at the same time permit U.S. firms to sell."

In April 1980, a Department of State official testified before the Congress as to the factors which must be weighed in deciding whether to add a particular country to the list of eligible FMS countries. One factor was "whether we [the U.S.] believe that the use and transfer restrictions applicable to any equipment sold would be scrupulously observed." This, again, although presented in an FMS vein, would appear to be a "must" consideration for third country transfers as well.

Impact on U.S. Industrial Base

The issue of third country transfers vis-a-vis the U.S. defense production base also seemingly weighs into the equation. In the Department of State's supplemental information to President Reagan's Conventional Arms Transfer Policy Statement which provided a series of policy questions and answers(see DISAM Newsletter, Fall 1981, pp. 4-11), question number 10 related to: How do arms transfers enhance U.S. defense production and efficiency? The response was:

> Without question, arms sales can enhance the efficiency of our defense production capabilities by making maximum use of the existing industrial base and reducing unit costs. Nevertheless, this will be neither the sole motivation nor even a primary consideration for the approval of an arms transfer request.

While this author is not aware of a comprehensive U.S. policy position on this matter, it would appear that third country transfers, especially those precipitated through coproduction, must also be reviewed in light of U.S. defense production capabilities. In the MOU with Italy, discussed above, the economic matter of future transfers was resolved in the context that each country would ". . .not reject, solely in the pursuit of its own national commercial advantage, a request from the other for a third country transfer. . . ." Also, Congressional concern is reflected in a May 1982 Senate Foreign Relations Committee staff report titled "United States Relations with Japan and Korea: Security Issues" which made reference to concern for foreign nation "arms export expansion in competition with U.S. exports."

As the above references tend to illustrate, U.S. industrial base and economic factors have become increasingly significant security assistance policy considerations with important implications for third country transfer decisions.

PROCESSING THIRD COUNTRY TRANSFER REQUESTS

Transferring Country Request

The process is usually initiated with the transferring country's submission of a request to make a proposed transfer. In the absence of unique procedures for a given country, such a request is made through diplomatic channels to the U.S. Department of State.

Review of Request

The Department of State oversees the USG interagency review of the request. The Defense Department, among others, often plays a significant advisory role in such deliberations. Should the request be viewed in an unfavorable light during this interagency review phase, the request will likely be denied or deferred at this point.

Tentative Approval

If the Executive Branch is inclined to support the proposed transfer, the Department of State advises the transferring country of its "agreement in principle" to the proposed transfer contingent upon: (1) advance certification/notification to the Congress, if the monetary value so warrants; and (2) the receipt of "transfer assurances" from the proposed receiving country. Transfer assurances equate to the receiving country's forwarding a written statement (to the American Embassy in the receiving country) incorporating wording similar to that found in the DD Form 1513, Annex A, paragraph B.9. whereby a future transfer to yet another country, or party, will be subject to USG approval.

Approval

Once the aforementioned are satisfied the Department of State consents on behalf of the President and advises all concerned that the transfer may proceed.

WHAT DO OTHER ARMS SUPPLYING NATIONS DO?

The question often comes up in discussions of U.S. third country transfers and similar provisions: What do other arms supplying nations do in such circumstances? Do they, too, have third country transfer provisions? Unfortunately, this is a difficult question to address inasmuch as the other supplying nations are, to say the least, much less inclined to publish their arms sales procedures. However, from what we have been able to accumulate through international press releases and discussions with foreign government representatives, the other major arms supplying nations tend to have a third country transfer provision similar to that of the United States. The same can be said in some instances with respect to the U.S. provision (in DD Form 1513, Annex A, paragraph 8) that items sold be used only for "...internal security, individual self-defense, and/or civic action..." For instance, one news report noted that a given supplier country's policy required that weapons sold must be "exclusively for defensive use."

It is pleasing to know that the United States is not alone in its endeavor to treat weapon sales as a highly serious matter and one that warrants responsible procedures.

SUMMARY

Third country transfers can be an indirect, yet positive, aspect of the U.S. security assistance program. The requirement for prior U.S. Government consent to a third country transfer is contained in U.S. law and is incorporated into U.S. documentation provided to the purchasing/receiving nations for their agreement. The process and procedures for such transfers are relatively straightforward but highly important from a U.S. foreign policy perspective.

ABOUT THE AUTHOR

Mr. Larry A. Mortsolf has been a member of the DISAM faculty since 1977 and specializes in legislative and executive branch policy, and financial aspects of security assistance management. He holds a Master of Science in Logistics Management from the Air Force Institute of Technology and is a Commander, Supply Corps, in the Naval Reserve.