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BIS Aims to Propose Rule on Satellites in March

The Bureau of Industry and Security (BIS) and the Directorate of Defense Trade Controls (DDTC) plan to propose the transfer of satellites now controlled in U.S. Munitions List (USML) Category XV to the Commerce Control List (CCL) in March, BIS Assistant Secretary Kevin Wolf told the Materials Technical Advisory Committee (MTAC) Feb. 7. Presidential authority to make the moves was included in the National Defense Authorization Act (NDAA) that President Obama signed Jan. 3 (see **WTTL**, Jan. 7, page 1).

The changes to Category XV and the creation of new Export Control Classification Numbers (ECCNs) for the transferred items will be similar to the draft changes included in the so-called 1248 report Defense and State issued in advance of the NDAA vote, Wolf indicated. “What we’ll do is take from the Defense Department’s report the proposed revisions to Category XV and [ECCN] 9A515, which again will be a unilateral control, and put those out as a proposed rule for public comment. We hope to get that out in March. There won’t be much difference between that which Defense published last year and what we propose,” Wolf said.

“This is just trying to tailor and right-size a whole series of unilateral controls on satellites and spacecraft. We’re putting it into a ‘5’ as opposed to a 600 series, because these aren’t military items, but they don’t really fit into the rest of the CCL either, so we’re using another empty gap,” Wolf noted.

Since the start of the new year, administration officials have stepped up their consultations with congressional staffers on the proposed rule changes and transfers. “There are still many questions on the substance of specific list changes and the process for making the transfers. That has not diminished,” one congressional source told **WTTL**. Nevertheless, there is less opposition to the overall plan. With changes in the leadership of key congressional committees, “the temperature has gone down,” the source said.

U.S., EU Inch Toward Start of Transatlantic Trade Talks

The U.S. continues to play the reluctant bride to the courting European Union (EU) in talks aimed at launching negotiations on a transatlantic trade pact. Nonetheless, EU

officials were described as “pretty upbeat” after they met with White House officials and U.S. Trade Representative (USTR) Ron Kirk during a quick visit to Washington by EU Trade Commissioner Karel DeGucht Feb. 6, according to sources.

A report DeGucht and Kirk are supposed to issue on the framework for U.S.-EU trade talks is over a month late (see **WTTL**, Sept. 24, page 4). The delay appears to be caused by U.S. demands that the EU first show it is ready to deal with several long-running bilateral disputes. Another problem reportedly involves concerns that Treasury and some U.S. regulatory agencies have raised about including their areas of jurisdiction in a trade deal.

The EU Commission took one step toward resolving U.S. concerns Feb. 5 with a decision to allow the use of lactic acid in meat preparation as of Feb. 25. “The possibility to use lactic acid should in no way be considered as a substitution for good hygienic slaughtering practices and operating procedures,” a Commission statement said. The action was based on a risk assessment by the European Food Safety Authority, which issued a favorable opinion on the use of lactic acid in July 2011.

The U.S. still is raising concerns about EU rules on the use of tallow in cosmetics and restrictions on genetically modified organisms (GMOs) in some EU countries. Members of Congress also say they want assurances that EU farm subsidies and import restrictions would be on the table for any transatlantic deal. “The U.S. has not yet reached the right comfort level” with EU promises, one source told **WTTL**. “It wants the EU to prove that it will resolve old issues,” he said; adding, “The U.S. is making them pay.”

DeGucht’s visit to Washington was actually a “stop over” on his way to Canada where he was supposed to push for completion of talks on a EU-Canada trade agreement. Sources say the Europeans may believe an EU-Canada deal would put pressure on Washington to get U.S.-EU talks launched. The Europeans also reportedly are worried that Kirk’s announced plans for leaving office at the end of February could further delay the start of transatlantic talks as the White House goes through the process of naming and confirming a new USTR.

Meanwhile, union sources say organized labor will seek very strong labor provisions in any U.S.-EU deal even though both trading partners have high labor standards. Because the transatlantic accord might become the model for future trade deals, they want the provisions to be tougher than those that were put in the U.S.-Peru Free Trade Agreement as the result of a deal reached between the Bush administration and congressional Democrats May 10, 2007, as a condition for getting the Peru pact approved by Congress.

Global Economic Woes Slowed U.S. Export Growth in 2012

A recession in Europe and slower gains among emerging markets cut the rate of U.S. merchandise export growth in 2012 to 4.4% from its torrid rate of 16% in 2011, according to trade figures Commerce released Feb. 8. The growth of services trade also slowed, increasing at the same 4.4% rate. With world trade estimated to grow only 3.8% in 2013, it appears unlikely that the Obama administration will achieve its goal of doubling U.S. exports by 2015 from 2009 (see **WTTL**, Jan. 28, page 4). Despite the growing elusiveness of that goal, Deputy Secretary of Commerce Rebecca Blank was still upbeat about the trade figures. “Not only did exports outpace the growth in imports for

the first time since 2007, but exports have helped support the creation of over 6 million private sector jobs over the past 35 months,” she said in a statement. The newest trade

Preliminary 2012 vs. 2011 U.S. Merchandise Trade Figures
(in billions)

	2012 Exports	2011 Exports	% Change	2012 Imports	2011 Imports	% Change
Total	\$1,564	\$1,498	4.41%	\$2,299	\$2,235	2.86%
BY COUNTRY/REGION						
Canada	292	281	3.9	324	315	2.9
Mexico	216	198	9.1	278	263	5.7
European Union (27)	265	268	-1.1	381	368	3.5
Germany	49	49	0	108	99	9.1
France	31	28	10.7	42	40	5.0
United Kingdom	55	56	-1.8	55	51	7.8
Japan	70	66	6.1	146	129	13.2
China	110	104	5.8	426	399	6.8
NICs: HK, Singapore, Taiwan, Korea	135	137	-1.5	123	121	1.7
South/Central America	184	169	8.9	172	174	-1.1
BY SECTOR						
Agriculture	132.8	126	5.4	110.2	107.4	2.6
Aircraft, parts, engines	94.1	80.1	17.5	39.9	35.4	12.7
Autos, parts, engines	146	133.1	9.7	297.7	254.6	16.9
Clothing	3.4	3.3	3.0	84.9	85.5	-0.7
Chemicals-Organic	42.4	43.5	-2.5	52.3	54.3	-3.7
Chemicals-Inorganic	12.3	13.3	-7.5	15.5	17	-8.8
Petroleum, total categories	123.8	113	9.6	415	439	-5.5
Iron & Steel	18.9	18.5	2.2	36.8	32.9	11.9
Metalworking Machines	7.9	7.8	1.3	11.7	9.7	20.6
Pharmaceuticals	47.9	44.9	6.7	87.1	91.7	-5.0
Semiconductors	42.1	44.7	-5.8	40.3	40.2	0.25
Telecommunications	38.3	35.8	7.0	52.8	48.5	8.9
Wood Products	2.1	2	5.0	7.7	6.8	13.2

figures, however, show areas of significant growth as well as weakness (see table). More than 67% of the growth in U.S. goods exports was attributed to just four sectors: agriculture, aircraft, autos and petroleum. At the same time, organic and inorganic chemicals and semiconductors saw declines last year.

Petroleum trade saw particularly noteworthy shifts reflecting the increase in production in the U.S., with exports rising 9.6% as imports dropped 5.5%. For the whole year, the trade deficit in petroleum products plunged 10% to \$291.3 billion from \$326.1 billion in 2011. The deficit in December was the lowest since August 2009.

Despite economic problems in the rest of the world, U.S. trade with the Western Hemisphere remained strong in 2012. Exports to Mexico rose 9.1%, while exports to the rest of Central and South America grew 8.9%.

After several years during which U.S. exports to China were growing faster than imports from China, 2012 saw the pace of

imports from China exceeding exports to China. The result was an increase in the U.S. trade deficit with China to \$316 billion. Imports of wood products appear to reflect the rebound in the housing industry, although they are still far off pre-recession levels. The strong growth in U.S. manufacturing also accounts for a 20.6% jump in imports of machine tools. The U.S. pharmaceutical industry reversed a trend, with exports increasing in 2012 while imports declined. According to the National U.S.-Arab Chamber of Commerce (NUSACC), 2012 exports to the 22 nations of the Arab world increased

from \$56.18 billion in 2011 to \$65.91 billion in 2012, an increase of 17.3% and the highest single-year sales volume ever.

Hills Calls for Common North American Stand in Trade Talks

The U.S., Mexico and Canada should negotiate trade deals with the Pacific and the European Union (EU) together because the three NAFTA partners are an integrated market, contends former USTR Carla Hills. “I am a strong proponent that this should be a North American agreement with the Europeans,” she told a briefing Feb. 6 on a new report that the Inter-American Dialogue issued on U.S. relations with Mexico. “We would be much, much more efficient were we to negotiate as a North American region,” she said.

Hills noted that Mexico already has a free trade agreement (FTA) with the EU, and Canada is close to reaching a similar deal with Europe (see related story page 1). A North American accord with the EU would also provide an opportunity to upgrade NAFTA, she said. “We could do it with a big agreement, a really massive agreement,” Hills said. A U.S.-EU deal would involve two markets that account for more than 50% of global GDP.

“We no longer sell things to each other; we make things together,” she said. “We are no longer individual economies. Our economies are entwined and things pass the border five to eight times to have a finished product,” Hills added. She said a North American deal with the Trans-Pacific Partnership or EU agreement would cut costs and delays at the border caused by a “spaghetti bowl” of regulations from different trade agreements.

“I think it would have another positive effect too. I think it would bring people back to multilateral negotiations,” Hills argued. “I say that based on history,” she said, noting that after the Uruguay Round collapsed in 1990, talks on NAFTA started in 1991. Within four months of its approval by Congress, the Uruguay Round was completed and talks on a Western Hemisphere deal began. “Whenever you have a big trade agreement where a lot of people are left out, there is a tremendous pull to be part of the parade,” she said.

According to the latest trade figures released Feb. 8, U.S. exports to Mexico, Canada and the EU accounted for nearly 50% of total U.S. merchandise exports. Imports from the three trading partners represented 43% of all U.S. goods imports (see table page 3).

U.S. Seeks WTO Talks with India on Solar Products

The U.S. launched World Trade Organization (WTO) dispute-settlement consultations with India Feb. 6 to raise complaints against local-content and subsidy programs New Delhi has put in place to support its solar products industry. The complaints are aimed at requirements India has adopted to require the use of Indian-made solar cells and modules in solar systems installed in the country. The complaint also addresses guaranteed purchases that the Indian government has promised its domestic producers.

The U.S. claims that India’s national solar policy, which began in January 2010, requires developers of solar photovoltaic (PV) projects employing crystalline silicon technology to use solar modules and crystalline silicon solar cells made in India. New Delhi has said it is considering expanding domestic content requirements to include solar thin film

technologies, which the U.S. says comprise the majority of U.S. solar exports to India. The program also offers power producers a highly subsidized rate, if they use domestic solar equipment instead of imports. The complaints contends the Indian programs violate several WTO rules, including provisions on national treatment, subsidies and the Agreement on Trade-Related Investment Measures (TRIMS).

The USTR's office said the case against India was developed with the support of its new Interagency Trade Enforcement Center. "Let me be clear: the United States strongly supports the rapid deployment of solar energy around the world, including with India," said USTR Ron Kirk in a statement. "Unfortunately, India's discriminatory policies in its national solar program detract from that successful cooperation, raise the cost of clean energy, and undermine progress toward our shared objective," he added.

Toyo Ink Pays \$45 Million for Evading Import Duties

Japan-based printing ink manufacturer Toyo Ink and its U.S. subsidiaries have agreed to pay \$45 million in civil penalties, plus interest, to settle charges that they violated the False Claims Act by knowingly failing to pay antidumping and countervailing duties on imports of colorant carbazole violet pigment number 23 (CVP-23). The companies had claimed that imports of the ink between April 2002 and March 2010 met substantial transformation rules and came from Japan and Mexico, but the government argued that Toyo had misrepresented the countries of origin, which were actually China and India. Imports of CVP-23 from China and India have been subject to duties since 2004, while there are no such duties on imports from Japan or Mexico.

"Although Toyo Ink's CVP-23 from the PRC and India underwent a finishing process in Japan and Mexico before it was imported into the United States, the government alleged that this process was insufficient to constitute a substantial transformation to render these countries as the countries of origin," Justice said in a statement following settlement of the suit Dec. 17 in Charlotte, N.C., U.S. District Court.

Justice had intervened in April 2012 in the case, which was originally filed by whistleblower John Dickson, president of Toyo's U.S. competitor, Nation Ford Chemical (see **WTTL**, April 30, 2012, page 1). Dickson will receive more than \$7,875,000 as his share of the government's recovery. "Importers seeking access to United States markets must comply with the law, including the payment of customs duties meant to protect domestic companies from unfair competition abroad," said Stuart F. Delery, principal deputy assistant attorney general for Justice's civil division, in a statement.

When Justice intervened, Toyo Ink issued a statement saying, "At all times, Toyo Ink believes that it acted in good faith, in accordance with industry practice, and made every effort to comply with the applicable U.S. laws." It said the suit was a "competitor's attempts to gain an unfair competitive advantage over Toyo Ink."

Companies covered by the agreement are Toyo Ink SC Holdings Co. Ltd. (successor to Toyo Ink Manufacturing Co. Ltd.), Toyocolor Co. Ltd., Toyo Ink Co. Ltd. and Toyochem Co. Ltd., and their U.S. affiliates, Toyo Ink Mfg. America LLC (Teaneck, N.J.), Toyo Ink International Corp. (New Jersey), and Toyo Ink America LLC (Wood Dale, Ill.).

CIT Rejects Customs Ruling on Exclusion Order

Customs and Border Protection (CBP) is more than just an enforcer of general exclusion orders (GEOs) that the International Trade Commission (ITC) issues in Section 337 patent infringement cases, ruled Court of International Trade (CIT) Judge Leo Gordon Feb. 1 (slip op. 13-15). In *Corning Gilbert v. U.S.*, Gordon said the importer of certain coaxial cable connectors could challenge Customs' interpretation of the GEO. He also questioned whether the agency adequately analyzed the application of the patent to the imported connectors.

“In the Government’s view, Customs is simply required to determine whether the product encompassed by the GEO is excluded from entry by applying the ITC record without examining the underlying findings. According to the Government, the ITC’s findings are the law of the case. Consequently, Plaintiff is precluded from relitigating those findings in a 1581(a) action challenging the exclusion. The court disagrees,” Gordon wrote.

Although the government had argued that CBP had adequately applied the GEO, the plaintiff claimed the ruling from Customs headquarters was hastily reached and contrary to patent law. “The court is not persuaded that Customs undertook such a logical, thorough, and expert analysis that would warrant deference,” Gordon stated. “Customs may have to go beyond the mechanical application of the ITC’s Section 337. It may have to look at evidence and analyze whether the importer, particularly a non-party such as Corning Gilbert, has established non-infringement. Consequently, it is difficult to conclude, under these circumstances, that an infringement finding could not be subject to collateral attack in a proceeding that challenges the enforcement of a GEO,” he ruled.

Tomato Deal Aims to Increase Prices, Enforcement

A tentative suspension agreement reached Feb. 2 between Commerce and Mexican tomato growers appears to take positive steps toward three goals sought by the domestic U.S. tomato industry: an increase in reference prices on tomato imports, better differentiation of prices for different sources of productions and stronger enforcement of the agreement at the border. The agreement, which is still subject to public comment, would mark the third time the original 1996 suspension agreement that ended an antidumping case against tomatoes from Mexico has been modified after threats that the deal would be terminated (see WTTL, Oct. 1, page 4).

Under the terms of the draft accord, there would be four categories of tomatoes rather than just one, with different prices during the summer and winter. The so-called “reference” prices for tomato imports, under which the products could not be priced, would in some cases be twice to nearly three times the reference price under the last suspension agreement. Reference prices range from 0.2458 cents per pound for open field tomatoes in summer to 0.59 cents per pound for specialty packed tomatoes in winter.

As part of the stronger enforcement measures under the new deal, the Mexican government would guarantee that almost 100% of Mexican tomato growers that export to the U.S. would come under its terms. At the same time, the U.S. would impose a reporting mechanism administered under the Department of Agriculture’s Perishable Agricultural

Commodities Act (PACA) fair trade regulations. In a statement released before the draft text was publicly released, representatives of the U.S. tomato industry praised Commerce Under Secretary Francisco Sanchez for his effort to reach the deal. “Each component had to reflect the reality of today’s market,” said Edward Beckman, president of Certified Greenhouse Farmers in the statement.

“During the negotiations between the Department of Commerce and Mexico and their growers, we identified three essential components to any new agreement to bring about fair trade: pricing, coverage, and enforcement,” he noted. “We believe that the Department of Commerce and Mexico have struck a deal that meets those three tests, and we’re hopeful and optimistic that we’ll be able to compete under fair trade conditions,” he said.

“The agreement will continue to provide certainty and stability to Mexican tomato exports to the United States, Mexico’s main agricultural export,” said a statement from Mexico’s Ministry of the Economy. “In 2011 alone, sales of Mexican tomatoes to the United States reached approximately \$2 billion dollars, effectively supporting almost 400,000 direct jobs in Mexico,” it noted.

Nonprofits, Unions Ask USTR for “Engagement” in TPP Talks

While U.S. trade officials have claimed negotiations toward a Trans-Pacific Partnership (TPP) have been more transparent than other trade talks, 25 unions and nonprofit organizations are asking for even further engagement with civil society stakeholders. In a letter Feb. 4 to Barbara Weisel, Assistant USTR for Asia and the South Pacific, the groups complained about the lack of transparency in the talks and suggested ways they could increase their participation at the next TPP negotiating round in Singapore in March.

“This lack of transparency has severely limited meaningful input by civil society and other stakeholders who have a direct and long-term interest in the outcome of these negotiations,” said the letter from groups including Doctors Without Borders, Sierra Club, Humane Society, Knowledge Ecology International (KEI), Public Citizen, Communication Workers of America and International Association of Machinists and Aerospace Workers.

The groups offered ten suggestions for increasing stakeholder engagement in the TPP talks, including: publicized schedule of stakeholder events, stakeholder access to venue where negotiations are taking place, briefings by lead negotiators with a call-in option, space and time for stakeholder presentations when negotiations are not in session and negotiator reception open to all stakeholders.

The groups repeated the demand for the USTR to release the negotiating texts, as it has in other talks. “While we believe that facilitating stakeholder engagement in this way is critical as negotiations advance, we respectfully reiterate our earlier demands for negotiating texts to be made public,” the letter noted. In testimony to Congress in March 2012, USTR Ron Kirk boasted of the transparency in the TPP talks. “I would defend our record for transparency, for inclusion of all groups, against any other administration. I think we have gone further. And we are absolutely acting consistent with the president’s commitments that he made about having a more transparent administration,” he said.

Industry Supports BIS' 180-Day VSD Reporting Deadline

Based on the few comments posted Jan. 7, 2013, industry generally supports a Bureau of Industry and Security (BIS) proposal to set a 180-day deadline for completing and submitting the final narrative report of a voluntary self-disclosure (VSD). For example, in its comment, Boeing finds the proposal “reasonable and appropriate.”

The trade group TechAmerica wrote that the proposed rule “should encourage companies with sound trade compliance departments to perform with greater precision and transparency.” It said the 180-day period for firms to prepare and submit a narrative account of any violations disclosed to BIS “is sufficient for compliance officers to investigate any history of export violations and gain a better understanding of operations within the company or acquisition target.”

MKS Instruments said the proposed rule was too vague as to when the clock would start, how to request an extension, what conditions “may be attached to an extension,” as well as what constitutes a completed disclosure. The company suggested a parallel deadline for BIS officials, in addition to that on exporters. “We also believe there is merit to the implementation of reciprocal time constraints with regards to OEE’s [Office of Export Enforcement] acceptance and subsequent disposition of the disclosure,” it noted.

CCL “Cleanup” May be Overreaching, Comments Say

A BIS proposal that supposedly was to be a nonsubstantive “cleanup” of the Commerce Control List (CCL) may be trying to do too much, industry comments on the proposal suggest. The proposed fixes in Nov. 29 Federal Register would affect hundreds of Export Control Classification Numbers (ECCNs).

“After consulting with our members, AAEI believes that the proposed rule tries to accomplish far too much at one time,” said comments from the American Association of Exporters and Importers (AAEI). “By trying to tackle all of the CCL categories at once, which is a huge task, there is a significant likelihood that affected companies will not have an adequate opportunity to respond and that numerous unintended errors and new ambiguities will be created,” the group noted.

Agilent Technologies took issue with the removal of 14 ECCNs subject to the exclusive jurisdiction of the Nuclear Regulatory Commission. Among those ECCNs are products Agilent sells or manufactures. Their removal “would not result in clarity but rather in complexity,” the company noted.

DuPont suggested BIS include language from the Wassenaar Munitions List (IML) into ECCN 1A613. “By including the IML language, BIS would better distinguish between soft body armor controls and more fully conform the evolving CCL to the multilateral export control regime control lists.” United Technologies Corporation is concerned with the proposal to use “parts and components” interchangeably with “parts or components.” “There are cases where this may cause some readers to read the control as being narrower than intended,” it wrote.

*** * * Briefs * * ***

ITC: President Obama resubmitted to Senate Feb. 4 nomination of F. Scott Kieff to be member of International Trade Commission for term expiring June 16, 2020. President had originally submitted his name last September, but Senate failed to act on nomination (see **WTTL**, Sept. 17, page 4). Kieff is professor at George Washington University Law School and Ray and Louis Knowles Senior Fellow at Stanford University's Hoover Institution, where he directs Project on Commercializing Innovation and serves on Property Rights Task Force. From 2007 to 2010, he was member of Patent and Trademark Office's Patent Public Advisory Committee.

CAFC: President Obama Feb. 7 nominated Raymond T. Chen and Todd M. Hughes to Court of Appeals for Federal Circuit. Chen is deputy general counsel for intellectual property law and solicitor for U.S. Patent and Trademark Office. He received B.S. in electrical engineering from UCLA and J.D. from NYU School of Law. Hughes is deputy director of commercial litigation branch at Justice. He received A.B. from Harvard and joint J.D./M.A. at Duke.

MEXICO: In presentation at BIS Materials Technical Advisory Committee (MTAC) Feb. 7, DuPont representatives urged agency to update Country Control (CC) list in EAR once Mexico joins Australia Group, for which country is applying. Mexico joined Wassenaar Arrangement last year and CC "wasn't changed to reflect this status," said Dupont's Clara Zahradnik. In response, BIS Assistant Secretary Kevin Wolf said, "It's not that we're late or early, we're actually right in the same boat with all the other members." He claimed no other Wassenaar member has yet revised its controls for Mexico. Previously, BIS officials said they are waiting to see Mexico's compliance with WA commitments (see **WTTL**, Dec. 17, page 4).

NME: For second time in recent months, CIT has rejected Commerce's use of India instead of Thailand as surrogate in NME antidumping case (see **WTTL**, Dec. 3, page 1). In Feb. 7 ruling, CIT Judge Jane Restani ordered ITA to reconsider its administrative review of polyethylene terephthalate film from China because agency did not justify its use of 2008 data to select India as surrogate instead of more current 2009 that pointed to Thailand as appropriate surrogate. "The court remands this issue for Commerce to either provide a reasoned explanation as to why it may disregard the 2009 GNI [gross national income] data or, in the alternative, make a surrogate country selection with the benefit of the 2009 data," Restani ordered.

SHRIMP: ITC Feb. 7 in preliminary 5-1 vote determined subsidized imports of frozen warm-water shrimp from China, Ecuador, India, Indonesia, Malaysia, Thailand and Vietnam materially injure U.S. industry.

ACTIVATED CARBON: ITC in sunset review Feb. 8 voted 6-0 that revoking antidumping duty on certain activated carbon from China would likely lead to continuation or recurrence of material injury to U.S. industry.

SENATE: Sen. Mark Warner (D-Va.) will chair Banking Committee's national security and international trade and finance subcommittee...Senate Finance Committee Chairman Max Baucus (D-Mont.) named Mac Campbell committee general counsel. Campbell is now assistant USTR for congressional affairs. He had been legislative director for Sen. Maria Cantwell (D-Wash.) and tax counsel and legislative assistant to then-Sen. Blanche Lincoln (D-Ark.). He has B.S.A. and J.D. from University of Arkansas and LL.M. from Georgetown University Law School.

IRAN: Treasury imposed new sanctions against Iran Feb. 6, adding one individual and four entities to its blocked parties' list due their link to censorship in Iran. They are Islamic Republic of Iran Broadcasting and its director, Ezzatollah Zarghami; Iranian Cyber Police; Communications Regulatory Authority; and Iran Electronics Industries. It also identified 35 Iranian oil tankers that have had their names changed to avoid sanctions. OFAC also issued new guidance on humanitarian exports still permitted.