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Lawmakers Want U.S. to Cut Ties with Russian Arms Dealer

As the State Department confirmed March 27 that it has joined the Bureau of Industry and Security (BIS) in stopping the processing of export licenses to Russia, 10 senators wrote to President Obama, urging the U.S. to stop dealing with Russia's leading arms dealer, Rosoboronexport (see **WTTL**, March 24, page 1). "In light of the Russian Federation's illegal invasion of Ukraine and annexation of Crimea, we ask for your leadership in re-imposing sanctions on Rosoboronexport, Russia's official state arms exporter, and fully severing the U.S. Department of Defense's (DoD) business relationship with this unsavory agency," wrote the bipartisan letter from the senators, including John Cornyn (R-Texas) and Richard Blumenthal (D-Conn.)

> State had nonproliferation sanctions in place on Rosoboronexport until May 2010 when they were lifted reportedly because of Moscow's cooperation in imposing tougher sanctions on Iran. "Since 2011, DoD has awarded Rosoboronexport more than $1 billion in no-bid contracts for the procurement of Mi-17 helicopters," the senators' March 27 letter noted. These helicopters are for the Afghan armed forces.

At State's daily press briefing March 27, Deputy Spokesperson Marie Harf said "the State Department has also placed a hold on the issuance of licenses that would authorize the export of defense articles and defense services to Russia." State "will continue the hold until further notice," she said. "Our hold, I believe, began on Monday," she added. After a March 26 summit in Brussels, the U.S. and European Union (EU) issued a statement saying: "Further steps by Russia to destabilize the situation in Ukraine would lead to additional and far reaching consequences for the EU's and U.S.' relations with Russia in a broad range of economic areas."

C-TPAT for Exports Could Come by End of Year

Customs and Border Protection (CBP) is aiming to create an "export entity" under its current Customs-Trade Partnership Against Terrorism (C-TPAT) program, which is now only for importers, by the end of 2014, but it is still trying to figure out what benefits participation in such a program will have for exporters. George Rudy of CBP's C-TPAT staff, told the President's Export Council Subcommittee on Export Administration

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(PECSEA) March 25 that 286 exporters have already indicated interest in joining an export version of C-TPAT. CBP had planned to launch the export version in the fall of 2014, but that schedule has been delayed by last-minute disagreements over what the criteria should be for eligibility and what security profile participants would have to maintain. Now the goal is to have the program in place by next winter, with all participants being volunteers, Rudy said.

> Participants in the program would be subject to a validation process that could entail inspections of their operations by CBP agents. Customs still has to train its staff on conducting those visits and reviews, so it may be 2015 before the program is actually implemented.

Rudy conceded that CBP cannot do as much for exporters as it does for importers under C-TPAT because export policies are dictated by Commerce and State. While Customs can offer C-TPAT members "head-of-the-line" treatment for imported cargo at ports and other expedited handling, there is no similar export process, he noted. The main potential benefits may be in how U.S. trading partners will treat imports from the U.S. that come from participating export-entity firms, he said. An early goal would be making such an arrangement with Canada and Mexico.

One of the main factors driving creation of an export-entity program is U.S. entry into Mutual Recognition Arrangements (MRAs) with several trading partners that recognize Authorized Economic Operators (AEOs), which are their version of C-TPAT. The MRAs are intended to help Customs clear cargo before it is shipped to the U.S. "Our overseas partners are asking, what are you doing for us?" Rudy said.

Under these MRAs, expedited treatment for U.S. cargo imports could be one of the benefits for U.S. exporters participating in the export-entity program, he said. Another potential benefit might be better treatment for participants when they make errors on Automated Export System (AES) filings, issuing them warnings rather than fines. For other exporters, participation might just mean getting the recognition that they are in the program. "A lot of companies say they would be pleased just to be in the program," Rudy told PECSEA.

CBP is already working with two MRA partners, Japan and the European Union (EU), in developing better treatment for U.S. imports. Other countries that have MRAs with the U.S. are New Zealand, Canada, Jordan, South Korea and Taiwan. CBP is working to enter MRAs this year with Mexico, Israel, Singapore, China and Switzerland, he said.

USML-CCL Transition Leaves Some Electronics in Limbo

Because a final rule transferring some electronic items from U.S. Munitions List (USML) Category XI to the Commerce Control List (CCL) hasn't been published yet, some electronic components for aircraft already moved from Category VIII to the CCL are getting caught in a gap between the two lists. Some exporters that are applying to the Bureau of Industry and Security (BIS) for CCL licenses for electronic components for their aircraft are being told they have to apply to State's Directorate of Defense Trade Controls (DDTC) for licenses because the items are still in Category XI. This is a problem that was anticipated and will be solved by the end of the year when the final Category XI transitions go into effect, BIS Assistant Secretary Kevin Wolf told the President's Export

Council Subcommittee on Export Administration (PECSEA) March 25. "We realized that there would be over-controls in the interim period as things flesh out," Wolf said. This was because agencies didn't want to decontrol anything. "It just means you may have an ITAR tagalong for things that are electronic for the rest of the year," he said.

> The problem has arisen because firms whose products have shifted to the CCL 600 series for aircraft have applied for licenses for some electronic components that go with the aircraft. Those components, however, did not move with aircraft and are still controlled under USML Category XI, Wolf explained.

"Historically, there have been no real policies at State between what was VIII or XI," he told the PECSEA. "It really didn't matter because everything was treated the same," he added. This issue will "no longer be relevant after [the transition of] XI kicks in," Wolf said. He explained the proposed new 600 series for transferred electronics will have a note in Export Control Classification Number (ECCN) 3A611.x to create a catch-all for military electronic items not otherwise controlled by another USML or 600-series entry. Items not specially designed for military aircraft will go into specific a 600-series ECCN. "The electronic catch-all will be only for those things that are electronic that don't fit in another entry," he said.

In the meantime, before the final Category XI transfers are published, exporters caught in this gap can talk with their BIS licensing officer to explain the proposed changes to the CCL and explain that the part is not in Category XI and is unique to a military aircraft, Wolf advised. BIS officials have said the final Category XI transition order should be sent to Congress soon in advance of its publication. It would go into force 180 days after the final rule is published.

U.S. Cheers WTO Decision on China Rare Earth Export Policies

The Obama administration welcomed a World Trade Organization (WTO) panel report March 26 that China's policies on exports of rare earths, tungsten and molybdenum, including export duties, quotas and quota administration requirements, fail to comply with its WTO accession commitments. The U.S. joined the European Union (EU) and Japan to ask China formally for WTO consultations in March 2012 after a previous Appellate Body ruling against similar Chinese restrictions on raw materials (see **WTTL**, March 19, 2012, page 2).

> The WTO dispute-settlement panel agreed with the U.S. that China's export duties and quotas on various rare earths, tungsten and molybdenum constitute a breach of WTO rules and Beijing failed to justify those measures as legitimate conservation or environmental protection measures. "The panel also found that China's export quota administration requirements are inconsistent with WTO rules," the U.S. Trade Representative's (USTR) office said in a statement.

"China's decision to promote its own industry and discriminate against U.S. companies has caused U.S. manufacturers to pay as much as three times more than what their Chinese competitors pay for the exact same rare earths. WTO rules prohibit this kind of discriminatory export restraint and this win today, along with our win 2 years ago in an

earlier case, demonstrates that clearly," USTR Michael Froman said in a statement. All parties have the option to appeal the report in the next 60 days. Unless overturned by the WTO Appellate Body, parties will negotiate the deadline for implementation of the panel's recommendation. In the earlier case against Chinese raw material restrictions, Beijing had 12 months to comply with the report, USTR attorneys told reporters. They said the current administration monitoring of exports and global prices indicates China is in full compliance with that previous decision.

> Labor unions and elected officials joined in welcoming the new decision. "China's policies relating to rare earths first helped put our domestic industry on the chopping block – with a mine and refinery operated by USW-represented workers. Once the mine closed a few years back, China tightened the supply noose and strangled domestic manufacturers who rely on rare earths," said United Steelworkers (USW) President Leo Gerard in a statement. USTR attorneys said the U.S. steel industry relies very heavily on these materials, estimating steel shipments of $75 billion annually, affecting 150,000 jobs.

"The World Trade Organization's decision sends a strong message to China that its mercantilist trade restrictions on rare earth elements have no place in the 21st Century. Today's ruling is a clear win for the United States, for rules-based trade, and for American high-tech manufacturing jobs that depend on a stable supply of these products," Senate Finance Committee Chairman Ron Wyden (D-Ore.) said.

WTO Says U.S. Must Prevent "Double Remedies" in Trade Cases

A week after the Court of Appeals for the Federal Circuit (CAFC) accepted a congressional mandate that allows Commerce to apply countervailing and antidumping duties retrospectively to imports from non-market economies (NMEs) without accounting for "double remedies," a World Trade Organization (WTO) dispute-settlement panel said it can't. In a mixed ruling, including a dissenting opinion, released March 27, the panel sided with the U.S. in part and the right of Congress to amend the Trade Act to apply AD and CVD remedies retroactively, but it said the U.S. must prevent the application of "double remedies" when it does.

> While the U.S. has the right to appeal the panel ruling to the WTO Appellate Body, that body has already ruled in a previous case that the U.S. breached WTO rules by failing to affirmatively investigate an alleged overlap with respect to 25 countervailing duty proceedings from 2006 to 2012, when Congress overturned the CAFC's ruling in *GPX I,* which reached the same conclusion. This new ruling is likely to keep resolution of those cases in limbo a while longer (see **WTTL**, March 24, page 1).

"The Panel finds that Article X:3(b) [of WTO General Agreement on Tariffs & Trade], which requires that administrative agencies implement and be governed by decisions of the tribunals maintained to review their administrative action relating to customs matters, does not prohibit a Member from taking legislative action in the nature of Section 1 of PL 112-99" [statute overturning CAFC's ruling in *GPX I*], the panel report stated. It noted that the CAFC ruling never became final so the legislation did not violate the requirement to base rulings on tribunal decisions. The panel said its decision that members

need to prevent double remedies in AD and CVD cases is based on the earlier WTO Appellate Body decision. "We agree with the United States that the text of Article 19.3 does not contain any explicit obligation to 'investigate' the existence of double remedies. However, we do not consider that this is sufficient, in and of itself, to undermine the Appellate Body's conclusion. In our view, the Appellate Body based its finding on a necessary implication arising from the words that are found in Article 19.3. That is, the Appellate Body appeared to reason that the obligation to assess and collect CVDs in the appropriate amounts necessarily implies an affirmative obligation to first establish what the appropriate amount is," the panel report explained.

> "Based on the foregoing, the Panel concludes that in proceedings 1 through 25, the USDOC imposed anti-dumping duties calculated on the basis of an NME methodology, and concurrently imposed CVDs on the same products, without having investigated, on the basis of positive evidence, whether double remedies arose. Accordingly, the Panel finds that in proceedings 1 through 25, the United States acted inconsistently with its obligation under Article 19.3 to investigate whether, on the basis of positive evidence, double remedies arose from the imposition of such concurrent duties," the panel declared.

The panel explained that the concept of "double remedies" applies in NME cases when a subsidy leads to a reduction in the export price of a product and that subsidy is captured in the dumping margin. "From this, it follows that if a Member imposes a CVD in an amount equivalent to the full amount of the subsidy in such circumstances, and an antidumping duty equivalent to the full amount of the dumping margin is concurrently imposed on the same products to offset the dumping, this will result in the subsidy being offset twice, i.e. a double remedy," it said.

"The WTO panel's decision to reject China's challenge to our law is a significant victory for the United States," said USTR Michael Froman in a statement. "At the same time, we're disappointed that the panel found that the United States breached WTO rules in 25 countervailing duty proceedings by failing to investigate an alleged overlap between antidumping and countervailing duties on Chinese imports. However, the panel's concerns relate to certain past determinations, and U.S. law now directs the Department of Commerce to investigate any possible overlap,' he added. Froman's statement refers to the law's requirement to prevent double remedies prospectively, but the law still allows double remedies for pre-2012 cases, which is what the panel ruled against.

AFL-CIO's Trumka Holds Hope for TTIP, TPP

While labor unions have traditionally been seen as critics of free trade agreements, AFL-CIO President Richard Trumka told a progressive audience in Washington March 25 that a new model is possible in Washington. He expressed a sliver of optimism that ongoing talks toward a Trans-Pacific Partnership (TPP) and Transatlantic Trade and Investment Partnership (TTIP) could garner his union's endorsement.

"TPP and TTIP are products of the Obama Administration. And our hope has been that we would see a new template, one that we could support. Yet so far, we see the same corporate-dominated processes, and, in too many respects, the same fundamental outdated framework for both agreements," Trumka said in a speech at the Center for American

Progress. "Still, I maintain some hope, even for TPP. After the collapse of the Baucus fast track bill, some new thinking may yet occur in the TPP negotiations," he said. Later, he called the Trade Promotion Authority (TPA) bill "dead on arrival," since no Democrats other than former Senate Ways and Means Committee Chairman Max Baucus (D-Mont.) had been willing to sponsor it (see **WTTL**, March 10, page 5).

> "We know what we're looking for in these agreements. We want trade agreements to contribute to democratic global economic governance and to promote good jobs, full employment and rising wages," he said.

Trumka told reporters after the speech that he has met several times with USTR Michael Froman and sounded upbeat. "We're willing to work with him to create an agreement that does meet the needs of the American working people. And it starts with what the goals of a trade agreement are," he said.

For the AFL-CIO, those goals "would be to create enforceable labor standards, environmental standards, consumer standards, and quite frankly, an agreement whose goal is to move wages up, not drive wages down," he said. When asked what the chances of existing TPP talks fulfilling his organization's goals, Trumka told reporters: "Slim, but a chance. If I was a betting person, I would say no, but there's a slim chance."

Government Defends FOIA Exemption for Licensing Data

In another round of briefs filed in a suit seeking release of Commerce export licensing data under the Freedom of Information Act (FOIA), the government continues to argue that previous rulings have set precedents exempting the information from release. In a brief filed Feb. 26 in the Ninth Circuit Court, the government argued that rulings in *Times Publishing* and *Wisconsin Project* excluding license data from release still apply as well as a 1989 Supreme Court ruling in *John Doe Agency v. John Doe Corp*.

> The brief rebutted arguments made by the Electronic Frontier Foundation (EFF), which is seeking the information, in its last brief (see **WTTL**, Jan. 27, page 3). EFF had argued that the government couldn't use the "statutory scheme" it has used to maintain the export controls in the expired Export Administration Act to invoke FOIA's Exemption 3, which allows the denial of requests for information protected by statute.

"Like the district court, however, EFF incorrectly embraces an 'overly technical and formalistic reading of FOIA to disclose information clearly intended to be confidential' – a reading that would deprive Exemption 3 of 'meaningful reach and application,' the Justice brief contends. "This is at odds with the Supreme Court's teaching that 'the [FOIA] statutory exemptions are intended to have meaningful reach and application,' it quoted from the high court's decision in *John Doe Agency v. John Doe Corp.*

"Plaintiff argues that this statutory 'scheme' does not constitute a 'statute' for Exemption 3 purposes and accuses the government of playing fast and loose with the text of Exemption 3," it said. "On the contrary, this Court has already found the confidentiality provision of the EAA to meet the requirements of Exemption 3, with no 'cutting and pasting' required," it stated. The brief also disputed EFF's attempt to link its suit to a separate case challenging the use of the International Economic Emergency Powers Act

(IEEPA) to impose penalties for Export Administration Regulation (EAR) violations. "EFF next tries to draw sustenance from the D.C. Circuit's decision in *Micei Int'l v. Dep't of Commerce*, but as we showed in our opening brief, *Micei* actually supports the government's position here," the Justice brief said.

> "To the extent that plaintiff relies on *Micei*'s holding that the D.C. Circuit lacked subject matter jurisdiction over the request for direct appellate review of the agency action in that case, EFF downplays the key fact *Micei* relies upon bedrock principles of Article III jurisdiction, which require an Act of Congress to confer jurisdiction on a federal court, and preclude the President from doing so unilaterally," it argued.

U.S. Loses Softwood Lumber Arbitration Case

Three decades on, the debate over softwood lumber between the U.S. and Canada took another turn March 26 with release of the London Court of International Arbitration ruling that Canada no longer has to pay compensatory adjustments under the 2006 Softwood Lumber Agreement (SLA). The ruling, dated March 21, ran only two sentences.

> "The Tribunal determines that Canada has no obligation to continue to apply the Compensatory Adjustments beyond October 12, 2013. The Tribunal's award with reasons will follow shortly," it said. Observers expect a full rationale of the tribunal's decision in the next couple of weeks. The SLA entered into force in October 2006 and originally was set to expire on October 12, 2013. In January 2012, the two sides signed an extension until October 2015 (see **WTTL**, Jan. 30, 2012, page 4).

"As a result of this ruling, the Government of Canada will cease to collect export charges from Ontario and Quebec softwood lumber exporters that were implemented as a result of a 2011 award. The federal government will also refund charges collected from the Ontario and Quebec industries subsequent to the termination of the award on October 12, 2013," Canadian Minister of International Trade Ed Fast said in a statement.

"The United States disagrees with the tribunal's decision that lifts previously imposed compensatory measures on Canada's softwood lumber exports from Quebec and Ontario due to Canada's breach of the Softwood Lumber Agreement. The United States will continue to press for and work with Canada on the full enforcement and implementation of the Softwood Lumber Agreement," a USTR spokesperson said in an email to WTTL.

As expected, the U.S. Lumber Coalition expressed its disappointment at the ruling. "The Coalition is very disappointed that Canada will not be required to fully compensate U.S. industry for the harm the Tribunal found to be caused by Canada's violations of our trade agreement," said Luke Brochu, Coalition chairman and president of Pleasant River Lumber Company in Maine. "For Canada to be allowed to collect export taxes with one hand, then give them back with the other hand through illegal subsidies and not to pay a penalty for it, seriously undermines our faith in the usefulness of this trade agreement with Canada," Brochu said.

The current SLA is the latest of numerous bilateral lumber accords that have tried to resolve U.S.-Canada lumber disputes dating back to 1982. The antidumping and

countervailing duty complaints against Canadian lumber imports have spawned extensive litigation in U.S. and international venues. Under the SLA, Canada agreed to impose certain measures to keep up the price of softwood lumber exports to the U.S. With the 2008 recession and accompanying housing bust, imports of Canadian lumber have declined sharply from their pre-2006 and 2008 levels. Significant changes in the industries on both sides of the border, including cross-border mergers, acquisitions and consolidation, have changef the dynamics of the dispute and may, perhaps, determine what happens when the current deal expires in 2015.

* * * Briefs * * *

EXPORT ENFORCEMENT: Arkema Rotterdam B.V. agreed March 21 to pay $16,000 to settle one BIS charge of unlicensed export from Netherlands to Syria. In July 2009, Arkema allegedly reexported 33 long tons of ethyl mercaptan designated EAR99 without authorization.

600 SERIES: Based on very preliminary data during first five months since first USML-CCL transfers became effective in October, exporters have used EAR license exceptions for 46% of exports moved to CCL, BIS officials told PECSEA March 25. They said 26% went out under license, 16% as No License Required (NLR) and 12% as .y not specially designed. BIS, through February, processed about 2,100 licenses in average of 14.5 days.

INNERSPRINGS: In 5-0 "sunset vote" March 25, ITC determined that ending antidumping duty orders on uncovered innerspring units from China, South Africa and Vietnam would cause renewed injury to U.S. industry. Commissioner Shara L. Aranoff did not participate.

AUSTRALIA GROUP: In March 26 Federal Register BIS updated EAR to "implement the understandings reached" at June 2013 plenary meeting and December 2012 intersessional of Australia Group. Changes include ECCN 2B352 to clarify controls on fermenters; ECCN 1C351 to clarify controls on *Lyssavirus genus*; and general updates to reflect addition of Mexico as participating country and of Somalia and Syria as States Parties to Chemical Weapons Convention (CWC). Rule also adds License Exception STA paragraph to ECCN 1C351 to clarify scope of eligible items.

TTIP: In joint statement March 26 after EU-U.S. Summit, governments "reaffirmed our commitment to conclude expeditiously a comprehensive and ambitious" TTIP agreement. "We commit ourselves to conducting these negotiations with clarity and in a manner that builds support among our publics," statement noted. Separately, National Association of Manufacturers President Jay Timmons told reporters in conference call March 27 that Ukraine crisis "accelerates the need for us to successfully conclude these negotiations and discussions." Timmons added, "There was an economic imperative even before Ukraine, and both sides of the Atlantic understand that." Meanwhile, in report on EU trade barriers released March 28, ITC noted that without TTIP, complying with EU standards and technical regulations is "potentially prohibitive" for small and medium-sized businesses "because many costs are fixed regardless of a firm's size or revenue." Businesses also cited difficulties involving patenting costs, logistics challenges, difficulties navigating customs requirements and differing tariff classifications for products, ITC said.

THERMAL PAPER: CIT Judge Timothy Stanceu remanded to Commerce March 25 administrative review of antidumping order on lightweight thermal paper from Germany (slip op. 14-31). Department erred by making price adjustments for quarterly and annual rebates offered to customers in Germany but not for monthly rebates. "Under the regulations, the question is not whether the rebates were made according to a 'program' that satisfied the various prerequisites Commerce identified in the Decision Memorandum but whether the monthly rebates actually were made, i.e., whether there were downward adjustments in the prices charged for the foreign like product that were reflected in purchasers' net outlays," Stanceu wrote. He declined to

order record opened so respondent could comment on letter sent department from lawmakers in favor of order. "Because Commerce must take corrective action in the determination it reaches upon remand, plaintiff is receiving an appropriate remedy, and therefore, directing Commerce to reopen the record to allow plaintiff to comment on the Joint Congressional Letter would serve no purpose," he ruled.

ALUMINUM EXTRUSION: CIT Senior Judge R. Kenton Musgrave ordered second remand March 26 of Commerce's scope ruling in antidumping and countervailing duty cases on aluminum extrusion from China and decision not to consider certain trim kits as finished goods. "Upon review of the remand results, the court finds that although Commerce reasonably defined the 'finished goods kit' exclusion methodology, as applied in the *Drapery Rail Kits* Remand and *Solar Panel Mounting* Ruling, its conclusion that the Trim Kits do not qualify as goods intended to 'display customizable materials' or 'work with removable/replaceable parts' and do not merit application of the methodology from the rulings is not supported by substantial evidence," Musgrave wrote (slip op. 14-32). "Commerce fails to adequately address in its remand what is required for a product to qualify as one designed to 'display' a customizable good and has not explained with sufficient clarity why Trim Kits do not meet this criterion," he stated.

WIND TOWERS: Commerce has been ordered to reconsider its antidumping ruling on wind towers from Vietnam because it failed to explain why it used suurogate Global Trade Atlas (GTA) import data rather than Steel India data to value steel plate on products. It also must revise its value calculations based on substantial evidence for carbon dioxide, overhead, and brokerage and handling (B&H) costs, CIT Judge Jane Restani ruled March 27 (slip op. 14-33). While saying she understands department's desire to determine unit values, Restani criticized its attempt to set unit value for B&H costs based on weight of tower. "Commerce has failed to explain why document preparation costs, as opposed to other B&H fees, would change depending on the size or weight of the shipment. Taken to its logical extreme, under Commerce's methodology, a single shipment of wind towers by CS Wind, at an average weight of 2,600,000 kg, would incur a document preparation cost of over $100,000," she wrote.

COUNTERFEIT: CBP and ICE's Homeland Security Investigations reported March 24 that in fiscal year 2013, which ended Sept. 30, 2013, they seized 7% more counterfeit and pirated goods than in FY 2012, with 24,361 seizures in 2013 compared to 22,848 in 2012. Suggested retail price of seized goods rose to $1.74 billion. While China remains primary source for counterfeit and pirated goods seized, with total value of $1.1 billion or 68% of all seizures by value, agencies made seizures from 73 additional sources, including Hong Kong, India, Korea, Singapore and Vietnam, they reported.

TRADE AGENDA: USTR Michael Froman is scheduled to testify April 3 at Senate Finance Committee on administration's trade policy agenda, committee announced. Early that day, he will be at House Ways and Means Committee for hearing on administration's trade agenda.

BIS: Commerce's Office of Inspector General launched audit March 24 of BIS' information security practices "to determine whether BIS' continuous monitoring strategy and practices, including ongoing security control assessments of its critical information systems, provide adequate information for authorizing officials to make proper risk-based decisions." Audit will determine compliance with Federal Information Security Management Act of 2002.

UNITED KINGDOM: UK's export control office issued Open General Export License (OGEL) March 22 to allow exports without licenses of certain controlled items to selected countries for demonstration purposes. "Subject to the following provisions of this Licence, goods specified in Schedule 1 hereto, may be exported from the United Kingdom to any destination in a country specified in the Schedule 2 hereto providing the goods are for demonstration in the country to which they are exported," agency said.