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Strong Concerns Remain About UN Arms Trade Treaty

Industry opponents of the United Nations (UN) Arms Trade Treaty (ATT) continue to predict dire consequences from the accord, especially in six years when it will be open to amendment and the U.S. won't be able to participate in the amendment process. Only countries that ratify the treaty will be eligible to vote on any amendments, and it is generally agreed the Senate will never ratify it. As a result, provisions the U.S. kept out of the ATT could get put into a revised agreement, industry representatives warn.

> So far, 81 countries have signed the ATT and two have ratified it since it was opened for signature June 3 (see **WTTL**, June 10, page 7). The U.S. is expected to sign the accord in September after State has confirmed that translations of the agreement into the five other official languages of the UN match the English version, a State source said.

Industry is concerned that human rights groups are working with countries to draft implementing legislation. They claim some proposals could prevent those countries from exporting to the U.S., warned Major General (Ret.) Allen Youngman, executive director of the Defense Small Arms Advisory Council. In particular, under those provisions exporting countries might require end-user certificates from U.S. gun purchasers, not just from U.S. importers. "This is not just a Second Amendment issue, there is a real business implication," Youngman told a National Shooting Sports Foundation (NSSF) and FireArms Import/Export Roundtable (FAIR) trade conference Aug. 6.

The amendment process "poses the biggest danger," Rich Patterson, managing director of the Sporting Arms and Ammunition Institute (SAAMI), told the NSSF conference on exporting and importing. He said civil society groups have been extremely open that they see the current ATT as the start of global gun controls and will seek to use the amendment process to further restrict gun trade. He also warned about the effort to draft a UN International Small Arms Control Standard (ISACS) in Geneva. Gun control advocates are using the standard to "justify and give credibility to their wish list," he said.

Record Exports Not High Enough to Reach Obama's Goal

Way off the goal of doubling U.S. exports by 2015, U.S. merchandise exports in the first half of 2013 gained just 0.92% from a year ago to $786.6 billion in seasonally adjusted

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numbers, Commerce reported Aug. 6. Services exports increased 4.9% to $338.2 billion from first six months of 2012. Goods imports went down 1.7% to $1.16 trillion from the first half of 2012, as services imports gained 2.8% to $226.7 billion. To meet President Obama's goal of doubling exports in five years, U.S. exports would need to grow at a 14.4% rate annually.

Preliminary U.S. Goods Exports--Imports
Selected Markets -- 6 Months 2013 v. 2012
(In billions; Not seasonally adjusted)

	Exports 2013	Exports 2012	% Change	Imports 2013	Imports 2012	% Change
Total	$781.1	$773.0	1.1%	$1,108.5	$1,132.8	-2.1%
Canada	150.6	148.2	1.6	166.1	164.9	0.73
EU	129.7	137.2	-5.5	187.3	189.3	-1.1
China	55.1	52.9	4.2	202.8	197.9	2.5
OPEC	44.2	38.8	13.9	77.4	95.7	-19.1
Japan	32.2	34.7	-7.2	68.7	73.7	-6.8
Brazil	21.0	20.9	0.48	13.1	17.2	-23.8
S. Korea	20.4	22.2	-8.1	31.4	29.5	6.4

Increased sales of civilian aircraft (+$4.8 billion or 23%) were offset in part by a large decrease in exports of soybeans (-$2 billion, -21%) and corn (-$2.8 billion, -45%). The decline in those agriculture exports was attributed to the droughts and subsequent floods in the Midwest. In addition, exports of the broad category of industrial supplies and materials declined $2.8 billion compared to the same period a year ago.

Exports for Selected Sectors
First 6 Months 2013 v. 2012
(In billions; Seasonally adjusted)

	2013	2012	% Change
Autos	$75.1	$73.5	2.2%
Fuel Oil	28.2	29.8	-5.4
Civilian Aircraft	25.7	20.9	23.0
Soybeans	8.0	10.1	-20.8
Jewelry	6.5	5.2	25.0
Metallurgical Coal	4.2	6.1	-31.2
Corn	3.4	6.2	-44.3

A $1.95 billion decline in exports of metallurgical coal and a drop of $1.1 billion in exports of steelmaking materials contributed to that decline. Excavating machinery exports slid $1.5 billion to further account for sluggish export growth overall.

U.S. exports have been hurt by the recession in Europe and slower growth in many emerging markets. In absolute terms, exports to Europe were down 5.5% in non-seasonally adjusted numbers, and exports to Japan were down over 7%. At the same time, exports to OPEC were up almost 14%.

Imports for Selected Sectors
First 6 Months 2013 v. 2012
(In billions; Seasonally adjusted)

	2013	2012	% Change
Autos	149.6	147.1	1.7
Crude Oil	135.3	166.9	-18.9
Pharmaceuticals	42.4	44.5	-4.7
Computers	32.0	33.4	-4.2
Iron-Steel Products	8.8	11.1	-20.7
Chemical Fertilizers	8.3	7.0	18.6
Feeds and Grains	3.6	2.5	44.0

The decline in imports was driven by a $31.6 billion (-18.9%) decline in crude oil imports from a year ago. Imports from Brazil were down almost 24%, and from OPEC down 19%, in large part due to slowdown in oil imports from those countries.

The decline in exports to Korea was due mainly to the same factors that cut soybean and corn exports, weather in the Midwest, U.S. Trade Representative (USTR) Michael Froman told reporters Aug. 9. "My understanding is the drought effected certain crops that had been exported before that are not exported now," he said. Froman also tried to respond to critics who cite the decline in U.S.

exports to Korea as a sign that the U.S.-Korea Free Trade Agreement has been a failure. "Auto exports from here are up 48%. Big Three exports are up 18%, from a very small base. I don't want to overstate that," he added. "We are going to monitor that very closely and where there have been issues over implementation, we have engaged immediately with the Korean government to get full implementation," Froman said.

> Administration don't talk often any more about doubling exports by 2015. Officials, instead, were quick to compare current numbers with 2009 figures, which had dropped sharply due to the recession. "Exports have been growing at an annualized rate of 10.4 percent when compared to the same period in 2009," a statement from the Export-Import Bank noted, while touting the record-high numbers.

"Our efforts are paying off for America's workers, farmers and ranchers, manufacturers and service providers, and innovators and investors," said Commerce Secretary Penny Pritzker in a statement. "Today, we sell more products made in America to the rest of the world than ever before, and we will continue to do everything we can to assist U.S. exporters and help create new jobs for American workers," she added.

Prospects for the second half of 2013 may be looking up, as merchandise exports in June increased 2.1% from a year ago to $134.3 billion. In that same period, services exports grew 5.8% to $56.9 billion from 2012, leading to a much-touted record high in total exports. Goods imports went down 1.8% from June 2012 to $187.4 billion, as services imports gained 3.2% to $38 billion.

Expect Delays on Firearms Proposals, Ex-State Official Says

Proposals to transfer items in U.S. Munitions List (USML) categories I (firearms), II (guns) and III (ammunition) to the Commerce Control List (CCL) may not come until after the 2014 elections, a former State official said Aug. 6. "The chances of anything changing in I, II and III are zero this year," Bob Kovac, former managing director of the Directorate of Defense Trade Controls (DDTC), predicted. "The chance of anything in 2014 aren't zero, but I'm not sure they are to the left of a decimal point," he told the National Shooting Sports Foundation (NSSF) and FireArms Import/Export Roundtable (FAIR) annual import-export conference in Washington.

> The potential delay has raised concerns in the gun industry, which has supported export control reform in anticipation that most of its products would move to the CCL and gun makers could avoid paying registration fees required for items controlled by the International Traffic in Arms Regulations (ITAR). Industry sources say they expect to begin lobbying Congress to make sure their products are not left behind in the reform effort.

Kovac said Federal Register proposals for categories I, II and III were ready for publication in mid-2012 but were delayed because of the mass shooting in Aurora, Colo., in July. The rules were then held up because of an administration-wide hiatus in Federal Register publications before the election. The rules were to be proposed right after the election, but then the tragedy in Newtown, Conn., occurred in December, and the proposals were pulled back from publication. After Aurora, "the administration was not going to look like we were lessening controls," Kovac said. "Each time it became a

public relations question as to whether this [proposals] would get out on the street," he added. In January, categories I, II and III were "removed from the schedule of work that was to run through April 2014," he noted.

> The drafting of proposals for the three categories was already delayed due to bureaucratic resistance to change, Kovac said. The Alcohol, Tobacco, Firearms and Explosives Bureau (ATF) wanted to make sure it would retain controls on imports of these items after they were transferred to the CCL; Justice was afraid its case law on arms violations would no longer apply after the transfers and some working-level staff at the Bureau of Industry and Security (BIS) didn't want to control lethal weapons, even though the agency already has jurisdiction over hunting shotguns, Kovac explained.

As currently drafted, almost everything in Category I will move to the CCL except fully automatic weapons and a new provision covering "caseless" ammunition. It is not clear whether items in the three categories transferred to the new 600 series will be handled separately from shotguns or whether all gun controls will move to the 600 series.

The former DDTC official also warned control changes are likely to face opposition from human rights groups that are trying to stiffen gun control laws and are likening guns to weapons of mass destruction. "It has seeped into their rhetoric," Kovac said. Administration officials have already had to defend export reforms against claims that it would weaken human rights protections (see **WTTL**, June 10, page 1).

Apple Decision Stresses Need for Licensing Agreements

In overruling an International Trade Commission (ITC) exclusion and cease and desist order against imports of Apple iPads and iPhones Aug. 3, U.S. Trade Representative (USTR) Michael Froman stressed the Obama administration's support for the settlement of patent disputes involving standards-related patents through licensing agreements rather than litigation. Froman noted a January policy statement issued by Justice and the Patent and Trademark Office, which urged the use of "fair, reasonable and non-discriminatory" (FRAND) licensing agreements for standards-essential patents (SEPs) that are incorporated in standards set by standards-development organizations (SDOs).

> The policy statement "expresses substantial concerns, which I strongly share, about the potential harms that can result" from SEPs owners, who have committed to licensing those patents under FRAND terms, "gaining undue leverage and engaging in 'patent hold-up'...to "obtain a higher price for use of the patent." At the same time, he criticized "reverse hold-up" by licensees who refuse to negotiate a FRAND license or pay a fair royalty.

Froman's intervention, which is rare in the application of the unfair trade provisions of Section 337 of the Trade Act, blocked an ITC order protecting patents held by Samsung Electronics Co. Ltd. and Samsung Telecommunications America, Inc. Although most Section 337 cases get settled by parties before a final ITC ruling, Apple and Samsung have been engaged in intense mutual cross litigation at the ITC and in federal courts over patent infringement and refused to settle their dispute at the commission. "Licensing SEPs on FRAND terms is an important element of the Administration's policy of promoting innovation and economic progress and reflects the positive linkages between

patent rights and standards setting," Froman wrote in his letter to the ITC informing the commission of his decision. The ITC still can use exclusion orders in future SEPs cases, but in doing so it should be certain to examine public interest issues and "seek proactively to have the parties develop a comprehensive factual record" related to the standards-essential nature of a patent and "the presence of patent hold-up or reverse patent hold-up," Froman wrote.

> Meanwhile, in a separate ruling, the Court of Appeals for the Federal Circuit (CAFC) reached a divided decision Aug. 7 in an Apple appeal from an ITC ruling on Apple's patent-infringement complaint against Motorola's use of touch-screen technology. In a 2-1 ruling, the court affirmed-in-part, reversed-in-part and vacated-in-part the commission's decision in Motorola's favor. The CAFC examined claims of prior art, anticipation and obviousness in the case and decided to send it back to the ITC for a new ruling based on the majority's opinion.

The appellate court agreed with the ITC's determination that Motorola did not infringe on seven of Apple's claims based on an earlier patent that "anticipated" the Apple patent and was "prior art," while reversing and remanding commission's determination on one claim that the earlier patent was "prior art" and "obvious."

"We are troubled by the ITC's obviousness analysis. We have repeatedly held that evidence relating to all four *Graham* factors—including objective evidence of secondary considerations—must be considered before determining whether the claimed invention would have been obvious to one of skill in the art at the time of invention," two of three CAFC judges ruled. "For the foregoing reasons, we vacate the ITC's decision that claim 10 of the '607 patent would have been obvious and remand the case for further proceedings," they ordered.

"The Smartphone has defined modern life," wrote Judge Jimmie Reyna in a partial dissent to the majority's prior-art decision on seven claims, saying he would have remanded the issue to the ITC. "Today, fingers tapping, grazing, pinching, or scrolling the screen is a ubiquitous image that reflects how we conduct business, work, play, and live. The asserted patent in this case is an invention that has propelled not just technology, but also dramatically altered how humans across the globe interact and communicate. It marks true innovation," he wrote.

Pulungan Not Guilty But Not Innocent, Court Rules

Doli Syarief Pulungan, who won a landmark court ruling overturning his conviction on violating the Arms Export Control Act (AECA) in June 2009, failed to convince the same appellate court that he is entitled to a "certificate of innocence" that would allow him to sue the government for compensation for his prosecution. In a July 10 ruling, the Seventh Circuit Court reversed and remanded a district court decision granting Pulungan's request for a certificate, saying he had not met the statutory conditions that would warrant a certificate (see **WTTL**, Sept. 7, 2009, page 4).

In reversing Pulungan's original conviction, the appellate court criticized the Directorate of Defense Trade Controls (DDTC) for not clearly classifying as defense items the riflescopes that Pulungan had exported to Indonesia. The government declined to pursue

his prosecution on remand to show a jury that the scopes were subject to the U.S. Munitions List (USML), so Pulungan's actual guilt or innocence was never confirmed. To warrant a certificate of innocence, a person has to show that a court had found him not guilty of a crime or that he had not committed the acts with which he was charged. "Pulungan committed all of the acts necessary for conviction" even though the jury had not deter-mined whether the Leupard Mark 4 scopes he exported were defense articles," wrote Appellate Court Judge Frank Easterbrook, the same judge who wrote the opinion reversing Pulungan's original conviction.

> "The record would have supported a finding that it is (there was testimony to that effect, which the jury could have accepted). The district judge did not hold a hearing on Pulungan's request for a certificate of innocence, so the defense article issue has not been resolved in his favor at either the criminal trial or this civil proceeding," Easterbrook ruled. As a result, Pulungan "cannot prevail" under the first statutory condition, he wrote.

"The district court treated our decision that he is entitled to an acquittal as equivalent to a decision that he did not commit a crime. Not at all. We held that it had not been *proved*, beyond a reasonable doubt, that Pulungan committed the crime," Easterbrook continued (his emphasis). "It remains entirely possible that the 'scopes are defense articles, that Pulungan knew it, and that he also knew of the need for a license. His contention that the secrecy was attributable to a belief in a nonexistent arms embargo to Indonesia may be a tall tale. A conclusion that the prosecutor did not prove a charge beyond a reasonable doubt differs from a conclusion that the defendant is innocent in fact," he wrote.

"On remand, one vital question will be whether the Leupold Mark 4 CQ/T riflescope is a defense article. If it is not, then Pulungan is actually innocent without regard to his state of mind," he explained. "The agency's evidence about its classification of the 'scope will be admissible, and the judge as trier of fact will need to determine whether it meets the regulatory criteria. If it does, then as a practical matter Pulungan could show actual innocence only by testifying about his knowledge; the judge then could determine whether he is telling the truth. He is now the plaintiff in civil litigation, so the burdens of production and persuasion are his. If he decides not to testify, that would be a good basis for an adverse inference," Easterbrook ruled.

Voluntary Disclosures to DDTC Jump 20%

Defense exporters are stepping up the number of voluntary disclosures (VDs) they are filing with the Directorate of Defense Trade Controls (DDTC). In the first 10 months of fiscal 2013, from Oct. 1, 2012, to Aug. 6, 2013, defense firms filed 1,762 VDs, 20% more than the 1,454 they filed for all of 2012, DDTC staffers report. The latest numbers compare to just 580 VDs filed in 2006.

The increase is partly due to the increase in volume of defense exports, which is also seen in the growth of export license applications to DDTC. These numbers also track the increase in the number of firms registered with the agency, which is now more than 12,500. Other factors include violations that are discovered in the merger and acquisition process, along with increased auditing by companies and more export training, DDTC staff say. Of the 1,762 VDs, 1,687 were truly voluntary and 75 were "directed disclosures" that DDTC required firms to make, usually as a result of another disclosure

or investigation. A review of VDs from 2008 showed that 88% were closed with no further action. Of the remaining, most are only directed to take remedial actions, conduct internal audits, or to file commodity jurisdiction (CJ) requests to determine whether the apparent violation actually involved a defense article. Less than 1% of cases -- one to three a year -- lead to consent decrees.

> "Very rarely do we find no violation," Sarah McKeown, a compliance specialist in DDTC's office of defense trade compliance, told the NSSF-FAIR trade conference Aug. 7. "Usually, if it's no violation, it's because the items in not actually on the USML. We've asked the company to do a CJ and it came back on the CCL," she said.

For most cases, "we just say, 'Thank you. We found a violation but the remedial action we got them to do helped correct the situation and we're confident of the company moving forward," McKeown said. "It's pretty rare that there's a criminal referral. That happens only once or twice a year'," she added.

Pacific Trade Talks Moving Toward Political-Level Involvement

With the Obama administration still forecasting an agreement on a Trans-Pacific Partnership (TPP) trade deal by the end of the year, USTR Michael Froman will be bringing political-level focus to the talks at upcoming meetings in Brunei and Japan in August. "The goal, given that we're in the end game here of TPP, is to bring political-level involvement to the negotiations, which we think are at an important stage," Froman told a roundtable with reporters Aug. 9. There will be a higher-level political push for the talks when President Obama meets with leaders belonging the the Asia-Pacific Economic Cooperation Forum (APEC) in Bali, Indonesia, in early October, Froman said.

> As part of a round-the-world trip, Froman will meet with the trade ministers of TPP participating countries in Brunei Aug. 20-22 on the sidelines of the ministerial of the Association of Southeast Asian Nations (ASEAN). Those talks will follow an Aug. 19 stop in Tokyo for talks with Japanese officials.

Froman would give no details on which provisions in the TPP have been agreed upon and which remain unresolved. He only emphasized the "good progress" that was made at the most recent round of talks in Malaysia. He said parallel talks with Japan have just gotten started, noting that Deputy USTR Wendy Cutler was in Japan for those initial talks the week of Aug. 5 (see **WTTL**, Aug. 5, page 9).

Froman acknowledged the difficult task of getting Japan to open its market as part of the TPP talks. "I think we all bear scars of trying to open the Japanese market in the past, and Japan's market remains closed in a number of very important significant ways," he said. "So we go into this with our eyes wide open," he added. Froman noted Japanese Prime Minister Abe's plans for restarting the Japanese economy, including structural reform. "We're not naive about this. We know there are historical difficulties," he said.

Froman also commented on the human rights complaints about Vietnam. "We are very much focused on and concerned about human rights in Vietnam," he said. "In the context of TPP, that is translated into the labor rights provision and ensuring that Vietnam is committed both in law and practice to improving their treatment of labor,"

Froman said. When asked if a side deal similar to the one with Colombia will be needed to assure those commitments are met, Froman said, "At this point, we are focused on the labor chapter and reaching an agreement on the nature of the agreement and the implementation. They understand how important that is to us and other TPP members."

* * * Briefs * * *

EXPORT ENFORCEMENT: Aeroflex Incorporated of Plainview, N.Y. agreed Aug. 9 to pay $8 million civil penalty under two-year consent agreement with State for "inadequate corporate oversight and a systemic and corporate-wide failure to properly determine export control jurisdiction over commodities, leading to numerous violations during the period of 1999-2009," State said. Violations included unauthorized exports and re-exports of ITAR-controlled electronics, microelectronics, and associated technical data and causing unauthorized exports of ITAR-controlled microelectronics by domestic purchasers. Of penalty, $4 million will be suspended "on the condition the Department approves expenditures for self-initiated, pre-Consent Agreement remedial compliance measures and Consent Agreement-authorized remedial compliance costs." Aeroflex voluntarily disclosed nearly all violations in settlement.

TRADE PEOPLE: Renato Ruggiero, WTO's first director-general, died Aug. 5 in Milan at 83. He served as DG from 1995 to 1999, playing "an important role in brokering three important WTO agreements covering information technology products, trade in telecommunications services and trade in financial services," WTO said. He also oversaw launch of Doha Round.

CIT: Court will switch to Public Access to Court Electronic Records (PACER) System on Oct. 1, it announced Aug. 7. PACER is centralized service that provides access federal court dockets. "If you already have a PACER account, you will not need to re-register," CIT said.

MOTOCROSS BOOTS: CIT Judge Leo Gordon issued summary judgment Aug. 2 in favor of Alpinestars S.p.A., overturning Customs classification ruling on motocross boots (slip op. 13-98). Judge agreed boots are other footwear covering ankle under HTSUS subheading 6403.91.60 with 8.5% duty rate and not other footwear covering ankle, under HTSUS subheading 6402.91.90, which carries a 20% duty rate, as Customs claimed.

BURMA: In wake of July 28 expiration of Burmese Freedom and Democracy Act, President Obama issued executive order Aug. 7 withdrawing broad ban on imports of most products from Burma. At same time, he renewed prohibition on imports of Burmese jadeite and rubies imposed under Tom Lantos Block Burmese JADE Act of 2008. Obama's order "represents the next step in the administration's continued efforts to promote responsible trade and investment in support of Burma's reform process," said statement by Deputy National Security Advisor for Strategic Communications Ben Rhodes (see **WTTL**, July 29, page 2).

VSDs: BIS issued final rule in Federal Register Aug. 9 setting 180-day deadline for completing and submitting final narrative report of voluntary self-disclosure (VSD) and other changes to delivery service in administrative enforcement proceedings. Industry had generally supported proposal (see **WTTL**, Feb. 11, page 8).

SERVICES: WTO and World Bank agreed Aug. 6 to develop jointly database on trade in services from 100 countries. Data will cover WTO members' commitments under General Agreement on Trade in Services (GATS); commitments in regional trade agreements; members' applied measures; and statistics. Among sectors to be reported are financial, transportation, tourism, retail, telecommunications and business services, including law and accounting.

STEEL THREADED ROD: In preliminary 6-0 vote Aug. 9, ITC found reasonable indication that U.S. industry may be materially injured by allegedly dumped and subsidized imports of certain steel threaded rod from India and Thailand.