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## USML Firearms Transfers Get Their Day in Congress

Despite a Senate hold and opposition from human rights groups, the transfers of firearms and ammunition from U.S. Munitions List (USML) categories I (firearms), II (guns and armament) and III (ammunition) to Commerce jurisdiction got their day in court March 26 at a House Foreign Affairs Committee oversight subcommittee hearing.

A month prior, Sen. Bob Menendez (D-N.J.) Feb. 26 cited congressional oversight and 3D printing of firearms when he put a “hold” on the transfers after receiving a 30-day formal 38(f) notice from State on the long-awaited rules (see **WTTL**, March 4, page 1). House progressives earlier introduced the Prevent Crime and Terrorism Act (H.R. 1134) to block the transfers.

University of Michigan Professor Susan Waltz, who is associated with Amnesty International, argued against the transfers, saying in her opening statement that the proposed rules’ “bright line between fully automatic weapons on one hand, and semi- or non-automatic weapons on the other” is a “distinction without a difference.” In response to statements about other USML items that have already moved to Commerce jurisdiction, she noted that firearms are the “only complete lethal weapons that are being transferred.”

Gun industry groups in contrast are pushing for the publication of final rules. Our companies “will economically benefit because the regulatory simplification and cost reductions will allow them to consider exporting when they might not have otherwise. Those that already export will be able to expand sales of exports that would have otherwise been approved,” Lawrence Keane, National Shooting Sports Foundation (NSSF) senior VP, wrote in a letter to the subcommittee that was entered into the record.

## German Medical Firm Pays \$231 Million to Settle FCPA Charges

German medical device manufacturer Fresenius Medical Care (FMC) agreed March 29 to pay more than \$231 million to settle parallel Securities and Exchange Commission (SEC)

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and Justice charges of violating the Foreign Corrupt Practices Act (FCPA). FMC paid nearly \$30 million in bribes to government officials and others in Saudi Arabia, Morocco, Angola, Turkey, Spain, China, Serbia, Bosnia, Mexico and eight countries in West Africa to procure business between 2007 and 2016, the agencies charged.

Under the settlement, FMC agreed to pay \$147 million in disgorgement and interest to the SEC as well as an \$84.7 million criminal fine as part of a non-prosecution agreement (NPA) with Justice. “FMC employees and agents utilized the means and instrumentalities of U.S. interstate commerce, including the use of internet-based email accounts hosted by numerous service providers located in the United States. The company benefitted by over \$135 million as a result of the improper payments,” the SEC order noted.

“FMC failed to promptly address numerous red flags of corruption in its operations that were known since the early 2000s. This includes employees making improper payments through a variety of schemes, including using sham consulting contracts, falsifying documents, and funneling bribes through a system of third party intermediaries,” the order added.

“Although Fresenius voluntarily self-disclosed the misconduct in April 2012, the company did not timely respond to certain requests by the Department and, at times, did not provide fulsome responses to requests for information. In addition, misconduct occurred in 13 countries, yielded profits of more than \$140 million and continued in certain countries until 2016,” Justice noted. Due to these factors, the company did not qualify for a declination under the Corporate Enforcement Policy, but was afforded a 40% reduction below the sentencing guidelines, the department said.

“We are pleased to have concluded these investigations and to have resolved the issues that we identified and voluntarily disclosed to the U.S. authorities. Since the investigation began we have taken extensive steps to further a culture of ethical business behavior throughout the entire company and to strengthen our compliance programs and internal controls,” Fresenius CEO Rice Powell said in a statement.

## **Grassley Working on One More 232 Tariff Bill**

Faced with competing bills introduced by fellow committee members, Senate Finance Committee Chairman Chuck Grassley (R-Iowa) is working to find a compromise bill to require congressional approval of the administration’s use of Section 232 tariffs, primarily focused on steel and aluminum imports.

Sen. Pat Toomey (R-Pa.), Rep. Mike Gallagher (R-Wis.) and two dozen cosponsors introduced in January parallel bipartisan bills (H.R.940/S. 287) (see **WTTL**, Feb. 4, page 8). Fellow committee member Sen. Rob Portman (R-Ohio) previously introduced legislation (S. 365) for the same purpose, but with slight different requirements.

“Congress should take back some of this delegation of its Constitutional authority and rebalance trade powers between the two branches in a responsible way that doesn’t impede a president’s ability to protect America’s national security,” Grassley said in a statement March 26.

Two days later, Sen. Pat Toomey (R-Pa.) told an event in Washington that he and Grassley have a “shared view of the fundamentals,” even if the specific bill that might emerge could have different requirements. For example, Toomey’s bill requires congressional approval within 60 days or the tariffs cannot take effect, and it would be retroactive so Congress would get a vote on existing tariffs. That retroactivity is “one of the more controversial parts” of his bill and is “still the subject of discussion.”

While Toomey said he wants a “legislative outcome,” not simply to send a message of congressional intent, he was realistic about any bill’s prospects. We’re “probably going to need 67 votes” in the Senate to override a presidential veto, he noted. Toomey also cited the more than 60 endorsements from industry groups, many of whom expressed support even before the bills were introduced.

## **Tool Company Settles OFAC Iran Sanctions Charges**

Stanley Black & Decker of New Britain, Conn., and its Chinese subsidiary Jiangsu Guoqiang Tools (GQ) agreed March 27 to pay Treasury’s Office of Foreign Assets Control (OFAC) \$1,869,144 to settle 23 charges of violating U.S. Iran sanctions. Between June 2013 and December 2014, GQ exported and attempted to export power tools and spare parts worth more than \$3 million to Iran or to “a third country with knowledge that such goods were intended specifically for supply, transshipment, or reexportation, directly or indirectly, to Iran,” OFAC noted.

Stanley Black & Decker voluntarily self-disclosed the apparent violations on behalf of GQ. “Despite the written agreements GQ’s senior management executed in which they attested that GQ would not engage in transactions with Iran, and notwithstanding the ... trainings Stanley Black & Decker provided, GQ continued to export goods to Iran throughout 2013 and 2014,” the agency said. Stanley Black & Decker acquired a 60% interest in GQ in May 2013 and created a joint venture with the firm.

“GQ utilized six trading companies as conduits for these sales — four companies located in the United Arab Emirates and two companies located in China. In addition, GQ employees created fictitious bills of lading with incorrect ports of discharge and places of delivery and instructed their customers not to write ‘Iran’ on business documents, such as bills of lading,” OFAC noted.

“Stanley Black & Decker, Inc. is committed to a culture of integrity and compliance. In 2015, upon learning that employees at a recently acquired company had disregarded our training and violated our trade compliance policies and procedures, we took quick action to

remediate and also submitted a voluntary self-disclosure to OFAC,” a company spokesperson wrote in an email to WTTL. “We have taken and will continue to take steps to ensure all employees are compliant with corporate policies and applicable laws,” the spokesperson added.

## **USTR Highlights Victories, Irritants in Annual Report**

In the 34<sup>th</sup> edition of an annual report, it can be hard to distinguish between the boilerplate of trade irritants and the newly implemented barriers that will truly lead to lost business. This year’s National Trade Estimate (NTE) that the U.S. Trade Representative’s (USTR) office released March 29 is no different, just a bit longer.

This year’s 540-page report covers trade barriers in 61 countries, the European Union (EU), Taiwan, Hong Kong, and the Arab League and addresses everything from tariffs, nontariff barriers, phyto-sanitary and sanitary restrictions, to government procurement, standards, import and customs procedures, quotas and intellectual property protection. The section on China covers 22 pages; Japan gets 16 pages; and the EU, 50 pages.

On China, with which the administration is conducting ongoing trade talks, the U.S. “continues to pursue vigorous engagement to increase the benefits that U.S. businesses, workers, farmers, ranchers, service providers and consumers derive from trade and economic ties with China,” it said. “China continued to pursue a wide array of industrial policies in 2018 that seek to limit market access for imported goods, foreign manufacturers and foreign services suppliers, while offering substantial government guidance, resources and regulatory support to Chinese industries,” the report noted.

On trade with the EU, the report highlighted “some of the most significant barriers that have endured despite repeated efforts at resolution through bilateral consultations or WTO [World Trade Organization] dispute settlement,” it said. U.S. exporters and investors “face persistent barriers to entering, maintaining, or expanding their presence in certain sectors of the EU market,” it said.

In a fact sheet released with the NTE, the USTR’s office highlighted successes at the WTO against China’s unfair duties on poultry broiler products and its domestic support for rice, wheat, and corn as being in excess of the country’s commitments. In addition, it cited numerous provisions of the negotiated U.S-Mexico-Canada Agreement (USMCA) “that – once in force – will address outstanding trade-related irritants.”

For example, under the USMCA, Canada agreed to eliminate certain milk classes, discriminatory grading of U.S. wheat, rules prohibiting simultaneous substitution of advertising for the Super Bowl, and British Columbia’s discriminatory treatment of U.S. wine in grocery stores, the report noted.

In another fact sheet focused on digital trade, the USTR highlighted work toward a high-standard agreement on digital trade with other WTO members. Specifically, the report

noted barriers such as data localization requirements in China, India, Indonesia, Kenya, Nigeria, Russia, Saudi Arabia, Turkey and Vietnam, as well as restrictions on cross-border data flows in China, India and Korea.

“Korea restricts the export of geo-location data, disadvantaging international suppliers that incorporate services such as traffic updates and navigation into their products. Korea is the only market in the world that USTR is aware of maintaining such restrictions,” the report noted.

## CIT Upholds Constitutionality of Section 232 Tariffs

As lawmakers are mulling legislation to restore congressional authority under Section 232, two Court of International Trade (CIT) judges March 25 upheld the constitutionality of the tariffs in *Am. Inst. for Int'l Steel, Inc. v. U.S.*, citing a 1976 Supreme Court opinion. A third judge wrote a separate opinion that concurs with the ruling, but with doubts.

The American Institute for International Steel (AIIS), an association of steel-consuming companies that has long been opposed to any tariffs, filed the suit in June 2018, challenging the constitutionality of Section 232 by which President Trump has imposed a 25% tariff on imported steel (see **WTTL**, July 2, page 2).

“Identifying the line between regulation of trade in furtherance of national security and an impermissible encroachment into the role of Congress could be elusive in some cases because judicial review would allow neither an inquiry into the President’s motives nor a review of his fact-finding,” Judges Claire R. Kelly and Jennifer Choe-Groves wrote.

“One might argue that the statute allows for a gray area where the President could invoke the statute to act in a manner constitutionally reserved for Congress but not objectively outside the President’s statutory authority, and the scope of review would preclude the uncovering of such a truth. Nevertheless, such concerns are beyond this court’s power to address,” they added.

“What we have come to learn is that section 232 ...provides virtually unbridled discretion to the President with respect to the power over trade that is reserved by the Constitution to Congress. Nor does the statute require congressional approval of any presidential actions that fall within its scope,” Judge Gary Katzmman wrote in a dubitante opinion.

“In short, it is difficult to escape the conclusion that the statute has permitted the transfer of power to the President in violation of the separation of powers,” he wrote. “If the delegation permitted by section 232, as now revealed, does not constitute excessive delegation in violation of the Constitution, what would?” Katzmman asked.

AIIS President Richard Chriss said in a statement the group was “heartened” by parts of the court’s opinion, but would appeal the decision. “Unfortunately, the court also found that a 1976 Supreme Court decision foreclosed closer review of the merits of our constitutional claim by the CIT itself,” Chriss said.

## WTO Rules in Decade-Long Boeing-Airbus Dispute

In yet another case where both sides claimed victory, the World Trade Organization's (WTO) Appellate Body (AB) confirmed March 28 that the U.S. has continued to provide subsidies to Boeing through tax concessions despite previous rulings in the long-standing dispute. However, the panel said it could not determine whether other programs constituted subsidies benefiting Boeing or had adversely affected sales of Airbus aircraft.

In May 2018, the AB confirmed that the EU and four of its member states failed to comply with an earlier ruling by maintaining illegal subsidies for Airbus (see **WTTL**, May 21, 2018, page 4).

In this latest case, the AB specifically said a determination on foreign sales corporation/extraterritorial income (FSC/ETI) tax concessions "must focus on the conduct of a government, rather than on the use of tax concessions by the eligible taxpayers," the report noted. "On this basis, the Appellate Body reversed the Panel's rejection of the European Union's claim that the tax concessions at issue involved a financial contribution," it said.

"The Appellate Body completed the legal analysis and found that, to the extent that Boeing remains entitled to FSC/ETI tax concessions in the post-implementation period, the United States has not withdrawn FSC/ETI subsidies with respect to Boeing," the panel added.

U.S. officials welcomed the ruling as a "major win," citing even larger EU subsidies to Airbus. "This report confirms what every other WTO report on these issues has found: the United States does not provide support even remotely comparable to the exceptionally large and harmful EU subsidies to Airbus. It is long past time for the EU to stop their subsidies and let our world-class aircraft manufacturers compete on a truly level playing field," said USTR Robert Lighthizer in a statement.

In contrast, EU trade officials said the ruling vindicated their long-held position that the U.S. "has taken no steps to comply with WTO rules on support to Boeing." Specifically, "the Appellate Body has now settled this case definitively, confirming our view the U.S. has continued to subsidize Boeing despite WTO rulings to the contrary. We will continue to defend a level-playing field for our industry. European companies must be able to compete on fair and equal terms and today's ruling is important in this respect," EU Trade Commissioner Cecilia Malmström said.

**\* \* \* Briefs \* \* \***

**TRADE FIGURES:** Merchandise exports in January jumped 3.3% from year ago to \$137.4 billion, Commerce reported March 27. Services exports gained 2.5% to record-high \$69.9 billion from January 2018. Goods imports increased 1.1% from January 2018 to \$210.7 billion, as services imports gained 4.0% to \$47.8 billion.

**SILICOMANGANESE:** In 5-0 “sunset” vote March 27, ITC said revoking antidumping duty orders on imports of silicomanganese from India, Kazakhstan and Venezuela would renew injury to U.S. industry.

**FCPA:** Chi Ping Patrick Ho aka Patrick C.P. Ho, head of Hong Kong non-governmental organization China Energy Fund, was sentenced March 25 in Manhattan U.S. District Court to 36 months in prison for participating in multi-year, multimillion-dollar scheme to bribe high-level officials in Chad and Uganda in exchange for business advantages for Chinese oil and gas company. Federal jury convicted Ho of conspiring to violate Foreign Corrupt Practices Act (FCPA), violating FCPA, conspiring to commit international money laundering, and committing international money laundering after one-week trial (see **WTTL**, Dec. 10, 2018, page 5). Ho and Cheikh Gadio, former foreign minister of Senegal and U.S. resident, were charged in November 2017. Charges against Gadio were dropped in September 2018.

**SYRIA:** OFAC, State and Coast Guard March 25 updated previous advisory to alert persons to “significant U.S. sanctions risks for parties involved in petroleum shipments to Syria,” especially those shipments involving Iran and Russia (see **WTTL**, Nov. 26, 2018, page 6). In addition to non-exhaustive list of vessels that have delivered petroleum to Syria, new annex provides list of dozens of vessels “engaged in Ship-to-Ship (STS) transfers of petroleum destined for Syria, or have exported Syrian petroleum since 2016. Some of these shipments and transfers have involved Iranian-origin oil,” agencies noted.

**IRAN:** OFAC March 26 designated 25 individuals and entities, including Iran, UAE and Turkey-based front companies, and Iran’s Ministry of Defense and Armed Forces Logistics (MODAFL) and Ansar Bank, as part of “extensive sanctions evasion network.” Iran established network “to bypass sanctions, gain access to the international financial system, and exchange devalued Iranian rial for dollars and euros,” agency noted. OFAC and State four days earlier designated 14 individuals and 17 entities connected to Iran’s Organization of Defensive Innovation and Research (SPND) (see **WTTL**, March 25, page 5).

**SOUTH SUDAN:** At first meeting of WTO Working Party of South Sudan March 21, members expressed support for nation’s accession negotiations. “All journeys, short or long, start by a mere single step,” said Chief Negotiator Aggrey Tisa Sabuni at meeting. “South Sudan is the timely reminder of the backbones of the multilateral trading system,” Deputy Director-General Alan Wolff said in opening remarks. Request for WTO accession received unanimous support at Ministerial Conference (MC11) in December 2017 (see **WTTL**, Dec. 18, 2017, page 1).