

Vol. 29, No. 18

May 4, 2009

## BIS to Ease Licensing Rules for Night-Vision Cameras

A three-year effort by the thermal-imaging industry to ease controls on uncooled thermal-imaging cameras (UTIC) is about to payoff, according to Bureau of Industry and Security (BIS) officials who say a new rule lifting export licensing requirements for most of these cameras will be published soon. For some firms the move comes too late, with the U.S. industry having already lost a large part of the market to foreign competitors, industry executives say.

The new “UTIC Rule”, as BIS staff are calling it, will end licensing requirements for exports to U.S. allies, including NATO members, Japan and Australia. The change will eliminate the need for 30 to 40% of individual validated licenses now being reviewed by BIS annually, agency staff say (see **WTTL**, March 23, page 2).

The change in the Export Administration Regulations (EAR), which has been approved by the State and Defense departments, would apply to UTICs covered by Export Control Classification Number (ECCN) 6A003.b.4.b and would remove the cameras from controls under Regional Stability (RS) Column 1, BIS Acting Assistant Secretary for Export Administration Matt Borman told the agency’s Sensors and Instrumentation Technical Advisory Committee (SITAC) April 28. “What this rule does after significant effort and time is get to the point where a significant universe of commercial uncooled thermal-imaging cameras will be treated under the RS-2 level of controls. In other words, they can go to Europe and other major markets, Japan and Australia, without a license but with a reporting requirement,” Borman explained.

While SITAC members applauded the new policy, they also expressed regret that change took so long. Stanley Kummer, vice president at L3 Communications, said the delay has “unfortunately allowed international competition to grow.” He noted the steady decline in export licenses BIS handles for these products because of the loss of foreign markets and the shift of production overseas. “Because of resistance elsewhere in the government, what we were trying to fix has gotten away from us,” Kummer said.

## Kirk Opposes “Fear and Raw Politics” In China Disputes

U.S. Trade Representative (USTR) Ron Kirk April 30 separated himself from trade critics who have placed the blame on China for all of America’s trade problems, indicating his preference to negotiate disputes with Beijing before filing formal complaints at the World Trade Organization (WTO). He also said he would be an advocate for allowing more Chinese investment in the United States. Kirk tried to discourage plans among some groups in the business community to



form a coalition to bring new complaints against China to avoid retaliation against any single company. Kirk, speaking to the Committee of 100, an association of Chinese-Americans, was particularly forceful in supporting an open investment environment in the U.S. for China.

“It is our task then to operate in an environment in which we can use logic and reason -- that we can use the factual strength of the relationship between the U.S. and China -- to deal with what we know to some degree is just fear and raw politics to prevent that relationship from being all that it could be,” Kirk said. “If I could be a part of that advocacy and part of the calming intellectual influence, that is a path I would willingly undertake,” he said.

Kirk was responding to a question from former U.S. Ambassador to China Jim Sasser, who noted the protest against the attempt by the Chinese oil company, CNOOC, to buy Unocal in 2005. “In broad terms, I am uniquely suited in this office as trade representative to be an advocate for a rules-based trading relationship,” Kirk said. “If we carry that principle forward in all elements, than we as a nation have to be mature enough to want to grant the same privileges to any nation that we see as a partner and as an equal, which China very much is,” he added. “So whether we use the basic biblical philosophy that we do unto others as we would have them do unto you or we use a principle based in law, to me it’s hard to argue against the principle that what’s good for America’s business to invest around the world, that we would want to close our borders and our shores to those who want to do the same,” Kirk declared.

Sasser also suggested that U.S. companies have been reluctant to file trade complaints against China because of concerns that the Chinese would punish them. He noted discussions in the business community to form a coalition to bring such complaints so individual companies could remain anonymous. Kirk said there have been a number of cases where the U.S. has brought complaints against China at the WTO without retribution. “In every case where we have been successful, I have to tell you, China has behaved in a very responsible way,” Kirk replied.

“I hope that before we go immediately to a litigious dispute-settlement path that some of those businesses would give our office the opportunity to be engaged with them as we are beginning to develop a longer track record, a longer history of being able to work with our counterparts in China to see if we can resolve some of these directly,” Kirk said. “We have a number of very difficult issues with China, but we shouldn’t be quick to blame all of that [on China.],” he said.

## **Kirk Faces Dilemma on Trade Enforcement**

The Obama administration is trying hard to create the public perception that it is going to be tougher on enforcement of U.S. trade agreements than previous administrations, but its actions, so far, indicate that its enforcement strategy won’t be much different than its predecessors. The annual Special 301 report released April 30 on countries that are denying U.S. firms adequate intellectual property rights (IPR) protection is an early example. It shuffled the list of countries placed on the Priority Watch List and Watch List but didn’t name any country a Priority Foreign Country – a designation that could trigger a formal Section 301 investigation and potential trade retaliation.

The concept of the Priority Watch List and Watch List was an artifice created under USTR Carla Hills in the administration of President George H.W. Bush to avoid the strict requirements of the Special 301 provisions in the 1988 Omnibus Trade Act. The 20th annual report just released continues the same approach used by USTRs for 20 years.

In the latest report, the USTR elevated Canada to the Priority Watch List because of its alleged laxness in border protections against counterfeit and pirated materials. The report complains that Canadian customs agents don’t have the authority to seize these items at the border. The report also says Ottawa has not fully implemented the World Intellectual Property Organization (WIPO) internet treat to which it acceded in 1997. The USTR also elevated Algeria and

Indonesia to the Priority Watch List, while removing South Korea from the Watch List. This is the first time in 20 years that Korea has not appeared on either list. The USTR's office said Seoul has made "significant improvements" in the past year in IPR protection. Nonetheless, it said it will continue to monitor the ongoing problem of Internet piracy in Korea.

Earlier in the week, USTR General Counsel Tim Reif told the Cato Institute that his staff is looking at all U.S. trade agreements and talking to business, unions, environmental groups and U.S. Foreign Commercial Service officers to identify problems of "large magnitude and small magnitude." He said his office will cull what it hears to determine if there is a legal case to pursue. Rather than seeking dispute-settlement, however, it will first enter into discussions with the country involved. "We are going to try to make sure there is a higher degree of confidence that once an agreement is reached, that's not the end of it," Reif said. "I think you will see over a period of time that this administration will fulfill that commitment," he offered.

Daniel Ikenson, director of Cato's center for trade policy studies, said "it's a myth that we don't enforce trade agreements." He said he is concerned about legislative proposals that would put trade enforcement on "auto pilot" and take away the discretion of the USTR to use other ways to resolve disputes.

## **BIS Okays One More VEU for China**

The hold on the approval of new Validated End Users (VEU) in China has been lifted. BIS in the April 30 Federal Register added Aviza Technology China to the five previously approved VEU's. Aviza will be allowed to receive license-free exports of items in Export Control Classification Numbers (ECCNs) 2B230, 3B001.c.1.a and 3B001.e. BIS also listed the locations of the firm's factories, which will be eligible to obtain these items. Approved sites are in Shanghai, Beijing, and Chengdu. The approval became possible after the agency reached an agreement in January with China on procedures for conducting on-site audits of the compliance records of VEU firms and to interview company employees (see **WTTL**, Jan. 19, page 1).

"The VEU program is an important initiative that promotes secure civilian high technology trade and we are pleased to expand the program in China," said Acting BIS Under Secretary Daniel O. Hill. "We look forward to more additions to the VEU program in the coming months," he said in a statement.

In addition to naming Aviza a VEU, BIS said it has modified the items eligible to go without license to existing VEU Applied Materials China, Ltd. It has added ECCN 2B006.b.1.a, it announced. It also changed the name for existing VEU BHA Aerocomposite Parts Co., Ltd to Boeing Tianjin Composites Co. Ltd. and added to the list of items it can receive ECCN 2B001.b.2 (limited to machine tools with accuracies no better than (i.e., less than) 13 microns), and replaces ECCN 2B001.e.1.a. with 2B001.e. under Eligible Items. "ECCN 2B001.e. encompasses all parameters of its subparagraphs," BIS stated.

## **BIS Fines BJ Services \$800,000 for Valve Exports**

In a settlement agreement reached April 14, BIS imposed a \$800,000 civil fine on Houston's BJ Services Company to resolve charges that the firm committed 67 violations of the Export Administration Regulations (EAR) when it exported controlled valves to 11 countries without required licenses from BIS. The BIS charges were the result of a voluntary self-disclosure (VSD) the company made regarding the alleged shipments. The exports included valves, kits and spare parts subject to Export Control Classification Number (ECCN) 2B350.

Although the fine was high compared to most BIS settlements, it represented a deep discount from the maximum fine the firm could have faced. The discount appears to have been given because the firm made a VSD. The shipments, which occurred between March 2003 and July 2007, went to Colombia, Kazakhstan, Kuwait, Libya, Mauritania, Mexico, Nigeria, Peru, Saudi

Arabia, United Arab Emirates, and Venezuela. Of the 67 charges in the BIS Charging Letter to the firm, 33 involved unlicensed exports and 34 were additional charges of “acting with knowledge of violation” in regard to those exports and others.

In a separate legal action, BJ Services has reported that it is in negotiations with the Securities and Exchange Commission (SEC) and Justice Department to resolve potential charges of violating the Foreign Corrupt Practices Act (FCPA). “In October 2004, we received a report from a whistleblower alleging that our Asia Pacific Region Controller had misappropriated Company funds and that illegal payments had been made to government officials in that region,” BJ Services revealed in a 10-Q filing with the SEC in February.

“Management and the Audit Committee of the Board of Directors conducted investigations of these allegations, as well as questions that later arose whether illegal payments had been made elsewhere. As a result of the theft investigation, the Region Controller admitted to multiple misappropriations and returned certain amounts to the Company. His employment was terminated in 2004,” the company reported.

### \* \* \* Briefs \* \* \*

SECTION 337: Divided Court of Appeals for Federal Circuit April 30 upheld ITC ruling that imports of drug, recombinant human erythropoietin (EPO), by Hoffmann-LaRoche to conduct new drug research did not violate process patent held by Amgen. “We affirm the Commission’s ruling that the safe harbor provided by [section] 271(e)(1) applies in proceedings under the Tariff Act relating to process patents, as well as product patents, for imported product that is used for exempt purposes,” it ruled.

EXPORT ENFORCEMENT: Royal Canadian Mounted Police (RCMP) arrested Mahmoud Yadegari, Canadian dual-national, April 16, on charges of violating Canada’s Customs Act and the Export Import Permits Act as well as UN sanctions on nuclear trade with Iran. RCMP alleged he attempted to procure and export items known as “pressure transducers,” which can be used to enriched uranium as well as for commercial purposes. RCMP said it worked with ICE in investigation.

COLOMBIA: After meeting May 1 of Commerce Secretary Gary Locke and Colombian Trade Minister Luis Guillermo Plata, Commerce statement said: “The Secretary and Minister Plata reaffirmed the commitment of both governments to move forward on progress towards the U.S.-Colombia Trade Promotion Agreement.”

STAINLESS STEEL: In Federal Register April 29, ITA issued Section 129 decision to implement WTO ruling against its use of zeroing in initial antidumping investigation of stainless steel sheet and strip in coils from Mexico. Based on revised calculation without zeroing, agency modified dumping margin on imports by ThyssenKrupp Mexinox S.A. from 30.85% to 30.69% (see **WTTL**, March 30, page 4).

AIRPORTS: USTR’s office in April 30 Federal Register said it did not identify any country this year that is denying fair market opportunities to U.S. products, suppliers or bidders in airport construction projects.

ZEROING: WTO compliance panel April 24 ruled that U.S. still isn’t in compliance with earlier WTO ruling on zeroing in case filed by Japan. “We find that the United States has failed to comply with the recommendations and rulings of the DSB regarding the United States’ maintenance of zeroing procedures challenged ‘as such’ in the original proceedings. In particular, we find that the United States has failed to implement the DSB’s recommendations and rulings in the context of T-to-T comparisons in original investigations and under any comparison methodology in periodic and new shipper reviews,” it ruled.

OFAC: Varel Holdings, Inc. of Dallas, Texas, agreed to pay \$110,000 fine to settle charges that between June 2005 and June 2006, foreign subsidiary of Varel made 11 unlicensed exports of goods in which Cuba or Cuban nationals had an interest, OFAC reported May 1. Varel made voluntarily disclosure, it said.

OFFSETS: BIS in April 29 Federal Register proposed revisions to its offset reporting regulations to require more detailed information on industry sectors affected by these deals. Proposal stems from internal BIS review and recommendations in 2008 GAO report (see **WTTL**, June 30, 2008, page 4).

USTR: Office marked its own First 100 Days with release highlighting its early achievements, including its efforts to open opening markets for U.S. beef to Chile, rice to Japan, marine equipment to EU, poultry to Sri Lanka, and cotton to Peru.