

STRATEGIC TRADE ACT 2010

Background

1. The United Nations Security Council (UNSC) on 28 April 2004, adopted a resolution on non-proliferation of weapons of mass destruction (WMD) namely the United Nations Security Council Resolution 1540 (UNSCR 1540). The UNSCR 1540 states that all Member States shall take and enforce effective measures to establish domestic controls to prevent the proliferation of nuclear, chemical, or biological weapons and their means of delivery, including by establishing appropriate controls over related materials.
2. Malaysia, being one of the United Nations (UN) Members, is obliged to set up national export control relating to the items stated in the said Resolution while mitigating the national security threats. In light of this, the Cabinet agreed on 5 October 2005 that a comprehensive law and regulations on export of strategic goods be formulated since Malaysia's current export control framework is not sufficient to govern the control on the strategic items which can contribute to proliferation of WMD.
3. In light of this, the Strategic Trade Act 2010 ("STA") was drafted by the Attorney General's Chambers and approved by the Cabinet on 26 March 2010. The STA was passed by the *Dewan Rakyat* on 5 April 2010 meanwhile *Dewan Negara* on 6 Mei 2010 and received Royal Assent on 2 June 2010. The STA was published in the Government Gazette on 10 June 2010 and is targeted for implementation on 1 October 2010.

Objective of the STA

4. The STA provides for control over the export, transshipment, transit and brokering of strategic items, including arms and related material, and other activities that will or may facilitate the design, development and production of WMD and their delivery systems.

Key Features of the STA

5. STA contains the essential elements relating to export control of strategic items and other activities as follows:

- Preliminary Matters;
- Appointment and Powers of Strategic Trade Controller;
- Control of Strategic Items, Unlisted Items and Restricted Activities;
- Permit and Registration;
- Enforcement; and
- General Provisions

A. Preliminary Matters

I. Definitions of Expressions

6. The STA defines certain important expressions used in the Act as follows:
 - permit – means a permit issued under the Act including a special permit;
 - items – includes goods and technology;
 - strategic items – means any item prescribed as strategic items prescribed under the section 7 of the STA;

- **restricted activities** means –
 - (a) any activity that support development, production, handling, usage, maintenance, storage, inventory or proliferation of any WMD and its delivery system; or
 - (b) participation in transactions with person engaged in such activities;
- **unlisted items** – means items that may be used in a restricted activity but are not prescribed as strategic items under section 7 of the STA

II. Transactions of Items under the STA

7. The following transactions of items are controlled by the STA:

- **bring in transit** – to bring items from any country into Malaysia by land, sea or air, where the items are to be taken out from Malaysia on the same conveyance on which they are brought into Malaysia or any other conveyance and whether or not such items are landed or transhipped in Malaysia, but does not include the passage through Malaysia in accordance with the international law of foreign conveyance carrying any items.
- **brokering** – the activity of a person who, either on his own behalf or acting as an agent on behalf of another person-
 - (a) negotiates, arranges or facilitate the purchasing, financing, conveying, sale or supply of items; or
 - (b) buys, sells or supplies such items
- **export** – (a) to take or cause to be taken out of Malaysia any items by land, sea or air, or to place any items in

a conveyance for the purpose of such items being taken out of Malaysia by land, sea or air; or

(b) to transmit technology by any means to a destination outside Malaysia, and includes any oral or visual transmission of technology by a communication device where the technology is contained in a document the relevant part which is read out, described or otherwise displayed over the communications device in such a way as to achieve similar result (*“Intangible Technology Transfer”*)

- tranship – to remove items from the conveyance on which they were brought into Malaysia and to place the items on the same or another conveyance for the purpose of taking them out of Malaysia where these acts are carried out on a through bill of lading, through airway bill or through manifest.

III. Prevailing Law

8. The STA is to be read with other written laws and be regarded as an addition to the other laws relating to the prevention of the WMD and their delivery systems. However, if there is any conflict or inconsistency between the STA and any other laws, the STA shall prevail to the extent of such conflict or inconsistency.

IV. Extra-territorial Jurisdiction

9. The STA will enable extra-territorial criminal jurisdiction to be claimed by Malaysia for offences under the STA which are committed outside Malaysia regardless the nationality of the offender.

B. <u>Appointment and Powers of Strategic Trade Controller</u>

I. Appointment

10. A Strategic Trade Controller (the Controller) and a Deputy Strategic Controller are appointed by the Minister of MITI from among public officers. These two officers are obliged under the STA to perform the functions and duties imposed and exercise the powers conferred under the STA.
11. The Controller is empowered by the STA to appoint any public officers and other officers to assist him in performing his functions under the Act. The STA is administered by MITI and the Controller will reside in MITI to regulate the STA.

II. Functions and Powers of the Controller

12. The Controller is required by the STA to perform the following functions:
- dealing with strategic items, unlisted items and restricted activities;
 - issuing guidelines for the implementation of the STA;
 - seeking assistance from any government, international organisation or person in the implementation of the STA; and

- doing anything incidental or conducive to perform its functions
13. The Controller is also granted with the necessary powers for the performance of his functions under the STA; and general direction and control of authorised officers for the purpose of regulating the STA.

C. Control of Strategic Items, Unlisted Items and Restricted Activities

I. Control

14. The STA controls the transactions of the following items or activities:
- strategic items;
 - unlisted items; and
 - restricted activities
15. A definitive and comprehensive List of controlled strategic items will be put in place through the Ministerial Order. The List will be reflective of the items currently required to be controlled under the global export control regimes as well as the UNSCR 1540.

II. Export, Transshipment and Transit Controls

16. The STA requires a person to obtain a permit for the following transactions of strategic items:
- export;
 - transshipment; or
 - transit

17. A special permit is required for transactions of strategic items or unlisted items to a restricted end- user. However, any transaction of strategic items or unlisted items to a prohibited end-user is not allowed under the STA.
18. The restricted end–user and prohibited end-user are as the Strategic Trade (Restricted End-Users and Prohibited End-Users) Order 2010.

III. Brokering Control

19. Brokering is controlled under the STA by way of registration. It means that a broker of any strategic / unlisted item is required to be registered under the STA before brokering any of the items.
20. A broker is required to hold a valid permit for brokering of strategic items if he:
 - is notified by the relevant Authority or an authorised officer;
 - knows; or
 - has reasonable grounds,

that such strategic items are intended or likely to be used, wholly or in part, for or in connection with a restricted activity.

IV. “Catch- All” Controls on Unlisted Items and Restricted Activities

21. The STA incorporates the “catch-all” provision to cover any unlisted items that will or may be used for a restricted activity. Under the STA, a person is required to notify the relevant

Authority of his intention to export any unlisted item at least 30 days before the carrying out of that export if:

- he is informed by the relevant Authority;
- otherwise knows; or
- has reason to believe,

that the unlisted item will or may be used for a restricted activity.

22. The relevant Authority, upon such notification, shall decide whether or not to allow such export of the unlisted item. The approval of such export is subject to granting of a permit.

V. Offences and Penalties

23. The STA prescribes specific offences committed under the Act such as:

- export, transshipment or transit of strategic items without a permit;
- export, transshipment or transit of strategic items or unlisted items to restricted end-user without special permit;
- export, transshipment or transit of strategic items or unlisted items to prohibited end-user;
- technical assistance for use in connection with restricted activity; and/or
- brokering without registration

24. In view of the seriousness of the repercussions of misuse of the strategic items and unlisted items for the purpose of restricted activities, commensurate penalty is provided for each of the offence under the STA.

25. For example, for the offence committed under the STA with the intent to unlawfully export, tranship or bring into transit of strategic items which are arms or related material without a permit; or with knowledge that such transaction without a permit is unlawful, and where death is the result of the act, the most severe penalty is:
- death; or
 - imprisonment for life
26. If such offence is committed by a body corporate, a minimum fine of RM30 million shall be imposed.

D. <u>Permit and Registration</u>
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I. Permit

27. The STA lays down that an application for a permit or a special permit for export, tranship or transit of the strategic items or unlisted items is to be:
- made to the relevant Authority in accordance with the regulations made under the Act; and
 - accompanied with end-use statement and any additional documents if required
28. The relevant Authority has discretion either to grant or refuse to grant the permit and impose any conditions in granting the permit.
29. The permit granted can be suspended or revoked at any time by the relevant Authority on the following grounds:

- failure by the holder to comply with the STA any or conditions attached to the permit;
- improper or illegal obtaining of the permit; or
- on reason of national interest, national security or non-proliferation purposes

II. Registration of Brokers

30. The STA specifies that an application for registration of brokering of any strategic items is to be:

- made to the relevant Authority in accordance with the regulations made under the Act; and
- accompanied with any additional documents if required

31. The registration is valid for one year and can be suspended or revoked at any time by the relevant Authority on the following grounds:

- failure by the broker to comply with the STA any or conditions attached to the registration;
- improper or illegal obtaining of the registration; or
- on reason of national interest, national security or non-proliferation purposes

E. <u>Enforcement</u>

32. For the purpose of enforcing the STA, the authorised officers are empowered by the STA to do the following matters:

- investigation;
- arrest without warrant;
- search of conveyances;
- search and seizure without warrant;
- examination of a person acquainted with case;
- interception of communications;
- access to places/ premises;
- access to computerized data; and
- use of force

F. General Provisions

I. Exemption from the STA

33. The Minister of MITI has the power to exempt any persons, class of person or activity from the STA by way of regulations.

II. Prosecution

34. The STA provides that any offence committed under the Act can only be prosecuted by or with the written consent of the Public Prosecutor.

Conclusion

35. The STA is a centralized and comprehensive legislation on export controls relating to strategic items, unlisted items and restricted activities to enable Malaysia to contribute to the maintenance of international peace and security by combating the proliferation of WMD.

36. The STA is intended to protect Malaysia and Malaysian exporters from being exploited by proliferators and those that profit from their activities without compromising legitimate trade in the strategic items concerned.
37. A copy of the STA is available (upon subscription) at the [http://www.lawnet.com.my/ lawnetPublic/](http://www.lawnet.com.my/lawnetPublic/) or you may purchase a printed copy from *Percetakan Nasional Berhad*.