

# OVERVIEW OF THE MALAYSIAN STRATEGIC TRADE ACT 2010 AND ITS SIGNIFICANCE TO THE IMPORT AND EXPORT SECTORS IN MALAYSIA

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## ABSTRACT

*Unlawful trafficking or potential illicit trafficking of strategic goods or items could bring a lot of probable harm or damage to the host country as well as the recipient countries. Goods or items which are strategically used for purposes in enrichment towards nuclear armament and weapons of mass destruction (WMD) ought to be controlled especially if they were to be used or fall into the hands of terrorist groups. Hence, Malaysia is not marginalizing itself in the promulgation of the relevant laws especially in the promotion of peace and stability in the region. The passing of the Strategic Trade Act 2010 calls for the implementation as such in line with the UNSCR 1540. This write-up looks at the law and the significance of the provisions to the import and export sectors in Malaysia and with the substantive application of the procedural aspects, Malaysia thus fully accord herself to the UNSCR 1540.*

*Keywords: Unlawful trafficking, strategic goods, WMD, terrorist, Strategic Trade Act 2010, UNSCR 1540, ECCN.*

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## *INTRODUCTION*

The PUIC Conference (Parliamentary Union of the OIC Member States held in Tehran, Republic of Iran on the 14-19 February 2014) did recall on the resolution concerning the creation of a zone free of weapons of mass destruction including nuclear weapons in Africa, the Middle-East and South-East Asia and called for removing the world from all weapons of mass destruction. The conference also reiterated on the Islamic Summit Conference on committing Israel to abide by the UN resolutions of the Security Council Resolution 487 of 1981 and its accession to the Nuclear Non-Proliferation Treaty (NPT).

The conference reaffirmed the universalisation of the NPT as a starting point of an international effort in nuclear non-proliferation and disarmament and a complete elimination of nuclear weapon is essential to removing the danger of nuclear weapon.

### *WEAPONS OF MASS DESTRUCTION (WMD) AND NON-PROLIFERATION TREATY (NPT)*

That there shall be rights for all states to develop nuclear energy and technology for peaceful purposes, and encourages cooperation among them in this field in accordance with the provisions of the NPT and the IAEA (International Atomic Energy Agency) safeguard system and further reconfirms that nothing should be interpreted in a way as restricting the rights for developing atomic energy for peaceful purposes and policies pertaining the energy should be respected – CONF/8-2013/PFR-RES.7.

It is important to emphasise on the 2012 International Conference on the establishment of a Middle East Zone Free of nuclear weapons and all other WMD as mandated by the 2012 Nuclear Non-Proliferation Treaty Review Conference. – CONF/8-2013/PFR-RES.7

Malaysia has to that effect made a significant fulfilment to the Nuclear Security Summit in Washington USA in 2010. The government has acceded to the Convention on Physical Protection of Nuclear Material (CPPNM) and its 2005 Protocol; ratifying the International Convention for the Suppression of Acts of Nuclear terrorism (ICSANT) and the International Atomic Energy Agency (IAEA) Additional Protocol and does adopt the various code of conduct. WMD has a connotation to trade and the impact from arms race and trade (Farah, 2007)<sup>1</sup>. The threats can be of an actual attack and the world is equally facing threats from illegal markets and marketers who were evil enough to transfer weapons underground. There were times such transfer of weapons was done under the disguise of certain government agencies (The Star, Thursday 7 October 2010)<sup>2</sup>. This could be regarded as a global burden. Many times the deals on WMD are a human capital loss and economic loss and even at a later stage would be loss due to humanitarian operations (OXFAM)<sup>3</sup>.

## *WEAPONS OF MASS DESTRUCTION IN RELATION TO NATIONAL SECURITY AND SECURITY TO OTHERS*

These would be some of the terms connected to WMD namely they are war potential, mass destruction by itself, terrorist uses, military items for economic warfare, potential harms which is degrading in nature especially when it involves torture which in return is inhumane, software technology pertaining to arms deal and trade, black market, sanctions, embargo and strategic uses for import and export and typically they do involve veil of secrecy.

### *THE HISTORY OF STRATEGIC ACT*

The then American export controls began as emergency measures during WW II, to keep enemy nations from acquiring military significant goods, information and technology. In 1949, Congress passed the first comprehensive legislation regulating exports, largely in response to the threats to national security presented by the Soviet Bloc nations<sup>4</sup>.

Exports are now regulated primarily under the Export Administration Act (the EAA) of 1979, as amended in 1985 and 1988, and by the Commerce Department's export administration regulations. The EAA attempts to balance the need to protect national military, economic and political interests with the need to foster economic growth through export trade.

National security controls restrict the export of goods and technology that "make a significant to the military potential" of other countries, to the detriment of American security. National security controls extend both to weapons and to "dual use", items such as computers, chemical equipment, and machinery that have both civilian and military applications. These dual use items have become increasingly important as the subject of export controls. Many products with peaceful civilian uses are integral parts of weapons of mass destruction. For example common agricultural fertilizers can be used to make chemical weapons<sup>5</sup>, tractors too can be turned into or serve as rocket launchers.

During the late 1980s and early 1990s the application of export controls for national security purposes changed considerably. With the fall of communist governments in Europe and the collapse of USSR, businesses found it significantly easier to export to those areas. On the other hand, the Persian Gulf War in 1991 revealed major gaps in export controls to countries in the Middle East. Iraq was able to build its military might in large part as a consequence of purchasing dual use products. The Persian Gulf War prompted a tightening of export controls and a re-examination of COCOM and U.S practices<sup>6</sup>.

Export controls have a side draw to its application. The most controversial of export controls then was to advance US foreign policy objectives<sup>7</sup>. The United States has

maintained long-standing trade embargoes against Cuba, Vietnam, North Korea and Kampuchea under the International Emergency Economic Powers Act, but the foreign policy provisions included in the 1979 EEA gave the President a means to impose trade sanctions in response to specific events. For example, President Carter banned grain exports to the USSR and banned U.S participation in the 1980 Moscow Olympics in response to the Soviet invasion of Afghanistan. In 1986, President Reagan imposed a total ban on trade with Libya to protest its support of international terrorism.

### *THE IMPACT OF EXPORT PROHIBITION*

The impact of foreign policy controls can be extremely costly to American businesses or for that matter to any country announcing such measures. Businesses lose markets, breaches of contract and lost credibility with foreign customers. For historical example, prior to trade sanctions against the USSR in 1978, Caterpillar Tractor supplied 85% of Soviet tractor imports. By 1982, Komatsu of Japan controlled 85% of the same market. The 1986 trade sanctions against Libya required US companies to stop work on several hundred million dollars' worth of service contracts.

Perhaps the most damaging effect of foreign policy-based export controls is their long-term damage to the reputation of American companies as reliable suppliers to the world markets. Because of political objectives change with election of new administration in Washington, foreign customers fear that American companies may have to breach contracts to comply with that export controls. These customers may turn to suppliers from other countries who are perceived as more reliable<sup>8</sup>.

Malaysia is not an exporter or happens to be the main exporter of strategic items but the country can be used strategically as a transit point to strategic items or goods. Most items categorized as transit items are chemical and chemical based goods, biological items and nuclear weapons materials, though the word nuclear may have sounded a bit off tune.

The question is how to control re-export and of the issue when there is an intentional diversion of goods and technology to forbidden destinations but at the same time when there is a need to control unintended diversion of such goods. Perhaps this case can be of reference to determine the intention and unintended diversion.

United States v. Elkins, (885 F.2d 775 (11<sup>th</sup> Cir. 1989). The facts of the case stated; as a result of a complex series of negotiations, Elkins arranged to purchase two Lockheed L-100-30 jets from Lockheed and resell them to Contrust, a German business controlled by a Libyan national, Badir. Badir initially wanted to purchase the military version of the jets, but was unable to do so. Because export licences to Libya would not have been granted, the planes were routed through France to the allegedly ultimate destination of Benin. Elkins assured the Commerce Department that Badir was a Libyan expatriate, opposed to the government, while at the same time its agent delivered the contract to

Tripoli for signing and discussed the transaction with Badir's Libyan banker.

Once the export licences were granted, the planes were delivered to Benin, at a profit \$7 million to Elkins. The planes were never seen in Benin again, although one did appear in Cairo, flown by defecting members of the Libyan Air Force. Elkins was convicted of one count of conspiracy to defraud the government and one count of violating export laws. He was sentenced to 5 years in prison on the first count and received a consecutive 10 year sentence on the second count. He was also fined \$6,600,000. Elkins appealed his sentence as excessive, and as cruel and unusual punishment. The issue was whether Elkins' punishment unconstitutionally harsh? However, the Court said No and affirmed the sentence and the fine.

The reasons:-Defendant eventually makes one argument that his sentence violated the Eighth Amendment: "Because the harshness of Appellant's sentence far exceed the sentences imposed in similar export prosecutions in the Northern District of Georgia and elsewhere, Appellant respectfully submits that his sentence is unconstitutionally disproportionate. A sentence is disproportionate for Eighth amendment purposes if the punishment is grossly disproportionate when compared with the nature of the crime... These sentences, five years for conspiracy and ten years for violating export control laws, certainly are not grossly excessive compared to the nature of the crime. Additionally, the ten year sentence imposed for violating export control regulations is not grossly disproportionate to the sentences imposed in other federal jurisdictions for violations of the same federal laws. Defendant unlawfully sold \$57 million worth of high technology equipment to an unfriendly nation. Defendant also challenges the fine imposed on count two. There may be circumstances where an excessive fine constitutes cruel and unusual punishment in violation of the Eighth Amendment.

We need not identify those circumstances in this case. Defendant made a gross profit of \$13,049,474, a net profit of \$7,336,233, and an after-tax profit of \$3,368,917 from the sale of these aircraft. Defendant's fine of \$6.6 million was less than his gross profit and less than his net profit from the sale of these planes. Although, a large amount, we hold that a fine representing an amount less than the net profit of an illegal transaction does not violate the Eighth Amendment absent a showing of severe, particularized hardship suffered by defendant. Defendant argues that the district court did not consider the impact of this fine on his family... this argument has no merit. That information was before the district court, and the transcript indicates that the court considered these factors<sup>9</sup>.

### *STREAMLINING CONTROLS OVER WMD AND NPT WHERE MALAYSIA IS CONCERNED*

At the national level, all government agencies especially the Malaysian Royal Customs Department and Ministry of International Trade and Industry play a pivotal role in curbing and controlling the incoming issues or materials as contraband or pertaining uses of

weapons of mass destruction unless it is bona fide government per se import or export materials.

Malaysia accorded to the United Nations Security Council (UNSC) Resolution 1540. The member countries work in concerted efforts in curbing terms related to strategic items and as an export control for the purpose of non-proliferation of WMD. Malaysia is also in line with the organization like the COCOM (Coordinating Committee for Multilateral Export Controls) or other NGOs in matters against WMD related issues.

Hence the Malaysian Parliament passed the Strategic Trade Act 2010 which came into force on 1<sup>st</sup> July 2011, contributing to global efforts to curb the proliferation of weapons of mass destruction. Since terrorism is regarded as one of the most challenging threats to democracy and international security, Malaysia has also endorsed the Statement of Principles to the Global Initiatives to Combat Nuclear Terrorism (GICNT). As such if illegal trafficking on materials is involved, the government has implemented the Container Security Initiative (CSI) and the Megaport Initiative. Both CSI and Megaport Initiative have been implemented at several ports in Malaysia.

The Act clearly stated as “An Act to provide for control over 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 weapons of mass destruction and their delivery systems and to provide for other matters connected therewith, consistent with Malaysia’s national security and international obligations<sup>10</sup>”.

The guiding principles used by the Malaysian government in dealing with weapons of mass destruction is to look into areas like the needs to licences, have standard control lists and strong authorisation by the relevant bodies which is strictly regulated.

Apart from those mentioned, others inclusive are guided and registered, categorised and characterised and one important aspect would be termed as national interest.

WMD may also put in a nutshell having a strong relationship with nuclear terrorism. As such a good set of national laws may be of pertinent use to tackle the matter. Malaysia can bring forth the Security Offences (Special Measures) Act 2012, the Penal Code, the Criminal Procedure Code, the Anti-Money Laundering Act 2001, Mutual Assistance in Criminal Matters Act 2002, the Aviation Offences Act 1984, Explosives Act 1957, the Corrosive and Explosive Substances and Offensive Weapons Act 1958, the Firearms (Increased Penalties) act 1971 and the Strategic Trade Act 2010.

As stated by Section 3(1) of the Strategic Trade Act 2010, “the provision of this Act shall be in addition to, and not in derogation of the provision of any other written laws, including the related laws, relating to the prevention of the proliferation of weapons of mass destruction and their delivery systems”.

The Strategic Trade Act 2010 by Section 2 has to be read with the Animals Act 1953, the Atomic Energy Licensing Act 1984, the Chemical Weapons Convention Act 2005, the Customs Act 1967, the Pesticides Act 1974, the Plant Quarantine Act 1976, the Prevention and Control of Infectious Diseases Act 1988 and the Protection of New Plant Varieties Act 2004.

### *EXTRA-TERRITORIAL APPLICATION*

The Strategic Trade Act 2010 makes it mandatory 16 offences due to weapons of mass destruction. And they are considered as major offences. The major offences are punishable with death or imprisonment for natural life where the death is the result of the act. The fine starts from **five million ringgit**<sup>11</sup> and has no limit; whereas imprisonment starts from a **minimum of five years** and has no cap<sup>12</sup>.

One special powerful provision by this Act is the extra-territorial application. By virtue of Section 4 (1) the STA 2010 states clearly that; ‘... in relation to any person, whatever his nationality or citizenship, have effect outside as well as within Malaysia...may be dealt with in respect of that offence as though committed in Malaysia. Whereas Section 4 (2) STA 2010 states “... in relation to transmission of technology...utilized any equipment or device located in Malaysia or was routed through any equipment or device located in Malaysia”.

The offence under the Strategic Trade (United Nations Security Council Resolution) Regulation 3(3) states, “Knowingly provide or collect by any means, directly or indirectly, property to be used by a person designated under the Strategic Trade (Restricted End-Users & Prohibited End-Users) Order 2010.” And “knowingly deal with the property ... facilitate, provide financial service, avail for the benefit of that designated person”, “causes or assist”, “failure to disclose information to Controller...transaction ...” deemed to contravene the UNSC regulations.

However, as of 21<sup>st</sup> June 2016, industry players must be aware of the Strategic Trade (Restricted End-Users and Prohibited End-Users) (Amendment) Order 2016 in which the Order comprises the Lists of the designated individuals and entities established, maintained and updated pursuant to the UNSCR’s 1718 (2006) and 2231 (2015) against the People’s Republic of Korea and Islamic Republic of Iran<sup>13</sup>.

To a certain extent, other national laws may come into play when apprehending perpetrator or suspicious character dealing with WMD. The laws that regulate the “ins” and “outs” of nationals are for example the Malaysian Passport Act 1966, the Immigration (Exemption) Order 1963 and the Immigration (Prohibition of Entry) Order 1963.

Malaysia like her neighbouring countries (ASEAN) especially has to that effect worked

jointly and mutually with each other to tackle issues related to WMD and terrorism that sprouted from it. The areas of concern would be the enforcement of joint regional security, the decisive role using technology, strong enforcement and through strong enforcement capacities, having good preventive measures and putting up additional mechanisms as an effective deterrent.

Making any country free from weapons of mass destruction especially nuclear weapons requires no small efforts. In order to enhance security between nations, all members have to work together in a concerted effort towards policy coherence. Bilateral activities are important to help improve capacity for example the border security which should not be used as an escape route for perpetrator and contraband goods. Thus, border security in the region has to be profiled accordingly.

In countering free flow of items of WMD or terrorist activities or for that matter illegal arms deal, Malaysia has to that effect through its legislature approved measures in enforcing its maritime safety nets; for example through the Eyes in the Sky – EiS (Indonesia, Malaysia and Singapore joint air patrol as of 13<sup>th</sup> September 2005, MASLINDO (Malaysia, Singapore, Indonesia). Naval patrols along the Straits of Malacca/ formalised into MSSP (Malacca Sea Straits patrol), MPA (Thailand contributed two Maritime Patrol Aircrafts), CMPT (Combined Maritime Patrol Team), CMPT establishes MAAs, where MAA (Monitoring and Action Agencies), JCC – a joint endeavour by littoral states/ coordination/ Joint Coordinating Committee – late April 2006. JCC is considered as an umbrella agreement overseeing the task force EiS and MASLINDO.

Currently, there is a teamwork between the Malaysian Maritime Enforcement Agency, Singapore's Police Coast Guard and Indonesia's maritime security body known as "*Badan SAR Nasional and Badan Keamanan Laut Republik Indonesia*" in regard to overseeing illegal activities on the high seas of the three countries. As of Monday 10 August 2015, Defence Minister and Transport Minister of Malaysia call for stronger efforts for working arrangement of the "eyes in the sky" (surveillance and joint patrols between Singapore, Malaysia, Thailand and Indonesia) to be further strengthened.

Activities such as sharing intelligence and joint enforcement operations are the building trust and cooperation with the governments. This is to reinforce mutual benefits of the shared relationship.

The outlined activities may be permissive in nature and may also sustain well the relationship between the working countries for example the analytical border management assessment, the use of alert systems' design an implementation, the activity in identifying and verification, the creation of legal and regulatory frameworks and joint training ventures and technical assistance and training such as on forensic findings, "recce"/surveillance – military and police intelligence, document examination, immigration intelligence and possibly required skills in the language for example Arabic



and English language.

### *UNSC RES. 1540 CATEGORIZED ITEMS*

The items categorized under the United Nations Security Council Resolution 1540 - (Ministerial Order/Government Gazette – Controlled List) Nuclear materials, facilities and equipment are:- Special materials and related equipment, Materials processing, Electronics, Computers, Telecommunications and information security, Sensors and lasers, Navigation and avionics, Marine, Aerospace and propulsion; and Military items.

The items or goods categorized under STA 2010 however are subjected to its own Export Control Classification Number which is synonymous as ECCN. The ECCN is actually an alpha numeric classification to identify items for export control purposes and for the relevant authority involved in issuing the export permit. Next, the ECCN have five characteristics; for example 1A002, AD003 or 9E 102. As it is there are 11 categories given in the Strategic Items List. The ML is a connotation in reference to Military Items, 0 is an indicator that equalises to Nuclear Materials, Facilities and Equipment. This is followed by 1 which is meant for Materials, Chemicals, Microorganisms and Toxins, 2 for Materials Processing, the number 3 for Electronics, 4 for Computers, 5 for Telecommunications and Information Security, 6 for Sensors and Lasers, 7 for Navigations and Avionics, 8 for Marine and number 9 reference given for Aerospace and Propulsion.

The UN member countries have by far worked in a concerted effort in curbing such terms or reference terms related to the strategic items and as an export control for the purposes the application for non-proliferation of WMD. Most countries that are not in line with the UNSC 1540 may face difficulty for export and import trade requirement. The shipping fraternity must take cognizant to the Malaysian Guideline For HS Code Strategic Act 2010 (AELB). Similarly, the shipping fraternity too is bound by the Standard Trading Condition 2010-2011 under the Federation of Malaysian Freight Forwarders.

### *CATEGORIES OF PEOPLE AND COUNTRIES CAUGHT WITHIN THE STRATEGIC ACT 2010*

People or organizations involved directly under the Strategic Act 2010 must observe carefully to all the requirements due to the fact that most of the contents of the legislation are substantively mandatory in nature. As such anyone who is engaged in the export activities are caught by the nature of their activities namely that relate to transshipment, traders, exporters, cargo agents, carriers, freight forwarders, feeder operators, logistic or service providers; and these also inclusive those within the ambit of involvement either in his own behalf or acting as an agent of another person who happens to be directly involved in the negotiation, purchase, financing, conveying, buying, selling and supply of such items.

As such, involvement for all activities above mentioned require licensing and permits without which no trades could be done. These activities under the Act are regulated, licence intense, lists controlled, by virtue of authorization, government regulated, categorized, and on national security interest. These countries are subjected to export control of strategic items or trade by the United Nations for example, Afghanistan, Republic of Iran, Democratic Republic of Congo, Democratic People's Republic of Korea, Iraq, Liberia, Cote' D'ivoire, Sierra Leone, Somalia, Sudan and all individuals and entities associated with Taliban, Al Qaeda and the ISIS.

These are some pertinent issues in ensuring that organizations, States and individuals are aware of the strategic trade issues that rivet questions to any companies importing or exporting under the veil of secrecy, evading the Customs process or checking buy using insiders either from the private companies or the government officers' authority, tampering with the Customs Forms or regulations, declaration which impinging the transparency of goods exported or imported, fraud and misrepresentation and conniving done with the support of other agencies in the export and import as well as in re-export and re-import.

### *TYPES OF PERMITS*

Permits are of paramount needs for import and export purposes under STA 2010. Hence the needs for export permit types and broker registration:-

#### Single Use Permit

(One off export permits and issued on a shipment basis – apply not less than 5 days before export – valid for 6 months)

#### Bulk Permit

(Multiple shipments export permits destined for one single country or destination – apply not less than 2 months – validity for 2 years)

#### Multi-Use-Permit

(Multiple shipments export permits destined for multiple countries – apply not less than 2 months – validity for 2 years)

#### Special Permit

(One off export permits to export to a restricted end-user and issued on a shipment basis – validity for 1 year)

#### Broker Registration

(A certificate issued to a broker of strategic items / activities – apply within 14 days – validity for 1 year).

### *APPLYING FOR PERMITS*

The application can be done via On-line function because such application saves cost and speed up processing.

The application for the registration involves two phases:-

A. **Pre- registration** which is:-

(Subscribe to DagangNet Technologies (DNT) for user to have ID and Password).

After filling up the required information – then register the company.

B. **Permit Application**

(Once application approved, a DST will be issued. This DST (Digital Signature Token) is used for permit application – application is made on-line.

The processing of application is within 5 working days upon receiving complete application.

### *LICENSING AUTHORITIES*

There are four (4) Authorities issuing permits under the Strategic Trade Act 2010 according to the Category Codes in Strategic Items List.

1. Strategic Trade Secretariat, MITI,
2. Atomic Energy Licensing Board (AELB),
3. Malaysian Communications and Multimedia Commission (MCMC) and
4. Pharmaceutical Services Division (MOH).

### *BASIS FOR PERMIT APPLICATION*

The application for renewal of permit for export or transit or transshipment and special permit needs to be accompanied by the relevant supporting documents. These documents are:-

1. End-use Statement.
2. Technical Specification.
3. A statement of undertaking to provide the relevant Authority and Delivery Verification Statement.
4. Others as may be required by the Licensing Authorities.

### *REASONS FOR REVOCATION, DENIED AND SUSPENDED*

The relevant authorities reserve the reasons on the grounds such as:-

- Convicted of an offence under any Act or related laws
- Permits contravene the laws or any related laws
- Granted permits but subsequently revoked
- Contrary to public policy or national laws or national interest or in furtherance of any activity which is prejudicial to the well-being of the country
- Contravene the UNSC or any international Agreements of which Malaysia is a party to that Agreement
- Refusal or inability by applicant to furnish document required by an Authority in

connection to his application

- False or misleading information in a material particular
- Any documents which contains a statement or omits any matter renders the document to become false or misleading in a material particular
- In the opinion of the Authority the applicant is not fit for a proper person to hold a permit or (for any other reason).

### *INTERNAL COMPLIANCE PROGRAM*

This is a must prerequisite for the industry who deals with the strategic export and import items. Each company or business must duly observe such requirements. Internal Compliance Program (ICP) sets out the guidelines and compliance to be followed.

- ICP is a set of internal procedures that satisfy the export control regulations.
- ICP is thus a pre-requisite for companies to avail to Bulk and Multiple-Use Permits under the Strategic Trade Act 2010.
- ICP is in support of the Authorities' in ensuring that companies are not taken ride on or advantage by the WMD operators or proliferators.
- Once companies have established procedures, a thorough investigation on the buyer and end-user can be undertaken prior to shipment and export of strategic items and or technology.

### *KEY ELEMENTS OF AN ICP*

- The document should be in a written statement having intent on export control.
- A designated officer appointed at the level of management to oversee on the implementation of the ICP and his or her responsibilities and positions stated clearly in the company.
- Clear compliance policy and procedures prepared on the company's letterhead.
- Transparent reporting and decision making responsibilities for exports.
- Knowledge of customers or clients and end-user of the items.
- Centralised processing for the exported the export of strategic items.
- Early warning and screening of all enquiries and orders.
- Proper documentation of all transactions of strategic items to be kept for a period of at least 6 years.

### *ICP AND GUIDE & CHECKLIST*

The ICP Guide and Checklist can be screened on MITI website at [www.miti.gov.my](http://www.miti.gov.my) whereby,

- The ICP documents need to be submitted to the Secretariat at MITI

- Submission – manually with a letterhead of the company and signed by the designated person in charge of export control
- The Secretariat will undertake pre and post audits for ICP compliance and these audits may be done without prior notice to the company.

There are many ICP examples one can refer to namely from the internet and websites on ICP and one would be a good example is on the INTEL CORPORATION, copyright 19 July 2011.

### *STRATEGIC TRADE ACT 2010 – ENFORCEMENT AND PENALTIES*

The enforcement powers are given by the Act and relevant Acts and the enforcement agencies include Royal Malaysian Customs, Royal Malaysian Police, Malaysian Enforcement Agency, Malaysian Communications and Multimedia Commission and other officers specified by the Controller as specified under Interpretation Section 2 of the Strategic Trade Act 2010. Section 2 further reiterates who is the “authorised officer” and they are an officer of customs, a police officer, an officer of the Malaysian Maritime Enforcement Agency, an officer of the Communication and Multimedia Commission and any such other officers as may be specified by the Controller.

### *POWERS OF AUTHORIZED OFFICERS*

Section 28(1) of the Strategic Act 2010 states, without prejudice to the powers of the Authorised Officers under any written law, including the related laws, an authorised officer shall have the following powers:-

- To receive and consider any report of the commission of an offence under the Act;
- To stop, enter, board, inspect and do search
- To detain any conveyance
- To recall any conveyance that has departed from Malaysia
- To exercise the right of hot pursuit
- To demand the production of documents
- To inspect, make copies of or to take extracts of documents
- To investigate any offence under the whole of STA 2010
- To examine and seize any strategic items or unlisted items together with the container and the documents related to the offence;
- To arrest any person suspected of committing or attempt to commit an offence under the STA
- To expel any conveyance which he has reason to believe to be involved in a restricted activity or acting against the national security.

Section 29 of the Strategic Trade Act 2010 relate to the powers of investigation in that:-

- Shall have all the powers necessary to carry out an inspection and to investigate

the commission of any offence under the Act

- All the powers which the authorised officers may under any written law and the Criminal Procedure Code
- Other powers given under Part V of the STA (Enforcement sections).

## *OFFENCES AND PENALTIES*

The STA provides 16 offences and they are considered as major offences which are punishable with death imprisonment for natural life where the death is the result of the act. The major offences fine starts from five million ringgit and has no limit and imprisonment starts from a minimum of five years and has no cap<sup>14</sup>.

### *MAJOR OFFENCES*

Section 9, 10, 11, 12, 18 of the Strategic Act 2010 warrant an offence which is:-

- Section 9(4) – export, tranship or bring in transit of strategic items without permit
- Section 9(5) – export, tranship, or bring in transit strategic items or unlisted items to restricted user without Special Permit
- Section 9(6) – export, tranship or bring in transit strategic items or unlisted items to prohibited end-user
- Section 10(2) – provides technical assistance within or outside Malaysia which is intended for use in connection with a restricted activity
- Section 11(2) – brokering of strategic items without being registered as a broker of strategic items and without brokering permit (requirement by related law)
- Section 12(4) – failure to inform the relevant authority on intention to export unlisted items 30 days before such export to take place
- Section 18(2) – where the permit owner allows other person to use the permit granted to the owner

### *OTHER OFFENCES*

Section 21, 23, 24, 33, 40, 46 and 51 of the Strategic Trade Act 2010 deal with other offences and they are succinctly explained below:-

- Section 21 provides for suspension of permit or registration upon disqualification
- Section 21(4) – disqualification base on the failure on registration for brokering
- Section 23(2) – failure to give particulars of the court's order for endorsement on permit registration
- Section 24(4) – failure to maintain, keep or make available register by the Strategic Trade Act.
- Section 33(1) – Master of a vessel, pilot of an aircraft or person in control of any other conveyance refusing to allow an authorised officer to search his conveyance,

- or refusing to give such information or to produce such documents on demand
- Section 40(1) – submission of false or misleading information
- Section 40(2) – furnishes, falsify, misleading information to authorised officer.
- Section 46(2) – obstruct, impede, interfere with the authorised officer’s function
- Section 51(3) – failure to provide the requested information and documents to the Controller or the relevant authority in the prescribed form and within the time specified in the notice.
- The offence under the UNSC should also be considered by those involve with the strategic goods. The Strategic Trade (UNSC Resolution) Regulation 3(3) provides that ... **“knowingly provide or collect by any means, directly or indirectly, property to be used by a person designated under the Strategic Trade (Restricted End-Users & Prohibited End-Users) Order 2010”**.
- **“... knowingly deal with the property... facilitate, provide financial service, avail for the benefit of that designated person ...”**
- **“... causes or assist ...”**  
**“... failure to disclose information to the Controller ... transaction...”**.

## CONCLUSIONS

As far as Malaysia is concerned on the agenda pertaining issues on trade of strategic items or goods; Malaysia has taken all the necessary steps in ensuring that the country is not at the minimal level be used as a transit country for the purposes of enrichment towards nuclear terrorism and weapons of mass destruction. In that course the country is moving in the right direction by applying and implementing the Anti-Money Laundering Act to counter financing for terrorism in line with the operation of UNSCR 1267 and UNSCR 1373.

The introduction of Strategic Trade Act 2010 specifically targeted the right groups from involving with the export and import materials that could harm the nation. The Act implies an obligation to control the nation’s behaviour regarding acquisition or development or the deployment of weapons of mass destruction (WMD). The Strategic Act 2010 works closely with AELB under the purview of the relevant ministry i.e., MITI and four mandated licensing agencies together with the other relevant enforcement bodies. Thus, the Strategic Trade Act 2010 outlaws the shipment of weapons of mass destruction (WMD) and related materials through the Malaysian territory.

As an afterthought in safeguarding companies or trading organisations dealing with WMD’s products and technologies, the government calls for more from the industry players to understand the law and to work closely with the authorities. They should keep their documents intact as required by the MITI and to cooperate with the authorities should the company comes under investigation for WMD.

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