

Client Alert

July 2017

For further information, please contact:

Adeline Wong
Partner
+603 2298 7880
adeline.wong@wongpartners.com

Meng Yew Wong
Partner
+603 2298 7902
mengyew.wong@wongpartners.com

Shing Yi Lee
Associate
+603 2298 7806
shingyi.lee@wongpartners.com

Ivy Tan
Associate
+603 2299 6505
ivy.tan@wongpartners.com

Kelvin Hong
Associate
+603 2299 6446
kelvin.hong@wongpartners.com

Strategic Trade (Amendment) Act 2017

Background

By way of background, the Strategic Trade Act 2010 ("**STA**") came into force on 1 January 2011 and implemented for the first time in Malaysia export controls based on the Wassenaar Arrangement, the Australia Group, the Missile Technology Control Regime, and the Nuclear Suppliers Group. Malaysia was the second country within ASEAN to implement such export controls after Singapore.

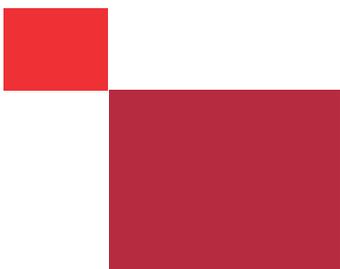
The STA applies to any person who exports, transships, brings-in-transit and brokers strategic items or unlisted items, whereby a permit would be required from the Strategic Trade Controller of the Ministry of International Trade and Industry ("**MITI**"). Strategic items are prescribed in the *Strategic Trade (Strategic Items) Order 2010* (updated as of 2017), which provides two separate lists for military items and dual-use items.

Since the inception of the STA, MITI as the relevant ministry in charge of the STA, has lead various efforts across industries in both the private and public sector to raise awareness of export control obligations under the STA and its licensing requirements. In its efforts also to be more trade facilitative, MITI had engaged various stakeholders to study the impact of the STA on business, and to identify areas of improvement.

One common criticism of the STA centered around the wide definition of the term 'brokering', as the existing term caught not only intermediaries who buy and sell strategic items on behalf of others, but also those facilitating the purchasing, financing, conveying, sale or supply of such items. This was broad enough to cover a wide range of persons involved in any transaction within a supply chain such as freight forwarders, financiers, insurers, and even persons providing support-based services which could be deemed to facilitate the sale or supply of strategic items.

The other criticism of the STA surrounded the harsh penalties that could be imposed under the STA, from the death penalty for exports of or brokering of military arms without a licence (which results in death), to minimum fines of MYR 10 to 30 million (approximately USD 2.38 to 7.2 million) for corporations found to have exported strategic or unlisted items without a licence, and MYR 5 to 10 million (approximately USD 1.2 to 2.38 million) for individuals found to have exported strategic or unlisted items without a licence.

Through industry efforts and the support of MITI to ensure that Malaysia remains competitive as a trading hub, amendments were proposed to the STA. On 27 April 2017, the *Strategic Trade (Amendment) Bill 2017* ("**Amending Bill**") was passed by the Upper House of Parliament and finally received royal assent on 19 June 2017. The effective date of the Act has yet to be announced but is expected to be gazetted soon.





Key Changes

The Act introduces new provisions within the STA and amends several existing provisions within the STA. The key changes under the Act are summarised as follows:

a) Refined "Brokering" Definition and Carve-Out for 'Ancillary Services'

Under the STA, any act of brokering of strategic items requires a valid broker registration permit from MITI. As stated above, under the previous definition, "brokering" was very widely defined to include any acts of facilitating the purchase, financing, insurance, conveyance, sale or supply of strategic items. The Amending Bill has removed the term facilitation, and restricts the application of the term to any person who negotiates or arranges the purchase, sale or supply of strategic items, or who purchases, sells or supplies strategic items, from one foreign country to another foreign country.

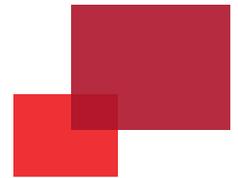
A specific exclusion is also given to any person whose sole involvement in a strategic item transaction, is to provide 'ancillary services', which includes transportation, financial services, insurance or re-insurance, general advertisement, or any other ancillary services as may be determined by MITI.

The effect of the amendment is to restrict the brokering registration requirement to only transactions occurring outside Malaysia, whereas the previous position applied to transactions within Malaysia, from within Malaysia to outside Malaysia, and vice versa. The carve-out provided in new section 11(4) is also useful to persons providing 'ancillary services' to bring them outside the scope of the brokering registration requirement.

b) Broader Definition of "Authorised Officers"

Under the STA, powers of enforcement of the act were granted to officers from the Royal Malaysian Customs Department, the Royal Malaysia Police, the Malaysian Maritime Enforcement Agency and the Malaysian Communications and Multimedia Commission. The Amending Bill now extends such powers to officers from the Atomic Energy Licensing Board (AELB), the Pharmaceutical Services Division (PSD), the Central Bank of Malaysia, the Securities Commission of Malaysia and the Labuan Financial Services Authority.

This amendment was deemed appropriate as it would afford agencies such as the AELB and PSD (which are involved in reviewing and approving licence applications for strategic items related to nuclear and chemical items) enforcement powers for offences involving items falling under their purview and expertise. On the other hand, the enforcement powers given to the Central Bank of Malaysia, the Securities Commission of Malaysia, and the Labuan Financial Services Authority would be required in relation to offences regarding provision of financial services, funds or other types of economic resources or assistance to persons falling within the *Strategic Trade (Restricted End-Users and Prohibited End-Users) Order 2010*.



c) *Presumption as to Export*

The Amending Bill introduces a new provision in the form of section 12A to provide that strategic items and unlisted items will be deemed to have been exported from Malaysia if such items (i) have been cleared by Customs on their route out of Malaysia, (ii) have been loaded onto a conveyance which is about to depart from a port or place in Malaysia, or (iii) have been cleared by Customs at an inland clearing depot or customs station on their route out of Malaysia through a customs port or airport.

d) *Requirement of 'End-Use' Statements now Optional rather than Mandatory*

Previously under the STA, any person applying for a licence (to export, transship or bring-in-transit strategic items) or special licence (to export to restricted end-users) under section 14 of the act, shall accompany such application with an end-use statement in the prescribed format. Under the Amending Bill, it is no longer mandatory for the exporter to provide an end-use statement for an application for a licence or special licence unless required by MITI.

e) *Replacement of Minimum Fines to Maximum Fines*

Penalties for offences under the STA were previously imposed on a 'minimum penalty' basis (e.g. minimum of five (5) years imprisonment, and/or minimum fines of MYR 5 million). Whilst the penalty amounts under the STA remain the same, these are now prescribed to be on a 'maximum penalty' basis (e.g. maximum of five (5) years imprisonment, and/or minimum fines of MYR 5 million).

f) *Power to Compound Offences under the STA*

Previously under the STA, there was no provision for compounding of any offences committed the act. In other words, MITI had no discretion to compound an offence committed under the act by offering a fine in exchange for non-prosecution of any offence. These powers are generally useful as they allow authorities a discretion to compound less serious offences which may not warrant prosecution (e.g. intra-group transfers of strategic items, inadvertent exports to 'low-risk' countries or end-users, or other non-compliances of a less serious nature).

Accordingly, under the existing STA, MITI would have no other option but to refer any non-compliances to the Attorney General's Chambers for a decision on whether to prosecute an offence under the act. If found guilty, minor offenders and serious offenders alike were subjected to harsh penalties under the STA.

Based on the Amending Bill, the Minister of International Trade and Industry may make regulations prescribing any offences under the Act to be a compoundable offence, and set out the criteria for compounding of such offence and the method and procedure to compound such offence.

Based on such regulations, any authorised officer may make a written offer to the person suspected of committing an offence to compound such offence by paying



a sum not more than 50% of the maximum fine prescribed for such offence. Such offer would need to have obtained the consent in writing of the public prosecutor. To date however, the regulations setting out the criteria for MITI to compound an offence under the STA is still pending.

Conclusion

The Amending Bill introduces much welcomed changes to the STA and MITI is commended on its efforts in pushing ahead with the amendments to have more trade-facilitative export control laws, to cater to today's changing and dynamic business environment. This is important as Malaysia remains a crucial trading partner of many major economies around the world and is plugged into international supply chains.

The new brokering definition is particularly helpful to companies falling within the 'unjustifiably wide' ambit of the brokering controls previously, and the introduction of compounding provisions and maximum penalties also make it useful for companies who have inadvertent gaps in export control compliance to go forward to the authorities to disclose non-compliances and receive administrative fines without criminal sanctions in return. This will contribute towards a higher compliance culture, akin to other more developed countries who have also adopted export control legislation around the world.

As the regulations prescribing the criteria to compound offences under the STA have not been announced, this will be awaited with baited breath by industry professionals and practitioners alike.

It should be noted also that whilst the Amending Bill has introduced more flexibility to the STA, there could also be heightened monitoring and enforcement of the licensing obligations under the act given the extension of powers now given to additional government authorities and agencies. As such, businesses are well advised to ensure strict and continued compliance with export control laws under the STA to minimise risks and exposure moving forward.

www.wongpartners.com

Wong & Partners
Level 21
The Gardens South Tower
Mid Valley City
Lingkaran Syed Putra
59200 Kuala Lumpur