

Pacific Forum CSIS Seminar on Strategic Trade Controls in Southeast Asia

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Crowne Plaza Hotel

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The Pacific Forum CSIS, with support from the US Department of State's Export Control and Related Border Security Program held a workshop on strategic trade controls in continental Southeast Asia in Bangkok, Thailand, on August 8-9, 2016. Some 30 Cambodian, Laotian, Myanmar, Thai, and Vietnamese mid-level officials representing agencies involved in licensing, customs, and general policy development and observers attended, along with 15 individuals from the broader Asia-Pacific and the United States and Europe. The off-the-record discussions focused on international trade and strategic goods, the core components of an effective system of strategic trade controls, national legislation, licensing, enforcement, interagency coordination, industry outreach and internal compliance programs, an assessment of national program implementation, and the role of strategic trade controls in the ASEAN Economic Community.

Summary of Presentations

Session 1: Overview of Strategic Trade Control (STC) System

As a means of preventing proliferation of Weapons of Mass Destruction (WMD) and its delivery system, an STC system places controls on activities related to international transfers of particular types of goods and technologies. A comprehensive STC system consists of four core components including an adequate legal basis, licensing procedures, enforcement measures, and outreach to stakeholders. The legal framework consists of transparent laws and regulations covering export, import, re-export, transshipment, transit, brokering, technical assistance, penalties, catch-all provisions, and empowering authorities. An effective licensing system requires a focal agency that interacts with other government agencies to manage national control lists. Restrictions on end-use and end-user enhance the licensing process. For effective enforcement, it is essential to have well-defined procedures for investigation and prosecution of STC violations, and there should be adequate technologies and expertise for detections. Also, penalties for the violations should be sufficiently punitive. Outreach activities to industry and other government agencies and international cooperation are important to enhance awareness of STC requirements in Southeast Asia.

Implementation of STC is important in Southeast Asia. First, UNSCR 1540 requires states to place controls on transfers of WMD-related goods and technologies to address proliferation risks posed by non-state actors. Commitments to international obligations enhance national reputation and contribute to international peace and security. Second, there has been a dramatic increase in dual-use trade activity in the region. Foreign and domestic investments have boosted economic growth especially in dual-use industrial sectors, and there are a number of transit and transshipment points in Southeast Asia that can be exploited by proliferators. However, in most cases existing domestic laws were designed to safeguard public safety, health, environment, and national security but not to sufficiently cover trade of dual-use items. Third, comprehensive STC systems can bring about benefits of trade facilitation and foreign investment. By protecting legitimate exporters from being

exploited by proliferators, STC can enhance confidence of importers. Also, a robust STC system can create secure trade environments that attract foreign high-tech investments.

Session 2: National Strategic Trade Control Legislation

A strong legal framework is needed to ensure national STC systems have the capacity to meet international commitments to establish a domestic control regime. The essential legal authorities include mechanisms for ensuring a state has the capacity to fulfill its obligations in the international nonproliferation regimes such as UNSCR 1540 and the Treaty on Non-proliferation of Nuclear Weapons (NPT), the Chemical Warfare Convention (CWC) and the Biological and Toxic Weapons Convention (BTWC). Legal authorities should define the scope of controls in terms of transactions, items, places, and entities. The legal framework for STC should address authority, principle, and processes for STC licensing, outreach, enforcement, and international cooperation.

There are four different approaches to establishing a legal basis for STC. First, states can enact one overarching STC law that establishes legal authorities and requires detailed regulations for full implementation. The second approach is to establish the general legal basis in the state's foreign trade law, together with STC-specific regulations. A third alternative is to provide the legal basis for STC through several different laws that are harmonized by STC-specific regulations. The fourth approach is to have several different laws that address the requirements associated with STC. There is no perfect way to approach to the need to establish a legal basis for STC since each country has different legal traditions and systems. Meanwhile, most countries either have overarching STC law or dedicated STC regulations based on foreign trade law.

Session 3: Licensing

An effective licensing system should have the core elements that include control lists, catch-all controls, license review process, and post-shipment verification. Establishing lists of items to be controlled is essential as it is a basis for determining whether exporting items are subject to licensing requirement. Creating a comprehensive list is difficult and time-consuming. A good practice for creating national control lists is to adopt the EU list as the basis of the national control list as it is acknowledged as an international standard that has incorporated the control lists of all the multilateral export control regimes (MECRs). At the same time, it is necessary to keep updating the national control list based on domestic needs and requirements.

For items not specified by the control lists, licensing authorities require a mechanism for catch-all controls – controls that allow them to determine end-use and end-users. Exporters should apply for license if they suspect, know, or are informed that the end-use is related to WMD-applications. Authorities should promulgate lists of end-users and destinations that are restricted or prohibited from specific trading activities. There are a variety of ways to address the requirement for catch-all controls. In the case of Japan, the government maintains the list of candidate items that might require catch-all controls to help industry in understanding possible licensing requirements.

An effective STC licensing system should regulate the full range of trading activities including exportation, importation, transit and transshipment of goods, re-exportation, brokering, and transfer of technologies by both tangible and intangible means. This means that STC licensing should cover activities in free trade zones and other special economic zones.

In terms of the licensing review process, there are several different organizational approaches to licensing. One option is to establish a single STC authority that licenses all transactions involving strategic items. The examples here are Hong Kong, Japan, and Singapore. In India, one primary agency licenses transactions in most types of strategic items with input from other agencies. Another approach is that two or more agencies are responsible agencies for particular class of items. The examples here are China, Korea, and Malaysia. Another approach is that an interagency body licenses all transactions involving strategic items.

Post-shipment verification is an important tool that ensures actual end-use and destinations are consistent with what were declared in licensing process. There are several viable options for conducting post-shipment verification. In case of Malaysia and Taiwan, diplomatic missions conduct post-shipment verification activities albeit with a limitation in resources they can spend on it. Another approach can include establishing a post-shipment reporting requirement for exporters to have end-users verify and demonstrate the end-use after the shipment.

Session 4: Enforcement

Enforcement is the last-line defense of a national STC system. For effective STC enforcement, the legal framework should provide for a commitment to the principles of nonproliferation, authority and capacity to enforce STC, and sufficient penalties to deter potential violations. There must be adequate resources and technology for detection of violations and an effective communication system with agencies involved in the process. Also, clear procedures for information sharing, controls, and disposal of goods are necessary to make STC enforcement effective.

Enforcement agencies are always under pressure to facilitate faster and larger trade flows. To keep the balance between trade facilitation and STC, it is important to have more efficient collaborative work among agencies and companies with different objectives, functions, and cultures. To this end, stakeholders involved in STC enforcement should build coordination mechanisms based on political will, mutual trust, and recognition of their role and expertise. All actors should make technical expertise and resources available to each other, and it is necessary for the authorities to reach out for international assistance when it is deemed necessary.

Session 5: Interagency coordination

Establishing strong interagency coordination in a STC system is important. The interagency process helps the government in making the best decisions on licensing by bringing unique and different expertise together. It also prevents one agency from having a monopoly on decision making regarding the issuance of licenses. The downside to interagency coordination is that it can delay licensing procedures as reaching consensus is often a time consuming process. In the

United States, the interagency process involves escalating the decision to issue a license from the licensing officer to the Operating Committee, the Advisory Committee on Export Policy, the Export Administration Review Board, and the President's Office in ascending order when consensus cannot be reached at the lower level.

Session 6 and 7: Industry Outreach and Internal Compliance Program (ICP)

Industry outreach and ICPs are essential components for STC as a front-line defense. While the vast majority of goods and technologies are dual-use in nature, government resources are insufficient to monitor all trade in dual-use industrial sector. Therefore, industry with enhanced awareness of STC through outreach and ICPs can reduce the burden of managing the control of goods and contribute to countering proliferation by providing valuable intelligence and developing programs to identify and vulnerabilities.

The core element that national authorities should provide to industry in outreach activities is education on industry's responsibilities under the national STC regime as well as information regarding new or updated regulations and the establishment or updates to any control lists and restricted entities lists. Meanwhile, industry outreach can be extended to cover other elements. The authorities can encourage industry to develop ICPs by incentivizing ICPs and introducing of ICP templates. Publication of best practices and guidance for catch-all controls is another element that can be incorporated into industry outreach activities. The government can also consider community-building within industry by identifying STC "champions" that other players in the industry can benchmark.

As a systematic approach to addressing an organization's export compliance requirements, ICPs contribute to controlling strategic items and promote legitimate trade and business activities. To establish effective ICPs, industry should consider three dimensions of ICPs that are people, process, and technology. Within company, there should be effective training programs supported by adequate resources and management commitments. Documented procedures and general policy guidelines for STC compliance should be provided to employees. In terms of technology, data management system and robust IT infrastructure can make process for ICPs more transparent and efficient.

Session 8: National implementation assessments

Assessment of national STC implementation is important for identifying next steps to enhance the existing STC systems. A matrix for the initial assessment of national STC implementation in Southeast Asia was introduced during the session. Drawn from the CSCAP Memorandum on managing the trade of strategic goods (CSCAP Memorandum #14), the matrix identifies elements that are essential for a comprehensive STC system. This matrix is similar to the one used by US State Department Export and Border Control program in assessing STC programs around the world. Participants from countries in Southeast Asia are encouraged to provide detailed feedback on the matrix and the assessments provided. This will lead to creation of individual country sheet that would allow for a more in-depth analysis and serve as a tool for improving STC coordination in the region.

The European Union's P2P program on dual-use goods is a valuable source for determining the appropriate level of external assistance for STC implementation. The EU program offers a tailored approach for each country depending on the stage of the country's STC implementation. To complete the assessment, the program conducts at least two missions to a single country. An initial visit is intended to grasp the situation, and a following visit consists of training sessions. The focus of training session can be awareness training, capacity building, or industry outreach depending on the result of initial assessment.

Session 9: The ASEAN Economic Community and STC

Regional cooperation on strategic trade controls should be strengthened. Universal implementation of strategic trade controls in ASEAN would eliminate weak links that proliferators seek to exploit. Establishment of national STC system is a critical first step to fully realize the ASEAN Community Vision 2025. For this step, creating collective political will is most imperative to overcome difficulties such as cultural difference, different level of knowledge, lack of resources, and language barriers. At the international level, top-level officials from countries with the robust STC systems should engage in discussions with leaders from the other countries in the region to promote political will to implement STC. At the national level, making a local STC "champion" and convening national champions in Southeast Asia together can contribute to maintaining momentum for STC implementation and consistent development of national expertise in STC.

Key Findings and Next Steps

Calling forth top-level official's political will to promote implementation of a national strategic trade control (STC) program is crucial first step in developing a national STC system. Incremental implementation of elements of a STC program is important and facilitates quicker implementation rather than waiting until all components of the program are ready for implementation. Top-level officials from countries with robust STC systems should engage in dialogue with leaders from other countries to reinforce the importance of implementation.

In promoting the value of STC implementation in Southeast Asia, it is important to highlight that a robust national STC system can attract foreign high-technology investment in the region. A robust STC system can contribute to enhancing investor's confidence in secure trade environment that can lead to economic development of the region.

Establishment of a single focal agency for STC that interacts with other agencies can contribute to enhancing the efficiency of STC system. Having multiple responsible agencies can delay STC process and hinder trade facilitation. It is necessary to streamline the organizational structure centered on a single nodal agency. Ministry of Trade or Commerce should be considered as a first and best option as most of trade-related issues are handled by those agencies.

STC implementation is most efficiently accomplished by developing a legal framework through one primary law that establishes legal authorities and identifies key relationships, which is specified through a regulatory framework. The primary legislation provides a basis for STC

implementation with broad language, and detailed rules and procedures can be stipulated by regulations with control lists. In taking this approach, countries in the Southeast Asia can take an incremental approach to STC implementation.

National legislation for STC must have provisions for penalties for violations. However, it is important to recognize that there must be some consideration that mistakes and missteps are likely to occur, especially in the early stages of the implementation process. To promote a sense of collaborative support between government and industry, punishments should not be overly severe and rigid enforcement should be avoided to ensure full implementation of an effective STC program.

Controlling brokering activity is a key component in trading activity in Southeast Asia. Therefore, it is important to establish a linkage between proliferation financing and STC. Legal and regulatory instruments for STC should be designed to control proliferation financing or to have a linkage with other legislation controlling such activities.

Classification of strategic goods is an area that requires close cooperation between the national authority and industry. The government needs to help the private sector in identifying their license requirement while the private sector should provide their technical knowledge of industry to the authority.

Transparency in the STC licensing process can be enhanced through the establishment of robust IT infrastructure. IT infrastructure for STC can reduce the likelihood of corruption by reducing the amount of face-to-face interaction and creating better oversight of the transaction process. It should also be stressed that paperless information sharing between agencies through IT infrastructure can contribute to faster processing and trade facilitation.

Finding essential factors that contribute to successful prosecution of catch-all violations was identified as an important area to be explored. Participants shared concern regarding the difficulty associated with substantiating an exporter's clear intent to proliferate when bringing cases to prosecution.

Close coordination and active information sharing between customs and licensing agency is important for enhancing the effectiveness of STC enforcement. Emphasis should be placed on mutual trust between customs and licensing authorities.

It is important to ensure that actual end-use and end-user are consistent with the information provided throughout the transaction process from the initial application for the export license through post-shipment verification. Diplomatic missions can carry out post-shipment verification albeit with limited in resources. A better approach would be to establish a post-shipment reporting mechanism in which the exporter requires the end-user to verify the end-user after a certain period of time from the shipment.

Given a number of stakeholders involved in global trade, it is important to highlight that the target audience of STC outreach should include not only manufacture but also other entities such

as shipping companies, freight forwarders, warehouse operators, brokers, and other government agencies.

In organizing outreach activities, it is necessary for the national authority to ensure those involved have a good understanding their industry and the trends in national trade patterns. Identifying dual-use industrial sectors with high volumes of exports makes planning outreach more efficient.

Multi-national companies (MNCs) can play an important role in introducing the global standards for internal compliance programs (ICPs) in Southeast Asia. Large MNCs can leverage investment promises to encourage small-medium enterprises (SMEs) in their supply chain to implement ICPs. Also, national authorities can gain a better understanding of international standards by incorporating MNCs in their outreach activities.

The ASEAN National Single Window (NSW) initiative is a good basis for establishing the basic infrastructure for STC. Integration of STC into NSW will enhance STC licensing and enforcement by optimizing complex data sharing between agencies. Also, it should be highlighted that introducing STC into the country's NSW will contribute to solidifying STC implementation in the ASEAN region and facilitate integration of STC requirements to ASEAN Single Window in the future.

There is a wide range of views in the region regarding the value of integrating strategic trade management requirements into the ASEAN Single Window initiative. Some participants thought it would help solidify trade controls in the region, while others argued it would be too difficult to implement. There was general agreement that success or failure would depend on the specific ways in which strategic trade management principles were integrated into the ASEAN Economic Community.