

**EXPORT CONTROL OF DUAL-USE ITEMS:
A COMPARATIVE STUDY OF THAI AND FOREIGN LAWS***

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ABSTRACT

The terrorists attack on 9 September 2001 in the United States the World Trade Center and the Pentagon by the hijacked airplanes caused a great number of casualties. As a result, terrorism has affected and become a new important problem in global community.

Terrorists have developed complex processes to procure materials and equipment for producing or obtaining WMD. Therefore, to prevent WMD proliferation and terrorism, many developed states are trying to encourage other states to develop their own effective export control measures for any material or technology that can be used to develop WMD in order to prevent harm that may be caused to peace and security of global community. Thus, “Dual-Use Items (DUI)” which are referred to goods, software and technology that can be used for both civilian and military applications and/or can contribute to the proliferation of WMD, are subject to control under domestic export laws of each state. Thus, the United Nations Security Council (UNSC) adopted the Resolution 1540 in 2004 requires all member states to adopt domestic laws to prevent the proliferation of WMD by controlling concerned activities namely export, re-export, transit, transshipment, brokerage, provision of fund and service related to WMD or related materials which could be used for the design, development, production or use of nuclear, chemical and biological weapons specified by relevant multilateral treaties. Many states in Asia, as members of the United Nations, have developed domestic laws focused on

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export control measures of DUI such as Japan, Singapore and Malaysia etc. to fulfil its obligations under such Resolution.

As for Thailand, the Cabinet endorsed UNSCR 1540 since 10 August 2004 and the Thai government considered formulating national export control law following the adoption of such Resolution. The export control law of DUI was prescribed by the Ministry of the Commerce under the title of “The Ministerial Notification Specifies Dual-Use Items as Goods Requiring Permission and Complying the Export Measures B.E.2558 (2015),” on 16 October 2015, ten years after the endorsement of Resolution 1540. This Ministerial Notification will take effect on 1 January 2018. However, this Law has no provision regarding export permission measures of DUI. Thus, this may cause unclear practices in operation of the exporters. Moreover, this Ministerial Notification does not cover brokerage and intangible technology transfer. Likewise, this Law is issued under “Export and Import of Goods Act B.E.2522 (1979)” under which penalty is not specified on the basis of intention and knowledge of violator.

This thesis mainly focuses on the enforcement of the Ministerial Notification Specifies Dual-Use Items as Goods Requiring Permission and Complying the Export Measures B.E.2558 (2015) and the draft Trade Control on Weapons of Mass Destruction Related Items approved by the Cabinet in comparison with export control laws of DUI of Japan, Singapore and Malaysia in order to increase the effectiveness of export control system to prevent the proliferation of WMD together with to facilitate the permission process of controlled activities and to reduce difficulties caused to the operations of the entrepreneurs.

Keywords : Dual Use Items, Export Control, Weapon of Mass Destruction, WMD

บทคัดย่อ

จากเหตุการณ์ที่ผู้ก่อการร้ายใช้เครื่องบินพาณิชย์ พุ่งชนตึกเวิลด์เทรดเซ็นเตอร์และตึกเพนตากอนในประเทศสหรัฐอเมริกา เมื่อวันที่ 9 กันยายน ค.ศ. 2001 จนทำให้มีผู้เสียชีวิตจำนวนมาก ส่งผลให้การก่อการร้ายกลายเป็นปัญหาที่สำคัญของประชาคมโลก

ในปัจจุบันผู้ก่อการร้ายได้พัฒนาวิธีการจัดหาวัตถุดิบและเครื่องมือสำหรับการผลิตอาวุธที่มีอานุภาพทำลายล้างสูง ดังนั้น เพื่อป้องกันการแพร่ขยายของอาวุธที่มีอานุภาพทำลายล้างสูงและการก่อการร้าย ประเทศพัฒนาแล้วทั้งหลายจึงพยายามสนับสนุนให้ประเทศอื่น ๆ สร้างระบบการควบคุมการส่งออกวัตถุดิบหรือเทคโนโลยีใด ๆ ที่สามารถนำไปใช้ในการพัฒนาอาวุธที่มีอานุภาพทำลายล้างสูง เพื่อป้องกันภัยอันตรายที่เป็นภัยคุกคามต่อความสงบสุขและความปลอดภัยของประชาคมโลก ส่งผลให้สินค้าที่ใช้ได้สองทาง ซึ่งหมายถึง สินค้า โปรแกรมคอมพิวเตอร์ และเทคโนโลยี ที่สามารถนำมาใช้ทางด้านการค้าและทางการทหาร และ/หรือ ช่วยสนับสนุนให้เกิดการแพร่ขยายของอาวุธที่มีอานุภาพทำลายล้างสูง จำเป็นจะต้องถูกควบคุมภายใต้กฎหมายภายในของแต่ละประเทศ ด้วยเหตุนี้ คณะมนตรีความมั่นคงแห่งสหประชาชาติจึงมีมติที่ 1540 ในปี ค.ศ. 2004 เรียกร้องให้บรรดาสมาชิกยอมรับข้อมติโดยออกกฎหมายภายในประเทศเพื่อป้องกันการแพร่ขยายของอาวุธทำลายล้างสูงโดยการควบคุมกิจกรรมที่เกี่ยวข้อง อันได้แก่ การส่งออก การส่งกลับออกไป การผ่านแดน การถ่ายทำ การเป็นคนกลาง การจัดหาเงินทุนและการบริการที่เกี่ยวข้องกับการแพร่ขยายของอาวุธทำลายล้างสูงและวัตถุดิบที่เกี่ยวข้องซึ่งสามารถนำไปใช้ในการออกแบบ พัฒนาผลิต หรือใช้ทำอาวุธนิวเคลียร์ อาวุธเคมี และอาวุธชีวภาพตามที่ระบุไว้ในสนธิสัญญาพหุภาคี

ประเทศต่าง ๆ ในภาคพื้นเอเชียที่เป็นสมาชิกขององค์การสหประชาชาติได้มีการพัฒนากฎหมายภายในโดยมุ่งเน้นมาตรการควบคุมการส่งออกสินค้าที่ใช้ได้สองทาง เช่น ญี่ปุ่น สิงคโปร์ และมาเลเซีย เป็นต้น เพื่อปฏิบัติตามภารกิจภายใต้มติคณะมนตรีความมั่นคงแห่งสหประชาชาติที่ 1540 ดังกล่าว

สำหรับประเทศไทย คณะรัฐมนตรีให้การรับรองมติคณะมนตรีความมั่นคงแห่งสหประชาชาติที่ 1540 ตั้งแต่ 10 สิงหาคม ค.ศ. 2004 โดยรัฐบาลได้พิจารณาออกกฎหมายข้อเรียกร้องของมติดังกล่าว โดยกฎหมายควบคุมการส่งออกสินค้าที่ใช้ได้สองทางได้ถูกระบุไว้ในประกาศกระทรวงพาณิชย์ เรื่องกำหนดให้สินค้าที่ใช้ได้สองทางเป็นสินค้าที่ต้องขออนุญาต และกำหนดให้สินค้าที่ต้องปฏิบัติตามมาตรการจัดระเบียบในการส่งออกไปนอกราชอาณาจักร พ.ศ. 2558 (ค.ศ.2015) เมื่อวันที่ 16 ตุลาคม พ.ศ. 2558 หลังจากให้การรับรองมติคณะมนตรีความมั่นคงแห่งสหประชาชาติที่ 1540 เป็นเวลาถึงสิบปี โดยประกาศกระทรวงพาณิชย์ฉบับนี้จะมีผลใช้บังคับตั้งแต่วันที่ 1 มกราคม 2561 เป็นต้นไป อย่างไรก็ตาม ประกาศกระทรวงพาณิชย์ฉบับนี้ยังไม่มีการกำหนดว่าด้วยวิธีการขออนุญาตส่งออกสินค้าที่ใช้ได้สองทาง ซึ่งอาจนำไปสู่ความไม่ชัดเจนในแนวทางการปฏิบัติงานของผู้ส่งออก นอกจากนี้ประกาศกระทรวงพาณิชย์ฉบับนี้ยังไม่ครอบคลุมถึงการเป็นคนกลางและการถ่ายโอนเทคโนโลยีที่จับต้องไม่ได้ และในขณะเดียวกันประกาศกระทรวงพาณิชย์ฉบับนี้ออกมาโดยอาศัยอำนาจตามพระราชบัญญัติการส่งออกไปนอกและการนำเข้าภายในราชอาณาจักรซึ่งสินค้า พ.ศ. 2522 (ค.ศ.1979) ซึ่งมิได้มีการกำหนดโทษตามเจตนาและความรู้สำนึกในการกระทำของผู้ฝ่าฝืน

บทความนี้ศึกษาถึงการบังคับตามกฎหมายของประกาศกระทรวงพาณิชย์ เรื่องกำหนดให้สินค้าที่ใช้ได้สองทางเป็นสินค้าที่ต้องขออนุญาต และกำหนดสินค้าที่ต้องปฏิบัติตามมาตรการจัดระเบียบในการส่งออกป็นอกราชอาณาจักร พ.ศ. 2558 (ค.ศ.2015) และร่างพระราชบัญญัติการค้าสินค้าที่เกี่ยวข้องกับการแพร่ขยายอาวุธที่มีอานุภาพทำลายล้างสูง พ.ศ.... ที่คณะรัฐมนตรีมีมติอนุมัติหลักการในเชิงเปรียบเทียบระบบการส่งออกสินค้าที่ใช้ได้สองทางของประเทศญี่ปุ่น สิงคโปร์ และมาเลเซีย เพื่อเพิ่มประสิทธิภาพในระบบการควบคุมการส่งออก ทั้งนี้เพื่อป้องกันการแพร่ขยายของอาวุธที่มีอานุภาพทำลายล้างสูง พร้อมกับการอำนวยความสะดวกในขั้นตอนการพิจารณาอนุญาตให้ดำเนินกิจกรรมควบคุมต่าง ๆ เพื่อลดความยุ่งยากอันจะเกิดขึ้นในการดำเนินการของผู้ประกอบการ

คำสำคัญ : สินค้าที่ใช้ได้สองทาง การควบคุมการส่งออก อาวุธที่มีอานุภาพทำลายล้างสูง WMD

1. BACKGROUND OF EXPORT CONTROL OF DUAL-USE ITEMS

Nowadays, terrorists have and continue to attempt to attack many states with WMD to inflict greater numbers of casualties and threaten to cause loss, damage, pain, death, sorrow, terror, and insecurity to the public. To achieve such objectives of terrorism, terrorists are trying to develop complex processes to procure materials and equipment for producing or obtaining WMD by using DUI as a composition.

From the incident mentioned above, proliferation of WMD could have extreme impact on humankind and global environment. Thus, it is the obligation of each state to prevent WMD proliferation and terrorism by developing its own systems to build up efficient export control of DUI to eliminate the risk that such DUI will be used for a part of WMD.

Scopes of DUI export control are generally specified by international cooperation and national laws that cover list of controlled items, classification, controlled activities, export measures, authorities, enforcement mechanism, penalties and sanctions applied to the violation of export control laws including provisions on restricted customers, users and destination on export control of DUI.

Non-proliferation of WMD and DUI export control could create an essential contribution in the global community to fight against terrorism by reducing risk of terrorists or any non-state actor for gaining access to WMD or related materials from illegal export of DUI. Therefore, any state subject to establish measures for international cooperation and domestic laws to control and prevent the increase of WMD and their means of delivery including related materials, equipment and technology for contribution and maintenance of international peace and security.

2. DEFINITION OF WEAPON OF MASS DESTRUCTION AND DUAL-USE ITEMS

United Nations Security Council Resolution 1540 requires the member states of the United Nations to establish national control to prevent the proliferation of nuclear, chemical, or biological weapons that could be

called “WMD” including their means of delivery and related materials¹ which include DUI.

According to the items subject to control under UNSC Resolution 1540, the definitions of such items are as follows.

1) Weapons of Mass Destruction (WMD) refers to all types of weapons such as nuclear, chemical, biological weapons which could cause harm to a large number of people or cause serious damage to the environment, including wire-guided missile system, missiles or any other unmanned control system of such weapons.²

2) Means of delivery refers to missiles, rockets and other unmanned systems which are designed for the use of delivery of nuclear, chemical, or biological weapons.³

3) Related Materials refer to any material, equipment, and technology which is controlled by multilateral treaties and arrangements, or national control list and these materials could be used for the purposes of design, development, production or use for nuclear, chemical and biological weapons and their means of delivery.⁴

4) Dual-Use Item (DUI) refers to a product, technology and software which can be used for civilian and military applications and/or can contribute to the increase of WMD.⁵

¹ United Nation Security Council Resolution 1540 (2004), Art 3.

² The Ministerial Notification Specifying Dual-Use Items as Goods Requiring Permission and Subject to Export Measures B.E.2558, Ministry of Commerce, Section 3.

³ United Nation Security Council Resolution 1540 (2004), Definitions 1.

⁴ Ibid.

⁵ European Commission, ‘Trade: Dual-Use Export Control’ < <http://ec.europa.eu/trade/import-and-export-rules/export-from-eu/dual-use-controls/> > accessed 18 Nov 2016.

3. CONTROLLED ACTIVITIES

Export control of DUI is expanded to cover the following activities.

- 1) Export means the transfer of items from the exportation state to other state.⁶
- 2) Re-Export means the export of items that has been imported into the state.⁷
- 3) Transit means the transport of items through the state from the port or place of entry to the port or place of exit, whereby the beginning and ending points of transportation are outside the state, regardless whether there is any transshipment, warehousing, changing of container or mode of transportation involved.⁸
- 4) Transshipment means transshipment of items from one mode of transport to another within the same port or place such as ship to ship or airplane to airplane, where the points of origin and destination are outside the state.⁹
- 5) Brokerage means negotiation or arrangement of deals involving the transfer of items between third states.¹⁰
- 6) Technology Transfer means of transfer technology whether it is tangible or intangible technology from the exportation state to other state or from the resident to non-resident.

Therefore, any person who would like to conduct activities mentioned namely export, re-export, transit, transshipment, brokerage or transfer of technology concerning DUI are controlled under the DUI export control laws and required to obtain permission in compliance with the export measures prior to conduct of such activities.

⁶ Anna Wetter, *Enforcing European Union Law on Exports of Dual-Use Goods* (1st edn, Oxford University Press 2009) Glossary.

⁷ Ibid.

⁸ Department of Foreign Trade, Ministry of Commerce, Thailand.

⁹ Ibid.

¹⁰ Anna Wetter, *Enforcing European Union Law on Exports of Dual-Use Goods* (1st edn, Oxford University Press 2009) Glossary.

4. THE IMPORTANCE OF PENALTY FOR VIOLATION

To prevent illegal exports of DUI and the increase of WMD, administrative sanctions and criminal penalties such as prohibition of export, fine and imprisonment especially heavy fines and long prison sentences should be applied to the violation of DUI export control laws. Any person who is engaged in the controlled activities; in violation of such export control laws is subject to penalties because there sanctions or penalties could stop the violator from similar offences in order to protect the general public. Moreover, If the violator is a member of terrorism organization, the conviction could also obstruct other illegal activities of terrorists.

Moreover, the United Nations Security Council Resolution 1540 Resolution 1540 dictates all members of the United Nations to formulate proper laws to control export, re-export, transit, transshipment and to establish proper control system of funds and services related to the activities mentioned above as well as to apply proper criminal penalties or administrative sanctions for violation of such control measures.¹¹Based on aforesaid reasons, appropriate penalties or sanctions applied to the violation of export control of DUI are very important.

5. INTERNATIONAL LAWS CONCERNING “EXPORT CONTROL OF DUAL-USE ITEMS”

Currently, goods, technology and software which are classified as DUI are used not only for civilian applications but also for military purposes. Therefore, the increase of growth of international trade on DUI will increase the risks that such DUI will be used to develop WMD or other illegal activities.

In preventing the proliferation of WMD, there is international cooperation on non-proliferation and export control system of DUI as follows.

¹¹ United Nation Security Council Resolution 1540 (2004), Art 3.

5.1 The International Non-Proliferation Agreement

After the Cold War, international non-proliferation agreements went through improvement and reinforcement in order to maintain security and stability of global community. There are three major international non-proliferation agreements namely,

(1) Treaty on the Non-Proliferation of Nuclear Weapons (NPT)

The objective of NPT is to promote non-proliferation and disarmament of nuclear weapons together with peaceful uses of nuclear energy. Thus, the Treaty establishes a safeguard system to prevent the use of fissile material for weapons. This safeguard system is under the responsibility of the International Atomic Energy Agency (IAEA) the uses of nuclear energy for the peaceful purposes. Under the safeguard system, there are an international organization taking charge of inspections conducted by IAEA to verify the compliance with this Treaty.¹²

(2) Biological Weapons Convention

BWC is the first multilateral disarmament treaty which prohibits the development, production and stockpiling of WMD especially biological and toxin weapons.

(3) Chemical Weapons Convention

CWC is the multilateral disarmament treaty which prohibits the development, production, stockpiling, transfer or use of WMD especially chemical weapons.

5.2 United Nations Security Council Resolution 1540

The increase of WMD such as nuclear, chemical and biological weapons is the obstruction to the maintenance of international peace and security. There are the potentials that terrorists may possess, acquire, develop or use such WMD for terrorism activities. Thus, UNSC Resolution 1540 was adopted on April 28, 2004 under Chapter VII of the United Nations Charter in order to affirm that the increase of WMD as well as the means of delivery is the threat to international peace and security and thus

¹² Ibid.

dictates the members of the United Nations to take proper and effective actions against such threat and to fulfil all other obligations related to arms control and disarmament for the prevention of the proliferation of WMD in all aspects.¹³

This Resolution lays down obligations for all members of the United Nations to take steps decided by itself to prevent the increase of WMD and the means of delivery by requiring prohibition of non-state actors to obtain, possess, apply, manufacture, develop and transfer of WMD and related materials for terrorism purposes¹⁴

For legal status of United Nations Security Council Resolution, the power of United Nations Security Council to pass resolution is provided for in Article 24 of the United Nations Charter¹⁵. Then, the members of United Nations bound by Article 25¹⁶ and 48¹⁷ to implement obligations under United Nations Security Council Resolution 1540.

In implementing the UNSC Resolutions 1540 (2004) under Articles 25 and 48 of the Charter of the United Nations that requires Thailand and other members to establish its national export control measures with an aim to prevent the proliferation of WMD or any related materials including to

¹³ United Nation Security Council Resolution 1540 (2004) 1.

¹⁴ Ibid, 3-4.

¹⁵ The Charter of United Nations, Article 24.

“In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.”

¹⁶ Ibid, Article 25.

“The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”

¹⁷ Ibid, Article 48.

“1. The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.

2. Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.”

set up and enforce export control laws over DUI, Thailand, by the Minister of the Ministry of Commerce and upon authorization by the Cabinet, issued the Ministerial Notification Specifies Dual-Use Items as Goods Requiring Permission and Complying the Export Measures B.E.2558 (2015) by virtue of the provisions of Sections 5 (2), 5 (6) and 15 of Import and Export of Goods Act B.E. 2522 (1979) which is the first national export control law on DUI.

5.3 The Multilateral Export Control Regimes

The multilateral export control regime is the voluntary groups of supplier states that have the objectives to restrict the trade on controlled items including DUI only for peaceful proposes. Under each regime, the members have the commitments to ensure that their activities shall not contribute to proliferation of WMD.

(1) Nuclear Suppliers Group (NSG)

The Nuclear Suppliers Group (NSG) is a cooperation of nuclear exporters which is a voluntary association founded in 1975 that has no formal measures to enforce all members on the compliance. Currently, there are 48 members.¹⁸ All members are seeking to contribute to non-proliferation of nuclear by implementing two guidelines adopted by consensus. The first guideline controls the export of items designed or used for nuclear purposes and the second controls DUI and related technology. Both guidelines are consistent with relevant international non-proliferation agreements.

(2) Australia Group (AG)

This cooperation is an informal voluntary export control arrangement founded in 1985 seeking to ensure that any export does not contribute to the proliferation of biological and chemical weapons. It sets export guidelines and six common control lists. The lists are included dual-

¹⁸ Nuclear Treat Initiative, 'Nuclear Suppliers Group NSG' 31 January 2017 <<http://www.nti.org/learn/treaties-and-regimes/nuclear-suppliers-group-nsg/>> accessed 18 Feb 2017.

use chemical manufacturing, chemical weapons precursors, biological agents and biological equipment.¹⁹

(3) Missile Technology Control Regime (MTCR)

This cooperation is a voluntary export control arrangement founded in 1987 having the objective to limit the proliferation of ballistic missile, unmanned delivery systems capable of delivering WMD and other related items that could be used for WMD attacks. Members of the MTCR have to establish national export control measures for ballistic missiles and related items that appear on the MTCR.

(4) Wassenaar Arrangement (WA)

This arrangement calls for cooperation of export control system which was established in 1996 to contribute to the international security concerning the transfer of conventional arms, DUI and technologies and also to prevent the use of such items by terrorists. WA is the first system of multilateral export control designed to cover both conventional weapons and sensitive dual-use items. All parties agree that items on a Munitions List and List of DUI and Technologies shall be controlled in order to prevent unauthorized transfer or re-transfer of such items.

As mentioned above, all members of the United Nations are required to establish and implement national legislation and export control system to prevent any non-state actor to acquire, possess, develop, manufacture, transport, transfer or use WMD and their means of delivery to comply with the UNSC Resolution 1540.²⁰ Thus, DUI which are goods, software and technology that can be used for producing, developing or using in missile, nuclear, chemical or biological weapons will be focused and controlled under national export control laws of each member.

6. ANALYSIS ON THE PROBLEMS OF “EXPORT CONTROL OF DUAL-USE ITEMS” IN THAILAND COMPARING WITH FOREIGN LAWS

¹⁹ The Australia Group, ‘Home’ < <http://www.australiagroup.net/en/index.html>> accessed 18 Nov 2016.

²⁰ United Nations Security Council Resolution 1540, Art 3 (d).

After examining Thai laws on export control of DUI regarding the background, international law, foreign laws namely Japan, Singapore and Malaysia comparing with Thai laws, the Author found the problems as follows.

6.1 Non-Compliance with UN Resolution 1540 on the Control of Brokering

Referring to the activities subjected to control under Thai laws, there is no provision on brokering both in the Import and Export of Goods Act B.E. 2522 (1979) and in the Ministerial Notification. Thus, this Ministerial Notification does not covers the requirements of UNSCR 1540 because its enforcement does not cover brokering and intangible technology transfer that are Controlled Activities under UNSCR 1540.

Comparing with the other countries namely Japan, Singapore and Malaysia as mentioned in the previous Chapter, all countries have the control provisions of brokering transactions related to DUI.

Thus, Thailand as a UN member state is required to comply with the Resolution by establishing “Export Control Measure” that covered DUI and technology transfer.

6.2 Non-Compliance with UN Resolution 1540 on the Control of Technology

Referring to the definition of “Dual-Use Goods” under this Notification that refers to goods which can be used for both commercial and military applications, in design, development, manufacture, utilization, modification, storage, transport or act in any way in order to acquire weapon of mass destruction,²¹ there is no other regulations issued under the Ministerial Notification Specifies Dual-Use Items as Goods Requiring Permission and Complying with the Export Measures B.E.2558 (2015) which control transaction of brokering and technology transfer. Thus, this Ministerial Notification does not covers the requirements of UNSCR 1540 because its enforcement does not cover brokering and intangible technology transfer that are Controlled Activities under UNSCR 1540.

²¹The Ministerial Notification Specifies Dual-Use Items as Goods Requiring Permission and Complying the Export Measures B.E.2558 (2015), Section 3.

Comparing with the other countries namely Japan, Singapore and Malaysia as mentioned in the previous Chapter, all countries have the control provisions of technology transfer.

For Japan, the controlled list of technologies is under the Foreign Exchange Order issued by the Cabinet under Article 25 of Foreign Exchange and Foreign Trade Act that are separated into three cases as follows.

(1) Technology Transfer from Japan to Foreign Company that any person who would like to transfer technology specified in the controlled List from Japan to other countries is required to obtain permission. However, such permission is not applied in the case that the person would like to use such technologies by himself in other countries.²²

(2) Transfer within Japan that a person who is a resident of Japan would like to transfer technologies controlled by the List under the Foreign Exchange Order to a non-resident in Japan, the resident is also required to obtain the permission.²³

(3) Technology Transfer in Foreign Country that the person who is a resident of Japan would like to transfer technologies controlled by the List under the Foreign Exchange Order to a non-resident in foreign countries, the resident is required to obtain permission.²⁴ Nevertheless, such permission is not applied to a case where such technology originates outside Japan and its transactions are accomplished outside Japan.²⁵

For Singapore, the transfer of intangible technology in Singapore is required to obtain permission if it is strategic goods, software or technology under Dual-Use List or any software/technology under Catch-all Control.

For Malaysia, the transfer of intangible technology from Malaysia to the destination outside Malaysia including any oral or visual transmission

²² The Foreign Exchange and Foreign Trade Act, Art 25.

²³ Ibid.

²⁴ Ibid.

²⁵ Center for Information on Security Trade Control of Japan, Overview of Japan's Export Control (4th edn, 2015) 12-13.

of technology by any communication device²⁶ are required to obtain permission if it is related to strategic goods, software or technology under Dual-Use Items List or any software/technology which is Unlisted under the Strategic Trade Act 2010.²⁷

Therefore, Thailand as a UN member state is required to comply with the Resolution by establishing “Export Control Measure” that covered DUI and technology transfer.

6.3 Export Control System

Referring to the Ministerial Notification Specifies Dual-Use Items as Goods Requiring Permission and Subject to Comply with the Export Measures B.E.2558 (2015), which cover the dual-used items that may have impact on big industries namely Automotive, Steel, pharmaceutical, Medical, Electronics, Semiconductors, Computer, Telecommunications, and Chemical.

This Ministerial Notification shall come into force on 1 January 2018²⁸. However, there is no regulation under or related to this Notification that. Therefore, exporters could not prepare themselves for the compliance.

After studying export control laws on Dual-Use Items in Thailand and comparing then with those of Japan, Singapore and Malaysia, there is no specific laws regarding the export license measures in Thailand that exporters are subject to apply for the permission prior to export DUI²⁹ under Ministerial Notification mentioned above. Thus, there are unclear procedures that may create an obstacle to exporters to comply with such laws.

²⁶ Mohamed Shahabar Abdul Kareem, ‘The Strategic Trade Act (STA) 2010: Facilitating Trade in A Secure Trading Environment’, 7.

²⁷ Strategic Trade Act 2010, Sections 2, 7, 8 and 9.

²⁸ Ibid, Section 2.

²⁹ Ibid, Section 4 and 5.

6.4 Penalty and Sanction

In case of violation, the penalties for having no export license or for failure to comply with such Ministerial Notification is too high and not consistent with the act of violator because violator is subject to be liable under the provision of section 22 of Import and Export of Goods Act B.E. 2522 (1979) to be punished by imprisonment not exceeding ten years or fine equivalent to five times of the value of exported goods, or both whether by intention or mistake. Comparing applicable laws of Thailand with Japan, Singapore and Malaysia, there are some differences between those and those of Thailand. All countries except Thailand consider the penalty of each offense based on the ground of intention and knowledge of violator.

For Japan, the violator who export or brokerage of goods or technologies related to WMD without permission shall be punished by imprisonment or fine with the rate of penalty higher than the violator who export or brokerage of goods or technologies related to convention arms. Likewise, the administrative sanction will be applied for a violation of a petty offense that a violator shall be punished by prohibition of export not more than 3 years. Certain, the METI has the authority to issue a warning which is served upon a violator when the violation is not so serious.

For Singapore, to commit the offence regarding false declarations or failure to comply with conditions of permit, the violator shall be punished by imprisonment or fine with the rate of penalty higher than the offence regarding refusal or failure to keep or submit record.

For Malaysia, the violator who intended to export arms and related materials without the permit shall be punished by a death sentence or life imprisonment, if the result of violation causes death. But, in any other case, the violator shall be punished by imprisonment at least 10 years or with a fine at least of Ringgit Malaysia 10,000,000.

Thus, from the author's point of view, the penalty and sanction of Thailand is not appropriate.

Although Thailand has ratified the International Covenant on Civil and Political Right (ICCPR) adopted by the United Nations General Assembly (UNGA) since 1996, death penalty could be imposed in case of most serious crimes. Death penalty in cases that the violators have intention

to kill or result of the offences are the loss of life is not in conflict with the right to life under Article 6 of the ICCPR. Then, provisions of each offences and penalties under the new Draft Trade Control of WMD Related Items Act are more appropriate than those in the Ministerial Notification.

7. CONCLUSION AND RECOMMENDATIONS

This thesis focuses on export control laws of DUI in Thailand that are controlled by Ministerial Notification specifying dual-use items as goods requiring permission and complying with the export measures B.E.2558 (2015).

As compared to the laws of Japan, Singapore and Malaysia, it can be concluded that the Thai Ministerial Notification specifies Dual-Use Items as Goods Requiring Permission and Complying the Export Measures B.E.2558 (2015) does not cover the requirements of UNSC Resolution 1540 because its implementation does not cover brokering and intangible technology transfer.

Furthermore, Thailand has no provisions regarding export permission measures of DUI. Thus, this may cause unclear practices in operation of the exporters. Based on the study in Chapter 3 of this thesis, Japan, Singapore and Malaysia have the export permission measures and the types of permission are categorized as Individual Permission and Bulk Permission that are convenient for exporters to apply and comply with such measures. Comparing with the laws of Japan, Singapore and Malaysia, Thailand should establish export control measures of DUI for trade management such as export license procedure, technology transfer procedures and internal control program for exporters etc. in order to ensure that the dual-goods are controlled and the entrepreneurs and their staffs are able to understand and comply with the Thai export control laws.

Moreover, the Ministerial Notification specifies Dual-Use Items as Goods Requiring Permission and Complying the Export Measures B.E.2558 (2015) is prescribed under the “Export and Import of Goods Act B.E.2522 (1979)” in which the penalty in case of violations of this Notification have to be based on Section 22 of such Act. Thus, if there are a violation of this

Notification whether by intention or mistake, violator shall be punished by imprisonment not exceeding ten years or fine equivalent to five times of the value of exported goods, or both, and the goods including containers and vehicles used in connection with such violation shall be confiscated. Comparing the laws of Thailand with those of Japan, Singapore and Malaysia, all countries except Thailand consider the penalty of each offense based on the ground of intention and knowledge of violator. This is the significant differences that Thai government should consider for developing Thai laws to encourage the investors to operate DUI business in Thailand.

Therefore, this thesis suggests that it be an appropriate time for Thailand to enact the “Trade Control on Weapons of Mass Destruction Related Items Act” that covers dual-use goods, intangible technology transfer and any activities related to WMD in order to ensure security and to protect the benefits of the state in compliance with international agreements and to protect Thai entrepreneurs from non-tariff trade barriers in other countries.

From the analysis mentioned above and the author’s perspectives, this thesis would like to provide the recommendations as follows.

7.1 Establishment of Export Control for Brokering and Technology Transfer

The Ministerial Notification controls only export of Dual-Use Goods³⁰ from Thailand; but, it does not cover brokering and technology transfer³¹ that Resolution 1540 requires all member states to take and enforce effective measures to establish domestic controls over WMD related materials, equipment and technology covered by relevant multilateral treaties which could be used for the design, development, production or use of WMD.³² Therefore, Thailand as a UN member state is required comply with the Resolution by establishing “Trade Control on

³⁰The Ministerial Notification specifying dual-use items as goods requiring permission and subject to comply with the export measures B.E.2558 (2015), Ministry of Commerce, s 3.

³¹Tamotsu Aoi, Historical Background of Export Control Development in Selected Countries and Regions (2016) 17.

³²United Nation Security Council Resolution 1540 (2004), Definitions 1.

Weapons of Mass Destruction Related Items Act” that covered DUI, technology transfer and any activities of WMD namely export, re-export, transshipment, transit and brokering in order to prevent the proliferation of WMD and to strengthen export control enforcement of Thailand.

7.2 Categories of Export License as Individual License and Bulk License

Under the Trade Control on Weapons of Mass Destruction Related Items Act, the Thai government should formulate regulations for technology or software transfer and export license issuance on controlled transactions namely export, re-export, transshipment, bringing in transit and brokering by adopting Japanese laws because export permission under the Japanese laws is issued by item and shall be based on the country of destination together with the recipient entity; then, export license should be separated into two types of license as follows.

(1) Individual License: the permission is based on a transaction.

(2) Bulk License: the permission is valid for multiple transactions into with the specified period in which exporter is required to establish proper internal control system based on the requirements of Internal Compliance Program (ICP) designed by the Department of Foreign Trade.

Bulk License should be categorized as three types as follows

- (a) Bulk License for combination of items and destination that an exporter who obtains this License could export specific dual-use items to foreign countries. However, the exporter is prohibited to export such dual-goods items to the restricted countries specified by the Thai government.
- (b) Bulk License for the same customer that an exporter who obtains this License could export specific DUI to specific customer who is business partner repeatedly.
- (c) Bulk License for overseas subsidiaries that an exporter who is the manufacturer and obtains this License could export specific DUI to subsidiaries in foreign countries repeatedly

7.3 Establishment of Internal Control Program (ICP)

Referring to Internal Compliance Program (ICP), this thesis suggests that the Thai government should require exporters to establish their own internal program for export control covering management policy, export control of organization, export procedures, record of shipment confirmation, internal audit, training, record keeping procedures and penalties of violation etc. that are necessary for Bulk License Approval. Due to the fact that ICP is a voluntarily commitment provided by an exporter to support the government authorities by ensuring that internal controls and procedures are proper and satisfactory to the government that the exporter has the proper screening procedures such as items classification, customer screening, end-use or end-user verifying and transactions screening to certify that any DUE exported by an exporter is not related to the proliferation of WMD before the approval of bulk license to allow the exporter carrying its business to facilitate trade of government.

7.4 Infliction of the Penalties for Each Offences Based on Ground of Intention and Knowledge of Violator.

Under the Ministerial Notification, the penalties for having no export license is too high and not consistent with the act of violator because violator is subject to liable under the provision of Section 22 of Import and Export of Goods Act B.E. 2522 (1979) that violator shall be punished by imprisonment not exceeding ten years or fine equivalent to five times of the price of exported goods, or both whether by intention or mistake.

The penalties are likely to be significant because the penalties for having no export license or should be consistent with the act of violator. Then, the Draft Trade Control of WMD Related Items Act should be revised with respect to penalties of any offence in case where the result of violation causes death to any person to be the death penalty for the violator. Although Thailand, as a member of United Nations and the International Covenant on Civil and Political Rights (ICCPR) has obligations to abolish death penalty, paragraph 2 of Article 6 of the ICCPR states that the sentence of death may be imposed only for the "most serious crimes" in countries that have not abolished the death penalty.

However, the penalty provisions in this Draft will include a presumption that the managing director, manager or any person responsible for the operations of an entity found to be in violation of this Draft; if a violation by such legal entity is due to an order or performance of any person, or a neglect of order or, a neglect of a duty required as a managing director or of any person who is responsible for carrying out the business of such entity, such person shall be penalized according to the provisions prescribed for such violations. Then, the government authorities have to consider and set the penalty for each offence based on the ground of intention and knowledge of violator. Although the representatives of legal entity are presumed innocent until proven guilty, all directors listed in the company registration would be named as defendants and each of them needs to prove to the satisfaction of the court that such offense was committed without their knowledge or consent . Due to the fact that such presumption of liability was a heavy legal burden for the representatives of the entity who were forced to produce evidence to prove their innocence, the Thai government should reconsider the penalties under the Draft of Trade Control of WMD Related Items Act and setting each offence and penalty clearly. Nevertheless, violators are subject to penalties or sanctions, which may vary depending on the case.

7.5 Establishment of Administrative Penalties for Violation without Intention.

When a violation is not so serious or in case where of a minor technical offense is committed without the intention, only an administrative sanction may be imposed on the violator. Therefore, the Department of Foreign Trade should have the authority to take administrative measures such as revocation of a permit and to prohibit a person who has engaged in the transactions violating this law with the intention from the exporting and transferring technology for 2 years.

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