

INTER-AMERICAN CONVENTION AGAINST  
THE ILLICIT MANUFACTURING OF AND  
TRAFFICKING IN FIREARMS, EXPLOSIVES,  
AND OTHER RELATED MATERIALS (CIFTA)

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MODEL LEGISLATION AND COMMENTARIES  
IN RELATION TO CONFISCATION AND FORFEITURE OF  
FIREARMS, AMMUNITION, EXPLOSIVES, AND OTHER RELATED MATERIALS

(Approved by the Consultative Committee on April 23, 2010)



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**I. INTRODUCTION**

Confiscation or forfeiture of property to the government as a legal process exists widely in the domestic law of most of the countries of the Americas in both Common Law and Civil Law Jurisdictions.

In countries with Common Law systems, there are two types of forfeiture, civil forfeiture and criminal forfeiture. Civil forfeiture, often referred to as *in rem* forfeiture,<sup>1</sup> entails proceedings directed against certain property (and not a person) based upon a legal finding that the property has been used in an illegal manner. In general terms, this type of forfeiture is most frequently used in money laundering cases and enables governmental authorities to proceed against (illegal) property even if it does not apprehend an offender because, for example, he or she remains a fugitive from justice, or may have died. Criminal forfeiture is completely separate from civil forfeiture in that it may be part of the punishment against an individual, in addition to possible fines and imprisonment following his or her conviction in criminal proceedings.

Throughout Latin America there appear to be rough equivalencies in the approach to confiscation/forfeiture although there are broad differences among individual countries' laws in both language and substance. As in Common Law jurisdiction countries confiscation/forfeiture can occur when a criminal case is brought against an individual and provisions of the law expressly prescribe confiscation/forfeiture as part of the penalty. In addition, possibly in view of the more restrictive approach to firearms taken by the U.S., in a number of Latin American countries what is referred to as "administrative confiscation" can occur without a trial, such as for example when an object, typically a firearm, is *sui generis* unlawful to be possessed by an individual, or to be possessed in certain circumstances. Under the law an identified "competent authority" is authorized to effect the seizure and confiscation of the firearm on a temporary or permanent basis. In the case of a permanent confiscation the laws ordinarily provide procedures for the firearm's destruction or its recycling for official use.

The operative provision on confiscation and forfeiture in the Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and Other Related Materials (hereinafter "CIFTA" or the "Convention") is set out in Article VII. Pursuant to the two paragraphs of this provision, the States Parties undertake to confiscate or forfeit firearms, ammunition, explosives and other related materials that have been illicitly manufactured or trafficked and to adopt the necessary measures to ensure that after these products have been seized, confiscated or forfeited, they do not fall into the hands of private individuals. Neither this provision (Article VII) nor any other in the Convention makes express reference to the forms of forfeiture, whether civil, criminal or administrative and the subject is only addressed in general terms. However, notwithstanding the absence of this distinction in the words of the Convention, any of these types of forfeiture are possible under Article VII, and accordingly, this Model Legislation will take into

account the different types of forfeiture for countries to consider applying, to the extent that their legal systems allow.

At the same time it should be noted that because of differences in the four official languages in which the Convention is written, there are differences in the terminology employed with the result that forfeiture is equated with confiscation although from a technical-legal perspective they are not necessarily the same things in different jurisdictions.

Member States that seek to strengthen their legislative and/or regulatory regimes regarding the confiscation and forfeiture of firearms, ammunition, explosives and other related materials may wish to adopt, in accordance with the provisions of their national policies, their legal systems and in accordance with their fundamental laws, the policies and practices identified in the following commentaries and in the legal provisions of the proposed Model Legislation.

To this end, the following draft Model Legislation endeavors to reflect the Convention's substance in the manner expressed within the provisions of the Convention. To facilitate any comparison that a reader may wish to make between the Convention and the draft confiscation/forfeiture provisions derived from it, which appear below in Part III of this Model Legislation, excerpts from the relevant Articles of the Convention are listed in Part II, following.

## **II. RELEVANT PROVISIONS OF THE CIFTA**

For the purposes of this Model Legislation, the following are the relevant provisions of the Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials (hereinafter "the Convention" or "the CIFTA"):

### **A. Article I: Definitions**

1. "Illicit manufacturing": the manufacture or assembly of firearms, ammunition, explosives, and other related materials:

- a. from components or parts illicitly trafficked; or
- b. without a license from a competent governmental authority of the State Party where the manufacture or assembly takes place; or
- c. without marking the firearms that require marking at the time of manufacturing.

2. "Illicit trafficking": the import, export, acquisition, sale, delivery, movement, or transfer of firearms, ammunition, explosives, and other related materials from or across the territory of one State Party to that of another State Party, if any one of the States Parties concerned does not authorize it.

3. "Firearms":

- a. any barreled weapon which will or is designed to or may be readily converted to expel a bullet or projectile by the action of an explosive, except antique firearms manufactured before the 20th Century or their replicas; or

- b. any other weapon or destructive device such as any explosive, incendiary or gas bomb, grenade, rocket, rocket launcher, missile, missile system, or mine.
4. “Ammunition”: the complete round or its components, including cartridge cases, primers, propellant powder, bullets, or projectiles that are used in any firearm.
5. “Explosives”: any substance or article that is made, manufactured, or used to produce an explosion, detonation, or propulsive or pyrotechnic effect, except:
- a. substances and articles that are not in and of themselves explosive; or
  - b. substances and articles listed in the Annex to this Convention.
6. “Other related materials”: any component, part, or replacement part of a firearm, or an accessory which can be attached to a firearm.”

*COMMENTARY: The foregoing definitions are material in that they give certainty to Article VII, the operative provision of the Convention in relation to forfeiture. The first two definitions, “illicit manufacturing” and “illicit trafficking” set out the specific circumstances and conditions that make the firearms, ammunition, explosives and other related materials illicit and hence susceptible to forfeiture. The remaining definitions give precision to what the Convention considers to be firearms, ammunition, explosives and other related materials.*

*Unless the objects to which the corresponding domestic forfeiture legislation are made to apply meet the minimum standards set out in the Convention’s definition, the conditions of compliance with the Convention will not be met. However, countries are always at liberty to enact legislation that would allow forfeiture of a wider range of weapons, ammunition, explosives and other related materials that are not included in the definitions above.*

## **B. “Article IV: Legislative Measures**

1. States Parties that have not yet done so shall adopt the necessary legislative or other measures to establish as criminal offenses under their domestic law the illicit manufacturing of and trafficking in firearms, ammunition, explosives, and other related materials.
2. Subject to their respective constitutional principles and basic concepts of the legal systems of the States Parties, the criminal offenses established pursuant to the foregoing paragraph shall include participation in, association or conspiracy to commit, attempts to commit, and aiding and abetting, facilitating, and counseling the commission of said offenses.”

*COMMENTARY: Paragraph IV.1 sets out the requirement for states to adopt the two offenses of illicit manufacturing and illicit trafficking of firearms that trigger confiscation or forfeiture under Article IV.2 only obligates countries to adopt the related offenses of “participation in, association or conspiracy to commit, attempts to commit, and aiding and abetting, facilitating, and counseling the commission of” the illicit manufacturing and illicit trafficking offenses subject to the constitutional principles and basic concepts of the legal systems of the individual States Parties.*

### C. “Article VII: Confiscation or Forfeiture

1. States Parties undertake to confiscate or forfeit firearms, ammunition, explosives, and other related materials that have been illicitly manufactured or trafficked.
2. States Parties shall adopt the necessary measures to ensure that all firearms, ammunition, explosives, and other related materials seized, confiscated, or forfeited as the result of illicit manufacturing or trafficking do not fall into the hands of private individuals or businesses through auction, sale, or other disposal.”

*COMMENTARY: The foregoing constitutes the basic legal obligation of the States Parties in relation to confiscation or forfeiture under the Convention; that they undertake to confiscate illicitly manufactured firearms, ammunition, explosives and other related materials, and that having confiscated these products, they adopt the measures necessary to ensure that the products do not fall into the hands of private individuals or businesses.*

### D. “Article VI.1.c: Marking of Firearms

1. For the purposes of identification and tracing of the firearms referred to in Article I.3.a, States Parties shall:
  - c. require appropriate markings on any firearms confiscated or forfeited pursuant to Article VII.1 that are retained for official use.”

*COMMENTARY: This subparagraph is only incidentally related to confiscation or forfeiture. It is more a marking and tracing provision that requires a State Party to mark any confiscated or forfeited firearm that is retained for official use.*

## III. DRAFT MODEL LEGISLATION PROVISIONS AND COMMENTARIES

### A. Overview and Structure of the Convention

As its title indicates, the CIFTA provides for a comprehensive approach to control illicit manufacturing of and trafficking in firearms, ammunition, explosives, and other related materials. While the illicit trafficking aspect by its very definition suggests a focus on transnational movement of firearms etc.<sup>1</sup> across national boundaries without the appropriate authorization of one of the State

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1. For convenience, rather than repeatedly making reference to “firearms, ammunition, explosives and other related materials,” henceforth throughout this paper, the term “firearms etc.” will be employed, unless the context otherwise indicates that a full recitation of all of the objects of confiscation or forfeiture under the Convention is warranted. Note that the Convention’s reference to “related materials” is in relation to firearms only and not to “materials” related to ammunition and explosives. This is so because the CIFTA defines (in Article I.6.) other related materials as “any component, part, or replacement part of a firearm, or an accessory which can be attached to a firearm.”

Parties concerned, the manufacturing aspect encompasses both a national and transnational orientation in that it includes references to manufacturing from components or parts illicitly trafficked, as well as firearms etc. manufactured without a license issued by the competent government authority in which the manufacturing takes place, or without the markings required at the time of manufacture pursuant to Article VI.1.a and VI.1.b. Both national and international efforts to reduce illicit trafficking depend on the ability to trace individual firearms, and this requires that firearms be uniquely identified.

In Article IV, Legislative Measures, the CIFTA requires States Parties to establish criminal offenses for illicit manufacturing and illicit trafficking of firearms etc. Under Article VII it is pursuant to these offenses that States Parties assume the obligation of confiscating or ordering forfeiture of illicitly manufactured or illicitly trafficked firearms, ammunition, explosives and other related materials.

In this manner the CIFTA sets out the minimum standards to be employed by States Parties in the establishment of offenses for illicitly manufacturing or illicitly trafficking firearms etc. States Parties are at liberty to enact legislation that provides for broader criminalization or that might encompass a wider range of weapons, but if they do so they may run the risk of limiting cooperation with other countries that have not developed their legislative measures in the same fashion.

The core of the confiscation/forfeiture provisions of the CIFTA lie in Article VII, Confiscation or Forfeiture, where pursuant to Article VII.1, the States Parties to the Convention undertake to confiscate or forfeit firearms etc. that have been illicitly manufactured or trafficked.<sup>2</sup>

The confiscation/forfeiture provisions of Article VII apply to firearms etc. that have been illicitly manufactured or trafficked. Illicit manufacturing and illicit trafficking are defined terms under the Convention (see Article I). As defined, these terms constitute the essential elements of the legislative measures that Article IV of the Convention requires the States Parties to adopt. Conversely, however, the terms “seizure”, “confiscate” and “forfeit” are not defined. It must be assumed that this was a deliberate omission by the drafters of the Convention who were satisfied that the States Parties understood what was meant by those terms.

Article VII.2 requires the States Parties to take the necessary measures to ensure that the firearms etc. that have been seized, confiscated, or forfeited do not fall into the hands of private individuals or businesses through auction, sale, or other disposal. For purposes of the Model Legislation, however, the subjects of seizure, confiscation and forfeiture referenced in Article VII.2 will be afforded further elaboration because of what the Convention expressly and implicitly indicates can be done or not done with confiscated/forfeited firearms etc.

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2. The English version of this provision contains a linguistic anomaly in that States Parties “undertake to... forfeit firearms etc.”, when in fact this is the opposite of what is intended. It is not the case that States Parties should forfeit illegal firearms etc. but rather that the States Parties should order that the illegal firearms etc. be forfeited unto themselves. This is not an issue in the other language versions.

Essentially, Article VII.2 requires States Parties to ensure that illegally manufactured or illegally trafficked firearms etc. that have been seized, confiscated or forfeited<sup>3</sup> not subsequently fall into private hands. The implicit message in the provision is vague but can be taken to mean that firearms etc. that have been seized and subsequently confiscated or forfeited must be disposed of by some means that is not auction or sale which would invariably put the firearms etc. back on the street. The main point, however, is not the auction or sale itself, but rather what occurs to the firearms after they have been confiscated or forfeited to the State. That is, that the firearms must not end up in the hands of private individuals or businesses. This would appear to leave open the possibility of the retention of these objects for official use (as contemplated by Article VI.1.c and implicitly, their (authorized) storage i.e., by an organ of the State and again implicitly, their (authorized) destruction, by or under the supervision of some organ of the State.

Article VI.1.c requires a State Party to place appropriate markings on any confiscated or forfeited firearm (but not on other related materials, ammunition or explosives) that is retained for official use, presumably to make tracing of any such firearm possible, especially if the firearm happens to turn up in private hands or at a crime scene.

Article IV.1 requires States Parties to establish as criminal offenses the illicit manufacturing of and trafficking in firearms etc. These offenses are defined in Article I paragraphs 1 and 2.

Article IV.2 provides that the criminal offenses shall include participation in, association or conspiracy to commit, attempts to commit, and aiding, abetting, facilitating and counseling the commission of these offenses.

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3. The reference to “seized, confiscated, or forfeited” firearms etc. in the English version of Article VII.2 in each of the four language versions of the CIFTA contains a different translation of these three terms in three of the four different language versions, owing to the manner in which the words for confiscation and forfeiture are employed in other languages.

In the English and Spanish texts of Article VII.2, which are essentially the same, the litany of firearms etc. “seized, confiscated, or forfeited” is employed, while Article VII.1 would only have States Parties undertake to confiscate or forfeit these objects. Article VII.1 makes no reference to their seizure.

The French version of Article VII in both paragraphs 1 and 2 only makes reference to firearms etc. “confiscated or seized” (confisqués ou saisis). There is no term for “forfeiture” in French other than “confiscation” or “ordonnances de confiscation” (forfeiture order).

The Portuguese text in Article VII.1, however, refers to the “confiscation of” arms etc. (confiscar) but in Article VII.2 refers to firearms etc. that have been “seized, confiscated or that are the object of forfeiture (aprendidos, confiscados ou objeto de perdimento).

In addition to the discrepancies identified above, it is not clear why the term “seized” is employed in Article VII.2 at all. It is not used in Article VII.1, which is acceptable, but when the word appears in Article VII.2 it should be asked why the term “seized” was not included in Article VII.1, and why it was included in Article VII.2. It should also be noted that the term “seizure” refers to the actual seizing of an item in circumstances where the item is suspected of being illegal, whereas the terms “confiscation” and “forfeiture” refer to a final act by the appropriate organ of the State, usually a court, ordering after a conviction that the seized object or objects now be confiscated and forfeited to the State.

In addition to the definitions “illicit manufacturing” and “illicit trafficking”, the subjects of seizure, confiscation and forfeiture, namely firearms, ammunition, explosives, and other related materials are also defined terms to be taken into account by drafters of national legislation and should be included as presented in the Convention.

It should also be noted by drafters of any corresponding national legislation that with one qualification set out in Article IV.2, the relevant operative provisions of the Convention—that is, Articles IV.1, VI.1.c, and VII—are all mandatory provisions that in ratifying the Convention, the State Parties are obligated to follow.

Whether the Convention is considered by a State Party to be self-executing i.e. that by ratifying the CIFTA the Convention’s provisions are considered to have been automatically adopted in national law, or whether the State Party considers it necessary to implement domestic legislation to give full force and effect to the Convention, the provisions of the above-mentioned Articles constitute minimum requirements that must be met by each State Party under its domestic law. In addition, as will be seen below, the wording of the definitions of terms that appear in the aforementioned provisions must, at a minimum, include the essential elements prescribed by the Convention.

Unlike the Articles referred to above, the qualification referenced in relation to Article IV.2 lies with the opening words of that provision to the effect that “Subject to the respective constitutional principles and basic legal systems of the States Parties, the criminal offenses to be established pursuant to Article IV.1 (illicit manufacturing and illicit trafficking) are to include “participation in, association or conspiracy to commit, attempts to commit, and aiding and abetting, facilitating, and counseling the commission of” those offenses. This affords leeway to States Parties not to establish those criminal offenses if their respective constitutional principles and the basic concepts of their legal systems do not allow it.

## **B. Terms of the Convention**

### **(1) Definitions**

In cases where States Parties have already defined what they mean by the terms “illicit manufacturing”, “illicit trafficking”, “firearms”, “ammunition”, “explosives” and “other related materials”, the country’s existing legislation can be checked against the following definitions (adapted from the Convention, as necessary, in order to be capable of being accommodated in domestic legislation) to confirm that the national legislation contains provisions with the same content.<sup>4</sup>

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4. In the June 2008 document “Norms and Legal Instruments on Firearms, Ammunition and Explosives”, a joint product of the Inter-American Drug Abuse Control Commission (CICAD) and the United Nations Regional Centre for Peace Disarmament and Development in Latin America and the Caribbean (UN-LiREC), which has been relied upon for a number of facts in this document, it is stated in relation to the Spanish-speaking countries that have ratified the CIFTA that “Upon the ratification of the CIFTA through law...(here the national law is identified) the definitions in Article I of this legal instrument (i.e. the CIFTA) are hereby incorporated in the body of laws of...(here the country is cited) and are thereby, positive law”. Despite this assertion we propose to maintain using the following existing text and observations of the Model Legislation as

If the present national legislation does not contain all of the elements set out in the model provisions below, then the national legislation should be modified accordingly.

States Parties should also bear in mind the wording of Article XXVII.2 of the CIFTA to the effect that they “may adopt stricter measures than those provided for by this Convention if, in their opinion, such measures are desirable to prevent, combat, and eradicate the illicit manufacturing of and trafficking in firearms, ammunition, explosives, and other related materials.” (*Emphasis added*)

It follows as a corollary proposition to the foregoing that if the definitions of a State Party’s firearms control legislation are more all-encompassing than their counterpart provisions in the CIFTA, then the country’s definitions may be preserved as they already exist in national norms. However, in such a case, State Parties need to be mindful that cooperation with other countries may be difficult in some cases where the other countries laws on illicit manufacturing and illicit trafficking are more limited.

In order to be in full compliance with the CIFTA, the national legislation of each State Party should already contain or be modified to contain, as necessary, definitional or explanatory language that, at a minimum, includes the following:

1. “Illicit manufacturing”: the manufacture or assembly of firearms and related materials, ammunition, and explosives:
  - a. from components or parts illicitly trafficked; or
  - b. without a permit, license or authorization from the competent authority; or
  - c. without marking the firearms that require marking at the time of manufacturing.

COMMENTARY: Note that the reference to “related materials” is in relation to firearms only and not to “materials” related to ammunition and explosives. This is so because this is the manner in which “related materials” is defined in Article I.6 of the Convention.

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they already appear, because from a legal perspective and for the purposes of a criminal trial involving the illicit manufacturing or trafficking of firearms etc., we harbor reservations that a court would apply the CIFTA definitions unless the applicable provisions of its corresponding criminal code had also been amended, because of the principle of certainty required by the criminal law. We are of the view that this observation in the CICAD-UN-LiREC document does not confer the required certainty.

On the other hand the position of Brazil upon ratification of the CIFTA creates a unique exception to the text of the following paragraphs of this document in that the implications of Brazil’s ratification of the CIFTA are different from those of the other countries, as follows: “Brazil ratified the CIFTA (Decree N° 3.229 of October 29, 199) and from that moment on, the Inter-American Convention, by legal imperative became the law of the Union.” This means that in Brazil there is no doubt that the defined offenses and other definitions of art. I of the Convention would be applied in any trial or other legal process involving the illicit manufacturing or illicit traffic of firearms etc.

*It should be noted that there are three separate and alternative possible forms of the offense of illicit manufacturing and accordingly, states could create under national law a separate offense out of each of the elements described above, each with its own sanctions, if the country determines that separate sanctions are warranted.*

2. "Illicit trafficking":

Option A: the import, export, acquisition, sale, delivery, movement or transfer of firearms and related materials, ammunition and explosives from the national territory of one State Party to the territory of another State Party of the Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials (CIFTA), or across the territory of another State Party to a third State Party, if any one of the States Parties concerned does not authorize it.

COMMENTARY: *It is important to note that the "trafficking" referred to in the definition above directly corresponds to the definition in the CIFTA and necessarily involves the unauthorized movement of firearms or related materials, ammunition, or explosives across one State Party's borders into another State Party. The reference to States Parties in the Convention's definition of "illicit trafficking" and above, arises because Article IX of the Convention provides an additional measure of protection for the States Parties (as opposed to other states that are not parties) in that the movement of the product (firearms, ammunition etc.) requires the prior approval of the importing state before the shipment is made from the exporting state.*

*It is suggested, however, that national legislation consider as "illicit trafficking" not only unauthorized cross-border movements of firearms and related materials, ammunition and explosives among States Parties as mentioned in Article I.2, but unauthorized cross-border movements of the same from the territory of any state to a State Party, as well as its converse, namely, the unauthorized export of firearms etc. from the territory of a State Party to any state.*

*It is further suggested that countries may also wish to consider as "illicit trafficking" unlawful acquisitions, sales, deliveries etc. within a State Party to the extent that these activities are not otherwise covered under national penal law.*

*While it is acknowledged that the following alternative proposed definitions go beyond the parameters of the CIFTA, they are offered in recognition of the fact that for national penal law purposes there will be an interest in not only unlawful transnational "trafficking" among States Parties, but illicit trafficking that involves as one of the parties to the transaction non-states parties as well. In addition, national penal law interests may extend to "trafficking" of these products inside the country.*

Option B: the unauthorized acquisition, sale, delivery, movement, transfer, or diversion of firearms and related materials, ammunition and explosives within the national territory of a State Party, and, as the case may be, their unauthorized import from another state.

Option C: the unauthorized acquisition, sale, delivery, movement, transfer or diversion of firearms and related materials, ammunition and explosives within the national territory of a State Party, and, as the case may be, their unauthorized export to the territory of another state.

3. “Firearms”:

- a. any barreled weapon which will or is designed to or may be readily converted to expel a bullet or projectile by the action of an explosive, except antique firearms manufactured before the 20th Century or their replicas; or
- b. any other weapon or destructive device such as any explosive, incendiary or gas bomb, grenade, rocket, rocket launcher, missile, missile system, or mine.

COMMENTARY: As noted above, the foregoing definition of the term “Firearms”, and similarly the definitions of “Ammunition”, “Explosives” and “Other related materials” below, set out the minimum characteristics and features of the types of objects that a national law must contain in order for those objects to be considered to be firearms (or as the case may be “ammunition” or “explosives” or “other related materials”) for purposes of compliance with the CIFTA.

Accordingly, a firearm (a) is a barreled weapon that (b) expels a projectile by the action of an explosive. The words “expels a projectile by the action of an explosive” means that under the CIFTA, a weapon that uses some other form of propulsion is not considered a firearm. Additionally, a firearm is not (a) an antique manufactured before the 20<sup>th</sup> Century or (b) a replica of an antique. While the term “replica” is not defined in the CIFTA, drafters of the term “firearms” in any national legislation should take note that if a replica of an antique firearm was enhanced by technology introduced after the time of the antique so that it could expel a projectile with greater power or more efficiently than the antique, it would no longer be a mere replica, but a firearm.

As one of the basic categories of the subject matter to which the provisions of the CIFTA relating to forfeiture applies, a definition of “firearms” that contains at a minimum elements that are reflected in the definition set out in Article I of the CIFTA will be a key element in the corresponding domestic legislation.

4. “Ammunition”: the complete round or its components, including cartridge cases, primers, propellant powder, bullets, or projectiles that are used in any firearm.

COMMENTARY: States Parties need to ensure that any domestic definition of “ammunition” in force or that is proposed to be brought into force must meet the minimum standards of the term as it is set out in Article I.4 of the Convention. While there is no express requirement in the Convention that “ammunition” be a defined term under domestic law, it is desirable that such a provision exist so as to ensure that other relevant legislative requirements are made applicable to the confiscation or forfeiture as well as other subject matters identified in the Convention.

Among States where the constituent parts of ammunition such as primers and propellant powder are not subject to authorization requirements, the preparation of national legislation should be expanded to include those elements in the event that these are not already regulated in other legislation.

5. “Explosives”: any substance or article that is made, manufactured, or used to produce an explosion, detonation, or propulsive or pyrotechnic effect, except:

- a. substances and articles that are not in and of themselves explosive; or
- b. substances and articles listed in the Annex to this Convention.

*COMMENTARY: It is recognized that the definition of “Explosives” in Article I.5 of the CIFTA and in the Annex referred to in that definition (reproduced below) is one where a number of countries may have already chosen, for reasons of domestic security, to take a broader approach to substances to be regulated than the one taken in the CIFTA. State parties and signatories wishing to avail themselves of an updated definition of explosives may, therefore, in coordination with explosives experts and law enforcement want to consider other alternatives.*

#### “ANNEX

The term “explosives” does not include: compressed gases; flammable liquids; explosive actuated devices, such as air bags and fire extinguishers; propellant actuated devices, such as nail gun cartridges; consumer fireworks suitable for use by the public and designed primarily to produce visible or audible effects by combustion, that contain pyrotechnic compositions and that do not project or disperse dangerous fragments such as metal, glass, or brittle plastic; toy plastic or paper caps for toy pistols; toy propellant devices consisting of small paper or composition tubes or containers containing a small charge or slow burning propellant powder designed so that they will neither burst nor produce external flame except through the nozzle on functioning; and smoke candles, smokepots, smoke grenades, smoke signals, signal flares, hand signal devices, and Very signal cartridges designed to produce visible effects for signal purposes containing smoke compositions and no bursting charges.”

6. “Other related materials”: any component, part, or replacement part of a firearm, or an accessory which can be attached to a firearm.

*COMMENTARY: Because of the way in which Article I.6 of the Convention is drafted, the term “other related materials” is in relation to firearms only and not to ammunition and explosives.*

*Other related materials were included in the Convention to ensure that the requirements for firearms moving across national borders could not be circumvented by disassembling the firearms into their components, parts or replacement parts.*

*There is no express requirement in the CIFTA that “other related materials” be defined in domestic law, however, States Parties’ legislatures may find it necessary to adopt or amend legislative definitions to ensure that domestic legislative provisions cover the full range of subject matters set out in the Convention.*

#### C. Article IV: Legislative Measures

The main policy objective of the Convention is to control the illicit manufacturing and illicit trafficking of firearms etc. and to that end, criminalize any manufacturing, transaction or transfer that

does not comply with the requirements of the Convention. The Convention recognizes that in order to prevent illicit manufacturing and trafficking, a State Party must establish a legal regime with broad application. To identify illicit manufacturing as well as illicit transactions all such activities must be scrutinized to determine which ones are legitimate and which not.

Regarding CIFTA Article IV.1, which calls for the creation of criminal offenses for the illicit manufacturing of and trafficking in firearms etc. in domestic law, the following provision is proposed for inclusion in the Model Legislation based on the provisions of the CIFTA itself and the Criminal Code of Canada (R.S., 1985, c. C-46), as amended.

#### Illicit Manufacturing

1. Except as otherwise provided by law, every person commits an offense who knowingly manufactures or assembles firearms and other related materials, ammunition and explosives:

- a. from components or parts illicitly trafficked; or
- b. without a permit, license or authorization from the competent authority; or
- c. without marking the firearms that require marking at the time of manufacturing.

#### Illicit Trafficking

2. Every person commits an offense who, without corresponding permit, license or authorization issued by the competent authority, knowingly imports, exports, acquires, sells, delivers, moves, diverts or transfers firearms and other related materials, ammunition and explosives from or to another state.

*COMMENTARY: In addition to the above provision on Illicit Trafficking, if a country wished to address internal illicit transfers as well as those beyond its borders, an additional provision could be provided that would read:*

*“Every person commits an offense who transfers, whether or not for consideration, firearms and other related materials, ammunition and explosives knowing that the person is not authorized to do so under (here, the country would insert the applicable national legislation).”*

*For purposes of the above provision, the term “transfer” could be defined by countries to mean “acquire, sell, provide, barter, give, lend, rent, send, transport, ship, distribute, divert or deliver”.*

#### Participation, Association or Conspiracy

3. Every person commits an offense who participates in, associates with, conspires to commit, attempts to commit, aids, abets, facilitates and counsels, or incites the commission of any of the offenses established in accordance with (here, the corresponding provision of the applicable national offense needs to be inserted), or assists any person participating in such an offense or offenses to evade the legal consequences of his actions.

*COMMENTARY: Article IV.2 of the CIFTA does not make it mandatory for States Parties to enact offenses of participation, association, conspiracies, attempts, aiding and abetting, facilitating or*

*counseling or inciting someone to manufacture or traffic in illicit firearms etc., as it acknowledges that such offenses may not be consistent with national constitutional principles or may not exist as basic concepts of a country's legal system. This is not to say, however, that States Parties should not consider broadening the criminal net to include such persons and to make confiscation and forfeiture possible in such cases.*

#### **D. Article VII: Confiscation or Forfeiture**

*COMMENTARY:* To comply with Article VII.1 of the CIFTA, States Parties are required, wherever firearms etc. suspected of being illicitly manufactured or illicitly trafficked have been recovered pursuant to a criminal investigation, or otherwise in accordance with the law, to establish preventive measures relating to the confiscation and preservation of those products by the competent authorities both for use as evidence at trial and their ultimate forfeiture and possible destruction. Article VII.2 provides that these products, having been seized, confiscated, or forfeited, should not subsequently fall into the hands of private individuals or businesses through auction, sale or other disposal. This provision of the CIFTA leaves open only two remaining possibilities for these objects; some unspecified form of use by agencies of the state, or their destruction.

*Before the illicitly manufactured or illicitly trafficked firearms etc., as the case may be, can be confiscated, it will be necessary that national legislation include powers to search for and to seize these items. Likewise, national legislation must provide, once a conviction of the person guilty of the illicit manufacturing or trafficking has been secured, for an order declaring that the firearms etc. are to be forfeited or confiscated. The foregoing national powers should generally be consistent with the provisions of the Convention, but in some States, more expedited powers that allow firearms etc. to be seized quickly may be in place to avoid procedural delays and corresponding safety or security risks.*

*While Article VII.1 does not mention search and seizure, and the term "seizure" is only referenced in Article VII.2 in a secondary manner, it will be necessary to ensure that these matters are covered in national legislation in a manner that addresses procedural safeguards that need to be applicable whenever the State is appropriating property unto itself whether on a temporary or permanent basis. In the case of seizures of firearms etc. the seizing of the items is part of an evidence-compiling measure before the actual illicit manufacturing or illicit trafficking, as the case may be, is proved at trial, or other proceedings. Indeed, the seizure may occur well before a trial takes place, pursuant to an investigation. Such a seizure may occur in exigent circumstances founded upon the suspicion that there are illicitly manufactured or trafficked weapons etc. that are about to be illegally exported or that are about to disappear in an illegal domestic distribution.*

*A number of States may already have search, seizure, and confiscation/forfeiture provisions that expressly apply to firearms. In those cases it will only be necessary to see if they will require amendment in order to be in conformity with the Convention. They will need to apply to "firearms, other related materials, ammunition, and explosives" and be available for the illicit manufacturing and illicit trafficking offences, which may not have been covered by national legislation existing prior to the Convention's adoption.*

*As noted earlier, Article VII implicitly contemplates both civil and criminal forfeiture. Thus, civil and criminal forfeiture or such variants as may exist where the proceedings are known as “confiscation” can form part of national legislation if these are constitutionally permissible or are consistent with basic concepts of the legal systems of the corresponding State Party.*

*With respect to the requirement in Article VII.2 that States Parties ensure that confiscated/forfeited firearms etc. not fall into the hands of private individuals, national legislation could be enacted to provide, pursuant to the forfeiture order, that the court, having heard the representations of the appropriate state organ or organs appearing before it, orders that the items be (a) retained for active official use as contemplated by and in accordance with the provisions of Article VI.1 c. of the Convention; (b) retained by a particular state organ for scientific, historical or forensic purposes; and, (c) destroyed. With respect to alternative (b) above, the court could also order that the firearms etc. be deactivated depending upon the use to which the firearm etc. would subsequently be put, and, in the case of option (c), that the firearm etc. remain deactivated until such time as it was destroyed.*

*A final option that countries need to provide for in national legislation is some form of hearing to address situations where there are parties claiming they have a legitimate interest in the property about to be confiscated/forfeited. To this end, there must be established procedures and processes whereby legitimate owners can bring an application that, if supported by the court will result in the property being returned to them before it is confiscated.. (See Bona-fide Third Parties in item 3 below.)*

*National legislation could also consider the establishment of new standards and conditions to govern the adequacy of security with respect to the storage of confiscated/forfeited firearms, ammunition, explosives and other related materials, as well as the security of those articles that are to be destroyed. The conditions would result in standards to ensure that the firearms etc. in question are not illicitly diverted.*

*A further proposal in relation to confiscated/forfeited firearms etc. is that records be kept indefinitely of all forfeited firearms etc. and that these records be classified by the use to which the articles are put.*

*Finally, to reinforce the Convention’s concern that confiscated/forfeited firearms etc. not fall into hands that would see the return of these items to the public, new criminal offenses should be created with the objective of deterring the theft or diversion of seized and/or confiscated/forfeited firearms, other related materials, ammunition and explosives, as the case may be. Nevertheless, provisions should be included that permit the return of seized items to the person from which they were seized if the items are subsequently demonstrated to not have been illegally manufactured or trafficked. The legislation should not, however, envision returning items that cannot be lawfully possessed or returning items to a person not legally eligible to possess those items.*

### Confiscation and Forfeiture

1. In accordance with the law, (here, the national legislation should cite the appropriate legal provision or provisions) the court (or such other competent authority is provided for under national law) shall issue, at any time, without prior notification or hearing, a freezing or seizure order, or any

other preventive or provisional measure intended to preserve the availability of firearms and other related materials, ammunition and explosives suspected to have been illicitly manufactured or trafficked, for its eventual forfeiture.

2. Where a person is convicted of the offense of illicit manufacturing or illicit trafficking under the (here, the country should insert the provisions of the applicable national norm dealing with firearms and other related materials, ammunition and explosives such as the Criminal Code or other law), the court shall order that the property, proceeds or instrumentalities connected to such an offense be forfeited and disposed of in accordance with the law.

3. In the event that a person is not convicted of the offense of illicit manufacturing or illicit trafficking under the (here, the country should insert the provisions of the applicable national norm dealing with firearms and other related materials, ammunition and explosives such as the Criminal Code or other law), the items seized in connection with the charge may be returned (on request of that person within a fixed period of time) to that person provided that the person may lawfully possesses those items under (here, the relevant national legislation should cite the appropriate legal provision or provisions).

4. When, as a result of any act or omission of the person convicted, any of the firearms and other related materials, ammunition and explosives described in the previous paragraph cannot for any reason be forfeited, the court shall order the forfeiture of any other property of the person convicted for an equivalent value or shall order the person convicted to pay a fine of such value, in accordance with the law.

#### Bona-fide Third Parties

*COMMENTARY: With respect to a confiscation and forfeiture regime, States Parties need to also provide for the rights of bona fide third parties, so that in the event that an offense such as illicit firearms trafficking arises out of a theft from a legitimate business such as a firearms manufacturer or a munitions or chemicals factory, proper notification of the seizure is publicly made so that all those claiming a legitimate legal interest in the firearms etc., as the case may be, may appear in legal proceedings before final confiscation/forfeiture occurs to make representations in support of their claims. Such a provision in a generic form might read:*

5. The court (or other competent authority, as the case may be) may return the property to the claimant, when it has been demonstrated to its satisfaction that:

- a. the claimant has a legitimate legal interest in the property; or
- b. no participation, collusion or involvement with respect to illicit traffic or other serious offenses which are the object of the proceedings can be imputed to the claimant; or
- c. the claimant lacked knowledge and was not intentionally ignorant of the illegal use of the property, or if he had knowledge, did not freely consent to its illegal use; or
- d. the claimant did not acquire any right in the property from a person proceeded against under circumstances that give rise to a reasonable inference that any right was transferred for the purpose of avoiding the eventual subsequent forfeiture of the property; or

- e. the claimant did all that could reasonably be expected to prevent the illegal use of the property.

Disposition of forfeited, recovered or voluntarily surrendered firearms and other related materials, ammunition and explosives

6. Whenever firearms and other related materials, ammunition and explosives that have been forfeited, recovered or voluntarily surrendered are intended to be re-used by public authorities, the court (or other competent authority), in accordance with the (here insert the applicable legal provision), may order them retained for official use. All firearms forfeited, recovered or voluntarily surrendered that are retained for official purposes shall be marked in accordance with the law. To this end, it is recommended that a national authority be appointed to do the marking so that said authority has strict control over the actions taken.

7. Firearms not retained for official purposes should be destroyed.

*COMMENTARY: In this regard, measures are needed, such as studying the safest and most economical way to destroy the firearms, appointing a specific authority to have strict control over destroyed firearms, establishing mechanisms for their destruction, preparing written reports, graphs, and videos to record and bear witness to the actions taken, and establishing a systematic process for determining the destination and/or use of the remnants of the destroyed firearm.*

*As necessary, the following definitions can be employed in national law to describe the actions of confiscation and forfeiture described above:*

*“Forfeiture” means the permanent deprivation of property by order of a court or other competent authority.*

*“Freezing” or “seizure” means temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority.*