

**CONFERENCE OF THE STATES PARTY TO THE
INTER-AMERICAN CONVENTION AGAINST THE ILLICIT MANUFACTURING OF
AND TRAFFICKING IN FIREARMS, AMMUNITION, EXPLOSIVES,
AND OTHER RELATED MATERIALS (CIFTA)**

**THIRD CONFERENCE OF THE
STATES PARTY TO CIFTA**

May 14-15, 2012
Washington, DC

OEA/Ser.L/XXII.4.3
CIFTA/CEP-III/doc.7/12 rev. 1
14 May 2012
Original: Spanish

**MODEL LEGISLATION AND COMMENTARIES IN RELATION TO
THE CONTROLLED DELIVERY OF FIREARMS, AMMUNITION, EXPLOSIVES, AND
OTHER RELATED MATERIALS**

(Adopted at the third plenary session, held on May 14, 2012)

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I. INTRODUCTION

Controlled delivery is part of the group of so-called special investigative techniques. It first made its appearance in connection with drug trafficking and has been used informally in the past by law-enforcement agencies. Not all countries have laws regulating this technique. In many states controlled delivery is governed by administrative regulations or police guidelines. It was formally legitimized internationally by the 1988 United Nations Convention against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances, although exclusively for illicit trafficking in narcotic drugs.

In 1997, 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”) established, in its Article XVIII, that States Parties were obligated to adopt the controlled delivery technique for the offenses of illicit manufacturing of or trafficking in firearms, ammunition, explosives, and other related materials,^{1/} provided that their domestic systems so permit. This provision is almost identical to the obligation set forth in the 1988 United Nations Convention, with the exception of the object to which the controlled delivery applies.

In 2000, the United Nations Convention against Transnational Organized Crime expanded the use of the so-called special investigative techniques, including controlled delivery, to combat organized crime. Article 20.1 reads: “If permitted by the basic principles of its domestic legal system, each State Party shall, within its possibilities and under the conditions prescribed by its domestic law, take the necessary measures to allow for the appropriate use of *controlled delivery* and, where it deems appropriate, for the use of other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, by its competent authorities in its territory for the purpose of effectively combating organized crime.” (*emphasis added*).

In line with the international conventions, states are now quite receptive to including regulation and implementation of the controlled delivery technique in their domestic law. In fact we can see that most States Parties have introduced related norms into their legislation. However, as often occurs, the legislative procedures selected have not been at all uniform. Thus, many countries have included controlled delivery in special laws against illicit drug trafficking, thereby limiting its use regarding other offenses.

Moreover, in some jurisdictions the investigative technique of controlled delivery is known [in Spanish] as “*circulación vigilada*,” “*remesa controlada*,” or “*entrega controlada*.” For the purposes of this model legislation, the term “*entrega vigilada*” will be used.

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.

The value of controlled delivery is that it can provide information on the routes, origin, and destination of illicit transfer or transit operations and identify the make-up, structure, resources, and activities of criminal organizations.

In Article 1.7, the CIFTA defines controlled delivery as “the technique of allowing illicit or suspect consignments of firearms, ammunition, explosives, and other related materials to pass out of, through, or into the territory of one or more states, with the knowledge and under the supervision of their competent authorities, with a view to identifying persons involved in the commission of offenses referred to in Article IV of this Convention.”

A similar definition may be found in Article 2.1 of the United Nations Convention against Transnational Organized Crime: “Controlled delivery” shall mean the technique of allowing illicit or suspect consignments to pass out of, through or into the territory of one or more States, with the knowledge and under the supervision of their competent authorities, with a view to the investigation of an offence and the identification of persons involved in the commission of the offence.”

A common characteristic of these and other definitions of controlled delivery given in some legislations in the Hemisphere is the prior discovery of an illicit act in process—since an illicit act that has not been detected cannot be monitored; clear rejection by the State of its exercise of *ius puniendi* while priority is given to pursuit of the investigation to frustrate the offense; and the effectiveness of this investigative technique in identifying the criminal structure.^{2/}

Controlled delivery may be classified as active or passive. In the first case, it is implemented by national authorities and/or those working on their behalf, which in most national legislations is considered illegal. In the second case, or passive controlled delivery, the illicit consignment is delivered by people from outside the government, with the role of authorities limited to allowing its circulation or replacing its content by licit or innocuous products.

Likewise, controlled delivery can be classified geographically as national, when the movement of illicit consignments takes place within a national territory; or international, when the movement involves two or more national jurisdictions. Although the CIFTA requires that countries legislate it only “at the international level,” countries updating their domestic legislation should also consider enacting it into law nationally.

Member states that seek to strengthen their legislative and/or regulatory systems for the use of controlled delivery of firearms, etc., may wish to adopt, in keeping with their legal systems and their basic laws, the policies and practices specified in the following commentaries and in the legal provisions of the present draft model legislation.

2. In this connection, those countries that have not adopted legislation on the penalties that can be imposed on natural and/or legal persons involved in the commission of the criminal offenses envisaged in the CIFTA are recommended to take into account the “Model Legislation and Commentaries on Legislative Measures to Establish Criminal Offenses in relation to the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials,” adopted *ad referendum* by the Consultative Committee of the CIFTA on May 9, 2008.

In addition and based on the principle of reciprocity, States Parties should consider, on a case by case basis, the possibility of concluding agreements for collaboration in joint investigations with other States Parties, assuming that the controlled delivery investigative technique is used, with due respect at all times for the principle of sovereignty embodied in the CIFTA and in this draft model legislation.

To these ends, this draft model legislation is intended to reflect the substance of the Convention, as expressed in its provisions. To facilitate the reader's understanding of the provisions on controlled delivery set forth in Part III of this model legislation, the relevant provisions of the Convention have been cited in Part II.

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:

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.
 7. “Controlled delivery”: the technique of allowing illicit or suspect consignments of firearms, ammunition, explosives, and other related materials to pass out of, through, or into the territory of one or more states, with the knowledge and under the supervision of their competent authorities, with a view to identifying persons involved in the commission of offenses referred to in Article IV of this Convention.

COMMENTARY: The foregoing definitions are material in that they give certainty to Article XVIII, the operative provision of the Convention in relation to controlled delivery. The first two definitions, “illicit manufacturing” and “illicit trafficking” set out the specific circumstances and conditions that make the firearms, etc., illicit and hence susceptible to controlled delivery with a view to discovering the persons involved. 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 controlled delivery 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 controlled delivery of a wider range of weapons, ammunition, explosives, and other related materials that are not included in the definitions above.

Note that the reference in the Convention to “related materials” pertains exclusively to firearms 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.”

B. “Article III. Sovereignty”

1. States Parties shall carry out the obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of states and that of nonintervention in the domestic affairs of other states.

2. A State Party shall not undertake in the territory of another State Party the exercise of jurisdiction and performance of functions which are exclusively reserved to the authorities of that other State Party by its domestic law.

COMMENTARY: Controlled delivery implies cooperation among various States Parties; however, it must always be done with due respect for the principle of sovereignty established by the CIFTA.

C. “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 the 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, abetting, facilitating, and counseling the commission of said offenses.

COMMENTARY: Article IV.1 stipulates that states must include in their legislation the two offenses of illicit manufacturing of and illicit trafficking in firearms, etc. Article IV.2 only requires the countries to include among the criminal offenses established pursuant to the previous paragraph “participation in, association or conspiracy to commit, attempts to commit, and aiding, abetting, facilitating, and counseling the commission of said offenses,” subject to the respective constitutional principles and basic concepts of the legal systems of the States Parties. These offenses allow for use of the controlled delivery technique in accordance with Article XVIII.1, with a view to investigating the persons involved.

D. “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.

COMMENTARY: This paragraph is only tangentially related to controlled delivery in that it establishes the obligation of the States Parties to confiscate or forfeit illicit arms. This obligation of the States Parties is postponed for as long as continued priority is given to pursuing the investigation to frustrate the criminal offense, thus postponing the state’s exercise of ius puniendi.

E. “Article VIII: Security Measures”

States Parties, in an effort to eliminate loss or diversion, undertake to adopt the necessary measures to ensure the security of firearms, ammunition, explosives, and other related materials imported into, exported from, or in transit through their respective territories.

COMMENTARY: This paragraph is related to controlled delivery as it establishes the obligation of the States Parties to ensure the security of firearms, etc., that are in transit in the countries. It is considered a basic provision for controlled delivery in that it requires that there will be sufficient guarantees among the States Parties that the firearms, etc., will not be lost or diverted as a result of use of the controlled delivery technique.

F. “Article XII: Confidentiality”

Subject to the obligations imposed by their Constitutions or any international agreements, the States Parties shall guarantee the confidentiality of any information they receive, if requested to do so

by the State Party providing the information. If for legal reasons such confidentiality cannot be maintained, the State Party that provided the information shall be notified prior to its disclosure.

COMMENTARY: This paragraph is related to controlled delivery as it establishes the obligation of the States Parties to guarantee the confidentiality of any information they receive, if requested to do so by the State Party providing the information. Maintaining the confidentiality of information is of vital importance when a State Party requests collaboration from another State Party in applying the controlled delivery technique.

G. “Article XIII: Exchange of Information”

1. States Parties shall exchange among themselves, in conformity with their respective domestic laws and applicable treaties, relevant information on matters such as:

- b. the means of concealment used in the illicit manufacturing of or trafficking in firearms, ammunition, explosives, and other related materials, and ways of detecting them;
- c. routes customarily used by criminal organizations engaged in illicit trafficking in firearms, ammunition, explosives, and other related materials;

2. States Parties shall provide to and share with each other, as appropriate, relevant scientific and technological information useful to law enforcement, so as to enhance one another's ability to prevent, detect, and investigate the illicit manufacturing of and trafficking in firearms, ammunition, explosives, and other related materials and prosecute those involved therein.

COMMENTARY: This paragraph is only tangentially related to controlled delivery in that it establishes the obligation of States Parties to exchange information among themselves, in particular on the means and routes used for the illicit manufacturing of or trafficking in firearms, ammunition, explosives, and other related materials. In this connection, Article XIII is related to the purposes of controlled delivery to discover the routes and criminal organizations involved in the illicit trafficking in firearms, etc., and to share that information with the states concerned.

H. “Article XIV: Cooperation”

1. States Parties shall cooperate at the bilateral, regional, and international levels to prevent, combat, and eradicate the illicit manufacturing of and trafficking in firearms, ammunition, explosives, and other related materials.

2. States Parties shall identify a national body or a single point of contact to act as liaison among States Parties, as well as between them and the Consultative Committee established in Article XX, for purposes of cooperation and information exchange.

COMMENTARY: Article XIV.1 requires the States Parties to cooperate at the bilateral, regional, and international levels to combat illicit trafficking in firearms. Article XIV.2 requires the States Parties to identify a single point of contact to act as liaison for purposes of cooperation and information exchange. Considering that controlled delivery is a form of cooperation among States Parties, Article

XIV.2 is relevant since the single points of contact would have to be responsible for coordinating cooperation among the States Parties in cases of controlled delivery.

I. “Article XVIII: Controlled Delivery”

1. Should their domestic legal systems so permit, States Parties shall take the necessary measures, within their possibilities, to allow for the appropriate use of controlled delivery at the international level, on the basis of agreements or arrangements mutually consented to, with a view to identifying persons involved in the offenses referred to in Article IV and to taking legal action against them.

2. Decisions by States Parties to use controlled delivery shall be made on a case-by-case basis and may, when necessary, take into consideration financial arrangements and understandings with respect to the exercise of jurisdiction by the States Parties concerned.

3. With the consent of the States Parties concerned, illicit consignments under controlled delivery may be intercepted and allowed to continue with the firearms, ammunition, explosives, and other related materials intact or removed or replaced in whole or in part.

COMMENTARY: The foregoing constitutes the basic legal obligation of States Parties regarding adoption of the controlled delivery technique. Article XVIII.1 requires the States Parties to take measures, if their domestic legal systems so permit and within their possibilities, to use the controlled delivery technique at the international level. Article XVIII.2 provides that decisions to use that technique shall be made on a case-by-case basis and that financial arrangements may be taken into account in that regard. Finally, Article XVIII.3 establishes that controlled delivery may be used in two ways: (a) by intercepting the consignments and allowing them to continue intact; or (b) by removing or replacing them in whole or in part.

III. DRAFT MODEL LEGISLATION PROVISIONS AND COMMENTARIES

1. Introduction

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., across national boundaries without the appropriate authorization of one of the State Parties concerned, the manufacturing aspect encompasses both a national and transnational orientation in that it includes references to manufacturing from illicitly trafficked components or parts, 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 the States Parties to establish as criminal offenses the illicit manufacturing of and illicit trafficking in firearms, etc. In Article XVIII, it is in the context of these offenses that the States Parties assume the obligation to adopt necessary measures to make appropriate use of the technique of controlled delivery of illicitly manufactured and/or trafficked firearms, ammunition, explosives, and other related materials.

Thus the CIFTA sets out the minimum standards to be used by the States Parties to establish as criminal offenses the illicit manufacturing of and trafficking in firearms, etc. The States Parties are at liberty to enact legislation that provides for broader penalties or that encompasses a wider range of firearms, etc.

The core of the controlled delivery provisions of the CIFTA lies in Article XVIII: “Controlled Delivery.” These provisions govern firearms, etc., that have been illicitly manufactured or trafficked. Illicit manufacturing and illicit trafficking are terms defined in the Convention (see Article 1). As defined, these terms constitute the essential elements of the legislative measures that Article IV of the Convention requires the States Parties to adopt. In turn, the term “controlled delivery” is defined in Article I.7.

Article IV.1 requires the States Parties to establish as criminal offenses the illicit manufacturing of and trafficking in firearms, etc. These offenses are defined in Article I.1 and I.2. Article IV.2 provides that the criminal offenses shall also include participation in, association or conspiracy to commit, attempts to commit, and aiding, abetting, facilitating, and counseling the commission of said offenses.

Apart from the definitions “illicit manufacturing” and “illicit trafficking,” the terms firearms, ammunition, explosives, and other related materials are also definitions that drafters of national legislation will have to take into account and include as presented in the Convention.

Drafters of the corresponding provisions of national legislation must also consider that, except for the qualifying statement made in Article IV.2, the relevant provisions of the Convention, that is, Articles IV, VII, VIII, XII, XIII, and XIV, are all binding and for that reason, upon ratification of the Convention, the States Parties are obliged to implement them.

Unlike the articles referred to above, the qualification referenced in relation to Article IV.2 comes in the opening words of that provision, to the effect that “[s]ubject 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.

Likewise, Article XVIII of the CIFTA expressly supports the investigative technique known as controlled delivery as long as “their domestic legal systems so permit,” which means that countries whose constitutional systems do not so permit will not be able to adopt the technique. Controlled delivery is especially useful in investigating organized criminal groups, in view of the inherent dangers and difficulties in gaining access to their operations and compiling information and evidence

for use in national trials, and in the mutual provision of judicial assistance with other States Parties. In many cases, less intrusive methods would be ineffective or could not be used without subjecting those involved to unacceptable risks.

Controlled delivery is useful in cases where contraband in transit is identified and intercepted and is then delivered under supervision in order to identify the recipients or control its subsequent distribution through a criminal organization. Although some countries regulate controlled delivery through regulations or guidelines, the legal systems in other countries require legislative measures for this type of action, since the failure of a law-enforcement official to seize, confiscate, or forfeit illicit shipments can in itself constitute an offense under domestic law.

Whether the Convention is considered by a State Party to be self-executing, i.e., that by ratifying the CIFTA, its provisions are considered to have been automatically adopted in national law, or whether the State Party considers it necessary to enact 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.

2. Requirements

Under Article XVIII of the Convention, the States Parties must:

- a. Allow for the use of controlled delivery as an investigative technique available at the international level, if the fundamental principles of their domestic legal systems so permit;
- b. Have the legal capacity to provide international cooperation regarding controlled deliveries on a case-by-case basis, as long as this does not violate the fundamental principles of their domestic legal systems;
- c. Regulate controlled delivery, in which illicit consignments are intercepted and allowed to continue intact, or the illicit goods are replaced in whole or in part.

Article XVIII.1 requires the States Parties to allow the use of the special investigative technique of controlled delivery, as long as it does not violate the fundamental principles of their domestic legal systems. Many states have already enacted this mechanism at least for trafficking in narcotic drugs, as provided for in the 1988 United Nations Convention against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances. The decision to use this technique in a specific circumstance is left to national law and to the discretion and resources of the state, as reflected in the phrases “within their possibilities” and “[s]hould their domestic legal systems so permit.” Likewise, paragraph 1 encourages the States Parties, but does not require them, to conclude agreements or arrangements allowing for the use of the special investigative technique of controlled delivery, on behalf of another state, as a form of international cooperation.

Paragraph 2 establishes that decisions to use this special investigative technique at the international level shall be made on a case-by-case basis. This wording requires a State Party to have the capacity to cooperate in controlled delivery, case by case.

Paragraph 3 clarifies that among the methods used for controlled delivery at the international method are intercepting and allowing the consignments to remain intact, intercepting and removing

illicit goods, or intercepting and replacing the illicit consignments in whole or in part. It leaves the choice of the method to the State Party involved. The method used can depend on the circumstances of the specific case.

For a number of countries, these provisions alone will be sufficient to provide legal authority for cooperation on a case-by-case basis. However, in cases where a state cannot directly implement this type of treaty provision but requires new legislation to participate in such activities, reference will have to be made to the present model legislation.

3. Terms of the Convention

A. Article I: 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 able to incorporate them into domestic legislation) to confirm that the national legislation contains provisions with the same content.

If the national legislation in force does not contain all of the elements set out in the model provisions below, then the national legislation will have to 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 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.

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” pertains exclusively to firearms 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.

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 for each of the cases 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 to 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 that of 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, etc., among States Parties, as mentioned in Article I.2, but also 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 not only in unlawful transnational “trafficking” among States Parties, but also in 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” in 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 them to be considered to be firearms (or as the case may be “ammunition,” “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. Nor is a firearm (a) an antique manufactured before the 20th 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 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.

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 controlled delivery as well as to 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, with regard to the definition of “explosives” in Article I.5 of the CIFTA and in the Annex referred to in that definition (reproduced below), some 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. States Parties and signatories wishing to avail themselves of an updated definition of explosives may, therefore, in coordination with explosives experts and law-enforcement agencies 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, smoke pots, 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” pertains exclusively to firearms 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.

B. Article IV: Legislative Measures

The main policy objective of the Convention is to prevent, combat, and eradicate the illicit manufacturing of and illicit trafficking in 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 Article IV.1 of the CIFTA, 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, and in keeping with the provisions of prior model legislations.

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 the 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 included 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 must 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.

C. Article XVIII: Controlled Delivery

1. Controlled delivery shall be understood as the technique of allowing illicit or suspect consignments of firearms, ammunition, explosives, and other related materials to pass out of, through, or into the territory of one or more states, with the knowledge and under the supervision of their competent authorities, with a view to identifying persons involved in the commission of offenses, as well as of providing assistance to foreign authorities for the same purposes.

COMMENTARY: The purpose of controlled delivery at the international level is twofold: on the one hand, as concerns the investigation carried out by national authorities, "to discover or identify the persons involved in the commission of an offense" and, on the other hand, to provide assistance to foreign authorities.

2. Use of controlled delivery shall be made on a case-by-case basis and shall conform to the provisions of international treaties. The decision to use controlled delivery should be duly supported under national law. To adopt these measures, the [*indicate the competent National Authority*] shall take into consideration in each specific case: (1) the need thereof for investigation purposes; (2) possibilities for monitoring it; (3) the explicit identification, where possible, of the object of the controlled delivery as well as the type and quantity of the object concerned; and (4) the objective of enhancing international cooperation and increasing its effectiveness.

COMMENTARY: The decision to use controlled delivery should be duly supported by reliable police information, sworn statements by witnesses or informants, or other evidence as supported by national law. Moreover, the measure must be aimed at obtaining useful information for the investigation. The National Authority may be a prosecutor, a judge, police official or other competent authority.

3. Illicit consignments under controlled delivery may be intercepted and allowed to continue intact or the firearms, ammunition, explosives, and other related materials they contain may be removed, modified or replaced in whole or in part. The use of any of these methods shall be at the discretion of [*indicate the competent National Authority*].

COMMENTARY: This establishes that the following procedures may be used for controlled delivery: (a) the illicit good is not replaced; or (b) the illicit good is replaced, which may in turn be done: (i) in whole; or (ii) in part. The National Authority entrusted with the operation shall be responsible for determining which type of procedure to use in accordance with the circumstances of the case. These are the procedures set out in Article XVIII.3 of the CIFTA. In some circumstances the commodities involved in a controlled delivery may not be removed or replaced, but modified or altered. Modification could be contemplated so that controlled delivery is a more effective technique.

4. During the controlled delivery operation, appropriate technical means must be used to enable intervention by the persons involved.

COMMENTARY: The purpose of controlled delivery is "to discover or identify persons involved in the commission of an offense," in particular those persons active in criminal organizations. In this connection, controlled delivery should make use of the technical means, such as Global Positioning

Systems (GPS) and microchips, among others, best suited to each case and make it possible to gather the information needed in a judicial setting to prove the connection between those persons and the offenses established in Article IV of the CIFTA.

5. Foreign authorities of the countries participating in the controlled delivery operation must provide in connection with entry of the consignments into the country and/or their exit therefrom:
 - a. Assurances to monitor the movement of consignments continuously from their entry into the country or their exit therefrom, as the case may be;
 - b. Assurances that the shippers, the heads of criminal organizations, and the buyers will be investigated; that the consignments will be confiscated or seized; and that efforts will be made to prosecute the criminals and implement their sentences;
 - c. Assurances that the national authorities will be regularly informed about the situation of the operations;
 - d. As appropriate, necessary evidence for purposes of analysis and investigation; and
 - e. Assurances to keep strictly confidential the information provided to them in connection with the investigations for which this investigative technique is being implemented.

COMMENTARY: As concerns the object of controlled delivery (firearms, ammunition, explosives, and other related materials) and the danger that would result from the loss of these consignments, a guarantee is needed from the requesting country that all necessary measures will be taken to keep constant watch over the consignments involved. Likewise, the collaboration of the requesting country is needed to investigate the entire criminal chain, and the national authorities have to be regularly informed of progress made in the controlled delivery operation.

6. Any expenditures incurred in the use of the international controlled delivery technique shall be borne by the [indicate the competent National Authority]. The [indicate the competent National Authority] is authorized to conclude a specific financial agreement with the foreign authority or authorities involved.

COMMENTARY: This establishes that the costs of applying the controlled delivery technique shall be borne by the National Authority appointed by the country, which shall be authorized to enter into economic arrangements with the country that requests collaboration in the use of controlled delivery, as established in Article XVIII.2 of the CIFTA.

7. Upon conclusion of the controlled delivery operation, and in accordance with national law and applicable treaties, the results and especially the proof and physical evidence shall be transmitted, without delay, to the foreign authorities involved.

COMMENTARY: This establishes that, mindful of the cooperation sought by controlled delivery at the international level, the corresponding results shall be reported to the foreign authorities involved.

Thus, information on the routes, origin, and destination of the illicit transfer or transit of firearms, etc., may be provided, along with any information making it possible to identify the make-up, structure, resources, and activities of criminal organizations.

It is recommended that national legislations include, in the event they do not, provisions on the evidence chain of custody as well as pertinent procedural arrangements so that the evidence collected abroad through this technique will be admitted in court proceedings.