

EXPERT GROUP ON ATT IMPLEMENTATION

Implementing the ATT: Developing brokering controls in less capacitated States

EGAI

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Introduction

Over the past 20 years, concern over the role of unscrupulous arms brokers in fuelling the illicit and irresponsible trade in arms has grown significantly. The problems caused by unregulated arms brokering and the role of brokers in breaching UN arms embargoes and facilitating arms transfers that fuel conflict and grave violations of human rights are now a matter of public record.¹ Often arms brokers do not reside in the country from which the weapons originate, nor do they live in the countries through which the weapons pass or for which they are destined. As a result, international arms brokering has proved difficult to trace, monitor or control. Arms brokers generally do not own the arms they arrange to sell and transfer. Moreover, because they are not manufacturers, retailers or wholesalers, they are frequently not defined as a specific category under States' national arms export control laws, and as a result their activities often go unrecorded and uncontrolled.

Compounding this problem is the fact that relatively few States are known to have in place effective laws or regulations for controlling the activities of arms brokers within their jurisdiction. As a result, irresponsible arms brokers often conduct their activities in countries and regions where controls are inadequate or poorly enforced. In addition, arms brokers work very closely with transport or shipping agents, contracting transport facilities, carriers and crews in order to move arms cargoes by sea, air, rail or road, potentially employing a range of dubious techniques such as shell companies and flags of convenience in order to conceal the true origin and nature of their business.

At first glance, this would appear to make effective regulation of arms brokering a difficult proposition. However, a number of States have introduced controls in this area since the late 1990s and so there is now a significant body of experience in this field that could be of use to States that are seeking to take action to control arms brokering within their jurisdiction, as required under the Arms Trade Treaty (ATT).

This briefing² examines the requirements of ATT Article 10 and explores possible options for regulating arms brokering in light of developments in this field, at both national and international levels, over the past 20 years. It goes on to examine the potential utility of various options for arms brokering regulation, with a particular emphasis on the requirements of less capacitated States; in doing so, the briefing seeks to encourage the adoption of controls on arms brokering agents by all ATT States Parties that have yet to do so.

¹ See, for example, 'Final Report of the UN Panel of Experts on Violations of Security Council Sanctions Against UNITA' (Fowler Report), S/2000/203, 10 March 2000 (www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Sanc%20S2000%20203.pdf); and 'Report of the Group of Experts submitted pursuant to paragraph 2 of Security Council resolution 1708 (2006) concerning Côte d'Ivoire', S/2006/964, 12 December 2006, pp7–8 (www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Cote%20d'Ivoire%20S2006964.pdf). A more recent account of the complex web of actors that can be involved in illicit arms brokering can be found in 'Brokers without borders: How illicit arms brokers can slip through gaps in the Pacific and international arms control system', Oxfam, 2010 (<https://www.oxfam.org/en/research/brokers-without-borders>)

² This briefing is the fourth output of the Expert Group on ATT Implementation. For further information see www.saferworld.org.uk/news-and-views/case-study/54-the-expert-group-on-att-implementation-egai-

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Understanding the problem of unregulated arms brokering

Despite the increased attention paid to arms brokering since the mid-1990s the patchy nature of controls internationally suggests that there remains a lack of understanding of the issue. This is particularly the case among States that do not play a major role in the international arms trade – as either exporter or importer. The activity of arms brokering is often mistakenly viewed as being similar, if not identical, to that of arms ‘dealing’ which refers to the sale of arms in the domestic market of a State. The crucial distinction between dealing and brokering is based upon the locations of both the source and end-user of the arms being transferred. Arms brokering involves the transfer of weapons between third countries; as such the arms in question do not pass through the territory or jurisdiction of the State where the broker is based. While many States do control the activities of domestic arms dealers the activities of arms dealing and arms brokering are not the same and require a distinct legislative and regulatory approach. This briefing addresses only arms brokering in the international context as the principal issue with which a large number of States have yet to engage.

The ongoing privatisation of the international arms trade over the past two decades and more has contributed to the growth of arms brokering agents and their increased role in the international transfer of conventional arms. In this context it is important to note that arms brokers can play a legitimate role in the government-authorised arms supply chain. However, while some arms brokers operate legally, complying with relevant national laws and respecting UN and other international sanctions, others do not.

For States with little involvement in the international arms trade, regulation of arms brokering may not seem an urgent priority. However, continuing reports of illicit arms brokering activities and the experiences of States that have taken action to regulate arms brokering in recent years suggests that the regulation of arms brokers is an issue that all States should take seriously. Moreover, since the ATT’s entry into force, all States Parties are now required to take action to address this issue; indeed of the 78 States Parties (at time of writing) as many as half may be required to introduce or amend their controls.

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The ATT and arms brokering

If the ATT is to fulfil its object and purpose, all States Parties must implement it in letter and spirit. Central to this effort will be the implementation of Article 10 which requires States to take measures to regulate arms brokering.

ATT Article 10 sets out the following obligations:

Each State Party shall take measures, pursuant to its national laws, to regulate brokering taking place under its jurisdiction for conventional arms covered under Article 2 (1). Such measures may include requiring brokers to register or obtain written authorization before engaging in brokering.

The requirement that States Parties regulate brokering of arms (specified in Article 2.1) is clear despite the potential caveat that this should be ‘pursuant to [their] national laws’. This qualifying language is included in a number of ATT Articles and has the effect of allowing States Parties to develop or adapt legislation and regulations that are consistent with their existing national laws. While few States are likely to have laws in place that completely prevent their taking steps to regulate arms brokering, it is possible that the scope and application of the laws and regulations that can be adopted may be subject to constraints, for example, due to constitutional restrictions.

The need for ATT States Parties to regulate arms brokering is further reinforced by the obligations that flow from ATT Article 6. Under Article 6 States Parties must not authorise any transfer of conventional arms or items listed in Articles 2.1, 3 or 4 where this would violate international law in the form of obligations flowing from UN Security Council sanctions and embargoes or obligations arising from international agreements to which a State is party. Crucially, Article 6 also requires States Parties not to authorise the transfer of ATT-listed arms or items where they have knowledge at the time of authorisation that the arms or items would be used in the commission of genocide, crimes against humanity and war crimes. Given that Article 2.2 of the ATT defines the term ‘transfer’ as applying to ‘export, import, transit, transshipment and brokering’, States Parties must be able to prevent arms brokering taking place under their jurisdiction in at least these circumstances.

Beyond this, the exact nature of each State Party’s response may depend on, *inter alia*:

- its extant legal traditions;
- how far a State’s jurisdiction can extend (e.g. the possibility, or otherwise, that national controls may have an extra-territorial application);
- the specific regulatory measures a State considers appropriate to its particular situation;
- the resources available for administration and enforcement of controls.

Complicating matters further is the fact that the ATT does not define arms brokering or the territorial scope of any regulations and Article 10 leaves to national discretion the exact steps to be taken by States Parties, suggesting just two possible regulatory options: requiring brokers to register as such or requiring that they obtain written authorisation for their activities.

Given the lack of guidance given to States as to what exactly they should do in order to regulate brokering, existing international agreements and current State practice may prove a useful starting point for States Parties that need to develop their own brokering controls.

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Multilateral and national approaches to controls on arms brokering

Multilateral approaches

There is no single agreed definition of an arms broker or arms brokering, although various regional and multilateral institutions have sought to develop such definitions for their own purposes, in some cases for all conventional arms and in others just for small arms and light weapons (SALW). Relevant agreements relating to arms brokering control include those concluded by the Inter-American Drug Abuse Control Commission (CICAD), the Economic Community of West African States (ECOWAS), the European Union (EU), the Organisation for Security and Co-operation in Europe (OSCE) and the Wassenaar Arrangement (see Annex for an overview of these agreements). Individual States also define arms brokers and brokering where laws exist for their control. While these definitions are not identical, they do tend to share a number of common elements.

In the global context, the 2007 Report of the UN Group of Governmental Experts (GGE) on illicit SALW brokering³ did not contain a definition per se, but instead described an arms broker as:

*a person or entity acting as an intermediary that brings together relevant parties and arranges or facilitates a potential transaction of SALW in return for some form of benefit, whether financial or otherwise.*⁴

The Report goes on to elaborate on the types of activities that an arms broker could undertake. An arms broker may:

- a) Serve as a finder of business opportunities to one or more parties;
- b) Put relevant parties in contact;
- c) Assist parties in proposing, arranging or facilitating agreements or possible contracts between them;
- d) Assist parties in obtaining the necessary documentation;
- e) Assist parties in arranging the necessary payments.⁵

³ Report of the Group of Governmental Experts established pursuant to General Assembly resolution 60/81 to consider further steps to enhance international cooperation in preventing, combating and eradicating illicit brokering in small arms and light weapons (www.poa-iss.org/BrokeringControls/English_N0744232.pdf)

⁴ *Ibid.*, paragraph 8.

This description could usefully serve as the basis for definitions of arms brokers and arms brokering by ATT States Parties establishing brokering controls.

With regard to the operational measures that relevant inter-state agreements (see Annex) and national laws contain, the following types of provisions are the most common:

- Licensing requirements for specific brokering transactions;
- Assessment of licence applications on the basis of specified criteria;
- Registration requirements for individuals and companies involved in brokering;
- Criminal and/or civil sanctions for unauthorised brokering.

In addition, most multilateral agreements understand arms brokering as taking place between third countries (as described above) and require the application of controls, at a minimum, to relevant activities of individuals, groups or companies conducting their business on national territory, although some also include the activities of nationals operating abroad.

National approaches

The aforementioned multilateral initiatives provide a useful overview of current thinking as regards what may comprise an effective arms brokering control system. National systems, however, have to apply these general principles to take account of their specific situations and legal traditions, which gives scope for different approaches.

South Africa and Russia are presented here as examples of States which both have restrictive regimes on arms brokering but take markedly different approaches with potentially different consequences. Whereas the South African model can be seen as largely consistent with the ideas set out above, Russia takes a different approach which would appear to run the risk of creating unintended loopholes.

South Africa⁶

South Africa's National Conventional Arms Control Act 2002 [amended 2008] takes a very comprehensive approach to the control of arms brokering. In the first instance it contains a detailed and multifaceted definition of arms brokering services as follows:

- Acting as an agent in negotiating or arranging a contract, purchase, sale or transfer of controlled items for a commission, advantage or cause, whether financially or otherwise;
- Acting as an agent in negotiating or arranging a contract for the provision of services for a commission, advantage or cause, whether financially or otherwise;
- Facilitating the transfer of documentation, payment, transportation or freight forwarding, or any combination of the aforementioned, in respect of any transaction relating to buying, selling or transfer of controlled items; and
- Acting as intermediary between any manufacturer or provider of controlled items, and any buyer or recipient thereof.

As such, the South African definition of arms brokering goes beyond the general understanding of core brokering activities (that centre upon negotiating or arranging contracts or transactions). Instead, the regulations subject a wide range of supporting activities to control – including transportation and financing – where they are undertaken in connection with the transfer, not only of arms and military equipment, but of all controlled items.

⁵ *Ibid*, paragraph 9.

⁶ The information contained in this section was drawn from an article entitled 'The Regulation of Arms Brokering in Southern Africa' by Guy Lamb, and published by the Disarmament Forum in 2009 and also from a forthcoming monograph on arms brokering in Southern Africa by the same author to be published by ISS in 2015.

Further to this, arms brokers must register with the Directorate for Conventional Arms Control and seek a permit from the National Conventional Arms Control Committee (Ministerial Committee) to engage in arms brokering activities as defined in the Act.

South Africa's arms brokering legislation has full extra-territorial application in that any South African citizen, permanent resident or organisation registered or incorporated in South Africa is bound by the regulations, regardless of their physical location when the relevant activities occur. Criminal penalties for breaching arms brokering regulations can extend to a prison sentence of up to 25 years.

While South Africa's arms brokering controls appear comprehensive and robust, the extent to which they are, in practice, reinforced by the full spectrum of enforcement capabilities that are required to fully implement these controls in the domestic context and elsewhere is unclear.

Russia⁷

Since 2007, only one State-owned company – Rosoboronexport – has been permitted to export arms from Russia. This means that in practice Rosoboronexport is now the only 'broker' legally operating on Russian territory.

There is no definition of the terms 'arms broker' or 'arms brokering' in Russian legislation although steps were taken to establish a legal definition for the 'State mediator'.⁸ While the words 'broker' and 'brokerstvo' (brokering) do exist in Russian, they are not found in legislation in relation to arms trade and other military transfers. Rather, the terms 'posrednik' (intermediary) and 'posrednichestvo' (intermediation) are included in the main procedures governing arms exports.

Article 13 of Presidential Decree No. 1062 of 2005 *Questions of Military-Technical Cooperation of the Russian Federation with Foreign States* prohibits all forms of intermediation activity by Russian entities and persons 'during the exercising of foreign trade activity in respect to military products', with the exception of that conducted by the State intermediary. While seemingly clear-cut, the absence of a definition of 'intermediation' within Russian legislation presents the risk that controls on 'intermediation' could be applied in a discretionary manner.

This lack of a clear definition also leaves open the question as to whether the prohibition on 'intermediation' by all except Rosoboronexport covers the brokering of arms transfers by Russian-based individuals or companies between third countries (where the arms do not physically enter Russian territory or jurisdiction) and, further, whether the prohibition extends extraterritorially to Russian nationals or residents who are located overseas. The reference to 'foreign trade activity' in Decree 1062 would suggest that the prohibition might apply to the former. However the absence of any reference to extra-territorial intermediation is likely to mean that Russian citizens operating outside of Russia may be able to remain beyond Russian jurisdiction. This would certainly appear to be the case in light of the known activities over almost two decades of the notorious arms broker, Victor Bout.

⁷ Up to date information on Russian controls on arms brokering is not readily available. This section is based on a Saferworld research paper entitled *Beyond the reach of state monopoly controls: A comparative overview of Russian controls on arms brokering* from 2007 (www.saferworld.org.uk/resources/view-resource/265-beyond-the-reach-of-state-monopoly-controls). It is likely that much of this remains accurate given that key information relating to Russian legislation is consistent with the Russian Federation 2014 national report on implementation of UNSCR 1540.

⁸ Decree of the President of the Russian Federation of 16 October 2009, No 1167 'On amendments to some acts of the President of the Russian Federation on military-technical co-operation between Russia and foreign states'.

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Developing a system of brokering control for less capacitated States

The importance of regulating arms brokering

While certain common understandings have developed regarding the principles, ways and means of controlling arms brokering, it remains for individual States to determine how this should translate into their national context. For those States Parties that have yet to take steps to control arms brokering, regulations in this area can be configured in a number of different ways. For example, a variety of options exist in relation to how arms brokers and arms brokering activities are defined, as well as in relation to the territorial scope of controls and the potential for the establishment of registration and licensing regimes. Accordingly, deciding on what is most appropriate for any given set of circumstances may not be the easiest of tasks. Moreover, for less capacitated States Parties, most of whom play only a limited role in the international arms trade, a lack of experience in administering an arms transfer control system along with limited capacity for doing so may raise concerns about the practicalities of controlling brokering.

Nevertheless there are compelling reasons why States Parties to the ATT that have yet to regulate in this area should make a serious effort to adopt arms brokering controls. Firstly, as discussed above, ATT Article 10 establishes an obligation upon States Parties to regulate arms brokering. While the exact steps that must be taken in order to fulfil this obligation are a matter for individual States, they must at a minimum not authorise the brokering (or the import, export and transit/transshipment) of arms where there is knowledge at the time of authorisation that the arms would *inter alia* be used in the commission of genocide, crimes against humanity or war crimes (ATT Article 6). Secondly, as noted at the beginning of this paper, unregulated arms brokering is known to play a part in fuelling conflict and human rights abuses around the world; the destabilising impact of these actions can often be felt far away from the centre of a crisis. Thirdly, as more and more States take steps to control arms brokering in an effective manner, irresponsible actors will be inclined to relocate to those countries and territories where arms brokering controls either do not exist or are poorly enforced in order to operate unhindered. It is therefore in all States' interests to act in order to close down the space in which unregulated arms brokering can take place.

It is clear from current practice, however, that to be efficiently and effectively administered any national provision for arms brokering control should be incorporated into the broader domestic system for international arms transfer control. Thus, for States

that already have an export control system that meets the standards set by the ATT, incorporating provisions for arms brokering regulation should, on paper at least, be relatively straight forward.

For those States Parties that do not have a mature arms transfer control system that includes: control of imports, exports, transit/transshipment; export risk assessment; a variety of types of licences/authorisations; a comprehensive control list; and systems for record-keeping, information sharing and reporting, it will prove most efficient to develop brokering provisions as part of a wider comprehensive arms transfer control system. Many essential elements of a national control system apply equally to brokering as to exports; it would be inefficient, confusing and counterproductive to have, for example, different control lists or assessment criteria for brokered transactions than for exports. An integrated approach to arms transfer control will thus help to ensure consistency and effectiveness across the board.

Key provisions for regulation of arms brokering

For States seeking to adopt controls on arms brokering, an overview of existing national and multilateral approaches (see Annex) points to an emerging international understanding of the key elements that can form the basis of an effective national brokering control regime, as follows:

- **Core arms brokering activities** include acting as an intermediary in negotiating or arranging contracts/transactions; they may also include buying and selling of arms as well as involvement in financing and transportation.
- Arms brokering should be considered as **taking place between third countries**; however States may also include brokering of arms transfer where the arms originate on national territory.
- Regulation should be based on a legal requirement that **arms brokering agents apply for a licence in advance of each transaction**; arms brokers operating within national jurisdiction could also be required to register as such with the authorities.
- Controls should apply to those individuals and entities that engage in arms brokering **activities on national territory**; controls may also be **applied extra-territorially** to the activities of nationals and permanent residents abroad.
- Arms brokering transactions should be **assessed according to the same criteria** that are applied in the consideration of arms export licence applications.
- **Outright prohibition of arms brokering** should be enforced in relation to specific arms brokering activities e.g. in respect of transfers that would contribute to violations of international law or in relation to specific categories of arms e.g. landmines and cluster munitions.
- Arms brokers should be required to keep **records of their activities** and allow inspection of these by relevant authorities; they could also be required to **provide an annual report** of the activities to their national authority.
- **States should keep records** of all arms brokering activities that take place within their jurisdiction and should compile this information in a national report which is **shared with national stake-holders and partner governments**.
- States should adopt **civil and criminal penalties** for violations of national laws and regulations regarding arms brokering controls.

In overall terms, States will need to establish a framework for national arms brokering controls that is based on one of three broad approaches:

Option 1: A prohibition-based system

While this could take the form of outright prohibition, with no exemptions, it is unlikely that this would necessarily serve a State's national interest. As noted above, arms brokering can be a legal and legitimate activity. In particular for those States that are infrequent purchasers of arms and therefore do not necessarily have much in-house expertise, arms brokering agents can potentially be the most efficient way for a government to source arms to equip its own military and law enforcement agencies. An outright prohibition on arms brokering could thus potentially harm the procurement interests of a State. Alternatively, States can adopt a prohibition with certain exemptions, for example for State-owned entities or for brokering activities that are part of an official national procurement exercise. A third option, to prohibit arms brokering but then to allow activities to take place on the basis of specific authorisations essentially falls under the licensing/ authorisation approach, below. Whatever the approach, a key consideration is to ensure that the exact nature of the prohibition – including the legal definition of arms brokering – is clearly articulated in legislation; failure to specify what activities, where and by whom are prohibited leaves loopholes that risk being exploited by unscrupulous individuals.

Option 2: Registration

A number of States – including Australia, South Africa, Sweden and the United States – already impose a registration requirement upon arms brokers. Registration can be employed on its own as a means of vetting an individual or enterprise before granting (or otherwise) a permit to engage in arms brokering activities. It can also be coupled with a case-by-case authorisation system (see below) or a prohibition-based system (see above). In terms of adhering to their obligations under the ATT, States would be well advised not to adopt registration as the only means of regulating arms brokering. Giving arms brokers a licence to conduct whatever arms deals they wish presents the risk that some, at least, will engage in irresponsible and/or illicit transfers that fuel conflict and human rights crises. Moreover, the provisions of ATT Article 6 oblige States Parties to have the possibility to scrutinise and prevent individual arms brokering transactions taking place within their jurisdiction where they would be used in the commission of genocide, crimes against humanity or war crimes. This purpose would not be served by establishing a registration requirement as the only means of controlling arms brokering.

However, when coupled with a licensing system registration of arms brokers can serve several important regulatory functions. For example, a register of arms brokers can constitute a vital information resource for government authorities by requiring those individuals and companies that engage in arms brokering activities (as defined in national legislation) to declare their interest in this area and to disclose important information such as the identity and location of company directors and their beneficial owners. Moreover, if made available to parliaments and the public, a register of arms brokers can also introduce much needed transparency into an aspect of international trade that is often shrouded in secrecy.

To be fully effective, however, a registration system should incorporate a 'fit and proper person' test whereby anyone with a conviction for a serious criminal offence – including breaches of arms transfer control legislation, fraud and trafficking offences – would be unable to register and subsequently to engage legally in arms brokering activities.

Option 3: A licensing or authorisation regime

A licensing or authorisation system – whereby arms brokering agents are required to apply for authorisation before undertaking specific brokering activities – has been adopted by most of the States that currently operate arms brokering controls. In the process of applying for such authorisation arms brokers are required to provide certain information about the nature of the equipment to be transferred as well as details of the exporter, importer and final end-user. This allows the host State to carry out a risk assessment similar to that undertaken in advance of authorising (or otherwise) arms exports. While many States will claim to operate a ‘case-by-case’ licensing system, this does not mean that each potential transaction is scrutinised. Rather, some States also allow the use of General or Global Licences whereby certain brokering transactions (for example, involving the transfer of certain types of arms/equipment from a set of ‘low risk’ exporters to a set of ‘low risk’ importers) can take place without the need for individual authorisation providing the various conditions stipulated in the General or Global Licences are met.

As such, an arms brokering licensing system enables a flexible and responsive approach to regulation in this area – allowing legitimate activities to go ahead while halting those that are seen to be undesirable or inimical to a State’s values or interests.

While States may fear that a licensing system would impose a significant administrative burden upon States, for most States this would be unlikely. Indeed, the establishment of a licensing system might have the effect of reducing the number of arms brokering agents operating on national territory; it would also help reassure authorities that those arms brokers that are operating are doing so within the law. The establishment and implementation of extra-territorial controls would potentially place a greater burden of enforcement upon State agencies; however the application of controls to arms brokering activities (negotiation, intermediation, buying and selling) taking place within national territory should fit alongside existing national export controls and therefore avoid the need for any great increase in resources.

While most of the options outlined above would enable States to meet their obligations under the ATT, it should be noted that in the absence of any national legislation and regulations to control arms brokering, few States will have a clear idea of the scale of the problem that they are likely to be faced with. However, experience suggests that it would be unwise for States to believe that they do not have any problems relating to the activities of irresponsible arms brokering before they have introduced measures for control. For example, in the UK during the late 1990s, before a decision was taken to adopt a licensing system to regulate arms brokers, the government at the time was initially very sceptical of the need to adopt brokering controls and contested the likelihood of the UK having much, if anything, of a problem to address. Nevertheless, in 2004, the UK began to implement a licensing system for arms brokering (trade) control, and in 2013 issued a total of 150 brokering licences.⁹ It is very unlikely, however, that many States would face a regulatory burden on the scale of the UK which, in 2013, issued by far the greatest number of arms brokering licences of any EU Member State. In the same year, for example, Austria issued two such licences, Bulgaria issued four and Germany issued 27.¹⁰ The scale of UK brokering licences can also be kept in perspective by noting that during the same period the UK issued over 14,000 licences for arms exports, or over 90 export licences for every brokering licence.¹¹

⁹ Department for Business, Innovation & Skills (2014), ‘Strategic export controls: licensing statistics, 2013’, 31 January (updated 20 October 2015) (<https://www.gov.uk/government/statistics/strategic-export-controls-licensing-data-report-2013>)

¹⁰ Sixteenth Annual Report according to Article 8 (2) of the Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment, 27 March 2015 (<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2015:103:FULL&from=EN>).

¹¹ Strategic export controls: licensing statistics, 2013, *ibid.*

Enabling enforcement

Notwithstanding the above discussion, probably the biggest challenge facing States, including those that have already established arms brokering regulations, is to ensure that the controls are effective. This will require the capacity – in terms of resources and expertise – and the political will to enforce controls in a meaningful way. Crucially, the international nature of arms brokering controls means that co-operation and sharing information among States will be vital to ensuring effective enforcement. Important information relating to arms brokers can be gathered by States through a registration process, by establishing a reporting requirement for arms brokers and/or through a licensing system.

Given that only a relatively small number of States possess sophisticated intelligence services with a global reach, for most States the exchange of information on illicit arms brokering activities and the actors involved could significantly enhance their potential to implement national arms brokering controls. At present there are few international mechanisms that allow for information exchange on arms brokers and their activities, however the ATT presents an opportunity to address this situation. States Parties to the ATT should press for the establishment of a mechanism whereby information can be shared concerning efforts that have been undertaken to identify, trace and prosecute individuals and entities that have engaged in illegal arms brokering activities. Such a mechanism would particularly benefit ATT States Parties that are not members of (m)any international non-proliferation regimes and who are likely to find themselves at a disadvantage in terms of taking informed decisions on how to identify and address illicit arms brokering.

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Conclusion

The ATT is clear that each and every State Party must regulate arms brokering that takes place under its jurisdiction. This must, at a minimum include the power to prohibit transfers that would contravene other international obligations, including those articulated by the ATT. In addition to observing and implementing UN arms embargoes, a State Party's brokering controls must allow it to fulfil its obligation under Article 6 not to authorise brokering where the State Party knows that the items for transfer would be used in the commission of genocide, crimes against humanity, or war crimes. Yet the Treaty does not specify the form that brokering regulation should take beyond noting that it may include requiring brokers to register or obtain written authorisation before engaging in arms brokering.

For States with limited involvement in the international arms trade, developing, establishing, implementing and enforcing controls on arms brokering may appear to present a significant challenge. Where States have limited experience in arms export, import or transit/transshipment licensing there may be little in the way of arms transfer control legislation upon which arms brokering regulations could be built.

Nevertheless, there is a significant amount of guidance available through a variety of regional and multilateral agreements relating to the control of arms brokering and a substantial body of practical experience at national level that States can draw upon when devising their own systems. Two key lessons to draw from this guidance and experience are that:

1. The most *effective* way to regulate arms brokering (so as to fulfil the stated object and purpose of the ATT) is to require arms brokers to obtain prior written authorisation before engaging in brokering activities, i.e. to licence individual brokered transactions;
2. The most *efficient*, simple and logical way for States to regulate arms brokering is to integrate this as fully as possible into their general system of arms export control – applying, wherever possible, the same control list, licensing application mechanisms, licensing assessment process and the same enforcement mechanisms; this represents a more logical and efficient option than establishing and operating separate systems and rules for arms brokering control.

States Parties should also keep in mind the significant potential that exists to engage support from, and co-operation with, other States across all aspects of arms brokering control. This may include the provision of advice, technical assistance, capacity building, information-sharing, and mutual legal assistance. This is the case not only with regard to establishing and strengthening regulations, institutions and mechanisms, but also to the implementation and enforcement of national controls. Third-country arms brokering by its very nature involves multiple jurisdictions; it is therefore in the interests of all those States that support the object and purpose of the ATT to work together to ensure that arms brokering is brought under meaningful control.

All States Parties are therefore encouraged to treat the control of arms brokering as an integral component of a comprehensive national arms transfer control system, and to use the opportunities afforded by the agreement of the ATT to put the necessary national regulatory measures in place.

ANNEX

An overview of the key elements of selected multilateral approaches to the issue of arms brokering regulation

The UN Group of Governmental Experts

While there is, as yet, no universally accepted definition of what is an ‘arms broker’ or ‘arms brokering’, the 2007 Report of the UN Group of Governmental Experts (GGE) on illicit small arms and light weapons (SALW) brokering¹² does provide descriptions that could, in effect, serve the same purpose:

*A broker in [small] arms [and light weapons] (parentheses added) can be described as a person or entity acting as an intermediary that brings together relevant parties and arranges or facilitates a potential transaction of [small] arms [and light weapons] in return for some form of benefit, whether financial or otherwise.*¹³

The Report then goes on to elaborate on the types of activities that an arms broker could undertake:

- f) Serve as a finder of business opportunities to one or more parties;
- g) Put relevant parties in contact;
- h) Assist parties in proposing, arranging or facilitating agreements or possible contracts between them;
- i) Assist parties in obtaining the necessary documentation;
- j) Assist parties in arranging the necessary payments.¹⁴

While it was disappointing that the GGE could not produce a more definitive outcome, the pressure was relieved by the developing prospect, in 2007, of a UN-negotiated Arms Trade Treaty which would provide a further opportunity to develop a response to the lack of arms brokering regulation.

The Wassenaar Arrangement (WA)

In 2003 The Wassenaar Arrangement (WA) on Export Controls for Conventional Arms and Dual-Use Goods and Technologies agreed ‘Elements for Effective Legislation on Arms Brokering’.¹⁵ These require Participating States to introduce and implement adequate laws and regulations to control brokering of conventional arms consistent with other relevant documents and agreements concluded by the WA and include the following:

- Brokering activities are described as those involving negotiating or arranging contracts, selling, trading or arranging the transfer of arms and related military equipment from one third country to another.
- Brokers undertaking relevant activities within a Participating State should obtain a licence or written approval from the competent authorities of that State.

In addition Participating States may:

- Claim jurisdiction over citizens, residents or other persons;
- Impose a licence requirement irrespective of where the brokering activities take place;
- Limit the number of brokers that are permitted to operate.

Participating States are also urged to keep records of individuals and companies that have received a licence for arms brokering activities and may, if they wish, establish a register of brokers. Criminal and other penalties should be implemented so as to ensure enforcement of controls. Finally, the WA ‘Elements’ require that Participating States exchange information on arms brokering activities, that they also assist others in establishing national controls.

¹² Report of the Group of Governmental Experts established pursuant to General Assembly resolution 60/81 to consider further steps to enhance international cooperation in preventing, combating and eradicating illicit brokering in small arms and light weapons (www.poa-iss.org/BrokeringControls/English_N0744232.pdf)

¹³ *Ibid*, paragraph 8.

¹⁴ *Ibid*, paragraph 9.

¹⁵ See www.wassenaar.org/guidelines/docs/Elts_for_effective_legislation_on_arms_brokering.pdf

The European Union (EU)

In 2003, the EU Member States agreed a Common Position on Arms Brokering which binds all Member States and which establishes minimum standards for national controls.¹⁶

The **definition** of arms brokering within the EU Common Position goes beyond the description contained in the 2007 UN GGE Report (see above) and includes persons and entities:

- *negotiating or arranging transactions that may involve the transfer of items on the EU Common List of military equipment from a third country to any other third country; or*
- *who buy, sell or arrange the transfer of such items that are in their ownership from a third country to any other third country.*

In addition to regulating third-country brokering, the Common Position allows Member States to include cases where arms are exported from their territory or from that of another Member State.

The **key operational aspects** of the Common Position require Member States to:

- Impose a licensing requirement upon brokering activities that take place on their territory; they may also impose a licensing requirement where arms brokering activities are carried out by nationals and residents operating overseas.
- Require arms brokers to obtain written authorisation before engaging in any controlled activities.
- Assess licences against the criteria of the EU Common Position on Arms Exports.¹⁷

In addition Member States may establish a register of arms brokers as long as this does not interfere with the obligation to impose a licensing requirement upon each individual transaction.¹⁸

Economic Community of West African States (ECOWAS)

The 2006 ECOWAS Convention on Small Arms and Light Weapons, Their Ammunition and Other Related Materials is a comprehensive instrument dealing inter alia with the manufacture, ownership, possession, security, marking, tracing, brokering and transfer of small arms, light weapons, ammunition and related materials.¹⁹

The term brokering is **defined** comprehensively in the ECOWAS Convention as:

[w]ork carried out as an intermediary between any manufacturer, supplier or distributor of small arms and light weapons and any buyer or user; this includes the provision of financial support and the transportation of small arms and light weapons.

This definition thus addresses the 'core' aspects of arms brokering, namely the mediation function that many brokers perform, and also extends to explicitly include involvement in financial aspects of SALW transfers as well as their physical movement. However, the exact scope of the SALW brokering controls – whether it applies to transfers between third countries and/or those that originate in the Member States' national territory – is left to national discretion.

The **operational** provisions of the ECOWAS Convention require that Member States:

- Establish a registration requirement for citizens and companies incorporated in their territory that are engaged in SALW brokering (including those involved in financial and transportation aspects).
- Ensure that all those registered apply for 'an explicit authorisation' for each transaction and provide full disclosure of relevant documentation (including the names and locations of all brokers and shipping agents involved and the transit route to be taken by a shipment).
- Assess brokering activities according to the criteria elaborated in Articles 1 and 6 of the Convention (which include transfer criteria).
- Establish legislation to criminalise and sanction illicit arms brokering.

While the Convention does not specifically apply to third-country arms brokering it does require that all arms brokers should seek authorisation for individual transactions 'irrespective

¹⁶ See <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003E0468&from=EN>

¹⁷ See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:335:0099:0103:EN:PDF>

¹⁸ By the last quarter of 2013 all but two EU Member States (Italy and Luxembourg) had adopted controls on third country arms brokering as required by the EU Common Position. For an in-depth analysis of EU Member States Implementation of the EU Common Position on Arms Brokering see Kloe Tricot O'Farrel, *Arms Brokering Controls: How are they implemented in the EU*, GRIP, August 2013 (www.grip.org/sites/grip.org/files/RAPPORTS/2013/Rapport_2013-2_EN.pdf)

¹⁹ See www.poa-iss.org/RegionalOrganizations/ECOWAS/ECOWAS%20Convention%202006.pdf

of where the arrangements take place'. This suggests that Member States should include an element of extra-territoriality in their national controls.

Inter-American Drug Abuse Control Commission (CICAD)²⁰

In 2003 CICAD issued an amendment to the Model Regulation for the Control of the International movement of Firearms, their Parts and Components and Ammunition latter in the form of 'Broker Regulations'.²¹

The CICAD Broker Regulations provide a **definition** of 'broker' and 'brokering activities' as follows:

- "Broker" or "Arms Broker" means any natural or legal person who, in return for a fee, commission or other consideration, acts on behalf of others to negotiate or arrange contracts, purchases, sales or other means of transfer of firearms, their parts or components or ammunition.
- "Brokering activities" means acting as a broker and includes, manufacturing, exporting, importing, financing, mediating, purchasing, selling, transferring, transporting, freight-forwarding, supplying, and delivering firearms, their parts or components or ammunition or any other act performed by a person, that lies outside the scope of his regular business activities and that directly facilitates the brokering activities.

With regard to the operational provisions, those that are to be applied by all Member States include *inter alia*:

- Establishment of a licensing system for prior authorisation of brokering activities.
- The possibility for States to prohibit brokering in particular categories of firearms.
- Prohibition on the issuing of a licence for brokering activities that would lead to the violation of a UN Security Council arms embargo or other multilateral sanctions.
- Exemptions for brokering by or for an agency of the national authorities.
- Prohibition on the issuing of a licence that would fuel breaches of international human rights law or international humanitarian law, terrorism or crime or which would violate non-proliferation agreements.
- The establishment of offences in relation to arms brokering regulations.

The scope of the CICAD Broker Regulations apply to the activities of brokers whether they take place on national territory or elsewhere and irrespective of whether or not the firearms, parts, components or ammunition enter the territorial jurisdiction of the State in question. The registration of brokers is left to national discretion, however, for those States seeking to establish such a requirement a detailed set of guidelines are provided.

Finally, the CICAD Broker Regulations also require firearms brokers to provide an annual report on their activities to their competent authority and to allow inspection of their records.

Organisation for Security and Co-operation in Europe (OSCE)

The 2003 OSCE Best Practice Guide (BPG) on National Control of Brokering Activities²² sets out a description of what could be considered as core brokering activities focussing on the concept of 'third country' arms brokering as follows:

- Acquisition of SALW located in one third country for the purpose of transfer to another third country;
- Mediation between sellers and buyers of SALW to facilitate the transfer of these arms from one third country to another;
- The indication of an opportunity for such a transaction to the seller or buyer (in particular the introduction of a seller or buyer in return for a fee or other consideration).

Further, the OSCE BPG **defines** the term 'broker' as:

The natural person or legal entity that carries out a brokering activity. A broker is anyone who directly performs an activity defined as a brokering activity in the exercise of his own commercial or legal relations. The acts of natural persons, especially employees, are to be ascribed to the legal entity.

²⁰ CICAD was established by the General Assembly of the Organization of American States (OAS) in 1986 primarily as an institutional response to the growing drug problem in the Americas. In practice, however, it has addressed issues in related fields beyond that of drug control and has developed model regulations *inter alia* in relation to money laundering and the movement of firearms.

²¹ See www.oas.org/juridico/english/cicad_brokers.pdf

²² See www.osce.org/fsc/13616?download=true

While those providing support services in the financial, freight transportation, insurance or advertising services are not classed as brokers per se, the OSCE BPG acknowledges that some countries do regulate these activities when associated with the transfer of arms.

In respect of the **operational** provisions advanced in the OSCE BPG it is noted that regulation of arms brokers can be implemented on the basis of:

- A system that is prohibition-based – where brokering is either prohibited entirely or prohibited with one or two specified exemptions (e.g. for the operation of a State-controlled enterprise);
- A system that is licensing-based – where brokering activities are not prohibited but can only legally be undertaken on the basis of government authorisation; or
- A dual system where brokering is prohibited but exceptions to this prohibition are issued by way of a licensing system.

The BPG recommend that where a licensing system is adopted, at a minimum this should apply to all core brokering activities. In addition, a licence should be required, in advance, for each brokering activity and each transaction should be assessed according to criteria such as those set out in the OSCE Document on SALW.

In terms of **scope**, the BPG advocate that licensing controls apply to all covered activities taking place anywhere on a State's territory, whether or not the company concerned is registered or the individuals involved are nationals or residents of the State. However, the possibility is recognised that even these controls may still be circumvented by nationals or residents of a State conducting arms brokering business entirely overseas. Thus, where a State has the potential and the capability to implement extra-territorial controls it is recommended that these apply to the relevant activities of all nationals and permanent residents wherever they take place.

The BPG also advocates comprehensive record-keeping on the part of all States in relation to their licensing of arms brokering activities together with the production of an annual report which can be shared with domestic stakeholders and international partners. The possibility is also raised of States establishing a registration requirement for entities that engage in arms brokering in addition to a licensing requirement.

Finally, the BPG also stress the need for States to enforce their national controls on arms brokering by means of effective criminal, civil or administrative penalties based on the application a graduated system of fines, custodial sentences and the seizure of assets accrued through illicit activity.

Saferworld

Saferworld is an independent international organisation working to prevent violent conflict and build safer lives. We work with local people affected by conflict to improve their safety and sense of security, and conduct wider research and analysis. We use this evidence and learning to improve local, national and international policies and practices that can help build lasting peace. Our priority is people – we believe in a world where everyone can lead peaceful, fulfilling lives, free from fear and insecurity.

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The Expert Group on ATT Implementation

The Expert Group on ATT Implementation (EGAI) is convened by Saferworld. Its purpose is to help develop common understandings among government and civil society experts from all world regions on issues relevant to ATT implementation, with a view to promoting progressive interpretation of the Treaty's provisions and the development of a robust ATT regime.

As of November 2015 the EGAI has met on five occasions – in London, November 2013; Stockholm, May 2014; Berlin, July 2014; San José, Costa Rica, March 2015; and Accra, November 2015. This briefing is based upon discussions on the subject of arms brokering that took place at these meetings. The views and ideas expressed herein should not be taken as reflecting the official view of those States or individual experts that have participated in this process.

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