Many paramilitary fighters in Colombia's mountains have received weapons through complex deals arranged by specialized arms brokers.
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Targeting the Middlemen:
CONTROLLING BROKERING ACTIVITIES

5

INTRODUCTION

On 5 November 2001, a Panama-registered ship, the *Otterloo*, offloaded 14 containers with 3,117 AK-47s and 5 million rounds of ammunition in the port of Turbo in Colombia. The weapons, which were previously owned by the Nicaraguan armed forces, reached the armed group Autodefensas Unidas de Colombia (AUC), for which they were intended (OAS, 2003b). The complex deal at the origins of this weapon transfer had been organized by an Israeli broker, Shimon Yelinek, and his associate, Marco Shrem, who both declared themselves brokers for the Panamanian National Police (PNP). Yelinek had bought the weapons under a false purchase order from the PNP; he then had been instrumental in arranging their transportation to the AUC. Yelinek called off a second order when word leaked out of a joint investigation by Panama, Colombia, and Nicaragua into the weapon purchase. He was arrested in Panama in November 2002 (OAS, 2003b). In August 2003, a Panamanian first-instance criminal court dismissed the charges against Yelinek on grounds of lack of jurisdiction, given that the weapons had been loaded in Nicaragua and delivered in Colombia. The court's decision was appealed by the Panama Fiscalia de Drogas, which took over the investigation (*El Panamá América*, 2003).[1]

As shown by this example, brokers and their activities are central in the illicit small arms trade, even if their role and functions, while new neither to the international sphere nor to the arms business, have remained relatively unnoticed for decades. This has changed in recent years, during which policy agendas and research conducted by various governmental and non-governmental institutions have increasingly focused on the issue of illicit brokering activities.

This research has developed in parallel with, and sometimes as a consequence of, increased concern expressed in international, regional, and national forums about the role of brokers in illicit transfers of small arms and light weapons. During the 2001 *United Nations Conference on the Illicit Trade of Small Arms and Light Weapons in All Its Aspects* (2001 UN Small Arms Conference), for example, 79 states mentioned the issue of illicit brokering in their opening statements.[2] These countries stressed that efforts to tackle the illicit small arms trade could not neglect the role played by brokers, and called for some form of regulation in this area. Some countries spoke of 'standards', while others advocated 'strict regulation' and, in a few cases, 'legally binding instruments' (Small Arms Survey, 2003, p. 231).

Existing research has highlighted how the ways in which brokers typically carry out illicit deals are grounded in a series of regulatory gaps that are present at both national and international levels. This chapter complements this research by analysing the attempts by individual states and regional and international organizations to prevent illicit arms brokering. It particularly focuses on countries that have established national regulations on brokering, and compares these regulations to identify differences and potential loopholes. Finally, the chapter assesses whether such national regulations are effective in controlling illicit arms brokering.

The main findings of this chapter are as follows:

- Brokers acting illicitly play a key role in diverting weapons to illicit destinations.
- Controls on legal and illicit brokering are closely linked: unless states regulate the former, they will be unable to prevent the latter.
- Activities on the issue of small arms brokering, promoted by states at both national and international levels, rely primarily on national capacities for adopting and implementing brokering controls.
- At the national level, only 25 states have explicit regulations on brokering. These differ widely, creating potential loopholes and the possibility of circumvention.
- Even in countries that have enacted relevant legislation, effective implementation of brokering controls presents a number of challenges.
- International cooperation is critical in preventing illicit brokering activities.

The first section of the chapter briefly describes brokers' activities and their modus operandi, thus identifying the regulatory gaps that allow illicit brokering to take place almost undisturbed; the second analyses the initiatives to control brokering that have been developed at the international, regional, and national levels; finally, the third section assesses the effectiveness of existing national controls on brokers. While the focus of this chapter is on brokering of small arms transfers, it should be noted that brokering is rarely restricted to small arms and light weapons, and often involves other arms technologies, including major weapon systems.

MAKING ILLICIT BROKERING POSSIBLE

In order to grasp the full significance of the role of brokers in arms transfers, a broad definition of the term is necessary (see Box 5.1). The *Small Arms Survey 2001* identified seven main services offered by brokers (Small Arms Survey, 2001, p. 100). These can be broadly divided into 'core' services—mediation in negotiations of weapon deals—and 'associated' brokering activities—transportation, financing, insurance, and technical assistance services. Brokers may facilitate one or more aspects of a weapon deal, from the identification of the weapons' sources to their delivery to the final recipient. Thanks to their expertise and contacts, especially in an increasingly large and complex global economic system, brokers have become an important resource for states and private companies involved in legal weapon transfers. In this sense, brokering cannot be considered an illicit activity *per se*. However, prominent cases revealed in recent years clearly point to brokers as key actors in carrying out illicit arms deals.

Brokers are key actors in illicit small arms deals.

A number of UN Panels found that brokers were instrumental in the diversion of weapons to embargoed countries such as Angola, Liberia, Sierra Leone, Somalia, and Rwanda. Other research has also stressed the role of brokers in transferring weapons to zones of conflict, such as Sri Lanka and the Democratic Republic of Congo (DRC). While arguably not in violation of international law when an arms embargo has not been imposed, arms transfers to zones of conflict violate many national regulations on arms exports, and may contradict states' obligations under international human rights and humanitarian law.

Box 5.1 Defining brokering activities

As an activity that is essentially intangible as well as encompassing diverse types of operations, brokering is hard to define in detail. Wood and Peleman (2000, p. 129) define brokers as 'middlemen who organize arms transfers between two or more parties. Essentially, they bring together buyers, sellers, transporters, financiers and insurers to make a deal'. While describing brokers' activities in a comprehensive and exhaustive way, such a definition would not serve the purpose of regulatory instruments, which aim to identify what clearly falls within their scope of control. This tension between the need for comprehensiveness and for precision is reflected at the international level where, even if some proposals have been made, no definition of 'brokering activities' has yet been agreed.

A study conducted by the UN Group of Governmental Experts on the 'feasibility of restricting the manufacture and trade of small arms to the manufacturers and dealers authorized by States' (UN, 2001), which was presented during the 2001 UN Small Arms Conference, proposed distinctions between dealers, agents, brokers, and transportation agents in an attempt to capture the various types of brokering activities. While straightforward in theory, such distinctions prove difficult to frame in practice, since the boundaries between the four categories are often blurred. At the opposite extreme, the Model Regulations of the Organization of American States (OAS) define a large spectrum of activities as brokering, which range from manufacture to delivery of arms, and include 'exporting, importing, financing, mediating, purchasing, selling, transferring, transporting, freight-forwarding' (OAS, 2003a, art. 1). Broad definitions are also contained in the *EU Common Position on the Control of Arms Brokering* (EU, 2003) and in the *Protocol on the Control of Firearms, Ammunition and Other Related Materials in the Southern African Development Community (SADC) Region* (SADC, 2001).

At the national level, a few countries provide an explicit definition of brokering activities. This is the case, among others, with Belgium, France, Slovakia, South Africa, Switzerland, Ukraine, and the United States.[3] Among these, the definition established in the South African legislation is both comprehensive and specific, and might offer a good legal basis for the scope of brokering controls. In the National Conventional Arms Control Act, brokering services are defined as:

(a) acting as an agent in negotiating or arranging a contract, purchase, sale or transfer of conventional arms for a commission, advantage or cause, whether financially or otherwise;
(b) 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;
(c) 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 conventional arms; and
(d) acting as intermediary between any manufacturer or supplier of conventional arms, or provider of services, and any buyer or recipient thereof (South Africa, 2002, Preamble, 1.i).

The South African definition is broad enough to include the core activity of mediation and the arrangement of associated activities like transportation and financing. It does not limit the scope of controlled activities to those that facilitate transfers only between third countries. It recognizes that non-financial forms of payment can be made in exchange for brokering services. Finally, it is generic enough to include both those cases in which brokers directly possess the weapons they sell and those (the majority) in which they do not.

Illicit brokering presents a number of common features that highlight loopholes—regulatory gaps or inadequacies of existing controls—that make it possible.

Regulatory gaps and inadequate control mechanisms make illicit brokering possible.

Unregulated activities. In many cases, brokers do not acquire ownership of the weapons they sell. An important consequence of this is that brokers' activities, which are more intangible than those of importers and exporters, are rarely defined as a specific category under national arms export laws. They are, therefore, typically unregulated (Wood and Peleman, 2000, p. 129).

Lax control on weapon stocks. Various cases show that existing surplus or second-hand weapon stocks are valuable sources of supply for brokers acting illicitly. This is possible because the life cycle of small arms is notoriously long, and weapons that are considered old or unserviceable in some countries can nevertheless serve the purposes

of other countries engaged in conflict. As pointed out by a number of UN Panels' reports, weapons originating from existing government stocks, mainly but not exclusively from Eastern European countries, have found their way to African countries under embargo (UNSC, 2000a, para. 41; 2000b, paras 35–6). Lax controls on weapon stockpiles and government surplus weapons are then a primary loophole that brokers acting illicitly exploit.

Third-party brokering. In many instances so-called third party brokering takes place: deals are arranged without the weapons entering the territory in which the intermediary activity occurs. Often, in fact, brokers do not reside in the weapons' country of origin, nor do they live in the countries that the weapons pass through or ultimately arrive in (Clegg and Crowley, n.d., p. 5). This creates various monitoring and enforcement difficulties; many countries have problems enforcing their regulations outside their territories. More importantly, even some countries that have brokering regulations cannot apply them if the weapons traded do not cross the national territory.

Offshore financing. Brokers frequently establish their illicit activities in tax havens and countries with lax export or transit controls. From the point of view of financing illicit arms deals, the need to conceal payment trails and to launder money puts a premium on tax havens, offshore banks, and countries with strong bank secrecy systems. Financial tax havens are favourite choices of brokers acting illegally because of their strong confidentiality practices with money transactions, lax regulation, and lack of income tax, among other reasons (Small Arms Survey, 2001, p. 104). Offshore banks are attractive because they are exempt from the host country's rules relating to interest rates, capital adequacy, and liquidity. Offshore banks are often used to split the main transaction into a set of multiple payments between banks with lax controls or protected by secrecy, usually in the name of shell companies (Naylor, 2000, pp. 166–7).

Easily circumvented documentation requirements. Successful brokers have great expertise in obtaining the necessary official documentation, whether through forgery or by exploiting the negligence or active complicity of state officials. This is true particularly of end-user certificates (EUCs) without which, in principle, states would not authorize an arms export. For example, the Panel of Experts appointed by the UN Security Council (UNSC) to conduct a follow-up assessment on Liberia's compliance with the arms embargo of 2001[4] documented weapons sales to the country on the basis of a false Nigerian EUC (UNSC, 2003a, para. 69). The weapons, which included automatic rifles, automatic pistols, missile launchers, machine guns, pistols, and various types of ammunition, were delivered from Belgrade in six shipments from June to August 2002. These shipments were brokered by a Belgrade-based company, Temex, and the weapons were delivered by a Moldovan company, Aerocom, and by the Belgian affiliate of Ducor World Airlines (UNSC, 2003a, para. 70). During the investigation, Serbian authorities confirmed that all the weapons had been manufactured by a Serbian company, Zastava, between 2001 and 2002, and that the serial numbers found by the Panel corresponded with those of the weapons that Temex declared were destined for the Nigerian Ministry of Defence (para. 72). The Nigerian Ministry of Foreign Affairs, in an official letter transmitted to the Government of Serbia and Montenegro through its embassy in Lagos, stressed that the EUCs used for this deal were false documents (para. 72).

Ease of transport. Transportation is also a key aspect of brokering activities, and one that easily exploits difficulties of enforcement and monitoring. While the choice among transportation modes—by land, sea, or air (see Box 5.2)—depends on a number of factors, including the size of the weapons transferred and the geography of destinations, a number of tactics are commonly used by transport agents.

Box 5.2 Transporting weapons by air

Air freight is a popular mode of transport for illicit weapon deliveries, particularly small arms and light weapons. It is fast, and speed in delivery and turn-around may reduce the chances of detection (UNSC, 2003a, para. 104). Arms brokers looking to move their cargo by air often turn to *ad hoc* charter airlines, companies that will let their planes, or the cargo space on them, to the highest bidders. Much of the air charter industry consists of small companies that operate only one or a handful of aircraft that are usually old. It is most often the smaller cargo companies that operate to and in countries with weak law enforcement capacities, especially if these countries are politically unstable.

With an increasing number of older aircraft like the DC-8 and Boeing 707 coming onto the market, cargo planes have become relatively inexpensive, which in part explains the explosion in the number of small private companies willing to fly just about anything to just about anywhere. As a result of fierce competition, profits on regular flights tend to be marginal, and many of the smaller charter companies are struggling financially. Some are therefore hard-put to resist lucrative contracts, like those involving weapons and ammunition. According to industry sources, few charter companies have not been engaged, at one time or another, in arms shipments. However, some companies appear more willing than others to ship weapons to governments or non-state actors involved in armed conflict even if this violates an arms embargo.[5]

Because transporting arms can be very profitable, companies that do fly weapons are able to substantially underbid other companies for contracts carrying regular commercial cargo on the return flight. This means that airlines that refuse to fly weapons lose valuable general freight business. This then creates a vicious circle that drives some airlines that previously refused to ferry weapons to reconsider their opposition to the arms trade, as a way to keep their airlines in business. A UN Panel of Experts recognized this situation, stating: 'Operators can find themselves in a position where taking certain risks could well be one of only a few options available in order to stay afloat economically' (UNSC, 2000c, para. 116).

Source: Hogendoorn and Misol (2003)

Illicit arms deliveries to the final recipients are commonly broken into numerous shorter trips that involve many sub-contractors and different companies. Such complexity is designed to make it very hard to trace the exact route, and therefore the origin, of the weapons, or to identify the individuals or companies originally responsible for the shipment (Hogendoorn and Misol, 2003; Wood and Peleman, 2000).

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Cover blown: Italian customs police find weapons in a truck whose manifest said it contained humanitarian aid for Kosovo refugees in April 1999.

Also, transport agents typically disguise the content of the goods they deliver. Arms have been described as a host of other innocuous goods, such as food, clothing, agricultural equipment, tents (Wood and Peleman, 2000, p. 140), technical equipment, or metalwork. In August 2003, for example, the UN Panel of Experts investigating the embargo violations in Liberia reported the offloading of cargo from a 'suspected arms flight' from Iran to Guinea. The cargo contained green boxes with green ropes that soldiers loaded onto military trucks. The cargo manifest indicated that 'detergent' material was contained in the boxes. The Panel's suspicions were confirmed by an oral testimony, according to which ammunition was in the cargo, which was forwarded to Liberia (UNSC, 2003b, para. 4; HRW, 2003).

Other tactics used by transport agents include diversion from authorized routes, with 'emergency stops' that are used to load cargo different from that declared in the accompanying documentation or to offload concealed weapons to other means of transportation; the filing of false flight plans (Small Arms Survey, 2001, p. 113; Wood and Peleman, 2000, p. 141); and the establishment of companies in countries with lax regulations, as is the case with the so-called 'flags of convenience' (FOCs) (see Box. 5.3).

Box 5.3 Flags of convenience

A major tactic used by brokers to transport weapons illicitly is through the establishment of business companies in countries that provide 'flags of convenience' (FOCs). Companies that own aircraft and ships are required to register these vessels with the relevant authorities of a national government, this giving each vessel the nationality of its country of registration and placing it under the legal jurisdiction of that country. Some countries serve as FOCs, offering easy registration, even to companies that have no ownership or operational link to the flag country. FOCs are popular because they are cheaper, impose fewer taxes, and offer maximum discretion and lack of transparency with minimal regulatory interference (ITF, 2003).[6] Many FOCs have shown themselves to be unable or unwilling to monitor and enforce companies' compliance with international rules and standards, and so attract arms traffickers seeking to register their transport companies with them (Vines, 2002). When arms-related scandals force one registry to clean up or close, as has happened with Liberia's civil aviation registry[7] and the maritime registry of Tonga,[8] another FOC stands ready to lend its flag. As noted by UN investigators, it takes 'only a matter of hours' for a company to register in another country (UNSC, 2000c, para. 144).[9]

Source: Hogendoorn and Misol (2003)

Israeli Defence Force labels identify assault rifles, ammunition clips, and mortar equipment on the deck of the Karine-A, seized in the Red Sea in January 2002 with 50 tonnes of mainly Iranian-supplied weapons and explosives for the Palestinian Authority.

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Transport agents exploit the difficulties in enforcing customs controls, particularly in countries with long borders and limited resources.

When delivering illicit cargo, transport agents exploit the difficulties in enforcing customs controls, particularly in countries with long borders and few resources. They also exploit the favourable situation created by the increasing scale of transnational commercial activities that, coupled with the lack of cooperation between customs authorities, makes systematic checks of cargoes very difficult. However, the transportation of weapons remains the most 'visible' part of an illicit arms deal and, therefore, one with great potential for monitoring. As pointed out by the UN Panel of Experts investigating violations of the embargo on UNITA, the transportation of goods creates a real 'paper trail', a long list of documents (for loading and offloading cargo, registering aircraft and ships, crossing borders, and obtaining landing permits) that, if adequately controlled, could help reconstruct and punish illicit arms transactions (UNSC, 2000a, para. 167).

The preceding description of illicit brokering activities points to a number of implications for their control:

- It is clear that controlling the activity of arms brokers is not a matter just of the existence of regulations but also of their implementation and enforcement. In this respect, and given the inherently transnational nature of illicit brokering, international cooperation is critical.
- Controls on brokers cannot be divorced from the control of weapons generally. In this sense, controls on existing stockpiles, which serve as the main source of illicitly brokered deals, acquire great importance.

- Given that diversion from legal transfers is a common practice among brokers, brokering controls should be complementary to, not a substitute for, systems of regulation governing the export, import, and transit of weapons (Mason, 2003).

GLOBAL AND REGIONAL INITIATIVES FOR THE CONTROL OF BROKERING ACTIVITIES

As knowledge about the role and characteristics of illicit brokering activities has grown, international momentum has built around initiatives to control these. A great number of international and regional processes have been initiated, all of which are still under way, aimed at preventing illicit arms brokering. At the very least, these initiatives have aimed to bring states together to discuss the nature of the issue and possible solutions. In a few instances, these processes have led to the adoption of documents setting out the measures that states should adopt to counter illicit brokering. While these processes vary greatly in scope and strength, they all rely on national controls as the primary means of regulating arms brokering activities. International momentum on the issue is undoubtedly strong.

International momentum on the issue of illicit brokering is growing.

This could be considered surprising, given that, during the 2001 UN Small Arms Conference, while some states spoke of necessary common 'standards', 'strict regulation', and, in a few cases, 'legally binding instruments' for the control of illicit brokering activities (Small Arms Survey, 2003, p. 231), the issue of brokering was dealt with in relatively diluted terms in the UN *Programme of Action* (UNGA, 2001). At the national level, states were encouraged 'to develop adequate national legislation or administrative procedures regulating the activities of those who engage in small arms and light weapons brokering'. Measures such as 'registration of brokers, licensing or authorization of brokering transactions as well as the appropriate penalties for all illicit brokering activities' were listed as suitable (UNGA, 2001, II.14). At the global level, states agreed to 'develop common understandings of the basic issues and the scope of the problems related to illicit brokering in small arms and light weapons with a view to preventing, combating and eradicating the activities of those engaged in such brokering' (UNGA, 2001, II.39).

Far from dropping off the agenda, brokering was taken up again, at the global level, during the First Biennial Meeting of States (BMS) to consider the implementation of the UN *Programme of Action*, held in New York on 7–11 July 2003. Brokering was listed as a stand-alone issue on the informal agenda for the thematic discussion circulated by the chair of the meeting. This was an important development, since it created an opportunity for targeted discussions on the problem.[10] The Chairperson's Summary, which was annexed to the BMS final report, also stated that 'it is widely accepted that progress in addressing the question of illicit brokering depends largely on the level of international cooperation, particularly in information sharing, compliance, and law enforcement' (UNGA, 2003, Annex, para. 35).

An important indication of states' priority concerns around small arms was contained in the statements that countries gave, either on their own behalf or on behalf of regional groups, during the BMS. The issue of brokering was mentioned in 19 statements,[11] representing a total of 40 countries. Some of the national statements—Colombia, Germany, Sweden, and Italy for the European Union (EU)—contained an explicit call for the adoption of a legally binding international instrument on the subject.

Almost all the states that mentioned brokering in their national statements were members either of the EU and associated countries or of the Organization of American States (OAS). This is not surprising, as it is in these two regions that measures to control the illicit brokering of small arms are the most advanced. Statements by regional

groups during the BMS confirmed that it is primarily in the EU and the OAS that control of brokering activities is regarded as necessary, as no other region has given any priority to the issue at this stage.[12]

In the EU and OAS regions, the control of illicit brokering activities is regarded as essential.

Outside the EU and the OAS, at least for the time being, developments have been absent or much slower because it is believed that illicit brokering is not a significant factor in the illicit spread of small arms. This is at odds with the findings of recent research, which have shown that brokers acting illegally have been crucial to the diversion of weapons to illicit destinations (such as embargoed countries), particularly in Africa. However, this situation might change, given that in some regions in Africa, attention is being focused on the problem of illicit brokering (see Box 5.4).

Positive influence, in this sense, might also be exerted by the latest UN General Assembly resolution on the illicit trade in small arms and light weapons, approved during the 58th session of the Assembly. In paragraph 11 of the resolution, the General Assembly requested the Secretary-General to hold broad-based consultations with all member states and interested regional and subregional organizations 'on further steps to enhance international cooperation in preventing, combating and eradicating illicit brokering in small arms and light weapons'. The Secretary-General is also requested to report to the next session of the Assembly on the results of these consultations (UNGA, 2004, para. 11).

Regional initiatives

As the issue of illicit brokering has attracted more attention within the UN Conference process, a number of other initiatives have been undertaken in some regions. Developments in the EU and the OAS have been particularly significant.

The European Union. In the EU, a *Common Position on the Control of Brokering Activities* was passed in June 2003 by the EU Council (EU, 2003). The Position, which is legally binding, established that EU Member States would enact or improve, as appropriate, national legislation to control brokering activities, and laid out the provisions that national regulations should contain, relating to, among other things, licensing, record-keeping, international exchange of information, and criminal sanctions. Some provisions, related to extraterritorial jurisdiction and registration, were indicated as optional.

Two elements of the Common Position are worth noting. First, brokering activities are defined as those of 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'. The Position leaves it optional for states to include among the controlled brokering activities those that relate to weapons originating from their own territory (art. 2.3). Second, while making control of activities that occur within one state's territory a key provision, the Position 'encourages' Member States to 'consider controlling brokering activities outside of their territory carried out by brokers of their nationality resident or established in their territory' (art. 2.1).

As a result of the Common Position, EU states that do not yet have brokering controls (Denmark, Greece, Ireland, Italy,[13] Luxemburg, Portugal, Spain, and the UK) are in the process of discussing or adopting them (Anders, 2003).

The Organization of American States. Within the OAS, *Model Regulations for the Control of Brokers of Firearms, their Parts and Components and Ammunition* were approved during the Inter-American Drug Abuse Commission (CICAD) meeting in November 2003 in Montreal (OAS, 2003a). The regulations consist of nine articles, and two annexes that are intended as guidelines for the framing of national legislation. The articles cover definitions, competent national authorities, registration, licensing, prohibitions, offences, liability of legal entities, scope of controls, and reports and inspections. The annexes reproduce models of registration and licensing application forms, thus listing the information that national authorities should obtain from interested agents in considering their request to engage in brokering activities.

These regulations define brokering activities in very broad terms, covering, among other things, financing and transporting of weapons (art. 1). Licensing systems are viewed as the minimum requirement for effective control, with registration as an option. However, it is suggested that a *de facto* register of brokers be constructed with the information collected for licence applications (art. 3). Importantly, the regulations make people convicted of related serious crimes ineligible for registration and licensing, and require national authorities to exchange information on ineligibility, debarments, and denied applicants (arts. 3.1, 3.12, 4.5). The regulations spell out a number of criteria for assessing licence applications. These include the risk that the transferred weapons could result in genocide, crimes against humanity, or human rights violations; in the violation of UN Security Council arms embargoes or other sanctions imposed by international organizations; or in diversion for illicit activities (art. 5). Finally, the regulations require that violations of the arms brokering provisions be made offences under national legislation with appropriate criminal penalties (art. 6).

The OAS Model Regulations are specifically designed to control brokering of small arms and light weapons, not of weapon systems in general. The effectiveness of this instrument, therefore, and the risk of significant legal loopholes being created, will strongly depend on how small arms are defined. Moreover, the regulations are not legally binding; it will then be up to governments to choose to incorporate them into national laws making them binding. However, the Model Regulations represent an important step in the attempt to harmonize national approaches to the control of brokers and their activities.

Promising developments have also occurred within the framework of the Wassenaar Arrangement (WA) and of the Organization for Security and Co-operation in Europe (OSCE) even if, so far, they have produced political rather than legally binding documents.

Promising developments for the control of illicit brokering have taken place within the Wassenaar Arrangement and the OSCE frameworks.

The Wassenaar Arrangement. In a document adopted during the Plenary Meeting of 12 December 2003 in Vienna, states participating in the WA agreed to 'strictly control the activities of those who engage in the brokering of conventional arms by introducing and implementing adequate laws and regulations' (WA, 2003). The document was adopted following a series of WA initiatives on export (including brokering) controls, particularly the *Statement of Understanding on Arms Brokerage* of December 2002 (WA, 2002). It lists the measures that national regulations should include 'in order to ensure a common WA policy on arms brokering', as follows:

- mandatory licensing of arms-brokering activities to be carried out in the state where these take place, if the weapons are transferred from a third country to another third country;
- record-keeping of legal and natural entities that have obtained a brokering licence;
- prescribing adequate penalties, including administrative measures, for the punishment of illicit brokering activities;
- international exchange of relevant information; and
- assistance to other member states for the establishment of effective national controls on brokering activities.

The WA document also suggests optional measures, such as the regulation of brokers even when weapons originate from the state's territory (in addition to controls on the exporter), the establishment of national registers of brokers, and the extraterritorial application of brokering controls (WA, 2003).

The Organization for Security and Co-operation in Europe. Within the OSCE, and following the Forum for Security Cooperation (FSC) Decision No 11/02 (10 July 2002), a set of eight Best Practice Guides (BPG) were approved to help states identify regulatory options for the prevention of illicit small arms transfers. The BPG on brokering identified a set of measures—some essential, some optional—that states should adopt to exercise effective control over

brokering activities, of which the most important was licensing systems. In particular, the BPG suggested that, to be effective, licensing systems should cover all 'core brokering activities' conducted on a state's territory, whether by nationals or by foreigners. 'Core activities' included:

- acquisition of small arms located in one third country for the purpose of transfer to another third country;
- mediation between sellers and buyers of small arms to facilitate their transfer from one third country to another third country; and
- 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) (OSCE, 2003, p. 4).

The BPG treated the control of associated activities as optional. These included the arrangement of transportation, freight forwarding, and charter services; technical services; financial services; and insurance services (OSCE, 2003, p. 5). It also listed measures relating to the registration of brokers, criteria for assessing licence applications, mechanisms for enforcement, penalties for violations, and international cooperation.

These regional initiatives vary considerably in rigour. In particular, only the EU Common Position is legally binding. The degree to which the others influence national policies will therefore depend both on the follow-up to these processes within the same organizations and, to a great extent, on national decisions. However, these regional instruments, even where non-binding, are important for a number of reasons.

For a start, they reveal the salience that the issue of controlling brokering activities has gained on the international agenda. At the same time, they build on such salience and are an important means of furthering it. Second, these processes bring together diverse countries, some of which are vitally important for the control of the small arms trade. Third, they represent important steps in the harmonization of policies towards brokering issues, a necessary

Box 5.4 The Dutch–Norwegian Initiative on further steps to enhance international cooperation in preventing, combating, and eradicating illicit brokering in small arms and light weapons

Since April 2003, the Dutch and Norwegian governments have sponsored a series of international discussions on the problem of illicit small arms brokering, aimed at framing internationally agreed measures that states would adopt, at the national level, for its prevention. The first result of the Dutch–Norwegian Initiative (DNI) was an international conference held in Oslo on 22–24 April 2003, which brought together 71 experts, representing 28 states, in addition to international organizations, research institutes, and NGOs from around the world.

During the conference, key issues relating to the control of brokering activities were discussed. The report from the conference identified a number of measures that states should adopt within their jurisdictions to control brokering activities. These included systems of licensing and registration, penalty regimes, and mechanisms for international cooperation. The conference was important since it brought together governments from very different regions, and helped build on harmonized approaches to the prevention of illicit brokering.

As a follow-up to the DNI, the Dutch and Norwegian governments invited the main regional organizations to initiate discussions on arms brokering. Positive informal responses were received from many regional organisations.

Formal initiatives have been launched in cooperation with the Economic Community of West African States (ECOWAS) secretariat. ECOWAS hosted a regional conference to discuss small arms problems in the region with a particular emphasis on brokering. Conference participants tried to identify possible solutions as a basis for a regional plan of action. The initiative in ECOWAS was also supported by the UK government.

In the OSCE, the governments of the Netherlands and Norway have launched an initiative to formulate a common position for OSCE member states with respect to the adoption and implementation of legislation on brokering small arms. The government of Germany has joined this initiative.

step for effective control. Indeed, it has been pointed out that inconsistencies and strong differences among national regulatory systems are damaging to the effective prevention of illicit brokering activities as they undercut the value of national regulations. Brokers moving business from countries with strong regulations to countries with weaker ones provide compelling evidence of this.

A common feature of these regional instruments is their reliance on state regulations as the primary means for the control of brokering activities. While emphasizing the importance of international cooperation, they primarily underline the need for individual states to adopt, or improve, controls on brokers and their activities. The instruments also share a common focus on regulations and legislative frameworks as the primary means of controlling brokers. As well, some specific measures are consistently cited as the building blocks of national regulations on brokering, notably licensing systems. These are important developments, since they get to the heart of the issue of brokering controls, in two respects. First, the general regulatory void in which brokers operate is problematic and is a striking missing link in the chain of controls on the small arms trade. Second, controls on licit and illicit brokering are closely linked: unless states regulate the former, they will be unable to prevent the latter.

NATIONAL REGULATIONS ON BROKERING ACTIVITIES

Currently, only 25 countries have regulations governing the brokering of arms deals.

Some of these regulations are very recent, and their adoption has been spurred by recent debates over the central role of arms brokers in illicit arms transfers. This section gives an overview of existing national regulations on arms brokering. It will not treat each national system in detail but will rather compare national provisions in the following key issue areas:

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Brokers make their deals behind the scenes. Only 25 countries have regulations that could curb such illicit transactions.

- licensing systems;
- extraterritorial jurisdiction;
- registration requirements;
- reporting obligations on the part of brokers; and
- penalties.

The purpose of this comparison is to highlight how different national approaches might affect actual control over brokering activities. Most of the analysis is of the relevant national legal texts (laws and regulations); it has also examined the reports on the implementation of the UN *Programme of Action* submitted for the BMS, with clarifications directly from national officials. It is important to stress that only those regulations that clearly define the activity of brokering as subject

to national controls have been taken into account. That is, the analysis excludes the majority of national regulations, in which brokering activity is not explicitly defined but could be covered by existing export and import controls, because the use of export controls to regulate brokering activities, where the latter are not clearly defined, is not straightforward, but would depend on an extensive interpretation of the law. There is in fact a great difference between a national system that could be used to control brokers and one that considers brokering conducted without state authorization as illegal.

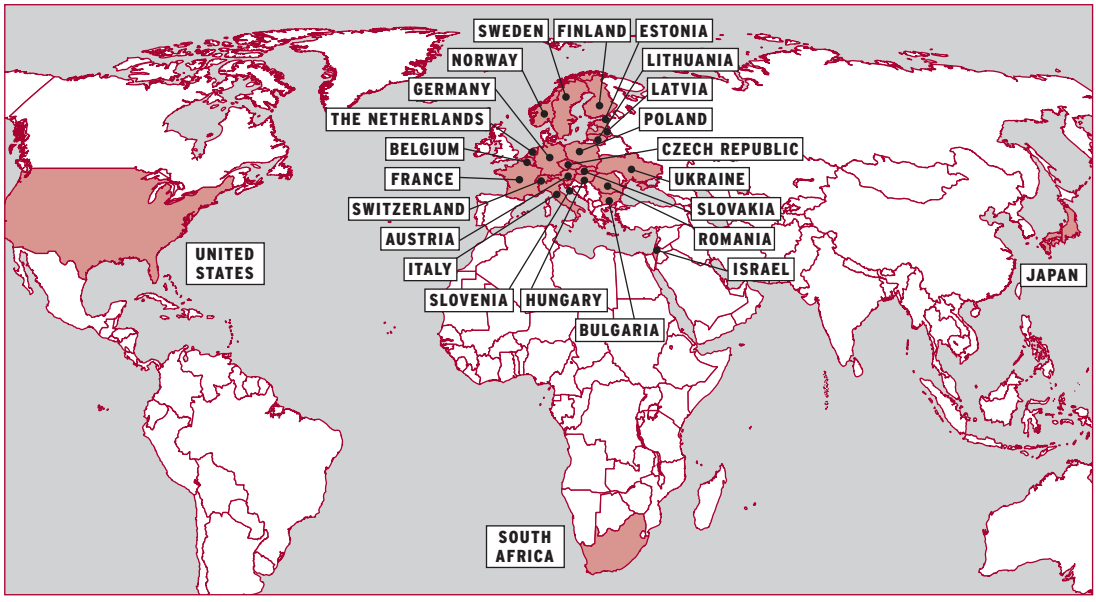
In total, 25 countries have brokering regulations in place: Austria, Belgium, Bulgaria, the Czech Republic, Estonia, Finland, France, Germany, Hungary, Israel, Italy, Japan, Latvia, Lithuania, the Netherlands, Norway, Poland, Romania, Slovakia, Slovenia, South Africa, Sweden, Switzerland, Ukraine, and the United States. Of these, 23 will be analysed in the next section.[14]

Of the 25 countries with brokering regulations, 21 are in the European region.

The geographical distribution of these countries is striking: 21 are in the European region, and one each from the Middle East, Africa, Asia, and North America (see Map 5.1).

Also, although some additional countries have announced they are in the process of adopting or considering such regulations, the total number remains very low.[15] This, for the moment, seems unlikely to change, given that the establishment of brokering controls does not appear as a priority for the majority of states. As mentioned, government statements during the BMS indicated that the firmest support for such controls come from the OAS and EU regions. This was confirmed by the statements given during the Security Council debate on small arms, held in New York on 19 January 2004. During the debate, 16 statements, representing in total 47 states, mentioned the issue of illicit brokering.[16] Eight of these (including Ireland on behalf of the EU and associated countries) belong to the EU or OAS region. The remaining eight are unevenly distributed among the Arab League (Algeria and Egypt), ECOWAS (Benin and Sierra Leone), SADC (Angola and South Africa), plus Armenia and India. Among these eight states, there were vague references to the problem of illicit brokering or unscrupulous brokers (Egypt and India), the general call for controls in this area (Angola), and the stress on national registers and/or international cooperation as a means of preventing illicit brokering activities (Algeria, Benin, and Armenia).

Map 5.1 Countries with brokering controls



While, for the most part, the issue of brokering controls is simply ignored (for example, in the Association of South-East Asian Nations (ASEAN), as well as in some of the Arab League members' statements), in some instances it is explicitly mentioned as one that 'does not pose any problem', and therefore that does not need to be addressed with specific measures. In this group of states, particularly relevant is the attitude of big small arms producers, notably China and Russia.

Licensing of brokering activities

Licensing systems have been identified by the *UN Feasibility Study* as the principal means, along with registration and disclosure requirements, by which states can exercise effective control on brokering activities (UN, 2001, para. 64).

Licensing systems have been identified as the key means to control brokering activities.

Arms broker licensing is in place when individual and/or commercial entities cannot legally engage in intermediary activities unless they have received explicit consent by the relevant national authorities. Without this consent, the relevant activity is automatically illicit and therefore liable to legal prosecution.

Given the opportunities they offer for state monitoring, it is not surprising that all of the 23 surveyed countries have brokering licensing systems. In three of these countries, Hungary, Italy, and the Netherlands, the licensing is not sanctioned by law but operates in practice (Hungary, 2003; Italy, 2003, p. 4; Netherlands, 1997, art. 9.1; 2003b, p. 6).[17] These licensing systems, however, vary greatly along five main dimensions: types of licensed activities, scope of brokering controls, types of goods for whose transfer brokering must be licensed, types of brokering licences (individual/open), and criteria for the assessment of licence applications.

Types of activities subject to licensing

While an internationally agreed definition of brokering activities has not yet emerged, the distinction between core and associated activities has become commonplace. Thus, the majority of the analysed national systems distinguish between licensing solely the activity of mediation and/or the related activities such as transportation and financing. While 22 countries require that the core intermediary activity be licensed, only 11 establish such a requirement also for associated activities (see Table 5.1).[18] In addition, in Latvia, only the associated activity of transportation must be licensed: Latvian companies wishing to transport strategic goods in transit outside Latvian territory must possess a licence (Latvia, 1997, art. 14).

Some countries—Bulgaria, the Czech Republic, Hungary, Romania, Slovenia, and Switzerland—have a system of what we might call 'double-licensing': brokers have to possess both an initial, general authorization (permit) and a specific licence (for each deal) to carry out the intermediary activity (Bulgaria, 1995, art. 5; Czech Republic, 1994, art. 6, 14; Hungary, 2003; Romania, 1999, arts. 10–11; Slovenia, 2003a, arts. 1, 14; Switzerland, 1996, arts. 9, 12, 15). In Switzerland, the Federal Law on War Material clearly states that any person who does not possess arms production facilities in the country and who wishes to broker the transfer of war materials to entities abroad needs an initial authorization and a specific licence for each individual deal (Switzerland, 1996, art. 15). The specification of production premises is important, since manufacturers in Switzerland need no specific authorization for brokering war material if they hold an initial permit for the brokering of war material similar to that produced in their own premises (Switzerland, 1998, art. 6.1). This provision covers situations in which a customer's order exceeds the current production capabilities of a Swiss manufacturer. In such cases, Article 6 of the War Material Ordinance allows those manufacturers with production branches abroad to supply the requested goods directly from their foreign branches to their customer, without having to apply for an individual brokering licence.[19]

In two other countries, Slovakia and France, brokers have to apply only for a general authorization or permit (France, 1992, art. 3; Slovakia, 1998, art. 5, 6). In France, this requirement applies to those operations (including the submission and acceptance of offers and the negotiation of contracts entailing the transfer or delivery of war materials abroad) in which the brokered weapons are exported from France.

As for associated activities, Italy and the Netherlands require any agent involved in the financing of arms deals to act under licence. While in Italy this requirement applies to any financial transaction related to the import into, export from, and transit through Italy of military material, and thus does not cover transfers between third countries (Italy, 1990, art. 27.1–2; 2003, p. 8), in the Netherlands the requirement applies to all financial transactions related to transfers of strategic goods—including military-style small arms—taking place outside the EU, carried out by Dutch nationals and residents (the Netherlands, 1996, art. 1; 2003a, p.13).

Bulgaria, Lithuania, Poland, and Slovenia require transportation of military material to be licensed, provided that they cross national territory (Bulgaria, 1995, art. 13a; Poland, 2000, art. 3.8.a; Slovenia, 2003a, art. 14.3).[20] In Germany, persons or entities wishing to transport war weapons that are loaded and unloaded outside German territory, and that do not transit German territory, on ships sailing under the German flag or in aircraft registered in Germany must obtain a licence to do so (1961a, art. 4.1). Estonia, South Africa, and the United States have particularly broad definitions of the associated activities that are subject to licence. In Estonia, for example, all brokering related to 'buying, selling, promoting, advertising, marketing, transporting, handling, developing, producing, testing, maintaining or other services related to WMD [weapons of mass destruction] or conventional arms and their parts' (including small arms) are subject to licence (Estonia, MFA, 2002). In the United States, it includes 'financing, transportation, freight forwarding, or taking of any other action that facilitates the manufacture, export, or import of a defense article or defense service, irrespective of its origin' (2003, sec. 129.2). (For the South African definition of brokering, which includes facilitation of various operations related to arms transfers, see Box 5.1.)

Exemptions to licensing requirements for brokering activities are common.

It is important to note that exemptions to licensing requirements are common. In general, these are provided for transfers carried out by government agencies, including the armed forces. In two cases, however, the exemption is broader, since it refers to brokering of arms deals directed towards a specified list of countries. In the US, the *International Traffic in Arms Regulations* (2003, sec. 129.6) provide that '[b]rokering activities that are arranged wholly within and destined exclusively for the North Atlantic Treaty Organization, any member country of that Organization, Japan, Australia, or New Zealand' do not require a licence, although with some exceptions, mostly covering WMD and fully automatic firearms and their parts (sec. 127.a.1). In Switzerland the exemption refers only to specific authorizations (the general permit must therefore still be granted) and currently relates to a list of 25 countries (Switzerland, 1998, Annex 2).[21] Clearly, such exemptions are aimed at facilitating commercial transfers with friendly countries. However, as the degree of screening is reduced in these cases, the risk of diversion from the licit to the illicit market is correspondingly higher. This seems all the more important given that cases have occurred of illicit weapon diversions from legal transfers originally intended for friendly or allied countries.

In the case of Lithuania, the licensing exemption covers an entire class of goods. For a start, Lithuanian brokers are not allowed to possess the weapons they assist in selling. Weapons in the Lithuanian system fall under four categories: category A comprises military-style weapons, and categories B, C, and D civilian weapons. While brokers can facilitate deals involving all categories of weapons, they have to possess a licence only for civilian weapons. Only the government can buy or sell military-style weapons in Lithuania, subject to a licence from the Ministry of Economy. The government is considering extending the licensing requirement for brokering activities to the brokering of category A weapons.[22]

Types of goods subject to brokering licences

On the types of goods covered by brokering regulations, EU countries are largely similar, all referring to the Common List of Military Equipment covered by the EU code of conduct on arms exports (EU, 1998). This common list, as well as most national lists on controlled goods, include arms and automatic weapons with a calibre of 12.7 mm or less such as rifles, carbines, revolvers, pistols, machine pistols, and machine guns (sec. 1.1), as well as armaments and weapons with a greater calibre, including guns, howitzers, mortars, anti-tank weapons, projectile launchers, and recoilless rifles (sec. 2.1). Related ammunition is also included (sec. 3). As existing arms brokering legislation is usually integrated into export controls on military weapons, controls extend to the brokering of military small arms and light weapons. Civilian firearms such as hunting and sport shooting rifles are normally excluded from military export controls, and consequently the brokering of such civilian firearms is generally unregulated or subject to other controls (as already mentioned, Lithuania is an important exception in this respect). Also, the system in the Netherlands varies according to the type of brokered weapons. The brokering of transfers of automatic firearms, which are covered by the Arms and Ammunition Act, requires a licence; as for military small arms covered by the Decree on Exports of Strategic Goods, which are the same as those in the Wassenaar Arrangement Munitions List, only *financial transactions* for transfers outside the EU need a licence. Among non-EU countries, four—Bulgaria, Estonia, Norway, and Romania—refer to the Wassenaar Arrangement Munitions List and/or the EU Common List of Military Equipment. The remainder all apply nationally defined lists of armaments that generally cover military-style small arms and light weapons.

Types of brokering licences

Licences granted for brokering activities can be individual or open. Under an individual licence, national authorization is required for each arms transaction, and licences are assessed on a case-by-case basis. Under an open licence, a single authorization covers more than one transfer, usually for a class of goods and/or a set of specified destinations.

Open licences carry a greater risk of illicit arms diversion.

Fifteen of the surveyed countries, for instance Italy and South Africa, provide only for individual licences to be granted, and five, for example Germany and Ukraine, provide for both open and individual ones. In Slovakia, only open (general) licences are granted (see Table 5.1). Open licences are usually designed to facilitate certain arms transactions and to reduce the administrative burdens on agents. Their potential for screening, however, might be much less than for licences that are assessed and granted for each transaction. Consequently, the risk of arms diversion to the illicit market is greater with open licences.

Scope of brokering controls

National licensing systems differ most in the scope of their application (or extent of their jurisdiction). Part of this issue is whether controls apply extraterritorially, and will be treated in detail below. In this subsection we analyse the types of transfers that require a brokering licence if the intermediary activity is carried out within the territory of the controlling state.

In general terms we can distinguish three basic models of the scope of brokering controls. Under the model with the narrowest jurisdiction, brokering activities must be licensed if they relate to *transfers from, into, or through the controlling state.* This system is found in Italy, Lithuania, and Poland. Thus, if a broker conducts the intermediary activity from the territory of the controlling state, but the weapons do not cross its territory, no licence is necessary. This system clearly creates a serious legal loophole, especially as so-called third-party brokering is a common aspect of illicit weapon transfers. In France, only brokering related to arms exports requires a licence for specific transactions (France, 1992, art. 3). However, brokers must possess an initial authorization to be able to operate, in the form of registration with relevant authorities (France,

1939, art. 2.1; 1995, art. 6). Following the adoption of the EU Common Position (EU, 2003), both France and Italy have started to revise their brokering controls, which will in the future be extended to arms transfers between third countries.

Under the second model, which allows for a greater degree of screening, brokering conducted on the territory of the controlling state and relating to the transfer of military equipment from *one third country to another third country* must be licensed. This model is found in the Czech Republic, Finland, Germany, the Netherlands,[23] Norway, Romania, and Slovakia. Under this system, brokering activities connected with the export from, and import into, the controlling state do not require state authorization. The logic of this model is that, when goods originate in the controlling state's jurisdiction, or are destined for it, it is sufficient to control the exporters and importers to ensure that the weapon transfer is licit. It also appears to be grounded in the intention to avoid administrative burdens linked to a double licensing system for each individual transaction. If import and export controls are efficiently applied, the system does not seem to pose any risks. In the Austrian case, however, the system is applied in a way that creates a potentially serious legal loophole. Under Austrian legislation, brokering activities must be licensed when they involve the transfer of goods *from one country outside the EU to another country outside the EU* (Austria, 1977, art. 1.4). In this sense, Austrian entities brokering weapon deals between EU countries enjoy great—perhaps too great—freedom of action.

Among the surveyed countries, Hungary, Slovenia, and Sweden impose controls whose scope combines versions of the first and second models described here. In Sweden, Swedish authorities and companies, and persons resident or permanently domiciled in the country, require licences to supply military equipment to a person or entity located abroad (Sweden, 1992, sec. 4). 'Supply' of military equipment includes its sale, transfer, offer for sale, loan, gift, or intermediary activity (sec. 2). This licensing requirement also exists for the supply of military equipment located abroad (sec. 5). Similar provisions exist in Hungary, where both the intermediation for weapon transfers between third countries and that for exports from Hungary must be licensed (Hungary, 2003). In Slovenia, brokering requires both a general permit and a specific licence for deals related to export from, import into, and transit through the country. Slovenian agents brokering a transaction between third countries do not need a specific licence. However, they do need a general permit for trading in military arms and equipment.[24] A system such as that of Hungary, Slovenia and Sweden allows, at least in principle and to different degrees, for the full control of brokering activities occurring on the national territory, whether or not the weapons originate there.

The third model has an even broader scope, and it is used in Belgium, Switzerland, Ukraine, and the United States. In these cases the law explicitly states that all brokering activity conducted on the national territory is subject to licensing, *irrespective of the origins of the weapons.* Swiss regulations have a particularly broad application, covering brokering conducted on their territory by any agent (Switzerland, 1996, art. 15). Foreign agents are also covered by Belgian and US legislation: for the first, all Belgian and foreign residents in Belgium need a brokering licence (Belgium, 2003, art. 10); for the second, licences are necessary for all US citizens and all foreign agents subject to the US jurisdiction (US, 2003, sec. 129.2.b). Similarly, in South Africa brokering subject to licensing includes mediation between any manufacturer or supplier of conventional arms, or provider of services, and any buyer or recipient of the same (2002, art. 1.i).

The cases of Bulgaria and Estonia lie outside these three main models. In Bulgaria, what is relevant is not the location of the brokered weapons but the nationality of the contractors. Under Bulgarian law licences are required for both Bulgarian and foreign brokers when the importer or the exporter is a Bulgarian company or citizen.[25] In Estonia, what counts is the link with the country, whether through citizenship or the location of the contractors. Services connected with the development, production, use, or maintenance of military equipment must be licensed, among other things, if they are supplied from or into Estonia and to a foreign recipient in Estonia or to an Estonian recipient abroad (1999, art. 2).

Criteria for assessing licences applications

As with controls on arms exports, those on brokering activities usually establish a number of criteria that national agencies must adopt in deciding on licence applications. In the surveyed systems, such criteria are always spelled out, either in the framework laws or in their implementing regulations. Criteria for licensing can also be established through government decisions or policy guidelines, or can derive from one state's membership in regional or international organizations. In many instances the relevant laws state only a general principle, whose interpretation may vary over time. For example, the majority of countries studied refer to obligations derived from international agreements, which might change over time and alter the corresponding specific criteria. In view of this, as well as the limited sources used, the criteria listed here should not be considered exhaustive. Despite these limitations, a number of general conclusions can be drawn.

In broad terms, criteria for the licensing of brokering closely follow those established by export controls and are indeed usually considered as belonging to broader export controls. Furthermore, states commonly make the national interest a criterion for licensing, and refuse licences for brokering transfers that might endanger national economic, foreign policy, or security interests. All EU countries have agreed on a minimum standard for evaluating licences, contained in eight criteria in the politically binding EU Code of Conduct (EU, 1998). At least in the EU region—and among EU associated countries and others that have joined the Code—a certain potential for uniformity is present.[26] Apart from these common features, national criteria for licensing differ widely.

In a few of the countries surveyed—Belgium, Bulgaria, the Czech Republic, France, Slovakia, and Slovenia—licences are not granted to agents who do not fulfil specified conditions of reliability and/or economic stability.[27] Importantly, in the Czech Republic past violations of trade regulations must be considered. Licences are refused if 'in carrying out foreign trade, or in connection with this trade, the applicant violated domestic or foreign legislation relating to this sphere' (1994, art. 18.b). Three countries—Lithuania, Poland, and the United States—establish lists of recipients for which brokering activities are prohibited or restricted. Usually these lists are established through government decision, and are subject to periodic revision (Poland, 2000, art. 6.3; US, 2003, sec. 129.5.a).[28]

For 12 countries—Austria, Belgium, Bulgaria, Estonia, Germany, Hungary, Italy, Lithuania, Norway, South Africa, Switzerland, and the United States—some criteria for licensing depend on the situation of the recipient of the arms. In particular, brokering licences are refused for transfers to countries under UN Security Council or other international embargo, countries in potential or actual conflict, or countries where weapons might contribute to the violation of human rights (see Table 5.1).

In 12 countries, some licensing criteria depend on the situation of the arms recipient.

Finally, a few countries—Poland, Slovakia, and Ukraine—impose an obligation on brokers to refrain from facilitating trade in certain situations. In this sense, brokers are considered responsible for the application of the listed criteria, which include:

- the risk that the transferred weapons will be used in human rights violations, will threaten stability, or contribute to terrorist acts (Poland, 2000, art. 10.1);
- national—foreign policy, economic, and trade—interests and obligations rising from international agreements (Slovakia, 1998, art. 10.3); and
- the risk that the transferred weapons will be used for purposes, or by end-users, different from those stated in the contract (Ukraine, 2003, art. 17).

Extraterritorial jurisdiction

Extraterritorial jurisdiction on brokering normally refers to the application of the law to one state's nationals when they operate from abroad. Given the inherently transnational nature of brokering activities, extraterritoriality is a critical issue and one that might be problematic, as it pits one state's sovereignty against that of other states unless inter-state agreements set out principles or procedures under which foreign authorities can enforce controls on one another's territory. The rationale of extraterritorial provisions in brokering regulations is to prevent brokers from evading them merely by crossing the border.

Extraterritorial jurisdiction helps prevent brokers from evading controls by moving across the border.

A common objection to extraterritorial jurisdiction is that it would not be needed if every state implemented export controls effectively. That is to say, the necessary screening of arms transfers should be carried out by those states from whose territory the weapons originate. While this argument is logical, it remains at odds with the reality that in many countries arms exports are poorly regulated and/or the regulations are poorly enforced, allowing brokers to send weapons to illicit end-users with the minimum of obstacles. Extraterritorial jurisdiction also poses important problems of practical implementation; even if states have the legal framework establishing extraterritorial provisions, how can they enforce them, for example regarding evidence gathering, overseas investigations, and seizing of suspects?

The United States presents the broadest application of extraterritorial provisions concerning brokering activities. The US Arms Export Control Act, as amended in 1996, applies to all US nationals operating in the United States or abroad. It also applies to all foreigners living in or operating from the United States, as well as foreigners who live abroad but *broker US-made weapons or work with US nationals* (Bondi and Keppler, 2001).

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Zimbabwean policemen inspect weapons seized in March 1999 from three US citizens who allegedly worked as arms dealers in Congo, Tanzania, and Zimbabwe.

Among the countries surveyed, including the United States, 14 have extraterritorial provisions for the control of brokering activities (see Table 5.1). While the *principle* of extraterritorial controls is common to all these systems, the *degree* to which it is applied varies considerably. Short of the broad interpretation characteristic of the US system, there are in fact many ways in which extraterritoriality can be established.

In seven countries—the Czech Republic,[29] Finland, the Netherlands, Norway, Romania, Sweden, and Ukraine—brokers subject to national jurisdiction must possess a licence even when they conduct operations from abroad, and the weapons they deal with neither enter nor transit national territory. In these countries, arms brokering requires explicit authorization even when the only link between the transaction and the controlling state is the nationality or permanent residence of the broker (Finland, 1990, sec. 2a.2; the Netherlands, 2003b, p. 6; Norway, 2003; Sweden, 1992, sec. 4; Ukraine, 2003, art. 1).[30] In Estonia, reference is made only to the location of the broker's operations, and not to the location of the transferred weapons. Brokering activities subject to licensing include, among others, those by Estonian service suppliers, both legal and natural persons, respectively through the economic activities of or in the territory of a foreign state.[31] Arguably, this provision covers the brokering of weapon transfers between third countries that is conducted abroad by Estonian nationals.

In Poland, brokers operating abroad must possess a licence for operations relating to the transfer from (export), into (import), or in transit through Poland. In this case, therefore, Polish individuals and companies that act as brokers abroad must possess a state authorization, as long as the weapons they help to transfer touch Polish territory (Poland, 2000, art. 1.a-b).

In the remaining four cases, extraterritoriality is established through national judicial competence rather than through an explicit licensing requirement. In Belgium and South Africa, judicial authorities are competent for any violation of the arms brokering regulations, even if such violation occurs outside the national territory (Belgium, 1991, art. 13; South Africa, 2002, art. 26).[32] In both Bulgaria and Germany, the judiciary's competence is restricted to specific cases. A Bulgarian agent who operates outside Bulgaria and brokers a weapon transfer that does not cross Bulgarian territory does not need a licence. However, if such a broker conducts the transfer in breach of a UNSC or EU established embargo, he or she is liable under the Bulgarian Penal Code.[33] In Germany, finally, violations of the provisions on arms brokering in the War Weapons Control Act fall under the competence of German courts if at least one part of the brokering operation took place on German territory (Anders, 2003, p. 8).[34]

Registration of brokers

Registration is one important means by which states can maintain supervision over, and gather information about, companies and individuals engaged in the brokering of arms. The *UN Feasibility Study* identified it as one of the three main regulatory options—together with licensing systems and disclosure requirements—that would allow states to exercise more effective control over brokering activities (UN, 2001, para 64). Beyond the 23 surveyed countries, very few states have registration requirements for brokers. As a consequence, few states have records of the numbers of individuals and companies that are allowed to trade in military and security equipment. While estimates put this number in the order of thousands, the exact figure is not known. This lack of 'institutional memory' has a number of consequences, at both the national and international levels: at the national level because the lack of records makes it impossible for states to prevent individuals and/or companies that have violated national provisions on the trade in military equipment from continuing their activities; at the international level because states cannot exchange information on brokers involved in illicit deals (Small Arms Survey, 2001, p. 126). This means that brokers convicted in one state, or suspected of illicit arms activity, can simply move to another country to continue their activities.

The lack of brokers' registration has important negative consequences at the national and international levels.

Of the 23 surveyed countries, 21 have registration systems. In most of these, brokers must register before they can legally engage in brokering activities, and broker registration works both as an initial authorization and as a form of record-keeping by the state (see Table 5.1).[35] In Germany and the Netherlands the registration requirement is applied to selected cases. In Germany, prior registration is necessary for those seeking a general licence for the transport abroad of war weapons on ships or aircraft registered in Germany (Anders, 2003, p. 14). In the Netherlands, registration is necessary for those wishing to engage in the trade of controlled goods under the 1997 Arms and Ammunition Act, including the transfer of firearms between third countries, but no such requirement applies to the brokering of weapons covered by the 1963 Decree on Exports of Strategic Goods (Anders, 2003, p. 14). In Finland, Norway, Poland, and Sweden, registration of brokers is *de facto:* it does not work as an initial authorization, but simply as a form of data collection on granted licences.[36]

Reporting obligations

To facilitate continued monitoring by state authorities on brokering activities, some of the 23 surveyed countries ask brokers to keep transaction records to report periodically to the relevant institutions, or both. Eleven countries require individuals and

companies engaging in brokering activities to keep records of their transactions. In addition, 12 require brokers to submit periodic reports on such transactions (see Table 5.1). Usually, brokers' records must contain information on the parties of the transactions and the weapons brokered, and must be available for inspection by relevant authorities. Where specified, the time period of such records varies from a minimum of three years (Lithuania) to five years (Slovakia), ten (Bulgaria and Switzerland), 15 (Romania), with a maximum of 20 years (Slovenia). As for mandatory reporting to national authorities, time intervals vary from a minimum of one month (Hungary), to three months (Sweden), to four months (the Czech Republic, Norway, and Slovakia), to six months (France and Poland), to a maximum of one year (Bulgaria and the United States). In South Africa, reporting is not automatic but can be requested by national authorities (South Africa, 2002, art. 22.1).

Both records and periodic reports can be a source of important information and can greatly assist effective state monitoring, depending on the type of information that brokers are required to keep and/or provide. For example, Bulgaria asks brokers to keep all transaction and transportation documents in addition to information on the execution of deals (Bulgaria, 1995, art. 14.1–3); France requires that records be updated constantly during the execution of the deal, and that they disclose the names of the parties involved, the contents of the operations, and their status (France, 1995, art. 16); in Germany, persons manufacturing, transporting (including through a third party), or trading weapons have to maintain an arms register indicating their whereabouts (1961a, art. 12.2). The registers must also provide information on people who transport and acquire exported weapons and the date of export (1961b, art. 9);[37] Slovenia generally requires documentation on the export of military weapons and equipment, including on the type, number, and identification code of the military weapons or equipment traded (Slovenia, 2003a, art. 19.1–2).[38]

Penalties: Administrative and criminal

The explicit definition of offences and the provision of corresponding penalties are important, since no action can be legally punished unless it has been defined as an offence. Of the 23 surveyed countries, all but one provide for legal penalties in relation to brokering controls.[39] The one exception is Slovenia, which has indicated that national provisions of the Penal Code will be revised to include crimes related to illicit brokering (Slovenia, 2003b).

Penalties for illicit brokering usually include both fines and imprisonment.

As a general rule, all countries make a distinction between minor and major offences, the first usually involving negligence. Countries usually also provide for both monetary penalties and imprisonment, according to the type of violation. Exceptions include Germany, Hungary, Lithuania, and Slovakia. In Germany, brokering an arms deal involving weapons located abroad, as well as the conclusion of such a contract without the required license, entails punishment by imprisonment of up to five years, and up to ten years in cases of serious violations (1961a, art. 22a.1.7, 22a.2). In Hungary, violations of brokering controls are classified in the Penal Code (arts. 261/A, 263, 263/A, 263/B, 264/C, and 287) and are punishable in the aggregate with up to 15 years of prison terms (Hungary, 2003). Neither Lithuania not Slovakia provides for imprisonment. In nine cases, penalties other than fines and imprisonment are established for some offences. These can include property seizure (Bulgaria, Estonia, and Switzerland), deregistration or debarment (the Czech Republic, Italy, Lithuania, Norway, Ukraine, and the United States), or the dissolution of the commercial activity (Estonia).

The Czech and Ukrainian systems contain the important offence of the granting of fraudulent documents by government officials. In the Czech Republic, '[a] person who has violated or failed to perform an important duty in his employment, profession, position or function thereby causing the illegitimate issue of a permit to trading in military material with a foreign country or a licence for a specific deal involving military material ... shall be punished by a prison term of from six months to three years' (Czech Republic, 1994, art. 124e). Similarly, Ukrainian law establishes

Table 5.1 Elements of national legislation on brokering activities

Country	Licensing requirement (core brokering activities)	Licensing requirement (related brokering activities)	Extraterri-torial jurisdiction	Criteria for licensing: human rights	Criteria for licensing: embargoes	Criteria for licensing: conflict areas	Types of licences	Registration	Requirement to keep records (for the broker)	Obligation to report to national authorities	Penalties
1. Austria	Yes			Yes	Yes	Yes	I				F, P
2. Belgium	Yes		Yes	Yes		Yes	I and O	Yes			F, P
3. Bulgaria	Yes	Yes	Yes		Yes	Yes	I	Yes	Yes	Yes	F, P, Ot
4. Czech Rep.	Yes		Yes				I	Yes		Yes	F, P, Ot
5. Estonia	Yes	Yes	Yes	Yes	Yes	Yes	I				F, P, Ot
6. Finland	Yes		Yes				I	*De facto*	Yes[i]		F, P
7. France	Yes[ii]						I and O	Yes	Yes	Yes	F, P
8. Germany	Yes	Yes	Yes			Yes	I and O	Yes[iii]	Yes		P
9. Hungary*	Yes				Yes	Yes	I	Yes		Yes	P
10. Israel*											
11. Italy	Yes[iv]	Yes		Yes	Yes	Yes	I	Yes			F, P, Ot
12. Japan*											
13. Latvia		Yes						Yes			F, P
14. Lithuania	Yes	Yes		Yes	Yes		I	Yes	Yes		F, Ot
15. Netherlands	Yes[v]	Yes[vi]	Yes				I and O	Yes[vii]			F, P
16. Norway	Yes		Yes		Yes	Yes	I	*De facto*		Yes	F, P, Ot
17. Poland	Yes	Yes	Yes				I[viii]	*De facto*	Yes	Yes	F, P
18. Romania	Yes		Yes				I	Yes	Yes	Yes	F, P
19. Slovakia	Yes						O	Yes	Yes	Yes	F
20. Slovenia	Yes	Yes					I	Yes	Yes		
21. South Africa	Yes	Yes	Yes	Yes	Yes	Yes	I	Yes		Upon request	F, P
22. Sweden	Yes		Yes				I	*De facto*		Yes	F, P
23. Switzerland	Yes			Yes	Yes	Yes	I	Yes	Yes		F, P, Ot
24. Ukraine	Yes	Yes	Yes				I and O	Yes	Yes	Yes	F, P, Ot
25. United States	Yes	Yes	Yes		Yes	Yes		Yes		Yes	F, P, Ot

Notes: I = Individual licences O = Open licences F = Fines P = Imprisonment Ot = Other (e.g. confiscation, debarment)

* Details on legislation not available.

i The obligation to keep registers pertains only to civilian firearms.

ii Licensing is mandatory only for the brokering of weapons that originate in France.

iii Only for those seeking a general licence for the transport abroad of war weapons on German ships or aircraft.

iv In Italy, core brokering activities are subject to licensing by way of practice; this requirement so far applies to weapons transferred from, into, or through Italy.

v Only for weapons covered by the 1997 Arms and Ammunition Act, which include automatic firearms and related ammunition.

vi Only for weapons covered by the 1963 Decree on the Export of Strategic Goods and transferred outside the EU.

vii Needed for those trading in the controlled goods under the 1997 Arms and Ammunition Act.

viii Licences for dual-use goods can be both individual and open (general or global). Licences for trade in munitions can only be individual.

the disciplinary, administrative, criminal, as well as civil and legal responsibility of 'officials from duly authorized executive state export control body and other executive structures involved in decision making in the sphere of state export control, if [they] violate legislation in this sphere' (Ukraine, 2003, art. 28).

What this review of national legislations shows is that even if brokering controls are in place, sometimes their design is such that important loopholes remain. For a start, the regulations examined here usually cover military-style small arms, while civilian firearms are either covered by other instruments or remain unregulated.

Governments' screening of brokering activities is also sensibly reduced when exemptions to the licensing requirement for transfers with specific countries as well as open brokering licences are possible. In both cases the risks of arms diversion to the illicit market are greatly increased.

Given the common practice of brokers to arrange deals for which weapons do not cross the territory of the state from where they operate, states where brokering licences are necessary only for deals related to weapons that are imported into, exported from, or transited through their territory can exert a lesser control than states for which brokering must be licensed irrespective of the origin of the weapons. While more difficult to enforce, these provisions diminish the ease with which brokers faced with constraints in one country can move their activities across the border.

ARE NATIONAL REGULATIONS EFFECTIVE?

This section deals with the effectiveness of national brokering regulations as measured by the extent and manner of the punishment of illicit activities. However, it cannot be considered exhaustive, for a number of reasons. Information about criminal prosecutions is rarely made public unless the case has been completely closed with a conviction or an acquittal. Information made available through media releases is seldom complete and often relies on unproven allegations. On the other hand, most media attention is skewed towards high-profile scandals, usually big-name brokers who have escaped justice in one way or another. These sources, therefore, rarely tell us whether 'minor' brokers manage to escape justice as easily as 'major' ones, or whether administrative sanctions (such as the revoking of brokering licences) are applied. Furthermore, investigations into illicit arms brokering are usually highly complex because, for example, they are conducted in numerous countries at the same time and involve other offences as well (individuals suspected of illicit arms trafficking are often alleged to have committed other, related crimes, such as money laundering, forgery, or smuggling of precious goods). In this sense, it is hard to keep track of the numerous and overlapping proceedings on individual cases. A full assessment of the effectiveness of national regulations in controlling brokering activities would therefore require direct contact with the national judicial authorities of those states in which brokering controls are in place, and future research in this issue would be a most welcome development. However, the few cases treated in this section will help us to reach some preliminary conclusions.

Convictions for violations of brokering regulations are rare.

It is striking that convictions for violations of brokering regulations are hard to obtain. In the United States, for example, where such regulations are among the most comprehensive, administrative sanctions have been used to 'debar' companies and individuals by revoking their licences and publicizing their names for violating arms trading regulations;[40] yet only one prosecution for the specific crime of violation of the brokering regulations is known to have occurred so far. This concerns the case of Hemant Lakhani, a British citizen who was arrested in August 2003 for allegedly selling an Igla-S man-portable surface-to-air missile system for import into the United States. According to the criminal complaint filed for the case, Lakhani was accused of attempting to 'engage in the business of brokering activities with respect to the import and transfer of a foreign defense article ... which was a non-United States defense article of a nature described on the United States Munitions

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A US court indicted alleged arms dealer Hemant Lakhani (foreground) on new allegations in January 2004, less than half a year after he was arrested on charges relating to the attempted sale of a shoulder-launched missile to the FBI.

List, without having first registered with and obtained from the Department of State's Directorate of Defense Trade Controls a licence for such brokering or written authorization for such brokering' (US District Court, 2003). On 10 January 2004, the competent District Court in Newark scheduled pre-trial oral arguments for Lakhani for 26 April 2004 (*Reuters*, 2004).

US prosecutors, for example, have attributed the rare use of the national brokering statute to ignorance of the law among law enforcement officials and lack of coordination among government agencies. Lack of time and resources, coupled with meagre legal experience in the application of the law, work against the use of judicial proceedings to enforce brokering regulations.[41] On the other hand, plea bargains may lead to brokering charges being replaced by different charges. In such cases, the offences would still have occurred but would not appear in the convictions.[42]

In general, the apparent absence of convictions for brokering offences may be explained by the fact that broker-specific laws exist in only a few countries and in most of those, they have only recently come into force. However, other explanations may also play a role.

The complex schemes of illicit brokering pose serious difficulties for prosecution, of which a central one is time. It takes a lot of time to gather sufficient evidence, and national laws often do not foresee that it can take years for an illicit arms deal to be exposed and a trial initiated (Hogendoorn and Misol, 2003, p. 33). For example, after a long delay, in 1997 Latvian authorities initiated criminal proceedings against Janis Dibrants and his associates.[43] Five years earlier, in 1992, Dibrants, who at the time was Chief of Procurement for the Latvian Armed Forces, allegedly provided the official cover for a shipment of weapons to Somalia, in violation of a UN arms embargo. Dibrants agreed to sign a contract with Jerzy Dembrowski, then First Director of Cenrex, a Polish majority-government-owned arms trading company, that would allow the export of the cargo—40 TT pistols, 301 AK-47 rifles, 30 RP sub-machine guns, 160 RPG-2, 100 hand grenades, 3,450,000 rounds of 7.62mm ammo (for AK-74s), and 10,000 mortar bombs—to Somalia. In return for his cooperation, Dibrants claimed he had demanded that a share of the arms be provided free of charge to the Latvian armed forces, an allegation that the Latvian Minister of Defence (MOD) has since denied. On 10 June 1992, Polish customs authorities cleared the departure of the MS Nadia (a Honduran-flagged freighter) with documentation indicating that the entire shipment was intended for the Latvian MOD. However, there were two sets of forms, one for shipment to the MOD of Latvia, the other for onward shipment. The second set declared the arms cargo to be bound for Yemen. This documentation was with a Cenrex employee who presented it to Dibrants upon arrival in Latvia. On 14 June 1992, the MS Nadia docked in Liepāja, Latvia, and offloaded 300 AK-74 assault rifles and 250,000 rounds of 7.62mm ammunition. In Latvia, Dibrants signed a receipt for the entire cargo, but in fact the captain departed with most of the cargo still on board for a rendezvous off the coast of Somalia. There the cargo was transferred to a new vessel, apparently a fishing vessel owned by Shifco, a Somali company, and delivered to the embargoed warring factions in Somalia.[44] In May 2000 a criminal case was brought against Dibrants and his associates in Latvia, but the charges were ultimately dropped because of time limitations—too many years had elapsed since the alleged crimes had been committed (*Neatkariga Rita Avize*, 2002).

In most countries it is not illegal under domestic laws to broker otherwise illegal deals if the weapons do not pass through the territory of the state of which the broker is a national or an established resident. For instance, lack of jurisdiction allowed Leonid Minin, an Israeli citizen, to avoid conviction in Italy for illicit arms trafficking. Minin was first arrested in August 2000 and imprisoned for possession of drugs. While serving the sentence, Italian prosecutors turned their attention to the documents that had been found in Minin's possession at the time of his arrest. The documents—1,500 pages which included fake EUCs, copies of money transfers, faxed messages, and correspondence—

all pointed to Minin's heavy involvement in illegal arms trafficking to Africa, specifically in arming the Revolutionary United Front (RUF) in Sierra Leone through Liberia and Liberia itself, in both cases in violation of UN arms embargoes (*RFE/RL Crime, Corruption and Terrorism Watch*, 2001; Warner, 2002). In November 2002 the Italian Supreme Court determined that Italy did not have jurisdiction to try Minin, for two reasons. First, the weapons transferred with Minin's connivance had not crossed Italian territory. Second, to be punished for an offence should be defined as such also in the state where the violation occurred (Tortorella, 2003; Tosi, 2003). Pending a final hearing, Minin was released in December 2002 (Tortorella, 2003). In January 2004, the Italian Supreme Court confirmed its previous sentence that Minin could not be tried in Italy (*Corriere della Sera*, 2004).

Accused illicit brokers have been able to evade arrest by crossing the border into another jurisdiction.

Accused illicit brokers are also able to evade arrest by crossing a border into another jurisdiction. While they still may face conviction *in absentia* in some cases, illicit brokers can continue their activities by moving their operations to countries where they are protected from extradition. This strategy worked for a time for Geza Mezosy, a Belgian national of Hungarian origin. Belgian authorities first accused Mezosy in the 1990s of involvement in a number of arms smuggling operations from Central and Eastern Europe, and he lost his Belgian arms dealing licence in 1993 (Wood and Peleman, 1999, pp. 49–54). In 1996 a Belgian court sentenced him *in absentia* to a three-year prison term for smuggling operations that involved fraud and gun-running to and from Croatia and Bosnia (*Le Soir*, 2001a; Wood and Peleman, 1999, pp. 50–4). Belgium also issued an international warrant for his arrest (Wood and Peleman, 1999, p. 53).

By that time Mezosy had moved to South Africa, where he continued his arms brokering activities until South African police arrested him in 1998 on an international arrest warrant but also on suspicion of new illicit arms trafficking activities. Their investigation showed that Mezosy's import-export company obtained weapons, including thousands of handguns, in Central and Eastern Europe which it then supplied to various war-torn countries in Africa, including the Central African Republic, DRC, Ethiopia, Sudan, and Uganda (Wood and Peleman, 1999, p. 53). Mezosy was extradited in 1998 to Belgium, where he was imprisoned on the 1996 charges and served two years in jail (*Le Soir*, 2001a). Following his release Mezosy remained under investigation and was later charged, again in Belgium, with forgery and arms trafficking but remained free pending trial (*Le Soir*, 2001b).[45] Mezosy reportedly is also the subject of new legal proceedings in Belgium, opened in 2002 on the basis of suspicions he had supplied weapons to the Armed Islamic Group (GIA) in Algeria (*Le Soir*, 2002).

Poor international cooperation also adds to impunity. Investigators and prosecutors complain that responses to requests can take years, if they come at all. This is especially troublesome in cases involving countries in Africa and the former Soviet Union (Hogendoorn and Misol, 2003, p. 33). The same problem of scant international cooperation was stressed in connection with the investigations over Yelinek and the other Israeli citizens involved in the illicit diversion of Nicaraguan weapons to the AUC in Colombia.

It is also striking that, even when convicted, individuals accused of violations of arms brokering regulations often receive lenient punishment. This has led some analysts to suggest that political will is a critical element in the effective implementation of brokering regulations (Bondi and Keppler, 2001). This factor has been stressed particularly in connection with recent scandals involving brokers with alleged high-level contacts. Lenient sanctions, in these cases, would reflect a lack of will on the part of relevant governments to seriously punish individuals who enjoy close ties with them and who have sensitive information that could compromise their current or former government sponsors (Hogendoorn and Misol, 2003, p. 22ff.) (see Box 5.5).

Box 5.5 Impunity for brokers: Sarkis Soghanalian and Pierre Joseph Falcone

The press has recently given extensive coverage to a number of cases of brokers who, despite acting illegally, received lenient sanctions. Among these are the cases of Sarkis Soghanalian and Pierre Joseph Falcone, who both claim that their actions were not just known about but also supported by national governments.

Sarkis Soghanalian

Sarkis Soghanalian, a long-time arms dealer, asserts that he has always worked with US government approval, including when he illegally supplied arms to Saddam Hussein's Iraq in 1983, a crime for which he was convicted in the United States in 1991 (PBS Frontline/World, 2001). He has noted that ties to the US government have mostly kept him out of jail: 'I was convicted for six and a half years [for the Iraq arms sales, for which the prosecutor had sought a much higher sentence of 24 years]. But I did not serve six and a half years. When they needed me, the U.S. government that is, they immediately came and got me out' (PBS Frontline/World, 2001). His sentence was reduced to two years. Later, he was arrested in the United States and charged in connection with an alleged USD 3 million fraud involving stolen cashier's checks. He faced a sentence of five years, but in 2001 was sentenced to time served (ten months). The US attorney's office recommended he be released in exchange for his 'substantial assistance to law enforcement' related to an unspecified investigation (PBS Frontline/World, 2001). On Soghanalian's account: '[T]he $3 million charge was dropped. Why was it dropped? Because I was helping the secret service ... I'm chasing people doing wrong on behalf of the US government. And chasing them around and with the knowledge of the US government' (PBS Frontline/World, 2001). Soghanalian left the US for Jordan, where he remained in 2003 (Silverstein and Pasternak, 2003).

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The 61-year-old international arms dealer Sarkis Soghanalian leaves federal court in Florida in October 1991, convicted of conspiracy to violate US laws by arming Iraq with military helicopters.

Pierre Joseph Falcone

Pierre Joseph Falcone, a broker of Algerian-French origin was taken into custody on the night of 2 December 2000, on the order of a French special prosecutor.[46] He was initially charged with brokered sales of weapons of Russian origin worth more than USD 1 billion to Angola in 1993 and 1994 without authorization from the French government agency that reviews weapon exports.[47] The first deal was worth approximately USD 47 million and took place on 7 November 1993, while a second deal, worth some USD 563 million, took place in 1994 (cited in Brunais, 2001).[48] In both cases, the weapon purchases were reportedly paid for with Angolan proceeds from oil sales—with Sonangol,[49] Angola's state oil company, for example, paying some of the money for the 1994 transaction to French bank accounts controlled by a Czech firm, ZTS Osos, that provided some of the weapons (HRW, 2001).[50] By late 1994, according to *Le Monde,* Falcone had been involved in the selling of weapons to Angola worth some USD 633 million (cited in Global Witness, 2002, p. 12).[51]

Falcone was let out of prison after serving one year—from 1 December 2000 to 1 December 2001. His release was contingent on posting a bail of FRF 105 million (USD 14,351,000, more than ten times France's previous highest bail demand) and on a number of conditions that prevented him from leaving Paris, from meeting with other people under investigation for his alleged crimes and a number of witnesses, and which obliged him to present himself periodically to the local judicial authorities (*Le Monde,* 2001b). A subsequent decision by the French Court of Appeal reduced the bail to about USD 6 million and allowed Falcone to move within French territory (Routier, 2002).

The discovery of new documents led to a second investigation on Falcone, beginning in late March 2002. The documents pointed to illicit weapon transfers to Angola post-1994 and at least until 2000, this time through another company, Vast Impex, which replaced ZTS-Osos (*Le Monde,* 2002).

In June 2003, Falcone was appointed Ambassador Plenipotentiary for Angola in UNESCO (*Le Monde,* 2003b). Only three days after receiving an Angolan passport and diplomatic status, he left France for Angola, purportedly with the intention of respecting the conditions of his bail agreement (*Le Monde,* 2003c).[52] However, he did not respect two convocation orders by the French investigator; this entailed the issuing of an international arrest warrant against him, which was declared on 14 January 2004 (*Le Monde,* 2004).

Why countries have not used existing brokering-specific provisions more often remains a mystery.

It remains to be seen whether political considerations are relevant beyond those cases of brokers with high-level contacts. Yet one key question, which for the moment remains unanswered, concerns how much significance 'big brokers' such as Soghanalian and Falcone have in the overall illicit weapons trade, specifically of small arms.

While not an exhaustive account of criminal investigations and prosecutions around the world, this section could identify a number of obstacles and difficulties that hamper the effectiveness of national brokering regulations. Future research on proceedings that are still under way would be a welcome development. It is, however, worth noting that in some instances brokers acting illegally have been convicted, but for other offences, such as money laundering, forgery of documents, or violation of generic export controls (Hogendoorn and Misol, 2003). The puzzle, at this point, is why brokering-specific provisions have not been used more often in countries that have had them in place for several years.

CONCLUSION

Illicit arms brokering is by definition a clandestine activity. As such, information on it is usually scarce, incomplete, and anecdotal. However, research conducted in recent years by both governmental and non-governmental organizations has revealed that brokers often play a critical role in illicit arms transfers. While each brokering deal displays specific features, illicit brokering tends to follow a range of patterns, a typical modus operandi whose success strongly depends on regulatory gaps. While the most obvious of these is the paucity of countries that explicitly regulate brokering, more specific gaps range from lax controls on governmental weapon stockpiles to lack of controls of transport and financing agents to inadequate border and customs controls.

At the national level, only 25 countries have specific brokering regulations. Provisions in these countries vary considerably, particularly concerning their scope of application—both within and outside the national territory of controlling states—the definition of the activities subject to licensing and the criteria for assessing brokering licence applications. In some cases, national regulations create important loopholes, notably when they establish exemptions to the licensing requirements, or the possibility of granting open brokering licences.

The analysis of the use of national brokering regulations in the context of criminal proceedings begs the question of how effective such regulations are. Convictions for brokering-specific offences are rare; however, some brokers have been convicted for other violations, typically relating to money laundering, forgery, and arms exports or imports. While this might be largely because in some of the countries brokering regulations have come into force only very recently, other factors can be highlighted. Poor knowledge of the relevant laws and meagre legal practice in their application; lack of international cooperation; difficulties in conducting investigations; and sometimes legal loopholes all help explain the small number of brokering-specific convictions.

Arms brokering remains a largely unregulated activity. However, international attention on this issue is growing and a number of important initiatives, started at both the international and regional level, might have significant potential for affecting national policies on brokering controls. In this respect, the EU Common Position and the OAS Model Regulations, the first of which is legally binding, show great potential. At a minimum, increased international discussions on illicit brokering might bring forth harmonized understandings of the issue and of the possible means of dealing with it. More importantly, they might spur the adoption of brokering regulations by a larger number of states, thus closing the biggest gap that allows illicit brokering to take place.

8. LIST OF ABBREVIATIONS

ASEAN	Association of South-East Asian Nations
AUC	Autodefensas Unidas de Colombia
BMS	Biennial Meeting of States
BPG	Best Practice Guide
CICAD	Inter-American Drug Abuse Commission
DNI	Dutch–Norwegian Initiative
DRC	Democratic Republic of Congo
ECOWAS	Economic Community of West African States
EU	European Union
EUC	End-user certificate
FOCs	Flags of convenience
FSC	Forum for Security Cooperation
GIA	Armed Islamic Group
MFA	Ministry of Foreign Affairs
MOD	Ministry of Defence
OAS	Organization of American States
OSCE	Organization for Security and Co-operation in Europe
PNP	Panamanian National Police
RUF	Revolutionary United Front (Sierra Leone)
SADC	South African Development Community
UNESCO	United Nations Educational, Scientific and Cultural Organization
WA	Wassenaar Arrangement
WMD	Weapons of mass destruction

5. ENDNOTES

[1] For a full account of this weapons deal, see OAS (2003b).

[2] During the Conference, 134 opening statements were made, representing a total of 171 countries.

[3] See Belgium (1991, art. 10); France (1995, art. 1); Slovakia (1998, art. 3); Switzerland (1996, art. 6); Ukraine (2003, art. 1); US (2003, art. Sec. 129.2).

[4] The UN Security Council placed an arms embargo on Liberia in 1992 (UN S/RES/788 (1992)), which was tightened in 2001, with SC Resolution 1343(2001), because of the Liberian government's support of the Revolutionary United Front (RUF) in Sierra Leone. Beginning in 2001, reports of the UN Panel of Experts investigating the contravention of the embargo on Liberia documented, in detail, the role of air cargo companies in the embargo-breaching transfer of arms into Liberia (UNSC, 2001). The Panel's first case studies demonstrated the ease with which Liberia was able to procure quantities of weapons and arrange for their delivery by air.

[5] Information in this paragraph provided by Ernst Jan Hogendoorn based on interviews with air cargo personnel under the auspices of HRW.

[6] As of June 2003, the International Transport Workers' Federation considered 28 countries to be FOCs: Antigua and Barbuda, Bahamas, Barbados, Belize, Bermuda, Bolivia, Burma/Myanmar, Cambodia, Cayman Islands, Comoros, Cyprus, Equatorial Guinea, German International Ship Register, Gibraltar, Honduras, Jamaica, Lebanon, Liberia, Malta, Marshall Islands, Mauritius, the Netherlands Antilles, Panama, São Tomé and Príncipe, St Vincent and the Grenadines, Sri Lanka, Tonga, and Vanuatu (ITF, 2003, p. 12).

[7] Liberian-registered aircraft have been used to ferry arms in violation of UN arms embargoes. The systematic misuse of this registry, including by the air cargo network of known arms trafficker Victor Bout, led the UN Security Council to adopt an unprecedented resolution grounding all Liberian-registered aircraft until the problem could be addressed. Also in pursuance of the Security Council resolution, the Liberian Aircraft Registry underwent a UN and International Civil Aviation Organization overhaul between late 2001 and early 2002 (UNSC, 2001, paras. 4–5). At the time of writing, Liberia had opened a new registry for civil aircraft registration that was not yet in use (UNSC, 2002, para. 109).

[8] On 3 January 2002, the Israeli Navy seized control over Tonga-flagged ship *Karine A*, which was sailing in international waters towards the Suez Canal. Aboard the ship were found 50 tonnes of weapons, which the Israeli government believes were destined for the Palestinian Naval Police (Israel, MFA, 2002). The cargo included rocket launchers, mortars, bombs, sniper rifles, machine guns, AK-47 assault rifles, and small arms ammunition, among others (Israel, IDF, 2002). This seizure, coupled with some other incidents involving

Tonga-flagged ships, prompted the Tongan authorities to decide to close down its ship registry, which had been opened in 2000 and was headquartered in the Athens port of Piraeus (Frontline World, 2004; *Sydney Morning Herald*, 2003). According to one source, the Tongan registry had more than 180 ships signed up on it before it closed down. Its 'success' was said to depend on the very low level of control exercised over ships registered with Tonga (Frontline World, 2004).

[9] The ease with which vessel registration controls can be evaded in some countries with low enforcement capacity has been exploited in the most ingenious ways. For example, aircraft have been reported to change their registration literally overnight, as soon as links with illicit activities have started to surface; another company used the logo and colours of a licensed firm to fly non-licensed planes; yet another operator used an old licence, cancelled by aviation authorities, to fly its planes to illicit destinations in Africa (Wood and Peleman, 2000, p. 141). Names and logos of shipping companies have also been changed in cases of transportation by sea. In 1993, for example, an international arrest warrant was issued for a ship registered in Greece under the name *Maria*, allegedly transporting a cargo of illicit arms. En route, however, the ship's name had been illegally changed to *Malo* (Wood and Peleman, 2000, p. 141).

[10] During the thematic discussions, the following countries spoke on brokering: Belgium, Brazil, Finland, Germany, Italy (for the EU), Mali, and the Netherlands. Italy gave an overview of the *EU Common Position on the Control of Arms Brokering*, which will be described in detail below. Finland and Germany stressed two important points, namely, that the absence of controls is 'clearly a potential loophole' and that brokers may play a role in the diversion of weapons from licit to illicit markets. Importantly, Mali called for international assistance to deal with the issue of arms brokering.

[11] Argentina, Armenia, Austria, Italy (on behalf of the EU), Brazil, China, Colombia, Cuba, Germany, Guatemala, the Holy See, Hungary, the Netherlands, Nicaragua, Niger, Norway, Rwanda, Sweden, and the United Kingdom. During the BMS, 102 countries gave general statements (two of them, Lithuania and Luxemburg, did not take the floor, but circulated written statements), representing in total 144 states.

[12] During the BMS the following regional organizations made statements: OSCE, African Union, Pacific Islands Forum Group, the Nairobi Secretariat on Small Arms and Light Weapons in the Great Lakes Region and the Horn of Africa, SADC, ASEAN, and the League of Arab States.

[13] In Italy explicit controls, in the form of a licensing requirement, currently exist only on financial activities related to arms deals. Other controls, notably on the core activity of mediation, are exercised by practice as they are not formally established in the law. Furthermore, they apply only to weapons originating in Italian territory. The Italian government has established an inter-agency group, chaired by the Ministry of Justice, to extend controls to brokering activities between third countries, thus bringing Italian legislation in line with the EU Common Position (Anders, 2003, p. 24).

[14] Israel and Japan are not included in this comparative analysis since details of their relevant regulations were not available.

[15] As well as the EU countries listed above, Botswana, Serbia, and Thailand have declared to be in the process of consideration or adoption of brokering regulations.

[16] All the statements can be found in the UN Small Arms Conference 'Government Documents and Statements' Database, <http://129.194.160.20:8080/examples/servlet/FMProXMLSearch>

[17] In Hungary, revisions to the export control system, with inclusion of explicit brokering controls, will enter into force during 2004 (Hungary, 2003).

[18] See Austria (1977, art. 1.4), Bulgaria (1995, art. 5.2), Norway (1987, para. 1; 1989, sec. 1.i), and Finland (1990, sec. 2; presentation of 2003, p. 2). For the provisions relating to licensing of core brokering activities in other countries see: Czech Republic (1994, 6.1, 14.1), Estonia (MFA, 2002), France (1939, art. 2.1; 1995, art. 6), Germany (1961a, art. 4a.1), Hungary (2003), Lithuania (2002, art. 7.1), Netherlands (1997, art. 9.1), Poland (2000, art. 6.1), Slovakia (1998, arts. 5-6), Slovenia (2003a, art. 1.1-3), South Africa (2002, art. 13), Sweden (1992, sec. 4), Switzerland (1996, arts. 2, 9, 12, 15; 1998, 6), Ukraine (2003), US (1976, (b)(A)(ii); 2003, sec. 129.6, 129.7.a.1).

[19] E-mail communication with the Swiss State Secretariat for Economic Affairs, January 2004.

[20] Concerning Lithuania, this information was provided by the Lithuanian MFA, Security Policy Department, e-mail communication of January 2004.

[21] These countries are all the EU members, plus Argentina, Australia, Canada, the Czech Republic, Hungary, Japan, New Zealand, Norway, Poland, and the United States.

[22] Information provided by the Lithuanian MFA, December 2003.

[23] In the Netherlands, brokering must be licensed for transfers of weapons covered by the Arms and Ammunition Act from one country outside Benelux to another outside Benelux (Anders, 2003).

[24] Information provided by the Slovenian MFA, e-mail communication, February 2004.

[25] E-mail communication with the Bulgarian MFA, January 2004.

[26] Lithuania also provides that the EU Code of Conduct will be followed in decisions to grant or refuse brokering licences (2002, art. 8.1).

[27] See Belgium (1991, art. 10); Bulgaria (1995, art. 6.2); Czech Republic (1994, arts. 7–8); France (1995, art. 9.II.b.) ; Slovakia (1998, art. 6); Slovenia (2003a, art. 4).

[28] For Lithuania, this information was provided by the Lithuanian MFA, e-mail communication, January 2004.

[29] E-mail communication with the Czech Ministry of Industry and Trade, January 2004.

[30] In Sweden, this requirement does not cover overseas activities of Swedish nationals who are established residents abroad (Anders, 2003, p. 8).

[31] E-mail communication with the Estonian MFA, December 2003.

[32] In Belgium, this competence by the judiciary can be exercised if the accused is found on Belgian territory, even if the Belgian authorities have not received a complaint or official notification by the authorities in the country in which the alleged violation took place, and even if the activity is not punishable in the country where it was carried out (Belgium, 1991, art. 13). In South Africa, any national court may also try a foreign citizen for similar violations committed within the country (South Africa, 2002, art. 26).

[33] E-mail communication with the Bulgarian MFA, January 2004.

[34] Such a link to German territory exists if, for example, a meeting for negotiations takes place in Germany, or if phone calls, letters, or faxes related to the weapons transfer in question originate or are received in German territory (Anders, 2003, p. 8).

[35] See Belgium (2003, art. 1.1); Bulgaria (1995, art. 5.1); Czech Republic (1994, art. 12); France (1995, art. 6.3); Hungary (2003); Italy (1990, art. 3.1-2); Latvia (MFA, 2002); Lithuania (2002, art. 25; 2003); Romania (1999, art. 10); Slovakia (1998, art. 10.6–7); Slovenia (2003a, art. 1.7); South Africa (2002, art. 13); Switzerland (1996, art. 9); Ukraine (2003, art. 12); and US (2003, sec. 129.3).

[36] See Finland (2003); Norway (2003); Poland (2000, art. 21); Sweden (Anders, 2003, p. 14).

[37] However, there is no requirement to provide information on weapons that are bought, sold, or mediated abroad (Anders, 2003, p. 15).

[38] This information on the weapons must be kept permanently.

[39] In Italy and the Netherlands, penalties are the same as those applied in the case of violations of general arms exports regulations. See Italy (1990, art. 25.2; 2003) and the Netherlands (2003b, p. 5).

[40] US Department of State, 'Defense Trade Controls—List of Debarred Parties, July 1988–March 2002,' available at <http://www.pmdtc.org/debar059.htm>. For example, in September 2003, the US government announced sanctions against a Russian company for transferring arms to Iran, which it considers to be a 'sponsor of terrorism'. Under the sanctions, the US government blocked the company for a period of one year from receiving any US aid, importing or exporting weapons or defence services from the United States, or taking part in any US procurement (*Reuters*, 2003). Numerous people have been prosecuted in the United States for attempted and actual illegal arms deals, often in connection with sting operations, but prosecutors have not relied on the brokering law in such cases (*Agence Presse*, 2003). Instead, they have often charged

brokers with violations of other provisions of US arms export law (Hogendoorn and Misol, 2003, p. 30).

[41] Interview and e-mail communications with a US Department of Justice official, November 2003.

[42] Interview and e-mail communications with a US Department of Justice official, November 2003.

[43] Interview by E. J. Hogendooorn with prosecutor Mariussz Marciniak, Gdansk, Poland, 18 November 2002.

[44] Interview by E. J. Hogendoorn with prosecutor Mariussz Marciniak, Gdansk, Poland, 18 November 2002, and interview with Somali involved in the transaction, Somalia, February 2002.

[45] Mezosy reportedly confessed to the charges.

[46] Letter from Pierre Joseph Falcone, Prison Register Number: 298073 T D-5, Fleury-Merogis Prison to Special Prosecutor Courroye, Special Prosecutor Prevost-Desprez, Tribunal de grande instance de Paris, Financial Division, 5/7 rue des Italiens, 75009 Paris, 7 May 2001.

[47] At that time the agency that approved French weapons sales to other countries was SOFREMI (French Company for Export of Materiel, Systems, and Services Under Ministry of Interior). Falcone served as a consultant to SOFREMI (Silverstein, 2001). As of February 2001, SOFREMI ceased to exist and was replaced by a new structure within the Interior Ministry called Civipol, which will no longer be involved in the sale of arms (*Le Monde*, 2001a).

[48] One news report states that there was actually just one sale, which was amended 20 April 1994 to raise it to a total value of USD 463 million (*Le Figaro,* 2002).

[49] For details on Sonangol see its Web site <http://www.sonangol.com/Home.jsp>.

[50] According to a journalist at CTK Publications, the Slovak state registry of companies records a name change from 'ZTS-Osos Martin' to 'Osos Vrutky' in December 1994 (Global Witness, 2002, p. 17).

[51] Illicit arms trafficking is only one of the charges that Falcone has to face. Investigations into arms sales to Angola uncovered a complex business network which involved, among other things, crimes of corruption and fiscal fraud (*Le Monde,* 2003a). Furthermore, Falcone's illicit activities involved prominent politicians (Angolan and French, among others), some of whom are subject of current investigations. For a full account of 'Angolagate' and the related scandals, see Global Witness (2002).

[52] Falcone's appointment to UNESCO spurred a debate over the nature and extent of the diplomatic immunity he was entitled to and on the effects this would have on the investigation that was being conducted against him. Falcone's lawyers argued that as the immunity would be total, Falcone could not be subject to any judicial order. The investigating judge, to the contrary, maintained that such immunity would be limited, and hence would cover only acts that Falcone would carry out in his official capacity as a UNESCO ambassador (*Le Monde,* 2004). The French MFA seconded the latter interpretation (*Le Monde,* 2003d).

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