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Day Two: Breakout Session I: Licensing: Brokering

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Introduction

It is well accepted in the international community that controls on arms brokering are vital in preventing unauthorised and illicit arms transfers. Brokering controls that are appropriate for small arms and light weapons (SALW) can also be applied to weapons of mass destruction (WMD), their delivery systems and related dual-use items.

Many countries have export controls in place, while some countries are just beginning to implement them. In both cases, countries have found that brokering activities need to be addressed if export controls are to be effective.

What is brokering?

Brokers negotiate or arrange contracts or services with regard to the transfer, import, export, transport, financing or manufacture of arms, their components, or production equipment or technology. They do not necessarily acquire any of these, nor need the activities they arrange pass through the country from which they operate.

Brokers who buy or who are already in possession of these items in foreign countries may likewise arrange for their transfer to another country. Brokers often use 'front' companies and intermediaries to mask the end-use of exports and make enforcement of export controls difficult.

There are several possible modes of brokering - related to the physical location of the broker, and the source, transshipment or transit country and the destination country.

Why do we need to regulate brokering?

Most brokers ensure the activities they conduct are legal, but 'legal' often has little meaning because not many countries have laws and regulations specifically designed to control the cross-border activities of brokers.

In the case of SALW, we know that brokers have been involved in the unauthorised or illegal delivery of military equipment to embargoed countries, terrorist organisations and armed groups. Middlemen in the arms trade have engaged in every aspect of arms deals between the suppliers and clients. Their wares include machine guns, landmines, grenades and ammunition to tanks and helicopters. Arms brokers are instrumental in facilitating war and armed conflict.

In 2008, Viktor Bout, a broker suspected of brokering arms throughout sub-Saharan Africa, was arrested in Thailand. Bout is alleged to have overseen a complex arms

freight network since the early 1990s. This case highlights the need for adequate laws regulate arms brokering and arms transporting activities.

In the case of WMD, the threat from brokering is evidenced by the exposure in 2003 of trading in nuclear technologies with states of proliferation concern by a key figure in Pakistan's nuclear program, AQ Khan. This network sourced nuclear components from some 30 companies in 12 countries. It showed how sophisticated methods could be used to exploit inadequate export controls.

How is the international community addressing brokering?

The international community has sought to address illicit brokering in a range of fora, particularly under the auspices of the United Nations (UN) and within export control regimes.

In 2008, the UN First Committee and General Assembly both adopted by consensus a new resolution entitled 'Preventing and combating illicit brokering activities'. This resolution underlined the commitment of states to address the threat posed by illicit brokering. It urged the full implementation of relevant treaties, instruments and resolutions, called for the establishment of appropriate national laws and measures, and noted the benefit of efforts at the regional and subregional levels. This resolution was initiated jointly by the Republic of Korea and Australia.

On WMD, UN Security Council resolution 1540 (2004) determined that all states shall develop and maintain appropriate effective border controls and law enforcement efforts to detect, deter, prevent and combat, including through international cooperation when necessary, illicit trafficking and brokering in accordance with their national legal authorities and legislation and consistent with international law.

In relation to SALW, international efforts to prevent illicit brokering activities are demonstrated by the 2001 UN Programme of Action to prevent, combat and eradicate the illicit trade in SALW in all its aspects (PoA) and the entry into force in 2005 of the UN Protocol against the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition (supplementing the UN Convention against Transnational Organised Crime).

Illicit brokering has featured in subsequent discussions related to the PoA, and would be an important consideration in a possible Arms Trade Treaty (ATT). The aim of an ATT would be to create basic international standards for how conventional weapons and munitions move from one state to another.

The need to address illicit brokering has been highlighted by several export control regimes – the Wassenaar Arrangement (conventional weapons), the Australia Group (chemical and biological weapons) and the Missile Technology Control Regime (unmanned WMD delivery systems).

How can brokering activities be regulated?

To regulate brokering, governments need to determine the activities to be controlled, the geographic scope of controls, the mechanics of regulation (including registration,

licensing conditions, end-user certificates and penalties), and how to best administer and enforce the controls.

The most effective way to regulate brokering is to implement regulations that are wide in scope with a catch-all clause to cover all SALW and WMD proliferation activities. Registration and licensing procedures need to be set out clearly, as should grounds for denying brokering activities and penalties for breaches. Once regulations are in force, then Governments have the legal authority to take action against illicit brokering.

Definition

Brokering is an activity that is a service related to the export of goods or technology. A broad definition of brokering is important to capture all relevant illicit activities. On this basis, brokering could be defined as the activities of a person or entity who arranges or negotiates (or agrees to arrange or negotiate) the transfer, purchase or sale of - items in the national lists of military or WMD items controlled for export; services related to the import, export, transport, financing or manufacture of items included in the national lists of military or WMD items controlled for export; and other items, services or intangible technologies not in the lists of controlled items which could reasonably be believed to contribute to a WMD program - regardless of origin, from national territory or from another country to any other third country.

Legislation

Legislation to control brokering activities should identify the persons, entities, goods and services covered, and outline the power of the licensing authority, reporting and record keeping requirements, enforcement and detection of non-compliance. Other aspects include licensing requirements, factors for denying a licence or transaction, penalties for breach of legislation, and access to information retained about brokers.

The application of legislation should be national and extra-territorial. To capture brokering activities by citizens, permanent residents and corporations incorporated within the legislating country that occur in foreign countries, legislation needs to be extra-territorial to require those persons or entities to comply with the laws of their home country even when operating abroad.

Central authority

A central licensing authority should be established (usually as part of the national export control authority) and equipped to perform its mission effectively. Licensing officials should have the right tools to do their job - including training, accessible information, legal powers and appropriate equipment. There needs to be outreach to raise awareness and facilitate compliance with brokering security requirements. Inter-agency cooperation is also important to ensure compliance, especially with customs and security agencies, and to undertake law enforcement action.

Registration

A register of brokers would provide a record of brokers and licence applications and facilitate communication with brokers. It would provide an incentive for brokers to

bring unregistered activities to the attention of the licensing authority. A register could operate by requiring brokers to register before applying for a licence to trade. The licensing authority would maintain the register and could refuse registration where it had concerns about the bona fides of an applicant.

Brokers could be required to renew their registration periodically. Information in the register could be used to evaluate licence applications and shared with the licensing authorities in other countries, as appropriate, to improve understanding of brokering activities. Consideration could be given to making the register publicly available to allow potential clients to check they are dealing with a registered broker.

Licensing

Licensing activities by brokers helps to ensure compliance. Licensing procedures can be set out in law or may vest discretion with the licensing authority. Having some discretion within the licensing authority allows case-by-case decisions about the risk associated with activities relating to different goods, with set terms for the maximum validity of licences under each category.

The licensing authority would determine whether to issue a global or individual licence and the validity. For example, an authority could issue global licences for brokering activities on certain goods, and individual licences for particularly sensitive goods or destinations. A requirement to report on completed transactions, possibly requiring copies of export and import certificates, could be built into the conditions.

End-user certificates

End-user certificates offer some security from the importing country that an item will not be re-exported to another user. The requirement for an end-user certificate for export licence applications would increase certainty and security in the licensing process. If a country chooses not to require an end-use certificate for every licence application, it would be desirable to allow the licensing authority the discretion to request an end-user certificate.

Denying licenses

An export licence should consider the legality of the activity being brokered under domestic and international law. A licence could be denied if there is doubt about the end-use of brokered items such as possible re-export. Concern that an activity could breach international obligations, including where the importing or destination country is subject to a UN embargo, would be grounds for refusal.

Other reasons to deny a licence include the foreign or strategic policy interests of the legislating state, and concerns that the activity being brokered could affect adversely the security of the legislating state. This would be a concern if the importing country has policies hostile to the strategic interests of the legislating state, its friends or allies, or if the brokered items could be for mercenary, terrorist or other criminal activity.

Penalties

Most states with brokering legislation apply administrative and criminal penalties for breaches - ranging from revocation of brokering licenses and confiscation of goods, to fines and imprisonment - with the ability to choose or scale the penalty depending on the seriousness of the offence. Criminal penalties should reflect the potential grave consequences of a breach and provide incentive to comply with the law.

Conclusion

Failure to regulate arms brokering activities creates 'safe havens' for illicit brokering of SALW and WMD, and enables illicit arms brokers to operate with impunity, often with grave consequences for regional and international security.

Brokering regulations - that are wide in scope, straightforward to administer and are enforced effectively - are an important part of a strong national export control system and deter transnational crime in weapons-related proliferation.

Requiring arms brokers to register provides transparency to arms transfers. Having brokers obtain approval for such transfers enables national governments to regulate this trade and prevent illicit proliferation that contributes significantly to insecurity.