



**ARMS TRAFFICKING:
THE INTERNATIONAL AND DOMESTIC LEGAL FRAMEWORK**

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The conventional arms trade,² both legal and illegal, is vast in scope. As of 2001, there were an estimated half billion documented small arms in the world, more than one for every twelve people.³ International arms sales are a booming business, and the United States is the world's largest exporter. In 2008, worldwide arms transfer agreements reached a value of \$55.2 billion, of which 76.4% involved developing nations.⁴ The United States accounted for \$37.8 billion, or 68.4%, of these worldwide arms transfer agreements,⁵ and U.S. activity falls into five categories: foreign military sales agreements between foreign governments and the Department of Defense, direct commercial sales to foreign buyers negotiated by U.S. companies, leases of military equipment by U.S. entities, excess defense materials, and emergency decreases of weapons stockpiles.⁶

An extensive legal regime has emerged at the international and domestic levels to regulate conventional arms trafficking. This report aims to provide an overview of that framework. It surveys existing international arms trafficking agreements and provides an analytic framework for distinguishing between them. It also surveys the domestic legal framework regarding arms trafficking. Together, these overviews provide a starting point for identifying the shortcomings of existing law, identifying gaps in the legal framework as it currently operates, and considering options to begin to address these shortcomings.

This report begins in Part I by briefly outlining the scope of the problem of conventional arms trafficking. It then turns in Part II to identifying three fundamental axes on which international arms trafficking agreements differ. First, each agreement targets one or more points in a conventional arms *life cycle*: it targets the point of production; the point of domestic ownership and transfer; or the point of interstate transfer. Second, agreements differ in the *scope* of weapons they cover—they may target different classes of weapons (such as major

² Conventional weapons, as referred to in this report, include those weapons without the mass destruction capabilities of chemical, biological, and nuclear weapons.

³ GRADUATE INSTITUTE OF INTERNATIONAL STUDIES, SMALL ARMS SURVEY 2002: CHAPTER SUMMARY, RED FLAGS AND BUICKS: GLOBAL FIREARMS STOCKPILES 1 (2002), available at <http://www.smallarmssurvey.org/fileadmin/docs/A-Yearbook/2002/en/Small-Arms-Survey-2002-Chapter-02-summary.EN.pdf>.

⁴ RICHARD F. GRIMMETT, CONGRESSIONAL RESEARCH SERVICE, CONVENTIONAL ARMS TRANSFERS TO DEVELOPING NATIONS, 2001-2008, at 3 (2009), available at <http://www.fas.org/sgp/crs/weapons/R40796.pdf>.

⁵ *Id.*

⁶ Rachel Stohl, *U.S. Small Arms and Global Transfer Principles*, Project Ploughshares, Working Paper No. 06-1, at 2 (2006), available at <http://www.cdi.org/pdfs/wp061complete.pdf>.

conventional weapons, small arms and light weapons, and dual-use technologies) and different legal categories of weapons (for example, some cover both legal and illicit weapons, while others only focus on illicit weapons). Third, agreements differ in terms of their *enforceability*: some are legally binding while others set nonbinding goals.

Part III of the report examines the ways in which the United States regulates arms trafficking through its domestic laws and international agreements. It shows that the United States places strong controls on interstate transfers of arms, but it has a more mixed record when it comes to regulating earlier stages of the arms life cycle. While U.S. law places a number of marking and recordkeeping requirements on arms producers and sellers, domestic ownership laws are lax compared to those of other countries.

Part IV shows that there are three major gaps in extant arms trafficking agreements. First, the international agreements that are the most enforceable either fail to target arms trafficking at multiple points in the life cycle or fail to cover a broad scope of weapons. Second, arms trafficking agreements do not adequately regulate the illicit resale of arms in the black market after they are produced and sold for the first time legally. This is because there is no binding and enforceable agreement that requires states to track all domestic weapons transfers, from their initial sale to the final sale before their export. Finally, major arms suppliers, such as the United States, are not party to several major arms trafficking agreements.

To address these shortcomings, this report offers three options available to U.S. policymakers for strengthening arms trafficking laws. First, the United States could increase multilateral engagement by ratifying the leading regional arms trafficking agreement, Inter-American Convention Against Illicit Manufacturing of and Trafficking in Firearms, Ammunitions, Explosives, and Other Related Materials (CIFTA). Doing so would likely require no changes in U.S. domestic law but would strengthen the U.S. ability to coordinate its arms control efforts with other countries while encouraging other countries to more effectively address arms trafficking. Second, the United States could increase bilateral programmatic assistance to address arms trafficking—at the very least by taking arms trafficking into account in existing assistance programs. Finally, the United States could engage more actively in leading negotiations over a robust and comprehensive arms trade treaty. Such an agreement would ideally aim to bring the international legal standards developed in CIFTA to the global stage. In leading the way toward such a comprehensive treaty, the United States could encourage universal adoption of the high standards the United States already has in place to ensure that

arms are not transferred for illegitimate purposes—purposes that may directly affect U.S. security interests.

I. OVERVIEW OF CONVENTIONAL ARMS TRAFFICKING

As noted in the opening of this report, the conventional arms trade, both legal and illegal, is vast. The figures quoted above, however, include only *legal transfers* of conventional arms: transfers that occur with the active or passive involvement of governments and that are in accordance with national and international law.⁷ These figures do not consider *illegal grey market transfers*, defined as situations in which governments or individuals transfer arm to other parties by “exploiting loopholes or intentionally circumventing” the law.⁸ These figures also do not include *illegal black market transfers*, which are transfers that take place “in clear violation of national and/or international laws and without official government consent or control.”⁹ Illicit arms sales, including grey and black-market activities, are estimated to equal 10-20% of the total trade in small arms.¹⁰ Individual weapons may pass through a combination of categories as legal sales are diverted through criminal channels, often with disastrous results. For example, after U.S. military officials distributed weapons to Iraqi forces in 2004 and 2005, the Pentagon lost track of 30 percent of the arms, including 190,000 AK-47 assault rifles and pistols, which may have fallen into the hands of insurgent forces.¹¹

Illicit trafficking in conventional weapons, particularly in small arms and light weapons (SALW) is a major U.S. national security concern. SALW are man-portable lethal weapons that expel or launch a projectile by the action of an explosive.¹² Small arms are designed for individual use, such as revolvers, sub-machine guns, and assault rifles.¹³ Light weapons are intended for the use of two or three persons and include, *inter alia*, heavy machine guns, grenade launchers, portable anti-aircraft or anti-tank guns, and mortars of a caliber of less than 100

⁷ Adèle Kirsten & Noel Stott, *Controlling the Transfer of Arms: Progress and Challenges in the African Context*, INSTITUTE FOR SECURITY STUDIES, Paper 159, at 4 (March 2008).

⁸ RACHEL STOHL & SUZETTE GRILLOT, *THE INTERNATIONAL ARMS TRADE* 94 (2009).

⁹ *Id.*

¹⁰ GRADUATE INSTITUTE OF INTERNATIONAL STUDIES, *SMALL ARMS SURVEY 2001: CHAPTER SUMMARY, CRIME, CONFLICT, CORRUPTION: GLOBAL ILLICIT SMALL ARMS TRANSFERS 1* (2001).

¹¹ Glenn Kessler, *Weapons Given to Iraq Are Missing: GAO Estimates 30% of Arms Are Unaccounted For*, WASH. POST, Aug. 6, 2007.

¹² This report adopts the definition of SALW. International Instrument To Enable States To Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons, U.N. Doc. A/CONF.192/15, para. 4 (Dec. 8, 2005) [hereinafter *Tracing Instrument*].

¹³ *Id.*

millimetres.¹⁴ SALW account for 60 to 90% of worldwide conflicts deaths every year,¹⁵ including 4 million people killed in internal conflicts from 1991 to 2002.¹⁶ They are also the weapons of choice for many terrorists; for example, most of the terrorist attacks in 2009 were perpetrated by conventional methods.¹⁷ Many SALW on the illicit market today originated in the United States.¹⁸

A particular challenge for the United States is the illicit transfer of SALW across the U.S.-Mexico border. Since 2006, Mexico has experienced a surge in drug-related violence, often perpetrated by Mexican drug trafficking organizations operating SALW that ultimately originated in the United States. Since his inauguration, Mexican President Felipe Calderon has made the targeting of drug trafficking organizations a major priority, and those organizations have responded with continuous violence against law enforcement officials. This violence has not been limited to Mexican officials—there were nearly three incidents a day against U.S. Border Patrol in 2008.¹⁹ Gun violence in Mexico dramatically increased from 2,700 drug-related murders in 2007 to over 6,200 drug-related murders in 2008.²⁰ Along the southwest border between the United States and Mexico, over 9,000 people were killed between 2007 and 2009.²¹

The United States is the primary source of illegal weapons seized in Mexico; nearly 87% of firearms seized by Mexican officials and traced in the past five years were found to have come from the United States.²² In the United States, “straw purchasers” obtain weapons at gun stores, gun shows, and pawnshops.²³ Most sales occur in Southwest border states, but U.S. sources of illegal SALW to

¹⁴ *Id.*

¹⁵ GRADUATE INSTITUTE OF INTERNATIONAL STUDIES, *SMALL ARMS SURVEY 2005: WEAPONS AT WAR 3* (2005).

¹⁶ Katharine Orlovsky, *International Criminal Law: Towards New Solutions in the Fight Against Illegal Arms Brokers*, 29 HASTINGS INT’L & COMP. L. REV. 343 (Spring 2006).

¹⁷ OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, *COUNTRY REPORTS ON TERRORISM 2009*, (Aug. 5, 2010), available at http://www.globalsecurity.org/security/library/report/2010/c-rprt-terrorism_2009.htm.

¹⁸ Stohl, *supra* note 6, at 2.

¹⁹ Jerry Seper, *Mexican Drug Wars Threaten U.S.: ‘Deadly Force’ Spills Over Border*, WASH. TIMES, Sept. 3, 2008.

²⁰ U.S. GOVERNMENT ACCOUNTABILITY OFFICE, *FIREARMS TRAFFICKING: U.S. EFFORTS TO COMBAT ARMS TRAFFICKING TO MEXICO FACE PLANNING AND COORDINATION CHALLENGES 7*, June 2009, available at <http://www.gao.gov/new.items/d09709.pdf> (hereinafter GAO REPORT).

²¹ Dudley Althaus, *Mexico Drug Crimes Leave Border at Odds*, HOUS. CHRON., Feb. 28, 2009.

²² GAO REPORT, *supra* note 20, at 3.

²³ OFFICE OF NATIONAL DRUG CONTROL POLICY, *NATIONAL SOUTHWEST BORDER COUNTERNARCOTICS STRATEGY 2* (June 2009), available at http://www.whitehousedrugpolicy.gov/publications/swb_counternarcotics_strategy09/swb_counternarcotics_strategy09.pdf (hereinafter SOUTHWEST BORDER STRATEGY).

Mexico are found in almost all 50 states.²⁴ Gun shows are particularly popular because many U.S. states, such as Arizona, New Mexico, and Texas, do not limit the number of weapons or ammunition in a single purchase and do not require purchasers at gun shows to present verification.²⁵ In contrast, Mexico has strict gun regulations that limit the accessibility of weapons, such as a requirement to register every weapon with the Federal Registry of Firearms and a prohibition on weapons reserved for the exclusive use of the military.²⁶

After purchasing conventional arms in the United States, Mexican gang associations transport the weapons across the border.²⁷ The weapons that are transported across the border have become more lethal and powerful in recent years and include high-caliber arms, such as the AK and AR-15 type semiautomatic rifles.²⁸ Once the arms reach Mexico, Mexican drug trafficking organizations are the primary beneficiaries.²⁹ In Mexico, as in many destination countries for illicit SALW, corruption within the government has crippled anti-trafficking efforts. Cartels have been effective in targeting high-ranking Mexican officials, judges, and prosecutors.³⁰ In certain areas, Mexican Army patrols have replaced local police forces decimated by corruption probes.³¹

The cycle of arms trafficking and drug trafficking between the United States and Mexico has become a central issue in bilateral relations between the two countries.³² Illicit SALW have allowed Mexican drug trafficking organizations to unleash an unprecedented level of lethal violence, which destabilizes the Mexican government and threatens to spill across the U.S. border.³³ Mexican drug trafficking organizations also present a serious organized crime threat for the United States, where they control drug distribution in at least 230 U.S. cities.³⁴

²⁴ *Id.* at 29.

²⁵ Luis Astorga, INTERNATIONAL DRUG POLICY CONSORTIUM, ARMS TRAFFICKING FROM THE UNITED STATES TO MEXICO: DIVERGENT RESPONSIBILITIES 2 (2010), www.idpc.net/sites/default/files/library/IDPC%20policy%20briefing%20Mexico.pdf.

²⁶ *Id.*

²⁷ SOUTHWEST BORDER STRATEGY, *supra* note 23, at 29.

²⁸ GAO REPORT, *supra* note 20, at 3.

²⁹ SOUTHWEST BORDER STRATEGY, *supra* note 23, at 29.

³⁰ J. Patrick Larue, *The "Ill-icit" Effects of NAFTA: Increased Drug Trafficking in the United States through the Southwest Border*, 9 CURRENTS: INT'L TRADE L.J. 38, 45-46 (2000).

³¹ Dudley Althaus, *Juarez's Drug Bloodbath Rarely Spills Into Nearby El Paso*, HOUS. CRON., Oct. 5, 2008, <http://www.chron.com/disp/story.mpl/front/6040560.html>.

³² Astorga, *supra* note 25, at 1.

³³ See Randal C. Archibald, *Mexico Drug Cartel Violence Spills Over, Alarming U.S.*, N.Y. TIMES, Mar. 22, 2009.

³⁴ Astorga, *supra* note 25, at 1.

The U.S. government faces significant challenges in addressing arms trafficking to Mexico. Within the United States, officials confront restrictions on collecting and reporting information about weapons sales, a lack of a requirement for background checks on private sales, and insufficient reporting requirements for multiple sales.³⁵ Inter-agency cooperation and data sharing is also lacking. U.S. law enforcement agencies have made a concerted effort to work with their Mexican counterparts, but they have been hampered by the lack of a Spanish language version of the electronic tracing system and corruption among some Mexican officials.³⁶

II. ARMS TRAFFICKING AGREEMENTS

This Part outlines the existing international legal framework for regulating arms trafficking. It offers an analytical framework for differentiating these instruments. First, however, this Part briefly summarizes the six major multilateral arms trafficking agreements currently in force—the first three of which are non-binding and second three binding. This list is intended to provide only an introduction to the current international legal framework, which is analyzed in more detail below.³⁷

- *United Nations Register of Conventional Arms (“UN Register”)*: The United Nations General Assembly established the UN Register in 1991 to promote transparency in interstate arms transfers.³⁸ States voluntarily report to the UN Register annually on the import and export of conventional arms.³⁹
- *Wassenaar Arrangement*: In 1996, members of the former Coordination Committee on Export Controls, along with states from

³⁵ GAO REPORT, *supra* note 20, at 3.

³⁶ *Id.* at 4. Note, however, that in December 2009 the United States deployed its Spanish language version of the tracing system to Mexico and a few other countries. See Press Release, Bureau of Alcohol, Tobacco, Firearms, and Explosives, ATF Deploys Spanish eTrace to Mexico, Guatemala, and Costa Rica, (Dec. 30, 2009) available at <http://www.atf.gov/press/releases/2009/12/123009-atf-deploys-spanish-etrace.html>.

³⁷ This report does not discuss major European and African multilateral arms trafficking agreements. It also does not discuss the OAS Guidelines for Control and Security of Man-Portable Air Defense Systems (MANPADS).

³⁸ G.A. Res. 46/36[L], U.N. Doc. A/RES/46/36 (Dec. 6, 1991); see also Report of the Secretary-General, U.N. Doc A/46/301 (Sep. 9, 1991).

³⁹ G.A. Res 46/36[L], *supra* note 38, annex para. 2.

the former Soviet Union, created the Wassenaar Arrangement.⁴⁰ The 40 parties to the Arrangement voluntarily share information about their exports of conventional weapons and dual-use technologies⁴¹ to non-members of the Arrangement.⁴²

- *United Nations Programme of Action on Small Arms and Light Weapons (“UN Programme”)*: The UN Programme, created in 2001,⁴³ expresses a nonbinding commitment to combat trafficking of small arms and light weapons.⁴⁴ An instrument adopted by the UN General Assembly under the Programme framework provides guidelines for marking, record-keeping, and tracing.⁴⁵
- *Inter-American Convention Against Illicit Manufacturing of and Trafficking in Firearms, Ammunitions, Explosives, and Other Related Materials (CIFTA)*: In 1997, the Organization of American States adopted CIFTA, the first legally binding regional treaty on firearms trafficking.⁴⁶ State parties to CIFTA reiterated their commitment to various aspects of the treaty in the Declaration of Bogota (2004)⁴⁷ and Tlatelolco Commitment (2008).⁴⁸

⁴⁰ *Origins*, WASSENAAR ARRANGEMENT, <http://wassenaar.org/introduction/origins.html> (last visited November 2, 2010).

⁴¹ Technologies that can be used both for military and peaceful purposes. European Commission, Trade Topics: Dual Use, <http://ec.europa.eu/trade/creating-opportunities/trade-topics/dual-use/> (last visited November 2, 2010).

⁴² *Introduction*, WASSENAAR ARRANGEMENT, <http://wassenaar.org/introduction/index.html> (last visited November 2, 2010); SAFERWORLD, MAKING IT WORK: MONITORING AND VERIFYING IMPLEMENTATION OF AN ARMS TRADE TREATY 6,8 (2008).

⁴³ United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, 9-20 July, 2001, Report, U.N. Doc. A/CONF.192/15 (Supp.) (2001) [hereinafter UN Report on Small Arms and Light Weapons].

⁴⁴ *Id.*

⁴⁵ Tracing Instrument, *supra* note 12, paras. 7-13.

⁴⁶ STOHL & GRILLOT, *supra* note 8, at 156.

⁴⁷ Conference of the States Party to the Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials (CIFTA), First Conference of the States Party, Bogota, Col., Mar. 8-9, 2004, *Declaration of Bogota on the Functioning and Application of the Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials (CIFTA)*, OEA/Ser.L/XXII.4 CIFTA/CEP-I/DEC.1/04 rev.3 (Mar. 9, 2004).

⁴⁸ Conference of the States Party to the Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials (CIFTA), Second Conference of the States Party to the CIFTA, Mexico City, Mex., Feb.

- *Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition (“Firearms Protocol”)*: The Firearms Protocol was created in 2001 under the United Nations Convention Against Transnational Organized Crime.⁴⁹ Parties to the Protocol are legally bound to combat the manufacture and trade of illicit firearms.⁵⁰
- *United Nations Security Council arms embargoes (“UN arms embargoes”)*: UN arms embargoes prohibit arms transfers by UN member states to particular countries or groups.⁵¹ At present, there are mandatory, binding arms embargoes against the Taliban, Al Qaeda, and Osama bin Laden,⁵² non-government forces in Lebanon,⁵³ rebels in Sierra Leone,⁵⁴ the Darfur region of Sudan,⁵⁵ the DRC,⁵⁶ Côte d'Ivoire,⁵⁷ Eritrea,⁵⁸ Iran,⁵⁹ North Korea,⁶⁰ and Somalia.⁶¹

These agreements create a legal framework for arms trafficking that can at times appear to be a confusing patchwork of commitments and aspirations. In the sections below, we analyze this panoply of existing arrangements according to three key thematic dimensions: the point in the arms life cycle that the agreement

20-21, 2008, *Tlatelolco Commitment*, OEA/Ser.L/XXII.4 CIFTA/CEP-II/doc.7/08 rev.1 (Feb. 21, 2008).

⁴⁹ Press Release, General Assembly, Major Review at United Nations to Assess Progress Made, Actions Needed to Further Stem Illegal Small Arms Trade, U.N. Press Release DC/3027 (June 20, 2006).

⁵⁰ *Id.*

⁵¹ *Arms Embargo Database*, STOCKHOLM INTERNATIONAL PEACE RESEARCH INSTITUTE, http://www.sipri.org/research/armaments/transfers/publications/grants/past_external_funds/research/armaments/transfers/controlling/arms_embargoes/research/armaments/transfers/controlling/arms_embargoes/arms_embargoes_default.

⁵² S.C. Res. 1390, U.N. Doc. S/RES/1390 (Jan. 28, 2002). Resolutions 1455 (2003) and 1526 (2004) strengthened measures preventing arms trafficking to Al Qaeda and the Taliban. *See* Press Release, Security Council, Security Council Tightens Sanctions Against Usama Bin Laden, Al-Qaida, Taliban, U.N. Press Release SC/7995 (Jan. 30, 2004). Resolution 1390 replaced Resolution 1333 (2000), an embargo against the Taliban only. *Id.*

⁵³ S.C. Res. 1701, U.N. Doc. S/RES/1701 (Aug. 11, 2006).

⁵⁴ S.C. Res. 1171, U.N. Doc. S/RES/1171 (Jun. 5, 1998).

⁵⁵ S.C. Res. 1556, U.N. Doc. S/RES/1556 (July 30, 2004).

⁵⁶ S.C. Res. 1493, U.N. Doc. S/RES/1493 (July 28, 2003).

⁵⁷ S.C. Res. 1572, U.N. Doc. S/RES/1572 (Nov. 15, 2004).

⁵⁸ S.C. Res. 1907, U.N. Doc. S/RES/1907 (Dec. 23, 2009).

⁵⁹ S.C. Res. 1737, U.N. Doc. S/RES/1737 (Dec. 23, 2006).

⁶⁰ S.C. Res. 1718, U.N. Doc. S/RES/1718 (Oct. 14, 2006).

⁶¹ S.C. Res. 733, U.N. Doc. S/RES/733 (Jan. 23, 1992).

targets, the scope of the weapons they address, and the enforceability of the agreement. We discuss each of these dimensions in turn.

A. Life Cycle

Arms trafficking agreements vary according to what stage of the life cycle of an arm at which they regulate. Some apply at the point of production (the time at which weapons are produced); some regulate domestic ownership and transfer (when weapons are owned and transferred domestically); and others apply only at the stage of interstate transfer (when weapons are imported or exported). Here we examine the international legal framework at each stage of this life cycle, beginning with production. It is important to note, at the outset, that some agreements may regulate at more than one stage of the life cycle. For example, the UN Programme, Firearms Protocol, and CIFTA all regulate throughout all three stages of the life cycle of arms, though CIFTA is not as restrictive or detailed as the UN Programme or Firearms Protocol. Nonetheless, analyzing the current legal framework by the stage in the life cycle at which different international agreements regulate makes it possible to identify the underlying analytical structure of the existing legal framework and sets the stage for our efforts to identify its shortcomings.

1. Production

There are several common methods of controlling arms at the point of production. First, agreements can ask states to engage in marking, whereby states demand that weapons manufacturers mark every weapon at the time of production with unique identifiers, such as serial numbers. Marking allows authorities to trace weapons after they have been sold.⁶² Second, agreements can ask states to engage in recording, by which states maintain records of all domestic weapons production, again so that authorities can make use of such records after weapons have been sold.⁶³ Finally, agreements can ask states to ensure that deactivated arms are destroyed so that they are not made into working arms.

The UN Programme employs almost all of these methods for controlling arms at the point of production. The nonbinding Programme encourages states to put in place “adequate laws, regulations and administrative procedures to exercise effective control over the *production* of small arms and light weapons within their

⁶² See, e.g., Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects § II, para. 7, U.N. Doc. A/CONF.192/15 (July 2001) [hereinafter PoA].

⁶³ See, e.g., *id.* § 2, para. 9.

areas of jurisdiction.”⁶⁴ States should identify people and organizations engaged in the illegal manufacture of arms and take legal action against them.⁶⁵ They should also ensure that arms manufacturers mark weapons when they are produced so that they can later be traced.⁶⁶ The Programme also suggests that states record all weapons manufactures,⁶⁷ and they “are encouraged to exchange information” with other states “on their national marking systems.”⁶⁸

CIFTA employs a full set of methods for controlling arms trafficking at the point of production. State parties to CIFTA must criminalize the illicit manufacture of arms and adopt measures to prosecute these crimes.⁶⁹ They must require that manufacturers mark weapons at the point of production,⁷⁰ and keep records of gun manufactures so that authorities can easily identify illicitly manufactured weapons.⁷¹ CIFTA further requires member states to cooperate to prevent trafficking by sharing information such as the identity of arms producers and legislative experiences and techniques used to fight illicit production.⁷²

The Firearms Protocol obliges member states to mark weapons at their point of production.⁷³ It also requires State parties to keep records of weapons produced⁷⁴ and to criminalize the illicit manufacturing of arms.⁷⁵

UN arms embargoes do not target arms trafficking at the point of production. However, some forbid states from providing technical training or assistance to embargoed countries or groups related to the manufacture of weapons.⁷⁶

⁶⁴ *Id.* § II, para. 2. (emphasis added).

⁶⁵ *Id.* § II, para. 6.

⁶⁶ *Id.* § II, para. 7.

⁶⁷ *Id.* § II, para. 9.

⁶⁸ *Id.* § III, para. 12.

⁶⁹ Inter-American Convention Against Illicit Manufacturing of and Trafficking In Firearms, Ammunition, Explosives, and other Related Materials arts. IV, V, adopted Nov. 14, 1997, 37 I.L.M. 143 (1998) [hereinafter CIFTA].

⁷⁰ *Id.* art. VI(1)(a).

⁷¹ *Id.* art. XI.

⁷² *Id.* art. XIII(1).

⁷³ Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime, G.A. Res. 55/255, art. 8, U.N. Doc. A/RES/55/255 (June 8, 2001) [hereinafter Firearms Protocol].

⁷⁴ *Id.* art. 7.

⁷⁵ *Id.* art. 5(a).

⁷⁶ *See, e.g.*, S.C. Res. 1701, *supra* note 53, para. 15(b); S.C. Res. 1874, para. 9, U.N. Doc. S/RES/1874 (June 12, 2009).

2. Domestic Ownership and Transfer

There are a variety of methods that international agreements use to target trafficking at the point of domestic ownership and transfer. Most broadly, agreements can encourage states to criminalize the illegal possession of weapons and prosecute those who possess weapons illegally. More specifically, agreements can encourage states to locate stockpiles of weapons, seize these stockpiles, and destroy them. They can push states to record ownership and transfer of weapons or employ tracing, meaning “the systematic tracking of [arms] for the purpose of assisting the [authorities] in detecting, investigating and analysing illicit manufacturing and illicit trafficking.”⁷⁷ Finally, they can advance efforts to carefully control arms issued to government authorities and limit the size of government stockpiles.

The UN Register does not focus on controlling arms trafficking at the point of domestic ownership and transfer, but it does ask states to report “available background information regarding their military holdings, procurement through national production, and relevant policies.”⁷⁸

The UN Programme, on the other hand, employs many, but not all, of the available methods for targeting arms at the point of domestic ownership and transfer. It encourages states to criminalize illicit possession and stockpiling of weapons⁷⁹ and to prosecute those engaged in both illegal possession and transfer of arms.⁸⁰ It encourages states to cooperate on a regional and global level to prevent illegal domestic ownership⁸¹ and to share information for that purpose.⁸² The UN Programme further asks states to destroy confiscated weapons,⁸³ and it directs governments to carefully manage their own arms stockpiles.⁸⁴ The International Instrument To Enable States To Identify and Trace in a Timely and Reliable Manner (“Tracing Instrument”) created pursuant to the UN Programme provides detailed guidelines for states on marking, record-keeping, and tracing. Under the Tracing Instrument, states should mark and record weapons at their

⁷⁷ Firearms Protocol, *supra* note 73, art. 3(f).

⁷⁸ G.A. Res. 46/36, *supra* note 38, annex para. 3.

⁷⁹ PoA, *supra* note 62, § II, para. 3.

⁸⁰ *Id.* § II, para. 6.

⁸¹ *Id.* § II, paras. 25-26, 38.

⁸² *See id.* § II, paras. 27, 31, 33, 40.

⁸³ *Id.* § II, para. 19.

⁸⁴ EDWARD LAURANCE & RACHEL STOHL, MAKING GLOBAL PUBLIC POLICY: THE CASE OF SMALL ARMS AND LIGHT WEAPONS 7 (2002); *see also Id.*, § II, paras. 17-18.

production in a manner of their choosing but consistent with guidelines provided.⁸⁵

The UN Programme directs states to maintain records on the ownership and transfer of weapons, including those weapons issued by the government.⁸⁶ States should “ensure that comprehensive and accurate records are kept for as long as possible on the manufacture, holding *and transfer* of small arms and light weapons under their jurisdiction.”⁸⁷ The UN Programme is the only multilateral agreement to stipulate that states should make records of every arms transfer within their jurisdiction. The Programme also suggests that states should engage in tracing, though it does not explain how states should trace weapons.⁸⁸ The Tracing Instrument encourages states to “ensure that they are capable of undertaking traces and responding to tracing requests” using tracing systems of their choice.⁸⁹

CIFTA employs several methods for targeting arms at the point of domestic ownership and transfer, but it too is not as detailed as the UN Programme. CIFTA focuses on ownership and transfer only in the context of illicit trafficking, which it defines as “the import, export, acquisition, sale, delivery, movement, or transfer of firearms, ammunition, explosives, and other related materials from or across the territory of one State Party to that of another State Party, if any one of the States Parties concerned does not authorize it.”⁹⁰ Thus, State parties to CIFTA are not required to criminalize the illegal possession of arms as such, but only “the illicit manufacturing of and trafficking in” arms.⁹¹ If an individual owns or transfers arms domestically for the purpose of trafficking across state lines, he would be subject to criminal penalties under CIFTA—but he would not necessarily be subject to criminal penalties for merely possessing arms illegally.

CIFTA makes interstate collaboration a core means of regulating trafficking at the point of ownership and transfer. It requires states to share information, including “accurate and prompt responses to trace requests.”⁹² State

⁸⁵ Tracing Instrument, *supra* note 12, paras. 7-13. States are further obliged to assist other states in efforts to trace illicit small arms and light weapons, though states may implement tracing systems in a manner of their choosing. *Id.* paras. 14-23.

⁸⁶ PoA, *supra* note 62, § II, paras. 9-10.

⁸⁷ *Id.* (emphasis added).

⁸⁸ *See, e.g., id.*, § II, paras. 4, 7, 10, 36; § III, para. 6.

⁸⁹ Tracing Instrument, *supra* note 12, para. 14.

⁹⁰ *Id.* art. I(2).

⁹¹ *Id.* art. IV(1).

⁹² *Id.* art. XIII(3).

parties must also exchange expertise and training on matters affecting domestic ownership and transfer, such as arms identification and tracing.⁹³ Currently CIFTA does not require states to record all domestic arms transfers, but in 2006, a group of experts drafted model legislation for State parties on domestic marking and tracing.⁹⁴

The Firearms Protocol does not criminalize the possession of illicit arms as such. Rather, it regulates at the point of ownership and transfer through requiring that states criminalize the removal of markings from arms;⁹⁵ through requiring that states mark arms when they are transferred from government to civilian stocks;⁹⁶ and through directing states to confiscate illegally manufactured or trafficked firearms.⁹⁷ The Firearms Protocol requires that states prevent the illegal reactivation of deactivated firearms.⁹⁸ Finally, it encourages State parties to provide each other with law enforcement tracing and assistance.⁹⁹

UN arms embargoes target arms trafficking at the point of domestic ownership and transfer only in the sense that UN member states must not transfer arms to specific non-state actors. This applies for embargoes against the Taliban,¹⁰⁰ Al Qaeda and Osama bin Laden,¹⁰¹ non-government forces in Lebanon,¹⁰² rebels in Sierra Leone,¹⁰³ and non-governmental individuals in the Darfur region of Sudan.¹⁰⁴

3. Interstate Transfer

Agreements target arms trafficking at the point of interstate transfer primarily by focusing on exports and imports. First, agreements can encourage states to engage in export controls. These include licensing controls, whereby

⁹³ *Id.* art. XV(2).

⁹⁴ Organization of American States, Draft Proposed Model Legislation on the Marking and Tracing of Firearms and Ammunition, OAS Doc. OEA/Ser.L/XXII.6.1 (Jan. 12, 2006).

⁹⁵ Firearms Protocol, *supra* note 73, art. 5(1)(c).

⁹⁶ *Id.* art. 8(1)(c).

⁹⁷ *Id.* art. 6(1).

⁹⁸ *Id.* art. 9.

⁹⁹ *Id.* art. 12(3)-(4).

¹⁰⁰ S.C. Res. 1333, U.N. Doc. S/RES/1333 (Dec. 19, 2000); S.C. Res. 1390, *supra* note 52.

¹⁰¹ S.C. Res. 1390, *supra* note 52. Security Council Resolutions 1455 (2003) and 1526 (2004) strengthened measures preventing arms trafficking to Al Qaeda and the Taliban. *See* Press Release, Security Council, Security Council Tightens Sanctions Against Usama Bin Laden, Al-Qaida, Taliban, U.N. Press Release SC/7995 (Jan. 30, 2004).

¹⁰² S.C. Res. 1701, *supra* note 53.

¹⁰³ S.C. Res. 1171, *supra* note 54.

¹⁰⁴ S.C. Res. 1556, *supra* note 55.

governments grant entities permission to export, import, or transit arms, and end-user certificates, whereby exporters must document “the final user of the arms in question” and the “use to which the weapons will be put.”¹⁰⁵ Second, agreements can promote efforts to record arms shipments across state borders. Third, agreements can aim to secure international borders from illicit arms transfers, such as by encouraging states to mark all imported weapons or regulating the activities of arms brokers. Finally, some agreements impose restrictions on interstate transfers to particular countries, organizations, or individuals.

The UN Register targets arms trafficking at the point of interstate transfer. Member states are encouraged to report each year the number of conventional arms¹⁰⁶ imported to and exported from their territory.¹⁰⁷

The Wassenaar Arrangement similarly targets arms trafficking only at the point of the interstate transfer of arms, focusing exclusively on exports. Members of the Wassenaar Arrangement maintain national export controls on items listed on the Wassenaar Arrangement Control Lists, which include conventional weapons and dual-use goods and technologies.¹⁰⁸ States report when they transfer or deny transfers of controlled items to states that are not parties to the Arrangement.¹⁰⁹

The UN Programme is much more comprehensive than either the UN Register or Wassenaar Arrangement, though, like them, it too is nonbinding. It encourages states to adopt nearly all of the above methods of regulating arms at the level of interstate transit. The Programme declares that States should adopt laws and administrative procedures to control “the export, import, transit or retransfer of [small arms and light weapons].”¹¹⁰ Specifically, the Programme envisions that states “maintain an effective national system of export and import licensing or authorization,”¹¹¹ and require end-user certificates for the importing

¹⁰⁵ Nicholas Marsh, *Two Sides of the Same Coin? The Legal and Illegal Trade in Small Arms*, 9 BROWN J. WORLD AFF. 217, 218 (2002).

¹⁰⁶ Battle tanks, armored combat vehicles, large caliber artillery systems, combat aircraft, attack helicopters, warships, and missiles or missile systems. G.A. Res 46/36, *supra* note 38, annex para. 2.

¹⁰⁷ *Id.*

¹⁰⁸ *How Does the Wassenaar Arrangement Work*, WASSENAAR ARRANGEMENT, <http://wassenaar.org/introduction/howitworks.html> (last visited November 2, 2010). States also exchange information on weapons and dual-use technologies. *Id.*

¹⁰⁹ *Id.*

¹¹⁰ PoA, *supra* note 62, § II, para. 2.

¹¹¹ *Id.* § II, para. 11

and exporting of arms.¹¹² The Programme directs states to engage in “trans-border customs cooperation”¹¹³ and to notify the original exporting states when arms that originated in those states are re-transferred to a third state.¹¹⁴ The Programme asks that States uphold arms embargoes individually,¹¹⁵ and collaborate in regional and global efforts to enforce such embargoes collectively.¹¹⁶ The UN Programme finally asks states to regulate the activity of arms brokers through licensing, registration, and imposition of penalties when brokers engage in illegal activities.¹¹⁷

CIFTA controls arms trafficking at level of interstate transfer through legally binding obligations on member states. Under CIFTA, State parties must criminalize and enforce laws against illicit trafficking,¹¹⁸ which includes importing, exporting, and transiting arms across state lines without the permission of both State parties.¹¹⁹ States must further institute two types of export control systems. First, they must have “an effective system of export, import, and international transit licenses or authorizations for [interstate] transfers” of arms.¹²⁰ States must ensure that “importing and in-transit countries have issued the necessary licenses or authorizations.”¹²¹ Second, states must “strengthen[] controls at export points,”¹²² although CIFTA does not specify how states should strengthen these controls. CIFTA is the only agreement discussed in this report to require importing states to mark imported arms.¹²³ However, unlike the UN Programme, it lacks an end-user requirement for licensing.¹²⁴

The Firearms Protocol targets interstate transfers through detailed export controls. It requires that State parties “establish or maintain an effective system of export and import licensing or authorization, as well as measures on international transit, for the transfer of” arms.¹²⁵ Unlike the UN Programme, the Firearms

¹¹² *Id.* § II, para. 12.

¹¹³ *Id.* § II, para. 27.

¹¹⁴ *Id.* § II, para. 13.

¹¹⁵ *Id.* § II, para. 15.

¹¹⁶ *Id.* § II, para. 32.

¹¹⁷ *Id.*

¹¹⁸ CIFTA, *supra* note 69, art. IV(1).

¹¹⁹ *Id.* art. I(2).

¹²⁰ *Id.* art. IX(1).

¹²¹ *Id.* art. IX(3).

¹²² *Id.* art. X.

¹²³ *Id.* art. VI(1)(b).

¹²⁴ Kierstan Lee Carlson, Comment, *Fighting Firearms with Fire in the OAS: A Critical Evaluation of the Inter-American Convention Against the Manufacturing of and Trafficking in Firearms, Ammunition, and Other Related Materials*, 25 AM. U. INT’L L. REV. 611, 638 (2010).

¹²⁵ Firearms Protocol, *supra* note 73, art. 10(1).

Protocol provides specifics on these export systems; it requires exporting states to verify that importing states have issued import licenses, and it requires that states through which arms are transiting (transit states) have given permission for arms transits.¹²⁶ Export and import licenses must contain significant information about the arms transfer, including the information normally part of an end-user certificate.¹²⁷ States must ensure that these licenses are authentic.¹²⁸ They must document the movements of arms at points of export, transit, and import.¹²⁹ States must keep arms secure at import, export, and transit.¹³⁰ States must regulate arms brokers by, for example, requiring their registration and licensing, or by requiring import and export licenses to disclose the names of brokers involved in interstate transfers.¹³¹ Although its preventive measures apply generally, the Firearms Protocol prohibits only interstate transfers to organized criminals.¹³²

UN arms embargoes primarily target arms trafficking at the point of interstate transfer. They do not specify when during interstate transfer states must target arms transfers but simply require states to take measures to “prevent the direct or indirect supply, sale [and] transfer” of arms to embargoed countries or groups.¹³³ Certain embargoes forbid the transfer of arms against specific groups or individuals: these are the embargoes against the Taliban, Al Qaeda, and Osama bin Laden,¹³⁴ non-government forces in Lebanon,¹³⁵ rebels in Sierra Leone,¹³⁶ and the Darfur region of Sudan.¹³⁷

B. Scope of Weapons

Arms trafficking agreements vary in scope: they target different classes of weapons. Early arms trafficking agreements focused largely on one class of weapons—major conventional weapons¹³⁸—but with the end of the Cold War, the

¹²⁶ *Id.* art. 10(2).

¹²⁷ *Id.* art. 10(3).

¹²⁸ *Id.* art. 10(5).

¹²⁹ *Id.* art. 10(1)-(4).

¹³⁰ *Id.* art. 11.

¹³¹ *Id.* art. 15(1).

¹³² *Id.* art. 4(1) (stating that the Protocol applies to the “investigation and prosecution of offences . . . where those offences are transnational in nature and involve an organized criminal group.”).

¹³³ *See, e.g.*, S.C. Res. 1390, *supra* note 52, para. 2(c).

¹³⁴ *Id.* para. 2.

¹³⁵ S.C. Res. 1701, *supra* note 53, para. 15.

¹³⁶ S.C. Res. 1171, *supra* note 54, para. 2.

¹³⁷ S.C. Res. 1556, *supra* note 55, para. 7.

¹³⁸ These are weapons “such as fighter jets and tanks, which are procured almost exclusively by national military forces.” Jeffrey Boutwell & Michael T. Klare, *A Scourge of Small Arms*, 282 *SCIENTIFIC AMERICAN* 48, 48-53 (June 2000).

international community increasingly focused on small arms and light weapons.¹³⁹ The UN Register, UN Programme, CIFTA, and the Firearms Protocol are the most limited in scope, in that they only cover illicit weapons. The Wassenaar Arrangement and UN arms embargoes are broader, covering several classes of weapons.

1. Agreements Covering a Narrow Set of Weapons

The UN Programme focuses only on illicit small arms and light weapons.¹⁴⁰ CIFTA is narrower in focus, covering only firearms (not other forms of small arms and light weapons), ammunition, explosives, and other related materials—such as components of firearms—that are illicitly manufactured or trafficked.¹⁴¹ The Firearms Protocol similarly covers only firearms, their parts and components, and ammunition.¹⁴² Unlike CIFTA and the UN Programme, however, it only targets weapons involved in specific offenses: firearms that are illicitly manufactured or trafficked¹⁴³ and involved in offences that are transnational or involve organized crime.¹⁴⁴

¹³⁹ PIETER D. WEZEMAN, *CONFLICTS AND TRANSFERS OF SMALL ARMS* 5 (Stockholm Int'l Peace Research Institute 2003). Small arms are “pistols, revolvers, rifles[,] and carbines; light weapons are “machine guns, small mortars, and other weapons that can be carried by one or two people.” *Id.* UN Secretary-General Boutros Boutros-Ghali had first brought the illicit small arms trade to the attention of the UN in 1992, calling for a “micro-disarmament.” Edward J. Laurance, *Shaping Global Public Policy on Small Arms: After the UN Conference*, 9 *BROWN J. WORLD AFF.* 193, 193 (2002). It appears that over the 1990s, the United Nations became increasingly concerned by the prevalence of illicit arms—arms not recorded as required by law—used in the incredibly destructive African and Latin American wars of the 1990s. United Nations Conference to Review Progress Made in the Implementation of the Programme of Action to Prevent, Combat, and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, *Facts on Illegal Small Arms*, New York, June 26-July 7, 2006. In the late 1990s, American, African, and European states came to regional agreements to reduce trafficking in illicit small arms. Laurance, at 194. In 2001 the General Assembly convened the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, where states met to “decide on steps nations should take to prevent the illicit trade in small arms.” IANSA, UN PROGRAMME OF ACTION ON SMALL ARMS AND LIGHT WEAPONS, <http://iansa.org/un/programme-of-action.htm> (last visited November 2, 2010). The President of the Conference noted that it the trade in illicit small arms was “one of the most urgent problems of international peace and security.” UN Report on Small Arms and Light Weapons, *supra* note 43, at 23.

¹⁴⁰ PoA, *supra* note 62, pmb1.

¹⁴¹ CIFTA, *supra* note 69, art. I(1)-(6).

¹⁴² Firearms Protocol, *supra* note 73, art. 3(a)-(c).

¹⁴³ *Id.* arts. 2, 3(d)-(e).

¹⁴⁴ *Id.* art. 4(1).

2. Agreements Covering a Broad Set of Weapons

Other arms agreements have broader scope. The UN Register initially focused exclusively on major conventional weapons, which the UN believed at the time “to be the most useful weapons for aggression and therefore the most likely to cause a destabilizing arms build-up.”¹⁴⁵ But in 2003, a group of governmental experts recommended that the UN Register come to include reporting on small arms and light weapons, and the General Assembly accepted this recommendation.¹⁴⁶ The Register now encompasses seven types of major conventional weapons—battle tanks, armored combat vehicles, large caliber artillery systems, combat aircraft, attack helicopters, warships, missiles, and missile launchers—plus small arms and light weapons.¹⁴⁷ State parties to the Register are still not asked to report on “international arms collaboration,” where one country assists another country in building conventional weapons by providing technology transfers or by engaging in “joint ventures between defense firms.”¹⁴⁸ Additionally, they need not report on transfers of subcomponents and subsystems of major conventional weapons—only on completed weapons and systems.¹⁴⁹

The Wassenaar Arrangement is the agreement broadest in scope, covering major conventional weapons and dual-use technologies.¹⁵⁰ The major conventional weapons on which the Wassenaar Arrangement asks states to report

¹⁴⁵ Siemon T. Wezeman, *The Future of the United Nations Registers of Conventional Arms*, 5 (Stockholm Int’l Peace Research Inst., SIPRI Policy Paper No. 4, 2003).

¹⁴⁶ UN OFFICE FOR DISARMAMENT AFFAIRS, *Transparency in Armaments: Reporting to the United Nations Register of Conventional Arms: FACT SHEET 14* (2010) [hereinafter UN Register Fact Sheet].

¹⁴⁷ SAFERWORLD, *supra* note 42, at 29. Small arms include: revolvers and self-loading pistols; rifles and carbines; sub-machine guns; and assault rifles, light machine guns. Light weapons include: heavy machine guns; hand-held under-barrel and mounted grenade launchers; portable anti-tank guns; recoilless rifles; portable anti-tank missile launchers and rocket systems; and mortars of calibers less than 75mm. *Id.*

¹⁴⁸ Richard A. Bitzinger, *The Globalization of the Arms Industry: The Next Proliferation Challenge*, 19 INT’L SEC. 170, 190 (1994). This collaboration is “potentially more destabilizing than outright arms sales.” *Id.*

¹⁴⁹ See SAFERWORLD, *supra* note 42, at 7.

¹⁵⁰ Kenneth A. Dursht, Note, *From Containment to Cooperation: Collective Action and the Wassenaar Arrangement*, 19 CARDOZO L. REV. 1079, 1108 (1997); see also Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies: List of Dual-Use Goods and Technologies and Munitions List, WA-LIST(09) 1 (Mar. 12, 2009), available at [http://www.wassenaar.org/controllists/2009/WA-LIST%20\(09\)%201/WA-LIST%20\(09\)%201.pdf](http://www.wassenaar.org/controllists/2009/WA-LIST%20(09)%201/WA-LIST%20(09)%201.pdf) (last visited Dec. 4, 2010) (listing all major conventional and dual-use technologies covered by the Arrangement) [hereinafter Wassenaar Control List].

are complete weapons systems similar to those of the UN Register.¹⁵¹ The Wassenaar Arrangement also asks states to report on small arms, light weapons, and man-portable air defense systems.¹⁵² Furthermore, State parties to the Arrangement maintain an extensive Control List of dual-use goods and technologies. These goods and technologies include special materials (such as toxic chemicals) and related equipment; materials processing systems and equipment (such as ball bearings systems); electronics; computers; telecommunications systems, equipment, and components; goods and technologies pertaining to information security; sensors and lasers; and goods and technologies related to air and marine navigation.¹⁵³ The Control List also contains an extensive list of munitions, including firearms, explosive devices, ammunition, ground vehicles, and toxic agents.¹⁵⁴ The Wassenaar Arrangement does not distinguish between legal and illicit weapons.

UN Resolutions vary in their scope, but most are even broader than the Wassenaar Arrangement. Resolution 1390, for example, requires states to take measures to “prevent the direct or indirect supply, sale and transfer” to Al Qaeda and the Taliban “of arms and related materiel of *all types*,” including ammunition, spare parts, and technical assistance and training.¹⁵⁵ Two embargoes, however, restrict only the transfer of certain arms to embargoed recipients. The arms embargo on Iran prohibits only the transfer of goods and technology related to nuclear weapons,¹⁵⁶ and the arms embargo on North Korea prohibits the transfer of major conventional weapons but not small arms and light weapons.¹⁵⁷ The UN arms embargoes do not distinguish between legal and illicit weapons.

¹⁵¹ Battle tanks, armored combat vehicles, large caliber artillery systems, military aircraft/unmanned aerial vehicles, military and attack helicopter, warships, and missiles or missile systems. Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies: Guidelines & Procedures, Including the Initial Elements, app. 3 § 1-7 (Dec. 2009), available at http://www.wassenaar.org/2003Plenary/initial_elements2003.htm.

¹⁵² *Id.*, app. 3 § 8.

¹⁵³ Wassenaar Control List, *supra* note 150.

¹⁵⁴ *Id.* at 162-189.

¹⁵⁵ S.C. Res. 1390, *supra* note 52, para. 2(c) (emphasis added).

¹⁵⁶ S.C. Res. 1737, *supra* note 59, para. 3. Because “[m]any of the items [covered by the embargo] are items commonly used in the production of conventional weapons, especially missiles and combat aircraft. Hence, the embargo may hinder Iran's efforts to procure conventional, as well as non-conventional weapons technology.” *UN Arms Embargoes on Iran*, STOCKHOLM INT’L PEACE RESEARCH INST. (Nov. 23, 2010), http://www.sipri.org/research/armaments/transfers/controlling/arms_embargoes/un_arms_embargoes/iran.

¹⁵⁷ S.C. Res. 1718, *supra* note 60, para. 8.

C. Enforceability

Finally, arms trafficking agreements differ in their degrees of enforceability. Most arms agreements are not legally binding, although some non-binding instruments constitute such common practice across states that they are treated as if they were binding by signatory parties. Some agreements are legally binding by their terms, but still suffer from enforcement mechanisms that lack teeth. The least enforceable agreements are the UN Register, the Wassenaar Arrangement, and the UN Programme. The most enforceable are the CIFTA, the Firearms Protocol, and the UN arms embargoes, though all struggle with enforcement.

1. Non-Binding Agreements

The UN Register is not legally binding, but it may constitute common practice. About eighty states—almost all states that produce conventional arms, including the United States—regularly report to the Register, and it has been found to increase transparency in conventional arms trading.¹⁵⁸ However, because the UN Register is not legally binding—the United Nations cannot require states to report—participation is subject to fluctuation. In 2010, that number of reporting states dropped to 69, “the lowest number of reports submitted by Member States since the inception of the Register.”¹⁵⁹ Moreover, the UN cannot monitor the quality of country reporting, such as through follow-up inspections or controls.¹⁶⁰ Not surprisingly, the quality of country reporting is low.¹⁶¹

The Wassenaar Arrangement is the least enforceable of the arms trafficking agreements. First, it is not legally binding.¹⁶² It lacks a central enforcement mechanism and instead makes each country responsible for implementing its own export controls.¹⁶³ Moreover, the primary mechanism states

¹⁵⁸ Edward J. Laurence, *The United Nations Conventional Arms Register (UNCAR): Present Challenges, New Directions*, at iii (Int'l Sec. Research and Outreach Program, Int'l Sec. Bureau, Dep't of Foreign Affairs and Int'l Trade, 2001), available at http://www.international.gc.ca/arms-armes/assets/pdfs/uncar_laurence.pdf.

¹⁵⁹ UN Register Fact Sheet, *supra* note 146, at 2.

¹⁶⁰ WEZEMAN, *supra* note 139, at 10-11.

¹⁶¹ *Id.*

¹⁶² Dursht, *supra* note 150, at 1108.

¹⁶³ *Frequently Asked Questions, WASSENAAR ARRANGEMENT*, <http://www.wassenaar.org/faq/index.html> (last visited Nov. 2, 2010).

use to prohibit arms trafficking for dual-use technology is deeply flawed.¹⁶⁴ Under the Agreement, a state can decide to deny an export license for dual-use technology to another state,¹⁶⁵ and parties to the Wassenaar Arrangement are supposed to refrain from undercutting such a decision by refraining from granting their own export licenses to the refused state.¹⁶⁶ However, these practices are often breached, and states then delay reporting their transgression until “well after the goods had already crossed the border and been transferred into the hands of the country which was originally denied access to the goods.”¹⁶⁷ Moreover, the Wassenaar Agreement does not constitute common practice: only 40 countries are party to the agreement.¹⁶⁸

The UN Programme is also not legally binding. Parties to the UN Programme promise to cooperate with one another and with the United Nations, but the Programme contains no enforcement mechanism.¹⁶⁹ At a 2008 conference states considered “calling for legally binding instruments,” but this issue was not resolved or included in the final conference report.¹⁷⁰ The UN Programme may constitute common practice, however: between 2001 and 2006, “more than 50 countries . . . reinforced their laws against the illegal trade in small arms, and more than 60 have collected and destroyed illegal small weapons” as a result of their membership in the Programme.¹⁷¹

2. Binding Agreements

CIFTA is legally binding by its terms, but it does not include effective enforcement mechanisms and suffers from low compliance. CIFTA “was the first legally binding regional agreement to address the problem of [small arms and light weapons] trafficking.”¹⁷² Nevertheless, CIFTA lacks “formal mechanisms to monitor and enforce compliance.”¹⁷³ CIFTA’s only monitoring body is a Consultative Committee created to promote the convention,¹⁷⁴ whose decisions

¹⁶⁴ Jamil Jaffer, *Strengthening the Wassenaar Export Control Regime*, 3 CHI. J. INT’L L. 519, 520-23 (2002).

¹⁶⁵ *Id.* at 522.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Frequently Asked Questions*, WASSENAAR ARRANGEMENT, *supra* note 163.

¹⁶⁹ PoA, *supra* note 62, Section III.

¹⁷⁰ Jeff Abramson, *Small Arms Conference Nets Agreement*, ARMS CONTROL ASSOCIATION (Sept. 2008), <http://www.armscontrol.org/act/2008-09/SmallArms>.

¹⁷¹ United Nations, Small Arms Review Conference, Backgrounder: Small Arms, as Deadly as WMD (2006), <http://www.un.org/events/smallarms2006/pdf/backgrounder.pdf>.

¹⁷² Carlson, *supra* note 124, at 618.

¹⁷³ *Id.* at 627.

¹⁷⁴ CIFTA, *supra* note 69, art. XX(1).

are only “recommendatory in nature.”¹⁷⁵ Additionally, CIFTA contains no effective dispute-resolution mechanism. State parties are expected resolve disputes through diplomatic channels or other means of peaceful settlement.¹⁷⁶ Furthermore, while 30 of 34 OAS states have joined the agreement,¹⁷⁷ many State parties fail to comply with CIFTA because they face “a dearth of financial resources . . . [a] lack of capacity to adequately train law enforcement officers, and a paucity of political will.”¹⁷⁸

The Firearms Protocol is legally binding by its terms,¹⁷⁹ although states must be parties to the United Nations Convention Against Transnational Organized Crime before becoming parties to the Protocol.¹⁸⁰ The Protocol is binding in that states must resolve their disputes under the Protocol either through arbitration or through adjudication before the International Court of Justice.¹⁸¹ However, there is a catch: State parties may issue reservations stating that they are not bound to the Firearms Protocol’s arbitration and referral clause.¹⁸²

Security Council arms embargoes are legally binding, as they are made pursuant to Chapter VII authority of the Charter of the United Nations.¹⁸³ But critics allege that arms embargoes have been ineffective nonetheless, “fail[ing] to halt arms flows or significantly change the behavior of the targets of embargoes.”¹⁸⁴ One example of how a UN arms embargo failed to work in practice is the case of Resolution 1390. Under the Resolution, the UN Security Council agreed in 2002 to “[p]revent the direct or indirect supply, sale and transfer, to [the Al-Qaida network and other associated terrorist groups] groups . . . of arms and related materiel of all types including weapons and ammunition, military vehicles and equipment, paramilitary equipment.”¹⁸⁵ However, a Security Council committee established to monitor Resolution 1390 reported in 2003 that many states were “unwilling to disclose any information” on the subject of arms

¹⁷⁵ *Id.* art. XX(2).

¹⁷⁶ *Id.* art. XXIX.

¹⁷⁷ United Nations Programme of Action Implementation Support System: PoA-ISS, Regional Organizations, Organization of American States (OAS), <http://www.poa-iss.org/RegionalOrganizations/4.aspx>.

¹⁷⁸ Carlson, *supra* note 124, at 626-27.

¹⁷⁹ UN Press Release, *supra* note 49.

¹⁸⁰ Christopher Ram, *The United Nations Convention Against Transnational Organized Crime and Its Protocols*, 1 FORUM ON CRIME AND SOC. 135, 138 (2001).

¹⁸¹ Firearms Protocol, *supra* note 73, art. 16 (1)-(2).

¹⁸² *Id.* art. 16 (3).

¹⁸³ Damien Fruchart et al., *United Nations Arms Embargoes: Their Impact on Arms Flows and Target Behavior 1-2* (2007), http://www.smartsanctions.se/literature/un_embargoes_071126.pdf.

¹⁸⁴ *Id.* at 5.

¹⁸⁵ S.C. Res. 1390, *supra* note 52, at 2(c).

transfers to Al Qaeda and the Taliban,¹⁸⁶ and that others reported that “weapons were crossing their borders and controlling this illegal traffic was very hard.”¹⁸⁷ In response, the monitoring group recommended to the Security Council “significant revision of the arms embargo,”¹⁸⁸ but the Security Council ultimately declined the recommendations because it had no “realistic expectation that states [were] willing and/or able to comply with them.”¹⁸⁹

III. CURRENT U.S. APPROACH

Part II provided an analytical framework for differentiating arms trafficking agreements. In this Part, we discuss U.S. arms control initiatives at the domestic, bilateral, and multilateral levels in the context of this framework. We thus analyze U.S. arms control initiatives along the three analytical dimensions outlined above: life cycle, scope, and enforceability.

At the outset, it is worth noting that the United States has played a unique role in the arms trafficking context on the world stage. Its domestic laws are in many ways very strong, particularly regarding the international transfer of arms. At the same time, the United States has been a key opponent of many international efforts to regulate arms trafficking. The United States has supported several non-binding multilateral agreements that focus on international transfer and has signed bilateral agreements that provide mutual assistance and training to foreign countries. But it has opposed comprehensive multilateral arrangements that would be legally binding, as well as agreements that would attack the problem of arms trafficking at various stages of the life cycle.

A. United States Domestic Laws Regarding Arms Trafficking

United States domestic law can be divided into two categories: the law governing international transfers of arms, and the law governing domestic firearms. Generally speaking, the United States has strong domestic laws regarding arms trafficking, particular its controls on interstate transfers of arms.¹⁹⁰

¹⁸⁶ Eric Rosand, *The Security Council's Efforts to Monitor the Implementation of Al Qaeda/Taliban Sanctions*, 98 AM. J. INT'L L. 745, 757 (2004).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ See Rachel Stohl and EJ Hogendoorn, *Stopping the Destructive Spread of Small Arms: How Small Arms and Light Weapons Proliferation Undermines Security and Development*, Center for American Progress 33 (March 2010) (“[T]he United States is often hailed as the ‘gold standard’ for comprehensive policies and practices concerning the transfer, management, and control of

That said, the United States has looser controls earlier in the arms life cycle, which sometimes enables arms traffickers to skirt interstate transfer controls.¹⁹¹

1. Regulation of International Arms Transfers

The United States regulates international arms transfers—both those resulting from private sales and from sales by the United States government—primarily through the Arms Export Control Act (AECA) of 1976, as amended.¹⁹² In addition, Congress has placed some relevant conditions on United States-provided assistance in the Foreign Assistance Act (FAA) of 1961, as amended.¹⁹³ AECA and the FAA target arms trafficking at the “interstate transfer” point of the life cycle. Note also that, to a lesser extent, the Export Administration Regulations,¹⁹⁴ implemented by the Department of Commerce, regulates some arms exports, including shotguns and related materials to OAS countries.¹⁹⁵

Like many of the international agreements surveyed above, AECA and FAA impose export controls, such as licensing and end-user certificate requirements; they regulate the activities of brokers; and they impose restrictions on interstate transfers to undesirable parties. The laws also go one step further in employing end-use monitoring, which aims to ensure that the recipient of the arms complies with all requirements imposed by the government with respect to use, transfer, and security of the weapons.

The Department of State implements AECA through the International Traffic in Arms Regulations (ITAR).¹⁹⁶ Under ITAR, the Department of State promulgates the U.S. Munitions List,¹⁹⁷ which contains the various arms (known

small arms and light weapons produced, maintained, and exported by the United States.”) [hereinafter CAP Report].

¹⁹¹ See *id.* at 34 (“[W]hile the U.S. government has advanced laws, regulations, and controls for the legal arms trade and maintains strict control over arms exports, permissive gun ownership laws and lax supervision of certain gun markets have made the United States a significant source of illegally diverted guns.”).

¹⁹² 22 U.S.C. §§ 2751 et seq. (2006).

¹⁹³ *Id.* §§ 2151 et seq.

¹⁹⁴ 15 C.F.R. § 730 et seq.

¹⁹⁵ See VIVIAN S. CHU & WILLIAM J. KROUSE, CONGRESSIONAL RESEARCH SERVICE, GUN TRAFFICKING AND THE SOUTHWEST BORDER 6-7 (2009), available at <http://fpc.state.gov/documents/organization/128845.pdf> [hereinafter CRS GUN TRAFFICKING REPORT], for a more extended discussion of these regulations; see also 15 C.F.R. § 742.17 (2010) (governing exports of shotguns and related items to OAS member countries to implement CIFTA).

¹⁹⁶ 22 C.F.R. Parts 120-130 (2010).

¹⁹⁷ *Id.* Part 121.

generally as “defense articles”¹⁹⁸) subject to the requirements of AECA. ITAR’s scope is broad; the Munitions List includes among other things, firearms and ammunition, bombs and missiles, tanks, ships, aircraft, and various types of military equipment.¹⁹⁹

AECA and ITAR provide a number of registration and licensing requirements regarding private international transfers. First, any U.S. person “engage[d] . . . in the business of . . . manufacturing or exporting defense articles” must register with the Department of State’s Directorate of Defense Trade Controls (DDTC).²⁰⁰ Then any person who wishes to export or temporarily import any defense article must secure approval of the DDTC prior to that specific transaction by obtaining the appropriate license.²⁰¹ The DDTC is authorized to deny licenses and specific arms transfers requests in a variety of circumstances. Namely: the DDTC may outlaw exports to a country for which the United States maintains an arms embargo or that engages in terrorism,²⁰² and it may deny a license “whenever an export would not otherwise be in furtherance of world peace and the security and foreign policy of the United States.”²⁰³ Since 1996 AECA has also required arms brokers²⁰⁴ to register with the DDTC and obtain a license prior to each brokering transaction.²⁰⁵ Unlike the provisions regarding exporters and manufacturers, the brokering amendment applies also extraterritorially. Thus, the United States requires any U.S. citizen or individual in the U.S. who engages in arms brokering to register, even if the arms are not from the United States.²⁰⁶ Importers of defense articles face similar requirements under AECA, governed not by the DDTC but by the Bureau of Alcohol, Tobacco, and Firearms (ATF).²⁰⁷ Importers must register with ATF²⁰⁸ and obtain a permit for each import

¹⁹⁸ See *id.* § 120.6 (defining “defense articles”).

¹⁹⁹ See *id.* § 121.1.

²⁰⁰ *Id.* § 122.1.

²⁰¹ *Id.* § 123.1(a).

²⁰² See *id.* § 126.1.

²⁰³ *Id.* § 126.1(a).

²⁰⁴ Under the law, a broker is “[a]ny person who acts as an agent for others in negotiating or arranging contracts, purchases, sales, or transfers of defense articles or defense services in return for a fee, commission, or other consideration.” *Id.* § 129.2(a).

²⁰⁵ 22 U.S.C. § 2778(b)(1)(A)(ii) (2006).

²⁰⁶ Compare 22 C.F.R. § 122.1(a) (2010) (requiring registration for those who engage “in the United States” in the business of manufacturing and export), with *id.* § 129.3(a) (requiring registration for “[a]ny U.S. person, wherever located, and any foreign person located in the United States or otherwise subject to the jurisdiction of the United States” engaged in brokering activities with respect to any defense articles or services, “regardless of whether such article or service is of United States origin,” *id.* § 129.2(c)).

²⁰⁷ See 27 C.F.R. Part 447 (2010).

²⁰⁸ *Id.* § 447.31.

transaction²⁰⁹ of articles under a modified munitions list called the “U.S. Munitions Import List.”²¹⁰ Like DDTC with manufacture and export licenses, ATF may deny such import permits from certain countries or deny a specific permit when “not in furtherance of world peace and the security and foreign policy of the United States.”²¹¹

Although the U.S. government is exempt from AECA’s registration and licensing requirements,²¹² AECA and FAA place other restrictions on government sales²¹³ and government grants,²¹⁴ respectively. First, AECA and FAA both establish general purposes that government arms transfers must serve; for instance, “internal security,” “legitimate self-defense,” or allowing foreign military to support economic and social development.²¹⁵ Second, AECA also requires certain findings before the U.S. government can effect sales. For example, the United States government may not sell or lease weapons unless, among other things, the President finds that such transfers will “strengthen the security of the United States and promote world peace” and the destination country or international organization agrees not to re-transfer the arms without U.S. consent and maintain proper security over the provided arms.²¹⁶ Third, the FAA limits the military assistance that the U.S. government can provide on a grant basis. For example, for grants above \$3,000,000, the President must determine that the destination country complies with the UN Charter, that the target nation is taking all reasonable measures to develop its capacities, and that the increased ability of the country to defend itself is “important to the security of the United States.”²¹⁷ In addition to these statutory limitations, the Executive Branch has placed its own limitations on aid. In Presidential Decision Directive 34, President Clinton outlined a long list of conditions that sought to “meet the

²⁰⁹ *Id.* § 447.41.

²¹⁰ *Id.* § 447.21.

²¹¹ *Id.* § 447.52.

²¹² *See, e.g.*, 22 U.S.C. § 2778(b)(1)(A)(i) (2006) (exempting such individuals from the registration requirement).

²¹³ *See id.* §§ 2751-68.

²¹⁴ *Id.* §§ 2151 et seq; *see also id.* §§ 2301-2349b(6) (Subchapter II of the FAA regarding “Military Assistance and Sales”).

²¹⁵ *See id.* § 2754; *id.* § 2302.

²¹⁶ *Id.* § 2753(a).

²¹⁷ *Id.* § 2314(b). Other conditions include a requirement that the assistance not be transferred without consent of the U.S., and that the President should consider whether the assistance would contribute to an arms race, increase the possibility of conflict, or prejudice the development of arms control arrangements. *See id.* § 2321(d).

continuing security needs of the United States” and also “restrain[] arms transfers that may be destabilizing or threatening to regional peace and security.”²¹⁸

Under AECA and FAA, Congress retains some review authority over both private and government transfers. For potential small arms transfers, for example, Congress must be notified when DDTC is considering an export license for a transfer valued at \$1,000,000 or greater.²¹⁹ Congress may disapprove of these sales within a certain period through a joint resolution (which must be signed by the President, or must override a Presidential veto).²²⁰ Similarly, Congress can disapprove certain U.S. government sales under AECA²²¹ and grants under FAA.²²²

Finally, under AECA, both private and government interstate transfers of arms must be evaluated through end-use monitoring.²²³ The United States’ practice of end-use monitoring sets it apart—no other international agreement on arms trafficking that regulates at the point of interstate transfer includes such an extensive feature. End-use monitoring by the U.S. government ensures that the recipient complies with all requirements imposed with respect to use, transfers, and security of the weapons.²²⁴ Commercial end-use monitoring occurs within the “Blue Lantern” program.²²⁵ As the State Department explains, that program entails “periodic end-use checks on commercial SA/LW exports (as well as other U.S.- controlled munitions) to ensure that the exported items are being used according to the terms authorized by the license and by a bona fide end-user. Inquiries may include interviews with end-users, site visits, and physical inspections.”²²⁶ The Defense Department administers a similar program called “Golden Sentry” for the end-use monitoring of arms provided by the U.S. government to other militaries.²²⁷

²¹⁸ Statement by the Press Secretary, Conventional Arms Transfer Policy, Feb. 17, 1995, *available at* <http://www.fas.org/irp/offdocs/pdd34.htm>.

²¹⁹ 22 U.S.C. § 2776(c)(1); *see also* 22 C.F.R. § 123.15(a)(3) (2010).

²²⁰ 22 U.S.C. § 2776(c)(2)(c); *see also* 22 C.F.R. § 123.15(a).

²²¹ 22 U.S.C. § 2753(c)(3).

²²² *Id.* § 2314(d)(2)(A).

²²³ *Id.* § 2785.

²²⁴ *Id.* § 2785(a)(2)(B).

²²⁵ *Id.* § 2785(a)(2)(A).

²²⁶ *The United States’ National Report on the Implementation of the UN Program of Action To Prevent, Combat, and Eradicate the Illicit Trade in Small Arms/Light Weapons in All Its Aspects*, 7 (Jan. 11, 2010) [hereinafter U.S. PoA Matrix], *available at* <http://www.un-casa.org/CASACountryProfile/PoANationalReports/2010@207@PoA-US-2010-E.pdf>.

²²⁷ *Id.*

2. Regulation of Domestic Firearms

The United States regulates domestic ownership and commerce in guns through two key statutes: the Gun Control Act (GCA) of 1968²²⁸ and the National Firearms Act (NFA) of 1934.²²⁹ These laws target firearms at earlier stages in the life cycle of arms, namely, at the points of production and of domestic ownership and transfer. The GCA and NFA employ several common mechanisms (described above in the context of international agreements) for regulating arms trafficking at these stages—for the production stage, U.S. law uses licensing and marking requirements, and for the domestic ownership and transfer, it uses record-keeping and registration laws. At the same time, certain limitations on U.S. law in the domestic ownership and transfer stage—in particular, its inability to track certain resales—would make it harder for the United States to achieve the aspirations of multilateral agreements like the UN Programme of Action.

The NFA regulates dangerous firearms (including machine guns and short-barreled shotguns) and destructive devices (including bombs, grenades, missiles, rockets) at the production and domestic ownership/transfer stages of the life cycle.²³⁰ The NFA regulates these weapons in a number of ways. First, the NFA creates a national registry with the name and address of every person entitled to possess weapons that fall under the law.²³¹ Second, it requires that the government approve any manufacture²³² and transfer²³³ of an NFA weapon (and both transactions are taxed²³⁴). Third, the NFA imposes on owners the responsibility of maintaining proof of registration.²³⁵ Fourth, the statute makes unlawful any possession, transfer, or manufacture of weapons in violation of the Act.²³⁶

The GCA applies to a broader set of weapons, which it labels generally as “firearms,” including “destructive device[s]” and any weapon that “expel[s] a projectile by the action of an explosive.”²³⁷ Like the NFA, it regulates at the point of production and domestic ownership/transfer, but not quite to the same degree.

²²⁸ 18 U.S.C. §§ 921-31 (2006).

²²⁹ 26 U.S.C. §§ 5801-72 (2006).

²³⁰ *Id.* § 5845.

²³¹ *Id.* § 5841.

²³² *See* 27 C.F.R. §§ 479.62-479.66 (2010).

²³³ *See id.* §§ 479.82-479.86.

²³⁴ 26 U.S.C. § 5821-22; 27 C.F.R. §§ 479.61, 479.81-479.82.

²³⁵ 26 U.S.C. § 5841.

²³⁶ *Id.* § 5861.

²³⁷ 18 U.S.C. § 921(a)(3) (2006).

The GCA requires that anyone engaged in the business of commercial manufacturing, dealing in, or importing of firearms be licensed.²³⁸ It outlaws sales of firearms to various categories of individuals (for example, convicted felons, individuals addicted to controlled substances, etc.).²³⁹ It prohibits the interstate sale of firearms to non-licensed individuals generally.²⁴⁰ And it requires dealers to maintain records of sales.²⁴¹ One recordkeeping requirement particularly important for arms trafficking is the multiple handgun reporting requirement: dealers must report sales of two or more handguns to an unlicensed person within any consecutive five business day period.²⁴² In addition, the Brady bill requires that dealers conduct background checks on unlicensed buyers through a system maintained by the FBI.²⁴³

On the buying side, among other things, the GCA outlaws possession of firearms by various categories of individuals,²⁴⁴ prohibits false statements made in connection with the purchase of a firearm,²⁴⁵ and establishes special penalties for the use of firearms in certain crimes.²⁴⁶ The GCA does not establish a registry on the scale of the NFA (for dangerous weapons), because U.S. law expressly prohibits the creation of such a national registry of firearms.²⁴⁷

In addition to the regulations specified above, the GCA also requires marking of firearms,²⁴⁸ and this allows the government to do some degree of tracing. All firearms manufactured or imported into the United States must be marked with a serial number, the model, the name of the manufacturer, and other identifying information.²⁴⁹ It is unlawful to possess or transfer weapons that have had their serial numbers removed.²⁵⁰ On the basis of this identifying information and other data, the Bureau of Alcohol, Tobacco, and Firearms (ATF) can trace

²³⁸ *Id.* § 923(a).

²³⁹ *Id.* § 922(d).

²⁴⁰ *Id.* § 922(a)(2).

²⁴¹ *Id.* § 923(g).

²⁴² *Id.* § 923(g)(3).

²⁴³ *Id.* § 922(t).

²⁴⁴ *Id.* § 922(g).

²⁴⁵ *Id.* § 924(a)(1)(A) makes unlawful knowing false statements to gun dealers; *Id.* § 922(a)(6) makes unlawful knowing false statements when those false statements affect the legality of the sale.

²⁴⁶ *See, e.g., id.* § 924(c).

²⁴⁷ Firearms Owners' Protection Act, Pub. L. No. 99-308 § 106 (1986) (codified at 18 U.S.C. § 926 (2006)) (providing that no regulation prescribed after passage of the Act establish "any system of registration of firearms, firearms owners, or firearms transactions or dispositions").

²⁴⁸ 18 U.S.C. § 923(i).

²⁴⁹ 27 C.F.R. § 478.92 (2010).

²⁵⁰ 18 U.S.C. § 922(k).

certain firearms when they are connected to law enforcement operations (such weapons are known as “crime guns”).²⁵¹ Specifically, the ATF can usually determine, after an average of two weeks, the first retail purchaser of a recovered firearm.²⁵² If the firearm was a handgun documented in a multiple-handgun sales report, the trace is substantially faster, since then the necessary information has been preloaded into ATF’s searchable database.²⁵³

Finally, in addition to its laws governing private ownership of guns, the United States also regulates government possessions of small arms. The Defense Department “has a central register . . . which is responsible for the serialization and accountability” of all Defense Department small arms.²⁵⁴ The Defense Department also maintains a stockpile management life-cycle program whereby it destroys military weapons as appropriate.²⁵⁵

Notwithstanding all the statutes described thus far, the United States is well known for its relatively permissive ownership laws and for gaps in enforcement that limit the effectiveness of its controls. First, the United States has no specific statute making “firearms trafficking” a crime.²⁵⁶ Instead, prosecutors targeting firearms traffickers use a number of gun crimes as a proxy. Specifically, the Department of Justice’s Office of the Inspector General (OIG) has noted that—at least in the context of referrals from ATF—prosecutors rely primarily on:²⁵⁷ false statements made while purchasing a firearm,²⁵⁸ knowing possession of a firearm by a convicted felon,²⁵⁹ and willfully engaging in firearms business without a license.²⁶⁰ OIG notes, however, that these statutes can be difficult to prosecute.²⁶¹ Thus prosecutors often decline to press arms trafficking charges.²⁶² Besides these statutes, Immigration and Customs Enforcement (ICE) has primary

²⁵¹ GAO REPORT, *supra* note 20, at 25.

²⁵² *Id.* at 25-26.

²⁵³ *Id.*

²⁵⁴ U.S. PoA Matrix, *supra* note 226, at 5.

²⁵⁵ *Id.* at 9.

²⁵⁶ Nevertheless, the United States still complies with CIFTA, because CIFTA only requires the criminalization of illicit trafficking across state lines. *See supra* Part II.A.3. U.S. law covers interstate trafficking through AECA. *See supra* Part III.A.1.

²⁵⁷ UNITED STATES DEPARTMENT OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, REVIEW OF ATF’S PROJECT GUNRUNNER 59-60 (2010) [hereinafter OIG REPORT].

²⁵⁸ 18 U.S.C. § 924(a)(1)(A) (2006) makes unlawful knowing false statements to gun dealers; *id.* § 922(a)(6) makes unlawful knowing false statements when those false statements affect the legality of the sale.

²⁵⁹ *Id.* § 922(g)(1).

²⁶⁰ *Id.* § 922(a)(1)(A).

²⁶¹ OIG REPORT, *supra* note 257, at 60-64.

²⁶² *Id.* at 64-65.

jurisdiction over a general smuggling statute which would also apply to international trafficking.²⁶³ However, ATF does not coordinate sufficiently with ICE to make full use of this statute, according to the OIG.²⁶⁴

Second, various provisions might allow traffickers to get around regulations. The GCA specifically only requires licensing for those who sell firearms “as a business” and thus does not affect those individuals who may sell from their personal collection.²⁶⁵ These unlicensed sellers need not perform background checks or maintain any records of the sale.²⁶⁶ This gap is sometimes referred to as the “gun-show loophole,” as individuals may sell guns to others, ostensibly from their private collections, at regular gun shows across the country with little ability of the federal government to track those sales.²⁶⁷ In addition, the multiple handgun reporting requirement does not apply to long guns, like shotguns and assault rifles.²⁶⁸ Commentators have noted that since long guns are lately the weapon of choice for cartel traffickers, this limits the ability of the government to trace weapons that might be trafficked.²⁶⁹

It bears noting, moreover, that U.S. ownership law in general is permissive as compared to other industrialized nations. In the United States, there are few limitations on adults’ ability to purchase a firearm.²⁷⁰ By contrast, in Mexico, for example, any person who wishes to own a weapon must first apply for a federal carry permit, must buy the weapon only from the military, and, among other things, must supply five character references.²⁷¹ Although Mexico has a population of 105 million, “there are only 4,300 [people that] carry licenses” in the country.²⁷² This significant difference between the two countries’ ownership laws may have played a role in encouraging the illegal flow of arms across the border.²⁷³

²⁶³ 18 U.S.C. § 554; OIG REPORT, *supra* note 257, at 71.

²⁶⁴ OIG REPORT, *supra* note 257, at 71.

²⁶⁵ See 18 U.S.C. § 923(a); OIG REPORT, *supra* note 257, at 64.

²⁶⁶ See 18 U.S.C. § 923(g) (applying recordkeeping requirements only to licensees); *id.* § 922(t) (limiting Brady background check requirement to licensees).

²⁶⁷ GAO REPORT, *supra* note 20, at 27.

²⁶⁸ *Id.* at 28.

²⁶⁹ *Id.* at 36.

²⁷⁰ See 18 U.S.C. 922(g).

²⁷¹ David B. Kopel, *Mexico’s Federal Law of Firearms and Explosives* 5-6 (Univ. of Denver Sturm Coll. of Law Legal Research Paper Series, Working Paper No. 10-12, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1588296.

²⁷² *Id.* at 6.

²⁷³ CRS GUN TRAFFICKING REPORT, *supra* note 195, at 2; CAP Report, *supra* note 190, at 2.

B. United States Approach to International Agreements on Arms Trafficking

In some respects, the U.S. approach to multilateral and bilateral agreements regulating arms trafficking mirrors its approach under domestic law. Just as U.S. domestic law most strongly regulates arms trafficking at the interstate transfer stage of the life cycle, so too does the United States focus its multilateral efforts on interstate transfers. Meanwhile, the United States has been far less willing to join bilateral or multilateral agreements that deal with arms regulations at the production and ownership stages of the life cycle. Moreover, the United States has thus far become party to only one enforceable multilateral agreement, and U.S. bilateral efforts generally focus on the provision of training and assistance to other countries, rather than on enforceable agreements.

1. Multilateral Efforts

The United States has joined multilateral agreements that target the interstate transfer point in the life cycle of arms. It has even led initiatives to expand these interstate transfer agreements worldwide, especially when they promote counterterrorism objectives.²⁷⁴ Meanwhile, the United States has been less willing to engage with multilateral efforts that regulate arms trafficking at the points of production or domestic ownership and transfer. It has declined to join the UN Programme, CIFTA, and the Firearms Protocol.

a. Agreements to which the United States is a Party

The United States is party to, and actively supports, multilateral agreements that target the interstate transfer point of the life cycle of arms: the UN Register, the Wassenaar Agreement, and UN arms embargos (particularly those embargoes targeting terrorist groups). These agreements cover a broad scope of weapons, yet all but the UN arms embargoes are nonbinding.

First, the United States is a participating state to the UN Register, which compiles interstate transfer information on a broad scope of weapons. States submit this information voluntarily. The White House has advocated increased participation in the UN Register, stating that a “critical element of U.S. policy is

²⁷⁴ See, e.g., Stohl, *supra* note 6, at 7 (discussing U.S. leadership in developing best practices for parties to the Wassenaar Arrangement).

to promote control, restraint, and transparency of arms transfers.”²⁷⁵ The United States has also been “instrumental” in expanding the categories of weapons it includes.²⁷⁶

Second, the United States has actively supported the export controls in the Wassenaar Agreement, another voluntary agreement covering a broad scope of weapons. The United States led the effort to adopt best practice guidelines for the export of MANPADS and similar nonbinding guidelines for the export of small arms and light weapons.²⁷⁷ Both initiatives occurred in the context of U.S. counterterrorism efforts. For example, “[a]lthough the United States . . . proposed [the SALW guidelines] prior to September 11, 2001, the call for their development was re-energized as linkages were made between the conflicts fuelled by small arms and the areas that served as breeding grounds for terrorists.”²⁷⁸ The final language of the guidelines includes as a primary objective “the need to prevent the acquisition of conventional arms by terrorist groups and organisations, as well as by individual terrorists,” and encourages states to avoid issuing export licenses when “there is a clear risk that the small arms in question might . . . support or encourage terrorism.”²⁷⁹ The United States has been equally supportive of UN arms embargos, especially those targeted at terrorist groups.²⁸⁰

Finally, the United States has not actively participated in supporting the UN Programme. The United States participated in the UN conference that produced the Programme, but strongly advocated for a weaker document. Specifically, then Undersecretary of State John Bolton delivered a list of “red lines,” stating that the United States would not support “measures that would constrain legal trade and legal manufacturing of small arms and light weapons . . . ; the promotion of international advocacy activity by international or non-governmental organizations [that is] not consistent with the views of all member states . . . ; measures that prohibit civilian possession of small arms . . . ; limiting

²⁷⁵ Press Release, The White House, Office of the Press Secretary, Fact Sheet: Conventional Arms Transfer Policy (Feb. 17, 1995), *available at* <http://www.fas.org/asmp/resources/govern/whfacts.html>.

²⁷⁶ Loretta Bondi, *U.S. Policy on Small Arms and Lights Weapons*, 59 NAVAL WAR COLLEGE REV. 119, 129 (2006).

²⁷⁷ Stohl, *supra* note 6, at 6-7.

²⁷⁸ *Id.* at 7.

²⁷⁹ Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies: Best Practice Guidelines for Exports of Small Arms and Light Weapons (SALW) 1-2 (Dec. 12, 2002), *available at* http://www.wassenaar.org/publicdocuments/2007/docs/SALW_Guidelines.pdf.

²⁸⁰ *See, e.g.*, S/RES/1390, *supra* note 52, para. 2(c); S.C. Res. 1455, U.N. Doc. S/RES/1455, para. 1 (2003); S.C. Res. 1526, U.N. Doc. S/RES/1526 (2004).

trade in small arms and light weapons solely to governments . . . ; [or] a mandatory review conference [on how the program is being implemented].”²⁸¹ Since its implementation, the United States has continued to object to aspects of the UN Programme, instead advocating other multilateral and regional efforts.²⁸² Under the Obama administration, the United States has issued reports detailing its compliance with the UN Programme,²⁸³ but administration officials have not taken a strong position advocating for or against the program.

b. Agreements to which the United States is not a Party

The United States is not a party to several key multilateral agreements that regulate at earlier stages of the life cycle, including CIFTA and the Firearms Protocol.

First, although the United States actively developed CIFTA, the United States has not ratified it.²⁸⁴ While various commentators and both Bush and Obama administration officials have stated that the United States already fully complies with its mandates, there is considerable domestic political opposition to ratification. This concern focuses on the domestic ownership and transfer stage of CIFTA’s arms controls. Several NGOs have raised concerns about the treaty’s impact on Second Amendment rights, despite the general view that the United States would not need to change its laws to be compliant with the treaty.²⁸⁵ President Obama called for ratification of the treaty in April 2009 and again in October 2010,²⁸⁶ but there has been little movement since that call.

²⁸¹ U.S. Dept. of State, Statement by John R. Bolton, United States Under Secretary of State for Arms Control and International Security, Plenary Address to the United Nations, Conference on Illicit Trade in Small Arms and Light Weapons (July 9, 2001), available at <http://usinfo.org/wf-archive/2001/010709/epf103.htm>.

²⁸² LAURANCE & STOHL, *supra* note 84, at 31.

²⁸³ *United States Support for the United Nations Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects*, DEP’T OF STATE (July 10, 2008), <http://www.state.gov/p/wha/rls/111429.htm>.

²⁸⁴ CIFTA has been ratified by thirty of thirty-four member states. See *Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and other Related Materials*, ORGANIZATION OF AMERICAN STATES, <http://www.oas.org/juridico/english/sigs/a-63.html> (last visited Dec. 4, 2010).

²⁸⁵ See, e.g., Theodore Bromund, Ray Walser, & David Kopel, *The OAS Firearms Convention Is Incompatible with American Liberties*, THE HERITAGE FOUNDATION (May 19, 2010), <http://www.heritage.org/research/reports/2010/05/the-oas-firearms-convention-is-incompatible-with-american-liberties>.

²⁸⁶ Mary Beth Sheridan, *Despite Obama Pledge, Democrats Show Little Enthusiasm for CIFTA Treaty on Gun Trafficking*, WASH. POST, Oct. 21, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/10/21/AR2010102107266.html>.

Second, the United States is not a party to the Firearms Protocol,²⁸⁷ although it is a party to the Convention against Transnational Organized Crime.²⁸⁸ The Firearms Protocol is limited in application to situations where “offenses are transnational in nature and involve and organized criminal group.”²⁸⁹ However, it was heavily influenced by CIFTA,²⁹⁰ and might raise some of the same domestic concerns about gun ownership.

Third, the United States has participated in negotiations concerning the UN Arms Trade Treaty, but that treaty is still in the earliest stages. It has the potential to become a multilateral treaty that would create comprehensive, legally binding international standards for the import, export, and transfer of conventional arms. The United States is a member of the group of governmental experts who released a 2008 report on the “the feasibility, scope and draft parameters” for such a treaty.²⁹¹ The report reflects concerns that the United States might be bound by potential provisions in the Arms Trade Treaty targeting domestic ownership and transfer of arms. It states that a feasible arms trade treaty “would need to reflect respect for the sovereignty of every State, without interfering in the internal affairs of States or their constitutional provisions, and respect for their territorial integrity.”²⁹² Therefore, “[e]xclusively internal transfers or national ownership provisions, including national constitutional protections on private ownership within that State’s territory, should not fall under an arms trade treaty.”²⁹³ The United States also agreed to join the treaty drafting process with the condition that it proceed on a consensus basis.²⁹⁴

²⁸⁷ See Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, Supplementing the United Nations Convention against Transnational Organized Crime, UN TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-c&chapter=18&lang=en (last visited Dec. 4, 2010).

²⁸⁸ See United Nations Convention Against Transnational Organized Crime, UN TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&lang=en (last visited Dec. 4, 2010).

²⁸⁹ Firearms Protocol, *supra* note 73, art. 4.

²⁹⁰ The Firearms Protocol includes several provisions of CIFTA verbatim. Carlson, *supra* note 124, at 623.

²⁹¹ See Report of the Group of Governmental Experts to Examine the Feasibility, Scope and Draft Parameters for a Comprehensive, Legally Binding Instrument Establishing Common International Standards for the Import, Export and Transfer of Conventional Arms, U.N. Doc A/63/334 (Aug. 26, 2008).

²⁹² *Id.* para. 18.

²⁹³ *Id.*

²⁹⁴ Patrick Worsnip, *Nations Open Talks on World Arms Trade Treaty*, REUTERS (July 12, 2001, 5:04 pm), <http://www.reuters.com/article/idUSTRE66B6FO20100712>.

While the United States initially voted against the General Assembly resolution in favor of national measures, Secretary Clinton has since stated that the United States “is committed to actively pursuing a strong and robust treaty that contains the highest possible, legally-binding standards for the international transfer of conventional weapons.”²⁹⁵ The United States supports a treaty that would “have all nations do what the United States already does: examine each conventional weapons transfer before it is authorized to be certain that it will enhance . . . not undermine . . . security and stability.”²⁹⁶ However, the United States opposes any outright ban on conventional weapons. The United States criticized the suggestions of other states as overly optimistic, containing “generic and laudable ‘goals, objectives, parameters, and elements’ that fit more appropriately into a treatise following on to Thomas More’s ‘Utopia.’”²⁹⁷

2. *Bilateral Efforts*

While the United States has been hesitant to support many multilateral arms trafficking agreements, it has actively engaged in bilateral efforts. From a series of bilateral agreements with the Soviet Union in the 1970s to inter-agency efforts with Mexico today, the United States has engaged in a variety of bilateral efforts to address the arms trafficking dilemma. Unlike its multilateral agreements, U.S. bilateral efforts address all of the stages in the life cycle of arms. The bilateral efforts also address a wide scope of weapons, evolving from an initial focus on nuclear weapons to include conventional weapons and SALW. Bilateral efforts, however, primarily consist of assistance programs. Thus, even in the bilateral arena, the United States has avoided submitting to binding agreements with enforcement mechanisms.

The bilateral efforts of the United States address all of the stages in the life cycle of arms, including production, domestic ownership and control, and interstate transfer. At the production stage and domestic ownership and control stages, the United States is particularly focused on encouraging marking and tracing programs. The United States provides funding, materials, and training

²⁹⁵ Hilary Rodham Clinton, Sec’y of State, Remarks: U.S. Support for the Arms Trade Treaty (Oct. 14, 2009) (transcript available at <http://www.state.gov/secretary/rm/2009a/10/130573.htm>).

²⁹⁶ Ellen Tauscher, Under Sec’y for Arms Control and Int’l Sec., Remarks Delivered by Special Negotiator Donald Mahley, Address Before the Carnegie Endowment For International Peace (Feb. 18, 2010) (transcript available at <http://www.state.gov/t/us/136849.htm>).

²⁹⁷ United States Mission to the United Nations, United States Statement: ATT Session One, March 5, 2009, http://www.un.org/disarmament/convarms/ArmsTradeTreaty/docs/OEWG09_S1_statements/US-5Mar.PDF.

assistance to countries that lack marking and tracing capabilities. For example, the United States supplied funding for marking equipment to member states of the Organization of American States (OAS) and to African states through the Nairobi-based Regional Secretariat on Small Arms. The United States has also shared its eTrace program, which allows law enforcement officers to trace firearms to their legal purchase, with member states of the OAS and of the Central American Integration System. To assist countries with eTrace and other programs, the United States offers training workshops through the International Law Enforcement Academies in Botswana, El Salvador, and Peru. The United States has also focused on stockpile management and surplus disposal programs. U.S. efforts usually consist of assistance and training programs, such as funding through the Merida Initiative for stockpile management and destruction assistance in Central America and physical security and stockpile management seminars in Nigeria, Ethiopia, and Sierra Leone.

At the international transfer stage, U.S. efforts focus on export and import licensing, end-user certification, and brokering controls. The U.S. Department of State provides export and border control assistance, particularly equipment and training, to countries under the Export Control and Related Border Security assistance program. U.S. officials provide briefings for foreign government officials on export control mechanisms, including end-use monitoring, and the United States funds training for export control and law enforcement officials. The United States has also supported the establishment of national brokering controls, by funding and participating in seminars that encourage countries to strengthen their brokering controls.²⁹⁸

U.S. bilateral efforts have also expanded in scope in recent years. Initially, U.S. bilateral agreements focused on nuclear, rather than conventional weapons. For example, during the Cold War, the United States and Soviet Union entered into a series of nuclear focused bilateral treaties,²⁹⁹ memorandums of

²⁹⁸ For example, the United States funded workshops in Rwanda to strengthen SALW brokering controls in accordance with the Nairobi Protocol. Experts from the U.S. Departments of State and of Justice participated in these workshops with member states of the African Great Lakes and Horn of Africa.

²⁹⁹ See, e.g., Treaty on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, U.S.-U.S.S.R., 23 U.S.T. 3435; Treaty on the Limitation of Underground Nuclear Weapons Tests, July 3, 1974, U.S.-U.S.S.R., 13 I.L.M. 967; Treaty on Underground Nuclear Explosions for Peaceful Purposes, May 28, 1976, U.S.-U.S.S.R., 1714 U.N.T.S. 387; Treaty on the Elimination of Intermediate-Range and Shorter-Range Missiles, U.S.-U.S.S.R., Dec. 8, 1987, S. Treaty Doc. No. 100-11, 27 I.L.M. 90; Treaty on Reduction and Limitation of Strategic Offensive Arms (START I), July 31, 1991, U.S.-U.S.S.R., S. Treaty Doc. No. 102-20 (1992); Treaty on Further Reduction and Limitation of Strategic Offensive Arms (START II), Jan. 3, 1993, U.S.-U.S.S.R., S. Treaty

understanding,³⁰⁰ and bilateral agreements. The United States continues to enter into similar bilateral agreements with Russia and former Soviet states today.³⁰¹ More recently, however, U.S. bilateral efforts have expanded to include conventional weapons, particularly SALW. Many of its marking, tracking, and stockpile management programs have an SALW focus.

While the United States has a wide range of bilateral efforts, most of these efforts consist of non-binding training and assistance programs. Many of the bilateral agreements with Russia have taken the form of treaties, and the United States continues to enter into bilateral agreements with other countries.³⁰² Nevertheless, the majority of efforts in this area include funding, equipment, and training assistance. While these programs encourage compliance with international norms, they generally do not contain any enforcement mechanisms.

3. U.S.-Mexico Arms Trafficking Efforts

The United States supports multilateral agreements that target trafficking at the interstate transfer point in the life cycle of arms, are broad in the scope of weapons covered, and are not enforceable. The characteristics of U.S. bilateral initiatives directed towards arms and drugs trafficking across the border with Mexico, however, differ substantially. The United States engages in bilateral arms trafficking efforts with Mexico through federal programs and state-based mutual

Doc. No. 103-1 (1993); Treaty Between the United States of America and the Russian Federation on Strategic Offensive Reductions, May 24, 2002, U.S.-Russ., S. Treaty Doc. No. 107-8 (2002).

³⁰⁰ Memorandum of Understanding Between the United States of America and the Union of Soviet Socialist Republics Regarding the Establishment of a Direct Communications Link, U.S.-U.S.S.R., June 20, 1963, 14 U.S.T. 825.

³⁰¹ See, e.g., Agreement on the Establishment of Nuclear Risk Reduction Centers, Sept. 15, 1987, U.S.-U.S.S.R., 27 I.L.M. 76 (1988); Agreement Concerning Emergency Response and the Prevention of Proliferation of Weapons of Mass Destruction, Oct. 22, 1992, U.S.-Bel., 32 I.L.M. 275; Agreement Between Ukraine and the United States of America Concerning Assistance to Ukraine in the Elimination of Strategic Nuclear Arms, and the Prevention of Proliferation of Weapons of Mass Destruction, Oct. 25, 1993, U.S.-Ukr., Hein's No. KAV 3765, Temp. State Dep't No. 94 - 46 (entered into force Dec. 31, 1993); Agreement Between the United States of America and the Republic of Kazakhstan Concerning the Destruction of Silo Launchers of Intercontinental Ballistic Missiles, Emergency Response, and the Prevention of Proliferation of Nuclear Weapons, Dec. 13, 1993, U.S.-Kaz. Hein's No. KAV 3751, Temp. State Dep't No. 94 -32.

³⁰² Many of the bilateral agreements that are in force relate to strategic offensive arms (Belarus, Russia), intermediate-range and shorter-range missiles (the former Czechoslovakia, Germany), and eligibility for U.S. military assistance and training pursuant to the International Security Assistance and Arms Export Control Act of 1976 (Ecuador, Indonesia, Kenya, Korea, Malaysia, Venezuela). See U.S. DEP'T OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 2010, 19, 67, 76, 98, 126, 152, 172, 235, 295 (2010).

assistance programs. Together, these efforts target SALW trafficking at all points in the life cycle of arms.

The Mérida Initiative is a broad security cooperation program that utilizes foreign aid to target issues such as arms trafficking, the drug trade, and organized crime. The program targets arms trafficking in Mexico and Central American countries, primarily of conventional weapons and SALW, by distributing equipment, training, and funds to the region.³⁰³ The program addresses the points of interstate transfer (by strengthening the capacity of Mexican and Central American countries' border security) and domestic ownership and transfer (by strengthening public security, law enforcement, and the rule of law).³⁰⁴ To combat trafficking at borders, the initiative provides inspection equipment, training for Mexican law enforcement, secure communications, and funding for security cooperation with Central American countries. To target corruption, the initiative also includes vetting of current Mexican police officers and new recruits.

In addition to the Mérida Initiative, U.S. and Mexican law enforcement agencies have also developed a program called *Armas Cruzadas*, or *Crossed Arms*. The program partners agencies within each county on interdiction, investigation and intelligence-sharing efforts in order to identify, disrupt, and dismantle arms smuggling operations.³⁰⁵ *Armas Cruzadas* targets those weapons that are most commonly trafficked across the border, such as firearms.³⁰⁶ *Armas Cruzadas* targets arms trafficking at the point of domestic ownership and transfer within the United States: it is designed to address deficiencies in current legislation regarding illicit sales at gun shows in the United States.³⁰⁷ The program provides for the sharing of database information between the countries and increased monitoring of sales at gun shows within the United States.³⁰⁸ The U.S. Federal Bureau of Investigation has also combined forces with Mexican law

³⁰³ For a detailed description of the Mérida Initiative, see Steven E. Hendrix, *The Mérida Initiative for Mexico and Central America: The New Paradigm for Security Cooperation, Attacking Organized Crime, Corruption and Violence*, 5 LOY. U. CHI. INT'L L. REV. 107 (2008).

³⁰⁴ The Mérida Initiative: Assessing Plans to Step up our Security Cooperation with Mexico and Central America: Hearing Before the Comm. On Foreign Affairs, 110th Congress 17 (2007), available at <http://www.internationalrelations.house.gov/110/38938.pdf> (last visited Dec. 4, 2010).

³⁰⁵ For a more detailed description of the program, see *Operation Armas Cruzadas/Arms Smuggling*, U.S. Immigration and Customs Enforcement, <http://www.ice.gov/armas-cruzadas/>.

³⁰⁶ David McLemore, *Mexico Is Praised for Anti-Drug Work*, DALLAS MORNING NEWS, Aug. 11, 2008 at 4A.

³⁰⁷ *Id.*

³⁰⁸ *Id.*

enforcement to create a task force that targets drug trafficking, gang activity, and kidnappings.³⁰⁹

The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) also has specialized programs, including Project Gunrunner and eTrace, that focus on interstate transfer, and domestic ownership and transfer, in the life cycle of arms. Project Gunrunner details additional ATF staff to the southwest border to focus on arms trafficking, including special agents, industry operations investigators, intelligence research specialists, and investigative analysts.³¹⁰ In addition to personnel, ATF has contributed search dogs and scanning equipment for border inspections. Project Gunrunner also includes training for federal firearms licensees in techniques to spot possible arms traffickers.³¹¹

ATF is also responsible for the eTrace program. The eTrace technology allows law enforcement officers to trace firearms to their legal purchase, which highlights tracking patterns of criminal organizations.³¹² This allows officers to identify straw purchasers and arms traffickers.³¹³ Before the development of eTrace, Mexican officials were only able to trace firearms in the police headquarters in Mexico City, which delayed the process to such an extent that most recovered weapons were not traced.³¹⁴ The decentralization of the process allows for a more efficient system. In 2008, ATF provided eTrace systems to all of the U.S. consulates in Mexico and began training for Mexican officials. The ATF has also developed a Spanish-language version of the program, which it plans to distribute.³¹⁵

In addition to federal initiatives, state politicians have developed mutual assistance agreements with their counterparts across the border. For example, in 2007, Arizona Governor Janet Napolitano and Sonoran Governor Eduardo Boors met and created an informal agreement, in which Governor Napolitano agreed to

³⁰⁹ *Id.*

³¹⁰ Press Release, Bureau of Alcohol, Tobacco, Firearms & Explosives, ATF Expands Efforts to Combat Illegal Flow of Firearms Into Mexico (Jan. 16, 2009), <http://www.atf.gov/press/releases/2008/01/011608-atf-expands-efforts-to-combat-firearms-trafficking.html>.

³¹¹ *Id.*

³¹² *Id.*

³¹³ *Id.*

³¹⁴ Manuel Roig-Franzia, *U.S. Guns Behind Cartel Killings in Mexico*, WASH. POST, Oct 29, 1997, <http://www.washingtonpost.com/wp-dyn/content/article/2007/10/28/AR2007102801654.html>.

³¹⁵ Press Release, Bureau of Alcohol, Tobacco, Firearms, and Explosives, Fact Sheet: Department of Justice Efforts to Combat Mexican Drug Cartels (Apr. 2, 2009), <http://www.atf.gov/press/releases/2009/04/040209-doj-factsheet-combatting-mexican-cartels.html>.

provide training to Sonoran police officers while Governor Boors “agreed to improve [police] communication” with U.S. authorities.³¹⁶ In August 2008, ten border governors from the United States and Mexico attended the Border Governors Conference. They discussed arms trafficking and border violence and agreed to support the ATF's Project Gunrunner and eTrace programs.³¹⁷

IV. CONCLUSIONS AND RECOMMENDATIONS

This report has outlined the current international and domestic legal regimes for addressing arms trafficking. Although the legal regime is extensive and growing, significant gaps that remain. Here, we identify several possible steps the United States might take to begin to fill these gaps.

A. Shortcomings of the Global Framework for Regulating Arms Trafficking

There are three major gaps in the existing global framework of arms trafficking agreements: first, the most ambitious international agreements are nonbinding; second, multilateral agreements do not address the resale of arms; and third, major arms suppliers have not joined most of the major international agreements.

The first notable shortcoming in the existing global framework for arms trafficking is that the legally binding arms trafficking agreements are highly limited in their aims. They fail, for example, to target arms trafficking at multiple points in the life cycle or to cover a broad scope of weapons. The Firearms Protocol and CIFTA are both legally binding to some degree,³¹⁸ but both agreements cover a narrow scope of arms. Namely, they regulate only illicitly manufactured or trafficked firearms and related materials rather than all small arms and light weapons. Meanwhile, most UN arms embargoes, which are also legally binding, focus exclusively on interstate transfer. Meanwhile, more comprehensive agreements, like the UN Programme, are not legally binding. Thus no enforceable agreement covers all weapons of concern or all points in the arms life cycle.

³¹⁶ Richard A. Serrano, *Drug War Fuels Border Violence*, SEATTLE TIMES, Aug. 20, 2007.

³¹⁷ Press Release, Bureau of Alcohol, Tobacco, Firearms & Explosives, Formal Declaration Between U.S., Mex. Governors to Use ATF Project Gunrunner, eTrace Investigative Tool (Aug. 15, 2008), <http://www.atf.gov/press/releases/2008/08/081508-atf-mexico-to-use-ettrace.html>.

³¹⁸ The Protocol binds through its arbitration provision, and CIFTA binds (weakly) through its Consultative Committee mechanism. *See supra* Section II.C.2.

A second shortcoming in the framework of multilateral arms trafficking agreements is that they fail to address the link between domestic and interstate transfer of arms. Arms produced and sold legally within a state can easily fall into the illicit trade if states do not require every buyer or seller to report post-initial sale transactions. Only the UN Programme stipulates that states should record all domestic weapons transfers, however. The UN Programme, of course, is not enforceable. Thus no enforceable agreement requires states to record or otherwise track all domestic weapons transfers after their initial sale.

A third shortcoming in the framework of multilateral arms agreements is that major arms suppliers are not party to several major agreements. For example, China and the United States are not party to the Firearms Protocol,³¹⁹ although they are parties to the Convention against Transnational Organized Crime.³²⁰ The United States is not a party to CIFTA.³²¹ Although the United States, as a member state of the UN, is a party to the UN Programme, it has historically been unsupportive of the Programme and has “objected to [its] cost, claimed that it duplicated other multilateral efforts, and asserted that . . . the small arms problem could basically be dealt with at the regional level.”³²² The United States, Russia, and China in 2001 would not agree to changes that would make the UN Programme more robust.³²³ Arms agreements arguably are ineffective if they do not include major arms suppliers as State parties, since only these states can target their arms at the points of production, domestic ownership and transfer, and export.

B. Recommendations for Strengthening U.S. Arms Trafficking Laws

There are several concrete steps available to the United States to address these shortcomings and to better control arms trafficking through international action. First, the United States could ratify CIFTA. Second, it could increase bilateral programmatic assistance aimed at addressing arms trafficking. Third, it could engage more actively in the process of negotiating a new Arms Trade Treaty. We address each of these briefly in turn.

³¹⁹ Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, Supplementing the United Nations Convention against Transnational Organized Crime, UN TREATY COLLECTION, *supra* note 287.

³²⁰ United Nations Convention Against Transnational Organized Crime, UN TREATY COLLECTION, *supra* note 288.

³²¹ Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Materials (Nov. 14, 1997), <http://www.oas.org/juridico/english/sigs/a-63.html>.

³²² LAURANCE & STOHL, *supra* note 84, at 30.

³²³ Human Rights Watch, *United Nations: “Program of Inaction” on Small Arms* (July 18, 2001).

1. Increase Multilateral Engagement by Ratifying CIFTA

Ratifying CIFTA would bolster U.S. efforts to combat the problem of international arms trafficking. President Obama called for the United States to ratify the treaty in April 2009,³²⁴ and the Bush Administration indicated that it was a “very high priority” treaty for ratification in 2002.³²⁵ In its recent report on National Southwest Border Counternarcotics Strategy, the Office of National Drug Control Policy calls for the ratification of CIFTA, in order to “send a powerful message to partner nations and help the countries of the hemisphere to shut down the illicit transnational arms market that fuels the violence associated with drug trafficking, terrorism, and international organized crime.”³²⁶

Moreover, both the Obama Administration and the Bush Administration have suggested that CIFTA ratification would not require any change in United States domestic law, since U.S. law already complies with the treaty.³²⁷ This conclusion, which stems in part from minor tweaks in domestic law made by the Clinton Administration upon signing CIFTA, has been verified by other experts.³²⁸

Although ratification of CIFTA does not require changes in U.S. law, it could bolster U.S. efforts to combat arms trafficking in the region in a number of ways. First, U.S. ratification would provide an immediate boost of credibility to CIFTA, and a prolonged failure of the United States to ratify the treaty would cause it to lose prestige over time.³²⁹ Since CIFTA is a relatively strong treaty modeled after U.S. laws and regulations³³⁰, a credible CIFTA would allow the

³²⁴ Sheridan, *supra* note 286.

³²⁵ MATTHEW SCHROEDER, FED. OF AM. SCIENTISTS, SMALL ARMS, TERRORISM, AND THE OAS FIREARMS CONVENTION 32 (2004), available at http://www.fas.org/pubs/_docs/FullReport.pdf (citing Letter from Paul V. Kelly, Assistant Secretary of Legislative Affairs, to Joseph R. Biden, Chair of the Senate Foreign Relations Committee, Feb. 2, 2002).

³²⁶ SOUTHWEST BORDER STRATEGY, *supra* note 23, at 350.

³²⁷ Sheridan, *supra* note 286 (quoting State Department Legal Adviser Harold Koh, who in response to concerns by the National Rifle Association that ratification would threaten certain routine actions by American gun owners, stated, “If those actions are lawful under U.S. domestic law, CIFTA doesn’t make them unlawful”); Schroeder, *supra* note 325, at 31 (citing U.S. Department of State Bureau of Political-Military Affairs, *Fact Sheet: Inter-American Convention Against the Illicit Trafficking and Manufacture of Firearms, Ammunition, Explosives and Related Items*, 1 August 2002).

³²⁸ Schroeder, *supra* note 325, at 35-36.

³²⁹ *Id.* at 34.

³³⁰ *Id.* at 32.

United States and the Western Hemisphere to get the rest of the world to live up to their standard.

Second, commentators have argued that ratification of CIFTA would carry moral weight for the United States within the region itself, sending a message that the United States is serious about this problem and willing to participate in multilateral agreements to solve it.³³¹ Such a message could allow the United States to take a more active role in regional conversations about arms trafficking. While the United States is permitted to observe CIFTA meetings, it cannot vote until it becomes a party and therefore its influence is limited; a number of countries have suggested that they do not put much stock in the exhortations of a country that has yet to ratify the treaty.³³²

The increased influence and moral weight the United States would obtain by ratification is particularly important in light of a number of gaps in CIFTA's framework. As noted above, CIFTA does not currently require destruction of confiscated weapons, and has few provisions regarding stockpile management.³³³ Yet encouraging weapons destruction and stockpile management to prevent leakage from arsenals have been the cornerstones of United States foreign policy on arms trafficking for over a decade.³³⁴ By ratifying CIFTA, the United States would be in a position to press its priorities in a legally binding instrument that will encourage compliance by other states while not requiring any additional commitments by the United States.

2. *Increase Bilateral Programmatic Assistance to Attack the Problem*

Although the United States has not ratified many multilateral treaties on arms trafficking, it has exhibited tremendous success in specialized programs, many of them conducted on a bilateral basis. These programs provide assistance to other countries to target a particular kind of weapon or subsection of the arms trafficking problem. Such approaches are attractive in that they do not require the United States to make firm commitments that may face considerable domestic opposition, but at the same time allow the United States to support the development of better practices abroad.

³³¹ CAP Report, *supra* note 190, at 44.

³³² Schroeder, *supra* note 325, at 33.

³³³ See *supra* text accompanying notes 90-95; see also Carlson, *supra* note 124, at 626-48 (noting a number of deficiencies in CIFTA and making recommendations).

³³⁴ Bondi, *supra* note 276, at 129 (2006).

The most well-known such program was the U.S. effort to combat the problem of MANPADs (man-portable air-defense systems). The United States has recognized the threat posed by these weapons and has spent tens of millions of dollars to support programs in other countries that destroy them.³³⁵ Yet, as at least one commentator has noted, similar programs run out of the State Department's Office of Weapons Removal and Abatement operate on a small budget and are relatively unknown in spite of their tremendous impact.³³⁶

The United States could also develop more robust programmatic assistance through developmental aid.³³⁷ Incorporating small arms initiatives into U.S. developmental programs—for example, by considering explicitly how to deal with small arms proliferation in the action plans while providing aid that addresses broader sector reforms—could help reduce underlying weapons demand and thus address the problem at its source.³³⁸ In particular, USAID could play a greater role in addressing small arms trafficking by taking it into account in its assistance programs.³³⁹

3. *Participate in Negotiations toward a Comprehensive Arms Trade Treaty*

The United States would further bolster its efforts to combat arms trafficking by helping to shape a robust international arms trade treaty (ATT). In 2006, the UN General Assembly adopted Resolution 61/89, which called for states to begin work “concluding a legally binding instrument . . . to establish common international standards for the import, export and transfer of conventional arms.”³⁴⁰ While the General Assembly will hold a United Nations Arms Trade Treaty conference in 2012 to discuss the proposed agreement,³⁴¹ currently the United Nations has not created draft terms for the ATT. The United States should take a leadership role in negotiating the ATT, pushing for a treaty that fills two key gaps in the existing framework of arms trafficking agreements: the narrow scope of most binding arms agreements and the lack of participation by major arms suppliers in binding agreements. The United States can work

³³⁵ *Id.*; see also U.S. PoA Matrix, *supra* note 226, at 9 (noting that the United States has destroyed nearly 30,000 MANPADs in 30 countries since 2003).

³³⁶ CAP Report, *supra* note 190, at 44; see also U.S. PoA Matrix, *supra* note 226, at 9 (describing work of the Office of Weapons Removal and Abatement).

³³⁷ CAP Report, *supra* note 190, at 45.

³³⁸ *Id.*

³³⁹ *Id.*

³⁴⁰ G.A. Res. 61/89, pmb. A/RES/61/89 (Dec. 18, 2006).

³⁴¹ G.A. Res. 64/48, para. 4, A/RES/64/48 (Jan. 12, 2010).

toward a powerful arms trafficking agreement that does not require changes in U.S. domestic law.

The United States should work toward an agreement that covers a broad scope of weapons³⁴² and is truly enforceable. Such an international agreement would fill one major gap in the existing international legal framework: most binding agreements are narrow in scope. The United States could shape an even more effective ATT by advocating an agreement that focuses primarily on “control[ling] transfers across international borders”³⁴³ but also makes use of arms control mechanisms at other stages of the arms life cycle. In this respect, the ATT could be patterned largely on CIFTA, which targets trafficking at all stages in the arms life cycle but does not include provisions that would require the United States to alter domestic law.

By supporting the ATT, the United States could address another major gap in the existing framework of arms agreements: the lack of participation by major arms suppliers in binding agreements. As a leader in the creation and implementation of the ATT, the United States could encourage other major arms suppliers, like China and Russia, to engage with the treaty and comply with the United States’ high standards on arms exports.³⁴⁴ Moreover, as Secretary Clinton has argued, the United States could use the ATT to “promote the same high standards for the entire international community that the United States . . . already [has] in place to ensure that weaponry is transferred for legitimate purposes.”³⁴⁵

C. Conclusion

There is an extensive legal regime regulating conventional arms trafficking at the international and domestic levels, but there remain gaps in the framework that allow arms trafficking to continue at levels that threaten U.S.

³⁴² See also CAP Report, *supra* note 190, at 45 (recommending that the United States “make sure that the ATT is comprehensive[, including] both small arms and heavy conventional weapons”). The United States has indicated its support for an ATT covering a broad scope of weapons. See Tauscher, *supra* note 296 (“We need a treaty that looks at regulating all conventional weapons, from small arms and light weapons to aircraft carriers.”). It has also indicated its support for an ATT that is truly enforceable. *Id.* (“We will not . . . [approve] a weak or loophole-laden agreement.”).

³⁴³ *Id.*

³⁴⁴ See also CAP Report, *supra* note 190, at 44-45 (recommending that the United States “play a leadership role in developing a legally binding Arms Trade Treaty that would develop common international standards at the highest level on the export of conventional weapons, including small arms”).

³⁴⁵ Clinton, *supra* note 295.

national security interests. On the international level, the most enforceable arms agreements fail to target multiple points in the arms life cycle, address only a narrow scope of weapons, and do not effectively regulate the illicit resale of arms in the black market. Additionally, major arms suppliers, including the United States, are not party to many of the primary arms trafficking agreements. On the domestic level, the United States has strong controls on the interstate transfer of arms, but it has much less robust regulations at earlier stages in the life cycle, particularly at the domestic ownership stage. This has limited the capacity of the United States to address the illicit arms trade.

The United States has the opportunity to play a crucial leadership role in combating the illicit trade in conventional weapons. The United States is a leader in robust interstate arms transfer controls and innovative bilateral assistance programs. The United States can build on these efforts and set a strong example for the world by ratifying CIFTA, increasing bilateral programmatic assistance, and advocating for an effective arms trade treaty. Through these efforts, the United States can be a leader in combating the threat posed by illicit arms trafficking.