Annex B:

Regulatory Impact Statement

Regulation of Arms Brokering Activities

Agency Disclosure Statement

The Ministry of Foreign Affairs and Trade has prepared this Regulatory Impact Statement.

It provides an analysis of options for regulating persons who negotiate, arrange or facilitate the international movement of arms and/or military equipment – an activity known as brokering. The objective of the regime is to prevent persons in New Zealand and New Zealand citizens and entities operating abroad from engaging in brokering where there is a risk of the arms and military equipment moving to illegitimate users or undesirable destinations, including countries under United Nations arms embargo and conflict zones. Currently this activity is subject to no regulatory controls in New Zealand.

One key assumption underlying the analysis is that the scale of the problem in New Zealand is limited – the Ministry of Foreign Affairs and Trade is aware of only a small number of people or entities in New Zealand and New Zealanders offshore either undertaking, or looking to undertake, brokering. As a result of this limited scale, it is not proposed that New Zealand's brokering regime be complex or administratively burdensome – but should instead utilise existing processes and procedures, in particular in relation to enforcement.

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Ministry of Foreign Affairs and Trade

Executive summary

New Zealand currently has an export control regime that regulates the movement of arms, weapons and military equipment from New Zealand, and an import control regime that regulates the movement of arms into New Zealand. However, there are currently no controls on persons in New Zealand or New Zealand citizens operating abroad who negotiate, arrange or facilitate the international movement of arms and/or military equipment – an activity known as brokering.

This is a significant gap. While brokering can be used to facilitate legitimate arms deals, it is widely recognised that uncontrolled brokering assists the movement of arms and military equipment to illegitimate users or undesirable destinations, including countries under United Nations ("UN") arms embargo and conflict zones, where they are often used to commit human rights and other abuses.

It is proposed that New Zealand close this gap by introducing legislative controls on brokering that will prevent New Zealand individuals or entities from engaging in brokering where there is a risk of the movement of arms and/or military equipment to illegitimate users or undesirable destinations.

Such controls will greatly enhance New Zealand's implementation of the recently ratified UN Arms Trade Treaty.

Without such controls we risk facilitating the illegitimate movement of arms and military equipment, and having illicit arms brokers shift their activities to our territory, so they can escape controls in their own jurisdictions.

The proposed Act would follow the approach of likeminded countries, including Australia, the US and the UK, and control brokering by requiring that individuals and entities wanting to engage in brokering register with the New Zealand government and obtain a permit for specific brokering activities. Permits would not be granted for brokering transactions where there is a risk of the movement of arms and military equipment to illegitimate users or destinations.

The number of people and entities likely to be affected by the policy is estimated to be low. MFAT is aware of only a small number of New Zealand individuals and entities either based in New Zealand or operating abroad that are carrying out, or intend to carry out, brokering.

Status quo and problem definition

New Zealand currently has in place an export control regime that regulates the movement of arms and military equipment from New Zealand and prohibits the movement of arms and military equipment to conflict zones or countries subject to UN embargos. New Zealand also has an import control regime that regulates the movement of arms into New Zealand.

However, there are currently no controls on persons or entities in New Zealand and New Zealand citizens and New Zealand incorporated companies operating abroad ("Relevant New Zealand Entities"), who negotiate, arrange or facilitate the international movement of arms and/or military equipment – an activity known as brokering.

Such activity is currently not subject to any controls by New Zealand because the goods do not pass through New Zealand territory. Accordingly, it poses a risk in terms of illicit transfer to conflict zones and countries subject to UN embargos. While in theory such transactions could (and should) be regulated by the foreign country involved, in practice – given the nature of the countries usually involved – this is typically not the case.

There is now international consensus that while arms brokers can be used to facilitate legitimate arms deals, uncontrolled brokering assists the movement of arms and military equipment to illegitimate users and/or undesirable destinations, including countries under UN arms embargos and conflict zones, where they are often used to commit human rights and other abuses.

In recent years there have been a number of high-profile cases where brokers have facilitated the illegitimate movement of arms into such countries and conflict zones.

This includes a high profile example involving New Zealand: in 2006 a large shipment of conventional arms from North Korea that was destined for Iran in breach of UN arms embargos was intercepted in Thailand. It was subsequently discovered that a New Zealand registered company had leased the plane that was transporting the arms. Because New Zealand had no controls on brokering by New Zealanders, no action was able to be taken by the New Zealand government. The case had negative implications for New Zealand's arms control reputation.

As a result of these cases, international efforts to regulate arms brokering have intensified, with the recently concluded UN Arms Trade Treaty requiring all States Parties to (at a minimum) take measures to regulate brokering taking place within their jurisdiction. New Zealand played a leadership role in the negotiation of the Arms Trade Treaty, and ratified it in September 2014. While New Zealand currently meets the minimum standards required by the Treaty, the introduction of legislative brokering controls would significantly enhance our implementation of the Treaty.

Likeminded countries, including the US, Australia and the UK, have all established legislative controls on brokering taking place within their jurisdictions and by their nationals and entities abroad. The EU also has a comprehensive brokering control regime.

Costs and benefits of status quo

The lack of controls on brokering in New Zealand creates a significant gap in our arms control regime, and we have been criticised for our lack of controls in this area.

Continuing with the current status quo, we risk:

· Facilitating the illegitimate movement of arms and military equipment to conflict zones and countries subject to UN arms embargos;

· Having illicit arms brokers shift their activities to our territory, so they can escape controls in their own jurisdictions. MFAT is already aware of interest by international arms brokers in operating from New Zealand given the lack of regulatory controls here;

· Damaging New Zealand's reputation as a global leader in arms control;

· Undermining the international credibility of our arms control regime.

For these reasons, it is in New Zealand's interest to establish a brokering control regime, to close this gap in our arms control regime, prevent Relevant New Zealand Entities from contributing to the global movement of arms and military equipment to illegitimate users and undesirable destinations, and to enhance our implementation of the UN Arms Trade Treaty.

Objectives

The objective of establishing brokering controls is to prevent Relevant New Zealand Entities from engaging in brokering where there is a risk of the movement of arms and/or military equipment to illegitimate users or undesirable destinations, including countries under UN arms embargo and conflict zones.

The broader policy goals are to:

· Contribute to regional and international peace and security;

· Promote respect for and compliance with international human rights and humanitarian law;

· Enhance New Zealand's implementation of the recently ratified UN Arms Trade Treaty;

· Strengthen New Zealand's positive reputation in the arms control area; and

· Align our arms control regime with like-minded countries.

Options and impact analysis

Non-regulatory options

In order to ratify the UN Arms Trade Treaty, New Zealand has already put in place a non-regulatory option – setting up a voluntary registration scheme for New Zealand-based brokers. As part of the scheme, MFAT requested any person or entity based in New Zealand that was or intended to undertake brokering to register with MFAT. As a voluntary scheme, this did not have the effect of meeting the objectives described above, but did provide some information on the extent of brokering activities currently being conducted in New Zealand, which has assisted the development of this policy.

There are no other feasible non-regulatory options available that would meet the objectives described above. To effectively control brokering activities in New Zealand,

legislative based controls are required because, to be effective, brokering controls must be supported by appropriate enforcement capabilities and penalties for breach.

Regulatory options

In looking at regulatory options, two possibilities have been identified:

· **Option 1:** Prohibit the brokering of arms and military equipment by Relevant New Zealand Entities, or

· **Option 2:** Control the brokering of arms and military equipment by Relevant New Zealand Entities by establishing a registration and permit based system.

It is proposed that Option 1 not be pursued because it is more restrictive than is required to meet the policy objectives described above. It would prevent Relevant New Zealand Entities from engaging in any brokering, even where there was no risk of the movement of arms and military equipment to illegitimate users and/or undesirable destinations. As noted above, brokers can be used to facilitate legitimate arms deals, and so there is no reason to prohibit brokering outright.

Instead, it is proposed that option 2 be pursued. This would be achieved by requiring Relevant New Zealand Entities seeking to engage in brokering to register with the New Zealand Government and obtain a permit for specific brokering activities. Permits would not be granted for brokering transactions where there is a risk of the movement of arms and military equipment to illegitimate users and/or undesirable destinations. Brokering without a permit would be an offence. See below for details of the proposed registration and permitting regime.

This option will allow Relevant New Zealand Entities to engage in brokering so long as there was a low risk of the arms and military equipment being transacted being moved to illegitimate users and/or undesirable destinations.

Range of impacts

Relevant New Zealand Entities (which as noted above includes persons or entities in New Zealand and New Zealand citizens and New Zealand incorporated companies operating abroad) that are engaged or planning to engage in brokering activities will be impacted by this policy.

The policy will have the following impacts:

· It will restrict the ability of Relevant New Zealand Entities to engage in brokering, unless they comply with certain criteria designed to prevent the movement of arms and military equipment to illegitimate users and/or undesirable destinations;

· It will result in additional compliance costs as Relevant New Zealand Entities seeking to engage in brokering will need to obtain specific registrations and permits. However, consistent with the approach of likeminded countries, it is not proposed that there will be any fees charged for registration or permitting applications, as administration of the regime can be met from within existing baselines.

· It will restrict the international movement of conventional arms and prevent movement where there is a risk of arms or military equipment being transferred to illegitimate users or undesirable destinations, including countries under UN arms embargo and conflict zones.

Incidence of these impacts

The number of Relevant New Zealand Entities affected by the policy is likely to be low. MFAT is aware of only a small number of New Zealand individuals and entities either based in New Zealand or operating abroad that are carrying out, or intend to carry out, brokering activities.

Overseas-based brokers complying with a robust brokering control regime in their jurisdiction of residence would not be subject to New Zealand's regime concurrently.

Specific elements of the regime

Scope of the regime

Consistent with the approach of likeminded countries and international best practice, it is proposed that New Zealand establish a brokering control regime that:

· **Clearly defines the activity to be regulated.** While there is no single internationally accepted definition or description of brokering, those that have been put forward and used by other like-minded countries all focus on **arranging, facilitating and/or negotiating a transaction involving the international movement of arms**.[1] There is also now international consensus that the actual acquisition of arms for the purpose of resale to other persons also constitutes brokering.[2] It is proposed that New Zealand follow a similar approach.

· **Applies to "core" brokering activities and not "ancillary services**" such as providing administrative support for an arms transaction. This would mean, for example, that persons assisting with customs paperwork/approvals or providing freight insurance or financing for an international arms transaction would not be caught by the regulation. The rationale for this restriction is:

- The need to avoid imposing unnecessary burdens on legitimate business.
- The purpose of regulating brokering is to prevent the movement of arms and military equipment to illegitimate users and undesirable destinations and thus it only makes sense to regulate those who have knowledge of the destination and end-use of the goods. In a brokered transaction, that is most likely to be the broker. Persons involved in "ancillary services" will usually have limited knowledge of the overall transaction.

Such an approach is consistent with regimes of likeminded countries which exclude certain administrative/ancillary services.[3]

· **Applies to all weapons and military goods included on New Zealand's Strategic Goods List** ("SG List"),[4] **as well as potentially certain other civilian goods that have military or other similar applications that are within the scope of the SG List.** In addition to traditional weapons and military goods, the SG List

[1] For example, the current formulation used by Australia is "arranges for another person to supply", with "supply" defined as including "supply by way of sale, exchange, gift, lease, hire or hire-purchase" and "arranges" defined as "acts as an agent of a person, or acts as an intermediary between 2 or more persons, in relation to the supply": see sections 4, 5A and 15 of the Australian Defence Trade Controls Act 2012.

[2] Flemish Peace Institute Report on "The international framework for control of brokering in military and dual-use items", March 2010, page 113.

[3] The US and UK regimes have explicit exclusions for certain ancillary services.

[4] The SG List is implemented pursuant to Customs Export Prohibition Order 2014.

includes within its scope certain civilian goods that may have military or related applications to the development, production or use of weapons of mass destruction and their means of delivery, such as advanced metals and computer systems.[5] Whether or not they fall within the scope of the SG List depends on their intended end-use. If they have a military end-use they are covered, but if they have a civilian end use they are not. It is proposed that such goods be covered by the regime if it is found to be feasible to do so.

- Is **restricted to transactions involving the movement of arms and/or military equipment from one foreign country to another foreign country** (i.e. excluding transactions involving imports, exports and internal movement of arms and/or military equipment within New Zealand). The basis for this restriction is that:

    - New Zealand already has an export control regime under the Customs and Excise Act 1996 that controls the movement of arms from New Zealand and which prohibits export to conflict zones or countries under UN embargos.

    - Movements of arms into New Zealand and domestic arms transactions are also already regulated under the Arms Act 1983, and pose no specific risk in terms of transfer to undesirable destinations, including countries subject to UN arms embargo and conflict zones. (Where such arms subsequently transferred out of New Zealand they would be subject to the export regime above.)

Such an approach has the benefit of ensuring there will be a clear delineation between the brokering regime and New Zealand's domestic regime for firearms dealers administered under the Arms Act – which only applies to imports of firearms to New Zealand and domestic arms transactions, and does not apply to international transactions. It is also consistent with the approach of likeminded countries.

- **Has extra-territorial effect.** Given the cross-border nature of brokering and the need to prevent New Zealand persons and entities from evading regulation by relocating to another country without brokering controls, it is proposed that the regime have extra-territorial effect and apply not only to persons and entities in New Zealand, but also to: (i) New Zealand citizens and individuals ordinarily resident in New Zealand operating abroad; and (ii) New Zealand incorporated companies operating abroad. This would be consistent with the approach of likeminded countries. Creating legislation with extra-territorial should only be done in "exceptional circumstances"[6] where the Crimes Act is found to be insufficient.[7] If a Relevant New Zealand Entity located offshore conducts brokering, no element of the activity will have a connection with New Zealand that would provide a basis for jurisdiction under the Crimes Act. Accordingly, it is considered that there is a clear case for New Zealand law to apply extra-territorially. An issue arises as to whether it is reasonable to expect New Zealand citizens operating abroad to comply with a New Zealand brokering regime, in particular New Zealand citizens and entities that

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[5] These include the dual-use (DU) categories for the SG List which have military or related applications, and goods which would be captured under SG List's catch-all provisions.

[6] LAC Guidelines paragraph (9.5)

[7] Section 7 of the Crimes Act provides that if any element of an offence has a connection to New Zealand, jurisdiction is available. It states: "for the purposes of jurisdiction, where any act or omission forming part of any offence, or any event necessary to the completion of the offence, occurs in New Zealand, the offence shall be deemed to be committed in New Zealand".

may already be complying with the regime relevant to their place of residence. To deal with this, it is proposed that the regime would include appropriate defences and/or exemptions for Relevant New Zealand Entities already complying with a robust brokering regime in their place of residence.

Registration/permitting structure

In terms of the actual control regime, it is proposed that the Act require any Relevant New Zealand Entity intending to engage in brokering to register with the New Zealand Government and obtain a specific permit for each brokering transaction. This is consistent with the approach of like-minded countries and international best practice guidance on brokering controls.[8] This registration and permit procedure would be established and administered by the Ministry of Foreign Affairs and Trade ("MFAT"), as the administering agency for the Act.

In considering an application for registration as a broker, it is proposed that MFAT assess whether the applicant is a "fit and proper person", taking into account factors such as previous registrations, financial position and criminal records. It is not proposed that the specific criteria used by MFAT to assess registration applications be recorded in the Act, so as to ensure that it is able to be reviewed and updated as required (for example to ensure it is current and consistent with the approach of likeminded countries). Instead it is proposed that it be outlined in publicly available policy guidance that would be subject to Ministerial approval. This is consistent with the approach to decision-making on applications to export strategic goods.

The Act would outline the requirements for registration, as well as the validity period of registration, the specific conditions that registration would be subject to, and when registration could be cancelled (including if false or misleading information had been supplied by the applicant or if registration conditions were not complied with). A register of brokers would be maintained by MFAT.

In addition, the Act would require that registered brokers must obtain a permit for each brokering activity they carry out, with the possibility of brokers being able to obtain a permit covering more than one transaction if they can show that the transactions are substantially similar. In considering an application for a brokering activity permit, MFAT would utilise the same criteria currently used for assessing applications to export Strategic Goods. Those criterion are focused on assessing the risk of the goods moving to an illegitimate end user, conflict zone, embargoed country, or having an undesirable end use or effect.[9] This approach would be consistent with likeminded countries, including the US, UK and Australia, all of which utilise identical (or very similar) criteria for export and brokering activity permits. It is also consistent with international guidance on best practice for regulating brokering, which recommends that the same criteria be used for brokering activity permits as for export permits.[10]

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[8] For example, the OSCE Best Practice Guide on National Control of Brokering Activity recommends "any individual subject to the controlling State's jurisdiction who intends to engage in brokering shall require a license for each brokering activity".

[9] The criterion are available at: http://www.mfat.govt.nz/Trade-and-Economic-Relations/3-Export-controls/1-NZ-Strategic-Goods-List/09-Procedures-and-Requirements.php.

[10] The OSCE Best Practice Guide on National Control of Brokering Activity recommends: "the international criteria and commitments governing brokering should be similar to those government licensing procedures for arms exports or could be

This two-step approach provided for in the legislation would ensure that only approved persons can conduct brokering activities and that such persons are only able to engage in brokering activities where there is no risk of the movement of arms and military equipment to illegitimate end users and undesirable destinations.

Offences and penalties

An offence would be created for engaging in conduct that contravenes the Act, for example by engaging in brokering without being registered as a broker, engaging in brokering without a permit for the specific transaction, or providing false and/or misleading information in connection with a registration or permit.

To ensure as far as possible that New Zealand's brokering regime to be consistent with likeminded countries, it is proposed that penalties be set in line with Australia's brokering regime.[11] If the penalties are not broadly commensurate, we risk having illicit brokers shift their activities to our territory to avoid the harsher penalties in their own jurisdiction.

In line with the above, it is proposed that penalties would be: for individuals imprisonment for a term not exceeding 5 years, or a maximum fine of $100,000, or both; and for corporate entities a maximum fine of $1 million.

Enforcement

Given the multi-jurisdictional nature of brokering, it is likely that even in situations where the broker is based in New Zealand, there will be challenges in investigating and prosecuting brokering offences – because the goods, the buyer and the seller will be located in other jurisdictions (and in some cases multiple jurisdictions as the chart in Annex A makes clear).

This creates challenges in terms of monitoring and enforcement of the regime. New Zealand would need to rely on information sharing with other countries. The UN Arms Trade Treaty has specific provisions designed to facilitate the sharing of information between States Parties to aid implementation of core obligations, including on brokering. New Zealand would also be able to rely on other established information/intelligence channels to obtain information on potential brokering offences by New Zealand Entities abroad.

Were the government to become aware of a potential brokering offence being committed (which would most likely be through information or intelligence shared by another country), it is likely that we would need the assistance of other jurisdictions involved in order to conduct an investigation. Key agencies in this regard would be MFAT and Police. MFAT would be able to identify and utilise any existing mutual legal assistance agreements and arrangements with relevant jurisdictions to request partner countries to assist with the investigation. This would include any relevant extradition agreements if brokering was an extraditable offence and the offender was located outside New Zealand.

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applied analogously. The procedures adopted for the licensing of brokering activities should be no less stringent than those applied to direct exports".

[11] Offences for breaches of Australia's brokering regime are imprisonment for 10 years or 2,500 penalty units (currently equivalent to AUS$425,000), or both.

The New Zealand Police would take the lead in terms of the actual investigation of the offence, particularly any New Zealand based elements (e.g. if the broker was based in New Zealand and had utilised their computer to transact the arrangement) and would be able to rely on all of their existing search and seizure powers in doing so. In relation to the foreign aspects of the offence, Police would also be able to utilise existing Police cooperation arrangements with other countries, as well as Interpol, to facilitate investigations in foreign jurisdictions.

Given the limited magnitude of brokering activity in New Zealand (as noted above, MFAT is only aware of a small number of persons and entities that conduct, or would like to conduct, brokering), it is not proposed that any specialised processes be established to facilitate investigations and prosecutions of brokering offences.

Because Australia also has a legislative brokering control regime, an issue arises as to whether the Bill should be subject to the Trans-Tasman Mutual Recognition Arrangement ("TTMRA"). Under the TTMRA, people registered to practice an occupation in one country are entitled to practice the equivalent occupation in the other country. Exemptions to the TTMRA are not introduced without significant policy rationale. Brokering arguably falls within the TTRMA's wide definition of an occupation. If the Bill was subject to the TTMRA, this would mean Australian registered brokers would be entitled to have their Australian broker registration recognised in New Zealand and vice versa. This should not pose any problems in New Zealand, because Australian registered brokers would still need to obtain a permit from MFAT for specific brokering activities. Accordingly, at this stage it is proposed that the Bill be subject to the TTMRA.

Conclusion

A non-regulatory option would not enable the objectives of a robust, comprehensive brokering control regime to be achieved. In particular, it would not provide the legal authority to prevent Relevant New Zealand Entities from engaging in brokering where there is a risk of the movement of arms and/or military equipment to illegitimate users or undesirable destinations, including countries under UN arms embargo and conflict zones.

To meet the objectives of the policy proposal, it is proposed that New Zealand establish a comprehensive legislative framework to control brokering that would consist of an Act, supplemented by policy guidance.

Consultation

New Zealand Police, the New Zealand Customs Service, Ministry of Justice, Ministry of Business, Innovation and Employment, the New Zealand Defence Force and the Ministry of Defence have been consulted on the development of this policy and this RIS.

Interested NGOs and representatives of New Zealand's firearms community have also been briefed and their feedback is reflected in this paper.

Conclusions and recommendations

The establishment of a brokering control regime will fill a significant gap in New Zealand's arms control regime and enhance New Zealand's implementation of the recently ratified UN Arms Trade Treaty.

A non-regulatory option would not enable the objectives of a brokering control regime to be achieved. In particular, it would not provide the legal authority for preventing Relevant New Zealand Entities from engaging in brokering where there is a risk of the movement of arms and/or military equipment to illegitimate users or undesirable destinations, including countries under UN arms embargo and conflict zones.

It is recommended that New Zealand establish a comprehensive legislative control regime that would require Relevant New Zealand Entities wanting to engage in brokering to register with the New Zealand Government and obtain a permit for specific brokering activities. Permits would not be granted for brokering transactions where there is a risk of the movement of arms and military equipment to illegitimate users or undesirable destinations, including countries under UN arms embargo and conflict zones. Brokering without a permit would be an offence.

MFAT would take the lead in administering the registration and permitting aspects of the regime. Given the multi-jurisdictional nature of brokering, there would be challenges around monitoring and enforcement of the regime. Monitoring activities would involve information sharing among relevant States. Investigations and enforcement action would be led by New Zealand Police, utilising existing search and seizure powers, with support from MFAT.

Implementation plan

MFAT, as the administering agency for the Act, will establish the systems required for broker registrations and brokering permits, including appropriate forms and guidance for applicants. All of this information will be made available on MFAT's existing export controls website. MFAT will develop the criteria to be used for assessing broker registration applications. These will be subject to approval by the Minister of Foreign Affairs. Existing criteria for export of Strategic Goods will be used for brokering activity permits.

A key implementation risk will be ensuring that all Relevant New Zealand Entities are made aware of the changes – particularly New Zealand citizens and corporate entities operating abroad. All persons that registered as brokers as part of MFAT's interim registration (see above) will be advised by email of the legislation when it is introduced to the House. In addition, relevant agencies will conduct further outreach with the New Zealand firearms community.

Compliance costs will be minimal: no fees will be charged for broker registration or brokering activity permits. The main compliance cost for affected parties will be the time involved in obtaining the relevant registrations and permits.

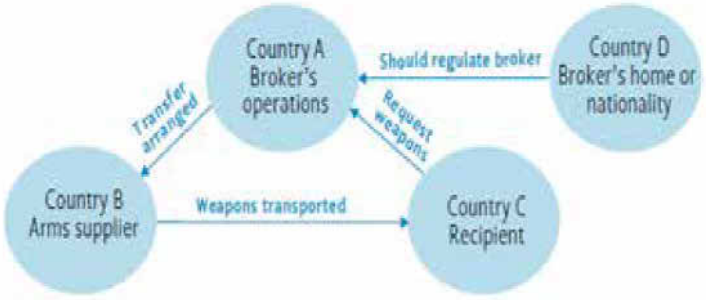
Monitoring, evaluation and review

It is proposed that the Act be subject to review by relevant New Zealand agencies within the first 5 years of its enactment to evaluate its effectiveness.

In accordance with the provisions of the UN Arms Trade Treaty, New Zealand will also work with and share information with other countries to ensure our regime remains in line with international best practice.

Annex A: representation of brokering

Sourced from the International Action Network on Small Arms



Representation of brokering from the International Action Network on Small Arms[10]

The illustration above shows that at least three – or sometimes four or more – countries may be party to brokering activities. Country A is the country where the *broker* exercises his activities, that is, his base. This may or may not be the country of which he is a national or resident (Country D). The transfer of goods takes place outside the territory of Country A: the goods are physically moved from Country B to Country C.