

# **Illicit brokering of weapons of mass destruction and related materials**

**Legal framework, characteristics, concerns**

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# Brokering in WMD & Dual-use items

## International attention:

- No such milestone as for arms brokering ('90, UN Reports)
- Post 9/11 context:
  - Threat of terroristic attacks
  - Fear of WMD in the hands of non-state actors



UN SC Resolution 1540 (2004)

# Brokering in WMD & Dual-use items

## UN SC Resolution 1540 (2004):

*Deter, detect, prevent, combat illicit trafficking and brokering of NBC weapons, means of delivery and related materials, through:*

- National **legislation** in accordance with international law
- Border **controls**
- Law **enforcement** measures
- International **cooperation** when necessary

UN SC Resolutions on nuclear non-proliferation **since: no mention of brokering**

# Brokering in WMD & Dual-use items

## **UN GS Resolution 63/67 (12.01.2009):**

*Calls upon the MS to establish appropriate national laws and/or measures to prevent and combat illicit brokering in a manner consistent with international law*



## **UN Resolutions:**

- No definition of brokers or brokering
- No concrete control measures
- No criteria for legal brokering
- RES 1540: instrumental definition + reference to ((inter)nat.) lists

# Brokering in WMD & Dual-use items

## **Australia Group:**

- Attention of the phenomenon in the Guidelines for Transfers of Sensitive Chemical or Biological items (2009)

## **Other non-proliferation organisations:**

- No binding document on dual-use brokering
- No guidelines on dual-use brokering

# Brokering in WMD & Dual-use items

## EC Dual-use Regulation 428/2009:

= the only (regional) comprehensive, legally binding document

- Extends the existing export control regime (2000) to brokering
- Directly applicable in the MS
- Covers conventional and WMD dual-use: definition + list in annex + catch all clauses, incl. suspicion clause
- Defines EC brokering services:
  - negotiation or arrangement of transactions between (EC) third countries
  - **Buying/selling** of dual items located in third countries

# Brokering in WMD & Dual-use items

## EC Dual-use Regulation 428/2009:

- Defines EC brokers:
  - Natural, legal persons, partnerships MS **resident or established**
- Control measures: license if the broker **is aware or is informed** that the goods can be used for WMD
- Criteria **legal/illegal**:
  - International non-proliferation commitments
  - Sanctions
  - National Foreign and Security Policy
  - End use or risk of diversion

# Brokering in WMD & Dual-use items

## EC Dual-use Regulation 428/2009:

- Other measures:
  - No undercut principle extended to brokering
  - Outreach by the authorities
  - Brokers keep records of their activities



## Merits of the EC Regulation:

- Common control regime for 27 MS, with minimum requirements
- Dealing with brokering as part of combating illegal trade in all its aspects

# Regulating WMD & Dual-use Brokering

**Specific characteristics** (similar to arms brokering), calling for specific measures:

- ✓ (Virtual) Activities: intermediation between arms traders
- ✓ Transactions in third countries, outside the jurisdiction
- ✓ Not necessarily possession/ownership of the goods
- ✓ Often involvement in other illegal activities
- ✓ Using loopholes in national control regimes to get the goods diverted from illegal export to illicit destinations



**Illegal brokering is a cross-boundary phenomenon**

**Requiring national regulatory control regimes**

# National legal requirements on brokering

**Ideal control = avoiding lacunas in national legal (export) control systems** (similar to arms brokering):

- ✓ Legal requirements in every national legislation
- ✓ Uniform definitions of brokers/brokering activities
- ✓ Uniform evaluation criteria for legal brokering (= export !)
- ✓ Identical material scope: definition + list of goods
- ✓ Identical jurisdictional scope (jurisdiction on activities)
- ✓ Deterrent sanctions, avoiding impunity

**Every remaining difference = loophole brokers take advantage off**

**The system is worldwide as strong as its weakest link**

# Specific characteristics of dual-use

## 1. Unlike for arms brokering: no exhaustive background information available:

- Who are they? Who are potential brokers?
- Dual-use items only, mainly, occasionally?
- Other illegal activities?
- Modus operandi?
- Mapping illegal end users and destinations,
- ...

⇒ **First step in making good legislation: insight in the problem and its characteristics**

# Specific aspects of dual-use

## 2. The nature of the goods involved:

Controlling illegal arms trade/brokering has two sides:

- Supply side - controlling the availability: by marking & tracing, stockpile management, ...
- Demand side: controlling illegitimate destinations and end users

Controlling the supply side for dual use = hardly possible

⇒ **Focus shifts to the demand side, controlling end use(rs) of dual use items**

# International framework on dual use brokering

## **First step:**

Insight in the problem and its characteristics: developing background information

## **Second step:**

Taking advantage from lessons learnt from arms brokering because of little experience with national regulations on dual use brokering



# International framework on dual use brokering

## Third step:

**Need for national legislation - role for the international community: closing the gaps in national (export control) regulations - stop 'regulatory shopping'**

- imposing a common national legal framework, with minimum requirements:
  - Uniform definitions of brokers/brokering
  - Uniform control measures & evaluation criteria (= traders/dealers)
  - Sanctions for non-compliance
- **imposing domestic cooperation !**
- **imposing mechanisms to catch brokers proactively !**

# International framework on dual use brokering

## Fourth step:

Reinforcing national capacity because of the trans-boundary aspect (transfers in third countries) – **role for the international community:**

- Ensuring international cooperation and exchange of information in order to:
  - bring illegal brokers to justice (ex post)
  - **identify brokers, to make sure they comply with license conditions (ex ante)**

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