

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

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INTRODUCTION

Illicit trafficking in small arms and light weapons ("SALW") undermines the stability of governments and the security of communities around the globe.¹ SALW are particularly dangerous because they are extremely lethal, yet portable and easy to use.² Despite the tangible threats presented by SALW, however, the global arms industry continues to manufacture these weapons at an alarming rate.³ SALW are readily available on the legal market through legitimate sales as well as on the black and gray markets through illegal diversions.⁴ Consequently, SALW are valued tools of the trade for violent criminals, both domestic and transnational.

1. See DAMIEN ROGERS, *POSTINTERNATIONALISM AND SMALL ARMS CONTROL: THEORY, POLITICS, SECURITY* 51 (Ashgate 2009) (1975) (noting that the impact of violence through the use of SALW is felt across national borders and has a deleterious effect on human security worldwide). There is no universally accepted definition of SALW, but there is a general consensus that "small arms" refers to weapons such as machine guns which can be wielded by an individual, whereas "light weapons" include larger, military-style weapons that usually require a crew of people to operate. See also CHRISTINE JOJARTH, *CRIME, WAR, AND GLOBAL TRAFFICKING: DESIGNING INTERNATIONAL COOPERATION* 223 (2009) (discussing the Organization for Security and Cooperation in Europe's working definition of SALW, which is widely accepted in the field of international policy).

2. See Harold Hongju Koh, *A World Drowning in Guns*, 71 *FORDHAM L. REV.* 2333, 2335 (2003) (emphasizing that even children can carry and operate SALW with "sickening ease").

3. See KIM CRAGIN & BRUCE HOFFMAN, *RAND NAT'L DEF. RES. INST., ARMS TRAFFICKING AND COLOMBIA* 52 (2003) (observing that in 2001, over 600 companies produced SALW—a three-fold increase since 1980).

4. See *id.* at xiii n.1 (explaining that SALW are available through three different channels: 1) the licit market, where weapons are legally exchanged via authorized actors; 2) the gray market, where one of the parties to the transaction is legitimate, but the other is not; and 3) the black market, where transactions occur between illegitimate parties). The most common diversions of SALW occur when weapons are sold to non-state actors, such as paramilitary groups, and moved across national borders without the authorization of all states involved. See JOJARTH, *supra* note 1, at 224 (defining diversion as "the movement of a weapon from legal origins to the illicit realm").

SALW trafficking has had a devastating effect on many regions, particularly Latin America, which has seen dramatic increases in crime and violence due to the illicit weapons trade.⁵ Though democratic Latin American states have developed economically and politically, threats to security have shifted from conflicts between states to the activities of subversive, transnational criminal groups.⁶ Inadequate controls on military stockpiles and widespread government corruption have further aggravated this tenuous situation because both are linked to illicit SALW transfers.⁷ The combination of Latin America's political environment with a hazardous increase in the availability of SALW is endangering individual safety, hindering economic development, and depleting states' confidence in their governmental structures.⁸

Illicit SALW trafficking is not unregulated in Latin America.⁹ Thirty of the thirty-five member states of the Organization of

5. See Nidya Sarria, *Small Arms in Latin America in the Aftermath of the NACLA Study*, COUNCIL ON HEMISPHERIC AFFAIRS, Aug. 18, 2009, <http://www.coha.org/small-arms-in-latin-america-in-the-aftermath-of-the-nacla-study/> (discussing statistics showing that there are 45 to 80 million SALW in Latin America, and observing that while most of these weapons were purchased legally, many have been used for unlawful purposes like drug trafficking and homicides); Rachel Stohl & Doug Tuttle, *The Small Arms Trade in Latin America*, NACLA Report on the Americas, Mar. – Apr. 2008, at 16 (observing unexpected increases in gun-related homicide in decades following cessation of civil warfare in Latin American countries).

6. See generally Bruce Zagaris, *Developments in the Institutional Architecture and Framework of International Criminal Enforcement Cooperation in the Western Hemisphere*, 37 U. MIAMI INTER-AM. L. REV. 421, 444-511 (2006) (summarizing the development of Latin American responses to security issues and recognizing that transnational criminals capitalize on economic development and globalization by operating in multiple states simultaneously).

7. See JOJARTH, *supra* note 1, at 224 (stressing that mismanagement of stockpiles and corrupt government officials are often the root cause of weapons diversions); MATTHEW SCHROEDER, FED'N OF AM. SCIENTISTS, SMALL ARMS, TERRORISM, AND THE OAS FIREARMS CONVENTION 4 (2004) (arguing that “inadequately controlled caches of Cold War weaponry” are a “potentially lucrative source of profit for unscrupulous arms brokers and a deadly threat to the rest of us”).

8. See ROGERS, *supra* note 1, at 35 (maintaining that illicit SALW trafficking undermines the authority of sovereign governments); Sarria, *supra* note 5 (asserting that easy access to SALW increases the potential for localized, violent conflicts throughout Latin America and stalls economic growth).

9. See *infra* Part I(A) (describing regional and global level SALW trafficking instruments in effect in Latin America).

American States (“OAS”) have ratified the Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials (“CIFTA”).¹⁰ However, many of these states are falling short of full compliance with CIFTA.¹¹ This Comment evaluates CIFTA’s efficacy in light of this non-compliance and through specific comparison to global level United Nations (“U.N.”) agreements, and argues that a dynamic and comprehensive response by the OAS and state parties is necessary. Though CIFTA covers illicit manufacturing and trafficking, this Comment will focus on the agreement’s trafficking section only.¹²

Part I of this Comment provides an overview of CIFTA and the two primary U.N. instruments regulating illicit SALW trafficking.¹³ This section also illustrates confirmed and probable CIFTA violations.¹⁴ Part II offers a thorough analysis of CIFTA’s strengths

10. See generally Organization of American States (OAS), Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials, Nov. 14, 1997, [hereinafter CIFTA] available at <http://www.oas.org/juridico/english/treaties/a-63.html> (controlling trade in firearms, ammunition, explosives and related materials, requiring criminalization of illicit manufacturing and trafficking, and encouraging cooperation between state parties). There are also binding and non-binding U.N. agreements in place to which many Latin American states are parties. See *infra* Part I(A)(2) (introducing the U.N. Protocol and Programme of Action).

11. See 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 CIFTA, Mexico City, Mex., Feb. 20-21, 2008, *Summary of Country Compliance With CIFTA: Status of Ratifications and National Firearms Legislation in Force*, 1, OEA/Ser.L/XXII.4.2 CIFTA/CEP-II/doc.5/08 (Feb. 8, 2008) [hereinafter *Summary of Country Compliance*] (noting incomplete compliance with marking, export, and recordkeeping requirements by many CIFTA parties).

12. See CIFTA, *supra* note 10, art. II (vowing to combat both unlawful manufacturing and trafficking in SALW).

13. See *infra* Part I(A) (delineating the requirements of CIFTA, the U.N. Protocol, and the U.N. Programme of Action). The United Nations Office for Disarmament Affairs is currently drafting the Arms Trade Treaty (“ATT”) aimed at “strengthen[ing] non-proliferation, disarmament and arms control measures.” United Nations Office for Disarmament Affairs, Towards an Arms Trade Treaty, <http://www.un.org/disarmament/convarms/ArmsTradeTreaty/html/ATT-OEWG-Statements-1.shtml>.

14. See *infra* Part I(B) (describing a diversion of Nicaraguan AK-47s that contravened CIFTA and a potentially unlawful diversion of Venezuelan anti-tank

and weaknesses, emphasizing flaws in the agreement's implementation and certain textual inadequacies.¹⁵ Part III recommends that the OAS devise a compliance mechanism to oversee CIFTA's implementation and make specific textual amendments as a means to compel states to fulfill their obligations under the treaty.¹⁶

I. BACKGROUND

A. INTERNATIONAL INSTRUMENTS REGULATING SALW TRAFFICKING

Many arms control agreements are rooted in the notion that states have an inherent right of self-defense, and therefore also possess the right to acquire weapons for themselves and to transfer them to other states.¹⁷ States view weapons, particularly SALW, as beneficial to their own security.¹⁸ At the same time, states also recognize that criminals or rebel groups can use weapons like SALW to contravene their authority and challenge their stability.¹⁹ Accordingly, states enter into agreements regulating SALW to legally justify their own possession and use of the weapons, while also limiting unauthorized SALW transfers.²⁰

guns).

15. See *infra* Part II (acknowledging positive progress resulting from CIFTA's implementation, but also criticizing the treaty's lack of enforcement mechanisms and imprecision).

16. See *infra* Part III (recommending that the OAS develop financially realistic compliance mechanisms for CIFTA and proposing specific modifications to CIFTA's text).

17. See Theresa A. DiPerna, *Small Arms and Light Weapons: Complicity "With a View" Towards Extended State Responsibility*, 20 FLA. J. INT'L L. 25, 33-34 (2008) (recognizing that states derive rights to individual and collective self-defense from customary international law and Article 51 of the U.N. Charter).

18. *Id.* at 34.

19. See ROGERS, *supra* note 1, at 107 (discussing the balancing that governments must do in controlling small arms because the proliferation of illegal small arms threatens the rule of law).

20. See Guido den Dekker, *The Effectiveness of International Supervision in Arms Control Law*, 9 J. CONFLICT & SEC. L. 315, 318-19 (2004) (proffering that arms control agreements are a primary means for states to guarantee security through the control of weapons).

Agreements regulating illicit trafficking in SALW are generally created and implemented through international organizations, such as the U.N. or the OAS, of which state parties are members.²¹ These international agreements range from “hard law” instruments, such as treaties, to “soft law” instruments, like political pacts, codes of conduct, and recommendations.²² The form of an instrument defines its role in the regulation of SALW: “hard law” instruments create obligations to which sovereign states are legally bound, while “soft law” instruments declare standards that states should seek to attain.²³ An additional distinction between these two legal forms is that “hard law” instruments often contain compliance mechanisms to ensure that states fulfill their obligations, whereas “soft law” treaties do not because they are aspirational and non-binding.²⁴ Such compliance mechanisms can vary from programs monitoring implementation to sanctions and trade embargoes.²⁵

CIFTA, as well as the U.N. Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition (“U.N. Protocol”), are “hard law.”²⁶ In

21. See ROGERS, *supra* note 1, at 106 (addressing various forms of SALW agreements stemming from international organizations, including the U.N. and regional organizations in Latin America).

22. Cf. Herbert V. Morais, *Fighting International Crime and Its Financing: The Importance of Following a Coherent Global Strategy Based on the Rule of Law*, 50 VILL. L. REV. 583, 591 (2005) (noting that international regulations of criminal activities (e.g. money laundering) tend to be a mixture of both “hard” and “soft law”).

23. See, Richard L. Williamson, Jr., *Hard Law, Soft Law, and Non-Law in Multilateral Arms Control: Some Compliance Hypotheses*, 4 CHI. J. INT’L L. 59, 62-64 (2003) (explaining that “hard law” represents a codification of norms that states consent to be bound by whereas “soft law” does not impose duties upon states).

24. See *id.* at 70-71 (reasoning that mechanisms in hard instruments incentivize state compliance).

25. See generally Thilo Marauhn, *Dispute Resolution, Compliance Control and Enforcement of International Arms Control Law*, in MAKING TREATIES WORK: HUMAN RIGHTS, ENVIRONMENT AND ARMS CONTROL 243, 243-45 (Geir Ulfstein ed., 2007) (discussing historical changes in compliance and enforcement approaches to arms control treaties).

26. 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, G.A. Res. 55/255, arts. 1, 2, U.N. GAOR, 55th Sess., 101st plen. mtg., U.N. Doc. A/RES/55/255 (May 31, 2001) [hereinafter U.N. Protocol] (requiring parties to control small arms

contrast, the U.N. Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects ("Programme of Action") is "soft law."²⁷ Thus, while the Programme of Action successfully establishes norms for states to abide by in their respective fights against SALW trafficking, states ultimately decide for themselves whether to abide by its terms.²⁸

1. Overview of CIFTA: Development, Requirements, and Successes

CIFTA was the first legally binding regional agreement to address the problem of SALW trafficking.²⁹ Proposals for the agreement evolved from the OAS' counter-narcotics efforts during the mid-1990s when officials saw a linkage between drug and weapons trafficking.³⁰ The OAS's Permanent Council and the Inter-American Drug Abuse Control Commission ("CICAD") organized three meetings of experts between 1993 and 1996 to discuss potential firearms regulations.³¹ The meetings led to the creation of the Model Regulations for the Control of the International Movement of Firearms, Their Parts and Components, and Ammunition ("CICAD Model Regulations").³² Following this development, a group of states known as the Rio Group, prepared a draft treaty and presented it to

as a means to combat transnational organized crime).

27. See U.N. Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, July 9-20, 2001, *Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects*, pmbL, ¶ 22, U.N. Doc. A/CONF.192/15 (July 20, 2001) available at <http://www.poa-iss.org/PoA/poahtml.aspx> [hereinafter *Programme of Action*] (marking states' concurrence on measures needed to adequately combat illicit SALW trafficking); see also JOJARTH, *supra* note 1, at 255 (underscoring the lack of "compliance mechanisms for monitoring and enforce[ment]" in the Programme of Action).

28. See Bobby L. Scott, Note, *The U.N. Conference on the Illicit Trade of Small Arms and Light Weapons: An Exercise in Futility*, 31 GA. J. INT'L & COMP. L. 681, 691-95 (2003) (discounting the Programme of Action for its "prima facie unenforceability").

29. DENISE GARCIA, SMALL ARMS AND SECURITY: NEW EMERGING INTERNATIONAL NORMS 53 (2006).

30. See ROGERS, *supra* note 1, at 102 (summarizing CIFTA's development within the OAS in addressing narcotics trafficking occurring in South America).

31. See *id.*

32. See *id.*; see also SCHROEDER, *supra* note 7, at 4 (remarking that the CICAD Model Regulations complement CIFTA and attempt to standardize procedures used in OAS member states to manage the import, export, and transit of SALW).

the Permanent Council of the OAS.³³ Member states were then permitted to comment on draft versions of CIFTA.³⁴ CIFTA was finalized and opened for signature on November 14, 1997.³⁵

CIFTA seeks to avert illicit firearms manufacturing and trafficking through controls on the SALW trade and encourages mutual assistance between state parties.³⁶ Under CIFTA, state parties are required, among other things, to: 1) criminalize illicit manufacturing and trafficking in SALW; 2) require the marking of firearms; 3) confiscate or forfeit illegal SALW and establish procedures to ensure their security; 4) establish and maintain licensing systems for the export, import, and transit of SALW; 5) maintain records of weapons transactions for a “reasonable” period of time; 6) cooperate and exchange information, experience and training, and technical assistance with other state parties; and 7) settle disputes through diplomatic channels.³⁷

CIFTA also called for the creation of a Consultative Committee to promote collaboration and information exchange, as well as recurring Conferences of State Parties to evaluate CIFTA’s implementation status.³⁸ Although the Consultative Committee’s

33. See Permanent Council of the Organization of American States [OAS], *Draft Convention Against the Illicit Manufacturing and Trafficking of Firearms, Ammunition, Explosives and Other Related Materials*, iii, OEA/Ser.G CP/doc.2875/97 (Mar. 20, 1997) [hereinafter *Draft Convention*] (offering a draft version of CIFTA to the Permanent Council for consideration). The Rio Group was comprised of Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Mexico, Panama, Paraguay, Peru, Uruguay, and Venezuela. ROGERS, *supra* note 1, at 102.

34. OAS, Working Group to Consider an Inter-American Convention Against the Illicit Manufacturing and Trafficking of Firearms, Ammunition, Explosives and Other Related Materials, *Interim Report of the Firearms Subgroup*, OEA/Ser.G/GT/CIFTA-2/97 (Mar. 31, 1997) [hereinafter *Interim Report*]. For the purposes of this Comment, each negotiation session for CIFTA or states’ public comments on the negotiations will be referred to as “CIFTA Working Group” followed by the appropriate OAS document number and date.

35. See CIFTA, *supra* note 10.

36. See CIFTA, *supra* note 10, art. II (CIFTA’s purpose is to “prevent, combat, and eradicate the illicit manufacturing of and trafficking in firearms” by “promot[ing] and facilitat[ing] cooperation and exchange of information and experience among States Parties”).

37. See *id.* arts. IV, VI, IX, XI, XIII-XVI, XXIX.

38. See *id.* arts. XX, XXI, XXVIII (necessitating a Consultative Committee to facilitate interactions between state parties, outlining the structure of committee meetings, and calling for a meeting of state parties within five years after entry into

decisions are not binding, they are influential.³⁹ The Committee works closely with CICAD to create model regulations for each of CIFTA's requirements.⁴⁰

In the years following its inception, CIFTA was lauded as a model legal framework for fighting SALW trafficking because it has a clear and narrow purpose and encourages small scale, cooperative law enforcement initiatives.⁴¹ CIFTA seeks only to curb the illicit trade in firearms and related goods and does not limit lawful trade or ownership of such items.⁴² Further, the required exchanges of information under CIFTA are cost effective, and the training programs are useful for states with weak governmental structures that may be unable to adequately prepare law enforcement officials to fight SALW trafficking.⁴³

States party to CIFTA have realized a number of the treaty's goals.⁴⁴ Notably, they have successfully convened two Conferences of States Parties, each of which has elicited a pronouncement recognizing CIFTA's positive effect on OAS states and re-affirming

force and at regular intervals thereafter).

39. *See id.* art. XX(2) (clarifying that Consultative Committee decisions "shall be recommendatory in nature").

40. *See, e.g.,* 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. 20-21, 2008, *Tlatelolco Commitment*, OEA/Ser.L/XXII.4 CIFTA/CEP-II/doc.7/08 rev.1 (Feb. 21, 2008) [hereinafter *Tlatelolco Commitment*] (agreeing to "strengthen the coordination and cooperation" between CIFTA's Consultative Committee and CICAD, and noting that, as of 2008, model regulations existed for Articles IV, VI, X).

41. *See Koh, supra* note 2, at 2354-55 (assessing CIFTA as "the best model" of a legal framework with concrete goals); *see also Zagaris, supra* note 6, at 453 (examining how agreements like CIFTA remove constraints on the ability of law enforcement officials to coordinate with their international counterparts).

42. *See CIFTA, supra* note 10, pmbl. ("[T]his Convention does not commit States Parties to enact legislation or regulations pertaining to firearms ownership, possession, or trade of a wholly domestic character . . .").

43. *See Zagaris, supra* note 6, at 453 (acknowledging that regional initiatives encouraged by agreements like CIFTA require fewer resources and allow developing states to glean expertise from states with superior law enforcement capabilities).

44. *See Summary of Country Compliance, supra* note 11 (identifying Argentina, Brazil, and Nicaragua as parties in substantial compliance with CIFTA and noting that the United States and Canada are also in substantial compliance although they have yet to ratify CIFTA).

states' commitment to CIFTA's implementation.⁴⁵ The Second Conference of States Parties also resulted in a report compiling data on states' compliance with CIFTA.⁴⁶ Although the report showed that many states are failing to comply with CIFTA's provisions, it singled out Argentina, Brazil, and Nicaragua as significantly complying with CIFTA.⁴⁷

With the help of CICAD, CIFTA's Consultative Committee has successfully prepared model legislation to assist states in implementing CIFTA's requirements as to weapons marking, export controls, confiscation and forfeiture, and domestic criminalization of illicit SALW manufacturing and trafficking.⁴⁸ The Committee also established a schedule to consider model legislation on record keeping, information exchange, and security measures.⁴⁹ Model legislation is critical for CIFTA's implementation because it provides states with a legal text that can be easily incorporated into their domestic legislation.⁵⁰

Finally, states also utilize CIFTA's framework to create or further the objectives of other international instruments.⁵¹ Shortly after

45. See 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), ¶¶ 6, 24, OEA/Ser.L/XXII.4 CIFTA/CEP-I/DEC.1/04 rev.3 (Mar. 9, 2004) [hereinafter *Declaration of Bogota*] (setting deadlines for states to establish a national point of contact and dates for future meetings, and encouraging states to implement CIFTA's provision into domestic law); *Tlatelolco Commitment*, *supra* note 40, pmbl., ¶¶ 2-3 (recognizing progress made since the First Conference of States Party, but also reminding states of inadequate implementation levels).

46. See generally *Summary of Country Compliance*, *supra* note 11.

47. *Id.* at 1 (noting further that Canada and the United States have not ratified CIFTA but both meet its mandates).

48. See *Tlatelolco Commitment*, *supra* note 40, ¶ 4 (commending the creation of model legislation on marking, export controls, and establishment of criminal offenses); see also OAS, Comm. on Hemispheric Security, *Draft Resolution*, ¶¶ 3, 5, OEA/Ser.G CP/CSH-1098/09 (May 6, 2009) (mentioning draft model legislation for confiscation and forfeiture).

49. See *id.* ¶ 3 (encouraging further model legislation for CIFTA's provisions).

50. See JOARTH, *supra* note 1, at 52 (explaining that model regulations "transform[] a convention's substantive provisions into a legal text that is compatible with most states' legal framework").

51. See CIFTA, *supra* note 10, art. XXVII (allowing state parties to "engag[e]

CIFTA opened for signature, five state parties developed a registry and archive of firearms purchases through the Southern Common Market (“MERCOSUR”) regional trade agreement.⁵² More recently, representatives from CIFTA’s Consultative Committee have participated in U.N. workshops on SALW issues and the U.N. has praised CIFTA’s regional initiatives for their positive impact on state compliance with the Programme of Action.⁵³

2. Tackling SALW at the Global Level: The U.N. Protocol and Programme of Action

There are two major SALW agreements that are global, rather than regional, in scope: the legally binding U.N. Protocol and the politically binding U.N. Programme of Action.⁵⁴ Like CIFTA, both instruments seek to reduce crime, governmental instability, and human suffering by eliminating illicit SALW trafficking.⁵⁵ Due to differences in their development and nature, however, each seeks to combat SALW through different means and practices.⁵⁶

in cooperation within the framework of other . . . international, bilateral, or multilateral agreements, or . . . arrangements or practices”).

52. See SCHROEDER, *supra* note 7, at 26 (elaborating on the firearms registry—created by MERCOSUR parties Argentina, Brazil, Paraguay, and Uruguay in 1998—that contains a database of “valid buyers and sellers of firearms, and officially recognized points of entry and exit for firearms transfers”).

53. See 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), Consultative Committee Tenth Regular Meeting, Apr. 24, 2009, *Report of the Secretariat Pro Tempore of the CIFTA Consultative Committee on Activities Carried Out During the Period 2008-2009*, 2-3, OEA/Ser.L/XXII.2.10 CIFTA/CC-X/doc.9/09 (Apr. 23, 2009) (outlining coordination between delegates of the United Nations and OAS during 2008-2009); see also GARCIA, *supra* note 29, at 59 (noting that the U.N. has recognized Latin American states for their leadership in implementing CIFTA and the Programme of Action).

54. See GARCIA, *supra* note 29, at 57-58 (chronicling the creation of the two global agreements).

55. See U.N. Protocol, *supra* note 26, pmbl. (highlighting the harmful effects of SALW trafficking on security and social and economic development); *Programme of Action*, *supra* note 27, pmbl. ¶¶ 2-3 (expressing concern that unlawful SALW trading increases poverty, underdevelopment, and violence).

56. See generally ROGERS, *supra* note 1, at 102-25 (contrasting binding and non-binding SALW agreements and explaining that the Programme of Action can be more demanding and inclusive than the U.N. Protocol because states are not obligated to comply).

The U.N. Protocol was developed within the framework of the United Nations Convention Against Transnational Organized Crime (“UNCATOC”) and has seventy-nine ratifying parties.⁵⁷ Because it was closely connected to its parent treaty, the U.N. Protocol opened for signature in May 2001, but could not enter into force until after the UNCATOC did in September 2003.⁵⁸ Additionally, though the U.N. Protocol was heavily influenced by CIFTA, adopting key provisions verbatim, its primary purpose is to reduce organized crime, not SALW trafficking.⁵⁹ Application of the U.N. Protocol is specifically limited to situations “where . . . offenses are transnational in nature and involve an organized criminal group.”⁶⁰

In comparison, the Programme of Action is the largest and most comprehensive SALW instrument.⁶¹ The U.N. conducted over a decade’s worth of research to develop the Programme of Action and 150 states adopted the instrument during a U.N. Conference in 2001.⁶² As non-binding “soft law,” the Programme of Action contains ambitious provisions through which states promise to work at the national, regional, and international levels to curb illicit SALW trading.⁶³ The Programme of Action has been criticized for its lack of enforcement mechanisms and the high financial cost of

57. See United Nations Convention Against Transnational Organized Crime, art. 1, opened for signature Nov. 15, 2000, T.I.A.S. No. 13, 127, 2225 U.N.T.S. 209 (articulating global commitment to “combat” organized criminal activity); see also Multilateral Treaties Deposited with the Secretary-General, vol. II, ch. XVIII, § 12, <http://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XVIII/XVIII-12.en.pdf> (tracking ratification status of the United Nations Convention Against Transnational Organized Crime) (last visited Mar. 4, 2010).

58. ROGERS, *supra* note 1, at 103.

59. *Id.* at 104; see GARCIA, *supra* note 29, at 53 (commenting that CIFTA inspired negotiations for the U.N. Protocol).

60. U.N. Protocol, *supra* note 26, art. 4.

61. See U.N. General Assembly, Third Biennial Meeting of States to Consider 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, New York, July 14-18, 2008, *List of Participants*, A/CONF.192/BMS/2008/INF/1/Add.1 (Aug. 12, 2008) (listing the many states in attendance).

62. See Scott, *supra* note 28, at 683-90 (describing the history of the U.N. Programme of Action); ROGERS, *supra* note 1, at 117 (“Over 150 governments reached consensus on the [Programme of Action].”).

63. See ROGERS, *supra* note 1, at 117 (observing that the “broad-ranging” coverage of the Programme of Action includes everything from “conflict prevention” to “child soldiering”).

implementation.⁶⁴ Still, it remains the leading international regulation on SALW.⁶⁵

B. EXAMPLES OF CIFTA VIOLATIONS: PAST AND (POSSIBLY) PRESENT

1. *Confirmed Violation: Diversion of Nicaraguan AK-47s*

In 2003, the OAS General Secretariat announced that Nicaragua had violated certain CIFTA provisions.⁶⁶ The Nicaraguan National Police (“NNP”) had arranged a legitimate deal with Grupo de Representaciones Internacionales (“GIR S.A.”), a Guatemalan private arms dealership, to exchange AK-47s for pistols and mini-Uzis.⁶⁷ GIR S.A. secured a buyer, Shimon Yelinek, for the arms.⁶⁸ Unbeknownst to the NNP and GIR S.A., Yelinek was an illicit arms merchant posing as a Panamanian National Police official and presenting a forged purchase order.⁶⁹ The NNP, GIR S.A., and Nicaraguan customs all failed to verify Yelinek’s purchase order.⁷⁰ The AK-47s were loaded onto a ship declared for Panama, but routed to Colombia and sold to the insurgent organization United Self Defense Forces of Colombia (“AUC”).⁷¹ According to OAS investigators, full implementation of CIFTA in Nicaragua and Panama “would have made the diversion far more difficult, if not prevented it outright.”⁷²

64. See Scott, *supra* note 28, at 690-91 (identifying “fundamental flaws” such as the Programme of Action’s unenforceability).

65. See, e.g., JOJARTH, *supra* note 1, at 230 (“The [Programme of Action] is the central global agreement on preventing and reducing the trafficking and proliferation of SALW.”).

66. See Press Release, OAS, OAS Presents Report on Investigation of Diversion of Nicaraguan Arms to the United Self-Defense Forces of Colombia, Reference E-011/03 (Jan. 20, 2003) available at http://www.oas.org/OASpage/press_releases/press_release.asp?sCodigo=E-011/03 (concluding that CIFTA non-compliance contributed to the diversion of AK-47s).

67. OAS, *Report of the General Secretariat of the Organization of American States on the Diversion of Nicaraguan Arms to the United Defense Forces of Colombia*, § 1(I), OEA/Ser.G CP/doc. 3687/03 (Jan. 6, 2003) [hereinafter *Nicaraguan Diversion Report*].

68. *Id.* (noting that the Nicaraguan Army introduced the GIR S.A. to the NNP).

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* § 3(VI).

2. Probable Violation: Diversion of Venezuelan Anti-tank Rocket Launchers

In late July 2009, the Colombian military seized from the terrorist group Revolutionary Armed Forces of Colombia (“FARC”) Swedish-made anti-tank rocket launchers legally sold to Venezuela in the late 1980s.⁷³ The weapons were confiscated during a raid of a FARC camp in October 2008.⁷⁴ Also discovered in the raid were email messages by FARC commanders verifying plans to purchase surface to air missiles and sniper rifles from Venezuelan military officials.⁷⁵ FARC leaders denied obtaining the anti-tank machinery from Venezuela and Venezuelan President Hugo Chavez claimed the weapons were stolen from a naval base in 1995.⁷⁶ Regardless of how and when FARC obtained these arms, this scenario suggests that Venezuela breached its obligations under CIFTA by failing to ensure the security of its SALW.⁷⁷

73. *Bazookas and Bases*, ECONOMIST, Aug. 8, 2009, at 32.

74. See, e.g., Posting of Matt Schroeder to FAS Strategic Security Blog, <http://www.fas.org/blog/s sp/2009/08/securing-venezuela's-arsenals.php> (Aug. 24, 2009) (urging the international community to increase monitoring and fill gaps in Venezuela's arms control).

75. Simon Romero, *Evidence Shows Venezuelan Aid to Rebel Group*, N.Y. TIMES, Aug. 3, 2009, at A1. The U.S. Treasury Department has also accused the military officials implicated in these emails of arming, abetting, and funding FARC drug trafficking operations. See Press Release, U.S. Dep't of Treasury, Treasury Targets Venezuelan Government Officials Supporting the FARC (Sep. 12, 2008) (targeting Henry de Jesus Rangel Silva, former director of Venezuela's police intelligence agency, and Ramon Emilio Chacin, former Venezuelan Interior Minister for Investigation).

76. See *Bazookas and Bases*, *supra* note 73, at 32 (claiming that Chavez provided no proof to substantiate his claims that the weapons had been stolen); *FARC Chief Denies Getting Launchers from Venezuela*, ABC NEWS, Aug. 13, 2009, <http://abcnews.go.com/International/wireStory?id=8319433> (reporting that FARC commander Alfonso Cano repudiated allegations that he received weapons from Venezuela).

77. See Posting of Matt Schroeder to FAS Strategic Security Blog, *supra* note 74 (asserting that the Venezuelan government is responsible for any weapons illegally diverted from its arsenals and reasoning that the international community should focus attention on increasing security on Venezuelan SALW and scrutinize the country's SALW exports).

II. ANALYSIS

International organizations like the OAS play a vital role in implementing controls on SALW because they facilitate cooperation between their member states and enable the negotiation of international agreements. Where international organizations are weak, however, is in their ability to guarantee state compliance with SALW regulations.⁷⁸ By entering into a treaty, the member states of an international organization signal their willingness to uphold the standards promulgated by the treaty. States' compliance with the terms of the treaty, however, is ultimately left to each individual state party.⁷⁹ While states may face some negative consequences for non-compliance, they are sovereign entities that have the ability to act in their own self interests.⁸⁰ The failure of CIFTA's parties to abide by its terms highlights OAS' lack of police power and suggests that some negative repercussions are needed to induce state compliance.

A. REVIEWING THE REASONS BEHIND CIFTA'S INEFFECTIVENESS

More than ten years have passed since CIFTA was opened for signature and model regulations exist for five of its major provisions to help states integrate CIFTA's requirements into their domestic law.⁸¹ Nonetheless, many of CIFTA's ratifying states have failed to fully implement its provisions.⁸² A number of factors contribute to states' continued non-compliance, including a dearth of financial resources within the OAS, state parties' lack of capacity to

78. See, e.g., *Nicaraguan Diversion Report*, *supra* note 67, § 3(VII) (stating that the OAS has no police powers, and lamenting the inability of the OAS to prosecute the criminals responsible for the diversion of Nicaraguan arms).

79. See generally Williamson, *supra* note 23, at 60 (asserting that the conclusion of a treaty does not guarantee compliance and specifically evaluating factors that induce states' compliance with arms control treaties).

80. See ROGERS, *supra* note 1, at 109-10 (stating that "governments do not surrender the power to act in ways contravening their [treaty] obligations" and observing that political and economic factors lead states to make calculated decisions regarding compliance).

81. See, e.g., *Tlatelolco Commitment*, *supra* note 40.

82. See *Summary of Country Compliance*, *supra* note 11, at 1 (reporting that the majority of CIFTA's state parties are only partially complying with the treaty's terms and that the national legislation of those states is "generally inadequate in one or more areas—most notably with regard to marking, export and in-transit licenses, and/or recordkeeping requirements").

adequately train law enforcement officers, and a paucity of political will to propel implementation.⁸³

The pervasiveness of corruption within Latin America also hinders compliance.⁸⁴ Corruption is deeply rooted within the region's political structure, but CIFTA does not address the impact of corruption on SALW trafficking.⁸⁵ There are also inadequacies in CIFTA's textual provisions and shortcomings in the OAS' execution of the treaty that contribute to non-compliance.⁸⁶ While some of these factors are beyond CIFTA's scope, textual inadequacies in CIFTA's express terms and ineffective implementation methods can be cured within CIFTA's framework through minor modifications and state cooperation.⁸⁷

1. CIFTA's Failure to Provide Effective Mechanisms to Monitor and Enforce Compliance Hinders its Efficacy

a. Effective Treaties Require Effective Mechanisms

A major flaw in every international instrument regulating trafficking in SALW is the lack of formal mechanisms to monitor and enforce compliance.⁸⁸ Compliance mechanisms generally

83. See SCHROEDER, *supra* note 7, at 27 (identifying a need for more training among CIFTA's state parties); Williamson, *supra* note 23, at 72-74 (implying that parties are less likely to abide by the terms of a treaty when there is little to no political risk for non-compliance); Zagaris, *supra* note 6, at 470 (observing that the OAS is still recovering from near bankruptcy in the 1980s and that the law enforcement efforts are economically constrained).

84. See Luz Estella Nagle, *The Challenges of Fighting Global Organized Crime in Latin America*, 26 FORDHAM INT'L L.J. 1649, 1679-80 (2003) (advancing that corrupt public and private officials in Latin America encourage organized crime).

85. See *id.* at 1651, 59 ("Corruption, violence, and political, social, and economic instability have plagued Latin American nations for generations.").

86. See *infra* Part II(A)(1), (2) (critiquing CIFTA for its lack of an effective compliance mechanism, for its inadequate definition of illicit trafficking, and for its provisions on confiscated SALW and licensing).

87. Cf. JOJARTH, *supra* note 1, at 226-30 (noting that specific SALW regimes, such as the Economic Community of West African States Convention, have been modified to contain monitoring schemes and recognizing the extremely specific terms of the Nairobi Protocol).

88. See ROGERS, *supra* note 1, at 110 (observing that CIFTA, the U.N. Protocol, the Programme of Action, and regional SALW agreements in Africa, Europe, and Asia each lack compliance mechanisms).

provide a program whereby an international or non-governmental organization oversees and verifies state implementation of a treaty.⁸⁹ Though often costly to establish and maintain, compliance mechanisms give treaties credibility because they create trust among states parties and make it difficult for states to evade their obligations.⁹⁰ Similarly, compliance mechanisms may also provide a remedy if a state breaches a treaty's provisions.⁹¹

By submitting to the compliance mechanisms in a treaty, states relinquish some of their sovereignty because they are delegating power over their own responsibilities.⁹² To be effective, treaties must therefore provide incentives for states to conform to compliance mechanisms.⁹³ Incentives may be negative, such as the imposition of sanctions or embargoes for non-compliance, or positive, like clauses calling for cooperation or mutual assistance.

Negative incentives seem appealing because they are forceful, but they can have repressive results.⁹⁴ For instance, imposing sanctions or a trade embargo on a country for failing to comply with the terms of a SALW trafficking treaty can lead to a drop in foreign direct investment in that country and, therefore, fewer available resources for individual citizens.⁹⁵ There are also less harsh, yet effective

89. See generally MARAUHN, *supra* note 25, at 257-66 (evaluating various means of compliance control in arms agreements, including verification and inspection programs).

90. See JOJARTH, *supra* note 1, at 25 (conceding that the absence of compliance mechanisms undermines the credibility of states' commitments to their treaty obligations); ROGERS, *supra* note 1, at 110 (explaining that compliance mechanisms provide transparency and help assure treaty parties that other parties are abiding by the treaty's articles and provisions).

91. See MARAUHN, *supra* note 25, at 255-56, 66-70 (evaluating dispute resolution clauses in arms control agreements, which parties utilize when potential treaty breaches arise, as well as strategies used to end or rectify such violations).

92. See, e.g., JOJARTH, *supra* note 1, at 47-48 (stressing that sovereign states will incur the risk of delegating their powers to the party responsible for overseeing a compliance mechanism if it enhances the credibility of their treaty commitments).

93. See MARAUHN, *supra* note 25, at 250 ("Compliance with . . . arms control agreements largely depends on the incentives States parties perceive with regard to such agreements.").

94. See *id.* at 251 (grappling with the often unjustly harsh effect of negative incentives).

95. See JOJARTH, *supra* note 1, at 40 (articulating that sanctions can deter investment as well as jeopardize a state's ability to receive debt relief and aid).

negative incentives, such as prominent publication of non-complying states.⁹⁶ In contrast, positive incentives induce state compliance by making the benefits of abiding by a treaty outweigh the costs of derogating from their obligations.⁹⁷ Positive incentives should be more comprehensive than the benefits inherent in arms control agreements, such as enhanced national security.⁹⁸ They must convince states that it is in their best interest to expend even scarce resources to comply with the treaty.⁹⁹

Regardless of which incentives a treaty utilizes, the treaty should ensure that states' reputations are at risk if they do not meet their obligations, including obeying compliance mechanisms.¹⁰⁰ States are most likely to comply when non-compliance will detrimentally impact their reputation.¹⁰¹ For example, a state will probably reconsider non-compliance with a treaty's requirements if failure to conform will make other states less willing to deal with that state or if it will harm the state domestically by angering its electorate.¹⁰²

96. Cf. *id.* at 39 (discussing the "naming and shaming" strategy used in the Kimberly Process where the names of states that fail to submit reports on their efforts to eliminate trade in conflict diamonds are published on the Process's website).

97. See generally Williamson, *supra* note 23, at 71-74 (insisting that states utilize cost-benefit analyses to determine whether they will comply with their treaty obligations and listing scenarios which induce states into compliance).

98. See MARAUHN, *supra* note 25, at 251 (contending that because states enter into SALW agreements to improve their security, more than the mere guarantee of security is needed to induce them into compliance).

99. See JOJARTH, *supra* note 1, at 25-26 (reasoning that states are unlikely to abide by a treaty or a compliance mechanism if they do not receive clear-cut political and reputational benefits).

100. See *id.* at 25-30 (recognizing that a treaty's credibility is enhanced when state parties are willing to incur reputational costs upon revocation or contravention of their commitments).

101. See Williamson, *supra* note 23, at 71 (rationalizing that the higher the "political risk of being labeled a lawbreaker," the more likely states are to comply with their treaty obligations).

102. E.g., JOJARTH, *supra* note 1, at 26 (listing negative repercussions, both international and domestic, that result from states' failure to comply with their formal obligations).

b. The Impact of CIFTA's Lack of Compliance Mechanisms

CIFTA does not provide compliance mechanisms.¹⁰³ In fact, the closest CIFTA comes to providing compliance mechanisms is the requiring of a Consultative Committee and Conferences of States Parties.¹⁰⁴ The Consultative Committee gathers information, facilitates exchanges between parties, and suggests ways in which states can improve their compliance.¹⁰⁵ Decisions and proposals by the Consultative Committee are only recommendations and the Committee, therefore, cannot compel or enforce state compliance.¹⁰⁶ Additionally, compliance reports are presented at each Conference of States Parties.¹⁰⁷ These compliance reports make public any deficiencies in states' implementation of their treaty obligations. Unfortunately, the reports are unreliable because the information is self-reported and, thus, not transparent or verified by a body other than the reporting state.¹⁰⁸

Though CIFTA lacks formal compliance mechanisms, it has positive incentives embedded within its requirements.¹⁰⁹ CIFTA mandates that parties confidentially exchange information, law enforcement experience, and training techniques.¹¹⁰ Ostensibly, such exchanges allow CIFTA states to benefit from their fellow states parties' knowledge and capabilities, but the extent of the benefits that state parties receive from these provisions is unclear. CIFTA's

103. See ROGERS, *supra* note 1, at 110 (denouncing CIFTA's failure to require government oversight of states' compliance). *But see* Koh, *supra* note 2, at 2355 (commending CIFTA's framework for creating domestic obligations to be executed by state parties).

104. CIFTA, *supra* note 10, arts. XX, XXVIII.

105. *Id.* art. XX(1).

106. See *id.* art. XX(2).

107. See *Declaration of Bogota*, *supra* note 45, ¶ 23 (calling for the presentation of reports on compliance at each Conference of States Parties).

108. See *Summary of Country Compliance*, *supra* note 11, at 1 (acknowledging the potential deficiency of information used in the Summary of Country Compliance); JOJARTH, *supra* note 1, at 37-38 (criticizing self-reporting in compliance monitoring because states can couch their non-compliance in rhetoric and there is no "cross-check" to ensure validity).

109. See Koh, *supra* note 2, at 2355 (listing key provisions of CIFTA that drive states' implementation of its requirements, such as requiring a system of import/export licensing of firearms).

110. See CIFTA, *supra* note 10, art. XII (guaranteeing the confidentiality of exchanged information).

requirements are vague, calling for exchanges only when they are “appropriate.”¹¹¹ The provisions also fail to identify how to conduct and finance such exchanges, as well as what repercussions will result from non-cooperation.¹¹² Inopportunately, the U.N. Protocol is just as ambiguous as CIFTA in this area.¹¹³ The U.N. Programme of Action, on the other hand, encourages states to establish regional level mechanisms for sharing information related to SALW trafficking.¹¹⁴

Unlike other arms control agreements that utilize outside entities to help monitor compliance, CIFTA deals only with interactions among state parties.¹¹⁵ Though CIFTA acknowledges existing international law enforcement mechanisms, it does not require states to utilize them.¹¹⁶ In contrast, the U.N. Programme of Action encourages states and regional organizations to cooperate with non-governmental organizations.¹¹⁷ The U.N. Protocol also requires states to cooperate with commercial entities involved in the SALW trade.¹¹⁸ This is significant because it engages parties that have a strong financial stake in SALW and an interest in minimizing illicit trafficking to help further the agreements’ objectives.¹¹⁹

111. *E.g., id.* art. XV(2) (“States Parties shall cooperate . . . , as appropriate, to ensure . . . adequate training of personnel in their territories”); *see also* JOJARTH, *supra* note 1, at 257-59 (reproving the inclusion of clauses like “as appropriate,” “where applicable,” and “where needed” within treaties because they are indeterminate).

112. *See* JOJARTH, *supra* note 1, at 41 (noting that imprecision of treaty provisions makes it hard for states to distinguish acceptable from unacceptable behavior).

113. *See generally* U.N. Protocol, *supra* note 26 (providing minimal guidance on conducting exchanges of information and technology).

114. *See Programme of Action, supra* note 27, art. II(27) (calling upon states to establish “regional mechanisms,” including “networks for information-sharing among law enforcement”).

115. *See generally* CIFTA, *supra* note 10.

116. *See, e.g., id.* pmbl. (“Recognizing the importance of . . . mechanisms such as the International Weapons and Explosives Tracking System of [INTERPOL]”).

117. *See Programme of Action, supra* note 27, art. II(40) (encouraging international organizations and states to facilitate cooperation with non-governmental organizations).

118. *See* U.N. Protocol, *supra* note 26, art. 13(3) (mandating that states seek the support of manufacturers, dealers, brokers and commercial carriers of SALW to combat illicit trafficking).

119. *See* JOJARTH, *supra* note 1, at 248-49 (linking the willingness of governments to work with the SALW industry to increased industry transparency

CIFTA additionally contains a weak dispute resolution provision for disagreements regarding its application or interpretation.¹²⁰ While the U.N. Protocol specifies the steps states must take when they cannot agree, CIFTA merely calls for diplomatic settlement of disputes and does not give any direction as to what remedies are available.¹²¹ The dispute resolution provisions in both treaties remain ineffective, however, because neither compels states to resort to a particular authority for settling disagreements.¹²²

CIFTA cannot attain its full potential without the addition of a mechanism that can monitor and verify compliance, and specific, official ramifications for non-compliance.¹²³ Fortunately, this goal is within reach. Certain states voiced concerns during the negotiation phase about CIFTA's lack of compliance mechanisms, suggesting their willingness to support the addition of such a mechanism into the treaty.¹²⁴ Further, as a "hard law" instrument, CIFTA is already

and a higher likelihood of industrial players helping to fight unlawful SALW trading).

120. See CIFTA, *supra* note 10, art. XXIX (advising states to seek diplomatic settlement of any disagreement on CIFTA's application or interpretation).

121. Compare U.N. Protocol, *supra* note 26, art. 16 (requiring states to seek dispute settlement in phases: 1) through negotiation, then 2) via arbitration, and 3) if the parties still cannot agree six months later, by referral to the International Court of Justice) with CIFTA, *supra* note 10, art. XXIX ("Any dispute . . . shall be resolved through diplomatic channels or . . . any other means of peaceful settlement.").

122. See ROGERS, *supra* note 1, at 110 (implying that CIFTA and the U.N. Protocol would more effectively compel states' compliance if they required states to seek recourse from judicial authorities and imposed penalties for non-compliance).

123. See Zagaris, *supra* note 6, at 491 (concluding that everyday law enforcement practices within the OAS rely on support from binding treaties with "implementation and enforcement mechanisms that require accountability, transparency, and provide the means to impose sanctions on non-complying states").

124. See, e.g., Permanent Council of the Organization of American States, CIFTA Working Group, *Observations of the Member States on the Draft Convention Against the Illicit Manufacturing and Trafficking of Firearms, Ammunition, Explosives, and Other Related Materials: El Salvador*, OEA/Ser.G GT/CIFTA-3/97 (May 8, 1997) (noting that El Salvador took issue with CIFTA's lack of mechanisms to facilitate cooperation and implementation); Permanent Council of the OAS, CIFTA Working Group, *Observations by Member States on the Draft Convention Against the Illicit Manufacturing and Trafficking of Firearms, Ammunition, Explosives, Other Related Materials: Belize*, art. II, OEA/Ser.G GT/CIFTA-3/97 (July 15, 1997) (expressing Belize's discomfort with

better positioned to enjoy efficacy because its ratifying parties declared their willingness to legally bind themselves to its terms.¹²⁵

2. Minor Textual Inadequacies with Major Consequences

The clarity of international instruments has a strong bearing on state compliance. Textual precision in treaties helps states overcome sovereignty barriers and narrows the scope of possible interpretations.¹²⁶ Specificity in treaty terms also clarifies states' obligations and allows other parties to readily identify when a state is not complying.¹²⁷ Thus, the more precise the terms of a treaty, the more likely states are to comply with them because non-compliance risks damage to states' political reputations.¹²⁸ It is also essential that the terms of arms control treaties plainly outline states' obligations because such treaties impact both state and human security.¹²⁹

The form and structure of SALW trafficking instruments dictate the specificity of their terms. "Hard law" instruments are sometimes purposefully vague to avoid costly negotiations and to induce compliance, while "soft law" instruments can be more precise without deterring states from signing on to them because they are not binding.¹³⁰ Comparably, SALW agreements at the global level are necessarily broad because they represent agreements between dozens of states, whereas regional agreements like CIFTA can address arms

CIFTA's lack of control mechanisms and recommending the implementation of devices to ensure the regime's efficacy).

125. See generally Williamson, *supra* note 23, at 71-74 (identifying contexts in which "hard law" instruments are likely to have a compliance advantage over "soft law" in SALW agreements).

126. See Zagaris, *supra* note 6, at 465 (conceding that multilateral agreements force states to give up some sovereignty, but stating that states cooperate more fluidly when "goals are distinct, technical, and clearly defined").

127. See, e.g., JOJARTH, *supra* note 1, at 41-42 (implying that clear-cut treaty terms enhance an agreement's credibility because states' obligations are obvious and their derogation from those obligations is readily apparent).

128. See *id.* (emphasizing that the "reputational stakes of non-compliance" are increased when a state's failure to comply can be easily discerned).

129. See Dekker, *supra* note 20, at 317-18 (stressing that clear language in arms control treaties allows states to predict and act upon their legal rights and duties under the treaty).

130. See generally JOJARTH, *supra* note 1, at 41-46 (addressing various theories on the precision of treaty terms).

trafficking in detail because each party understands the detrimental impact illicit SALW have on the region.¹³¹

a. CIFTA's Failure to Require Destruction of Confiscated Weapons and Proper Management of Surplus Stockpiles Leaves Many SALW Susceptible to Diversion

Though early drafts of CIFTA provided for the destruction of confiscated and forfeited SALW,¹³² CIFTA is the only major SALW treaty that does not require the destruction of weapons seized.¹³³ CIFTA's finalized provisions instead focus on ensuring that seized and surrendered weapons are not re-introduced into the market.¹³⁴ Similarly, CIFTA does not address surplus stockpile management.¹³⁵ The potential consequences of excluding these seemingly basic requirements from CIFTA's text are grave.¹³⁶ The military stockpiles of SALW in most CIFTA state parties are already too large and poorly secured.¹³⁷ Military stockpiles in South American states, for

131. See GARCIA, *supra* note 29, at 58 (contending that small arms frameworks at the global level represent the "low[est] common denominator" due to regional differences); ROGERS, *supra* note 1, at 104-20 (scrutinizing the efficacy of both global and regional international SALW trafficking instruments); Zagaris, *supra* note 6, at 466 (stating that regional instruments are effective because the international organizations that promulgate them help states address region-specific problems).

132. See, e.g., CIFTA Working Group, OEA/Ser.G GT/CIFTA-7/97 Art. III(11) (July 23, 1997) (obliging state parties to destroy or transfer to law enforcement for official use all illicitly produced or trafficked weapons).

133. See, e.g., U.N. Protocol, *supra* note 26, art. 6(2) (directing state parties to seize and destroy confiscated and forfeited SALW as a means to prevent further illicit trafficking); *Programme of Action*, *supra* note 27, art. II(16)-(19) (encouraging states to establish measures for SALW destruction and effective supervision of military inventories).

134. See CIFTA, *supra* note 10, art. VII (requiring state parties "to ensure that all [SALW] seized, confiscated, or forfeited . . . do not fall into the hands of private individuals or businesses through auction, sale, or other disposal").

135. See ROGERS, *supra* note 1, at 108 (criticizing CIFTA for its inadequate consideration of SALW inventory safety as compared with the SADC Firearms Protocol and Nairobi Protocol, which oblige destruction of weapons surpluses).

136. See, e.g., CRAGIN & HOFFMAN, *supra* note 3, at 28-32 (declaring that most SALW trafficked into Colombia from Ecuador and Peru originate from stolen military stocks and that many are registered to the Venezuelan military).

137. See Aaron Karp, *Surplus Arms in South America: A Survey* 15 (Small Arms Survey, Working Paper No. 7, 2009) available at http://www.smallarmssurvey.org/files/sas/publications/w_papers_pdf/WP/WP7-Surplus-Arms-in-South-America.pdf (evaluating South America's substandard record of eliminating

example, collectively have 1.3 million more modern SALW than their militaries legitimately need.¹³⁸ These stockpiles are notorious sources of illicitly trafficked weapons, either through theft or diversion by unscrupulous government employees.¹³⁹ Adding confiscated weapons to states' SALW inventories only increases the risk that they will be diverted, trafficked, and used for illegal purposes.¹⁴⁰

As its inclusion in both U.N. instruments demonstrates, the appropriate disposal of excess SALW is a globally accepted, and politically popular state practice.¹⁴¹ Destruction of excess SALW not only reduces the chances that the weapons will be resold, but also diminishes the likelihood that they will be stolen and used for nefarious or violent purposes.¹⁴² Regrettably, only seven of CIFTA's states parties currently have programs in place to destroy seized and surrendered SALW.¹⁴³

States generally resist the idea of mandatory surplus destruction and view such a requirement as falling wholly within their domestic responsibilities.¹⁴⁴ There is widespread recognition, though, that poor

surplus SALW and noting the vulnerability of the region's military stockpiles).

138. *See id.* (explaining that there are about 3.6 million modern SALW in South America even though the region's militaries require only 2.3 million).

139. *See* JOJARTH, *supra* note 1, at 224 (discussing the risk of SALW losses through various sources).

140. *See generally* Karp, *supra* note 137, at 16 (examining the vulnerability of excessive supplies of SALW and the threat of unlawful and unintended SALW losses in South American states).

141. *See generally* GARCIA, *supra* note 29, at 65-90 (reviewing the provisions and policy implications of international instruments calling for destruction and disposal of surplus SALW).

142. *See id.* at 67-68 (remarking that weapons destruction programs prevent SALW from "falling into the hands of criminals" who contribute to increases in crime).

143. *See id.* at 59 (indicating that SALW destruction has become a norm in Argentina, Brazil, Costa Rica, Guatemala, Nicaragua, Paraguay, and Peru).

144. *See* U.N. General Assembly, Third Biennial Meeting of States to Consider 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, New York, July 14-18, 2008, *Report of the Third Biennial Meeting of States to Consider 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*, § IV(III)(17), A/CONF.192/BMS/2008/3 (Aug. 20, 2008), [hereinafter *Third Biennial Meeting Report*] ("States stressed that decision-making on stockpile management . . . was a national prerogative.").

stockpile management is a major security threat and that surpluses only exacerbate that threat.¹⁴⁵ Stockpiles in many CIFTA states parties are susceptible to diversions through mismanagement, sale by corrupt government officials, or via raids by criminals or rebel groups.¹⁴⁶ This susceptibility becomes even more apparent when viewed in the context of Venezuela's potential breach of CIFTA. Here, proper stockpile management would have prevented the loss of the anti-tank weapons and Colombia could (and should) destroy them to guarantee they are never used for harm.¹⁴⁷

The global consensus on the importance of destroying confiscated and forfeited weapons, combined with the weak stockpile management provisions in CIFTA, demonstrates the need to amend CIFTA to require destruction of surplus SALW and effective arsenal management. Similarly, the prior desire of CIFTA's states parties to include destruction requirements in the treaty and the commencement of some destruction programs within the region shows that such requirements would likely be accepted. Thus, including destruction and stockpile management requirements into CIFTA's Articles VII and VIII, respectively, could exert pressure on state parties sufficient to induce them into compliance since failure to fulfill such obligations would be politically detrimental.¹⁴⁸

145. See *id.* § IV(III)(17)-(22) (recounting state parties' views on inadequately monitored stockpiles and continued accumulation of weapons as security threats).

146. See, e.g., CRAGIN & HOFFMAN, *supra* note 3, at 29-30 (noting that Colombian rebel groups are known to raid other states' weapons reserves); SCHROEDER, *supra* note 7, at 22 (elaborating on trafficking methods that weapons smugglers in Ecuador and Venezuela use).

147. See, e.g., Posting of Matt Schroeder to FAS Strategic Security Blog, *supra* note 74 (deriding the Venezuelan government for failing to safeguard its military arsenals and calling on states to closely monitor their SALW).

148. See Dekker, *supra* note 20, at 325 (averring that the possibility of damage to states' political reputation can cause them to alter their behavior); GARCIA, *supra* note 29, at 68 ("Key practitioners in the small-arms debate have pointed to stockpile management and destruction of excess arms as the simplest and most reliable way to prevent proliferation of illicit arms."). But see Scott, *supra* note 28, at 698-701 (attacking the virtue of arms trafficking regimes and arguing that reducing the supply of SALW merely makes illicit trafficking more lucrative for smugglers).

b. CIFTA Fails to Clearly Identify What Information Licenses for SALW Transfers Must Contain and to Mandate End-User Requirements

Licenses for and other regulations on SALW transfers, including imports, exports, and in-transit shipments, are necessary to control the legal weapons trade and to combat unlawful SALW trafficking.¹⁴⁹ Because licenses and authorizations are essential to SALW trade, it is imperative that their regulating instruments clearly identify what information licenses should contain and which kind of licenses states ought to demand.¹⁵⁰

Precision and transparency in the SALW licensing process is especially important for CIFTA's member states.¹⁵¹ Fraudulent transfer licenses and certifications largely contribute to illegal SALW diversions within the region.¹⁵² Moreover, CIFTA members are predominantly importing states and tend to utilize import controls more than export controls because SALW pose a higher risk of harm to importing states.¹⁵³ Export controls with end-use requirements,

149. See generally OWEN GREENE & ELIZABETH KIRHAM, SMALL ARMS AND LIGHT WEAPONS TRANSFER CONTROLS TO PREVENT DIVERSION: DEVELOPING AND IMPLEMENTING KEY PROGRAMME OF ACTION COMMITMENTS (2007) (outlining the purpose and mechanics of trade regulations on SALW and specifically analyzing regulations under the Programme of Action). See also YANN AUBIN & ARNAUD IDIART, EXPORT CONTROL LAW AND REGULATIONS HANDBOOK: A PRACTICAL GUIDE TO MILITARY AND DUAL-USE GOODS TRADE RESTRICTIONS AND COMPLIANCE (2007) (discussing laws regulating the lawful weapons trade).

150. See, e.g., Posting of Matt Schroeder to FAS Strategic Security Blog, *supra* note 74 (expounding upon the relationship between rigorous trade authorizations and the fight against illicit trafficking with particular emphasis on Venezuela).

151. See, e.g., *Clinton Urges Transparency in Venezuelan Arms Purchases*, VOANEWS, Sept. 15, 2009, <http://www.voanews.com/english/news/a-13-2009-09-15-voa60-68709812.html> (voicing concern about the connection between the lack of transparency in Venezuela's arms acquisitions and diversions of SALW to illegal groups).

152. See, e.g., *Nicaraguan Diversion Report*, *supra* note 67, §§ 1(I), 3(IV) (calling attention to the use of fraudulent trade documentation by SALW traffickers and advising CIFTA's state parties to abide by its licensing provisions and consider applying the CICAD Firearms Regulations).

153. See JOJARTH, *supra* note 1, at 242-43 (deducing that states relying predominantly on imported SALW benefit from controls on SALW transfers); ROGERS, *supra* note 1, at 151 (reporting states' general preference for small arms import controls over export controls). This is particularly true when importing states are also suffering from on-going internal conflict. See JOJARTH, *supra* note 1, at 243 (referring to Colombia's ardent support of tight SALW controls as a

however, generally force the exporting state to identify the purchaser of each SALW and prohibit the purchaser from transferring weapons to any other party.¹⁵⁴ Therefore, insisting upon export controls with end-use requirements would certify that SALW go only to the legitimate buyer to which they are exported.¹⁵⁵

Article IX of CIFTA mandates only that states establish licensing procedures and that they confirm that any states involved in a transfer of SALW have issued authorizing documentation before allowing the transfer to proceed.¹⁵⁶ Though the CICAD Firearms Regulations provide CIFTA states with some guidance, as they outline in detail what the OAS's member states ought to demand in terms of transfer licensing, CIFTA itself provides states with no direction.¹⁵⁷ Comparing CIFTA to the U.N.'s SALW instruments also makes clear that CIFTA's licensing provisions are much less rigorous than they should be. In addition to the state party authorizations demanded by CIFTA, the U.N. Protocol outlines the minimum information required in export and import licenses and any related documentation.¹⁵⁸ The Programme of Action goes even further, encouraging states to implement laws requiring the utilization of end-use certificates.¹⁵⁹

Providing minimum information requirements and mandating verification of licenses would reduce the risk of CIFTA violations.¹⁶⁰

means to frustrate rebel groups' access to SALW).

154. See GREENE & KIRKHAM, *supra* note 149, at 14-17 (noting cases of inadequate end-user controls and the acceptance of illicit end-use certification).

155. See, e.g., Posting of Matt Schroeder to FAS Strategic Security Blog, *supra* note 74 (stressing the need for end-user requirements in weapons sales throughout South America).

156. CIFTA, *supra* note 10, art. IX.

157. See SCHROEDER, *supra* note 7, at 4 (observing that the CICAD Firearms Regulations "seek to harmonize procedures and documentation used by OAS member states to control" the SALW trade).

158. See U.N. Protocol, *supra* note 26, art. 10(3) (requiring export and import licenses, authorizations, and accompanying documentation to contain the place and date of issuance, date of expiration, exporting and importing country, final recipient, a description of the SALW, and the names of countries through which the SALW will be shipped).

159. See *Programme of Action*, *supra* note 27, art. II(12) (undertaking "[t]o put in place and implement adequate . . . procedures to ensure effective control over the export and transit of [SALW], including the use of authenticated end-user certificates").

160. Cf. ROGERS, *supra* note 1, at 150-51 (observing domestic regulatory

Had such provisions been in place prior to the diversion of Nicaraguan arms, customs officials would have been better positioned to review Yelinek's fraudulent certifications and thwart the diversion.¹⁶¹ In fact, Colombia criticized CIFTA's meager licensing provisions during the negotiation phase, arguing that CIFTA should state exactly what information import and export licenses should contain.¹⁶² In addition, states and scholars alike stress the need for importing and exporting states to demand end-user requirements on SALW shipments.¹⁶³ End-user requirements are particularly vital for CIFTA's states parties at present, given their continued acquisition of large numbers of SALW from major exporting states like Russia and France.¹⁶⁴

Some scholars have argued that states are less inclined to comply with tight controls on the SALW trade.¹⁶⁵ But these contentions fail to consider the economic aspects of SALW exports. States with a stake in the SALW market do not want to chill trade and are therefore more likely to comply with increased licensing requirements.¹⁶⁶ Consequently, the addition of specific licensing and

regimes that many states have implemented that align with their international treaty obligations to control SALW).

161. See *Nicaraguan Diversion Report*, *supra* note 67, at 14 (arguing that Nicaragua failed to abide by CIFTA Article IX and asserting that Nicaraguan law should clearly establish what customs officials must look for on SALW licenses).

162. See, e.g., OAS, CIFTA Working Group, *Observations by Member States on the Draft Convention Against the Illicit Manufacturing and Trafficking of Firearms, Ammunition, Explosives, Other Related Materials: Colombia*, 7, OEA/Ser.G GT/CIFTA-3/97 add. 6-a (July 11, 1997) [hereinafter *Observations by Member States: Colombia*] (setting forth Colombia's proposed wording for CIFTA art. V, requiring, at a minimum, proof of a national certificate; country, date, and identification of the end-user; authorizing agency/importing state; and total quantity of weapons shipped).

163. See, e.g., *Third Biennial Meeting Report*, *supra* note 144, § IV(II)(12) ("States noted the importance of end-user certification, including verification measures, in addressing the problem of illicit brokering."); Posting of Matt Schroeder to FAS Strategic Security Blog, *supra* note 74 (insisting that states exporting SALW to Venezuela implement end-use requirements).

164. See, e.g., Robert Munks, *Could War Erupt in Arms-Spree LatAm?*, BBC NEWS, Sept. 15, 2009, <http://news.bbc.co.uk/2/hi/americas/8256686.stm> (drawing attention to recent large-scale military purchases in South America).

165. See JOARTH, *supra* note 1, at 237-38 (suggesting states shirk licensing responsibilities when it is in their own political interest to do so).

166. See generally *id.* at 234-48 (reviewing the costs and benefits to states from compliance with SALW instruments, including licensing provisions).

end-user requirements to CIFTA's text would be a feasible and realistic step towards enhancing the security of CIFTA's states parties.

c. CIFTA's Failure to Include Unmarked or Inadequately Marked SALW in its Definition of "Illicit Trafficking" Prevents Effective Detection and Prevention of Unlawful SALW Trafficking

CIFTA defines "illicit trafficking" as any trade or transfer of SALW not authorized by the importing, exporting, and in-transit states.¹⁶⁷ This definition is broad and encompasses both legal and black or gray market transfers of weapons.¹⁶⁸ It does not, however, make any reference to states' obligations under Article VI of CIFTA to mark weapons so that they can be easily identified.¹⁶⁹ In comparison, Article 3 of the U.N. Protocol has nearly the same definition of "illicit trafficking," but considers unmarked or inadequately marked weapons to be illicit.¹⁷⁰ The parties to the U.N. Protocol recognized that incorporating marking provisions into the definition of "illicit trafficking" helped to regulate transfers of unmarked firearms.¹⁷¹ Providing a similar recognition within

167. See CIFTA, *supra* note 10, art. I(2) ("'Illicit trafficking': 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.").

168. See CRAGIN & HOFFMAN, *supra* note 3, at 58-60 (indicating that illicitly trafficked weapons can originate from both the licit and illicit markets).

169. See CIFTA, *supra* note 10, art. VI (requiring firearms marking at the time of manufacture and import, and on confiscated or forfeited weapons retained for official use).

170. U.N. Protocol, *supra* note 26, art. 3(e) (including "firearms . . . not marked in accordance with article 8 of this Protocol" within the definition of illicit trafficking). The Programme of Action does not specifically define illicit trafficking. See generally *Programme of Action*, *supra* note 27 (lacking a section defining key terms of the agreement). See also U.N. OFFICE OF DRUGS & CRIME, TRAVAUX PRÉPARATOIRES OF THE NEGOTIATIONS FOR THE ÉLABORATIONS OF THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL CRIME 605 (United Nations 2006) [hereinafter TRAVAUX PRÉPARATOIRES] (showing that firearms marking was not included in the U.N. Protocol's definition of illicit trafficking as of the first negotiating session in January of 1999).

171. See U.N. Protocol, *supra* note 26, art. 3(e) (acknowledging that state representatives at the U.N. Protocol negotiations willingly included marking as part of the definition of "illicit trafficking").

CIFTA's text is necessary to induce the treaty's parties into compliance with their marking obligations under Article VI.¹⁷²

Firearms marking is generally accepted as a necessary component of pursuing illicit weapons traffickers, controlling unwanted diversions of weapons, and conducting effective investigations and prosecutions.¹⁷³ For instance, serial numbers on the anti-tank weapons seized from FARC in Colombia were used to trace the weapons back to a Swedish company.¹⁷⁴ State non-compliance with marking requirements, which alone is a breach of CIFTA's provisions, severely hinders the law enforcement process.¹⁷⁵ In addition, the significance of marking is even more apparent given the problem of unsecured surplus SALW stockpiles throughout Latin America.¹⁷⁶

As of February 2008, only seven of the thirty parties to CIFTA had domestic legislation requiring firearms marking.¹⁷⁷ Including the failure to adequately mark weapons within CIFTA's definition of "illicit trafficking" would provide an impetus for states to enforce its marking provisions. Further, broadening Article I's definition of "illicit trafficking" would allow states to criminalize trading of unmarked or inadequately marked weapons under Article IV.¹⁷⁸

172. See *Summary of Country Compliance*, *supra* note 11, at 1 (censuring states for the overall levels of non-compliance with CIFTA's marking requirements).

173. See GARCIA, *supra* note 29, at 57 (describing the marking system required by the U.N. Protocol and the essential role of marking in law enforcement efforts to recover diverted SALW).

174. E.g., Posting of Matt Schroeder to FAS Strategic Security Blog, *supra* note 74 (describing the discovery of arms within a FARC camp).

175. See CIFTA, *supra* note 10, art. VI (obliging state parties to require markings at the time of manufacture and import, and upon confiscated or forfeited weapons); GARCIA, *supra* note 29, at 57 (stressing "[t]he importance of firearm-marking to the law enforcement community").

176. See Karp, *supra* note 137, at 4 (noting that unguarded surplus military small arms increase the risk that diverted weapons will be used in civil violence and underscoring the need for effective checks on unlawful diversions).

177. See generally *Summary of Country Compliance*, *supra* note 11 (outlining each OAS member's compliance with each of CIFTA's technical requirements).

178. See CIFTA, *supra* note 10, art. IV (requiring states to criminalize illicit trafficking).

III. RECOMMENDATIONS

Trafficking of illegally diverted weapons threatens both human and state security throughout Latin America.¹⁷⁹ Despite the dire consequences this situation presents, CIFTA's reputable and crucial goals "to prevent, combat, and eradicate" illicit weapons trafficking have yet to be attained.¹⁸⁰ CIFTA's states parties are non-compliant, its framework remains inadequate, and efforts to execute the treaty have been weak and insubstantial.¹⁸¹ CIFTA's Consultative Committee and the OAS should respond to this situation by designing mechanisms to guarantee implementation of CIFTA's provisions in each of the ratifying state parties and by advocating textual amendments to CIFTA.

A. MECHANISMS FOR MONITORING AND ENFORCING COMPLIANCE SHOULD BE CREATED TO FACILITATE STATES' IMPLEMENTATION OF CIFTA

CIFTA's goals will not be attained without incentivizing compliance and facilitating dispute resolution. At present, there is no official oversight of states parties' implementation of CIFTA.¹⁸² The ideal compliance mechanism for CIFTA would be objective, institutionalized supervision of compliance by a well-recognized non-governmental organization.¹⁸³ Unfortunately, such a solution is unlikely within the OAS because it is expensive and the OAS utilizes non-governmental organizations only for their expert opinions and advice regarding the functioning of its own organs.¹⁸⁴ Still, the OAS

179. See, e.g., CRAGIN & HOFFMAN, *supra* note 3, at 53-54 (commenting that illicit trafficking has "contributed to an escalation of violence in Colombia" and surrounding states).

180. CIFTA, *supra* note 10, art. II. See generally Koh, *supra* note 2 (expounding upon the integral role of SALW regimes in stemming the violence that illegal weapons cause).

181. See generally *Summary of Country Compliance*, *supra* note 11 (reporting the implementation deficiencies in each of CIFTA's state parties).

182. See ROGERS, *supra* note 1, at 110 (stressing CIFTA's lack of a formal mechanism to guarantee states' compliance).

183. See JOJARTH, *supra* note 1, at 245 (claiming active monitoring by non-governmental organizations reduces the risk of states avoiding their obligations). See generally Marauhn, *supra* note 25, at 262-66 (describing various means of compliance verification, including institutionalization of compliance procedures).

184. See OAS, Permanent Council, *Guidelines for the Participation of Civil*

should strive to avoid directly addressing state responsibility, as this is a disfavored approach in multilateral agreements like CIFTA.¹⁸⁵

A more viable option is building a verification and monitoring regime into the treaty. The responsibilities of the Consultative Committee should be expanded beyond simple information gathering and its suggestions should be more than merely “recommendary.”¹⁸⁶ At a minimum, the Committee should be able to require states to exchange information when necessary and monitor such exchanges rather than waiting for states to cooperate between themselves.¹⁸⁷ Going further, procedures for routine verification inspections should be established.¹⁸⁸ States may resist such inspections, viewing them as sovereignty infringements, so the inspections should be conducted by an OAS consultant, rather than a state-representative on the Consultative Committee. Regardless of the specific inspection process chosen by the OAS, states should be made aware of the nature, duration, and schedule of inspections.¹⁸⁹

In conjunction with this recommendation, the OAS should also solicit, if not require, the assistance of businesses and non-governmental organizations. The addition of a provision like Article 13 of the U.N. Protocol, which requires states to cooperate with

Society Organizations in OAS Activities, ¶ 3, OEA/Ser.G CP/RES. 759 (1217/99) (Dec. 15, 1999) (defining the scope of participation of civil society groups, including non-governmental organizations, as providing expert advice and participating in the design, finance, and execution of OAS projects). *See generally* ROGERS, *supra* note 1, at 191-97 (identifying financial cost as a drawback to institutionalized compliance monitoring).

185. *See* Marauhn, *supra* note 25, at 270 (noting that terms such as “legality” and “illegality” are rarely used in compliance provisions because they come too close to addressing state responsibility, which is generally avoided in treaties).

186. *See* Marauhn, *supra* note 25, at 256 (providing an example of a standing consultative committee with the ability to field parties’ questions about other states’ compliance and provide advice on how to handle ambiguous situations).

187. *See, e.g.,* JOJARTH, *supra* note 1, at 38 (discussing compliance regimes in which international institutions authenticate state-to-state transactions by cross-checking parties’ submitted reports against one another).

188. *See* Marauhn, *supra* note 25, at 258 (identifying transparent verification as an essential means to build trust between states and pressure them into compliance).

189. *See* Dekker, *supra* note 20, at 320 (specifying important components of verification processes and explaining that verification is not continual or permanent but rather it is a responsive mechanism).

industrial players, is worthy of consideration.¹⁹⁰ Such a provision could assist with the financial burden of implementing a compliance regime because entities with a financial stake in the SALW trade may be a valuable source of funding. Moreover, a non-governmental organization can be engaged to publicly identify non-compliant states on a website or in a publication in an effort to pressure those states into compliance.¹⁹¹

Dispute resolution procedures should also be considered when formulating a compliance mechanism. Presently, CIFTA provides only that state parties are to resolve disputes diplomatically.¹⁹² State initiated investigations by the General Secretariat exist as a means for states to obtain an objective assessment of problematic situations.¹⁹³ Making such investigations mandatory upon suspicion of treaty violations or providing another specific procedure for states to follow could encourage them to seek official remedies for potential breaches of CIFTA.

**B. CIFTA SHOULD BE AMENDED TO PROVIDE FOR DESTRUCTION
OF CONFISCATED AND FORFEITED WEAPONS, PROPER STOCKPILE
MANAGEMENT, DETAILED LICENSING, AND MANDATORY END-
USE REQUIREMENTS FOR ALL SALW, AND AN EXPANDED
DEFINITION OF ILLICIT TRAFFICKING**

CIFTA's framework is based upon the general international consensus against SALW trafficking and it loosely outlines states' domestic obligations.¹⁹⁴ As a regional agreement, however, CIFTA should be at least as specific as a global agreement to be effective.

190. See U.N. Protocol, *supra* note 26, art. 13(3) ("State Parties shall seek the support and cooperation of manufacturers, [traders], and commercial carriers of [SALW] . . .").

191. See, e.g., JOJARTH, *supra* note 1, at 39 (recognizing publication of compliance status as a way to involve civil society in the compliance monitoring process). *But see* Dekker, *supra* note 20, at 325 (warning that states may become less cooperative with a compliance regime when under pressure).

192. See CIFTA, *supra* note 10, art. XXIX (calling for resolution of disputes through "diplomatic channels").

193. See, e.g., *Nicaraguan Diversion Report*, *supra* note 67, § 2(I) (noting that Colombia, Nicaragua, and Panama requested an investigation by the OAS General Secretariat into a large scale illicit diversion of AK-47s).

194. See Koh, *supra* note 2, at 2354-55 (extolling CIFTA's legal framework and the domestic legislative actions it requires).

Thus, CIFTA and its states parties would benefit from the inclusion of certain textual amendments, particularly if instituted together with an effective compliance mechanism which would verify that new requirements are being met.

1. Required Destruction of Confiscated and Forfeited Weapons and Effective Stockpile Management Will Reduce the Risk of Illicit SALW Trafficking in CIFTA States

CIFTA's Article VII should be altered to require states parties to destroy confiscated or forfeited weapons. States parties are likely to be amenable to such a requirement; parties to the U.N. Protocol were willing to obligate themselves to the practice of destruction and seven CIFTA states already do so.¹⁹⁵ Further, this amendment should also require states to devise a destruction procedure that is transparent, considers the military's actual SALW needs, and contains sufficient oversight to control potential losses through corrupt employees.¹⁹⁶

Next, CIFTA's Article VIII should call for appropriate stockpile management. The Article's vague references to security measures are insufficient to combat the threat of diversion from unsecured stockpiles.¹⁹⁷ The text should be modified to require well-managed and well-administered oversight of SALW reserves.¹⁹⁸ Because requiring destruction of surplus weapons is stringent and states may resist such an imposition, CIFTA states should alternatively consider adjusting the text to suggest that surplus destruction is preferable, but not required.¹⁹⁹ Finally, CIFTA should develop procedures that can

195. See *supra* Part II(A)(2)(a) (acknowledging that destruction is required under Article 6(2) of the U.N. Protocol and that Argentina, Brazil, Costa Rica, Guatemala, Nicaragua, Paraguay, and Peru already practice destruction).

196. See Karp, *supra* note 137, at 4 (calling for public scrutiny of SALW destructions and assurances that states are not inflating their projected needs for military weapons).

197. See *supra* Part II(A)(2)(a) (criticizing CIFTA's failure to specify security measures for protecting SALW stocks).

198. See generally Karp, *supra* note 137 (assessing problems associated with inadequately secured military stockpiles and providing detailed recommendations).

199. See *Third Biennial Meeting Report*, *supra* note 144, at 12 (showing state parties to the Programme of Action preferred national handling of surplus destruction).

negate the chances of diversion of SALW from stockpiles by disreputable government workers.

2. The Addition of Licensing and End-User Requirements into CIFTA's Text Will Assist Law Enforcement in Combating Trafficking and Clarify States' Responsibilities

Article IX of CIFTA should be modified to identify the minimum amount of information that must appear on SALW licenses. CIFTA's states parties signaled a desire for guidance on licensing procedures during negotiations and would therefore likely be open to the modification.²⁰⁰ Probable solutions include either making Article IX mirror the U.N. Protocol's Article 10(3) or incorporating the CICAD Model Regulations into CIFTA's text.²⁰¹

Additionally, Article IX should require exporting states to include end-user requirements on their exports, and more importantly, to require importing states to demand end-user requirements from any states exporting arms into their territory.²⁰² End-user requirements are widely acknowledged as an effective means of fighting unlawful diversions because they force exporters and exporting states to shoulder some of the burden.²⁰³ The OAS may also consider requiring rigorous end-use monitoring, which would entail follow-up inspections on arms exports into states' territories.²⁰⁴

200. See *Observations by Member States: Colombia*, *supra* note 162, at 7-8 (emphasizing the usefulness of detailed licensing provisions).

201. See *supra* Part II(A)(2)(b) (analyzing weaknesses in CIFTA's licensing provisions by comparison to the U.N. Protocol and considering perspectives voiced at CIFTA's negotiation).

202. See Posting of Matt Schroeder to FAS Strategic Security Blog, *supra* note 74 (advocating for stringent end-user requirements to combat SALW in OAS member states).

203. See generally GREENE & KIRKHAM, *supra* note 149 (explaining the breakdown of parties' responsibilities within transfer controls on SALW).

204. See, e.g., Posting of Matt Schroeder to FAS Strategic Security Blog, *supra* note 74 (articulating a need for end-user requirements across South America and suggesting methods of implementation).

3. Including Marking Requirements in CIFTA's Definition of "Illicit Trafficking" Will Expand CIFTA's Reach and Promote Law Enforcement Efforts to Track Illegal SALW

CIFTA's Article I(2) should be amended to include transfers of unmarked or inadequately marked weapons within the definition of "illicit trafficking" because it will broaden CIFTA's scope and promote effective law enforcement by ensuring the tracing of illegally diverted weapons.²⁰⁵ This addition would also encourage states to adopt the Consultative Committee's model legislation on marking since they would be held responsible for the failure to mark.

Along with the amendment to Article I(2), Article IV should be modified to require the criminalization of falsifying or obliterating markings on weapons. While it cannot be added until marking is included in "illicit trafficking," this modification is necessary given Latin American states' growing arsenals and may further dissuade gray market transfers by corrupt government officials.²⁰⁶

CONCLUSION

Illicit SALW trafficking is rampant in Latin America; there are 98 known trafficking routes into Colombia alone.²⁰⁷ Across the region, weapons ranging from AK-47s to anti-tank missiles are extremely easy to acquire and even easier to use. The business of arms trafficking is lucrative for the criminals involved, but it represents a grave threat to Latin American society because illegal SALW trading brings with it increased levels of violence and strained inter-state relations.

In passing CIFTA, OAS member states, comprised primarily of Latin American nations, were at the forefront of the movement to combat SALW trafficking. CIFTA even served as a model for the

205. See GARCIA, *supra* note 29, at 57 (describing marking as an integral tool in the investigation of illegally trafficked weapons).

206. See Scott, *supra* note 28, at 699 (observing that corruption and profit-making motives of government officials are often responsible for illegal transfers of weapons because lax controls allow them to evade detection).

207. See CRAGIN & HOFFMAN, *supra* note 3, at 18 (listing SALW trafficking routes into Colombia, including "21 . . . from Venezuela, 26 from Ecuador, 37 from Panama, and 14 from Brazil").

U.N. Protocol. Unfortunately, state non-compliance and ineffective approaches to implementation have limited CIFTA's ability to combat the SALW threat. These errors are not irreversible. CIFTA's efficacy can be enhanced and its purpose realized through minor textual amendments to the treaty and the creation of a compliance scheme that accounts for corruption.