



Activists supporting the Arms Trade Treaty lie in fake body bags in front of the UN building, New York, 2 July 2012. © Andrew Kelly/Control Arms Coalition/Reuters

Breaking New Ground?

THE ARMS TRADE TREATY

INTRODUCTION

[T]he world has decided to finally put an end to the free-for-all nature of international weapons transfers', UN Secretary-General Ban Ki-moon asserted when the Arms Trade Treaty (ATT) opened for signature on 3 June 2013 (UNDPI, 2013b). Sixty-seven countries signed the treaty during the signing ceremony at UN Headquarters in New York that day, with states continuing to sign—and in several cases ratify—the ATT at a brisk pace during the last half of 2013.¹ To date, UN member states have demonstrated broad support for the ATT, suggesting that they see it as a game changer.

In fact, different stakeholders perceive different benefits as arising from the ATT. For some, it is a means of leveling the playing field and ensuring that emerging arms exporters and those that do not already participate in existing export control regimes are subject to international norms and standards. For others, it represents a chance, through a legally binding instrument, to fulfil the promise of the UN Programme of Action (PoA) to curb the illicit small arms trade. For others, it is the beginning of the end of the human suffering brought about by irresponsible arms transfers. As the excitement following the adoption subsides, the question becomes: what does the ATT do and what will it change?

The central aim of the treaty is to establish the highest possible common international standards to regulate the international trade in conventional arms. This chapter evaluates the standards established by the treaty and considers what its provisions mean for arms transfer practices. Drawing on the treaty itself, UN documents, and the author's observations of the ATT negotiations, the chapter reviews the provisions of the ATT, situates the treaty within the current arms transfer control framework, and assesses its potential impact on state practice. Its main conclusions include:

- The compromises necessary for agreement on the treaty text have left the ATT with few unqualified legal obligations.
- The ATT covers a broad range of transfer-related activities, as well as items, but an absence of definitions and a lack of prescriptive detail may result in uneven and inconsistent implementation.
- The ATT makes a significant contribution to existing legal frameworks by introducing new standards for the international transfer of conventional arms. These gains are, however, more modest in comparison with existing small arms control measures.
- Given the universal scope of the treaty, non-exporting states have been and will continue to be involved in ATT-related arms transfer discussions as well as in the development of global norms to curb irresponsible arms transfers.
- The ATT process has raised the level of attention and scrutiny given to this issue at the global level and will undoubtedly continue to do so. This trend, in turn, has the potential to change state behaviour.

The chapter begins with a brief history of the ATT process. Next, it analyses the nature and content of the provisions of the treaty, including via a selective comparison of the ATT with other arms transfer commitments. A section exploring the possible impact of the ATT follows. The conclusion summarizes the chapter's main themes and findings.

A SHORT HISTORY

The journey towards the ATT began with a series of civil society initiatives. The first was the 1997 International Code of Conduct on Arms Transfers developed by Óscar Arias, former president of Costa Rica and winner of the Nobel Peace Prize, together with a group of fellow Nobel Peace laureates (Arias Foundation, 2008, p. 1). The Code stipulated that countries aiming to purchase arms meet certain criteria, including the promotion of democracy, the protection of human rights, and transparency in military spending (NPL ICoC, 1997, para. 2). This original set of standards was seen to be overly ambitious,² mainly because it sought to impose a de facto arms embargo on any state that did not comply with any one of its criteria rather than assessing exports on a case-by-case basis.

In 2001, a group of non-governmental organizations (NGOs)³ circulated a revised version of the text, based on states' international obligations; it became known as the draft Framework Convention on International Arms Transfers (Framework Convention, 2001, n. i). In October 2003, Amnesty International, Oxfam, and the International Action Network on Small Arms (IANSA) launched the Control Arms campaign and set about gathering support for an ATT of global scope. As part of this effort, they delivered a petition called 'Million Faces' to UN Secretary-General Kofi Annan on 26 June 2006 (UN News Centre, 2006). In 2009, the campaign developed and launched the Global Principles for International Arms Transfers based on the draft Framework Convention. It put forward a conceptual framework for an arms trade treaty, rather than draft treaty text (Control Arms, 2009).

Although the concept of an ATT enjoyed widespread NGO support, it was not until national governments—specifically, Costa Rica and the UK—began pushing the idea that it gained traction among states. In September 2004, Foreign Secretary Jack Straw announced that the UK supported the idea of an ATT (Vollmer, 2008, p. 3).



The permanent representative of Syria to the UN addresses the Final UN Conference on the ATT, expressing his country's opposition to the draft treaty, New York, 28 March 2013. © Rick Bajornas/UN Photo

By October 2006, a group of seven governments⁴ that became known as the ‘co-authors’ had co-drafted an initial ATT resolution and submitted it to the UN General Assembly. In December 2006, 153 UN member states voted in favour of the resolution, with 24 states abstaining⁵ and 1 voting against⁶ (UNGA, 2006a, p. 31). Resolution 61/89 instructed the Secretary-General to seek the views of member states on ‘the feasibility, scope and draft parameters for a comprehensive, legally binding instrument establishing common international standards for the import, export and transfer of conventional arms’ and to establish a group of governmental experts (GGE) to examine the same question (UNGA, 2006b, paras. 1–2). After three sessions in 2008,⁷ the GGE, comprising experts from 28 countries, produced a report that was endorsed by the UN General Assembly in Resolution 63/240 (UNGA, 2008b, para. 1). The resolution also established an open-ended working group (OEWG) to facilitate further consideration of UN efforts to address the international arms trade, as the GGE had recommended (UNGA, 2008b, para. 3; 2008a, para. 27).

The OEWG, open to all UN member states, delivered its report in July 2009 (UNGA, 2009a). In December 2009 the UN General Assembly decided to convene a conference in 2012—namely the United Nations Conference on the Arms Trade Treaty—to elaborate an international treaty on conventional arms transfers (UNGA, 2009b, paras. 4–5). The resolution also mandated that the three remaining OEWG sessions, scheduled for 2010 and 2011, be treated as preparatory committee meetings (PrepComs) for the ATT Conference (para. 6).

The United Nations Conference on the Arms Trade Treaty was held in New York from 2 to 27 July 2012, but was unable to reach consensus on a final treaty text. In December 2012 the UN General Assembly voted, by a wide margin,⁸ to convene the Final United Nations Conference on the ATT in March 2013. Resolution 67/234 A specified that the draft ATT text submitted by the president of the 2012 ATT Conference ‘shall be the basis for future work’ on the ATT (UNGA, 2012a, paras. 2–3).

The Final United Nations Conference on the Arms Trade Treaty, held in New York on 18–28 March 2013, produced a treaty text that could not be adopted by consensus, as Conference rules required, because of opposition from Iran, North Korea, and Syria. The matter was swiftly transferred back to the UN General Assembly, which, on 2 April 2013, voted to adopt the same ATT text through resolution 67/234 B—by 154 votes to 3,⁹ with 23 abstentions¹⁰ (UNGA, 2013c; UNGA, 2013e).

Box 3.1 ATT timeline: the UN process

2006

18 October Co-authors submit resolution ‘Towards an Arms Trade Treaty: Establishing Common International Standards for the Import, Export and Transfer of Conventional Arms’ to UN General Assembly (UNGA)

December UNGA adopts Resolution 61/89

2007

September GGE appointed

2008

11–15 February First GGE session

12–16 May Second GGE session

28 July–8 August Third GGE session

August GGE submits its report

December UNGA adopts Resolution 63/240, establishing OEWG

2009

23 January Organizational session of OEWG

2–6 March First substantive session of OEWG

13–17 July Second substantive session of OEWG

July OEWG delivers its report

December UNGA adopts Resolution 64/48, establishing a treaty negotiating conference

2010

12–23 July First ATT PrepCom

2011

28 February–4 March Second ATT PrepCom

11–15 July Third ATT PrepCom

2012

13–17 February Fourth ATT PrepCom

2–27 July United Nations Conference on the ATT

November UNGA adopts resolution 67/234 A

2013

18–28 March Final United Nations Conference on the ATT

2 April UNGA adopts the ATT through Resolution 67/234 B

3 June ATT opens for signature

THE NATURE OF THE TREATY

While the ATT carries the word ‘trade’ in its title,¹¹ there was never any question of negotiating it at the World Trade Organization (WTO), the established forum for international trade negotiations. First, agreements governing the transfer of arms, ammunition, and other ‘implements of war’ fall outside the WTO’s remit (GATT, 1947, XXI(b)(ii)). Second, and more importantly, the humanitarian objectives pursued by ATT supporters appeared incompatible with the WTO goal of facilitating and liberalizing global trade. The consideration and negotiation of the ATT was instead assigned to the UN’s principal forum for the regulation of conventional arms: the First Committee of the UN General Assembly, which deals with disarmament and international security.

ATT obligations are many and varied, in content and nature.

The ATT contains introductory text (‘preamble’ and ‘principles’) and 28 articles. States parties’ ATT obligations are many and varied, in both their content and nature. The binding or non-binding nature of a treaty provision is signalled by the use of terms, such as ‘shall’, ‘shall not’, ‘may’, and ‘encouraged’, as well as the presence or absence of qualifying language, such as ‘where feasible’, ‘where appropriate’, or ‘pursuant to its national laws’. Some treaty provisions create legal obligations that require a state party to take or refrain from a specific action. Other treaty provisions merely encourage a state party to take certain action or give it the option of taking such action; they do not create legal obligations.

In fact, there are relatively few legal obligations in the ATT. The ones that exist are often general—even subjective—in nature, such as the requirement that each state party ‘implement this Treaty in a consistent, objective and non-discriminatory manner’ (UNGA, 2013a, art. 5(1)). In some instances, this lack of prescriptive detail reflects the reality that states regulate and control arms transfers in different ways, depending on the nature of their legal and political systems, and the nature and scale of transfers involving them.¹² In other instances, however, the lack of detail reflects the desire of some exporting states to limit their ATT obligations to what they are already doing under their current control frameworks, as well as the concerns of small, non-exporting states regarding the use of scarce resources to establish complex export control systems that they do not need.

SCOPE

The scope of the treaty refers to the categories of conventional arms and types of activities to which the treaty applies.

Conventional arms

The discussions regarding the conventional arms to be covered by the treaty revolved around the question of whether to adhere to the categories of the UN Register of Conventional Arms. Under the UN Register, established in 1992, UN member states are ‘called upon’ or ‘requested’ to provide data on the import and export of seven categories of conventional arms (UNGA, 1991, para. 9; annexe, para. 2(a)); in addition, they are ‘invited’ to report on small arms transfers (UNGA, 2005c, para. 3). Ultimately, states agreed to apply the UN Register’s categories, such that the ATT explicitly applies to all conventional arms within the following categories:

- Battle tanks;
- Armoured combat vehicles;
- Large-calibre artillery systems;
- Combat aircraft;

- Attack helicopters;
- Warships;
- Missiles and missile launchers; and
- Small arms and light weapons (UNGA, 2013a, art. 2(1)).

During the negotiations, this list of categories was referred to as ‘7 plus 1’ because it included the seven categories of the UN Register—listed in ATT Article 2(1)(a)–(g)—as well as small arms and light weapons. The treaty does not include definitions of the conventional arms covered, but rather makes reference to existing descriptions in other instruments. With respect to the arms listed in Article 2(1)(a)–(g), the definitions that states must adopt as part of their national control lists ‘shall not cover less than the descriptions used in the United Nations Register of Conventional Arms at the time of entry into force of this Treaty’ (UNGA, 2013a, arts. 5(2)–(3)).

The descriptions applied to the categories have been amended by various groups of experts that have met eight times since the UN Register was established;¹³ they are likely to undergo further modification by future groups of experts. As suggested above, states parties to the ATT are bound to adopt, at a minimum, the descriptions used in the UN Register ‘at the time of entry into force’ of the treaty (UNGA, 2013a, art. 5(3))—in essence fixing the ATT-related definitions in time.¹⁴ Such static definitions are more palatable to states seeking certainty as to the arms they must regulate. However, the definitions will not be aligned with those in the UN Register if the latter evolve—unless states



A police officer guards a container holding parts and components of conventional arms seized from a North Korean ship travelling from Cuba back to North Korea, in Colon City, Panama, July 2013. © Carlos Jasso/Reuters

Box 3.2 Definitions of small arms and light weapons in the International Tracing Instrument

For the purposes of this instrument, 'small arms and light weapons' will mean any man-portable lethal weapon that expels or launches, is designed to expel or launch, or may be readily converted to expel or launch a shot, bullet or projectile by the action of an explosive, excluding antique small arms and light weapons or their replicas. Antique small arms and light weapons and their replicas will be defined in accordance with domestic law. In no case will antique small arms and light weapons include those manufactured after 1899:

(a) 'Small arms' are, broadly speaking, weapons designed for individual use. They include, *inter alia*, revolvers and self-loading pistols, rifles and carbines, sub-machine guns, assault rifles and light machine guns;

(b) 'Light weapons' are, broadly speaking, weapons designed for use by two or three persons serving as a crew, although some may be carried and used by a single person. They include, *inter alia*, heavy machine guns, hand-held under-barrel and mounted grenade launchers, portable anti-aircraft guns, portable anti-tank guns, recoilless rifles, portable launchers of anti-tank missile and rocket systems, portable launchers of anti-aircraft missile systems, and mortars of a calibre of less than 100 millimetres (UNGA, 2005a, para. II.4).

parties voluntarily incorporate the new definitions in their national control lists or the ATT is amended to reflect changes in the UN Register. More broadly, linking the scope of the ATT to the UN Register categories means that the treaty will be left behind if Register categories are amended and updated to reflect the development of new types of conventional arms.

With respect to small arms and light weapons, the ATT specifies that national definitions 'shall not cover less than the descriptions used in relevant United Nations instruments at the time of entry into force of this Treaty' (UNGA, 2013a, art. 5(3)). The 2005 International Tracing Instrument, which is cited in the ATT preamble, is the only UN instrument that includes a definition of 'small arms and light weapons'¹⁵ (UNGA, 2005a; see Box 3.2).

'Ammunition/munitions' and 'parts and components'

Certain provisions of the treaty also apply to 'ammunition/munitions'¹⁶ (UNGA, 2013a, art. 3), as well as 'parts and components' (art. 4). As a result, certain transfers of ammunition and parts and components are prohibited (art. 6) and states parties must conduct a risk assessment before exporting these items (art. 7). Yet—in contrast to their obligations with respect to conventional arms more broadly—states parties are not obliged to regulate the import, transit, transshipment, or brokering of ammunition/munitions or parts and components under the treaty, nor to keep records of their export or report on the import or export of such items (arts. 8–13). The disparity in the treatment of these items reflects the compromise necessary to accommodate opposition from the Russian Federation, the United States, and others to the inclusion of ammunition in particular in the scope of the treaty (Casey-Maslen, Giacca, and Vestner, 2013, p. 21).

As with conventional arms, the treaty itself does not include definitions of 'ammunition/munitions' or 'parts and components'. Moreover, in this case, it includes no reference to other definitions or descriptions outside the ATT. The treaty offers some guidance on these items, however, specifying that ammunition/munitions are to be 'fired, launched or delivered by the conventional arms covered under Article 2(1)' (art. 3) and referring to parts and components 'where the export is in a form that provides the capability to assemble the conventional arms covered under Article 2(1)' (art. 4).

The Firearms Protocol is the only UN instrument that includes definitions of ammunition and parts and components¹⁷ (UNGA, 2001a, art. 3(b)–(c)), but only insofar as they relate to firearms. States that are parties to the Wassenaar Arrangement may also look to the Wassenaar Munitions List¹⁸ for guidance in implementing Articles 3 and 4. Nevertheless, the issue of definitions in the treaty—or their absence—is something that states parties could revisit after its entry into force, when control lists have been devised and exchanged, and gaps and weaknesses in the scope of the ATT are identified.

Activities

With respect to the activities that comprise the ‘international trade’ in conventional arms under the treaty, Article 2(2) stipulates that these consist of export, import, transit, transshipment, and brokering; throughout the treaty, the term ‘transfer’ refers to these activities collectively. An early version of the draft treaty text included references to other activities, such as ‘manufacture under foreign licence’ and ‘technology transfer’ (UNGA, 2011, para. IV.2(e)–(f)); another informal document circulated in July 2012 also called for the inclusion of references to leases, loans, gifts, re-export, and ‘production by major producers/exporters’ (UNGA, 2012c, para. B(1)(e)–(g)). However, these were not included in the final list of activities comprising international trade under the treaty.

The activities listed in Article 2(2) are not defined under the treaty, although early drafts of the treaty text attempted to define international arms transfer—adapting the description proffered by the 1992 Panel of Experts on the UN Register (UNGA, 1992, para. 10)—as involving ‘the transfer of title or control over the equipment as well as the physical movement of the equipment into or from a national territory’ (UNGA, 2011, annexe A, para. 1(a)). Such a definition—as well as explicit references to gifts and loans mentioned in earlier drafts—made it clear that financial consideration or payment was not a prerequisite for a delivery of goods to qualify as a ‘transfer’ under the treaty. Yet China, in particular, resisted explicit references to ‘gifts’ and ‘loans’ within a definition of transfer, and such references were ultimately omitted from the treaty.¹⁹

In the absence of a definition, or explicit references to gifts and loans, it remains unclear whether the activities that comprise a ‘transfer’ under the treaty include non-commercial transactions or only sales and (financial) leases, leaving states parties some discretion. However, rules of treaty interpretation—which require consideration of a treaty’s object and purpose—suggest that states parties should apply the ATT’s provisions to all trade, regardless of whether it is commercial in nature. Indeed, on 22 October 2013 Switzerland circulated a model interpretative declaration, which asserts that:

the terms ‘export’, ‘import’, ‘transit’, ‘trans-shipment’ and ‘brokering’ in Article 2, paragraph 2, [include], in light of the object and purpose of this Treaty and in accordance with their ordinary meaning, gifts, loans and leases and [. . .] therefore these activities fall under the scope of this Treaty (Switzerland, 2013, p. 1).

The treaty stipulates that its provisions do not apply to the international movement of conventional arms by, or on behalf of, a state party for its own use, as long as the arms remain under that state’s ownership (UNGA, 2013a, art. 2(3)). In other words, if a state sends weapons to its own forces overseas, the shipment does not constitute a ‘transfer’ within the meaning of the treaty. This provision is consistent with discussions under the UN Register (UNGA, 1992, para. 11) and was most likely included to put the matter beyond doubt. But the fact that its inclusion was deemed necessary suggests that the mere movement of conventional arms (without a change in title or monetary payment) is regarded as a ‘transfer’ under Article 2(2). Thus, its inclusion supports the interpretation that a transaction does not have to involve financial payment or a change in title to constitute a ‘transfer’ under the treaty.

It is unclear whether a ‘transfer’ includes non-commercial transactions.

TRANSFER CRITERIA

The provisions in Articles 6 and 7 of the treaty, which include prohibitions on transfers in certain circumstances and require states parties to conduct a risk assessment before exporting conventional arms, ammunition, and parts and components, comprise the heart of the treaty.

Prohibitions

Under Article 6 of the treaty, a state party shall not transfer—that is, export, import, transit, tranship, or permit brokering of—conventional arms, ammunition/munitions, or parts and components in the following circumstances:

1. [...] if the transfer would violate its obligations under measures adopted by the United Nations Security Council acting under Chapter VII of the Charter of the United Nations, in particular arms embargoes.
2. [...] if the transfer would violate its relevant international obligations under international agreements to which it is a Party, in particular those relating to the transfer of, or illicit trafficking in, conventional arms.
3. [...] if it has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party (UNGA, 2013a, art. 6).

The interpretation of Article 6(3) will form the subject of further discussions.

The requirements that a state party refuse to authorize a transfer if it would violate an arms embargo (UNGA, 2013a, art. 6(1)) or an existing obligation under an international agreement to which it is a party (art. 6(2)) do not create 'new' obligations with respect to arms transfers, but simply codify existing obligations. UN member states are already bound to 'accept and carry out the decisions of the Security Council' under Article 25 of the UN Charter (UN, 1945); moreover, by definition, all states are obliged to fulfil relevant international obligations under international agreements to which they are parties.

There are differences of opinion regarding the exact scope of Article 6(3). First, it is not clear what threshold is set by the requirement that a state party have 'knowledge' that arms to be transferred would be used to commit certain crimes. The language in Article 6(3) was inspired by Article 16 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, which stipulate that a state that aids or assists another state to commit an internationally wrongful act is 'internationally responsible for doing so' if, among other things, 'that State does so with knowledge of the circumstances of the internationally wrongful act' (ILC, 2001, art. 16). The commentary to the draft article indicates that the latter phrase reflects a requirement that the assisting state 'be aware of the circumstances making the conduct of the assisted State internationally wrongful' (ILC, 2001, commentary to art. 16, para. 3).²⁰

Similarly, in the context of determining the mental element required for individual criminal responsibility, the Rome Statute provides that "'knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events' (ICC, 1998, art. 30(3)). But, in its model interpretative declaration, Switzerland indicates that the term 'knowledge' implies that the state party concerned shall not authorize the transfer 'if it has reliable information that provide[s] substantial grounds' for believing that the arms would be used in the commission of the crimes listed (Switzerland, 2013, p. 1), establishing a higher threshold for determining that a state has 'knowledge' than 'awareness'.

Furthermore, Article 6(3) does not specifically cover all war crimes. For instance, it does not refer to serious violations of Common Article 3 to the four Geneva Conventions, which covers prohibited acts that have been recognized in the Rome Statute and the case law of international criminal tribunals as amounting to war crimes in *non-international armed conflict*²¹ (Doermann, 2013, p. 5). In other words, uncertainties with respect to the interpretation and coverage of Article 6(3) will undoubtedly form the subject of further discussions among states parties and in potential treaty development.²²

Export and export assessment

If an export of conventional arms, ammunition, or parts and components is not prohibited under Article 6, an exporting state must conduct a risk assessment before authorizing the export of such arms or items, to assess the potential that they:

- would contribute to or undermine peace and security;
- could be used to commit or facilitate:
 - a serious violation of international humanitarian law (IHL);
 - a serious violation of human rights law;
 - an offence under terrorism conventions or protocols²³ to which the exporting state is a party; or
 - an offence under transnational organized crime conventions or protocols to which the exporting state is a party (UNGA, 2013a, art. 7(1)).

In making this assessment, exporting states must also ‘take into account’ the risk of the arms or items being used to commit or facilitate serious acts of gender-based violence or serious acts of violence against women and children (UNGA, 2013a, art. 7(4)). In addition, they must evaluate the risk of diversion of the export (art. 11(2)).

If any of the risks in Article 7(1) or a risk of diversion is identified, states parties are required to consider whether there are ‘measures that could be undertaken to mitigate’ such risks (UNGA, 2013a, arts. 7(2), 11(2)). In other words, states must consider if the risks can be reduced, lessened, or alleviated. The treaty does not specify what mitigation measures should or could be taken, though it does suggest ‘confidence-building measures or jointly developed and agreed programmes’ by the importing and exporting states (arts. 7(2), 11(2)).

If the exporting state has conducted the risk assessment and considered available mitigating measures, and if it determines that there is an ‘overriding risk’ of any of the negative consequences listed in Article 7(1), it ‘shall not authorize the export’ (UNGA, 2013a, art. 7(3)). While exporting states must consider the risk of diversion, and the risk of use in gender-based violence or serious acts of violence against women and children, they are not required to deny such exports if an ‘overriding risk’ of any of these consequences exists—unless such risks have the potential to lead to one of the consequences in Article 7(1).

If an exporting state authorizes an export and later becomes aware of ‘new relevant information’, it is encouraged—but not obliged—to reassess the authorization (UNGA, 2013a, art. 7(7)). Common sense suggests the state party should take into account the same criteria as in the original assessment to determine whether an ‘overriding risk’ of any of the consequences in Article 7(1) now exists, though this is not stipulated in Article 7(7). An exporting state could thus change its decision and withdraw or revoke a previously granted export authorization, although such a reversal will depend on the state’s own procedures and the terms of any agreement between the exporting state and importing state or entities involved in the transaction.

Article 7(1) tries to limit states’ discretion by requiring them to make the Article 7(3) assessment ‘in an objective and non-discriminatory manner’ and to take into account ‘relevant factors’, including information provided by the importing state (UNGA, 2013a, art. 7(1)). The treaty does not elaborate on what information exporting states should rely on when making an assessment or what ‘relevant factors’ must be taken into account (other than information provided by the importing state), although in the context of assessing the diversion risk of an export, exporting states are encouraged to consider examining the parties involved in the export, and requiring additional documentation (art. 11(2)).

Assessment must be undertaken ‘in an objective and non-discriminatory manner’.

Table 3.1 Overview of instruments that include transfer criteria

Scope (geography)	Instrument ^a	Nature		Scope (arms)					Scope (activities)				
		Legally binding	Politically binding	Major conventional arms	Small arms and light weapons	Ammunition	Other	Export	Import	Transit/transshipment	Brokering		
Global	ATT	✓		✓	✓	(✓)		✓	(✓)	(✓)		(✓)	
Multilateral	Wassenaar BPG		✓		✓			✓					✓
	Wassenaar Elements		✓	✓	✓			✓					
Regional	Central African Convention	✓			✓			✓				✓	
	ECOWAS Convention	✓			✓			✓				✓	
	EU Common Position	✓		✓	✓			✓			✓ (software, technology)	✓	
	OSCE Document		✓		✓			✓			✓ (related technology)	✓	
	OSCE Principles		✓	✓	✓			n.s. ^b			✓ (related technology)	n.s. ^b	n.s. ^b
	SICA Code of Conduct		✓	✓	✓			✓				n.s. ^b	n.s. ^b

Notes:

(a) For a list of complete instrument names and adoption dates, see endnote 24.

(b) The transfer criteria apply to 'transfers', but this term is undefined.

n.s.= not specified; (✓)=partially covered.

At least eight multilateral and regional instruments²⁴—some legally binding, some politically binding—include provisions that require participating states to conduct a risk assessment with respect to proposed exports of arms or apply certain considerations (‘transfer criteria’). Table 3.1 provides an overview of relevant instruments that include transfer criteria, indicating whether the instruments are legally or politically binding, and what types of arms and transactions are covered. Annexe 3.1 provides a comparative overview of the transfer criteria entailed in these instruments, including the nature of the obligation, the threshold to be applied to a risk assessment, and the consequence or risk to be assessed.

A comparison of transfer criteria in the ATT and in other instruments reveals several unique features. For example, the ATT’s use of the term ‘serious’ to describe violations of IHL or human rights law arguably creates a higher threshold than most equivalent existing provisions²⁵ that do not place a qualifier on the nature or scale of the violations. There is no settled international agreement on what constitutes a ‘serious’ violation of human rights law, although a review shows that ‘describing a violation of human rights as “serious” is generally assessed by the nature of the right violated and the scale or pervasiveness of the violation’ (da Silva, 2009, p. 31).

The ATT provision regarding terrorism is also narrower in scope than its equivalent in existing instruments, although it is potentially more meaningful. While other instruments require states to consider whether a proposed transfer might be used to support or encourage ‘terrorism’ generally,²⁶ the ATT is limited to terrorist acts that constitute offences under international terrorism conventions to which the exporting state is a party (UNGA, 2013a, art. 7(1)iii). It thus provides a reference point for what constitutes ‘terrorism’, for which no internationally agreed definition exists.

The abovementioned obligation in the ATT to consider the risk of arms, ammunition/munitions, and parts and components being used to commit or facilitate gender-based violence or violence against women and children is unprecedented. No other instrument or regime specifically mentions gender-based violence as a component of a risk assessment. In this sense, the inclusion of the phrase in the ATT is an unequivocal success for those who lobbied for its incorporation, especially given the strong resistance to its inclusion by several states (WOMEN, PEACE, AND SECURITY).²⁷

However, the insistence on a separate, specific reference to ‘gender-based violence’ in the ATT inevitably led the term to be distinguished from the category of ‘risks’ that it might otherwise belong to: serious violations of IHL and human rights law. The inclusion of gender-based violence as an example of a serious violation of IHL or human rights law in Article 7(1) would instead have underlined the relationship and prompted states parties to deny exports where the overriding risk of such violence was detected.

While the use of the phrase ‘overriding risk’ is also unprecedented in arms control agreements, its meaning is unclear. Indeed, it appears to have posed significant challenges to those tasked with translating the treaty into the official UN languages (see Box 3.3). Other relevant instruments tend to stipulate that the risk be ‘clear’ or that the misuse of weapons is ‘likely’, thus focusing on the magnitude of the risk rather than a comparison against other factors. The vast majority of states that spoke to the issue argued for the replacement of ‘overriding’ with ‘substantial’ during the ATT negotiations, with several states contending that the term ‘overriding’ was somewhat vague.²⁸

To describe a risk as ‘overriding’ normally means that it is ‘more important than any other considerations’ (Oxford Dictionaries, n.d.a). In the context of the ATT, the question is: what should the risk be compared to? What must it outweigh? There are at least two possible interpretations or applications: 1) the risk (or potential) that one of the negative consequences in Article 7(1) may occur outweighs the possibility or likelihood that it will not occur; or 2) there is a risk (or potential) that one of the negative consequences in Article 7(1) will occur, and this outweighs any *positive* contribution that the arms or items could make to ‘peace and security’, which is mentioned in Article 7(1) (a) as a possible positive consequence of an export.

Inclusion of gender-based violence as part of a risk assessment is unique.

Box 3.3 Lost in translation: 'overriding' risk

In the original translation of the ATT into Russian, the term 'overriding risk' was translated as 'significant risk' ('значительного риска'), and in the Spanish version it was translated as 'clear risk' ('un riesgo manifiesto'), but both terms were subsequently corrected (UNGA, 2013d; UNGA, 2013f). The corrections illustrate the difficulty in reaching a clear understanding of the term 'overriding'. The terms used are now closer to the English word 'preponderant', derived from the Latin word *praeponderare*, which means to 'weigh, consider' (Oxford Dictionaries, n.d.b; see Table 3.2).

Table 3.2 Translation of 'overriding risk' in official treaty texts

Language	Official text	Unofficial English translation
Arabic	خطرا كبيرا	high risk
Chinese	高于一切的风险	overriding risk, above all risks
French	un risque prépondérant	preponderant risk
Russian	безусловного риска возникновения	absolute risk
Spanish	un riesgo preponderante	preponderant risk

Source: UNGA (2013a)

the state party assesses the likelihood of any of the negative consequences in Article 7(1) materializing 'as being higher than the likelihood of them not materializing' (Switzerland, 2013, p. 1).

The use of the term 'overriding' received strong support from the United States, which aimed for the treaty to acknowledge the legitimacy of international arms transfers that have the potential 'to enhance, rather than undermine, peace and security' (US, 2013, p. 2). In other words, the United States appeared to envisage circumstances when the possible security benefits of a transfer would outweigh the possible human rights or other violations.

Some commentators see this usage as a significant loophole in the treaty.²⁹ Many states, it seems, will interpret the word 'overriding' to mean 'substantial'. For instance, following the adoption of the treaty on 2 April, New Zealand formally stated that it would interpret the concept of 'overriding' risk as a 'substantial' risk when applying the treaty (UNDPI, 2013a). The model interpretative declaration circulated by Switzerland indicates that the term 'overriding risk' entails an obligation not to authorize an export when

OTHER TRANSFER CONTROLS

General implementation

Article 5 of the treaty contains a series of general implementation measures, under which states parties are required to:

- implement the treaty in a 'consistent, objective and non discriminatory manner' (UNGA, 2013a, art. 5(1));
- establish and maintain a national control system (art. 5(2));
- establish a national control list (art. 5(2)) and provide it to the UN Secretariat, which will make it available to other states parties (art. 5(4));
- take the measures necessary to implement the treaty and designate a competent national authority 'in order to have an effective and transparent national control system'³⁰ (art. 5(5)); and
- designate one or more national points of contact to exchange information on matters related to treaty implementation (art. 5(6)).

States are also encouraged to make their control lists publicly available (UNGA, 2013a, art. 5(4)).



Dell Higgie, New Zealand's Disarmament Ambassador to the UN, signs the ATT, New York, 3 June 2013. © Keith Bedford/Insider Images

Import

The import obligations in Article 8 of the treaty require importing states to 'take measures' to provide information, if requested, to exporting states parties when conducting an export assessment (UNGA, 2013a, art. 8(1)); further, they task states with regulating imports of conventional arms (not ammunition/munitions nor parts and components) 'where necessary' (art. 8(2)). Under Article 8(3) importing states are entitled to request information from an exporting state party regarding an export decision (pending or complete).

The treaty only requires states parties to take measures to regulate imports 'where necessary' and does not specify what measures should be taken, except to note that 'such measures may include import systems' (UNGA, 2013a, art. 8(2)). Accordingly, states have discretion to determine whether and how they wish to regulate or control the importation of conventional arms, including whether to adopt a system of licensing or authorization.

This lack of prescription stands in contrast to the two international³¹ and seven regional instruments³² that include commitments to regulate the import of small arms—and, in some instances, ammunition and parts and components—most of which require importing states to establish a system of import licensing or authorization.³³ Some instruments also include:

- details of the procedure to be followed: for example, a requirement that an import licence be issued by the importing state before an export licence is issued by the exporting state (UNGA, 2001a, art. 10(2); Nairobi Protocol, 2004, art. 10(b)(i)) or a condition that a shipment not be authorized until an import licence has been received by the exporting state (OSCE, 2000, para. III(B)(3); OAS, 1997, art. IX(3));
- details regarding the nature and contents of import documentation: such as specifying the place and the date of issuance, the date of expiration, the country of export, the country of import, the final recipient, and a description and the quantity of the arms (OSCE, 2000, para. III(C)(1); ECCAS, 2010, art. 6); and
- a requirement that the importing state notify the exporting state upon receipt or delivery of the arms, generally when requested to do so.³⁴

The ATT transit provision is broadly consistent with existing small arms instruments. In short, all UN member states have undertaken to adopt laws, regulations, and administrative procedures to exercise ‘effective control’ over the import of small arms (UNGA, 2001b, para. II.2); some are under a legal obligation to implement more specific small arms import controls that are stronger than their ATT equivalent. Consequently, while the ATT import obligations may represent a strengthening of states’ existing commitments with respect to the broad spectrum of conventional arms, the same cannot be said with respect to the specific category of small arms and light weapons.

Transit or transshipment

The ATT requires states parties to take appropriate measures to regulate the transit and transshipment of conventional arms (not ammunition/munitions nor parts and components) (UNGA, 2013a, art. 9). The treaty does not specify what ‘measures’ are appropriate;³⁵ accordingly, states parties have discretion to adopt such measures as they deem appropriate. The obligation to regulate the transit and transshipment of arms is qualified by two caveats: ‘where necessary and feasible’ and ‘in accordance with relevant international law’ (art. 9). The former caveat acknowledges that there may be instances when it is not possible for a state to regulate or control goods in transit, due to resource or practical constraints, or out of a desire not to interrupt commercial operations, since controlling goods in transit can delay goods from reaching their intended destination. The latter caveat acknowledges that states have commitments under international law that may inhibit their ability to interfere with goods in transit (see Box 3.4).

For the most part, the ATT transit provision is consistent with commitments in existing small arms instruments. Under the PoA, for example, UN member states have committed to establishing ‘adequate laws, regulations and administrative procedures’ to control the transit of small arms (UNGA, 2001b, paras. II.2, II.12); meanwhile, states parties to the Firearms Protocol must establish or maintain a system of ‘measures on international transit’ for the transfer of firearms, their parts and components, and ammunition (UNGA, 2001a, art. 10(1)) and must ensure that transit states have given notice in writing, prior to shipment, that they have no objection to the transit (art. 10(2)(b)). The 1997 Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials goes somewhat further, requiring states to establish a system of transit licences or authorizations for the transit of firearms, ammunition, explosives, and other related materials (OAS, 1997, art. IX(1)).

However, instruments that include commitments on the part of transit states only cover small arms. Accordingly, the creation of a legally binding obligation—albeit qualified—to establish measures to regulate the transit of conventional arms does constitute a contribution to the current control system.

Brokering

The ATT requires each state party to take measures to regulate brokering taking place under its jurisdiction with respect to conventional arms (but not ammunition/munitions or parts and components) ‘pursuant to its national laws’ (UNGA, 2013a, art. 10). This provision could be interpreted several ways. It could imply that states need not do more than is already being done under existing national law, a reading supported by the fact that the original drafting used the phrase ‘within its national laws’ (UNGA, 2012b, art. 8). Or it could mean that states parties must regulate brokering in a way that is consistent with related national legislation regarding, for example, the possible imposition of criminal sanctions against corporations. The treaty also offers the following suggestions for what measures may be taken to regulate brokering: requiring brokers to register or obtain written authorization before engaging in brokering (UNGA, 2013a, art. 10).

The brokering provision of the ATT echoes equivalent provisions in international instruments on small arms. It is slightly stronger than the Firearms Protocol, which includes a non-mandatory provision whereby states parties ‘shall consider’ a system for regulating brokers (UNGA, 2001a, art. 15(1)). But it is slightly weaker than the PoA, which includes a clear, unqualified commitment to ‘develop adequate national legislation or administrative procedures’ regulating brokers, and stronger, more detailed language regarding the components of such regulation, which ‘should’ include registration of brokers, licensing, or authorization of brokering transactions, and appropriate penalties for all illicit brokering activities ‘performed within the State’s jurisdiction and control’ (UNGA, 2001b, para. II.14).

Box 3.4 ‘Relevant international law’ with respect to transit

Transit states may face restrictions on their ability to regulate all goods in transit through their territories under existing international commitments.

The United Nations Convention on the Law of the Sea gives states parties a right of innocent passage,³⁶ which precludes coastal states from hampering the innocent passage of foreign ships through their territorial sea—such as by imposing requirements on foreign ships that have the practical effect of denying or impairing the right of innocent passage—except in specified circumstances (UNCLOS, 1982, art. 24).

Under the Convention on Civil Aviation, all *scheduled* flights over the territory of a contracting state require special permission or other authorization of that state (ICAO, 1944, art. 6); in contrast, contracting states have agreed that *non-scheduled* aircraft (such as charter flights) shall have the right ‘to make flights into or in transit non-stop across its territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission, and subject to the right of the State flown over to require landing’ (art. 5).

The 1965 New York Convention on Transit Trade of Land-locked States recognizes the right of landlocked states to free access to the sea as an essential principle for the expansion of international trade and economic development, and grants freedom to traffic in transit (UNGA, 1965, principle 1; art. 2(1)). However, the convention notes that it does not affect measures a contracting state may have to take under another convention (existing or concluded later) if they relate to export or import or transit of particular kinds of articles including ‘arms’ (art. 11(3)) or any action necessary for the protection of its essential security interests (art. 11(4)). The provisions of this convention have been largely superseded by the Convention on the Law of the Sea, which gives landlocked states freedom of transit through the territory of transit states by all means of transport with the terms and modalities for exercising freedom of transit to be agreed between the concerned states (UNCLOS, 1982, art. 125).

Member states³⁷ of the 1980 Convention Concerning International Carriage by Rail have agreed to ‘adopt all appropriate measures in order to facilitate and accelerate international rail traffic’ (COTIF, 1980, art. 5); they have also decided to eliminate any ‘useless’ procedures, simplify and standardize existing formalities, and simplify frontier checks (art. 5(1)(a)–(c)). Further, Article 12(5) provides that a transit state may only seize a railway vehicle transiting its territory under a judgment given by the judicial authority of that state. Similarly, states parties³⁸ to the International Convention on the Harmonization of Frontier Controls of Goods have undertaken to ‘provide simple and speedy treatment for goods in transit’, for example by ‘limiting their inspections to cases where these are warranted by the actual circumstances or risks’ (UNECE, 1982, ch. III, art. 10(1)).

Anna Macdonald, head of the Control Arms campaign, addresses a press conference at the opening for signatures of the ATT, New York, 3 June 2012. © Evan Schneider/UN Photo



In 2003, participating states of the Wassenaar Arrangement agreed a set of common Elements for Effective Legislation on Arms Brokering (WA, 2003). That same year, the European Union (EU) adopted a Common Position specifically on brokering (EU, 2003). In addition to requiring the registration of brokers, the licensing of brokering activities, record-keeping and information exchange, and the adoption of penalty provisions, each of these agreements requires that applications for brokering licences or authorizations be assessed in accordance with specified transfer criteria. The EU Common Position on brokering also encourages member states to consider controlling brokering activities *outside* of their territory (art. 2(1)); in essence, it encourages them to establish extraterritorial controls.³⁹

The weak language of the final ATT text on brokering can in part be attributed to Canada, which claimed that states should not be required to ‘regulate’ brokering, but rather should choose their own processes for controlling brokers. Canada also raised concerns over the extraterritorial application of brokering measures (Canada, 2011, p. 3). As a consequence of such resistance to stronger language, the ATT brokering provisions are weak and even the measures that states ‘may’ adopt are very limited. In addition, the treaty fails to define the terms ‘broker’ and ‘brokering’ and, importantly, lacks stipulations on extraterritorial jurisdiction. Given the attention the issue of brokering has gained at the international⁴⁰ and regional levels over the past decade, the weakness of the ATT brokering provision signals a missed opportunity.

Diversion

Article 11 of the ATT is dedicated exclusively to the issue of diversion. While the term ‘diversion’ is not defined in the ATT, it is generally understood to refer to a breakdown in the transfer control chain such that, either before or after arriving at their intended destination, exported weapons come under the control of unauthorized end users or are used in violation of commitments made by end users prior to export (McDonald, 2008, p. 156).

The requirements of Article 11, which apply only to transfers of conventional arms and not to ammunition/munitions or parts and components, are:

- for states parties to take measures to prevent diversion (UNGA, 2013a, art. 11(1));
- for exporting states to prevent diversion by assessing the risk of diversion of exports of conventional arms, and potentially not authorizing the export (art. 11(2));
- for states parties to cooperate and exchange information in order to mitigate the risk of diversion of conventional arms (art. 11(2)–(3));
- for states parties to take appropriate measures to address diversion when detected, including by alerting potentially affected states parties, examining diverted shipments, and taking follow-up measures through investigation and law enforcement (art. 11(4)); and
- for states parties to share information on effective measures to address diversion (art. 11(5)).

In addition, states parties are encouraged to report to each other on measures taken in addressing the diversion of transferred conventional arms (UNGA, 2013a, art. 11(6)).

Enforcement

Article 14 obliges states parties to ‘take appropriate measures’ to enforce national laws and regulations that implement the provisions of the treaty, which implies an obligation to adopt such national laws and regulations.⁴¹ Except for the word ‘appropriate’, which may stem from the desire to reflect different national approaches to enforcement, the obligation in Article 14 is strong, given that it is unqualified. But its lack of detail, including the absence of a specific reference to penal sanctions, is a source of weakness.

Nevertheless, Article 14 is an important reminder that it is not sufficient for states parties simply to adopt laws and establish control systems to implement the treaty. They must also *enforce* the measures adopted to implement the treaty. There are other examples of enforcement-related commitments in the treaty, such as the suggestion in Article 11(4) that measures taken to address diversion may include ‘investigation and law enforcement’ and the requirement in Article 15(5) that states parties ‘afford one another the widest measure of assistance in investigations, prosecutions and judicial proceedings in relation to violations of national measures established pursuant to this Treaty’ if, for example, they have mutual legal assistance provisions in place.

International cooperation and assistance

The ATT includes an article on international cooperation (UNGA, 2013a, art. 15) and a separate article on international assistance (art. 16). As with similar articles in other treaties, these provisions are designed to promote and facilitate information sharing between states, mutual legal cooperation to prosecute individuals engaged in criminal activities relating to the arms trade, and the provision and reception of assistance—including technical, financial, and

Article 14 is a reminder that implementation means more than adopting laws.

legislative assistance as well as institutional capacity building—for ATT implementation. States parties that are ‘in a position to do so shall provide’ assistance on request (art. 16(1))—though they cannot be compelled to provide assistance as states parties themselves will determine if they are ‘in a position to do so’. States parties are also encouraged to contribute to the voluntary trust fund to be established under the treaty (art. 16(3)).

The inclusion of provisions on international cooperation and assistance is important, particularly for countries that are not major exporters or importers of arms, but that frequently feel the effects of arms trafficking and misuse. Regional organizations such as the Caribbean Community (CARICOM)⁴² and the Pacific Islands Forum⁴³ stressed the importance of including such provisions to facilitate implementation efforts.

TRANSPARENCY

Record-keeping

A legal obligation to record conventional arms transfers sets a precedent.

Under Article 12 of the treaty, states parties are required to keep records of export authorizations or actual exports of conventional arms (not ammunition/munitions or parts and components) (UNGA, 2013a, art. 12(1)); they are also encouraged to keep records of imported arms and arms that are authorized to transit their territories (again, excluding ammunition/munitions and parts and components) (art. 12(2)). The treaty urges states parties to include the following information in these records: quantity, value, model/type, authorized transfers of conventional arms, conventional arms actually transferred, details of exporting state(s), importing state(s), transit and transshipment state(s), and end users, ‘as appropriate’ (art. 12(3)).

The obligation to keep records of export authorizations or actual exports is qualified by the phrase ‘pursuant to its national laws and regulations’. This language may be designed to acknowledge the need to abide by national laws regarding the keeping of private or sensitive information. In any case, in many countries record-keeping requirements are not incorporated in national legislation, but rather in policy documents and other directives applicable to the agency responsible for export controls.

Lastly, the treaty requires records to be kept for a minimum of ten years (UNGA, 2013a, art. 12(4)). However, at the international level, in 2005 UN member states undertook to keep information on the transfer of small arms ‘indefinitely’ (to the extent possible) or at least 20 years under the International Tracing Instrument (UNGA, 2005a, para. IV.12). The ATT’s requirement that states parties keep records for only ten years is reminiscent of the timeframe adopted in the Firearms Protocol (UNGA, 2001a, art. 7)—12 years prior to the adoption of the ATT—and represents a step backwards from emerging best practice under small arms instruments. That said, a legally binding provision obliging states parties to keep records of their *conventional* arms transfers is a precedent in international arms control.

Reporting

The ATT includes commitments for states parties to report on diversion, implementation, and exports and imports (UNGA, 2013a, arts. 11(6), 13). A summary of reporting commitments under the ATT is provided in Table 3.3.

States parties are required to report annually on their authorized or actual exports and imports of conventional arms (not ammunition/munitions or parts and components), although the reports ‘may exclude commercially sensitive or national security information’ (UNGA, 2013a, art. 13(3)).

Table 3.3 Reporting commitments under the ATT

Theme	Content and information	Nature of commitment	Frequency
Diversion	Measures taken to address diversion (art. 11(6))	Encouraged	Ad hoc
	Measures proven effective in addressing diversion (art. 13(2))	Encouraged	Ad hoc
Implementation	Initial report on implementation (art. 13(1))	Mandatory	Within one year of entry into force for the state
	Ad hoc reports as new implementation measures are taken (art. 13(1))	Mandatory	When appropriate/ ad hoc
Transfers	Authorized or actual exports of arms (art. 13(3))	Mandatory	Annual (by 31 May)
	Authorized or actual imports of arms (art. 13(3))	Mandatory	Annual (by 31 May)

Source: UNGA (2013a)

One issue surrounding reporting that remained contentious throughout the ATT deliberations was whether and to what extent reports submitted to a dedicated ATT secretariat would be made publicly available. Given that one of the stated purposes of the ATT is to promote transparency in the international arms trade (UNGA, 2013a, art. 1), this was an important issue for many states. Ultimately, states agreed that reports on implementation and transfers ‘shall be made available, and distributed to States Parties by the Secretariat’ (arts. 13(1), 13(3); see Table 3.3). While the provision clearly stipulates that the secretariat will distribute reports to other states parties to the treaty, there is some ambiguity in the phrase ‘shall be made available’ and the placement of the comma. Whether reports *may* or *are to be* ‘made available’ to a wider audience beyond states parties is open to interpretation.

UN member states are already ‘called upon’ to provide data on an annual basis on imports and exports of the seven categories of conventional arms to the UN Register (UNGA, 1991). The 2003 GGE agreed that interested states could include transfers of small arms in their annual report to the Register as part of additional background information, and the 2006 GGE established a standardized reporting format to be used on an optional basis (UNDDA, 2007, p. 16). In the event, the ATT specifies that the report submitted by states parties to the ATT secretariat:

may contain the same information submitted by the State Party to relevant United Nations frameworks, including the United Nations Register of Conventional Arms (UNGA, 2013a, art. 13(3)).⁴⁴

Part of the reason for the latter provision was to allay concerns among states that they would be overburdened by reporting obligations.⁴⁵ The major difference is that states parties to the ATT have a *legally binding* obligation to report rather than simply being ‘called upon’ to report—although the treaty does allow them to exclude commercially sensitive or national security information.

Secondly, the ATT provision enhances states’ commitment with respect to reporting on small arms transfers since they are included in the scope of the treaty. This is much stronger than ‘inviting’ states to report on small arms transfers under the UN Register. The creation of a legal obligation to report transfers of conventional arms, including small arms, to an ATT secretariat should increase the level of reporting and information exchange on such transfers (TRADE UPDATE).

BOOKENDS

The ATT also includes introductory provisions, in the form of a preamble and principles, as well final provisions, which set out the procedural elements of the treaty.

Introductory provisions

Generally speaking, the preamble of an international treaty is designed to introduce the main text by providing information on its background and purpose. It may also contain political statements as well as references to issues whose inclusion in the body of the treaty could not be secured by negotiating states (Aust, 2013, p. 367).

**The provisions
in the preamble
help states
interpret and
apply the treaty.**

The ATT preamble does both of these things. It includes references to the purposes of the treaty, such as ‘the need to prevent and eradicate the illicit trade in conventional arms’⁴⁶ (UNGA, 2013a, preambular para. 3); further, it acknowledges certain issues that could not be addressed in the main text of the treaty, such as lawful civilian access to and use of arms (preambular para. 13).⁴⁷ The latter consideration also led to a restatement of certain principles, including the inherent right to self-defence under Article 51 of the UN Charter, in the introductory part of the treaty.

While the provisions of a preamble are not legally binding, they can aid in the interpretation and application of the treaty, and they may reflect certain understandings states have regarding how to interpret and apply the treaty. For example, while there is no definition of ‘diversion’ in the treaty, the reference in the third paragraph of the preamble to preventing diversion ‘to the illicit market, or for unauthorized end use and end users’, including terrorists, provides some guidance to the application of the term in the context of the ATT.

The object of the treaty—as echoed in the title of the ATT resolutions—is to ‘establish the highest possible common international standards for regulating or improving the regulation of the international trade in conventional arms’ (UNGA, 2013a, art. 1) as well as to prevent and eradicate the illicit trade in conventional arms and prevent diversion. The ATT’s purpose is threefold: to contribute to international and regional peace, security, and stability; reduce human suffering; and promote cooperation, transparency, and responsible action by states parties in the international arms trade, thereby building confidence among states parties (UNGA, 2013a, art. 1).

Final provisions

Generally speaking, the final provisions of a treaty, or final clauses, as they are commonly called, relate to procedural aspects rather than substance. They generally include articles governing the establishment of treaty infrastructure, future meetings, the settlement of disputes, treaty amendments, the requirements for the treaty to enter into force, and reservations (UNOLA, 2003, p. 1).

The central elements of the ATT’s final provisions can be summarized as follows:

- A Conference of States Parties will be convened no later than one year following the entry into force of the treaty. The first such conference will determine the frequency with which future meetings are held and the rules of procedure governing such meetings (UNGA, 2013a, art. 17(1)–(2)).
- Article 18 establishes a secretariat to ‘assist States Parties in the effective implementation of this Treaty’. Article 18(3) indicates the secretariat should operate ‘within a minimized structure’. This wording reflects a desire expressed by many states during negotiations that the secretariat be relatively small and inexpensive. Presumably, however, the size of the secretariat will ultimately depend on the tasks that are allocated to it.
- Proposed amendments to the treaty can first be made six years after its entry into force, and thereafter every three years (art. 20(1)).

- When a proposed amendment is under consideration, states parties must make every effort to achieve consensus on the amendment; if consensus cannot be achieved, the amendment may be adopted by a three-quarters majority vote of the states parties present and voting at the meeting (art. 20(3)). Any amendment that is adopted will only bind those states parties that deposit an instrument of acceptance for the amendment with the depositary (art. 20(4)).⁴⁸
- The treaty only enters into force—that is, it becomes legally binding for states parties—90 days after the day on which the 50th state has submitted its instrument of ratification, acceptance, or approval⁴⁹ to the Secretary-General of the United Nations (art. 22(1)).
- States may declare that they will provisionally apply Articles 6 and 7 of the treaty at the time they sign or deposit an instrument of ratification, acceptance, approval, or accession,⁵⁰ even before the treaty comes into force (art. 23). Of the states that signed the treaty when it was opened for signature on 3 June 2013, only Spain declared that it would provisionally apply Articles 6 and 7. States may also formulate reservations at the time of signature, ratification, acceptance, approval, or accession, provided such reservations are compatible with the object and purpose of the treaty (art. 25).

One of the most contested and controversial articles in the final provisions is Article 26, which governs the relationship between the ATT and other international agreements. The article is composed of two paragraphs: the first notes that treaty implementation ‘shall not prejudice obligations undertaken by States Parties with regard to existing or future international agreements, to which they are parties’, provided those obligations are consistent with the treaty (UNGA, 2013a, art. 26(1)); the second stipulates that the treaty ‘shall not be cited as grounds for voiding defence cooperation agreements concluded between States Parties’ (art. 26(2)).

In its original form, the first paragraph created a significant potential loophole, since there was no requirement that obligations under other agreements be consistent with the ATT (UNGA, 2012b, art. 5(2)). With respect to the second paragraph, India, in particular, as a major importer of arms, sought to ensure that exporting states that enter long-term arrangements to supply arms to it would not be able to use the treaty to break such agreements. In essence, Article 26 confirms that states parties may honour existing or future arrangements for the supply of weapons to allies, provided the latter are ‘consistent with’ the treaty.

The impact of the ATT will depend on more than words on a page.

IMPACT

The preceding analysis of ATT provisions offers a partial answer to the question: what impact will the ATT have? The brief comparison with some of the international and regional instruments that already restrict or at least affect states’ freedom to transfer conventional arms reveals what difference the ATT makes on paper: it expands and strengthens some existing commitments and introduces some new commitments, but it also weakens some existing norms and emerging practice, in particular with respect to small arms and light weapons.

Ultimately, however, the question of what difference the ATT will make in practice and whether it will achieve its objectives probably does not depend on words on a page. It depends on the extent to which states apply the treaty’s obligations and recommendations. As noted by the Secretary-General: ‘its effectiveness will depend on the willingness of States to ensure its full implementation’ (UNDPI, 2013c). This includes states’ willingness to implement the treaty themselves, as well as to ensure implementation by other states through cooperation and assistance, and through closer scrutiny of states’ decisions to export arms, ammunition, and parts and components in light of the ATT transfer criteria.



John Kerry, US Secretary of State, signs the ATT, New York, 25 September 2013. © Spencer Platt/Getty Images

A willingness to implement the treaty is apparent from the number of states that have already started the process of reviewing their existing national frameworks to determine what needs to be done to comply with the ATT; in some instances, states are already translating the ATT into national legislation.⁵¹ Furthermore, many states have expressed an intention to take a progressive approach to their interpretation of the treaty. As pointed out by several states⁵² following its adoption, the ATT creates a ‘floor, not a ceiling’ (UNDPI, 2013a); states that wish to do more than the ATT strictly requires them to be free to do so. Many states parties—including the ones that pushed for stronger treaty language and that are likely to be among the first to ratify the treaty—may take a maximalist approach, implementing provisions even if they are only ‘encouraged’ or ‘optional’.

A willingness to facilitate implementation by other states through the provision of assistance has already been demonstrated through the establishment of the multi-donor UN Trust Facility Supporting Cooperation on Arms Regulation (UNSCAR) in June 2013. Hosted by the UN Office for Disarmament Affairs, UNSCAR is to support ATT implementation with support from Australia, Denmark, Germany, the Netherlands, and Spain (UNDPI, 2013d).⁵³ Other states are providing funding for ATT projects on a bilateral basis to support implementation at both the national and regional levels.

It is too early to assess states’ willingness to ensure implementation of the ATT transfer criteria by other states through closer scrutiny of export authorization decisions. Although the ATT itself does not include a mechanism for monitoring arms transfers or reviewing exporters’ decisions to authorize exports, it unequivocally provides the framework for closer examination of states’ decisions by outlining the risks that should be assessed. In the absence

of a formal monitoring mechanism, civil society and the media will probably undertake such examination in the early years after entry into force. But, in the longer term, states parties themselves are likely to take up the mantle, formally or informally.

Monitoring by states will probably not take the form of public condemnation of export licensing decisions or a resort to formal dispute resolution regarding the application of the treaty (although this is possible under Article 19). It is more likely to take the form of bilateral consultations and requests for clarification of decisions taken, including, possibly, within meetings of the Conference of States Parties. Even states that do not become states parties to the ATT and that are not legally bound by its terms will experience pressure to apply its standards and will find their export licensing decisions scrutinized against the ATT backdrop.

While not all states are behind the treaty and certainly not all states will sign and ratify it, the evidence to date indicates that the majority of states are willing and intend to implement it and are looking for ways to assist other states to do the same. The ATT is already prompting states to take stock of their existing transfer control systems—be they exporting, importing, or transit states—and to identify weaknesses and gaps. Improvements to existing control systems and an increase in the number of countries that have control systems should boost the fight against the illicit arms trade.

In this sense, the ATT has raised awareness of the importance of transfer controls and opened up discussions on and scrutiny of the arms trade. Most major arms exporters are already committed to applying transfer criteria similar to the ATT's under existing export control regimes. But the majority of UN member states are importers or transit states and are not members of such regimes, which largely excludes them from the consideration of export control issues and the development of transfer criteria. The participation of non-exporting states in a global regulatory system—which the ATT offers—means that those that have traditionally not been in the exporters 'club' but that more frequently experience the adverse effects of irresponsible arms transfers will have a legitimate forum in which to raise their concerns and work to improve ATT standards.

From the commercial—as opposed to the humanitarian—perspective, the ATT is the first multilateral treaty that creates a level playing field for the international arms trade (Saferworld, 2013). Moreover, it is believed that '[i]ncreasing the number of countries operating under common standards of control will provide more predictability and confidence for organizations that operate in a global market place and with global supply chains' (de Vries, 2013). In other words, the ATT may bring improvements to the arms industry by ensuring that arms manufacturers throughout the world are subject to the same degree of governmental regulation (Youngman, 2013).

The adoption of the ATT also sends a positive message about multilateral arms control, which has had a less than impressive track record in recent decades. For example, the last agreement successfully negotiated by the Conference on Disarmament⁵⁴ was the 1996 Comprehensive Nuclear-Test-Ban Treaty (UNGA, 1996). Since then, conference members have been locked in a procedural stalemate, unable to agree on a programme of work. Both the Mine Ban Treaty and the Convention on Cluster Munitions were negotiated outside of the UN⁵⁵ after discussions within the auspices of the Convention on Certain Conventional Weapons at the United Nations in Geneva failed to make progress on the issues. In contrast, the successful negotiation of an ATT within a UN framework sends a signal that the UN can still deliver new arms treaties.

That said, the ATT also has the potential to detract attention from ongoing processes, such as the PoA and the Firearms Protocol, as states turn their focus—and donors turn their wallets—to ATT implementation and compliance. There are many overlaps and opportunities for synergies between the ATT and these existing processes, but there is also a danger that UN member states will perceive the ATT as replacing, or at least taking priority over, implementation

Most states are willing and intend to implement the ATT.

of other commitments. A related danger is that, as part of efforts—and pressure—to sign and ratify the treaty, non-exporting states will pour energy and scarce resources into developing national control systems for weapons that are rarely traded to or from their territories, at the expense of investing in measures that would do more to prevent diversion, such as improved stockpile management and surplus destruction.

CONCLUSION

The negotiation of an Arms Trade Treaty was a complex and ambitious undertaking, involving the reconciliation of humanitarian objectives with commercial and security considerations in a disarmament forum, all this while trying to balance the interests of arms suppliers and recipients alike. The ATT is, inevitably, an imperfect document that reflects the compromises necessary to achieve agreement. It contains a comprehensive array of regulatory measures, but its lack of detail and its reliance on national discretion increase the risk of inconsistent implementation by states parties.

In the coming months and years, lawyers will grapple with some of the ambiguities of ATT language as they seek to translate treaty provisions into national legislation and policy. That said, the ATT does establish *legally binding* common standards for the international trade in conventional arms, which, judging from the protracted and difficult treaty negotiations, are the ‘highest possible’ that the UN membership has been able to attain to date. This fact alone makes a significant difference from the perspective of international law. The ATT codifies some existing responsibilities relating to international arms transfers and helps develop other norms in an area that has hitherto been stubbornly resistant to such development.

The process towards an ATT has demonstrated impressive political momentum among states and civil society alike. The perceived success of that process can be expected to yield positive political ramifications. The ATT has already had an impact on the level of awareness of, and attention to, arms transfer decisions. This will undoubtedly lead to closer scrutiny of arms transfer decisions by states parties and non-state parties alike. Whether it translates into more responsible decisions being made in the longer term, and fewer arms getting into the hands of the wrong people, depends on several factors, including states’ long-term commitment to converting words on paper into concrete action.

The ATT cannot be expected to stop all arms exports that breach treaty norms. But it does promise greater scrutiny of arms transfer decisions by the international community. It has provided a universal benchmark against which all transfer decisions will be assessed and provides the framework for all states to engage on the issue of responsible arms transfers. The ATT negotiations and the implementation process that is just beginning have shone a light on an issue routinely considered a matter of ‘national security’. Until now. ■

LIST OF ABBREVIATIONS

ATT	Arms Trade Treaty
CARICOM	Caribbean Community
ECOWAS	Economic Community of West African States
EU	European Union
GGE	Group of governmental experts
IHL	International humanitarian law

NGO	Non-governmental organization
OEWG	Open-ended working group
OSCE	Organization for Security and Co-operation in Europe
PoA	United Nations Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects
PrepCom	Preparatory committee
UNGA	United Nations General Assembly
UNSCAR	United Nations Trust Facility Supporting Cooperation on Arms Regulation
WTO	World Trade Organization

ANNEXE

Online annex at <<http://www.smallarmssurvey.org/publications/by-type/yearbook/small-arms-survey-2014.html>>

Annexe 3.1. A comparative overview of transfer criteria in multilateral and regional instruments on conventional arms

ENDNOTES

- For up-to-date information on ATT signatures and ratifications, see UNODA (n.d.a).
- Author interview with a participant in the Code initiative, New York, 22 October 2013.
- The group was comprised of Amnesty International, the Arias Foundation, the British American Security Information Council, the Federation of American Scientists, Oxfam, Project Ploughshares, and Saferworld.
- The seven states were Argentina, Australia, Costa Rica, Finland, Japan, Kenya, and the United Kingdom.
- The abstaining states were Bahrain, Belarus, China, Egypt, India, Iran, Iraq, Israel, Kuwait, Laos, Libya, the Marshall Islands, Nepal, Oman, Pakistan, Qatar, the Russian Federation, Saudi Arabia, Sudan, Syria, the United Arab Emirates, Venezuela, Yemen, and Zimbabwe.
- The United States voted against.
- The sessions were held on 11–15 February, 12–16 May, and 28 July–8 August 2008.
- There were 133 votes in favour, 17 abstentions, and no votes against.
- Iran, North Korea, and Syria voted against.
- After the official vote, the delegations of Angola (which had abstained) and Cape Verde (which had not voted) informed the UN Secretariat that they had intended to vote in favour of the resolution (UNGA, 2013b, p. 13). Accordingly, 156 states voted in favour of the resolution, 3 voted against it, and 22 abstained from voting.
- The US statement on the ATT stressed that 'this is not an arms control treaty, not a disarmament treaty—it is a trade treaty regulating a legitimate activity' (US, 2013, p. 2).
- Canada noted: 'On the issue of treaty implementation, States Parties should take the necessary legislative and administrative measures to implement the treaty, but there must be national discretion on how such measures are put in place. There is no "one-size-fits-all" model' (Canada, 2011, p. 3).
- Expert meetings were held in 1992, 1994, 1997, 2000, 2003, 2006, 2009, and 2013. The reports of the various expert meetings on the UN Register, including amendments to the descriptions of the seven categories of conventional arms, are available at UNODA (n.d.b).
- The current descriptions adopted by the UN Register are available at UNODA (n.d.c).
- The Firearms Protocol includes a definition of 'firearm', which covers all small arms but only applies to a narrow range of light weapons; see McDonald (2005, p. 126).
- The term 'munitions' was added to the term 'ammunition' to ensure that the ATT covers bombs and shells. Furthermore, there is no word for 'ammunition' in Spanish, making negotiations using the English term difficult. The exact scope of the phrase is unclear, but given the requirement that ammunition/munitions be 'fired, launched or delivered' by the conventional arms the ATT covers (UNGA, 2013a, art. 3), items such as hand grenades and landmines appear to be excluded.
- Yet the International Tracing Instrument does give the following as examples of elements of a small arm that constitute 'parts': 'the barrel and/or slide or cylinder of the weapon' (UNGA, 2005, para. III.10). In addition, the international Ammunition Technical Guidelines includes definitions for ammunition, munitions, missiles, and other terms (UNODA, 2011).

- 18 The list is available at WA (n.d.).
- 19 See also Doermann (2013) and Casey-Maslen (2013).
- 20 During the negotiations, states disagreed over whether the commentary to Article 16 was authoritative, especially since it deviates from the actual text of the article. Eventually, the negotiators elected not to align the ATT with Article 16 (author correspondence with a participant in the ATT negotiations, December 2013).
- 21 This refers to armed conflicts in which one or more non-state armed groups are involved, in contrast to 'international armed conflicts', in which the opposing sides are states. See ICRC (2008) for more details.
- 22 For more details on Article 6(3), see Casey-Maslen, Giacca, and Vestner (2013, p. 25) and Clapham (2013, p. 2).
- 23 The ATT provision makes reference only to 'international conventions or protocols' and thus implicitly excludes regional instruments. A listing of the 16 major international legal instruments and additional amendments dealing with terrorism can be found on the Security Council Counter-Terrorism Committee website at CTC (n.d.).
- 24 The eight instruments are: (1) Wassenaar BPG: the Wassenaar Best Practice Guidelines for Exports of Small Arms and Light Weapons (SALW), adopted 2002, amended 2007 (WA, 2002); (2) Wassenaar Elements: the Wassenaar Elements for Objective Analysis and Advice Concerning Potentially Destabilising Accumulations of Conventional Weapons, adopted 1998, amended 2004 (WA, 1998); (3) Central African Convention: the Central African Convention for the Control of Small Arms and Light Weapons, Their Ammunition and All Parts and Components That Can Be Used for Their Manufacture, Repair and Assembly, 2010, not yet in force (ECCAS, 2010); (4) ECOWAS Convention: the Economic Community of West African States' Convention on Small Arms and Light Weapons, Their Ammunition and Other Related Materials, 2006, in force 2009 (ECOWAS, 2006); (5) EU Common Position: the European Union's Common Position of 2008 (EU, 2008); (6) OSCE Document: the Organization for Security and Co-operation in Europe (OSCE) Document on Small Arms and Light Weapons, adopted 2000, reissued 2012 (OSCE, 2000); (7) OSCE Principles: the OSCE Principles Governing Conventional Arms Transfers, 1993 (OSCE, 1993); and (8) SICA Code of Conduct: the Code of Conduct of Central American States on the Transfer of Arms, Ammunition, Explosives and Other Related Materiel, 2005 (SICA, 2006).
- 25 However, the EU Common Position makes reference to 'major' violations in providing that member states should deny transfers if there is a clear risk they may be used for 'internal repression', defined to include torture and other cruel, inhuman, and degrading treatment or punishment, summary or arbitrary executions, disappearances, arbitrary detentions, and 'other *major* violations of human rights and fundamental freedoms' as set out in relevant instruments (EU, 2008, art. 2, criterion 2, emphasis added).
- 26 For example, the OSCE Document and the Wassenaar BPG call on states to 'avoid' transfers where there is a 'clear risk' that the arms 'might' support or encourage terrorism (OSCE, 2000, para. III(A)(2)(b)(ix); WA, 2002, para. 2(a)).
- 27 For example, the Holy See argued that 'the reference to gender-based violence was ambiguous and that it could not accept this inclusion' in the relevant article (Nielsen, 2012, p. 4).
- 28 Liechtenstein was among those states (UNDPI, 2013a).
- 29 See Clapham (2013, p. 4).
- 30 Article 5(5) stipulates that states parties must have an effective and transparent national control system 'regulating the transfer of conventional arms covered under Article 2(1) and of items covered under Article 3 and Article 4'. The use of the term 'transfer', combined with the references to Articles 3 and 4, implies that states parties have an obligation to regulate the *transfer* (that is, the export, import, transit, transshipment, and brokering) of ammunition/munitions and parts and components. This contradicts the text of Articles 3 and 4, which requires only that states parties regulate the *export* of these items.
- 31 The two international instruments are the Firearms Protocol and the PoA.
- 32 The regional instruments are the Andean Plan (2003); the ECOWAS Convention (ECOWAS, 2006); the Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials (OAS, 1997); the Nairobi Protocol (2004); the OSCE Document (2000); and the Protocol on the Control of Firearms, Ammunition and Other Related Materials in the Southern African Development Community Region (SADC, 2001).
- 33 ECCAS (2010, ch. II, art. 6); ECOWAS (2006, art. 4(2)); Nairobi Protocol (2004, art. 10(a)); OAS (1997, art. IX(1)); OSCE (2000, para. III(B)(2)); UNGA (2001a, art. 10(1)).
- 34 Nairobi Protocol (2004, art. 10(d)); OAS (1997, art. IX(4)); OSCE (2000, para. III(B)(4)); UNGA (2001a, art. 10(4)).
- 35 Nevertheless, the reference to the keeping of records of conventional arms that are 'authorized to transit or trans-ship territory' in Article 12(2) suggests that a system of authorization would be an appropriate measure to regulate transit and transshipment.
- 36 The Convention on the Law of the Sea stipulates that 'ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea' (UNCLOS, 1982, art. 17).
- 37 A list of member states is available at OTIF (n.d.).
- 38 A list of states parties is available at UN (n.d.).

- 39 Attempts to control brokers and brokering activities outside states' territories are important since such activities are often conducted in a country other than the broker's country of nationality, residence, or registration. In addition, the arms in question do not necessarily pass through the territory of the country where the brokering activity is conducted.
- 40 For example, a GGE to consider further steps to enhance international cooperation in preventing, combating, and eradicating illicit brokering in small arms and light weapons was established under General Assembly Resolution 60/81 in 2005 (UNGA, 2005b). The GGE met in 2007 and produced a report that included recommendations on the regulation of brokers at the national level (UNGA, 2007, p. 18).
- 41 Article 5(2) requires states parties to establish a national control system but does not specify that this should include laws and regulations.
- 42 In a statement, the Caribbean Community noted that 'international cooperation and assistance is another vital area for CARICOM, provisions for which must find its way into the treaty' (CARICOM, 2012, p. 4).
- 43 The Pacific Islands Forum stressed that 'effective national implementation of the ATT will be contingent on the availability of technical assistance [. . .]. It is important that the ATT provide a comprehensive framework for international cooperation and assistance' (PIF, 2012, p. 4).
- 44 The date for submission of ATT reports on imports and exports—31 May—coincides with the date by which states are requested to provide information to the UN Register each year.
- 45 Throughout the ATT process, states stressed that reporting should not be overly burdensome and noted that 'reporting fatigue from too frequent, detailed and technical reporting should be avoided' (Kytömäki, 2012, pp. 78–79).
- 46 This reference is echoed in Article 1 of the ATT.
- 47 Several states tried to exclude civilian small arms from the ATT. For example, Italy argued that the treaty should not apply to sports shooting or hunting weapons (Italy, 2012, p. 3).
- 48 As the ATT depositary, the UN Secretary-General's offices will be responsible for keeping custody of the treaty and receiving notice of any amendments.
- 49 A state that has signed the ATT has an obligation to refrain, in good faith, from acts that would defeat the object and purpose of the treaty, but it is not legally bound by the treaty until it enters into force for that state. In ratifying a treaty, a state expresses its consent to be bound by the treaty (VCLT, 1969, art. 14(1)). Alternatively, it can express its consent by acceptance or approval, equivalent processes that are subject to similar conditions (art. 14(2)).
- 50 Accession is the equivalent of ratification, except that it takes place after a treaty has entered into force.
- 51 Author's observation derived from statements and interventions made by UN member states during UN and regional follow-up meetings in 2013 after the adoption of the ATT.
- 52 These states include Japan and the United States.
- 53 The UK has also pledged support to UNSCAR.
- 54 The Conference on Disarmament was established in 1979 as the single multilateral disarmament negotiating forum of the international community. It is based in Geneva and currently has 65 members.
- 55 The Mine Ban Treaty was negotiated through the Canadian-led 'Ottawa Process' and the Convention on Cluster Munitions was negotiated through the Norwegian-led 'Oslo Process'.

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