



Supporting the arms trade treaty negotiations: Options for discussions

Seminar report
Geneva, 28 February–1 March 2013

Summary

This report summarizes the main points discussed at the seminar ‘Supporting the ATT negotiations’, organized by the EU Non-proliferation Consortium. The seminar sought to provide concrete and specific text proposals for moving towards consensus on particular elements of the draft arms trade treaty (ATT) (A/CONF.217/CRP.1). In the main, the seminar concluded that the draft ATT serves as a good basis for the March 2013 final conference and that efforts should focus on fixing the main outstanding concerns in the text but avoid opening every article and paragraph. Based on the seminar, the main issues for further work are likely to be:

- **Scope of items:** in particular considering how to address ammunition, parts and components and control list;
- **Prohibited transfers and national assessment criteria:** ensuring articles 3 and 4 are clear with regards to the obligations of states parties, and also ensuring that the ATT does not provide for loopholes with regards to their application (e.g. Articles 5.2 and 23);
- **Activities to be controlled:** consideration of gifts, loans and leases, as well as consideration of responsibilities and information sharing with export, import, transit and trans-shipment and brokering;
- **Reporting:** Take into consideration the reporting burden and ensure a balance between considerations for commercial confidentiality and national security concerns and access for public monitoring and scrutiny;

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- **Final provisions:** potential loopholes in the article on reservations; making the process for amendments more equitable; considering the inclusion of a RIO clause.

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The EU Non-Proliferation Consortium

In July 2010 the Council of the European Union decided to create a network bringing together foreign policy institutions and research centres from across the EU to encourage political and security-related dialogue and the long-term discussion of measures to combat the proliferation of weapons of mass destruction (WMD) and their delivery systems.

The EU Non-Proliferation Consortium is managed jointly by four institutes entrusted with the project:

- Fondation pour la recherche stratégique (FRS), Paris,
- Peace Research Institute in Frankfurt (PRIF)
- International Institute for Strategic Studies (IISS), London
- Stockholm International Peace Research Institute (SIPRI)

in close cooperation with the representative of the High Representative of the Union for Foreign Affairs and Security Policy.

The main aim of the network of independent non-proliferation think tanks is to encourage discussion of measures to combat the proliferation of WMD and their delivery systems within civil society, particularly among experts, researchers and academics. The scope of activities also covers issues related to conventional weapons.

<http://www.nonproliferation.eu>

Preamble and principles

Participants seemed ready to consider adopting the Preamble of the draft ATT. However, a proposal was put forward to amend the subsequent paragraph as follows:

‘Recognizing also the challenges faced by victims of armed conflict *and armed violence*, and their need for adequate care, rehabilitation and social and economic inclusion.’

Participants also seemed ready to consider adopting the Principles of the draft ATT, but also discussed the following options:

- Delete all Principles that simply repeat those contained in the UN Charter;
- Change the chapeau of Principles to read:

‘*Reaffirm* the Purposes and Principles of the Charter of the United Nations, States Parties, in promoting the object and purpose of this Treaty and implementing its provisions, *will* act in accordance with the following principles’

Article 1. Goals and objectives

There was general acceptance of Article 1 on ‘goals and objectives’. There was a suggestion to change the title of the article to ‘object and purpose’, in line with the chapeau of Principles.

Article 2. Scope

Scope was one of the main outstanding points of contention during the seminar, with much focus upon the issue of ammunition. Among suggestions for solutions were the following:

- Include ammunition and parts and components in Article 2 as categories (i) and (j);
- Strengthening articles 6.4 and 6.5 referring to ammunition and parts and components, ensuring that at least the entirety of articles 3 and 4 of the ATT apply to these categories of items.

The issue of definitions also arose in the seminar on the following points:

- In the chapeau of the article, reference should be made to ‘all conventional arms’, and national laws and control lists will define the categories of conventional arms to be controlled
- If the current 8 categories are used to define the scope of conventional arms for the ATT, the titles for the categories should be changed from the UN Register category titles to the broader categories used in the draft ATT of 24 July 2012
- There are different translations and understanding of the terms *ammunition* and *munitions* that will need to be resolved; there was also a call for items such as hand grenades, which are not linked to a weapons system, to be included in the scope of the ATT
- It will be a challenge to distinguish between parts and components that have only military applications and are strategically important, and those dual-use parts and components that also have civilian and commercial applications

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- Does ‘transfer’ include gifts, loans and leases?

Several questions were raised regarding Article 2.2, including whether national control lists should be made public, or at the very least exchanged between states parties and explicitly mentioned in Article 10.4. To facilitate implementation, it was suggested that model control lists and examples could be developed and circulated among the states parties.

Article 3. Prohibited transfers

Although Article 3 primarily refers to existing international law and commitments, it is regarded as one of the most important articles of the ATT. There was some discussion of expanding the coverage of Article 3.2 to cover customary international law and not only the ‘international agreements to which it is a Party’. However, the discussion focused mainly on two aspects of Article 3.3:

- Replacing the wording ‘for the purpose of facilitating’—which refers to intent—with knowledge-based wording such as that offered by Switzerland such as
 - ‘where a transfer would aid or assist in committing’, or similar phrasing
 - ‘if a state knows that a transfer would or might contribute’
 - ‘if transfer would facilitate the commission of’
- Replace the narrow wording of ‘war crimes constituting grave breaches of the Geneva Conventions’ for the term ‘war crimes’.

Article 4. National assessment

Article 4 is the heart of the ATT for many countries because it provides the necessary guidance on the risk-assessment process for deciding whether or not to authorize an arms export. It is connected with Article 3 but is generally felt to contain risks where there is less certainty than for Article 3. However, there was some discussion as to whether ‘terrorism’ should be moved from Article 4.2 and become a fourth paragraph of Article 3. Much discussion also focused on how to strengthen the risk assessment and measures to be taken to avoid some of the elements contained in Article 4.6, in particular diversion. Options for addressing this issue included:

- Moving items such as diversion, gender-based violence and transnational organized crime from Article 4.6 into Article 4.2. Some suggested referring to ‘armed violence, including gender-based violence’ and ‘organized crime’ rather than ‘transnational organized crime (TOC)’, as there is no definition of TOC in UNTOC.
- Strengthening Article 4.6 as the three-tier approach of Article 3, Article 4.2 and Article 4.6 did not create a hierarchy of negative consequences of arms exports but rather a hierarchy of certainty and existing international understandings of the issues. This would involve requiring states to undertake a risk assessment taking these issues into account, before taking feasible measures to prevent these risks occurring. The current phrasing is weak if these risks are regarded as important.
- Diversion is mentioned throughout the ATT, from the goals and objectives through articles on national assessment, activities and international cooperation.

Creating an article that brings together all of the various obligations with regards to preventing diversion was discussed, although it was felt that at least there could be better consistency with regards to obligations.

- There were also questions about definitions and understandings of *development* and *corruption* in Article 4.6, with particular concerns from an importer perspective on these issues. There were suggestions that corruption be included in the diversion criteria or in Article 5 on general implementation as an obligation to apply existing international commitments on anti-corruption measures to the arms trade too.

Participants also suggested that Article 4.1 could be strengthened and perhaps the phrasing from Article 1(c) should be used: ‘contribute to international and regional peace, security and stability’.

There were also discussions on the use of the term ‘overriding risk’ in Article 4.5 and whether it referred to the assessment to be carried out in Article 4.1 or was used in place of ‘substantial’ or ‘overwhelming’. In addition, challenges for a clear translation into UN language led to a strong proposal for alternative wording to be sought.

Article 5. General implementation

The main discussion with regards to Article 5 related to concerns with Article 5.2 and in particular the first sentence of this paragraph. Several states raised concerns that this sentence would permit abrogation of Articles 3 and 4 due to other instruments, as well as questions regarding the consistency of the ATT and the relationship of Article 5.2 with Article 24. There was some discussion on whether the removal of Article 6.3 would make this sentence unnecessary. Regarding the second sentence of Article 5.2 it was stated that many states would not cite the ATT as a reason for denial but would refer instead to provisions contained in national legislation.

Article 5 was also regarded as the most appropriate article for an anti-circumvention clause in the ATT to prevent the delivery of kits or equipment for items falling within the scope of the items or activities as outlined in Article 2.

Articles 6–9. Export, import, brokering, transit and trans-shipment

A general point was made with regards to the articles dealing with activities that there are too many uses of ‘may’ in this part of the treaty and a lack of clarity on obligations for activities other than export. There was discussion on whether the concept of control should apply to all activities but distinguish between obligations for action and those for collecting information.

Article 6.3 currently states that if a state party becomes aware of new information relevant to paragraphs 1–5 of Article 4, it ‘may suspend or revoke’ the authorization to export. It was suggested that this should become an obligation and a state party ‘shall suspend or revoke’. Alternatively, this paragraph should be deleted.

While the flexibility contained in Article 7 is important for allowing for differences in national systems for controlling imports, this seems an appropriate place to make an explicit obligation for end-user/end-use documentation to be provided to relevant authorities in the exporting state.

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Participants called for Article 8 on transit and trans-shipment to be made consistent with international law with regards to UN law of the sea and free passage. There was also a suggestion for separate paragraphs to outline different obligations for dealing with transit by land, sea and air, based on existing experience.

There was also a proposal for the registration of brokers to be made compulsory in Article 9.

Article 10. Record-keeping and reporting

Overall there was a call for greater clarity with regards to the obligations contained in Article 10 on record-keeping and reporting, although there were no explicit calls for the two issues to be dealt with in separate articles despite the fact that record-keeping deals with a national implementation measure and reporting as a form of international cooperation and confidence-building.

Participants called for greater clarity in Article 10.1 on whether there is an obligation for records be kept on authorizations and/or actual transfers, and for which activities. It is possible that the use of the term ‘actual transfers’ as opposed to ‘deliveries’ also caused confusion as it is used in this context in a different manner to the one outlined in Article 2.3.

Several participants questioned the list of types of information to be retained as outlined in Article 10.2, as well as the length of time that states parties shall retain records. It was noted that weapons systems have a long life, but also that there is nothing in Article 10.2 that would prevent state parties from keeping records for longer than a minimum of 10 years.

There was a suggestion to change language in Article 10.4 from ‘any new activities’ to ‘major’ or ‘significant’ changes only, as a means to limit the reporting burden. It was also suggested that such reporting could accompany the annual report as outlined in Article 10.5.

There was some discussion surrounding Article 10.5 and making annual reports public. In this regard it was noted that commercial confidentiality concerns could be overcome by aggregated reporting. However, the current reference to ‘national security’ concerns might create a loophole for exploitation and could be replaced with reference to specific cases in which secrecy would be permitted such as when relating to ‘particularly sensitive military information, such as battlefield sustainability, when engaged in armed conflict’. Many participants noted that if the current language for excluding commercial confidentiality and ‘sensitive military information’ is retained, then it should be possible to include a reference to making the reports available for the public. It was argued that this would be important for civil society to assess the impact of the ATT.

Article 11. Enforcement

A proposal was also put forward to change Article 11 on Enforcement into a paragraph of Article 5 on National Implementation because Article 11 is currently framed as a national implementation measure. Some participants suggested that Article 5 could then be renamed ‘National implementation’ or ‘National enforcement’. Others noted that the objective of articles 5 and 11 were different in nature and should be maintained as separate. While Article 5 refers to measures that states parties should put in place to implement the treaty, Article 11 refers to actions that states parties should foresee to ensure that measures foreseen under Article 5 are applied and respected by individuals under their jurisdictions.

With regards to developing Article 11 on Enforcement, there was also discussion as to whether enforcement should also include a reference to penalties and sanctions and also if mutual legal assistance should be explicitly included here. Some proposed including mutual legal assistance as one channel for international cooperation. Also, to add clarity to the text, it was suggested that the article should specify that enforcement is limited to national territory and/or a State's own citizens. Here there was a difference of opinion over whether it was necessary to provide detailed examples of enforcement measures or keep this brief.

Article 12. Secretariat

In general it was considered that the experience of other international instruments suggests that a lean, efficient and independent secretariat will be required. It was also stated that the secretariat should not be part of the UN Office of Disarmament Affairs and should be responsible only to states parties.

Details concerning the size, location and funding for the secretariat were not regarded as necessary for inclusion in the article on the secretariat.

There was also some discussion on the duties to be performed by the secretariat and to what extent these should be listed in Article 12. Coordination and cooperation with other secretariats and relevant organizations should be ensured. If tasks are listed, paragraph 12.3(e) should allow the secretariat to also perform duties mandated by the meetings of states parties.

Article 13. International cooperation

It was suggested that Articles 13 and 14 could currently be regarded as alternatives, but many liked the division. In particular the division between 'shall' wording in Article 13 fitted. There was a particularly strong call for clear obligations on information sharing to combat diversion, for instance by referring to information exchange between exporters and importers with states that are transit or trans-shipment points for arms shipments.

Participants also asked whether cooperation with other relevant international instruments should be specifically mentioned. This article was considered as one of the possible places for including a reference to mutual legal assistance.

Article 14. International assistance

There was general agreement that Article 14 was an important article and that assistance should remain voluntary. The voluntary trust fund is also a useful tool.

However, it is important that assistance is provided to states before they ratify the ATT, to ensure that they have systems for controlling international arms transfers before ratifying the treaty. Therefore, states in a position to do so were encouraged to make assistance available for states seeking to establish or upgrade systems to fulfill ATT obligations. Australia and Germany are supporting a fund for the PoA and ATT, but states can also provide funding via other mechanisms.

Article 16. Entry into force

There was some discussion on lowering the number of ratifications for entry into force (EIF) from the current level of 65. However, many participants accepted this number and no one called for raising the number or adopting the Comprehensive Nuclear-Test-Ban Treaty (CTBT) approach that would require ratifications by ‘major exporters or importers’. On this latter point, the difficulties of defining these states and the fact that the ranking changes over time make such an approach unfeasible.

Many participants also call for a regional integration organization (RIO) clause to be included in Article 16. Supporters of this proposal stressed that regional organizations can have an important role in ensuring implementation of the ATT and other aspects of the treaty. It was also noted that the RIO clause is a well-established practice in international treaties (e.g. Firearms Protocol).

Article 19. Reservations

The ATT’s Articles are not all of mutual importance with regard to meaningful implementation and therefore Article 19 should make explicit reference to those articles for which reservations will not be acceptable (e.g. articles 2, 3 and 4).

Article 20. Amendments

Participants agreed that Article 20 on amendments needed amending. In particular it was agreed that amendments to the ATT should only apply to states parties that ratify them.

Participants expressed a preference for amendments to be agreed by a two-thirds majority rather than by consensus. However, a compromise option was proposed under which there would be a set period where all amendments after EIF would have to be agreed by consensus. After the initial set period expires, there would be a shift to two-thirds majority voting. This measure would be put in place to ensure that states that do not immediately ratify the ATT are not joining a very different treaty than they expected.

Article 22. Dispute settlement

Article 22 should not be among the last issues to be decided in March, as it was clear that a number of states have concerns and questions regarding the scope of application for dispute settlement. In particular, several states stressed that it should not be used to openly discuss denials.

At present it is unclear because it uses three different terms: *interpretation*, *application* and *implementation*. Some feel that the text in Article 22 should be clarified by referring only to application; others question this wording and prefer implementation.

Article 22.2 should not be worded in a way that would imply that a solution to dispute settlement is required—‘shall settle any dispute’—but the text should rather say something like ‘States Parties shall try to reach an agreement on any dispute between them’.

Article 23. Relations with non-states parties

Article 23 as currently phrased was regarded as a problem for many participants. Proposed solutions included:

- Delete Article 23
- Reword Article 23 to make it clear that:
 - All relevant aspects of the Treaty apply also to relations with non-states parties (e.g. scope, reporting on authorizations, etc.) and not only articles 3 and 4;
 - States parties have to apply articles 3 and 4 (and other relevant aspects of the treaty) also in relation to exports to other states parties, and not only in relation to non-states parties.