

# Arms Trade Treaty

The Arms Trade Treaty (ATT) is an international treaty that regulates international trade in conventional arms by establishing the highest international standards governing arms transfers and seeks to prevent and eradicate their illicit trade and diversion.<sup>1</sup> The Treaty requires states parties to set-up a national control system and take regulatory measures to control the export, import, transit, transshipment and brokering of, as a minimum, eight categories of major conventional arms, as well as to provide transparency about their imports and exports. To support effective implementation of these requirements, the ATT foresees international cooperation and assistance, mandates the Conference of States Parties (CSP) to review implementation on a continuous basis, including the consideration of recommendations and interpretation issues, and establishes a Secretariat to assist states parties in their implementation efforts. This chapter describes the basics of the Treaty and explains its scope and substantive requirements, as well as the measures states parties need to or can take to implement those requirements, with a focus on export controls.

## Background

The ATT was adopted by the United Nations General Assembly on 2 April 2013, following a process that was initiated at the UN level in 2006, eleven years after a group of Nobel Peace Laureates first called for such an initiative and presented their own International Code of Conduct on Arms Transfers. The adoption of the ATT by the United Nations General Assembly followed two diplomatic conferences where no consensus could be reached about a draft text that nonetheless enjoyed an overwhelming level of support. The Treaty opened for signature on 3 June 2013 and entered into force on 24 December 2014. At the time of writing, 113 states have become states parties to the Treaty and 28 states have signed the Treaty but not yet ratified it.<sup>2</sup>

Despite the fact that the ATT regulates international trade, the Treaty was not discussed within the WTO but under the auspices of the First Committee of the United Nations General Assembly, which deals with disarmament and international security. The potential application of the General Agreement on Tariffs and Trade (GATT) was also not under debate in the negotiations and the Treaty, including its preamble, does not include any reference to GATT or other general trade agreements. While the Treaty recognizes the legitimate political, security, economic and commercial interests of states in the international arms trade and respects their legitimate interests to acquire conventional arms to exercise their right to self-defence and for peacekeeping operations, and to produce, export, import and transfer conventional arms, the Treaty also clarifies in Article 1 that its purpose is humanitarian in nature, not to facilitate or deregulate trade in these products:<sup>3</sup>

“The object of this Treaty is to:

- Establish the highest possible common international standards for regulating or improving the regulation of the international trade in conventional arms;
- Prevent and eradicate the illicit trade in conventional arms and prevent their diversion;

for the purpose of:

- Contributing to international and regional peace, security and stability;
- Reducing human suffering;
- Promoting cooperation, transparency and responsible action by States Parties in the international trade in conventional arms, thereby building confidence among States Parties.”

The ATT framework consists of two important structures: the CSP and the ATT Secretariat. The working of the two structures is funded through mandatory assessed contributions by states parties (and other states participating in CSP meetings). Their basic tasks are defined in Articles 17 and 18 of the Treaty.

The CSP is the decision-making body in the ATT framework. Substantively, the CSP is mandated to review the implementation of the Treaty and to consider: (i) recommendations regarding the implementation and operation of the Treaty; (ii) amendments to the Treaty; and (iii) issues arising from the interpretation of the Treaty. For that purpose, the CSP has established a number of subsidiary bodies. Most importantly are the standing working groups. Currently, these are the Working Group on Effective Treaty Implementation (WGETI), the Working Group on Transparency and Reporting (WGTR) and the Working Group on Treaty Universalization (WGTU).

The WGETI is the most important body with respect to the practice of transfer controls. It acts as a forum for states parties to exchange information and challenges on the practical implementation of the Treaty at the national level, and to address specific issues set by CSP as priorities to take Treaty implementation forward. It has delivered a substantial body of voluntary guidance on Treaty implementation.<sup>4</sup>

Complementary to the working groups is the Diversion Information Exchange Forum. This is a subsidiary body for informal voluntary exchanges between states parties and signatory states concerning concrete cases of detected or suspected diversion and for sharing concrete, operational diversion-related information.

The ATT Secretariat manages the reporting process under the Treaty, maintains a database of national points of contact and facilitates the matching of offers of and requests for assistance for Treaty implementation. It facilitates the work of the CSP and performs other duties as decided by the CSP, including supporting the work of the President of Conference and the subsidiary bodies during the preparatory phase leading up to each CSP. In addition, the ATT Secretariat also administers the Voluntary Trust Fund and a sponsorship programme to facilitate the participation of state representatives in ATT meetings.

## Overview of Treaty requirements

The Treaty regulates the international trade in conventional arms. In terms of activities, “international trade” applies to the following types, which are commonly referred to as “transfer”: export, import, transit, transshipment and brokering. The Treaty does not define these activities. Its scope excludes the international movement of conventional arms by, or on behalf of, a state party for its use provided that the conventional arms remain under that state party’s ownership. The Treaty does not regulate and control conventional arms exclusively within the territory of states parties; it therefore does not apply to, for example, the domestic production and possession of firearms.

In terms of goods, the minimum scope of conventional arms that states parties need to subject to control concerns the following categories:

- (a) battle tanks;
- (b) armoured combat vehicles;
- (c) large calibre artillery systems;
- (d) combat aircraft;
- (e) attack helicopters;
- (f) warships;
- (g) missiles and missile launchers;
- (h) small arms and light weapons.

States parties can apply national definitions of those categories, but these cannot cover less than the descriptions used in the United Nations Register of Conventional Arms at the time of entry into force of the Treaty for categories (a)-(g) and the descriptions used in relevant UN instruments at the time of entry into force of the Treaty for category (h).<sup>5</sup>

States parties are also encouraged to apply the provisions of the Treaty to the broadest range of conventional arms. In that respect, reference is often made to the *Munitions List* of the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, which contains 22 main entries on items designed for military use.<sup>6</sup> The main obligations of the Treaty also apply to ammunition/munitions fired, launched or delivered by the listed categories of conventional arms, as well as their parts and components delivered in a form that provides the capability to assemble the arms in question. The range of arms and other items that a state party subjects to control – which can vary according to the type of transfer beyond the minimum scope – needs to be included in a national control list. This list then needs to be provided to the ATT Secretariat, which will make it available to other states parties. States parties are also encouraged to make the list publicly available.

### ***National control system – Article 5(2)***

The overarching obligation for each state party is to establish and maintain a national control system, including a national control list, in order to implement the provisions of the Treaty. In concrete terms, such a control system needs to contain legislation, regulations, administrative procedures, enforcement arrangements and institutions that enable a state to apply the substantive obligations of the Treaty in practice and to effectively control the import, export, transit, transshipment and brokering of conventional arms and their ammunition/munitions, parts and components.

### ***Transfer control requirements – Articles 6 to 11***

Article 6 of the Treaty concerns prohibited transfers of the aforementioned categories of conventional arms, ammunition/munitions and parts and components.<sup>7</sup> States parties need to prevent the respective types of transfer in a number of circumstances. These prohibitions make the link between states' broader international obligations and arms transfers explicit. States parties are required to prevent import, export, transit, transshipment and brokering when:

- (1) it would violate measures adopted by the United Nations Security Council under Chapter VII of the Charter of the United Nations, in particular arms embargoes;
- (2) it would violate relevant international obligations under the state's international agreements, in particular those relating to the transfer of, or illicit trafficking in, conventional arms;
- (3) 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 the state is a party.

Subsequently, the Treaty provides additional obligations per type of transfer, which require varying degrees of control. Other important Treaty obligations concern export of the aforementioned arms and items. Beyond the circumstances in which all transfers, including export, are prohibited, states parties are required to subject all exports to authorization to allow an assessment against a number of criteria. If states parties assess that there is an overriding risk of any of the negative consequences in these criteria, even after having considered possible mitigating measures, they are required to deny authorization of the export. Like the prohibitions in Article 6, the assessment criteria in Article 7 are steeped in international law. States parties are required to assess the potential that the conventional arms or items:

- (a) would contribute to or undermine peace and security;
- (b) could be used to:
  - (i) commit or facilitate a serious violation of international humanitarian law;
  - (ii) commit or facilitate a serious violation of international human rights law;
  - (iii) commit or facilitate an act constituting an offence under international conventions or protocols relating to terrorism to which the exporting state is a party;
  - (iv) commit or facilitate an act constituting an offence under international conventions or protocols relating to transnational organized crime to which the exporting state is a party.

In their assessment, states parties also need to take into account the risk of the items being used to commit or facilitate serious acts of gender-based violence or serious acts of violence against women and children.

Concerning import, transit and transshipment, as well as brokering, the additional obligations are less specific. The focus therefore is on preventing the circumstances included in Article 6 and preventing diversion. The specific provisions on these types of transfer generally require states parties to take measures to regulate these types of transfer, albeit only "where necessary and feasible", or "pursuant to its national laws". While these provisions only refer to the eight categories of conventional arms in Article 2(1), states parties need to take into account that they still need apply the prohibitions in Article 6 to import, transit and transshipment, and brokering of the aforementioned other items as well.

A crucial requirement across-the-board of all types of transfer concerns the obligation to take measures to prevent diversion. This obligation applies to all states parties involved in arms transfers because diversion can occur in all stages of the transfer chain, from the point of embarkation to the point of storage and use. States parties need to take this into account when developing their national control system. Article 11 also specifically requires importing, transit, transshipment and exporting states parties to cooperate and exchange information to mitigate the risk of diversion. An exporting state party in particular is required to conduct a diversion risk assessment and consider establishing mitigation and preventive measures.

### ***Additional requirements: record-keeping and reporting – Articles 12 and 13***

Next to the obligation to provide control measures, states parties also are required to keep records on authorized or actual exports – with an encouragement to do the same for import, transit and transshipment – and to report annually to the ATT Secretariat on authorized or actual exports and imports in the preceding year. Both obligations apply as a minimum to the eight categories of conventional arms in Article 2(1). In addition to the annual report, states parties also need to provide an initial report on their implementation measures, as well as updates, and are encouraged to report on effective diversion prevention measures. Especially the annual reporting requirement is a key obligation of the Treaty for the purpose of transparency, explicitly mentioned in Article 1, and accountability, as these reports reflect states parties' application of the Treaty in practice. In light thereof, these reports are made available to all other states parties, while most states parties also agree to their reports being made publicly available on the ATT website.<sup>8</sup> As a testament to the importance, of the annual reporting obligation a comprehensive guidance document was developed within the ATT framework to assist states parties in preparing their reports.<sup>9</sup>

## **Export-related measures**

As explained in the previous section, the Treaty requires states parties to subject exports to authorization and assessment and to set-up a national control system to comply with these requirements. The Treaty is mostly silent, however, on how to do this and which measures to take. This was deliberate in part, acknowledging that the involvement of states around the world in the international arms trade varies significantly. In that regard, the *Voluntary Basic Guide to Establishing a National Control System*, which was developed within the ATT framework, explains that the ATT does not specify a one-size-fits-all approach for the national control system and that each state party has a discretion depending on its size, resources, export profile and legislative as well as institutional/constitutional framework.<sup>10</sup> Many states are also a party to other international or regional instruments that provide similar regimes, which can require stricter or more expansive controls, or provide more explicit obligations and/or guidance regarding practical implementation. This does not mean that there are no common approaches among states parties and good practices. These practices do exist, and such practices have also been identified in the aforementioned body of guidance documents that have been developed within the ATT framework.

In that regard, the basic export control measure that states apply as part of their national control system is a regime of prior authorization, mostly laid down in national legislation, for all items included in its national (export) control list. This allows the state to apply the export assessment criteria, which may or may not be included in a legislative act. The basic framework is supplemented with regulations that set out a process and the information and documentation that needs to be supplied and administrative procedures for processing and deciding applications.

### *Export authorization regime*

The export authorization regime mostly involves a systematic licence (or permit) requirement for all exports, with states applying different types of licence that vary in degree of flexibility. Next to the traditional "individual" licence, which authorizes the export of a set quantity of arms to a specific recipient, states also apply more flexible licences, such as open and general licences. These generally allow exporters to export an undetermined quantity of arms to one or more recipients, certain types of recipient (e.g. armed forces) or for a specific purpose (e.g. a specific armament programme), either after authorization or a simple registration. This is often combined with post-export reporting requirements. States mostly use such licences for low-risk transfers, which states generally consider unproblematic in light of Articles 6, 7 and 11 of the Treaty, based on a relationship of trust (confidence) between the states involved. A good example of this is the licensing regime which EU member states are required to operate for transfers within the European Union itself.<sup>11</sup> A very specific licensing regime is also applied to import of small arms and light weapons by member states of the Economic Community of West African States (ECOWAS). The ECOWAS Convention on Small Arms and Light Weapons, their Ammunition and other related Materials provides a system of a general transfer ban and possible exemption requests that are processed via the ECOWAS Executive Secretariat, following consultations with all ECOWAS member states.

Next to requiring export authorizations, some states also reserve access to their export authorization regime – or to flexible licence types – to registered entities that have demonstrated their ability to comply with export regulations and exercise due diligence in their business relationships.

### *Authorities, processes and information*

The Treaty itself obliges states parties in Article 5(5) and 5(6) to designate competent national authorities in order to have an effective and transparent national control system, as well as each state party shall designate one or more national points of contact.<sup>12</sup> The Treaty also presupposes dedicated procedures to be put in place, to enable the exporting state to conduct the required risk assessment and prevent diversion. In that respect, states need to provide a clear application process, regulations and instructions to potential applicants, to ensure that it can apply measures such as those included in Articles 8(1) and 11(2): examining parties involved in the export, requiring end-use or end-user documentation, additional information and assurances. To this effect, the Treaty also focuses on cooperation

between the states parties involved in the transfer. Next to a general cooperation requirement in Article 14, Article 8(1) obliges importing states parties to take measures to ensure that appropriate and relevant information is provided to the exporting state party. Article 11(3) obliges all states involved in a transfer to exchange information to mitigate the risk of diversion. Extensive guidance on these aspects is included in the aforementioned *Voluntary Basic Guide to Establishing a National Control System* and the document with possible measures to prevent and address diversion.<sup>13</sup>

### **Export assessment**

The consistent, objective and non-discriminatory application of the prohibitions in Article 6 and the export assessment in Article 7, as well as the diversion risk assessment in Article 11, is the core element of the export authorization regime. States parties need to equip themselves to make prospective assessments of the future behaviour of the recipients of the arms to be exported, how they are likely to behave and how the arms to be transferred will likely be used, based on historic behaviour, present circumstances and reasonable expectations.<sup>14</sup>

As part of the export assessment, states also need to consider mitigating measures. The Treaty focuses on cooperation between the exporting and importing states. Both Articles 7(2) and 11(2) refer to confidence-building measures and jointly developed and agreed programmes as examples of mitigating measures.

For the purpose of this assessment, most states establish a process that involves a multitude of different government entities to inform decision-makers and use a wide range of information sources, both public and restricted, beyond the information provided by exporters and importing states. Because a comprehensive, consistent and well-informed assessment is so important, the implementation of the relevant provisions is extensively discussed in the ATT framework. While a specific voluntary guide to implementing Articles 6 and 7 is under development, lists of possible reference documents for the risk assessment under Articles 7 and 11 have already been developed, as well as elements of a process for the diversion risk assessment.<sup>15</sup>

### **Post-export control**

The Treaty does not explicitly require states parties to apply any form of control on exported arms after their delivery. In the post-export realm, the Treaty only encourages exporting states parties to reassess authorizations if they become aware of new relevant information after an authorization has been granted, after consultations with the importing state, if appropriate. Additionally, the abovementioned examples of mitigating measures to reduce the risk of misuse or diversion through cooperation between the exporting and importing state can also be understood to have post-export elements in it. In that respect, guidance on post-delivery controls is also included in the aforementioned document with possible measures to prevent and address diversion.<sup>16</sup>



## Enforcement

On enforcement, the Treaty itself, in Article 14, simply obliges states parties to take “appropriate measures” to enforce the requirements it has introduced into its national control system to regulate the different types of transfer. The Treaty does not prescribe their nature. Generally, states parties supplement proportionate and dissuasive sanctions with providing enforcement bodies with adequate powers to inspect and (temporarily) seize (suspicious) items and shipments, interagency cooperation arrangements and preventive measures such as outreach to those involved in arms transfers. The Treaty does oblige states, where possible, to assist one another in investigations, prosecutions and to share relevant information, for example regarding illicit activities and actors. Article 11, on diversion, also highlights the need for enforcement measures and cooperation, *inter alia* via the sharing of operational diversion-related information. The latter is also encouraged within the ATT framework, as the aforementioned Diversion Information Exchange Forum was established for this specific purpose, as a complement to bilateral exchanges.

## Other transfers of arms

In addition to the provisions discussed above, the ATT also deals with specific measures states parties (need to) adopt as part of their national control system to implement the import, transit and transshipment and brokering requirements – information on which is available on the ATT website. It should also be noted that most states involved in the international arms trade regulate are not arms producing and exporting states. In that respect, the WGETI has a specific sub-working group dealing with transit and transshipment, which is in the process of developing draft elements for a possible voluntary guide on the implementation of Article 9.<sup>17</sup>

## Recent developments

As explained in the Background, a comprehensive understanding of the substantive Treaty obligations and their effective implementation have been a priority within the ATT framework, next to transparency and universalization. This will continue, as the consideration of recommendations regarding the implementation of the Treaty and of issues arising from the interpretation of the Treaty are focus areas of the ATT framework. With the establishment of the Diversion Information Exchange Forum, the ATT framework has also created a platform for states parties (and signatory states) to engage in exchanges about concrete cases and operational information. While the Treaty does not include a formal review clause, it has been possible for states parties to propose amendments to the Treaty from the end of 2020. At the time of writing, no such proposals have been submitted. How all these aspects will develop is dependent on several factors, including the aspirations and commitments of states parties, the further universalization of the Treaty and geopolitical evolution.

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## Endnotes

- 1 The Treaty text, the ATT Universalization Toolkit and Welcome Pack for new states parties are available from the ATT website at <https://www.thearmstradetreaty.org>.
- 2 Information on participation in the ATT, including a regional overview, is available from <https://www.thearmstradetreaty.org/treaty-status.html?templateId=209883>.
- 3 For the discussions on this issue, see chapter 3 of Small Arms Survey (2014) and Clapham *et al.* (2016).
- 4 See <https://www.thearmstradetreaty.org/tools-and-guidelines.html>.
- 5 These descriptions have been reproduced in annexes 1 and 3 of the FAQ-style guidance document on the annual reporting obligation (*Reporting Authorized or Actual Exports and Imports of Conventional Arms under the ATT*, ATT document ATT/CSP8.WGTR/2022/CHAIR/734/Conf.Rep, 22 July 2022).
- 6 The Wassenaar Arrangement is an informal intergovernmental regime founded to promote greater responsibility in transfers of conventional arms and dual-use goods and technologies. Its participating states are required to control all items set forth in its *Munitions List*, updated annually, with the objective of preventing unauthorized transfers or re-transfers of those items. The *Munitions List* also forms the basis for the *Common Military List of the European Union*.
- 7 As well as the other arms and items which states parties have opted to include in their national control lists.
- 8 See <https://www.thearmstradetreaty.org/annual-reports.html>.
- 9 The FAQ-style guidance document on the annual reporting obligation (ATT document ATT/CSP8.WGTR/2022/CHAIR/734/Conf.Rep) was endorsed by the CSP in 2017 and updated in 2019 and 2021 (see <https://www.thearmstradetreaty.org/reporting.html>).
- 10 The *Voluntary Basic Guide* is available from <https://www.thearmstradetreaty.org/tools-and-guidelines.html>. It is noted that the *Guide* is not fully completed and that certain sections will be developed following discussions on these areas within the ATT framework.
- 11 See Directive 2009/43/EC of the European Parliament and of the Council of 6 May 2009 simplifying terms and conditions of transfers of defence-related products within the Community. The directive also allows EU member states to completely exempt certain transfers from the prior authorization requirement.
- 12 States parties can consult a database of national points of contact in a restricted area of the ATT website.
- 13 The Voluntary Basic Guide and the document with possible measures to prevent and address diversion is available from <https://www.thearmstradetreaty.org/tools-and-guidelines.html>.
- 14 In that respect, the components of Articles 6 and 7 can be applied jointly in one assessment, also because some elements refer to similar legal instruments, as long as states parties respect the different features of these respective obligations. If a state establishes that one of the prohibitions in Article 6 is applicable, it needs to simply stop the export; there is no question of taking into account certain other considerations or considering mitigating measures as there is when conducting the risk assessment under Article 7.
- 15 A draft chapter 1 (key concepts) of the proposed Voluntary Guide (Annex A) was completed in 2022 (see *ATT Working Group on Effective Treaty Implementation: Chair's Draft Report To CSP8*, ATT document ATT/CSP8.WGETI/2022/CHAIR/733/Conf.Rep, 22 July 2022). The lists of possible reference documents to be considered by states parties in conducting a risk assessment under Article 7 and to prevent and address diversion are available from <https://www.thearmstradetreaty.org/tools-and-guidelines.html>. A voluntary paper outlining the elements of a process for assessing the risk of diversion can be found in the annex to *ATT Working Group on Effective Treaty Implementation: Chair's Draft Report To CSP7*, ATT document ATT/CSP7.WGETI/2021/CHAIR/675/Conf.Rep, 22 July 2021.
- 16 In 2022, post-shipment controls and coordination was also specifically discussed in the ATT framework, *inter alia*, with a recommendation to share and learn from national experiences with post-export controls within the ATT framework (see: para. 21 of the *Final Report of the 8th CSP*, ATT document ATT/CSP8/2022/SEC/739/Conf.FinRep.Rev 2, 26 August 2022; *Working Paper Presented by the President of the Eight Conference of States Parties to the Arms Trade Treaty (ATT)*, ATT document ATT/CSP8/2022/PRES/732/Conf.PostShip, 22 July 2022).
- 17 These draft elements will be discussed (and supplemented) in 2023, during the 9<sup>th</sup> cycle of the CSP.