

Background Paper: Implementation

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Introduction

Once the principles, objectives, scope and parameters of an Arms Trade Treaty (ATT) are agreed, implementation of the Treaty will be critical to its effectiveness and utility. It is thus crucial that the structures and mechanisms established by the Treaty both facilitate implementation and ensure states can be held to account for any failure to meet their treaty commitment.

While much is still to be determined, there is wide agreement that the ATT will be implemented at the national level, with decisions on transfers made by individual States. There is little or no appetite for licensing or authorization decisions to be taken by a supranational body. Therefore all States will require a national system for the control of international transfers of conventional arms. Yet many States currently have relatively underdeveloped national arms transfer control systems and may find it difficult to immediately meet their ATT obligations. The links to international structures and mechanisms that support national implementation and enable and facilitate access to appropriate assistance will therefore be critical.

International mechanisms and structures will further support Treaty implementation if they also *inter alia* facilitate meaningful reporting, information-sharing and record-keeping, discussion regarding compliance issues, dispute resolution, and ongoing Treaty review and development.

The national and international levels are thus the two equally-critical sides of the ATT-implementation coin. This paper addresses each in turn.

National measures¹

The ATT will spell out the range of items and activities subject to its provisions, and the parameters/criteria to be followed in determining whether to authorize or refuse any prospective international transfer that falls within its remit. Because individual States will implement these provisions and make the decisions on individual transfers at the national level, an effective national system will have to provide for the following:

- a system of licensing/authorization—States should not make such decisions arbitrarily; they will need to establish a system of control that enables case-by-case decision-making on an informed, consistent, reasonable and defensible basis, in accordance with criteria/parameters outlined in the Treaty;
- rigorous enforcement— States must ensure that they are able to effectively enforce their national arms transfer controls in line with their obligations under

¹ This section draws extensively on Anne-Charlotte Merrell Wetterwik, Rachel Stohl, Roy Isbister and Elizabeth Kirkham, 'National implementation of the proposed Arms Trade Treaty: A practical guide', *Center for International Trade & Security, Oxfam GB and Saferworld*, July 2010, <http://www.saferworld.org.uk/smartweb/resources/view-resource/457>.

the Treaty. A system that is not enforced or indeed is unenforceable will soon be discredited and will be increasingly ignored;

- outreach/communication—information sharing both within the government as well as to external partners will assist in implementation of an existing system as well as in identifying where there are implementation challenges that require assistance.

It should be noted that although all national systems will need to address each of these elements, there is no 'one size fits all' solution. States should base their systems on the extent and nature of their arms trading, their system of government, technological infrastructure, capacity, and legal tradition. It would, for example, make no sense for a small state with very little involvement in arms transfers to adopt a system identical in every particular way to the world's largest conventional arms exporters. The Treaty will therefore have to be flexible enough to allow for different approaches while setting out clearly the underlying obligations that must be met. The ATT should be viewed as a floor, not a ceiling; the Treaty will set out minimum standards, but States will have the option of implementing additional or tighter controls at the national level.

Licensing/authorization

The range of equipment and the types of transfers and activities subject to control, and the range of criteria or parameters against which potential transfers are to be assessed, all of which will be established in the ATT, will have to be set out in national law.

The national system will need to establish the institutional arrangements for the administration and implementation of the licensing system, with functions, procedures and decision-making responsibilities clearly delineated among the relevant governmental agencies. Decisions about prospective transfers should be objectively informed, using reliable and credible sources. States will also be obliged to honor any provisions in the ATT with regard to procedural matters. These could relate to, for example, the issuance of and verification of end-use(r) certificates, or the application of post-transfer controls such as post-delivery verification or re-export restrictions.

Record-keeping will also need to be organized at the national level; with entities undertaking controlled activities legally obliged to make the necessary information available to the government. In addition, it will fall to national governments to make relevant information about the system (e.g. the laws, policies, control lists etc.) publicly available in a timely manner and accessible format. Detailed information about transfers approved or refused should also be published wherever possible.

Enforcement

National governments will be responsible for ensuring that offences established under the Treaty are offences in national criminal and civil law. Once again, States will need to establish which institutions are responsible for the different aspects of enforcement, and the procedures to be followed. Enforcement will need to be a consideration at all stages of the transfer process, including from licence application through physical screening at external borders to possible follow-up by diplomatic posts in the recipient State. Appropriate penalties and sanctions will need to be established in national law. Information-sharing and publicity with regard to enforcement needs to be balanced

against data-protection and privacy laws, possible commercial issues, and national-security issues, but it can be important in gathering meaningful intelligence, securing prosecutions and in deterring others from attempting to violate the law.

External communication

It is incumbent upon national authorities to ensure that entities operating within their jurisdiction that are engaged in activities subject to control (e.g. exporters) understand their obligations, both for the sake of fairness and to safeguard against inadvertent breaches of the national laws that are established under the Treaty. Information-sharing by national authorities may be required by the Treaty regarding national laws and procedures, transfers made or refused, problematic end-users or difficulties with implementation at the national level. As a general rule, such communication can be expected to improve the general quality of decision-making, demonstrate compliance with the Treaty, and facilitate provision of assistance in implementation where required.

International elements of implementation

The ATT, as a global treaty, will also need to establish international structures and mechanisms to provide for, at a minimum, peer-group review of and assistance with implementation. States currently with relatively rudimentary national systems may struggle initially to meet their newfound obligations. Thus, the long-term credibility of the Treaty and the prospects for effective arms transfer controls will be improved if the ATT contains mechanisms that enable and facilitate access to assistance. International measures are also necessary to fulfill the standard treaty functions of developing shared understandings across the international community of acceptable practice, providing a forum within which States' decision-making under the Treaty can be explored and allowing for ongoing responses to changes in the external environment.

There are any number of ways in which the international aspects to treaty implementation can be organized. They will be contingent on the content of the other aspects of the Treaty, and there will be a complex interplay among them. However, there are certain elements or building blocks that are fundamental to effective implementation and thus will need to be considered, and which will require certain institutional arrangements or structures to be put in place, including:

- reporting, information-sharing and transparency;
- monitoring, clarifying and verifying compliance;
- dispute management and resolution;
- co-operation and assistance.

This list is not exhaustive, but highlights the areas where the particularities of the arms trade are likely to create the most need for detailed consideration. Examination of each of these elements should focus on how best they can be organized to encourage, assist and ensure compliance with the Treaty. These subject areas are also co-dependent; the approach to any one will have implications for the consideration of all the others. Proposals for institutional arrangements to address these elements follow.

Reporting, information-sharing and transparency;

Regular (annual) reports by States on implementation are essential and will be at the heart of information-sharing and transparency under the ATT. Such national reports,

which will need to be submitted to a central institutional structure (for more on this, see the section on *Institutional arrangements* below), should contain information on the existing national system (including laws, procedures and processes), any steps taken or planned to implement the Treaty, along with reference to implementation assistance requested, received, offered or provided. Reports will also need to include information on licences/authorizations granted and refused, and on transfers made, under the Treaty. States should also consider sharing information that would assist others in their implementation efforts, e.g. on problematic actors or trade routes, on tracing requests and outcomes, on breaches of the Treaty, on prosecutions under relevant national laws. Information on other related arms issues, although not necessarily falling within the scope of the ATT, might also be supplied on a voluntary basis as a confidence-building measure (for example, information on non-transfer-based procurement and arms holdings). Wherever possible, information shared under the Treaty should be placed in an easily accessible format in the public domain (including online).²

Monitoring, clarifying and verifying compliance

National reports and information-sharing will be useful compliance-verification tools. There will, however, inevitably be times when States may want more information, or where they may have queries about particular transfers or about certain aspects of another State's national system or Treaty implementation. The ATT should therefore establish States' right to raise queries or concerns, and codify procedures for dealing with such cases. Wherever possible such matters should be handled by the States concerned, however the Treaty will have to provide for those circumstances where initial exchanges fail to resolve the situation, or where the question under review requires broader engagement (for more on this, see the section on *Institutional arrangements* below).

Dispute management and resolution

The ATT will have to address those situations where, following clarification, States remain in dispute over specific transfers or particular aspects of Treaty implementation. There may be circumstances where the States concerned can themselves suggest dispute resolution procedures, or matters may be addressed by a broader Treaty body for mediation, negotiation or arbitration. It may also be the case that ultimately a dispute is referred to an external institution such as the International Court of Justice, the UN General Assembly or the UN Security Council.

It should be noted that where disputes arise over (perceived) capacity to effectively implement the Treaty, the most appropriate resolution strategies may be through co-operation and assistance mechanisms (see below), rather than through dispute-settlement procedures.

Co-operation and assistance

The Treaty will be implemented nationally, and no State should be obliged to offer or accept assistance. Nevertheless, one of the most valuable consequences of an ATT

² For more on reporting under an ATT, see Paul Holtom, 'What kind of reporting mechanism could be used in an ATT?', *Stockholm International Peace Research Institute*, September 2010.

should be that it legitimizes and provides a much more effective mechanism for States to identify, request, receive and provide assistance in developing effective national systems for international arms transfer control. States should therefore ensure that Treaty provisions in this issue area are particularly robust. Co-operation and assistance should address all aspects of arms transfer controls, including legislation and regulation, licensing procedures, enforcement (including specific investigations, tracing requests, etc.), reporting and information-sharing, training of personnel, information-technology support. The Treaty should be flexible in terms of how co-operation and assistance might be advanced. For example, it should facilitate State interaction on a bilateral or regional basis where States so choose. However, consideration should also be given to establishing a specific mechanism designed to assist with identification of need and provision of co-operation and assistance (see below).

Institutional arrangements

To be effective, an ATT will require a number of specific institutional structures, both permanent (or semi-permanent), and convened at particular moments for strictly limited duration. Certain implementation functions of an ATT—for example reporting, and co-operation and assistance—will require permanent institutional structure and capacity if the issues raised above are to be managed appropriately.

Secretariat

Robust implementation will require a dedicated Secretariat. To guarantee clarity of purpose this would ideally be an independent institution established by the Treaty, however thought would need to be given to how it might interact with other related bodies or functions (e.g. the UN Register of Conventional Arms). It would be charged with *inter alia*:

- providing advice on, assisting production of and compiling national reports;
- providing administrative support to other Treaty institutions and mechanisms (for example Meetings of States Parties and Review Conferences—see below);
- providing routine technical support on Treaty implementation to States Parties, and operating as clearing house for requests for information, points of clarification, etc. (from governments but also from other stakeholders such as media, non-governmental organizations);
- acting as a repository for Treaty-relevant information provided by States or other credible parties. This could include, for example, information on actors of concern, diversion risks, embargo breaches etc.;
- functioning as a clearing house for requests for and offers of assistance;
- providing advice to governments wishing to become States Parties to the ATT.

Committee of experts

Meaningful co-operation and assistance will also benefit from strong institutional support. Some of this function can be provided by a Secretariat, for example by acting as a repository for requests for and offers of assistance. However, there is a strong case for establishing an additional permanent or semi-permanent body, established by the Treaty and with a limited, rotating membership approved by all States Parties, which could go further and assess States' national implementation, identify gaps and recommend

priorities for action to address those gaps. In this context, the 1540 Committee³ could provide a useful reference point for discussion. Such a body might also serve other functions, such as:

- answering interpretive questions from States Parties of a technical nature, for example concerning Treaty scope;
- providing an opinion where States have been unable to bilaterally resolve concerns over compliance;
- suggesting options/making recommendations regarding future changes to the Treaty or its annexes or protocols, especially where these are of a technical nature.

Meetings of States Parties and Review Conferences

In addition to these ongoing institutions, annual Meetings of all States Parties (MSP) and five-yearly Review Conferences would be fundamental to effective implementation and to ensure ongoing meaningful participation by all States Parties.

The MSP would consider a range of issues including:

- the operation and status of the Treaty;
- any matters arising from its implementation;
- procedural, technical, or administrative changes to the Treaty;
- requests for clarification of compliance;
- outstanding compliance issues;
- the endorsement of members of and the work of the aforementioned committee of experts (should one be established).

The Review Conferences would *inter alia* review ATT operation and status, consider the need for substantive amendment to the Treaty or the elaboration of additional protocols, and assess the need for further MSP.

Conclusion

Responsibility for Treaty implementation rests with individual States. Each must ensure it is capable of and committed to meeting its Treaty obligations. However, many States will be approaching ATT implementation with underdeveloped national transfer control systems. Each will approach the ATT with different needs and capacities, and with varying implementation-support needs. All these factors present considerable implementation challenges. It is therefore incumbent on States to keep these complexities in mind as they negotiate a Treaty that is practical, enforceable, and can achieve the objectives for which it has been proposed.

³ See the 1540 Committee: Security Council Committee established pursuant to resolution 1540, <http://www.un.org/sc/1540/>.