

A stylized world map composed of a grid of grey dots, with several dots highlighted in red. The title is centered over the map.

Looking to the Future of the Arms Trade Treaty

KATHERINE PRIZEMAN
April 2013

- After more than 10 years of preparations and two failed attempts to adopt a text by consensus, an Arms Trade Treaty (ATT) text was adopted in the UN General Assembly on 2 April 2013.
- The adopted text represents a convergence, although an overly compromised one, of states' views on common international standards for the trade in conventional arms. While there are some positive elements of the text, significant loopholes also remain.
- The adoption of the ATT has symbolic significance given the current climate of limited multilateral arms control and disarmament success. Yet it is not a victory in-and-of-itself, but step one of a longer process. The practical task now is to take what has been adopted and ensure that it has the most effective impact possible on the ground. The work of the Conference of States Parties (CSP), the national implementation of treaty obligations, and the ongoing interpretation and implementation of its provisions will be all the more important.
- Moreover, if and when the largest exporters and importers ratify the ATT will also be a factor in its success.

1. An Imperfect Process

After more than a decade of advocating for and working towards a robust and comprehensive arms trade treaty, relevant stakeholders can now mark a conclusion to the first step in this process. The ATT was adopted by a UN General Assembly majority vote that took place on 2 April 2013 with 155 votes in favor, 22 abstentions, and 3 against (The DPR Korea, Iran, and Syria)¹.

Preceding this majority vote was a »Final Conference on the Arms Trade Treaty,« convened from March 18–28, 2013 under the leadership of the President of the Conference Ambassador Peter Woolcott of Australia, which failed to reach consensus on an ATT when these three states formally objected to adoption of the text during the final plenary. Although the DPRK, Iran, and Syria were the states to formally object to the text, it was clear from subsequent explanations of vote that many other states were dissatisfied with the process, the text, or both. Several large and influential states in the arms trade, whether as exporters or importers, expressed textual reservations including India, Russia, and China, all of which abstained on the UNGA resolution and indicated that more study would have to be done on the text prior to consideration of ratification.

The world's largest arms exporter, the United States, voted in favor of the resolution as well as served as a co-sponsor of the resolution. This is a marked change from the previous insistence of the US that agreement on an ATT be reached by consensus. Nevertheless, as multilateral treaties need to be ratified by a two-thirds majority in the U.S. Senate (an insurmountable hurdle for even arguably less controversial agreements such as the Convention on the Law of the Sea and the Convention on the Rights of Persons with Disabilities), it would seem unlikely that the US will ratify the ATT any time soon.

Consequently, the formal hurdle for entry-into-force (EIF) of the treaty – ratification by 50 UN Member States² – may not prove to be the primary impediment to suc-

cessful implementation of the ATT. Rather, its future success will depend on whether the world's most influential states in the arms trade industry – exporters and importers – choose to ratify.

2. An Imperfect Treaty

Ultimately, the ATT negotiating process was an imperfect one that yielded an imperfect treaty. Nevertheless, the task now is to take what has been adopted and ensure that it has the most effective impact possible on the ground so that the human suffering caused by the illicit, diverted, and unregulated arms trade – the original purpose of and impetus for this process – is prevented to the greatest extent possible.

The adopted ATT text represents a convergence, albeit a rather compromised one, of the majority view that the arms industry needs regulation in the form of a legally-binding instrument. Undoubtedly, the text and the process that came before it have represented the emergence of a new international norm that the transfer of arms must be denied where there is serious risk of violations of international humanitarian law (IHL), international human rights law (IHRL), and when there is a likelihood that such arms would undermine peace and security. The undertaking of the ATT process has also underscored the need for greater transparency and accountability in the arms trade, bringing it out of the shadows and more prominently in the public domain. It is clear that the ATT writ large has been a worthy endeavor, if flawed, in attempting to consolidate the international drive towards these goals. Thus, the ATT has the potential to serve as a useful tool to continue to work towards these goals of reducing risk and increasing transparency.

Nevertheless, despite the good will of many stakeholders over the last decade, undisputed victory cannot be claimed. The text is not the ideal iteration of what an ATT could be or even the version that the majority of states had called for. The majority of states, led by the Caribbean Community (CARICOM), the Africa Group, as well as many Latin American and European states, called for a treaty with a comprehensive scope of items and activities, reflective of existing international legal obligations and norms, and one that enhances transparency and prohibits the transfer of arms when there is »substantial« risk of serious violations of international law,

1. UN General Assembly Draft Resolution calling for adoption of the Arms Trade Treaty, A/67/L.58 (2013) Available at: <http://reachingcriticalwill.org/images/documents/Disarmament-fora/att/negotiating-conference-ii/documents/UNGA-resolution.pdf>

2. UN General Assembly Draft Decision containing the final text of the Arms Trade Treaty, A/CONF.217/2013/L.3 (2013) Available at: <http://reachingcriticalwill.org/images/documents/Disarmament-fora/att/negotiating-conference-ii/documents/L3.pdf>

including IHL and IHRL, or high risk of diversion. Unfortunately, the text's provisions do not live up to these standards nor fulfill the calls from the vast majority of the governments, international organizations, and civil society groups. This is, of course, in part due to the tremendous compromising power of consensus.

Indeed, the text that has been adopted is clearly a product of a consensus process, despite its adoption by majority vote, whereby progressive states had to compromise to keep certain states on board. Any process that is subject to this constraint will indubitably be forced much closer to the lowest common denominator than the highest aspirations, even if the majority of states support the latter. The ATT process has been no exception, with the concerns and interests of a few states prominently reflected in the text despite opposition from most other states.

In particular, the retention of the term »overriding risk« and the exclusion of ammunition/munitions and parts and components from the full scope of the treaty were ultimately a direct result of the demands of the United States. Likewise, the weak human rights language is likely a consequence of the reservations expressed by the Chinese delegation given China's early opposition to any references to IHL or IHRL. Furthermore, the prohibition against transferring weapons when there is knowledge that the weapons would be used in the commission of genocide, crimes against humanity, and war crimes includes a reference to »attacks directed against civilian objects or civilians protected as such,« which is likely a compromise between those not wanting to reference Protocol I of the Geneva Conventions or customary international law and those demanding that the prohibition include attacks against civilians. Lastly, the retention of a reference to defence cooperation agreements was a non-negotiable demand of the Indian delegation. These are but a few examples of some of the compromises that were made to secure consensus despite the fact that the text was ultimately adopted by a vote.

The question, therefore, becomes: is the text that has been adopted going to, in practice, not only set norms and goals, but positively change arms transfer policy so that it will make a difference in the lives of those who suffer from armed conflict and armed violence?

Ultimately, the jury is still out. As many states and civil society representatives have noted, the adoption of a treaty is not a victory in-and-of-itself, but step one of a longer process. The work of the Conference of States Parties, the national implementation of treaty obligations, and the ongoing interpretation and implementation of its provisions will be all the more important.

3. Textual Successes and Gaps

There are some positive aspects of the treaty that deserve underscoring in terms of looking forward to implementation:

- Ammunitions/munitions, parts, and components are covered by prohibitions and export assessment, and are required to be regulated by national control systems.
- Prohibitions have been set forth that require denial of authorization of transfers if there is knowledge that such arms would be used for the commission of mass atrocity crimes, including genocide and crimes against humanity, as well as war crimes and attacks against civilians.
- Binding criteria for export assessment include if the transfer would undermine peace and security, facilitate serious violations of IHL or IHRL, acts of terrorism, or acts relating to organized transnational crime. Moreover, the text also includes a binding criterion on gender-based violence.
- A detailed article on diversion lays forth measures that states parties should take in cooperating with one another in order to address diversion risks and enhance the practice of effective anti-diversion measures.
- States parties involved in transfers must take measures to prevent diversion of items in the scope.
- The provisions on international cooperation encourage that states parties jointly support others in investigations, prosecutions, and judicial proceedings in relation to violations of national measures pursuant to the treaty. Likewise, states parties are encouraged to provide assistance in concrete areas related to the arms trade, notably stockpile management, model legislation, and disarmament, demobilization and reintegration programmes.

- The CSP has the ability to review implementation of the treaty, including developments in the field of conventional arm as well as to consider issues arising from the interpretation of the treaty. This thus allows, at least in a limited fashion, that the treaty can be adjusted to respond to evolving technological and security advances.

- Amendments can be adopted, as a last resort, by a three-fourths majority should adoption by consensus fail.

Despite the retention of these positive provisions, some loopholes and weaknesses still remain that will continue to pose challenges in the implementation of the ATT. These weaknesses and loopholes will have to be dealt with, to the greatest extent possible, during the follow-up meetings of the CSP.

- Ammunition/munitions and parts and components are not covered by the obligations under import, brokering, transit or trans-shipment, or reporting.

- The »floor« of the definitions of the items in the scope is limited to the UN Register of Conventional Arms and »other relevant United Nations instruments« at the time of entry-into-force. As a result, arms covered are »frozen« at the status of technological development of two decades ago, which will not take into account recent developments, such as drones or cyber warfare.

- Non-commercial activities such as gifts, loans, and leases are not expressly covered under the definition of »transfer.«

- There is no explicit prohibition against transfers that would violate human rights.

- Inclusion of the term »overriding risk« ostensibly allows states to proceed with a transfer even if there is substantial risk of violations of IHL or IHRL if some other concern (political, economic, or otherwise) can be cited to »override« these risks.

- References to socio-economic development and corrupt practices were dropped from export assessment criteria.

- When states parties become aware of new information, they are not required to revoke or suspend an authoriza-

tion, but are merely »encouraged to reassess the authorization« after possible consultations with the importing state.

- Public reporting is not mandatory and states parties can exclude any information deemed »sensitive« from reports to the Secretariat.

4. Implementation Mechanisms and Challenges

The ATT's specific implementation responsibilities and challenges will be dependent, in large part, on the role that the state plays in the transfer of arms – whether exporter, importer, or transit state. Some of the ATT's key provisions and challenges for implementation are illustrated below:

National Implementation Responsibilities for Exporters:

- As defined in article 5(5), states parties will be required to designate competent national authorities in an »effective and transparent national control system regulating the transfer of conventional arms covered under Article 2(1) and items covered under Article 3 and Article 4.« This does not represent a large undertaking for the largest exporting states (The US, Russia, Germany, France, and the UK), while rising exporters will likely have to improve upon their systems.

- All states parties will be required to maintain a national control system, including a national control list' as defined in article 5(2). Generally, the large exporting states will already have these systems in place, while the less developed states will need to start at various stages of the development process.

- National control lists of items will also have to be made available to the ATT's Secretariat (article 5(4)), which represents a large undertaking for those states that do not already have such systems. As for the major exporters, such lists are generally common practice.

- Articles 3 and 4 related to ammunition/munitions and parts and components, respectively, also require regulation of exports of these items. It was evident throughout

the negotiating process that export regulation of these items would be more challenging due to the massive amounts that are transferred.

National Implementation Responsibilities for Importers:

- The responsibilities of importing states are much less stringent. Import systems are not required, but rather importers are to regulate imports »where necessary«.
- Importing states will be faced with the challenge of providing the necessary information to exporters that are carrying out risk assessments. End user documentation is suggested, but not required.
- As previously noted, ammunition/munitions and parts and components are not covered under the importing provisions.

Recordkeeping and Reporting:

- Exporting states parties will be required to maintain records (for a minimum of 10 years) of all export authorizations, while importing and transit/trans-shipment states are »encouraged« to maintain records of arms covered under the scope (not including ammunition/munitions or parts and components) that are transferred to its territory. Therefore, the burden of recordkeeping surely rests with the exporting states parties.
- Reporting to the Secretariat about implementation measures undertaken is required within the first year of EIF of the Treaty (article 13(1)) so that thereafter such reporting becomes encouraged, but not required.
- An annual report (by 31 May) of all authorized or actual exports and imports is to be submitted to the Secretariat, which will surely represent another reporting challenge to small, developing states that often cannot complete all reporting requirements for the many international instruments to which they are responsible (UN Register, UN Programme of Action (UNPoA) against the Illicit Trade in Small Arms and Light Weapons, among others).

In anticipating these types of capacity gaps, a voluntary trust fund to assist states parties requesting international assistance has been set up through article 16(3) of the ATT text. Moreover, the governments of Australia and Germany have each pledged significant amounts of money to a multi-lateral donor fund to assist states in implementing the ATT's obligations as well as the UNPoA.

Follow-Up Mechanisms:

- The CSP will meet within the first year of EIF and thereafter at an interval to be determined.
- The financial and budgetary considerations of the CSP will be determined upon its first meeting. Funding responsibilities of the CSP meetings will likely fall on the usual group of donor states.
- The ATT Secretariat, described in the text as having a »minimized structure,« is tasked with basic administrative and logistical functions and will not perform programmatic or substantive functions, but rather will serve as a clearinghouse for reports, contact lists, and assistance requests.
- Where the Secretariat will be hosted will be a decision that will have to be taken by the CSP, yet there has been talk that Switzerland is interested in becoming the host country. In the meantime, it is likely that many states will call for the UN Office for Disarmament Affairs (UNODA) to house the structure in order to minimize financial costs.

In conclusion, the primary mechanism through which the ATT will function is a national risk assessment carried out by exporting states so that the onus of implementation will rest predominantly with these states. However, there is clearly no oversight or sanctioning mechanism, although the CSP can »review implementation,« or supranational organism tasked with flagging illicit transfers or subpoenaing governments for export records. Indeed, perhaps just as important as official entry-into-force is beginning to create a culture of arms transfers that is based on both norms and legal obligations so that the text does more than maintain the status quo. Engagement through already existing fora such as the Group of Interested States in Practical Disarmament Measures (GIS) – an informal grouping that has convened in New

York since 1998 – would be one such way to begin culture building even before official EIF. To the greatest extent possible, therefore, implementation will have to be improved through the robust functioning of the fora in which practical challenges can be addressed, namely the CSP and the GIS process.

5. The Impact of Implementation

The time for substantive improvements of the text has passed. In moving forward with the ATT process, attention must shift to implementation and interpretation in order to ensure that the most robust provisions that have been adopted are implemented in the best and most consistent way, while those that are still weak are not allowed to limit the overall effectiveness of the treaty. Indeed, this is only the beginning of evaluating the ATT's effectiveness. Of course, full implementation efforts will commence after official EIF of the Treaty, which requires 50 ratifications as set forth in the text.

In addition to the implementation challenges that lie ahead, interpretation of the Treaty's obligations will also play a significant role in its effectiveness in practice. As is the case with any treaty, interpretive statements and understanding of provisions will determine how robustly (or selectively) each state party will incorporate treaty obligations into its national practices. Following the UNGA vote, several progressive states, including New Zealand, Switzerland, Ireland and Norway, underscored particular interpretations of textual provisions. For example, the delegation of New Zealand noted that the term »transfer« should be interpreted to include all non-commercial activities such as gifts, loans, and leases. Similarly, the delegation of Liechtenstein noted that the term »overriding« is translated differently in each official text of the ATT – »preponderant« in the French version, »manifest« in the Spanish, and »significant« in the Russian – thus underscoring the linguistic challenges that are endemic to treaty implementation, particularly related to a term that is at the heart of the national export assessment mechanism. In contrast to this more progressive interpretive statement, the Russian delegation remained concerned over the knowledge-based test to prohibit the transfer of arms that would be used to commit mass atrocity crimes, noting that the term »knowledge« is not sufficiently defined and would have to refer more specifically to »reliable«

knowledge. Such interpretive statements illustrate that many provisions of the text do not enjoy a universal reading.

6. Moving Forward in a Time of Limited Multilateral Disarmament Success

While the road to adoption was a long one, the process of robust ATT implementation will be even longer from ratification and EIF to full functioning of the CSP and corresponding review process.

Many member states and civil society alike seized the ATT as an opportunity to mark a success in the disarmament and arms control arena (despite the fact that the ATT is not per se a disarmament or arms control instrument, although many advocates have treated it as such). While much of the UN disarmament machinery remains deadlocked, including the Conference on Disarmament and the UN Disarmament Commission, and other multilateral processes seem to be yielding very little, such as the lack of full implementation of the 2010 NPT Action Plan and the failure to convene a conference on establishing a Nuclear Weapon Free Zone in the Middle East, the international community is in desperate need of a success. The ATT has, in part, represented this success among a pool of failures despite its own bumps along the way to adoption in the UNGA. What began as an initiative of a few states and civil society advocates grew into a universally-accepted objective to which generally all member states subscribed. Nevertheless, the textual reservations still retained, and in many cases quite strong reservations, by several large exporters and importers will certainly have an impact on the long-term implementation success of the ATT. Likewise, the proven inability of the US to ratify international treaties will also be a factor. That being said, the normative value of the ATT is clear given that all member states have engaged in the negotiating process regardless of levels of satisfaction at its conclusion.

While the ATT's symbolic significance is important, the practical task now is to take what has been adopted and ensure that it has the most effective impact possible on the ground so that the negative consequences of the illicit, diverted, and unregulated arms trade – the original purpose of and impetus for this process – are limited to the greatest extent possible. As noted by the group of



98 states in its joint statement following adoption of the text, »The hard work starts now. We must secure the rapid entry into force of this historic Treaty and implement it as soon as possible.«



About the Author

Katherine Prizeman is the International Coordinator for the UN-based Global Action to Prevent War project in New York. She works primarily on the Disarmament Program focusing her advocacy and research on conventional weapons disarmament, including the Arms Trade Treaty and other issues of small arms and light weapons, directed towards the UN diplomatic community, local in-country partners, and other NY-based NGOs. Her policy advocacy is also focused on disarmament machinery and removing structural impediments to a more secure human security.

Imprint

Friedrich-Ebert-Stiftung | Global Policy and Development
Hiroshimastrasse 28 | 10785 Berlin | Germany

Friedrich-Ebert-Stiftung | New York Office
747 Third Avenue | Suite 22B | New York, NY 10017 | USA

Responsible:
Dr. Werner Puschra | Executive Director, FES New York

Phone: ++1-212-687-0208 | Fax: ++1-212-687-0261
www.fes-globalization.org/new_york/index.htm

To order publications:
jlandt@fesny.org

Dialogue on Globalization

As part of the international work of the Friedrich-Ebert-Stiftung, Dialogue on Globalization contributes worldwide to the debate on globalization and global governance. It is based on the premise that – through an inclusive and responsive global policy approach – globalization can be shaped into a direction that promotes peace, democracy and social justice. The program draws intensely on the international network of the Friedrich-Ebert-Stiftung – a German non-profit institution committed to the principles of social democracy with offices, programs and partners in more than 100 countries. Dialogue on Globalization addresses »movers and shakers« both in developing countries and in the industrialized parts of the world. The program is coordinated by the head office of the Friedrich-Ebert-Stiftung in Berlin and by the FES offices in New York and Geneva.

The Friedrich-Ebert-Stiftung office in New York

serves as a liaison between the United Nations, FES field offices and partners in developing countries to strengthen the voice of the Global South. It contributes to UN debates on economic and social development, and on peace and security issues. Towards this end, FES New York annually organizes some 30 seminars, conferences and round-tables and regularly publishes briefing papers and fact sheets. In addition, it contributes to a dialogue on the work of the World Bank and the International Monetary Fund in Washington, DC.

The New York office is located in close proximity to the United Nations headquarters. The office has four permanent staff members and provides internships for students specializing in international affairs, development and economic policy.

The views expressed in this publication are not necessarily those of the Friedrich-Ebert-Stiftung.