

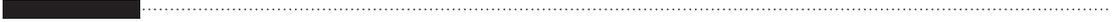


Making it work:

**Monitoring and verifying implementation of
an Arms Trade Treaty**



May 2008



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Responsibility for the content of this report, and the views expressed within, lies solely with Saferworld and the author.

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Foreword

IN RECENT YEARS there has been a great deal of attention paid to, and discussion of, the ‘what’ of an international Arms Trade Treaty (ATT), i.e. what should be the scope and draft parameters of such an agreement. As an active member of the ATT NGO Steering Committee, Saferworld has been closely involved in these discussions. By contrast, however, there has been comparatively very little discussion of the ‘how’ of an international ATT, i.e. how its implementation by states would be monitored and verified.

In publishing this paper, Saferworld is seeking to help generate an informed debate on the subject of how an international ATT would be monitored and verified. In this regard, it is important to note that most international treaty regimes have, associated with them, provisions for monitoring and verification of implementation by states parties; they also have some level of institutional capacity so as to enable such monitoring and verification functions to be carried out. This paper does not seek to offer a complete prescription of what the implementing provisions of an ATT should be, rather, it seeks to identify the range of issues that ought to be addressed, while illustrating how these aspects have been incorporated into a variety of other international instruments.

Saferworld recognises that agreement on the details of monitoring and verification mechanisms under an ATT will not be achieved overnight. Rather we anticipate that discussions will need to take place over a significant period of time and that they will need to involve all those who have an interest in achieving agreement on an effective international ATT. Ultimately the best agreement possible will only be achieved if all stakeholders engage in an informed debate concerning the substance and modalities of how an ATT is to be monitored and verified. Saferworld hopes that the ideas and concepts outlined in this report will provide a useful contribution to this debate.

Henry Smith, *Director*, Saferworld

Executive summary

THE PROCESS OF ESTABLISHING AN ARMS TRADE TREATY (ATT) will require consideration of a range of reporting, institutional, monitoring and verification options. Agreement on substantive provisions is likely to be key to the effectiveness and credibility of a Treaty, and to ensuring responsibility in the international arms trade. This paper examines the approaches of various international regimes so as to assist in the process of exploring and assessing the options that are open to states as regards the development of reporting, information exchange and transparency provisions under an ATT. It also explores possible institutional arrangements, monitoring and verification mechanisms, and adjudication, dispute settlement and sanctions provisions.

National Implementation: The paper notes that, whatever its normative substance, implementation of an ATT will take place largely at the national level, within those ministries and government offices of the states parties that are responsible for international arms transfer controls. The paper argues that an ATT should set out clear requirements for states parties in terms of establishing the necessary laws, regulations and administrative procedures that will be required for full adherence to the Treaty's provisions. The identification of weaknesses and gaps in relevant national laws, regulations and procedures will be particularly important so as to allow steps to be taken to strengthen them, where necessary.

Assistance: The range of likely requirements for ATT implementation at national level will carry resource implications for a number of states, particularly developing countries. Technical, financial or other assistance may therefore be required to build and implement effective controls on international arms transfers and to meet Treaty reporting and information exchange obligations. As a consequence states should identify and articulate their specific needs at the earliest opportunity. Dedicated Treaty bodies, international organisations, states and non-governmental organisations (NGOs) could be tasked with providing assistance; those in a position to assist with the provision of resources and expertise should make this clear.

Reporting under an Arms Trade Treaty: The paper recommends that the exact nature and modalities of reporting under an ATT should be agreed by states parties at the earliest opportunity, though this should not preclude further development of reporting requirements and mechanisms. The relevant details should be appended to the Treaty; templates for reporting should also be developed. The paper further argues that reporting under an ATT should reflect the full extent of the commitments enshrined within the Treaty and take place on an annual basis. It should cover details of international arms transfers involving states parties, steps taken to implement the treaty at national level, and details of capacity-building assistance provided and received.

It is argued that the level of detail of reporting should allow accurate assessment of international arms transfers. This would include the exchange of information by all states parties on their international arms transfers to and from all counterparts, not just other states parties. A Treaty institution (such as an ATT Secretariat) should be tasked with reviewing the data on international arms transfers provided by states.

Information exchange: A variety of information exchanges among states parties could be enabled under an ATT, thereby assisting them to meet Treaty obligations and to build confidence in the effectiveness of the regime. These could include:

- The exchange of information on international arms transfer licence denials. If a denial notification requirement cannot be agreed at the outset, consideration should be given to provisions for voluntary exchanges or for the future development of a denial notification mechanism.
- The exchange of information among states on ‘actors of concern’ within the international arms transfer chain; this would allow a greater number of states to make informed decisions in the granting or refusing of international arms transfer licences.
- The exchange of information on diversion risks.

Transparency: The paper argues that public support for an ATT would be best served by openness and transparency with regard to contingent reporting and information exchange activities. Accordingly:

- States should be wary of allowing concerns about national security and commercial confidentiality to block transparency provisions under an ATT. Such concerns often relate to the potential policies and activities of other states. In reporting on their international arms transfers under an ATT these concerns ought to be overcome.
- States should examine how to expand upon the level of information currently available under the UN Register in order to demonstrate that an ATT is being implemented fully. Information contained within states’ annual reports on national implementation of an ATT should be made publicly available.

An Arms Trade Treaty Secretariat: The paper argues that the fulfilment of substantive reporting, information exchange and transparency provisions under an ATT will require the development of some dedicated institutional capacity. In this regard, an examination of how such requirements have been met under other international regimes, particularly in situations where international trade data is collated and analysed, points to the establishment of an ATT Secretariat as a potential solution. Such a body could service a number of functions central to the effective implementation of an ATT including inter alia:

- Collection and analysis of data on international arms transfers;
- Provision of support and guidance to state parties in the production of national reports and identification of gaps in capacity for these ends;
- Providing a clearing house function with regard to requests for information on actors of concern in the international arms trade;
- Acting as a repository for and source of information on breaches of UN arms embargoes and on diversion risks;
- Acting as a repository for denial notifications;
- Production of an annual report on the implementation of an ATT; and
- Matching capacity-building needs by identifying sources of appropriate assistance.

Treaty bodies: The paper posits that a key challenge for the architects of an ATT will be to establish institutions that can be tasked with, and are capable of, the effective monitoring and verification of state party compliance under a Treaty as well as the future development of the regime. A minimum requirement would be to establish a ‘Meeting of States Parties’ alongside provision for a formal Treaty review every five years. Beyond this, the experience from a number of other international regimes

suggests that an ATT could benefit from the establishment of a permanent or semi-permanent 'executive-type' institution. Such an institution would be tasked with overseeing the day-to-day functioning of the regime, including the implementation of any monitoring and verification provisions, as well as the work of an ATT Secretariat. Finally, where there is scope for civil society to make a positive contribution to the effective functioning of the regime, states should enable this.

Consultation mechanisms: The paper notes that formal procedures governing consultation among states parties on cases of suspected non-compliance have been established under most international regimes. It suggests that, in drawing upon these experiences, an ATT should codify states parties' rights to raise issues relating to compliance either directly with other concerned states parties or through an official body. Consideration will also need to be given to any further provisions that might be required where initial consultations fail to resolve a compliance issue. These could include the right of the state party raising the concern to take the matter to an annual Meeting of States Parties or, in exceptional circumstances, to an extraordinary Meeting of States Parties. In establishing consultation mechanisms under an ATT, it will be important to guard against the raising of spurious or frivolous concerns over compliance. In this regard, a Treaty must establish clear evidentiary requirements based on reliable sources including, possibly, from open source information and civil society.

Addressing compliance issues: A number of international agreements include arrangements for monitoring and verification, some of which involve in-country activities. These allow states parties to observe particular facilities or activities on each other's territory with a view to verifying compliance with treaty obligations. While representing a substantial commitment by states parties, provisions for in-country monitoring and verification can help build confidence in the effective enforcement of a treaty as well as promoting full compliance. The experience of the Chemical Weapons Convention indicates that if such provisions are used early on within the lifetime of a treaty regime, and are targeted towards resolving low-level compliance issues, then such mechanisms are more likely to function effectively thereafter. Confidence is increased particularly in those cases where an inspection regime includes a capacity-building function that helps states parties meet their various obligations under the treaty.

Typically, monitoring and verification mechanisms are not implemented to the optimal extent. Nevertheless, experience suggests that such mechanisms are a valuable tool, especially as part of a package of compliance measures. The paper argues that establishment of regular monitoring efforts under an ATT could contribute to the development of an effective regime, particularly if the verification provisions are broadly applied, that is, not only within arms exporting and importing states but also in transit and transshipment states, as well as in those providing a base for the operation of international arms brokers. Such activities could include, for example, inspections of transfer licensing records and of procedures, and records kept, at exit and entry points for arms shipments. Such measures would assist in highlighting cases whereby, for example, data retrieval, management and storage or a lack of capacity, resources or relevant expertise are preventing states from fulfilling their obligations under the Treaty. With such information to hand co-operative efforts could be undertaken and assistance provided so as to resolve such matters.

Adjudication: The paper considers the different ways in which breaches of a Treaty could occur. The most serious type of breach would involve a state party licensing an international arms transfer in contravention of the terms of the Treaty. Proving that such an international arms transfer had taken place would, of necessity, involve two distinct components. In the first instance a specified Treaty body (possibly an ATT Secretariat, an executive institution, or a Group of Experts appointed by a designated Treaty institution) would need to establish beyond doubt that a particular international arms transfer of concern had, in fact, taken place. Once it had been

established that a ‘transfer of concern’ had taken place and the circumstances surrounding the transfer had been clarified, it would need to be fully assessed by an appropriate Treaty institution (for example a Meeting of States Parties) with a view to providing a definitive judgement on the nature and scope of the Treaty breach and any remedial steps to be taken. It is argued that establishing procedures of this type will be important in terms of boosting an ATT’s effectiveness and credibility.

Dispute settlement: The paper further notes that more general disputes may arise over Treaty implementation or the application of its provisions. Every effort should be made to resolve differences among states parties by means of the consultation mechanisms and other compliance provisions that are established under the Treaty. However, the possibility that intractable disputes will occur necessitates the establishment of clear dispute settlement procedures with the roles and responsibilities of different institutions clearly specified. While the detailed investigation of any compliance issue may well be undertaken in private, in order to maintain confidence in the regime the resolution of disputes should be made public.

Sanctions: Despite containing provisions for verification and dispute settlement, few arms control and non-proliferation regimes specify any sanctions in the event that a treaty breach is recognised. In such cases the majority of regimes that specify any further recourse simply refer the matter to the UN Security Council and/or General Assembly. The paper argues that where a state is established by a Meeting of States Parties to be in persistent and flagrant violation of an ATT there should be recourse to the possible imposition of sanctions against the offending state party – including the potential imposition of an arms embargo.

An effective Arms Trade Treaty: Ideally, the establishment of effective reporting, information exchange, transparency, institutional, verification and compliance provisions will be achieved at the outset of an ATT. However, if agreement on the details of such mechanisms proves problematic to the extent that it threatens to derail negotiation of the Treaty, then the initial text should establish the basic elements of such provisions and call for their subsequent further development. Great care should be taken to ensure that the provisions in the initial treaty text are fully capable of being built on to establish necessary and effective institutions and mechanisms. While an ATT will in some ways be a unique agreement, much can be learned from the experiences of other international regimes. By drawing upon this experience, states should be in a position to develop a transparent, accountable and effective international arms transfer control regime that is rooted in international law.

1

Introduction

THIS REPORT EXPLORES AND ASSESSES the various potential operative provisions for a future Arms Trade Treaty (ATT). In order to ‘make it work’, an ATT is likely to need:

- effective reporting, information exchange and transparency provisions;
- efficient institutional arrangements;
- workable monitoring and verification mechanisms; and
- appropriate adjudication, dispute settlement and sanctions provisions.

By examining the approaches taken by various other international regimes, including those relating to international arms transfer control and non-proliferation, the aim is to illustrate the range of options that are open to states when they consider the development of such provisions for an ATT. However, where there are clear minimum requirements for the establishment of an effective regime then these are identified.

When the UN Secretary General sought views on the feasibility, scope and draft parameters of an ATT, more than half of the states that responded had questions as to how a Treaty would operate in practice and what provisions would be necessary to monitor and verify its implementation. A significant number of states raised the requirement for information exchange and transparency mechanisms – including reporting on international arms transfers – together with the need for an appropriate institutional capacity and verification provisions.¹ Other issues raised included the possibility of exchanging information on international arms transfer denials and on the need for a Treaty review mechanism or follow-up provisions.² The process of establishing an effective ATT will thus require consideration of a range of reporting, institutional, monitoring and verification options. Agreement on substantive mechanisms relating to monitoring and verification, in particular, will be a crucial part of ensuring the effective functioning of the regime and in building confidence in its operation.

Ideally, the establishment of effective reporting, information exchange, transparency, verification and compliance provisions under an ATT will be achieved at the outset. However, if agreement on the details of these mechanisms proves problematic to the extent that it threatens to derail negotiation of the Treaty then, at a minimum, any initial Treaty text should establish the basic elements of such procedures. This should include provision for an appropriate institutional infrastructure and call for the

¹ See *The Global Arms Trade Treaty: What States Want* compiled by Clare da Silva for the Arms Trade Treaty NGO Steering Committee, October 2007, pp 36–37. <http://web.amnesty.org/library/Index/ENGPOL340042007>; and *Analysis of States' Views on an Arms Trade Treaty*, Sarah Parker, UNIDIR, October 2007, pp 11–12. http://www.unidir.org/pdf/UNIDIR_Analysis_States_Views_on_an_ATT_18OCT2007.pdf

² *The Global Arms Trade Treaty: What States Want*, p 37; *Analysis of States' Views on an Arms Trade Treaty*, p 12

development and substantiation of the other operative provisions in the near term.³

This report does not claim to provide all the answers, but rather seeks to demonstrate how similar monitoring and verification challenges have been dealt with elsewhere. With sufficient political will, states should be able to resolve these same issues in the context of an ATT.

³ For example, negotiators of the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer did not, at first, try to agree the details of the protocol's non-compliance procedure. Instead, they agreed that the first Meeting of States Parties would consider and approve mechanisms for determining and addressing non-compliance. The system was not, in fact, agreed until 1992 but it is considered to be one of the most effective multilateral environmental agreement (MEA) compliance mechanisms. Moreover the 1997 Kyoto Protocol, which commits states to tackling climate change, contains an Article on compliance which states that the first Meeting of Parties was to approve, at its first session, appropriate and effective mechanisms to determine and address non-compliance. These issues and many other operative aspects of the treaty were 'fleshed out' in the detailed 2001 'Marrakech Accords'.

2

Implementing an Arms Trade Treaty

AT THE OUTSET it is important to recognise that implementation of an ATT will take place at the national level. Whatever the normative substance of the agreement, implementation of the commitments that are made will take place within those ministries and government offices of the states parties that are responsible for international arms transfer control.

2.1 Requirements for national implementation

In order that all states parties are operating from the same base, it will be vital that an ATT sets out clear requirements for states parties in terms of establishing the necessary national laws, regulations and administrative procedures that will be required for full adherence to the Treaty's provisions. Research conducted in the context of the UN Programme of Action on the Illicit Trade in Small Arms and Light Weapons (SALW) in All Its Aspects (UN PoA) indicates that not all states have adequate legislative and administrative provisions for the regulation of the import, export, transit and brokering of SALW;⁴ it is likely then that for some states at least, this will also be the case with regard to other categories of conventional arms. Accordingly, there is an urgent need for states to identify weaknesses and gaps in national arms transfer control laws, regulations and procedures so that steps can be taken to address them.

Effective national arms transfer control mechanisms should include provisions regulating the import, export, transit, transshipment and brokering of weapons as well as an effective customs and enforcement capacity that is backed up by clear legal penalties. They also require measures to guard against the diversion of arms to unauthorised destinations or recipients. This should include the use of authenticated end-user certificates and procedures to check that arms that have been transferred across state boundaries have arrived and remain with their intended end-user. Controls on the retransfer of arms, including a ban on their unauthorised diversion or re-export, are also vital.⁵

Crucially, all of these functions and processes need to be administered by a competent authority or authorities. Accordingly one of the principal obligations imposed by an

⁴ See *Reviewing Action on Small Arms 2006: Assessing the First Five Years of the UN Programme of Action, Biting the Bullet and IANSA*, pp 44–55. <http://www.saferworld.org.uk/images/pubdocs/RB3-2006.pdf>

⁵ See *Small arms and light weapons transfer controls to prevent diversion: Developing and implementing key programme of action commitments*, Owen Greene and Elizabeth Kirkham, *Biting the Bullet*, August 2007. [http://www.saferworld.org.uk/images/pubdocs/070828%20BTB%20SALW%20diversion%20paper%20\(2\).pdf](http://www.saferworld.org.uk/images/pubdocs/070828%20BTB%20SALW%20diversion%20paper%20(2).pdf)

ATT must be that, from the outset, states parties are required officially to designate those institutions that have invested in them the responsibility for the implementation and enforcement of international arms transfer controls. States parties should be required to submit details of these authorities, including relevant points of contact, to a designated Treaty institution – for example an ATT Secretariat (see section 4.1 below).

An effective ATT will also require the establishment of reporting procedures that support information exchange and transparency mechanisms. In order to fulfil even basic requirements in this regard, states will require effective national-level accounting systems that accurately record all relevant international arms transfers that take place under their jurisdiction. Many states already have accounting and national reporting systems in place; however those states that do not will need to develop mechanisms that enable them to fulfil any reporting, information exchange and transparency obligations under a Treaty. This may necessitate new laws or regulations to allow data collection at the national level, the submission of the resultant information to an appropriate Treaty institution and its release into the public domain.

2.2 Assistance for national implementation

The range of likely requirements for ATT implementation at the national level will carry resource implications for a number of states, particularly developing countries. While many such states are not significant manufacturers or exporters of conventional arms, and therefore do not have extensive capacity dedicated towards controlling international transfers, all states nevertheless have the potential to be involved in the import, export, transit, transshipment or brokering of conventional arms. Accordingly, full implementation of ATT commitments may pose significant challenges to the existing capabilities of some states and a number may require technical, financial or other types of assistance in the development and implementation of effective international arms transfer controls and in meeting their reporting and information exchange obligations under the treaty (see section 3 below).

The provision of assistance for the purposes of ATT implementation could take a variety of forms. For example, some states may require legal and technical assistance for the development of appropriate international transfer control legislation, while others may require training or other types of assistance so as to boost the capacity of government departments to apply and enforce relevant legislation. For some states, the fulfilment of reporting, information exchange and transparency provisions under an ATT may also require support. In this regard technical and financial assistance for the establishment of appropriate systems and technological infrastructure, including for data retrieval and management, may be necessary. Discussion of when and how appropriate assistance could be delivered is a recurring theme throughout the remainder of this report.

In order that they may fully engage with an ATT process, states should identify and articulate their specific needs at the earliest opportunity. In some cases this may not be easy to do, but dedicated treaty bodies, international organisations, states and non-governmental organisations (NGOs) could be tasked with providing assistance, including in terms of how to identify needs. Those in a position to assist with the provision of resources and expertise should therefore make this clear.

3

Reporting, information exchange and transparency

IN ORDER TO DEMONSTRATE that they are meeting their obligations under an ATT, states will need to engage in a variety of reporting and information exchange activities. They will need to do so in a transparent manner that provides accountability at the national level (with regard to parliaments and the public) and at international level (with regard to other states parties and international institutions). As such, decisions regarding the nature and extent of reporting obligations, transparency provisions and information exchanges among states parties will have far reaching implications not only for the effectiveness of the regime but also as to how it is perceived publicly. It is important to reiterate, however, that the transparent fulfilment of reporting and information exchange obligations by states parties under an ATT may well require dedicated resources and support from states in a position to offer help, as well as the development or adaptation of international institutions.

3.1 Reporting under an Arms Trade Treaty

As with many other international instruments, states parties will need to provide information on ATT implementation. In terms of reporting requirements, states parties will need to provide detailed information on the following aspects of Treaty implementation:

- International arms transfers that fall within the scope of the Treaty;
- Progress at national level on steps taken to implement the Treaty; and
- Assistance given or received with the aim of assisting national implementation of the Treaty.

The modalities of reporting under an ATT, including the frequency of reports and the nature and level of detail to be provided, are discussed below. While it would be useful to establish the scope of such reporting early on, a decision regarding its exact form and content could, if necessary, be deferred until the first meeting of states parties to consider implementation of the Treaty (providing that this meeting was held soon after the Treaty entered into force, see section 4.2.1 below). Thereafter, agreement amongst states parties on these issues should be clearly set out in an Annex to the

Treaty, along with reporting templates that would assist states in meeting their reporting obligations under an ATT. It will be important, however, for subsequent meetings of states parties to retain the capability to make further improvements to the reporting system. Ultimately, the report that each state provides should also be the basis for an annual public report on national implementation of an ATT (see Section 3.3 below).

3.1.1 Reporting on international arms transfers

States will not be in a position to show that they are in full compliance with their obligations under an ATT unless they provide full and accurate information concerning those international arms transfer activities that fall within the scope of the Treaty. It will thus be important for an ATT to include clear commitments on the provision of national reporting on international arms transfers.

Reporting on international transfers of controlled commodities has taken place under a number of arms control and non-proliferation regimes, including those aimed at curtailing the proliferation of conventional arms⁶ as well as weapons of mass destruction.⁷ However, the experience that is of greatest relevance to an ATT is found within the context of international arms transfer control regimes (such as the Wassenaar Arrangement, EU Code of Conduct on Arms Exports and several OSCE mechanisms) and the UN Register of Conventional Arms, all of which include commitments to some form of reporting on conventional arms transfers.

The scope of reporting on international arms transfers

Within the aforementioned regimes, the exact form and substance of reporting obligations vary significantly. Under the Wassenaar Arrangement, for example, states parties exchange information on deliveries of conventional arms to non-members; the EU Code, on the other hand involves the exchange of information on all types of international arms transfers including exports, brokered transactions and transit licences granted to all states, including member states; while under the OSCE Document on Small Arms states are supposed to disclose information on SALW exports to and imports from other OSCE members. Finally, the UN Register of Conventional Arms – as yet the only global mechanism for reporting on international arms transfers – includes information submitted by states on their exports and imports of conventional weapons.⁸

Were all 193 states to participate in an ATT it might be argued that reporting on imports as well as exports of arms would be unnecessary. However, addressing both aspects could serve as an important means for cross-checking the data, thereby assisting in the verification of compliance.⁹ Indeed, the possibility should also be considered of tasking a Treaty Institution with reviewing the data on international arms transfers that is provided by states parties in order to identify any discrepancies. This would enable those matters of a procedural nature to be identified and acknowledged¹⁰ while also freeing up time and resources for any more substantive problems to be addressed. Such a data review process would represent an important means of monitoring compliance with Treaty obligations, thereby helping to build confidence in the effective functioning of an ATT (See Section 4.1 below).

⁶ See, for example, the 1990 Conventional Forces in Europe (CFE) Treaty and 1997 Anti-personnel Mine Ban Convention. The CFE Treaty remains in force despite the recent decision by Russia to suspend its participation. However, in practical terms, a range of inspections and transparency measures intended to bolster mutual military trust will be suspended.

⁷ See, for example, the reporting requirements under the 1997 Chemical Weapons Convention (CWC).

⁸ The UN Register has been cited by several states as a possible basis for ATT information exchange provisions. See *The Global Arms Trade Treaty: What States Want* pp 36–37 and *Analysis of States' Views on an Arms Trade Treaty* p 13.

⁹ Aside from the UN Register on Conventional Arms, which records data on exports and imports of arms, similar practices can be found elsewhere. For example, under the 1973 Convention on International Trade in Endangered Species (CITES), detection of possible illegal trade in endangered species is undertaken, in part, by identifying discrepancies between reported imports and exports. See 'Verification mechanisms in CITES', Rosalind Reeve, *Verification Yearbook 2001*, Vertic, London, 2001.

¹⁰ Differences in reporting on the part of states that are involved in the transfer of arms may arise owing to procedural or temporal issues. For example, a transfer may be reported as an export by one state within the context of one reporting period but may not be reported upon as an import by the recipient state until the next.

Ultimately, however, it should be the scope of an ATT that defines the extent of the reporting requirements. NGO commentators¹¹ and a significant number of governments¹² have argued that an ATT should be comprehensive in scope, addressing the import, export, transit, transshipment and brokerage of all conventional weapons whether the transfers are state-to-state, state-to-private end-user, commercial sales, leases; and loans or gifts or any other form of international transfer of material goods or credit or expertise. Thus, requirements for reporting on international arms transfers under an ATT should reflect the full extent of the international arms transfer control commitments enshrined within the Treaty.

At the same time there are strong arguments in favour of reporting on international arms transfers to all states – as opposed only to states parties or non-parties. It is crucial that an ATT is conceived and developed as a non-discriminatory regime in that the controls enshrined in the Treaty are applied consistently towards all; this should be demonstrated through the requirement that reporting by states parties on their international arms transfers should include all recipients. Secondly, as mentioned above, it will be important for the effective functioning of the regime that all parties can demonstrate that they are implementing ATT provisions in good faith and the best way to achieve this is by reporting on all international arms transfers.

The level of detail in reporting on international arms transfers

Another question relates to the extent or level of detail that should be provided in exchanges of information on international arms transfers. A review of existing multi-lateral arms transfer control fora again illustrates a variety of practices. Under the EU Code of Conduct information is provided according to agreed EU Common Military List categories while exchanges of information on international SALW transfers by OSCE states include Military List category and sub-category. Under the Wassenaar Arrangement and the UN Register on Conventional Arms Transfers, information is provided on eight specified categories of conventional arms (seven categories of major conventional weaponry plus small arms and light weapons – see Annex 1).

In order for an ATT to function effectively, sufficient information will be required (on international arms transfers falling within the scope of the Treaty) so as to allow accurate assessment of such transfers against the specified obligations. It is unlikely that providing information under eight broad categories covering complete weapons systems (as per the UN Register and the Wassenaar Arrangement) will be sufficient to allow effective assessment of all international arms transfers against the commitments set out in an ATT. Indeed, under this system, transfers of many important weapons and related components and sub-systems that do not fall within these established categories would go unreported. While reporting on international arms transfers according to existing Military List categories (as used, for example, by EU states) would be preferable, some Military List categories are extremely broad, for example, covering everything from combat helicopters to parachutes,¹³ and provision of information at this level would not permit accurate assessments to be made. The provision of further detail, such as through disclosure of Military List sub-categories, could be of greater utility in allowing objective scrutiny of international arms transfers.¹⁴ Clearly the greater the level of reporting detail required then the more effective an ATT would be, however the architects of an ATT will need to balance this against the administrative workload thus created. Nonetheless, it should be remembered that states will typically be recording the details of international arms transfers to at least this level of

¹¹ *Assessing the Feasibility, Scope and Draft Parameters of an Arms Trade Treaty: An NGO Perspective*, the Arms Trade Treaty Steering Committee, February 2007. <http://web.amnesty.org/library/Index/ENGACT300022007?open&of=ENG-390>

¹² *The Global Arms Trade Treaty: What States Want* pp 16–18 and *Analysis of States' Views on an Arms Trade Treaty* p 7.

¹³ See EU Common Military List Category ML10 "'Aircraft', 'lighter-than-air vehicles', unmanned airborne vehicles, aero-engines and 'aircraft' equipment, related equipment and components, specially designed or modified for military use." http://eur-lex.europa.eu/LexUriServ/site/en/oj/2007/l_088/l_08820070329en00580089.pdf

¹⁴ Under the EU Common Military List the Category ML10 has nine sub-categories (listed a to i) some of which have further sub-divisions. For example ML10 h: "Parachutes and related equipment, used for combat personnel, cargo dropping or 'aircraft' deceleration, as follows, and specially designed components therefor:" has eight further sub-categories of parachute, some of which are sub-divided further.

specificity within their own internal accounting systems and so reporting the information under an ATT should be relatively straightforward; moreover, states have accepted significant reporting requirements under other regimes.¹⁵

The frequency of reporting on international arms transfers

The frequency with which states parties should be required to report on their international arms transfers is also an important consideration. Typically, information exchanges on transfers of conventional arms under existing regimes take place either six-monthly, as in the case of the Wassenaar Arrangement, or annually, as is the case under the EU Code, the UN Register on Conventional Arms and the OSCE Small Arms Document. It would appear, then, that the minimal requirement should be for states parties to an ATT to report on their international arms transfers on an annual basis.

3.1.2 Reporting on steps taken to implement the Treaty

Since an ATT will be implemented at national level through national legislation and the development of adequate capacity for enforcement, it will be important that the Treaty also includes a requirement that states parties report on the progress that has been made in fulfilling these basic provisions. Such reporting could require states to provide information on a range of relevant issues, for example:

- Legislative developments that have relevance to national implementation of ATT commitments;
- Administrative improvements, such as the establishment of interdepartmental committees with a role in international arms transfer licensing;
- Improvements in international arms transfer control enforcement capabilities, such as through recruitment and training programmes focussed on enhancing customs or border control capacity; and
- Advances in information technology, such as the establishment or upgrading of relevant national registers or databases.

As regards the frequency with which such reporting should take place, it would make sense for states parties to include any relevant information on steps taken to implement the Treaty along with their annual returns relating to their international arms transfer activities.

3.1.3 Reporting on assistance given or received

As detailed in section 2.2 above, accession to an ATT and fulfilment of the obligations therein will carry resource implications for a number of states, particularly developing countries. All states, even those that do not manufacture conventional arms, are affected in some way by international transfers of conventional arms; all states will therefore need to develop the wherewithal to exercise effective controls in this area.

Some states parties may require technical and financial assistance in order to ensure that they develop adequate national capacity and expertise for the effective control of international arms transfers. Those states that provide or receive such assistance should therefore include information on relevant programmes alongside their other reporting commitments under an ATT. Such reporting would demonstrate how capacity-building exercises could be undertaken, facilitate objective assessment of their effectiveness and encourage further such collaboration between other donor and recipient states.

¹⁵ For example, under the 1973 Convention on International Trade in Endangered Species (CITES) states parties must report on the number and type of permits and certificates that they issue for trade in species, states with which trade occurred and the species and number of specimens traded from each appendix under the Treaty. www.cites.org.

Conclusion

In order for an ATT to function effectively, reporting provisions should include details of international arms transfers conducted by states parties during a given period, steps taken to implement the treaty at national level and details of capacity-building assistance provided and received. In addition, the consideration of reporting requirements should take account of the following:

- The exact nature and modalities of reporting under an ATT should be agreed by states parties at the earliest opportunity and included in an Annex to the Treaty; reporting templates should be developed, although these should be flexible enough to allow for further improvements to the reporting system in the future.
- A Treaty institution (such as an ATT Secretariat, see section 4.1 below) should be tasked with reviewing the data on international arms transfers that is provided by states so as to facilitate monitoring of compliance and to build confidence in the effective functioning of an ATT.
- An ATT should include clear commitments relating to the provision of national reports on international arms transfers; such reports should reflect the full extent of the commitments enshrined within the Treaty.
- As a non-discriminatory regime, an ATT should require the exchange of information by all states parties on their international arms transfers to all recipients (i.e. to end-users in all states, regardless of whether they are party to an ATT).
- Sufficient information should be provided so as to allow accurate assessment of international arms transfers, possibly through disclosure of transfers according to Military List sub-categories.
- States parties to an ATT should report on their international arms transfers on an annual basis.
- States parties should include in their reports information on steps taken to implement an ATT at national level including legislative developments, administrative improvements, increases in capacity for enforcement and relevant advances in information technology.
- States parties should report on assistance that has been provided or received with the aim of building capacity for implementation of an ATT at national level.

3.2 Information exchange between states parties

Beyond the reporting requirements discussed above, it is possible to envisage a range of information exchanges that could take place under an ATT and that may help states parties meet their Treaty obligations and build confidence in the effectiveness of the regime.

3.2.1 Denial notification

One of the most often-repeated arguments against the efficacy of multilateral arms transfer controls is that “if we don’t sell [A or B item to X or Y recipient] someone else will”, an argument that, when taken to its logical conclusion, has the effect of reducing levels of restraint to the lowest common denominator. Countering this premise will be a key part of efforts to build confidence in an ATT as an effective regime. The notification of denials of international arms transfer licences, when coupled with the observance of an implicit or explicit no-undercutting rule (i.e. states commit to not authorise an arms transfer when a similar request has already been refused by another state), could constitute an important mechanism in maintaining levels of restraint. Indeed, the desirability of states parties reporting on international arms transfer denials was raised by a number of states in their submissions to the UN Secretary General.¹⁶

¹⁶ *The Global Arms Trade Treaty: What States Want* p 37.

The denial notification and consultation mechanisms of the EU Code of Conduct have undoubtedly proved to be one of the main strengths of the regime and key to its relative effectiveness. Denial notifications are also a feature of other proliferation control regimes. For example, each year members of the Australia Group meet to discuss global chemical and biological weapons proliferation and to exchange information on international arms transfer denials relating to restricted chemical and biological agents; a no-undercutting agreement was concluded in 2002. States parties to the Nuclear Suppliers Group (NSG) are also required to exchange information on denials so as to prevent potential proliferators from obtaining sensitive technologies from one party having been previously denied them by another.

Experience suggests that denial notification systems work best in regimes where there is already a substantial level of trust and confidence among states, and it is important to acknowledge that this may not immediately exist within the context of an ATT. However, the exchange of information on international arms transfer licence denials could deliver significant benefits by bolstering overall levels of compliance. The architects of an ATT should therefore ensure that states parties wishing to circulate denials can do so while leaving open the possibility of a formal denial notification mechanism in the future.

3.2.2 Clarifying concerns relating to actors in the international arms transfer chain

One problem that states parties can face when seeking to assess an international arms transfer licence application against objective criteria is a lack of detailed relevant information relating to the nature and intentions of particular actors in the international arms transfer chain – be they suppliers of arms, international arms brokering or shipping agents, transit or transshipment states, consignees or end-users. However, exchanges of information among states concerning potentially sensitive actors could allow a greater number of states to make informed decisions in the granting or refusing of international arms transfer licences.

Although information exchange on proliferation risks is established practice in the context of WMD non-proliferation regimes such as the Australia Group and the NSG, the exchange of information on potentially sensitive actors is not currently widespread practice within international arms transfer control arrangements. However, such exchanges do take place under the EU Code of Conduct, while under the Wassenaar Arrangement states are at liberty to raise any relevant issue “such as emerging trends in weapons programmes and the accumulation of particular weapons systems, where they are of concern”.¹⁷

For an ATT it is possible to envisage at least two types of circumstances whereby information exchange could take place in order to clarify concerns regarding actors in the international arms transfer chain:

- **In pursuit of efforts to ensure the effective enforcement of UN arms embargoes:** States with information on particular international arms transfer activities that have been implicated in breaches of UN arms embargoes should be encouraged to share this information with other states parties. This could involve passing the relevant information to an appropriate Treaty body for wider assessment and circulation; and
- **Where one or more states parties are considering licensing an international arms transfer but have misgivings or uncertainties regarding a particular party in the transfer chain:** In such cases it would be useful to establish a voluntary

¹⁷ Wassenaar States also exchange the following information with regard to the activities of non-participating states:

1. Acquisition activities: companies/organisations; routes and methods of acquisition; acquisition networks inside/outside the country; use of foreign expertise; sensitive end-users; acquisition patterns; conclusions.
2. Export policy: export control policy; trade in critical goods and technology; conclusions.
3. Projects of Concern: description of the project; level of technology; present status of development; future plans; missing technology (development and production); companies/organisations involved, including end-user(s); diversion activities; conclusions. <http://www.wassenaar.org/>

mechanism to facilitate information exchange among, and ensure access for, all states parties. This could then involve states parties submitting requests for information to an appropriate Treaty body – possibly an ATT Secretariat (see section 4.1 below) – which could have access to information from relevant international instruments (e.g. the International Tracing Instrument) and/or which could engage with appropriate national and regional contact points.

3.2.3 Exchanging information on diversion risks

The risk of diversion of arms during or post international transfer is widely recognised as a key facet of the illicit arms trade. It is increasingly evident that the diversion of arms is one important way in which terrorist groups and other unauthorised non-state actors can acquire arms; at the same time diverted arms can also fuel destabilising accumulations and contribute to breaches of human rights and international humanitarian law. Since preventing the diversion of arms should be a key objective of an ATT the architects of the regime should seriously consider including the exchange of relevant information amongst states parties. Such exchanges on diversion risks could be undertaken in the same way as the proposed exchanges on actors of concern (above), i.e. states parties would be encouraged to provide relevant information to an appropriate Treaty body (e.g. an ATT Secretariat) which could then take steps to investigate further and inform other states parties.

Conclusion

Under an ATT, a variety of information exchanges between states parties could be enabled:

- The exchange of information on denials of international arms transfer licences could constitute an important mechanism for maintaining levels of international arms transfer restraint. Even if it is not possible to immediately establish a mandatory denial notification requirement under an ATT, consideration should be given to the establishment of provisions for voluntary exchanges or for the future development of a denial notification mechanism.
- Exchanges of information among states on actors of concern within the international arms transfer chain would allow a greater number of states to make informed international arms transfer licensing decisions.
- Preventing diversion of arms will be a key aspect of an ATT. Provision should be established under an ATT for the exchange of information between states parties on diversion risks.

3.3 Transparency provisions

While comprehensive provisions relating to reporting and information exchange will be crucial to the effective functioning of an ATT, unless there is a degree of transparency surrounding these activities there will be little to encourage public support for the regime. Although states have sought to portray the confidential reporting and information exchanges that take place within multilateral fora, such as the Wassenaar Arrangement, as constituting a form of transparency, such exchanges do not adequately serve the requirements of transparency in the wider sense. This report defines transparency as placing information (e.g. concerning the implementation, verification and monitoring of an ATT) in the public domain.

Concern among international public opinion in relation to the unregulated and irresponsible trade in arms has undoubtedly been a key factor in raising the issue of an ATT to the top of the governmental agenda. Accordingly, the inclusion of public

transparency provisions will be important in order to foster public confidence in the implementation of the Treaty. However, not all states have been comfortable with the notion of public transparency surrounding the arms trade. The most frequently repeated arguments against the public disclosure of information concern 'national security' and 'commercial confidentiality' issues. It is important to realise, however, that matters of national security often arise in relation to the potential policies and/or actions of other states. However, if states parties have already shared with all other states parties comprehensive reports on their national implementation of an ATT (including details of international arms transfers), then they can have few arguments against releasing such information to national parliaments and the public. Where concerns relate to commercial issues regarding competitors, fears should be assuaged by the fact that all reporting would be retrospective.

The level of public transparency regarding current international arms transfer control regimes varies significantly. While some have aspired to a certain level of openness through the publication of operating procedures and guidelines relating to various export control-related issues, few have provided significant levels of public transparency in relation to international arms transfers. Indeed, the extent to which information on international arms transfers is made public appears largely dependent on a combination of two factors: firstly the purpose of the regime in the eyes of the states parties; and secondly the level of trust and political coherence among the participating states. For example the declared aims of the EU Code of Conduct on Arms Exports included the wish to "strengthen the exchange of relevant information with a view to achieving greater transparency". However, there was initially no promise of public reporting on arms exports by Member States. Over time, however, as EU Member States have grown accustomed to the operation of the Code, levels of public reporting on international arms transfers have increased. EU states now publicly report on all arms export licences (and most report on actual exports/deliveries), listed by Military List category, although, as mentioned earlier, this is still insufficient to allow a fully accurate assessment of how the EU Code is being implemented in practice.

The Wassenaar Arrangement, on the other hand, was established to "promote transparency and greater responsibility in international transfers of conventional arms and dual-use goods and technologies, thus preventing destabilising accumulations".¹⁸ However, since its inception it has become clear that any increase in transparency that is referred to in the Initial Elements is intended for state-to-state information exchanges only and is not intended for public consumption. While information on the types of exchanges that take place within Wassenaar and a plethora of guidelines on issues ranging from export controls to disposal of surplus military equipment have been published, information on international transfers of weapons has not. This has meant that it is not possible for those outside the governments of the states parties to judge objectively whether or not the regime is making positive progress towards meeting its stated objectives.

Although it might be considered that the levels of political coherence among the states reporting publicly to the UN Register on Conventional Arms Transfers would be relatively low, the *raison d'être* of the UN Register is nevertheless to discourage the destabilising accumulation of conventional arms by increasing transparency in international transfers. Established in 1992, the UN Register saw 95 states submit reports in its first year (1993). Submissions in intervening years have reached a high of 126 (2002) and a low of 85 (1999). According to the 2006 Report of the Group of Governmental Experts on the continuing operation and further development of the UN Register, "as at 28 July 2006, a total of 170 States have participated in the Register at least once by reporting on international arms transfers and/or by providing additional background information. During the 13 years of operation of the Register, 142 States have

18 Wassenaar Arrangement Initial Elements <http://www.wassenaar.org/>

participated three or more times, 101 have participated at least seven times, 50 have participated in all the years, while 25 have never participated”¹⁹

The fact that levels of participation in the UN Register far outstrip levels of non-participation suggests that the vast majority of states are not opposed to the principle of transparency in the international arms trade. However, as mentioned above, reporting under the UN Register is limited to eight broad categories of weapons; as a result it does not allow for comprehensive assessment of states international arms transfer policies in practice. In its current form, therefore, the UN Register would not satisfy the requirement for full transparency and accountability under an ATT. Indeed, a fundamental principle underpinning the development and implementation of an ATT should be that as much information as possible is released into the public domain. At a minimum this should include full details provided by states in their national annual reports with regard to international arms transfers, steps taken to implement an ATT at national level, and assistance given and received for the purposes of implementing an ATT.

Conclusion

Discussion of options for ensuring public transparency in the implementation of an ATT should include the following considerations:

- An ATT should serve the purposes of public transparency in the international arms trade so as to build wider confidence in the effective implementation of the regime.
- States should not use arguments relating to national security and commercial confidentiality in order to block transparency provisions under an ATT. Such concerns relate primarily to the potential policies and activities of other states and in reporting retrospectively on their international arms transfers under an ATT these concerns ought to be overcome.
- The publication of information as currently takes place under the UN Register is inadequate for an ATT; this level of disclosure will be insufficient to demonstrate that an ATT is being implemented fully. All the information that is contained within states annual reports on national implementation of an ATT (see section 3.1 above) should be made publicly available.

¹⁹ UN Document ref (A/61/261) <http://daccessdds.un.org/doc/UNDOC/GEN/N06/468/71/PDF/N0646871.pdf?OpenElement>.

4

Institutional infrastructure

IT IS CLEAR that the fulfilment of substantive reporting, information exchange and transparency provisions under an ATT will require the development of some dedicated institutional capacity. Indeed, while the establishment of adequate institutions under an ATT will be central to the effective monitoring and verification of the regime, failure to build appropriate institutional support for reporting, information exchange and transparency provisions could jeopardise the fulfilment of a range of important functions, including the provision of assistance for implementation.

As regards the nature of the institutions that will be required under an ATT, ultimately this should be decided according to the range of specific functions that they are required to serve. However, an examination of other international arms control, non-proliferation, and environmental and trading regimes yields a wide range of potential options. Ranging from the relatively minimalist provisions of the 1990 Conventional Forces in Europe (CFE) Treaty to the extensive arrangements of the 1997 Chemical Weapons Convention (CWC), the 1992 UN Framework Convention on Climate Change (UNFCCC), the 1997 Kyoto Protocol and the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), there exists a significant body of international experience upon which the architects of an ATT may draw.

4.1 An Arms Trade Treaty Secretariat

At a minimum, it will be important that sufficient provision is made to allow the servicing of basic ATT requirements, including reporting, information exchange, transparency and the provision of appropriate assistance. An examination of how such requirements have been met under other international regimes, particularly in situations where international trade data is collated and analysed, points to the establishment of an ATT Secretariat as a potential solution.

The Technical Secretariat of the Organisation for the Prohibition of Chemical Weapons (OPCW) carries out a range of functions under the CWC. As well as preparing the annual programme, budget and report concerning implementation of the Convention, it provides technical assistance and technical evaluation to states parties including, for example, on the establishment of adequate national legislation. The Technical Secretariat is also specifically mandated to carry out the verification measures provided for in the Convention and it is responsible for negotiating

agreements with states parties in respect of the establishment and maintenance of permanent stockpiles of emergency and humanitarian assistance.²⁰

The 1997 Anti-Personnel Mine Ban Convention (Mine Ban Convention) also has significant structures that are concerned with monitoring implementation and compliance. The foremost of these is the Implementation Support Unit (ISU) of the Geneva International Centre for Humanitarian Demining (GICHD). This body was established by the GICHD in 2001 by way of a formal mandate from the states parties. The ISU is dedicated solely to the implementation of the Mine Ban Convention and fulfils a variety of functions, including providing advice and information on any aspect of Convention implementation and developing training programmes and briefings.²¹

In the environmental sphere there is a permanent Secretariat under the UN Framework Convention on Climate Change (UNFCCC), which, among other tasks, gathers and synthesises parties' emissions data and other reports. It also runs an electronic independent transaction log to ensure the integrity of emissions trading transactions by checking them against the trading conditions set out under the Protocol. There is also an assistance body – the Consultative Group of Experts on National Communications from Parties not included in Annex I to the Convention (CGE) – to help developing countries with their reports on steps they are taking or intend to take to implement the convention and their emissions data. Similarly, under the Convention on the International Trade in Endangered Species (CITES), a Secretariat is responsible for information gathering and review as well as working with parties to try to resolve major issues of implementation. In addition to offering advice and technical assistance it is also mandated to: undertake scientific and technical studies that will contribute to implementation; prepare reports and make recommendations on implementation; and “perform any other function as may be entrusted to it by the Parties.”²²

The need for the establishment of an ATT Secretariat to perform registry and clearing-house type functions and to act as a depository for national reports was raised by a number of states in their submission to the UN Secretary General.²³ As well as gathering reports on national implementation of an ATT, an ATT Secretariat could perform a range of registry functions, including:

- Development of a reporting template to assist states parties to fulfil the reporting obligations they themselves agree;
- Review of states parties' data and implementing measures as reported;
- Assessment of progress being made by states parties in implementing an ATT;
- Provision of advice on technical issues relating to the implementation of the Treaty; and
- Production of an annual report on implementation of the Treaty by states parties.

The review of states parties' data could be particularly important from the point of view of monitoring and promoting compliance with the Treaty. Such a review process could help to identify any underlying problems that are giving rise to such data discrepancies,²⁴ thereby highlighting those areas where parties can make improvements to their monitoring and reporting systems and where capacity-building assistance is

²⁰ More details concerning the provision of humanitarian assistance and the other activities of the Technical Secretariat can be found at <http://www.opcv.org/index.html>

²¹ Official reporting by states parties under Article 7 of the Mine Ban Convention tends to be relatively dry and uninformative. However, a great deal more information on the implementation of the convention by states parties, by states that have signed but not ratified the Convention, by non-states parties and the role of non-state actors is provided by the unofficial Landmine Monitor of the NGO International Campaign to Ban Landmines. The annual Landmine Monitor seeks to “monitor and report on implementation of and compliance with the [Mine Ban Convention], and more generally, to assess the international community's response to the humanitarian problem caused by landmines”. See <http://www.icbl.org/lm>

²² Resolution, Establishment of Committees of the Conference of the Parties, Conf. 11.1, April 2000 (Rev. CoP14) <http://www.cites.org/eng/res/11/11-01R14.shtml>

²³ See *The Global Arms Trade Treaty: What States Want* pp 36–37 and *Analysis of States' Views on an Arms Trade Treaty* pp 12–13.

²⁴ Data discrepancies could arise, for example, because the data collection systems used by different states parties are not comparable.

required. In so doing, the review process could promote the accuracy, compatibility, clarity, completeness and consistency of data submitted. Any data review process undertaken by an ATT Secretariat could consider information from a variety of sources, such as that from open sources and credible information provided by civil society.

In terms of its clearing house functions an ATT Secretariat could serve as a repository for a range of relevant information, including relating to actors of concern in the international transfer chain, breaches of UN arms embargoes, diversion risks and possibly denial notifications (see section 3.2 above). This would allow states parties to share in, compare and learn from each other's implementation experiences. A Secretariat could also help in identifying sources of appropriate assistance and in matching the needs of states parties with appropriate assistance, thereby aiding and promoting compliance with the Treaty.

Conclusion

The establishment of a Secretariat function under an ATT would follow the example set by several other international regimes and could service a number of functions that will be central to the effective functioning of an ATT, including:

Reporting:

- Collection of data on international arms transfers and on measures taken to implement an ATT;
- Checking the data provided in national reports and seeking clarification regarding inconsistencies; and
- Provision of support and guidance to state parties in the production of national reports, including through development of a reporting template.

Information exchange:

- Providing a clearing house function with regard to requests for information on actors of concern in the international arms trade;
- Acting as a repository for and source of information on those involved in breaching UN arms embargoes and on diversion risks; and
- Acting as a repository for denial notifications.

Transparency:

- Data analysis and assessment of trends and emerging issues in international arms transfers; and
- Production of a public annual report on the implementation of an ATT.

Capacity building and assistance:

- Identifying those discrepancies and inconsistencies in national reporting that are a result of inadequate capacity; and
- Matching capacity-building needs by identifying sources of appropriate assistance.

4.2 Treaty bodies and institutional infrastructure

Beyond meeting the requirements for an ATT Secretariat a key challenge for the architects of an ATT will be to establish institutions that are tasked with, and capable of, ensuring effective monitoring and verification of state party compliance with their obligations under the Treaty. In this regard, an examination of a variety of existing international regimes points to the requirement for three basic provisions that ought to be considered as a means of overseeing implementation and the future development of an ATT:

- Regular meetings of states parties and review conferences;
- A permanent or semi-permanent 'executive type' institution; and
- A role for civil society.

4.2.1 Meetings/conferences of states parties and review conferences

One of the most fundamental requirements under any international regime is for states parties to have the opportunity to meet regularly to discuss issues relating to the implementation of a treaty. However, beyond the creation of a 'talking shop', regular meetings or conferences of states parties often play a crucial role in overseeing compliance with Treaty obligations. For example, under the Mine Ban Convention a Meeting of States Parties is held every year for the purpose of considering any matter regarding the application or implementation of the Convention. Similarly, under the CWC an annual Conference of States Parties is the principal organ for overseeing implementation of the agreement. The CFE Treaty embodies a slightly different approach in that meetings of states parties take place twice yearly under the rubric of a Joint Consultative Group (JCG). Established to promote the objectives and implementation of the Treaty, the JCG is empowered, *inter alia*, to address questions of Treaty compliance, to work out measures that would improve the viability and effectiveness of the Treaty regime, to standardise implementation practices, and to help resolve disputes regarding implementation. However, any matter falling within the scope of the Treaty can be brought to the attention of the JCG. In the environmental sphere, under CITES the Conference of States Parties is the supreme decision-making body and meets every two-and-a-half years; the Conference of Parties (CoP) to the UNFCCC meets annually, along with the Meeting of Parties (MoP) to the Kyoto Protocol.

Since states parties are ultimately accountable to each other for their implementation of an agreement, meetings or conferences of states parties often serve as the primary decision-making and ultimate adjudication body under a treaty. In this regard a number of agreements contain provisions for states to request the convening of special or extraordinary sessions with a view to facilitating and clarifying compliance issues. Thus, while meetings or conferences of states parties do provide an opportunity for states parties to discuss and take decisions regarding the implementation of a treaty, they also provide a forum where states parties may take decisions regarding allegations or specific evidence of non-compliance (see section 5.3 below).

Under some international regimes, including the CWC, meetings of states parties can also be mandated, periodically, to undertake a formal review of an agreement. Other regimes, however, make provision for a special review conference to be held separate from periodic meetings or conferences of states parties. For example, under the Mine Ban Convention the UN Secretary General is tasked with convening a Review Conference at intervals of not less than five years. The CFE Treaty also provides for a five-yearly Review Conference, while a Treaty Amendment Conference can also be held if requested by three or more states parties.

In terms of an ATT, provision for an Annual Conference or Meeting of States Parties would seem a minimum requirement in order to consider technical and procedural changes in operating practice; for example, in relation to the provision of information on international arms transfers or on the operation of verification mechanisms (as is the case under the CWC and Mine Ban Convention). Such a Meeting could also serve as the forum within which decisions are taken concerning allegations or specific evidence of non-compliance. In addition, there should be provision for periodic review of an ATT through a five-yearly Review Conference. These could both review implementation and consider possible substantive amendments to the Treaty; in this regard, the need for some form of follow-up or review mechanism was supported by a number of states in their submissions to the UN Secretary General.²⁵

²⁵ *The Global Arms Trade Treaty: What States Want*, p 37 and *Analysis of States' Views on an Arms Trade Treaty*, pp 12–13.

4.2.2 Establishing an 'executive-type' institution

Meetings and conferences of states parties perform a vital oversight function with regard to the operation of any treaty regime, in so far as they are responsible for ensuring that the arrangements and mechanisms established under the treaty are meeting the purposes for which they were designed. However, the often large membership of such meetings or conferences of states parties and the infrequency of meetings held (commonly one per year) mean that such institutions are not necessarily best placed to support the day-to-day operation of the regime or to perform an 'executive' function and act promptly in response to particular issues of concern. Instead, these requirements typically necessitate the establishment of a body that either meets frequently or is permanent. As well as overseeing the day-to-day functioning of the regime, including the work of the Secretariat, this body should be capable of taking and acting on decisions regarding the ongoing requirements of a regime, including the operation of the monitoring and verification mechanisms (see section 5).

An examination of a variety of existing international regimes demonstrates that most have some form of executive institutional capacity charged with overseeing the day-to-day implementation of the agreement. For example, under the CWC, the Executive Council is the primary subsidiary body made up of 41 states on a rotating basis. Importantly, the Executive Council approves arrangements relating to the implementation of verification activities and is responsible for taking up issues of non-compliance with the states parties involved, possibly bringing matters to the attention of the Conference of States Parties. The Technical Secretariat, which provides technical assistance to states parties in the implementation of the Convention and carries out verification provisions under the Convention, is subsidiary to the Executive Council.

Between the annual Meeting of States Parties under the Mine Ban Convention there are also intersessional meetings of four Standing Committees addressing various areas of the Convention: General Status and Operation of the Convention; Stockpile Destruction; Mine Clearance, Mine Risk Education and Mine Action Technologies; and Victim Assistance and Socio-Economic Reintegration. These Committees have traditionally held two one-week meetings each year. Further to this, at the second Meeting of States Parties in 2000 the decision was taken to establish a Co-ordinating Committee in order to manage the required high degree of co-ordination between the various Standing Committees. The Co-ordinating Committee meets on an ad hoc basis under the chairmanship of the current President of the Meeting of States Parties.

Several institutions, including the Executive Board of the Clean Development Mechanism and the Joint Implementation Supervisory Committee, guide operational aspects of the Kyoto Protocol.²⁶ In terms of overseeing the main compliance system of the Kyoto Protocol, however, the central institution is the Compliance Committee, which consists of a Facilitative Branch and an Enforcement Branch. Each branch has 10 members elected to it by the Meeting of States Parties. Membership of the Compliance Committee is supposed to be balanced among the five official UN regions and between developed and developing country parties. It meets in a plenary composed of members of both branches while a Bureau, made up of the Chairperson and Vice-Chairperson of each branch, supports its work.

The CITES executive body is known as the Standing Committee. This is made up primarily of 14 representatives of the parties – elected on a regional basis – which oversees the operation of the Convention between Conference of States Parties (CoP) meetings. Its functions include: overseeing financial activities; co-ordinating and advising other committees, as well as working groups set up by the CoP; drafting potential CoP resolutions; and performing “any other functions as may be entrusted to it”²⁷ by the CoP.

²⁶ These are known as “flexible mechanisms”: Under the CDM, Annex I Parties (industrialised countries and countries with economies in transition) can implement emission reduction projects (or afforestation or reforestation projects) in developing countries. Under JI, Annex I Parties can carry out emissions reduction projects or projects that increase removals, in other Annex I countries.

²⁷ CITES Resolution, Establishment of the Standing Committee of the Conference of the Parties, Conf. 11.1 Annex 1, April 2000. www.cites.org

While the experience of a number of international regimes would point to the need for some form of executive institutional capacity under an ATT, one option may be to explore whether existing international mechanisms could be adapted in order to meet the requirements of the agreement. However, it is a matter for debate whether there currently exists sufficient and appropriate institutional capacity, for example within the UN, that could be channelled towards meeting these requirements.

4.2.3 A role for civil society

In developing institutional arrangements under an ATT, states should bear in mind the important role that civil society plays with regard to encouraging accession to, and monitoring the implementation of, various international regimes.

In the arms control sphere the Mine Ban Convention allows all interested parties – including non-government organisations (NGOs) – to fully participate in Meetings of States Parties and intersessional meetings of states parties. As well as being present in the room, NGOs may give presentations to the meetings and make interventions in proceedings.

In the environmental sphere, under the CITES, there is provision that enables the Secretariat to be “assisted by suitable inter-governmental or non-governmental, international or national agencies or bodies technically qualified in protection, conservation and management of wild fauna and flora”.²⁸ This has enabled the development of partnerships between the Secretariat and a number of NGOs that have been appointed to particular tasks. These include the World Conservation Union (IUCN), its Environmental Law Centre, and TRAFFIC²⁹ – a joint initiative of the World Wide Fund for Nature (WWF) and IUCN. As well as conducting a review of states parties’ suggestions for amending the CITES Appendices, the IUCN and TRAFFIC play an important part in assessing the trade in, and status of, species that are widely traded, as well as in reviewing states parties’ national legislation under the Convention’s national legislation project. Another NGO – the Africa Resources Trust – was tasked with developing a guide for the CoP meeting in 2000 to help parties to review and control significant trade in certain species.³⁰

While it may not be possible to replicate exactly these types of effort under an ATT, efforts to verify compliance with Treaty obligations could include the gathering of credible and substantiated evidence from civil society. It is certain, moreover, that civil society will continue to fulfil an important role in independently assessing levels of ATT implementation by states parties, in a similar way to which NGOs have sought to monitor implementation and encourage progressive development of other instruments including the EU Code of Conduct and the UN Programme of Action.

Conclusion

In order to function effectively an ATT will require appropriate institutional arrangements. A minimum requirement would involve the establishment of a Meeting of States Parties alongside provision for a formal review of the Treaty every five years. Beyond this the experience from other international regimes suggests that an ATT would also benefit from the establishment of a permanent or semi-permanent executive-type institution that would be tasked with overseeing the day-to-day functioning of the regime, including the work of an ATT Secretariat. The establishment of such an executive-type institution would be particularly important with regard to overseeing any monitoring and verification mechanisms under the regime (see section 5). Finally, where there is scope for civil society to make a positive contribution to the effective functioning of the regime states should support this.

²⁸ 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora, Article XII. <http://www.cites.org/>.

²⁹ TRAFFIC, the wildlife trade monitoring network, works to ensure that trade in wild plants and animals is not a threat to the conservation of nature. See: <http://www.traffic.org/home/>.

³⁰ ‘Verification mechanisms in CITES’, Rosalind Reeve, *Verification Yearbook 2001*, Vertic, London, 2001.

5

Monitoring and verification of compliance

UNDER ANY INTERNATIONAL TREATY there is always the possibility that questions could arise regarding compliance on the part of one or more states parties. In order to ensure that such matters are speedily and efficiently addressed, an ATT will require the adoption of procedures that include specific roles for states parties and Treaty institutions. Provisions that enable effective monitoring and verification of compliance will also be important in terms of clarifying any concerns that arise.

Prior to a discussion of the types of compliance mechanisms that might be adopted under an ATT, it is worth noting, first of all, that verification mechanisms serve three important functions, namely they:

- Enable states to demonstrate their compliance;
- Facilitate the detection of non-compliance; and
- Help to deter states parties from undertaking activities that would conflict with their obligations under a Treaty.

5.1 Consultation mechanisms

Although states are at liberty to consult with each other at any point regarding any matter of mutual concern, formal procedures governing consultation among states parties on cases of suspected non-compliance have nevertheless been established under most international regimes. Nonetheless, it is important to recognise that where consultation mechanisms are the *only* provisions for monitoring compliance they tend to function as a blunt instrument: without recourse to supplementary measures, the effectiveness of consultation mechanisms alone in resolving differences between states can be limited. As a result, consultation mechanisms function most effectively when they form part of a package of compliance procedures, supported by monitoring and verification processes.

The Mine Ban Convention, for example, has some substantive procedures allowing for consultation over compliance issues. Any state wishing clarification of compliance by another state party can submit a request for clarification through the UN Secretary

General; the state party receiving the request must reply within 28 days. If a response is not forthcoming, or it does not satisfy concerns, the matter can be referred to the next Meeting of States Parties or, where at least one third of states parties agree, a Special Meeting of the States Parties.

Under the CWC, states parties are required to first make every effort to clarify and resolve issues of potential or suspected non-compliance through exchange of information and consultations among themselves. A state party receiving a request from another state party for clarification of any such matter is supposed to provide this not later than 10 days after the request. States can request clarification from the Executive Council regarding possible non-compliance by a state; they can also request that the Executive Council obtain clarification from a state concerning a matter of possible non-compliance. The Council is supposed to act within 24 hours and request that the state party giving rise to the concerns respond within 10 days. If the reply is not satisfactory the Executive Council can be asked to solicit further clarification and the requesting state can call a special session of the Executive Council. If, 60 days from the date of such a request being made, the matter is still not resolved, a special session of the Conference of States Parties can be requested.

Many of the main multilateral environment agreements (MEAs) have a range of compliance procedures, although these involve treaty bodies rather than state party-centred consultation mechanisms. Several MEAs, such as CITES and the Kyoto Protocol, include provisions for states parties to respond to treaty bodies about questions of compliance. In particular, the Kyoto Protocol has extensive rules of procedure to ensure due process is observed as well as procedures for introducing evidence and for interested non-disputants to file information relevant to a case. Under CITES, the Secretariat is required to inform parties of cases of non-compliance. In response, parties are required to provide 'relevant facts' and to take remedial action. They are also asked to supply the Secretariat with comprehensive information on significant cases of illegal trade and to notify it about convicted illegal traffickers. When the Secretariat requests details of a suspected infraction, parties are required to reply within one month or indicate a date when one can be given; if the requested information has not been submitted within one year, parties are supposed to provide the Secretariat with an explanation for the non-response.

Conclusion

While there is a range of options open in respect of developing consultation procedures that will assist in resolving compliance issues under an ATT, certain minimum-level requirements can be identified. For example, an ATT should codify states parties' right to raise issues relating to compliance either directly with other concerned states parties or through an official body (such as an executive body that is established subsidiary to an annual Meeting of States Parties). Should initial consultations fail to resolve a compliance issue, states should have recourse to further provisions. These could include the right of the state party raising the concern to take the matter to an annual Meeting of States Parties or, in exceptional circumstances – the nature of which should be agreed – to an extraordinary Meeting of States Parties. Specific time frames governing these exchanges should be established.

It will be important that, in establishing consultation mechanisms under an ATT, care is taken to guard against the raising of spurious or frivolous concerns over compliance. In this regard a Treaty must establish clear evidentiary requirements based on reliable sources including, possibly, from open source information and civil society.

5.2 Mechanisms for addressing compliance issues

Beyond provisions for reporting, information exchange, transparency and consultation, a number of international agreements also include arrangements for monitoring and verifying compliance, some of which involve in-country verification activities. These allow states parties to observe particular facilities or activities on each other's territory with a view to verifying treaty compliance. At one end of the spectrum, verification activities may be integral to the day-to-day operation of a treaty and a routine means of ensuring its full implementation; at the other, activities can take a more reactive approach, sometimes in the form of 'challenge inspections'.

Some agreements incorporate in-country verification activities within an ongoing compliance monitoring system. For example, the CFE Treaty includes an ongoing 'on-site inspection regime' that allows monitoring by states parties of compliance on the part of other states parties with the Treaty's obligations throughout its different phases. Four distinct types of inspection are provided for and, in addition, each state party whose territory falls within the geographical scope of the Treaty is obliged to accept a certain number of aerial inspections. States parties are also entitled to use 'national or multinational technical means of verification' of other states parties' compliance with the Treaty. Similarly, the CWC provides for an extensive inspection regime in order to verify that states parties are in compliance with their obligations under the Convention. States parties must allow on-site inspection and monitoring of: all locations at which chemical weapons are stored or destroyed; all chemical weapons production facilities; and certain specified toxic chemicals and precursors. The inspection and monitoring process can involve *inter alia* the taking of photographs and the analysis of samples by the inspection team at the point of inspection. The Convention also contains on-site verification provisions relating to: old and abandoned chemical weapons; the conversion or destruction of chemical weapons production facilities; the production of chemicals scheduled under the Convention; and chemical production facilities declared under the Convention.

Article 8 of the Mine Ban Convention mandates 'fact-finding missions' in order to allow the investigation and resolution of issues of potential non-compliance. Following the report of an inspection team, a state party may be requested to take steps to address a compliance issue within a specified period of time. However, where a situation of non-compliance is considered to be beyond the control of a state party, a Meeting of States Parties can recommend the adoption of certain measures, including the provision of material, scientific and technological assistance, as specified under Article 6 of the Convention. In an effort to ensure reciprocity and to build confidence in the functioning of the regime, a state party may invite a fact-finding mission on to its territory at any time. Despite Article 8 emphasising co-operation and facilitation of compliance, it has yet to be invoked. Nevertheless, states have been urged to engage in advanced planning and preparation for such an occurrence thereby reaffirming their commitment to the full implementation of the Convention.³¹

The Kyoto Protocol compliance system includes a formal regular review mechanism for developed states parties' reports whereby expert review teams (ERTs)³², co-ordinated by the Secretariat, review emissions data and other reports. These reviews are either by in-country review, centralised review (which takes place at the UNFCCC Secretariat) or desk review (for which the experts work from their home countries). The review process then feeds into the compliance system as follows. The Facilitative Branch of the Compliance Committee provides advice and assistance with the aim of promoting compliance, with both the monitoring and reporting requirements and also 'early-warning' of cases where a party may be in danger of not complying with its

³¹ *Guide to Fact Finding Missions Under the Ottawa Convention*, Angela Woodward, Vertic 2002 <http://www.vertic.org/assets/Fact-finding%20missions.pdf>

³² The teams are composed of experts selected from a roster of individuals nominated by parties and should, to the extent possible, be balanced both between developed and developing country parties and geographically. Under the UNFCCC developing country parties' reports are not subject to individual review by ERTs but information from them is drawn up into a compilation and synthesis report by the Secretariat.

emissions target. The Enforcement Branch of the Compliance Committee determines cases of parties' compliance with emissions targets, monitoring and reporting requirements and eligibility to participate in the emissions trading mechanisms. The Committee's procedures are triggered when it receives 'questions of implementation', either in reports by the ERTs, or from a party with respect to itself or from any party with respect to another party, as long as it has corroborating information.

Under CITES the Secretariat can conduct missions to parties undergoing implementation problems in order to collate relevant information, evaluate problems and provide advice to relevant authorities. Secretariat missions are also used to assess progress where implementing conditions have been set down with regard to the lifting of trade sanctions. Missions are only conducted with the approval of the state party concerned. Another type of mission involving technical experts, organised by the Secretariat and the Standing Committee, has frequently been tasked with investigating problems concerning the illegal trade in endangered species, particularly rhinos and tigers. These have been followed by high-level political delegations that report their conclusions to the Standing Committee and the CoP.³³

Conclusion

The establishment of some form of verification measures under an ATT could play an important part in efforts to build confidence in the effectiveness of the regime and to promote full compliance. Indeed, to this end, a number of states responding to the UN Secretary General called for the establishment of a mechanism for overseeing ATT compliance.³⁴

While representing a substantial commitment by states parties, provisions for in-country monitoring and verification can help build confidence in the effective implementation of a treaty. Indeed, the experience of the CWC indicates that if such provisions are used early on within the lifetime of a treaty regime, and are targeted towards resolving low-level compliance issues, then the mechanism in question is more likely to function effectively thereafter. Confidence is increased where there are review mechanisms that include a capacity-building function to help parties improve their monitoring and reporting procedures, as is the case under the UNFCCC/Kyoto Protocol review process.

While monitoring and verification mechanisms are typically not implemented to the optimal extent, experience under the CFE Treaty, the CWC, CITES and the UNFCCC/Kyoto Protocol suggests that such mechanisms are a valuable tool, especially as part of a package of compliance measures. Thus, the establishment of regular monitoring efforts under an ATT could contribute to the development of an effective regime and could conceivably include verification activities. To enhance accountability in the international arms transfer chain, these monitoring and verification measures could apply not only to arms exporting and importing states but also to transit and transshipment states, as well as those providing a base for the operation of international arms brokers. Such measures could include, for example, inspections of transfer licensing records and of procedures and records kept at exit and entry points for arms shipments. In addition to assisting in the detection of compliance problems, such provisions could be useful in highlighting cases whereby, for example, data retrieval, management and storage or a lack of capacity, resources or relevant expertise are preventing states from fulfilling their obligations under the Treaty. With such information to hand co-operative efforts could be undertaken and assistance provided so as to resolve such matters.

³³ Rosalind Reeve, *Ibid.* According to Rosalind Reeve, technical missions – the composition of which is decided by the chair of the Standing Committee – typically consist of one or more Secretariat staff, accompanied by experts drawn from the IUCN and TRAFFIC. Accompanied by representatives of the host government, they examine records, conduct interviews and visit relevant sites.

³⁴ *The Global Arms Trade Treaty: What States Want*, *Ibid* p 37 and *Analysis of States' Views on an Arms Trade Treaty*, pp 11–12.

The frequency and extent of such in-country review/verification activities would be a matter for discussion and agreement by states parties and could be codified in the treaty itself or as part of a protocol on monitoring and inspections. For example, states could be required to accept a certain number and type of inspections per year – either randomly or at specified intervals – by an authorised inspection team.

Finally, it is also conceivable that states parties may wish to agree verification procedures that could be invoked with a view to resolving specific instances of suspected non-compliance. Provisions of this nature have been adopted – in the form of challenge inspections – by other international regimes, most notably under the CWC. Invariably, more politically charged and difficult to manage, examples of their effective employment are limited. Nevertheless, this remains an option for consideration under an ATT.

5.3 Adjudication, dispute settlement provisions and sanctions

It is possible that despite the invoking of consultation mechanisms and monitoring and verification provisions under an ATT concerns may persist regarding compliance with Treaty obligations on the part of one or more states parties. Accordingly, the effectiveness and credibility of the regime will be best served through the agreement of formal procedures for adjudication and dispute settlement along with recourse to the imposition of sanctions in the event of a clear and established breach.

5.3.1 Adjudication

It is important to clarify that there are at least three types of circumstances under which a breach of an ATT could occur – the first two of which could be considered ‘technical’ and the third ‘substantive’. In the first instance, a state party could be considered to be in breach of its Treaty obligations if it fails to establish the requisite national laws, regulations and administrative procedures that are required under an ATT; where they are identified such breaches should be met with offers of appropriate assistance. Additionally, a state party that fails to fulfil its reporting requirements adequately and in a timely fashion could also be considered in breach; again such occurrences should be met with offers of support and assistance. Thirdly, and most seriously, a state party could be considered in breach of its treaty obligations by licensing an international arms transfer in contravention of the terms of the Treaty. While transfers of this nature could conceivably take place as the result of a lack of capacity, resources and/or expertise, the possibility of wilful neglect would also need to be considered. In this regard, the precise circumstances surrounding, and nature of, such breaches would need to be formally established, ideally by means of the monitoring and verification provisions that are established under an ATT.

With regard to a substantive breach, it is crucial to recognise that an ATT will differ from other arms control and non-proliferation regimes in that proving that a particular international arms transfer has taken place will not necessarily be sufficient to establish that a breach in compliance has taken place. This is because the adjudication process will necessarily involve assessing a ‘suspect’ arms transfer against the objective criteria that lie at the heart of the Treaty. Accordingly, the process of establishing that a violation of the Treaty has taken place will necessarily involve two distinct components. In the first instance, a specified Treaty body (possibly an ATT Secretariat, an executive institution, or a Group of Experts appointed by a designated Treaty institution) would need to establish beyond doubt that a particular international arms transfer of concern has, in fact, taken place. As noted above, the monitoring and verification provisions of the Treaty could be a critical source of information in this respect. Once it were established that a ‘transfer of concern’ had taken place and the circumstances surrounding the transfer had been clarified, it would need to be fully assessed by an appropriate Treaty institution (for example a Meeting of States Parties) with a view to

providing a definitive judgement regarding how the transfer breaches the terms of the Treaty and what steps should be taken as a result.

As an ATT will represent a unique form of international agreement, there is limited experience of this type of adjudication, particularly in the non-proliferation sphere, upon which the architects of the regime may draw. However, under the CWC the Technical Secretariat can mandate a Group of Experts to look into and clarify a particular question of compliance before the Meeting of States Parties considers it. Adjudication-type provisions are more commonplace in the environmental sphere, with the most highly developed procedures found within the Kyoto Protocol compliance system (see section 5.2 above). Under this agreement, decisions taken by the Compliance Committee cannot be appealed, except with regards to a decision of the Enforcement branch relating to emissions targets. In such cases, a state party can appeal to the CoP/MoP only if it believes it has been denied due process. Under CITES, the Secretariat possesses considerable power, since not only does it assess and verify compliance related information, but it also makes recommendations to the CoP and the Standing Committee, which can be far reaching and are often implemented.³⁵

5.3.2 Dispute settlement

Beyond concerns over individual international arms transfers it is also possible that more general disputes may arise over Treaty implementation or the application of its provisions. In this regard, it will be important for an ATT to establish procedures for addressing such matters within a constructive framework.

Dispute settlement procedures are a part of some, but not all, international treaties and those that do exist are variable in scope. For example the provisions contained within the CFE Treaty are limited to mandating the Joint Consultative Group to deal with any disputes that may arise concerning the operation of the Treaty. There is no mention of how disputes or evidence of non-compliance are to be handled and ultimately, states that consider their supreme interests to have been threatened have little recourse except to withdraw from the agreement.³⁶ The provisions of the Mine Ban Convention are similarly limited in that states are required to ‘consult and cooperate’³⁷ in order to settle disputes concerning the application or interpretation of the Convention and with the Meeting of States Parties contributing to this process in whatever way it sees fit. In the context of general disputes regarding the application or interpretation of the CWC, the states parties concerned are required to consult with a view to the expeditious settlement of the dispute by negotiation or by other peaceful means; this may also include recourse to the International Court of Justice, although it is doubtful whether this would yield speedy resolution. Ultimately, the Conference of States Parties is responsible for ensuring the settlement of disputes, involving other organs of the Convention, as it deems appropriate.

5.3.3 Sanctions

Despite containing provisions for verification and dispute settlement, few arms control or non-proliferation regimes specify any sanctions in the event that a treaty breach is recognised. In such cases the majority of regimes that specify any further recourse simply refer the matter to the UN Security Council and/or General Assembly.

One exception is the CWC under which measures can be adopted in the face of clear violation of its provisions. The Conference of States Parties has ultimate responsibility for ensuring compliance and, taking advice from the Executive Council, may decide to restrict or suspend a State Party’s rights and privileges under the Convention until

³⁵ Rosalind Reeve, *Ibid.*

³⁶ In July 2007 Russia went some way towards this by announcing that it was suspending the application of the CFE Treaty, ruling out further inspections and data exchanges.

³⁷ 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Article 10. <http://www.icbl.org>

they adequately address the non-compliance issue. This is particularly important because the CWC requires states to eschew the acquisition of chemical weapons in return for access to technologies for peaceful purposes. Accordingly, states in breach of their commitments can be denied access to chemical technologies for industrial, commercial and other peaceful purposes. The CWC also states that where serious harm is threatened to the purposes of the Convention, the Conference may recommend certain collective steps to be taken by States Parties, in conformity with international law; it may also report particularly grave cases to the UN Security Council and General Assembly.

Provisions for sanctions or penalties in the event of non-compliance are included in some multilateral environmental agreements. Under the UNFCCC and Kyoto Protocol the Enforcement Branch of the Compliance Committee can apply certain 'consequences' in cases of non-compliance with emissions targets. These consequences are as follows:

- When a party fails to meet the monitoring and reporting requirements it must develop a compliance action plan.
- When a party fails to meet one or more of the eligibility requirements for the flexible mechanisms (emissions trading) it will have its eligibility suspended in accordance with the relevant provisions. An expedited procedure exists for parties to have their eligibility restored.
- When a party exceeds its assigned amount of emissions:
 - A number of tonnes equal to 1.3 times the amount in tonnes of excess emissions can be deducted from the party's assigned amount for the ensuing commitment period;
 - A compliance action plan must be developed by the party; and
 - A party's eligibility to transfer quotas can be suspended.

Under CITES there is the possibility of trade sanctions against states parties failing to meet their treaty obligations, both with regard to preventing deleterious trade in a species and for failing to introduce required legislation. Such sanctions are implemented through the Standing Committee, which can recommend to the states parties that they introduce trade measures on errant parties. Recommendations for the suspension of trade in CITES-listed species can be made either by the CoP or Standing Committee, on the advice of the Secretariat.

Conclusion

In order to facilitate the reaching of decisions on whether a particular international transfer of arms is in compliance with an ATT, the establishment of clear adjudicatory provisions will be necessary. One option could be for an ATT to follow the example of the CWC and provide for the establishment of a Group of Experts, at the behest of the states parties, to consider international arms transfer compliance questions. Once established, such a Group could be mandated to undertake a range of activities from deliberation of evidence already accrued to fact-finding and further evidence gathering, before presenting its opinion to the Conference of States parties which, as the ultimate arbiter, would then be required to make the final decision. Alternatively, a system based on the Kyoto Protocol arrangements could be envisaged, whereby the work of a group of experts (known under Kyoto as an Expert Review Team) is reinforced by a sophisticated compliance committee that is itself charged with determining and responding to compliance issues.

Several states in their submissions to the UN Secretary General stressed the importance of adopting practical dispute settlement measures as part of an ATT framework.³⁸ Every effort should be made to resolve differences between states parties by means of the consultation mechanisms and other compliance provisions that are established

³⁸ *The Global Arms Trade Treaty: What States Want*, *Ibid* p 38 and *Analysis of States' Views on an Arms Trade Treaty*, p 12.

under the Treaty. However, in the event that this fails to provide for the resolution of an issue, it may be necessary to consider establishing clear dispute settlement procedures with the roles and responsibilities of different institutions clearly specified. An interesting example in this regard is found under the 1982 UN Convention on the Law of the Sea (UNCLOS), whereby an independent tribunal has been established in order to address disputes among states parties.³⁹ Moreover, while the detailed investigation of any compliance issue could be undertaken in private, in order to ensure confidence is maintained in the operation of the regime it will be vital that the resolution of any concern is made public.

Finally, the experience of the CWC and various multilateral environmental agreements suggests that compliance with a Treaty can be encouraged *inter alia* by including trade incentives as well as technical and financial assistance as a benefit of membership. Accordingly, the architects of an ATT should consider whether there is the possibility of constructing a regime whereby particular benefits can accrue to states parties that are in full compliance with their obligations under the treaty and other relevant international law. However, where a state is confirmed as being in persistent and flagrant violation of an ATT (possibly by the Conference of States Parties), there should be recourse to the imposition of sanctions against the offender by states parties – including the potential imposition of an arms embargo. While the option would always remain that a particularly serious matter arising under an ATT could be referred to the UNSC, problems could arise in the event that a state party under investigation is represented (particularly as a permanent member) on the UNSC. Under such circumstances the potential for this body to arbitrate in an impartial manner would have to be called into question.

³⁹ Under Article 287 of the 1982 UN Convention on the Law of the Sea states parties are provided with a choice of means for the settlement of disputes concerning the interpretation or application of the Convention, one of which is the International Tribunal for the Law of the Sea, established in accordance with Annex VI.
http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm

6

Establishing an effective Arms Trade Treaty

IDEALLY, THE ESTABLISHMENT OF EFFECTIVE REPORTING, information exchange, transparency, institutional, verification and compliance provisions will be achieved at the outset of an ATT. However, if agreement on the details of such mechanisms proves problematic to the extent that it threatens to derail negotiation of a Treaty, then the initial text should establish the basic elements of such procedures. A Treaty should explicitly reference effective reporting, information exchange, transparency, monitoring and verification procedures and call for subsequent further development of these mechanisms. In this regard, great care should be taken that the provisions in the initial Treaty text are fully capable of being built on to establish necessary and effective institutions and mechanisms.

At the same time, the establishment of such provisions also depends on the level of understanding and experience of the issue being tackled. Agreement on the principles and details of implementation and verification procedures will only be possible if sufficient research and analysis has been carried out, and if the experiences and practices in similar international arrangements are learned from.

In conclusion, to be effective and credible an ATT will need to adopt provisions relating to all of the areas discussed above: reporting, information exchange and public transparency in international arms transfers; capacity building and assistance programmes; appropriate institutional capacity and infrastructure; monitoring, verification and compliance procedures; and adjudication, dispute settlement and sanctions. The exact nature and modalities of these provisions will undoubtedly be a matter for considerable debate. However, it is important to recognise that effective mechanisms do not need to be cumbersome or bureaucratic and that a considerable amount can be achieved through the establishment of focussed and transparent permanent or ad hoc mechanisms that are tailored to achieving particular objectives. While an ATT will in some ways be a unique agreement, much can be learned from the experiences under other international regimes – particularly those that are focussed on regulating trade in particular commodities. Accordingly, by drawing upon the experience of existing agreements, states should be in a position to develop a transparent, accountable and effective international arms transfer control regime that is rooted in international law.

ANNEX 1: UN Register of Conventional Arms reporting categories

Reporting under the UN Register occurs with respect to the following categories of equipment:

I. Battle tanks: Tracked or wheeled self-propelled armoured fighting vehicles with high cross-country mobility and a high level of self-protection, weighing at least 16.5 metric tons unladen weight, with a high muzzle velocity direct fire main gun of at least 75 mm calibre.

II. Armoured combat vehicles: Tracked, semi-tracked or wheeled self-propelled vehicles, with armoured protection and cross-country capability, either: (a) designed and equipped to transport a squad of four or more infantrymen, or (b) armed with an integral or organic weapon of at least 12.5 mm calibre or a missile launcher.

III. Large-calibre artillery systems: Guns, howitzers, artillery pieces, combining the characteristics of a gun or a howitzer, mortars or multiple-launch rocket systems, capable of engaging surface targets by delivering primarily indirect fire, with a calibre of 75 mm and above.

IV. Combat aircraft: Fixed-wing or variable-geometry wing aircraft designed, equipped or modified to engage targets by employing guided missiles, unguided rockets, bombs, guns, cannons or other weapons of destruction, including versions of these aircraft which perform specialized electronic warfare, suppression of air defence or reconnaissance missions. The term “combat aircraft” does not include primary trainer aircraft, unless designed, equipped or modified as described above.

V. Attack helicopters: Rotary-wing aircraft designed, equipped or modified to engage targets by employing guided or unguided anti-armour, air-to-surface, air-to-subsurface, or air-to-air weapons and equipped with an integrated fire control and aiming system for these weapons, including versions of these aircraft which perform specialized reconnaissance or electronic warfare missions.

VI. Warships: Vessels or submarines armed and equipped for military use with a standard displacement of 500 metric tons or above, and those with a standard displacement of less than 500 metric tons, equipped for launching missiles with a range of at least 25 km or torpedoes with similar range.

VII. Missiles and missile launchers: (a) Guided or unguided rockets, ballistic or cruise missiles capable of delivering a warhead or weapon of destruction to a range of at least 25 km, and means designed or modified specifically for launching such missiles or rockets, if not covered by categories I through VI. For the purpose of the Register, this sub-category includes remotely piloted vehicles with the characteristics for missiles as defined above but does not include ground-to-air missiles.

(b) Man-Portable Air-Defence Systems (MANPADS).

Small arms: 1. Revolvers & self-loading pistols. 2. Rifles & carbines. 3. Sub-machine guns. 4. Assault rifles. 5. Light machine guns. 6. Others.

Light weapons: 1. Heavy machine guns. 2. Hand-held under-barrel & mounted grenade launchers. 3. Portable anti-tank guns. 4. Recoilless rifles. 5. Portable anti-tank missile launchers & rocket systems. 6. Mortars of calibres less than 75mm. 7. Others.

Saferworld works to prevent and reduce violent conflict and promote co-operative approaches to security. We work with governments, international organisations and civil society to encourage and support effective policies and practices through advocacy, research and policy development and through supporting the actions of others.

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