

National Interest Analysis [2013] ATNIA 19

with attachment on consultation

**Arms Trade Treaty
(New York, 2 April 2013)**

[2013] ATNIF 18

NATIONAL INTEREST ANALYSIS – CATEGORY 1 TREATY

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Nature and timing of proposed treaty action

1. Australia signed the *Arms Trade Treaty* (the Treaty) at New York on 3 June 2013. It is proposed that Australia ratify the Treaty by depositing an instrument of ratification with the Secretary-General of the United Nations (UN) in accordance with Article 21 of the Treaty.
2. The Treaty will enter into force ninety days after it has been ratified by 50 States in accordance with Article 22(1). If Australia is not among the first 50 States to deposit its instrument of ratification, the Treaty will enter into force for Australia ninety days after the date of deposit in accordance with Article 22(2). It is proposed that Australia deposit its instrument of ratification once all necessary domestic treaty processes are completed.

Overview and national interest summary

Objective of the Arms Trade Treaty

3. The objective of the Treaty is to establish common global standards for national regulation of the international trade in conventional arms. It encourages States Parties to trade conventional arms more responsibly and transparently; thereby helping to deter their diversion to the illicit market and preventing the destabilising impact the illicit arms trade has on peace and security, human suffering and development. The Treaty, when it enters into force, would oblige States Parties to have national control systems to regulate the export of certain categories of conventional arms, their ammunition/munitions and components.

Background on the Arms Trade Treaty

4. The Treaty was adopted by an overwhelming majority of States at the 67th session of the United Nations General Assembly (UNGA67) on 2 April 2013 (154 States supported; 3 opposed; 23 abstentions). The UNGA vote followed the blocking of consensus at the Arms Trade Treaty Final Diplomatic Conference (which was held from 18-28 March 2013) by Iran, Syria and the Democratic People's Republic of Korea (DPRK), which were also the states that voted against the Treaty at UNGA67.

Reasons for Australia to take the proposed treaty action

5. Australia has been a strong and long-standing advocate of a robust treaty because of its potential to advance our humanitarian objectives and serve national and international security interests. Better controls will help reduce the deleterious impact that irresponsible and illicit arms transfers have on security and development internationally - with impacts most seriously felt by vulnerable countries, including in

our region. The establishment of a legally binding and widely supported multilateral treaty provides a strong tool in meeting these challenges.

6. The Treaty represents a strong humanitarian outcome while acknowledging the legitimate trade in conventional arms. The Treaty applies only to the international trade of such weapons and does not regulate the movement of arms within a country.

7. Consistent with Australia's views and leadership on this issue, Australia was among the first States to sign the Treaty when it opened for signature at the United Nations in New York on 3 June 2013.

Australia's strong and long-standing involvement in the development of the Arms Trade Treaty

8. Since 2006, Australia has actively supported the development of a legally binding instrument that would set common international standards for the transfer of conventional arms. Australia was a co-author of the UNGA resolution which called for the development of a treaty (Resolution 61/89 of 2006), and has co-authored subsequent resolutions on the matter.

9. In 2007, Australia outlined its position on a treaty in a submission to the United Nations Secretary-General. This submission expressed Australia's support for a treaty to address the irresponsible or illicit transfer of conventional arms, and set out our views regarding the feasibility, scope and parameters of the Treaty. Australia was engaged with other similarly strong supporters of the proposed Treaty in drafting annual UN resolutions working towards the goal, and participated actively in various preparatory processes established by those resolutions. Australia was involved in and supported outreach activities, including particularly in the Asia Pacific, the Caribbean and Africa.

10. In 2009, UNGA passed Resolution 64/48, co-authored and co-sponsored by Australia, which called for a conference to be convened in 2012 "to elaborate a legally binding instrument on the highest possible common international standards for the transfer of conventional arms".

11. The first of four Preparatory Committee meetings to prepare an Arms Trade Treaty was held in New York in July 2010. Australia was elected Vice-Chair of the Preparatory Committee and was also appointed a Friend of the Chair for that process. Consistent with this position, Australia participated in related outreach and advocacy activities. In March 2012, Australia submitted views on elements of the Treaty that were incorporated into a compilation prepared by the United Nations Office of Disarmament Affairs. The mandated United Nations Conference in July 2012 resulted in a text which, on the final day, failed to achieve the support of some key States.

12. In December 2012, UNGA voted in favour of convening a further and final conference from 18-28 March 2013 in New York, which would use the draft text of 27 July 2012 as the basis for negotiations. Australia's Ambassador to the UN in Geneva was appointed President of that Conference. The conference produced a revised text which had very broad support. However, the rules of the conference

required adoption of the text by consensus, which was blocked by Iran, Syria and the DPRK.

13. Accordingly, supporters of the text, including Australia, sponsored a resolution of the General Assembly which resulted in the text being adopted by an overwhelming majority on 2 April 2013.

Obligations

Core Provisions

14. Article 1 describes the object and purpose of the Treaty as being to establish the highest possible common international standards for regulating the international trade in conventional arms and to prevent and eradicate illicit trade in such arms, or their diversion, for the purposes of contributing to peace and security, reducing human suffering and promoting cooperation, transparency and responsible action by States Parties.

15. Article 2 sets out the types of conventional arms and types of activities covered by the Treaty. While the Treaty does not apply to all conventional weapons, its scope is very broad, covering “all conventional arms” within eight categories of conventional arms, namely: (a) battle tanks; (b) armoured combat vehicles; (c) large-calibre artillery systems; (d) combat aircraft; (e) attack helicopters; (f) warships; (g) missiles and missile launchers; and (h) small arms and light weapons. These eight categories reflect the seven categories covered by the UN Register of Conventional Arms (UNROCA) and small arms and light weapons, which are an optional eighth category under UNROCA. The Treaty does not define these categories, leaving this instead to States Parties’ national implementation of the Treaty. However, Article 5(3) of the Treaty prescribes minimum conditions for States Parties, when adopting definitions for their national control lists. For categories (a) to (g), States Parties’ definitions must be no less expansive than the descriptions of these categories used in the UNROCA as at the time of entry into force of the Treaty. The UNROCA “Guidelines for Reporting International Transfers”, set out in Annex III of that document, contain descriptions of each of these categories of conventional arms. For category (h), States Parties’ definitions must be no less expansive than the descriptions used in relevant UN instruments as at the time of entry into force of the Treaty. Relevant UN instruments would include the *International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons*, UNROCA Guidelines and the *Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition*¹, supplementing the *United Nations Convention against Transnational Organized Crime*². It is open to States Parties to adopt a broader, more comprehensive definition of these categories of conventional arms.

16. Article 2 provides that the Treaty applies to the activities of the international trade in conventional arms, which for the purpose of the Treaty, comprise “export”,

¹ [2002] ATNIF 7

² [2004] ATS 12

“import”, “transit”, “trans-shipment” and “brokering”. These terms are not defined in the Treaty but are left to the domestic implementation of States Parties.

17. Article 2 excludes from the scope of the Treaty any international movement of conventional arms by, or on behalf of, a State Party for that State Party’s use provided that those arms remain under that State Party’s ownership. This provision is intended to exclude from the ATT the re-supply of arms and equipment to a State Party’s military or police stationed abroad provided that such arms and equipment are not subsequently sold to a third party. Should such weapons and equipment be sold to a third party, the ATT would then apply.

18. Article 3 obliges States Parties to establish and maintain a national control system to regulate the export of ammunition/munitions fired, launched or delivered by any of the conventional arms categories covered under Article 2(1). States Parties, prior to authorising the export of ammunition/munitions, are then required to apply the provisions relating to prohibited transfers (Article 6) and export assessment (Article 7) in the same way they would with respect to other conventional arms within the scope of the Treaty.

19. Article 4 obliges States Parties to establish and maintain a national control system to regulate the export of parts and components where the export is in a form that can provide the capability to assemble the categories of conventional arms covered under Article 2(1) of the Treaty. States Parties must then apply the provisions relating to prohibited transfers (Article 6) and export assessment (Article 7), prior to authorising the export of parts and components. This provision is intended to prevent a State Party from circumventing its obligations by sending a number of separate shipments of parts and components for a conventional weapon falling under Article 2.

20. Article 5 sets out how States Parties are to implement the Treaty at the national level. States Parties must implement the Treaty in a consistent, objective and non-discriminatory manner having regard to the principles set out in the preambular section of the Treaty. Paragraph 2 of Article 5 is a core provision of the Treaty and obliges States Parties to establish and maintain a national control system, including a national control list, in order to implement the provisions of the Treaty. The national control list will define which conventional arms are covered by the national control system. It must comply with the minimum standards prescribed in paragraph 3 and is to be provided to the Secretariat pursuant to paragraph 4. Paragraph 5 contains a general obligation for States Parties to take necessary measures to implement the Treaty. Such “measures” are not defined in the Treaty, but may include the adoption of legislation, creation of administrative structures and provision of appropriate resources. States Parties must also designate competent national authorities to manage their national control system and establish national points of contact to exchange information on matters relating to the implementation of the Treaty. For Australia, the Defence Export Control Office and the Australian Customs and Border Protection Service will be the key national authorities and points of contact under our national control system.

21. Article 6 details the circumstances in which States Parties shall prohibit the transfer of conventional arms or their ammunition/munitions and parts or components

(as covered by Articles 2(1), 3 and 4). Paragraph 1 reaffirms an existing legal obligation on States Parties to implement decisions of the UN Security Council, particularly arms embargoes or other similar measures adopted by the Security Council under Chapter VII of the Charter of the UN. Paragraph 2 reaffirms existing legal obligations on States Parties to abide by international agreements to which they are party and to prohibit any transfer of conventional arms (or ammunition/munitions, parts or components) that would violate those agreements. Australia is party to the *Convention on Cluster Munitions*³ and the *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction*⁴. The obligations in these Conventions to prohibit the transfer of cluster munitions and anti-personnel mines (save for the purpose of destruction) continue to apply independently of the Treaty. Paragraph 3 prohibits the transfer of conventional arms (or ammunition/munitions, parts or components) where a State Party has knowledge at the time of authorisation that the arms would be used in the commission of genocide, crimes against humanity and certain war crimes. Relevant definitions of genocide and crimes against humanity are found in the *Rome Statute of the International Criminal Court*⁵ (Rome Statute) which, in the case of the former, reflects the definition contained in Articles 2 and 3 of the *Convention on the Prevention and Punishment of the Crime of Genocide*. Three types of war crimes are referred to in paragraph 3: grave breaches of the four Geneva Conventions of 1949 (as defined in Articles 50, 51, 130 and 147 respectively); attacks directed against civilian objects or civilians protected under international humanitarian law (well established prohibitions under international law); and other war crimes as defined by international agreements to which the State Party is a Party. For Australia the latter would capture, in addition to the grave breaches listed above, the grave breaches set out in Articles 11 and 85 of Additional Protocol I to the Geneva Conventions of 1977 and Article 8 of the Rome Statute. Each crime listed in paragraph 3 is an offence under Division 268 of the *Criminal Code Act 1995* (Cth), whether or not the conduct constituting the offence, or its result, occurs in Australia.

22. If an export is not prohibited under Article 6, Article 7 requires each exporting State Party to conduct an assessment, as part of its national control system, of the proposed export of conventional arms (or ammunition/munitions, parts or components) against specific criteria, including whether the conventional arms (or ammunition/munitions, parts or components) would contribute to or undermine peace and security, could be used to commit or facilitate serious violations of international humanitarian or human rights law or acts constituting terrorism or a transnational organised crime. Paragraph 2 requires each exporting State Party to consider possible risk mitigation measures that could be taken to reduce the risk of any of the above consequences occurring. Paragraph 4 requires each exporting State Party to take into account, when making its assessment, whether the conventional arms (or ammunition/munitions, parts or components) could be used to commit or facilitate serious acts of gender-based violence or violence against women and children. Having conducted the assessment and taken these matters into account, paragraph 3 requires each exporting State Party to determine whether there is an “overriding risk” of any of the negative consequences in paragraph 1 occurring and, if so, to refuse authorisation. Paragraph 5 requires each exporting State Party to deliver export

³ [2013] ATS 6

⁴ [1999] ATS 3

⁵ [2002] ATS 15

authorisations in a detailed and timely manner. Paragraph 6 requires each exporting State Party to make available information about the authorisation to importing States Parties and transit or trans-shipment States Parties on request. This provision explicitly permits each exporting State Party to limit the information it provides in order to protect its security or commercial interests (“subject to its national laws, practices or policies”). Recognising that export authorisations can be valid for a number of years, if an exporting State Party becomes aware of new information after authorisation has been granted, paragraph 7 encourages the State Party to reassess that authorisation, after consultations with the importing State if appropriate.

23. Article 8 outlines obligations for importing States Parties. Such obligations entail ensuring appropriate and relevant information is provided to the exporting State Party to assist with its export assessment and taking measures such as establishing import systems, to enable it to regulate as it deems necessary imports of conventional arms covered under Article 2(1) (excluding ammunition and parts and components). An importing State Party that is the final destination of an arms transfer may request information from an exporting State Party concerning such arms transfer.

24. Article 9 obliges each State Party to take appropriate measures to regulate the transit or trans-shipment under its jurisdiction of conventional arms covered under Article 2(1) – excluding ammunition and parts and components - through its territory in accordance with relevant international law. This would include, for example, the 1982 *United Nations Convention on the Law of the Sea*⁶ and the 1944 *Convention on International Civil Aviation*⁷.

25. Article 10 concerns brokering and obliges each State Party to take measures at a national level to regulate the brokering of conventional arms covered under Article 2(1) – excluding ammunition and parts and components - that occurs within its jurisdiction.

26. Article 11 outlines ways and means to prevent and react to diversion, particularly in the transfer (export, import, transit, trans-shipment, brokering) of conventional arms covered under Article 2(1) (excluding ammunition and parts and components). The Article describes a range of illustrative measures available to States Parties and encourages cooperation and information sharing in order to prevent diversion. If a State Party detects a diversion of conventional arms it is required to take appropriate measures consistent with international law and its domestic laws to address the diversion.

27. Article 12 requires each State Party to maintain national records for a minimum of ten years, pursuant to its national laws and regulations, of its export authorisations or actual exports of conventional arms under Article 2(1). This excludes ammunition and parts and components, although States Parties may nonetheless choose to maintain records of such items. Each State Party is encouraged to maintain records of conventional arms that are imported to its territory as the final destination or that are authorised to transit or trans-ship through its territory. Article

⁶ [1994] ATS 31

⁷ [1957] ATS 5

12 provides an illustrative guide as to what details should be included in those records.

28. Article 13 outlines the reporting requirements for States Parties under the Treaty. Each State Party must provide an initial report to the Treaty Secretariat (established under Article 18 of the Treaty) describing its national implementation measures within one year of the Treaty's entry into force for that State Party. States Parties are encouraged to report to other States Parties through the Secretariat on measures they have taken that have been proven effective in addressing the diversion of transferred conventional arms. Each State Party must submit an annual report to the Secretariat concerning its authorised or actual exports and imports of conventional arms covered under Article 2(1). This excludes ammunition and parts and components, although States Parties may nonetheless choose to report on such items. To avoid duplicating effort, the Treaty indicates this report may contain the same information as that submitted to UNROCA. States Parties are permitted to exclude commercially sensitive or national security information.

29. Article 14 obliges each State Party to take appropriate measures to enforce national laws and regulations that implement the provisions of the Treaty. This is consistent with the national implementation of the Treaty established under Article 5.

30. Article 15 encourages international cooperation among States Parties in the effective implementation of the Treaty, including through consultation, exchange of information and lessons learned, information sharing and mutual legal assistance, and cooperation to prevent or address diversion of arms, violations of national measures and corruption.

31. Article 16 provides that States Parties may seek assistance, whether of a technical, legal, material or financial nature, in implementing the Treaty and requires States Parties in a position to do so to provide such assistance on request. Article 16 (3) provides that a voluntary trust fund will be established to assist requesting States Parties requiring international assistance to implement the Treaty. All States Parties are encouraged – though not obliged – to contribute resources to this fund.

Final Provisions

32. Article 17 provides that a Conference of States Parties will be held within 12 months after the entry into force of the Treaty and thereafter at such times as decided by the Conference of States Parties. Its role includes reviewing the implementation of the Treaty, considering amendments and issues arising from the interpretation of the Treaty and considering and adopting recommendations regarding the implementation and operation of the Treaty. It is also empowered to perform any other function consistent with the Treaty.

33. Article 18 establishes a Secretariat to assist States Parties in the effective implementation of the Treaty. The Secretariat is to be adequately staffed within a minimised structure in order to facilitate the work of the Conference of States Parties, receive and distribute States Parties' reports, facilitate the matching of offers and requests for assistance and to perform any other duties mandated by the Conference of States Parties.

34. Article 19 provides that any disputes regarding the interpretation or application of the Treaty are to be cooperatively resolved between States Parties through mutually consenting to negotiations, mediation, conciliation, arbitration, judicial settlement or other peaceful means.

35. Article 26 sets out the Treaty's relationship vis-à-vis other international agreements for States that are party to both. Paragraph 1 permits States Parties to enter into other agreements governing the trade in conventional arms provided that these are consistent with the obligations of the Treaty. The same is true for existing agreements. Paragraph 2 provides that the Treaty shall not be cited as grounds for voiding defence cooperation agreements concluded by States Parties to the Treaty.

Implementation

36. No new legislation is required to give effect to the Treaty in Australia. The legislative framework established by the *Customs Act 1901*, the Defence and Strategic Goods List and the Customs (Prohibited Exports) Regulations (1958) already meets Australia's obligations under the Treaty.

37. Some new administrative procedures may be required to comply with Australia's obligations under Article 12 of the Treaty for record keeping and Article 13 for reporting.

Costs

38. To further the implementation of the Treaty, Australia has pledged \$1 million to provide assistance to developing countries with implementation of the Treaty, namely through the United Nations Trust Facility Supporting Cooperation on Arms Regulation (UNSCAR).

39. Costs will likely arise from the Conference of State Parties and the Treaty's Secretariat. Article 17(3) of the Treaty provides that the Conference of States Parties will adopt financial rules for itself, the Secretariat and any subsidiary bodies established.

40. The other costs that may be associated with the Treaty would be limited to travel by officers to the Conference of States Parties to represent Australia. The International Security Division of the Department of Foreign Affairs and Trade expects to be able to manage these costs within its divisional allocation.

Regulation Impact Statement

41. The Office of Best Practice Regulation has been consulted and confirms that a Regulatory Impact Statement is not required.

Future treaty action

42. The Treaty provides for amendment under Article 20. Pursuant to this Article, amendments may only be first proposed for consideration at the Conference of States

Parties six years after the entry into force of the Treaty and thereafter every three years. The Conference of State Parties will adopt amendments by consensus wherever possible, or by a three-quarters majority vote. Amendments adopted by the Conference of State Parties will enter into force 90 days after a majority of States Parties (as at the time of adoption) have deposited instruments of acceptance with the Depositary.

43. Acceptance of any future amendments to the Treaty would be subject to Australia's domestic treaty process.

Duration and withdrawal

44. Article 24 of the Treaty provides that the Treaty is of unlimited duration. Article 24 allows a State Party to withdraw from the Treaty by notifying the Depositary. Withdrawal will take effect 90 days after the receipt of the notification of withdrawal by the Depositary. However, a State Party that has withdrawn shall not be discharged from its obligations that arose under the Treaty while it was a Party.

45. Any decision to withdraw from the Treaty would be subject to Australia's domestic treaty process.

Contact details

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CONSULTATION

46. The Department of Foreign Affairs and Trade (DFAT) coordinated extensive inter- agency consultation in the lead up to and at the negotiations. Delegations to the negotiations were open to interested agencies and typically were led by DFAT and included Department of Defence, Attorney-General's Department, AusAID and the Australian Customs and Border Protection Service. Consultations were held in Canberra and were open to representatives reflecting humanitarian, security, sporting and industry interests, including: Oxfam; Amnesty International; Small Arms Survey; International Action Network on Small Arms; Act for Peace; International Committee of the Red Cross; WiSH; Paradox FX; Caritas; Sporting Shooters' Association of Australia; Pistol Australia; National Rifle Association of Australia; National Firearm Dealers; and the Medical Association for Prevention of War. At their request and with the approval of the Minister for Foreign Affairs, civil society experts were also included in the Australian delegations to the negotiations as advisers. Humanitarian advocacy groups generally urged Australia to take an active role in support of a strong Treaty. Sporting groups sought assurances that an ATT would not unduly impact on their activities.

47. States and Territories were informed of progress in the negotiations through the Standing Committee on Treaties (SCOT). The Treaty has been included in the bilateral schedule of treaties under negotiation, consideration and review by the Australian Government since September 2007.