

EXPERT GROUP ON ATT IMPLEMENTATION

Key issues for ATT Implementation: Preventing and combating diversion

**Chair's Interim Conclusions from
deliberations of the Expert Group
on ATT Implementation**

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Introduction

Diversion of conventional arms is a major problem for many States and populations that are suffering conflict and armed violence; it presents one of the biggest challenges to international efforts seeking to encourage responsibility and restraint in the international trade in arms. The Arms Trade Treaty (ATT) recognises the shared responsibility of all States Parties to prevent diversion: the issue is central to the object and purpose of the ATT (Article 1) and is addressed comprehensively in Article 11.

Diversion is often the crucial link between the authorised or legal trade and the illicit trade in arms. In many countries that are experiencing conflict, armed violence and arms proliferation, diversion is the means whereby those responsible for violations or abuses of human rights and international humanitarian law are able to procure weapons.

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The complexity of diversion

One of the key difficulties in addressing the problem of arms diversion is that there is no internationally accepted definition of the term. Indeed, during the ATT negotiations of July 2012 and March 2013, debate centred on whether diversion should be: considered as taking place from an authorised end-user; framed in terms of authorised end-use; or both. The difficulty in reconciling the different views meant that there could be no clear definition of diversion in the ATT.

The many facets and circumstances that can contribute to the problem mean that arms diversion is not universally recognised or well understood. Factors that contribute to the complexity of the issue include:

- The potential for diversion of arms during transfer and from arms stockpiles and holdings;
- The extended time-frame during which diversion may take place (i.e. diversion of an arms transfer may occur during transit, or immediately upon reaching the authorised end-user; it may also take place months or years later);
- The potential for a range of actors, both government and non-government, to be involved in arms diversion;
- The potential for diversion to be a deliberate premeditated act on the part of a State, or to be the result of loss, theft or neglect;
- The different perspectives that exist among supplier and recipient States as to whether recipient States have the right to retransfer or reassign weapons that have been purchased legally;
- That all States involved in the transfer (export, import, transit, transshipment and brokering) of arms have an important role to play in preventing and responding to diversion.

The lack of widespread, detailed and common understanding of the issue is therefore one of the key obstacles to concerted international action against the diversion of arms. It also places a clear onus on States to share information on all manifestations of the problem, thus aiding efforts to prevent and combat the illicit and irresponsible trade in conventional arms. The ATT provides a crucial framework for sharing knowledge and experience of arms diversion and for effective action to address it.

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The ATT and diversion

Article 11 of the ATT takes a comprehensive approach to the issue of diversion thus providing an important basis for States Parties to work together in order to tackle the problem effectively. The ATT requires States Parties to act in order to prevent diversion (Article 11.1 and 11.2), to take steps to mitigate the risks of diversion (Article 11.3), to respond to cases of diversion when they are detected (Article 11.4), to share information with each other on measures to tackle diversion (Article 11.5) and to report to the Secretariat on measures taken to address diversion (Articles 11.6 and 13.2). While the provisions of Article 11 explicitly refer only to conventional arms covered by Article 2.1, **there is nothing in the ATT that prevents States Parties or Signatories applying the diversion provisions to parts, components and ammunition or to the “broadest range of conventional arms” as encouraged by Article 5.3.**

Preventing diversion

Acknowledging the responsibility of all States in the transfer chain to prevent diversion, Article 11.1 establishes that “[e]ach State Party involved in the transfer of conventional arms covered under Article 2 (1) shall take measures to prevent their diversion”. This is a key obligation and one which underscores the premise that concerted action is required on the part of all States Parties whether they are involved in the export, import, transit, and transshipment or brokering of arms.

At the same time, **the ATT emphasises the key role that exporting States have in preventing and combating diversion.** This is based upon the fact that while States may relinquish control of arms exports once they have passed across their national boundaries, their responsibilities do not end there. Recognising this, Article 11.2 obliges that “[t]he exporting State Party shall seek to prevent the diversion of the *transfer* [emphasis added] of conventional arms...” thus emphasising the responsibility of exporting States throughout the transfer chain.

Article 11.2 also obliges States Parties involved in exporting conventional arms to make tackling diversion a priority within their national control systems, in particular by assessing diversion risks associated with conventional arms exports, and by considering mitigation measures that may be adopted jointly by exporting and importing States (see below for discussion of mitigation measures). The obligatory nature of these provisions is indicative of their central importance within the ATT, with the risk assessment forming the bedrock of the ATT’s approach to preventing diversion.

When a diversion risk assessment is undertaken the exporting State still has control over the items and is still in a position to decide whether the export will take place or not. Thus, should a risk assessment highlight a significant possibility that diversion will occur, the exporting State is in a position either to explore mitigation options or to halt the transfer.

The fact that the diversion risk assessment provision is set out within Article 11 and not in Article 7 means that there is no explicit requirement to consider whether there is an “overriding” risk of diversion (Article 7.3); nor is there a requirement to consider diversion risks in the context of a potential contribution to peace and security from a particular arms export (Article 7.1). On the other hand, **while there is no obligation within Article 11.2 to refuse an export where there is judged to be a risk of diversion, the Article as a whole is clear on the imperative to prevent diversion, whether by exploring the scope for mitigation efforts or – should this prove fruitless – by refusing authorisation.** This imperative is equally applicable in situations whereby information on diversion risks comes to light after an authorisation has been granted. In such cases an exporting State Party should follow the provisions of Article 7.7 and undertake a reassessment of the authorisation.

While the importance of the diversion risk assessment clause is clear, Article 11.2 provides little guidance as to exactly how the diversion risk assessment should be operationalised. However, a few voluntary prevention measures are cited in Article 11.2 such as “examining the parties involved in an export, requiring additional documentation, certificates, assurances, not authorising the export” and these do provide an indication of the types of issues and strategies that States Parties should consider as part of any diversion risk assessment. For example, a proliferation of actors – such as dealers/brokers/shipping agents/freight-forwarding agents, etc. – involved in an arms transfer may give cause for concern, particularly when this is combined with a complicated supply route involving several stages of transshipment or unusual shipment routes. Moreover, **the reference to the importance of “certificates” points towards the use of end-use/end-user certificates. These can serve as a valuable tool for exporting States that are seeking to establish the *bona fides* of a prospective recipient of arms and to impose restrictions on re-export that can help to prevent diversion** (see below for a further discussion of this point). At the same time, “certificates” can also refer to other types of documentation that may be issued by importing and transit States such as delivery verification certificates (DVC) and transit licences. The provision of DVC by an importing State can provide assurance that a consignment of arms has arrived in the country of final destination; it can also help to identify cases where diversion risks may have increased during the transfer process and where a re-assessment of the export is required. Given that issuing a DVC is primarily an administrative process, this should be a feasible undertaking for most States.

In reality, those States Parties with the most developed arms transfer control systems will be best-placed to implement the diversion-prevention aspects of Article 11, and in particular to conduct a comprehensive diversion risk assessment. **It will therefore be important for States Parties that are major exporters of conventional arms to share as much information as possible with other States Parties and Signatories, thereby helping to build the capacity of other stakeholders to take effective action to prevent diversion.**

Mitigation

A focus on mitigation is one of the key themes of Article 11. While mitigation efforts can be considered as part of the wider effort to prevent diversion, the clear requirements for action in this regard by States Parties merit specific consideration.

As noted above, Article 11.2 obliges States Parties to endeavour to prevent diversion by assessing the diversion risks associated with an export of conventional arms and by “considering the establishment of mitigation measures such as confidence-building measures or jointly developed and agreed programmes by the exporting and importing States”. In addition, the shared obligation to tackle diversion that falls on all States in

the transfer control chain is re-affirmed by Article 11.3 which states that “[i]mporting, transit, trans-shipment and exporting States Parties shall co-operate and exchange information, pursuant to their national laws, where appropriate and feasible, in order to mitigate the risk of diversion of the transfer of conventional arms covered under Article 2 (1).” Accordingly, **the diversion-mitigation provisions established by Article 11 involve States Parties co-operating to explore programmatic responses to diversion risks as well as in the exchange of relevant information that will help reduce the risks of diversion.**

The prominence of diversion mitigation within Article 11 is a reflection of concerns on the part of importing States that, should significant risks of diversion be identified in relation to specific transfers of conventional arms, exporters may – for a variety of reasons such as cost or convenience – prefer to refuse the transfer rather than to take measures to identify and implement provisions that would help reduce the risks to an acceptable level. Accordingly, meaningful dialogue between exporters and importers on the issue of risk mitigation is seen by importing States as a way of ensuring a balanced approach in the application of the Treaty.

At the same time, it is important to acknowledge the existence of qualifying language around the diversion-mitigation provisions, and in particular language such as “pursuant to their national laws” and “where appropriate and feasible” in relation to the co-operation and information exchange provisions within Article 11.3. Such caveats reflect a range of concerns, for example, as regards the nature and feasibility of mitigation efforts (among exporting States) and regarding the complexities of maritime trade (among transit and importing States). This qualifying language and other examples elsewhere in Article 11 should not, however, be regarded as diluting the clear obligation on all States Parties in the transfer chain to co-operate and exchange information so as to mitigate diversion risks.

Exporting States that are committed to taking action in order to mitigate diversion risks can consider a range of potential options. A first step could involve requiring specific undertakings from the importer in the context of the end-use(r) certification process. These could routinely take the form of a no-re-export pledge and/or an acceptance of the need to provide a full and timely response to any subsequent enquiry from the exporting State as regards the whereabouts and use of the arms in question. Exporting States with specific concerns regarding potential diversion may also seek to reserve the right to carry out post-export verification checks as a condition of authorising the transfer, although following up on such undertakings by way of on-site inspection to verify ownership and/or authorised use of arms exports can present a range of challenges – both political and practical.

An indication of the types of measures and programmes that might be adopted jointly by exporting and importing States can be found in Article 16.1, which gives examples of the types of assistance that may be useful in promoting Treaty implementation. Specific mention is made of “stockpile management, disarmament, demobilisation and reintegration programmes, model legislation, and effective practices for implementation”, all of which could be useful components of a diversion mitigation programme. It is worth noting that, should they prove effective, the positive effects of such mitigation measures may go beyond the specific case for which they are designed and may ultimately yield wider systemic benefits. For example, improvements in stockpile management and security provisions carried out in relation to a specific transfer of conventional arms may impact positively on post-transfer security with regard to subsequent transfers.

Responding to diversion

In the event that a State Party detects a case of diversion, Article 11.4 obliges it to take “appropriate measures, pursuant to its national laws and in accordance with international law” to address the problem. The Article then continues: “[s]uch measures may include alerting potentially affected States Parties, examining diverted shipments of such conventional arms covered under Article 2 (1), and taking follow-up measures through investigation and law enforcement.” While these provisions are potentially useful, it could be argued that their force is diminished, to an extent, by the inclusion of qualifying language. In particular, the phrases “pursuant to its national laws” and “in accordance with international law” could be regarded as effectively diluting the obligation to address cases of diversion when they arise. The reference to national laws should not, in practice, have a significant impact; however it does serve to highlight the importance of States Parties ensuring that, consistent with Article 14, their domestic legislation enables the State law enforcement authorities to take action if there are suspicions regarding the diversion of an arms shipment within their jurisdiction. On the other hand the reference to international law arises from concerns on the part of transit States as regards maritime trade and specifically how the ATT might impact upon the right of innocent passage (enshrined in the UN Convention on the Law of the Sea). Notwithstanding these concerns, States Parties are not free to invoke other provisions of internal law as a means of avoiding their obligations under the ATT; instead all States Parties must ensure proper implementation of the ATT, while taking into account other treaties.

In a similar vein, the fact that States Parties uncovering instances of diversion “may” alert potentially affected States Parties fundamentally weakens what is seen by many States as a key provision of the Treaty. **States that are seriously impacted by illicit trafficking of arms have consistently expressed their wish to be informed by other States when information comes to light regarding specific cases of diversion that affect them.** Indeed a failure to share information could be seen as effectively undermining the object and purpose of the Treaty; moreover it is difficult to understand how affected States are to take effective action against arms diversion within their jurisdiction if they lack the necessary information, for example, with regard to the provenance or ultimate destination of the arms in question or the actors involved in the diversion. Furthermore, it is generally understood that in the context of innocent passage those transfers that would be prohibited under Article 6 of the ATT do not enjoy this right. However, transit States cannot be expected to intervene to halt a shipment without firm evidence of a breach of the ATT. This places the onus on timely and complete information sharing among States Parties with regard to potential breaches of the Treaty (see below for further discussion).

It is important also to consider that the effectiveness of a number of the Article 11 provisions will be dependent, to some extent, on States Parties fulfilling and indeed going beyond the record-keeping requirements of Article 12. Record keeping will be an important tool in ensuring that when cases of diversion occur or become known years after the initial export, the circumstances around the original transfer can be properly clarified.

Finally, given that Article 11.4 of the ATT makes only a limited number of suggestions for State Party action in response to a case of diversion, it is possible to envisage a range of additional measures that could be adopted, for example:

- An exporting State could impose a moratorium on arms exports to a State and/or end-user that has allowed or facilitated diversion (until such time as they are satisfied that remedial/mitigation measures have been taken to address relevant problems).

- Joint investigation missions could be undertaken by exporting and importing (and potentially other involved) States so as to define the precise circumstances surrounding a diversion case and identify steps that could be taken to address them.
- On-site inspections could be carried out by an exporting State in order to verify the situation regarding previous exports to the importing State.
- Exporting States could establish the practice of undertaking post-shipment verification of future arms exports to the importing State in question.
- Exporting States could provide assistance to build capacity for more effective arms management and control within importing or transit States.

Information sharing and reporting

Article 11 of the ATT also provides for information sharing between States Parties so as to enhance the effectiveness of action to combat diversion. **Article 11.5 specifically refers to the need “to better comprehend and prevent the diversion of transferred conventional arms” and so encourages States Parties to share information with one another on effective measures to address the problem.** Then follows a broad range of suggestions regarding types of information that could be shared, i.e. “information on illicit activities including corruption, international trafficking routes, illicit brokers, sources of illicit supply, methods of concealment, common points of dispatch, or destinations used by organised groups engaged in diversion.”

As in previous paragraphs within Article 11 optional language is used insofar as States Parties are only “encouraged to share relevant information”. **It is to be hoped that States Parties can relatively quickly begin to share information on effective measures to address diversion and that this effort can receive support from the ATT Conferences of States Parties (CSP) and Secretariat.** Indeed, Article 11.6 suggests that this prospect is a realistic one with States Parties “encouraged to report to other States Parties, through the Secretariat, on measures taken to address the diversion of transferred conventional arms.” This provision is echoed by Article 13.2, which encourages States Parties to report to other States Parties, through the Secretariat, on measures that are proven to be effective in addressing diversion. The CSP should endeavour to provide impetus to this process as soon as practically possible, for example, by calling on States Parties to submit relevant information to the Secretariat immediately following its establishment.

The CSP also has an important role going forward in mandating the development of mechanisms and tools that can be utilised to support implementation of Article 11. For example, templates or guidance could be developed in order to assist States in sharing information on risks and/or cases of diversion and on strategies and measures that have been adopted in response. It would also be helpful if the CSP could facilitate the development of understandings around *inter alia* end-use/end-user certification, the regulation of brokering, post-shipment security and verification measures, and effective stockpile management provisions. The CSP could also mandate the development of a database for diversion-related information, thus enabling the creation of ‘institutional memory’ in this important field.

Paragraphs 11.5 and 11.6 are together an important contribution towards efforts to prevent diversion of weapons. **Timely access to the right type of information is vital for States Parties to be able to take action against diversion and thus to make a difference on the ground.** While it may not always be possible to place detailed information on diversion cases in the public domain where legal proceedings are underway, it should be possible to share generic information whereby the identity of implicated parties is concealed; and information should still be provided on a retrospective basis once any convictions are secured. States Parties can also be expected

to have access to a variety of information accrued from a range of sources – public and otherwise – relevant to combating the illicit activities listed in paragraph 11.5 but which is not related to particular ongoing criminal investigations or prosecutions. States Parties should, wherever possible, share this information through mechanisms available under the Treaty. Such efforts to share information will only serve to strengthen the ATT's contribution to tackling diversion through the dissemination of good practices and building confidence among States Parties.

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Conclusion

Article 11 of the ATT provides a comprehensive framework for efforts to tackle diversion on the basis of vigilance and action by all States Parties. At the same time, consistent with the general approach in the Treaty, the text of Article 11 does not prescribe in detail the measures individual States Parties must take in order to prevent, mitigate and respond to diversion, instead leaving space for the development of national controls and regulations in this area, but with an emphasis on co-operation and sharing of information among States Parties.

In order for the ATT to have an impact on the diversion of conventional arms, States Parties must ensure that preventing and combating diversion is a key priority within their national arms transfer control systems; they must also possess the political will to act against traffickers. In addition, States must have the capability to prevent and combat diversion. While major exporting States will be relatively well-placed to implement elements of Article 11, developing countries will face challenges where they do not have a comprehensive arms transfer control system and/or lack the capacity to effectively monitor border crossings and territorial waters and to prevent illicit trafficking. Meeting these challenges will necessitate information sharing, co-operation, capacity building and the provision of assistance among the States Parties in support of effective action to prevent and respond to diversion.

Arms diversion is a complex issue, requiring a multifaceted response on the part of all States Parties and Signatories. As such, there is still room for development of further understandings in many areas, such as in relation to the conduct of a diversion risk assessment and in respect of effective mitigation measures and programmes. This is an area in which the CSP will have an important role to play.

ANNEX

Selected excerpts from the Arms Trade Treaty with relevance to diversion

Article 1

Object and Purpose

The object of this Treaty is to:

- Establish the highest possible common international standards for regulating or improving the regulation of the international trade in conventional arms;
 - Prevent and eradicate the illicit trade in conventional arms and prevent their diversion;
- for the purpose of:
- Contributing to international and regional peace, security and stability;
 - Reducing human suffering;
 - Promoting cooperation, transparency and responsible action by States Parties in the international trade in conventional arms, thereby building confidence among States Parties.

Article 7

Export and Export Assessment

7. If, after an authorization has been granted, an exporting State Party becomes aware of new relevant information, it is encouraged to reassess the authorization after consultations, if appropriate, with the importing State.

Article 11

Diversion

1. Each State Party involved in the transfer of conventional arms covered under Article 2 (1) shall take measures to prevent their diversion.
2. The exporting State Party shall seek to prevent the diversion of the transfer of conventional arms covered under Article 2 (1) through its national control system, established in accordance with Article 5 (2), by assessing the risk of diversion of the export and considering the establishment of mitigation measures such as confidence-building measures or jointly developed and agreed programmes by the exporting and importing States. Other prevention measures may include, where appropriate: examining parties involved in the export, requiring additional documentation, certificates, assurances, not authorizing the export or other appropriate measures.
3. Importing, transit, trans-shipment and exporting States Parties shall cooperate and exchange information, pursuant to their national laws, where appropriate and feasible, in order to mitigate the risk of diversion of the transfer of conventional arms covered under Article 2 (1).
4. If a State Party detects a diversion of transferred conventional arms covered under Article 2 (1), the State Party shall take appropriate measures, pursuant to its national laws and in accordance with international law, to address such diversion. Such measures may include, alerting potentially affected State Parties, examining diverted shipments of such conventional arms covered under Article 2 (1), and taking follow-up measures through investigation and law enforcement.
5. In order to better comprehend and prevent the diversion of transferred conventional arms covered under Article 2 (1), State Parties are encouraged to share relevant information with one another on effective measures to address diversion. Such information may include information on illicit activities including corruption, international trafficking routes, illicit brokers, sources of illicit supply, methods of concealment, common points of dispatch, or destinations used by organized groups engaged in diversion.
6. States Parties are encouraged to report to other State Parties, through the Secretariat, on measures taken in addressing the diversion of transferred conventional arms covered under Article 2 (1).

Article 13**Reporting**

2. States Parties are encouraged to report to other States Parties, through the Secretariat, information on measures taken that have been proven effective in addressing the diversion of transferred conventional arms covered under Article 2 (1).

Article 16**International Assistance**

1. In implementing this Treaty, each State Party may seek assistance including legal or legislative assistance, institutional capacity building, and technical, material or financial assistance. Such assistance may include stockpile management, disarmament, demobilization and reintegration programmes, model legislation, and effective practices for implementation. Each State Party in a position to do so shall provide such assistance, upon request.

Saferworld

Saferworld is an independent international organisation working to prevent violent conflict and build safer lives. We work with local people affected by conflict to improve their safety and sense of security, and conduct wider research and analysis. We use this evidence and learning to improve local, national and international policies and practices that can help build lasting peace. Our priority is people – we believe that everyone should be able to lead peaceful, fulfilling lives, free from insecurity and violent conflict.

The Expert Group on ATT Implementation

The Expert Group on ATT Implementation (EGAI) is convened by Saferworld. Its purpose is to help develop common understandings among government and civil society experts from all world regions on issues relevant to ATT implementation, with a view to promoting progressive interpretation of the Treaty's provisions and the development of a robust ATT regime.

As of February 2015 the EGAI has met on three occasions – in London, November 2013; Stockholm, May 2014; and Berlin, July 2014. This briefing is Saferworld's summary of the discussions on the subject of arms diversion that took place at these meetings. The views and ideas expressed herein should not be taken as reflecting the official view of those States or individual experts that have participated in this process.

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