

# THE ARMS TRADE TREATY: **MEASURES TO PREVENT, DETECT, ADDRESS AND ERADICATE THE DIVERSION OF CONVENTIONAL ARMS**

BRIAN WOOD & PAUL HOLTOM



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## ABOUT THE RESEARCH

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Strengthening Shared Understanding on the Impact of the Arms Trade Treaty in Addressing Risks of Diversion in Arms Transfers is a joint research endeavor by UNIDIR, Conflict Armament Research (CAR), the Small Arms Survey and the Stimson Center. The objective of the research is to enhance knowledge and facilitate dialogue among States to strengthen shared understanding on the impact of the Arms Trade Treaty in addressing risks of diversion in arms transfers, and to identify options and avenues for more effective policies and practices under the Treaty moving forward. The research aims to reflect on the challenges and generate ideas to strengthen counter-diversion measures within the Treaty's framework. Through a series of issue briefs, the research examines key concepts and thematic issues in preventing and mitigating the risk of diversion. The research will culminate in an assessment of progress made by States Parties and their impact in addressing risks and challenges related to diversion in arms transfers. Findings from this research will contribute to tackling the challenges associated with poorly regulated arms transfers at the national, regional and multilateral levels, and to informing the development of good policies and practices to counter diversion under the Treaty's framework and the relevant multilateral instruments.

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## **UNIDIR**

UNIDIR is a voluntarily funded, autonomous institute within the United Nations. One of the few policy institutes worldwide focusing on disarmament, UNIDIR generates knowledge and promotes dialogue and action on disarmament and security. Based in Geneva, UNIDIR assists the international community to develop the practical, innovative ideas needed to find solutions to critical security problems.

## **CONFLICT ARMAMENT RESEARCH**

Since 2011, Conflict Armament Research (CAR) has established active field investigation capabilities to track weapons and military assistance supply networks in over twenty-five conflict-affected countries in Africa, the Middle East, and Asia. CAR investigation teams work on the ground in active armed conflicts alongside national defense and security agencies. The teams document weapons at the point of use and track their sources back through the chains of supply. CAR teams investigate weapons in a variety of conflict-related situations—be they recovered by state security forces, surrendered at the cessation of hostilities, cached, or held by insurgent forces. All of CAR's data is housed in iTrace®, a European Union and German Government-funded project which provides policy makers with the precise, verified information required to understand weapon transfers in detail and, thereby, develop effective, evidence-based weapon management and control.

## **SMALL ARMS SURVEY**

The Small Arms Survey is a global centre of excellence whose mandate is to generate impartial, evidence-based, and policy-relevant knowledge on all aspects of small arms and armed violence. It is the principal international source of expertise, information, and analysis on small arms and armed violence issues, and acts as a resource for governments, policymakers, researchers, and civil society. It is located in Geneva, Switzerland, and is an associated programme of the Graduate Institute of International and Development Studies. The Survey has an international staff with expertise in security studies, political science, law, economics, development studies, sociology, and criminology, and collaborates with a network of researchers, partner institutions, non-governmental organizations, and governments in more than 50 countries.

## **STIMSON CENTER**

For three decades, Stimson has been a leading voice on urgent global issues. Founded in the twilight years of the Cold War, the Stimson Center pioneered practical new steps toward stability and security in an uncertain world. Today, as changes in power and technology usher in a challenging new era, Stimson is at the forefront: Engaging new voices, generating innovative ideas and analysis, and building solutions to promote international security, shared prosperity, and justice through applied research and independent analysis, deep engagement, and policy innovation. Stimson organizes its work in cross-program research areas: Nonproliferation, Technology and Trade, Resources and Climate, International Order and Conflict, US Foreign Policy, and Asia.

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*The project is supported by a multi-disciplinary research team consisting of subject matter experts from the partner institutions. The team members guide the conceptual and methodological direction of the research, author and peer review written outputs, and facilitate consultations with government and industry stakeholders.*



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# ACRONYMS & ABBREVIATIONS

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<b>ATT</b>	Arms Trade Treaty
<b>CSP</b>	Conference of States Parties
<b>DVC</b>	Delivery Verification Certificate
<b>EU</b>	European Union
<b>ICP</b>	Internal Compliance Programme
<b>MOSAIC</b>	Modular Small-arms-control Implementation Compendium
<b>UNIDIR</b>	United Nations Institute for Disarmament Research
<b>WGETI</b>	Working Group on Effective Treaty Implementation

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# 1. INTRODUCTION

The diversion of conventional arms and related ammunition/munitions, parts and components to unauthorized end users and uses poses a significant threat to societies around the globe. Diversion undermines the effectiveness of counter-proliferation efforts and frustrates attempts to regulate the international arms trade for purposes consistent with relevant international law and standards. Over the past three decades, the international community has increased its focus on ways to prevent and eradicate the illicit trade and the illicit trafficking of arms, particularly of small arms and light weapons. Diversion is an aspect of such illicit activity but, until the adoption of the Arms Trade Treaty (ATT) in 2013,<sup>1</sup> had not been specifically addressed in most multilateral and regional legal instruments.

In considering steps towards the full and effective implementation of the ATT, the General Assembly recognized “the security, social, economic and humanitarian consequences of the illicit and unregulated trade in conventional arms” and underlined “the need to prevent and eradicate the illicit trade in conventional arms and to prevent their diversion to the illicit market, or for unauthorized end use and end users, including the commission of terrorist acts”.<sup>2</sup> ATT States Parties have accepted particular

obligations to prevent, detect, eradicate and address the diversion of conventional arms transfers, including conventional arms already transferred, through their national control systems and appropriate measures pursuant to their national laws, as well as through international cooperation in accordance with international law.<sup>3</sup>

Article 11 of the ATT requires States Parties to take measures to specifically prevent, detect, and address the diversion of conventional arms. Article 11(1) sets out the benchmark obligation on diversion in the ATT requiring that each State Party involved in the ‘transfer’ of conventional arms “shall take measures to prevent their diversion”.<sup>4</sup> The five other paragraphs of article 11 include specific measures that each State Party is required to take, or is recommended to take, in order to prevent, detect, and eradicate diversion throughout the international arms transfer chain and during the whole life cycle of those conventional arms. These provisions are reinforced by other obligations, as explained in the first Issue Brief in this series on ATT legal obligations to address diversion.<sup>5</sup> Many other ATT articles contain obligations and recommendations to strengthen national capacities to prevent, detect, and address diversion, as

<sup>1</sup> Arms Trade Treaty, “Certified True Copy (XXVI-8)”, May 2013, <http://disarmament.un.org/treaties/t/att/text>. The ATT was adopted by the General Assembly in April 2013 and as of 1 August 2020 that are 109 States Parties.

<sup>2</sup> General Assembly resolution A/RES/72/44, 12 December 2017.

<sup>3</sup> ATT articles 1, 11 and 15.

<sup>4</sup> ATT article 11(1).

<sup>5</sup> Brian Wood, “The Arms Trade Treaty: Obligations to Prevent the Diversion of Conventional Arms”, Issue Brief no. 1, United Nations Institute for Disarmament Research with Conflict Armament Research, Small Arms Survey, Stimson, 2020, p. 2, <https://unidir.org/publication/arms-trade-treaty-obligations-prevent-diversion-conventional-arms>.

elaborated in section 1.3 below. To prevent and eradicate diversion, the ATT requires each State Party to establish and maintain an effective national control system for transfers (article 5) and take measures to regulate international transfers (articles 6–10). It also includes relevant provisions in articles on record keeping (article 12), reporting and information exchange (article 13), enforcement (article 14), international cooperation (article 14), and international assistance (article 16).

## **1.1 PURPOSE OF THIS BRIEFING PAPER**

This Issue Brief is intended to support the efforts of ATT States Parties to implement treaty provisions to tackle diversion and help to achieve one of the main objectives of the Treaty, which is to “prevent and eradicate the illicit trade in conventional arms and prevent their diversion”.<sup>6</sup>

In order to achieve the objective, this Issue Brief approaches the issue of identifying effective measures to deal with diversion, consistent with the ATT’s provisions, in two broad inter-connected ways:

- » **Systemic Measures:** mechanisms or comprehensive arrangements that are established and maintained for national control systems and international cooperation to prevent, detect, address, and eradicate diversion; and
- » **Practical Measures:** specific actions taken to prevent, detect, address, and eradicate diversion before, during, and after an international arms transfer has taken place.

This Issue Brief examines treaty provisions and materials developed by ATT States Parties to support the implementation of article 11 and related provisions, including the paper from the ATT Working Group on Effective Treaty Implementation (WGETI) on

“Possible Measures to Prevent and Address Diversion” [Paper on Possible Measures],<sup>7</sup> in order to achieve two main objectives. First, the Brief provides detailed information and guidance on systemic and practical measures to prevent and address diversion that are already undertaken by ATT States Parties, which others may adopt, be required to adopt, or could develop further. Second, the Brief presents a potential analytical framework for examining/assessing the application by ATT States Parties of various systemic and practical measures designed to prevent, detect, address, and eradicate diversion. This framework can help to determine the direct and indirect impact of applying these measures to achieve the object and purpose of the Treaty.

## **1.2 STATE PARTY RECOMMENDATIONS TO IMPLEMENT ATT PROVISIONS ON DIVERSION**

ATT States Parties have highlighted the need to tackle diversion as a critical aspect of the Treaty’s implementation. Since the Treaty entered into force in December 2014, States Parties have begun to discuss and develop recommendations for this purpose. The issue of diversion was the thematic focus of the Fourth and Sixth Conferences of States Parties to the ATT (CSP4 in 2018 and CSP6 in 2020). The Third Conference of States Parties to the ATT (CSP3) established a dedicated sub-working group to support implementation of article 11 (Diversion) under the standing WGETI.

Specifically, the sub-working group has been tasked with facilitating the exchange of information regarding the implementation of article 11, as well as identifying effective practices for tackling diversion. During preparations for CSP4, States Parties asked the facilitator of the sub-working group to compile a list of practical measures to

<sup>6</sup> ATT article 1 (Object and Purpose). Article 15(4) also encourages the sharing of information on illicit activities and actors, pursuant to national laws, “in order to prevent and eradicate diversion of conventional arms”.

<sup>7</sup> ATT Working Group on Effective Treaty Implementation, Chair’s Draft Report to CSP4, 20 July 2018, pp. 18–24, [https://thearmstradetreaty.org/hyper-images/file/ATT\\_CSP4\\_WGETI\\_Draft\\_Report\\_EN/ATT\\_CSP4\\_WGETI\\_Draft\\_Report\\_EN.pdf](https://thearmstradetreaty.org/hyper-images/file/ATT_CSP4_WGETI_Draft_Report_EN/ATT_CSP4_WGETI_Draft_Report_EN.pdf).

**BOX 1: A DESCRIPTION OF DIVERSION**

The ATT does not contain formal definitions of its key terms and therefore the precise meaning of diversion has to be derived from established international and national law and practice. To support the efforts of States Parties to implement the ATT provisions regarding the diversion of conventional arms, the first Issue Brief reviewed relevant international standards to elaborate key elements for a description of diversion as follows:<sup>11</sup>

For the purposes of the ATT, 'diversion' is the rerouting and/or the appropriation of a transfer or of already transferred conventional arms or related items contrary to relevant national and/or international law leading to a potential change in the effective control or ownership of the arms and items.

Instances of such diversion can take various forms:

- a. An incident of diversion can occur when the items enter an illicit market, or when redirected to an unauthorized or unlawful end user or for an unauthorized or unlawful end use.
- b. The rerouting and misappropriation of the items can take place at any point in the transfer chain, including the export, import, transit, trans-shipment, storage, assembly, reactivation or retransfer of the items.
- c. The transaction chain facilitating a change of effective ownership and/or control can involve various forms of exchange, whether directly negotiated or brokered—grant, credit, lease, barter, and cash—at any time during the life cycle of the items.

prevent and address diversion, which could be used by States Parties on a voluntary basis. This resulted in the preparation of a "List of Possible Reference Documents to be Considered by States Parties to Prevent and Address Diversion" and the WGETI Paper on Possible Measures mentioned above.<sup>8</sup> CSP4 welcomed both documents, noting that the Paper on Possible Measures should be a "living document" of a "voluntary nature" that can be "reviewed and updated regularly by the [WGETI]".<sup>9</sup>

The Paper on Possible Measures "presents a non-exhaustive list of practical measures

which States Parties may draw from, where those are relevant, useful and feasible within the available resources of each State, to prevent diversion as it may occur in their particular national context".<sup>10</sup> Drawing on established multilateral best practice guidelines, measures that ATT States Parties have shared via their initial reports, and working papers and interventions made during preparations for CSP4, the paper provides examples of measures that each State Party involved in, or potentially affected by, an export, import, or transit/trans-shipment of conventional arms can take to prevent and address diversion

<sup>8</sup> ATT Working Group on Effective Treaty Implementation Chair's Draft Report to CSP4, 20 July 2018, pp. 16–17, [https://www.thearmstradetreaty.org/hyper-images/file/ATT\\_CSP4\\_WGETI\\_Draft\\_Report\\_EN1/ATT\\_CSP4\\_WGETI\\_Draft\\_Report\\_EN.pdf](https://www.thearmstradetreaty.org/hyper-images/file/ATT_CSP4_WGETI_Draft_Report_EN1/ATT_CSP4_WGETI_Draft_Report_EN.pdf).

<sup>9</sup> Ibid., para. 23.

<sup>10</sup> ATT Working Group on Effective Treaty Implementation, Chair's Draft Report to CSP4, 20 July 2018, p. 18, [https://www.thearmstradetreaty.org/hyper-images/file/ATT\\_CSP4\\_WGETI\\_Draft\\_Report\\_EN/ATT\\_CSP4\\_WGETI\\_Draft\\_Report\\_EN.pdf](https://www.thearmstradetreaty.org/hyper-images/file/ATT_CSP4_WGETI_Draft_Report_EN/ATT_CSP4_WGETI_Draft_Report_EN.pdf).

<sup>11</sup> Brian Wood, "The Arms Trade Treaty: Obligations to Prevent the Diversion of Conventional Arms", Issue Brief no. 1, United Nations Institute for Disarmament Research with Conflict Armament Research, Small Arms Survey, Stimson, 2020, p. 33, <https://unidir.org/publication/arms-trade-treaty-obligations-prevent-diversion-conventional-arms>.

**BOX 2: THE SCOPE OF ARTICLE 11**

The obligations and measures to tackle diversion under the ATT apply to conventional arms covered by article 2(1) of the Treaty. Ammunition/munitions and parts and components are not explicitly mentioned, but the largest arms exporting States Parties already apply their national control lists to the broadest range of conventional arms, ammunition, and other technologies with military applications.<sup>13</sup> This is encouraged under article 5(3) of the ATT.

Moreover, under international agreements to which they are also party, most State Parties have accepted obligations to prevent the diversion of such items.

National legislation and regulations to address diversion must also define which activities of the international trade are subject to the national arms control system. ATT article 2(2) states that “For the purposes of this Treaty, the activities of the international trade comprise export, import, transit, trans-shipment and brokering, hereafter referred to as ‘transfer’.”

Excluded from the activities constituting a ‘transfer’ are the movement of conventional arms beyond the borders of a State Party to its armed forces or law-enforcement authorities operating outside national borders, provided the arms remained in the ownership of that State Party, as provided for in article 2(3).

before, during, or after an international transfer of conventional arms. The recommended measures “are not intended to reinterpret, add to, or derogate from relevant obligations in any way”.<sup>12</sup>

### **1.3 SYSTEMIC AND PRACTICAL MEASURES UNDER THE ATT TO PREVENT AND ADDRESS DIVERSION**

ATT article 11 obliges every State Party involved in the international transfer of conventional arms to take systemic and practical measures to prevent, detect, and address the diversion of conventional arms at every stage in the transfer chain, including transferred conventional arms after delivery. In general, the establishment and maintenance of systemic measures by each State Party is fundamental to enable the national authorities to take specific practical measures effectively, as elaborated below and throughout sections

2 and 3. This approach is reflected in article 11 and its closely related provisions in the ATT, and subsequent work conducted by the working group on effective treaty implementation, which refer to a range of measures that are systemic as well as practical. All are designed to prevent and respond to incidents of diversion. The measures can be grouped into five broad areas:

- systemic measures for conducting a **risk assessment** to determine whether to deny the export in order to prevent it being diverted to the illicit market, or to an unauthorized end user or use;
- practical **risk mitigation measures** that can be put in place before an export is authorized to prevent diversion;

<sup>12</sup> ATT Working Group on Effective Treaty Implementation, Chair’s Draft Report to CSP4, 20 July 2018, p. 16, [https://thearmstradettreaty.org/hyper-images/file/ATT\\_CSP4\\_WGETI\\_Draft\\_Report\\_EN/ATT\\_CSP4\\_WGETI\\_Draft\\_Report\\_EN.pdf](https://thearmstradettreaty.org/hyper-images/file/ATT_CSP4_WGETI_Draft_Report_EN/ATT_CSP4_WGETI_Draft_Report_EN.pdf).

<sup>13</sup> Control lists for the most significant conventional arms export states have been developed in the Wassenaar Arrangement. These are updated regularly and can be found at <https://www.wassenaar.org/control-lists/>.





- systemic and practical measures to enable the **detection, investigation, and prosecution** of suspected unlawful activities to divert conventional arms transfers;
- practical measures to enable **bilateral cooperation and information exchanges** in relation to a particular transfer in order to prevent and/or mitigate the risk of diversion, or to investigate a detected diversion; and
- systemic measures to enable and facilitate **multilateral cooperation and information exchanges** on effective measures, indicators, and information to support practical efforts to prevent, detect, and address diversion.

As shown in the first Issue Brief in this series, and the second column in table 1 below, the provisions in article 11 relate closely to many other articles in the ATT. Table 1 provides a quick illustrative guide to:

- the linkages between the provisions in article 11 and other ATT articles;
- the type of action States Parties are obliged or encouraged to take;
- stages in the transfer chain in which certain types of action are required or encouraged;
- which States Parties are obliged or encouraged to act; and
- which of the five broad areas of measures listed above can be taken to implement article 11.

**TABLE 1: UNPACKING ATT ARTICLE 11 AND CLOSELY RELATED ATT ARTICLES**

Article 11 (Paragraphs)	Examples of closely related ATT articles	What type of action to take? (obligation or encouraged practice)	Transfer Stage	Which States Parties are obliged or encouraged to act?	What type of systemic and practical measures are listed in article 11?
11(1) Each State Party involved in the transfer of conventional arms covered under article 2(1) shall take measures to prevent their diversion.	5, 6, 7, 8, 9, 10, 12, 14,	Prevent (obligation)	All	All States Parties	Type of measures not specified
11(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.	5(2), 7(1), 7(5), 7(7), 8(1), 10, 15(4)	Prevent, including by considering risk mitigation (obligation) Consider specific measures to prevent, including mitigation (encouraged practice)	Before	Exporting and importing States Parties involved in the transfer chain	Systemic risk assessment measures; practical measures for prevention and risk mitigation; practical measures for bilateral cooperation and information exchanges
11(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).	7(6), 7(7), 8(3), 9, 15(4)	Cooperate with other States involved in the transfer to mitigate diversion risk (obligation)	Before; during	Exporting, importing, transit/trans-shipment States Parties involved in the transfer chain	Systemic risk assessment measures and practical risk mitigation measures; practical measures for bilateral cooperation and information exchange

**Note:** In column 3, the distinction between an 'obligation' and 'encouraged practice' is based on treaty language. This table uses 'obligation' when the Treaty declares that States Parties "shall" take measures and "encouraged practice" where it "encourages States Parties" to take or consider measures.



**TABLE 1: UNPACKING ATT ARTICLE 11 AND CLOSELY RELATED ATT ARTICLES**

Article 11 (Paragraphs)	Examples of closely related ATT articles	What type of action to take? (obligation or encouraged practice)	Transfer Stage	Which States Parties are obliged or encouraged to act?	What type of systemic and practical measures are listed in article 11?
11(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 States Parties, examining diverted shipments of such conventional arms covered under article 2(1), and taking follow-up measures through investigation and law enforcement.	14, 15(5)	Detect and address (obligation) Consider specific measures to detect and address (encouraged practice)	All	All States Parties	Systemic and practical measures for detection, investigation, and prosecution; systemic and practical measures for bilateral cooperation and information exchange
11(5) In order to better comprehend and prevent the diversion of transferred conventional arms covered under article 2(1), States 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.	7(1), 8(1), 8(3), 9, 10, 13(2), 15(4), 15(6)	Comprehend and prevent (encouraged practice)	All	All States Parties	Practical measures for bilateral cooperation and information exchanges; systemic measures for multilateral cooperation and information exchange
11(6) States Parties are encouraged to report to other States Parties, through the Secretariat, on measures taken in addressing the diversion of transferred conventional arms covered under article 2(1).	13(2)	Report (encouraged practice)	All	All States Parties	Practical measures for bilateral cooperation and information exchange; systemic measures for multilateral cooperation and information exchange





## 2. SYSTEMIC MEASURES FOR A NATIONAL CONTROL SYSTEM

The establishment and maintenance of a strong national control system for all transfers of conventional arms (required by article 5) is an essential prerequisite for preventing, detecting, and addressing the diversion of conventional arms. The WGETI sub-working group on article 5 (General Implementation) elaborated an indicative list of key elements for a national control system as part of efforts to develop a 'Voluntary Basic Guide to Establishing a National Control System' (Basic Guide) during ATT CSP4.<sup>14</sup> For the purpose of this Issue Brief, several of these key elements are 'systemic measures' for preventing, detecting, and addressing diversion.

The establishment and maintenance of a national legal and regulatory framework, with a clear set of administrative procedures designed to ensure transparent oversight and robust control of transfers taking place under the jurisdiction of each State Party, is an essential systemic measure for a national transfer control system to effectively prevent, detect, and address diversion. So too is the designation of particular government institutions as competent national authorities, with the extent of their powers clearly defined and provided with the required resources and capacity-building to implement and enforce the national control system. To

support implementation and enforcement of the national control system and assist with the prevention and detection of diversion attempts, it is also important to communicate relevant information to entities involved in the international arms trade.

### 2.1 ESTABLISHING AND MAINTAINING A NATIONAL LEGAL AND REGULATORY FRAMEWORK

In order to implement the provisions of article 11 and its closely related ATT provisions, the national legal and regulatory framework needs to:

- define the national arms transfer or trade control list, and the arms trading activities requiring authorization;
- define diversion-related offences, including corrupt practices, and indicate penalties; and
- elaborate the procedures and documentation, including applications for transfer authorizations and record-keeping requirements, that may be required to ensure that an international transfer will not be diverted.

The Paper on Possible Measures recommends that States Parties put in

<sup>14</sup> ATT Working Group on Effective Treaty Implementation Chair's Draft Report to CSP4, 20 July 2018, pp. 29–30, [https://www.thearmstradetreaty.org/hyper-images/file/ATT\\_CSP4\\_WGETI\\_Draft\\_Report\\_EN1/ATT\\_CSP4\\_WGETI\\_Draft\\_Report\\_EN.pdf](https://www.thearmstradetreaty.org/hyper-images/file/ATT_CSP4_WGETI_Draft_Report_EN1/ATT_CSP4_WGETI_Draft_Report_EN.pdf).

place “effective legislation for investigating and punishing theft, corruption, and other diversion-related offences”.<sup>15</sup> States have continued to express concern about links in some regions between terrorist networks and transnational organized crime, including trafficking in arms, ammunition, parts and components, drugs and cultural property, as well as trafficking in persons and human organs, and the illicit trade in natural resources, corruption, and cybercrime.<sup>16</sup> Legislation (for example, the criminal code) should define offences in relation to acts of diverting arms and related items, and thus enable the prosecution of offenders. A deliberate act to knowingly divert conventional arms to an unauthorized person or entity could be made a serious crime at the national level for each ATT State Party, taking into account existing domestic criminal law and, for example, article 2 of the United Nations Convention against Transnational Organized Crime, which defines a ‘serious crime’ as an offence that is “punishable by a maximum deprivation of liberty of at least four years or a more serious penalty”.<sup>17</sup> Some States’ legislative frameworks provide for higher criminal penalties when firearms, ammunition, explosives or equipment are unlawfully purchased, stored, carried, manufactured, transported, transferred, sold or used for terrorist purposes.<sup>18</sup>

National legislation might not define ‘diversion’ as an illegal act explicitly, but the following offences for activities that facilitate diversion can be found in the criminal codes of many States:

- corrupt practices;
- illegal acquisition;
- illegal appropriation;
- illegal delivery;
- illegal shipment;
- illegal trading;
- illicit trafficking;
- money laundering;
- participation in organized crime;
- smuggling;
- unlawful assembly of parts and components;
- unlawful manufacturing;
- unlawful possession; and
- organizing, directing, aiding, abetting, facilitating or counselling the commission of such offences.<sup>19</sup>

These prohibitions in national law, as well as the regulations and law enforcement capacity for their investigation, prosecution, and punishment, may be regarded as ‘systemic measures’ to assist in preventing, detecting, and addressing diversion.

<sup>15</sup> ATT Working Group on Effective Treaty Implementation, Chair’s Draft Report to CSP4, 20 July 2018, p. 23, [https://thearmstradetreaty.org/hyper-images/file/ATT\\_CSP4\\_WGETI\\_Draft\\_Report\\_EN/ATT\\_CSP4\\_WGETI\\_Draft\\_Report\\_EN.pdf](https://thearmstradetreaty.org/hyper-images/file/ATT_CSP4_WGETI_Draft_Report_EN/ATT_CSP4_WGETI_Draft_Report_EN.pdf).

<sup>16</sup> General Assembly resolutions A/RES/74/177 adopted 27 January 2020 and A/RES/67/193 adopted 23 April 2013; see also Security Council resolutions 2220(2015), 2322 (2016), 2370 (2017) and 2482 (2019) which referred to the links between terrorism and organized crime, including trafficking in arms, explosives and related materials.

<sup>17</sup> United Nations Convention on Transnational Organized Crime, adopted in the General Assembly by resolution A/RES/55/25 of 15 November 2000, and which entered into force on 29 September 2003. The Convention has 190 States Parties and applies to an “organized criminal group”, which is a “structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes” and in order to gain some financial benefit.

<sup>18</sup> Security Council, “Report of the Secretary General, ‘Action Taken by Member States and United Nations entities to address the issue of linkages between terrorism and organized crime’”, S/2020/754, 29 July 2020.

<sup>19</sup> These modes of secondary individual criminal liability are applicable to the intentional involvement by persons in an organized criminal group. They were agreed by States in article 5 of the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, Supplementing the United Nations Convention against Transnational Organized Crime (the ‘United Nations Firearms Protocol’); adopted by resolution 55/25 on 31 May 2001, in force 3 July 2005; as well as in article 5(1)(b) of the United Nations Convention Against Transnational Organized Crime, adopted by the General Assembly on 15 November 2000, by resolution 55/25, and entered into force on 29 September 2003. See the Legislative Guide for the United Nations Convention against Transnational Organized Crime and the Protocols thereto (United Nations Office on Drugs and Crime, 2016).

## 2.2 THE ROLE OF COMPETENT NATIONAL AUTHORITIES

Article 5(5) requires States Parties to designate competent national authorities in order to have an effective and transparent national control system regulating the transfer of conventional arms. The competent national authorities can include those tasked with preventing, detecting, and addressing diversion. Apart from dealing with the authorization and denial of applications to transfer conventional arms, a national control system needs to include systemic measures to ensure that security forces, police, customs, immigration, prosecutors, investigating magistrates and other law enforcement agents have adequate powers and resources to enforce national laws and regulations that implement the Treaty, as required under article 14—that is, to monitor compliance and to conduct investigations to detect, investigate and prosecute cases of diversion.<sup>20</sup>

For example, the national control system should give the authority, where necessary and appropriate, to stop, inspect and seize a shipment, as well as legal grounds to dispose of a seized shipment when law enforcement activities are completed. This authority should cover activities taking place in special customs areas located within a State's territory, such as free-trade zones, foreign trade zones and export processing zones.<sup>21</sup> Judicial authorities must have the power to prosecute offences and to impose proportionate sanctions, whether criminal, civil or administrative.

National authorities need to work together to undertake practical measures in order to identify risks of diversion, including of transferred conventional arms. In article 15(4), States Parties are encouraged to cooperate, pursuant to their national laws, "through sharing information regarding illicit activities and actors and in order to prevent and eradicate diversion of conventional arms".<sup>22</sup> If the appropriate mitigation measures are unavailable or insufficient to reduce the risk of diversion to an absolute minimum, then the transfer should be denied under the terms of the Treaty.

To achieve this, national authorities need to have adequate training systems and sufficient resources at their disposal to administer the national control system. For example, customs and police authorities need to have the legal powers and appropriate resources to enable practical steps to be taken by authorized officials to prevent suspicious routing of shipments, detect fraudulent trading practices, and seize conventional arms and monies involved in detected diversion cases. It is critical that national authorities have a clear mandate, as well as the experience and capacity, to gather, process, retain, and share information at all stages of the transfer chain in order to prevent, detect, and address diversion. They also need systems to maintain "open communication and cooperation across licensing, customs, law enforcement, intelligence and other government agencies" to deal with diversion.<sup>23</sup> The ATT and other international arms control instruments recommend that relevant records (licences, end-user

<sup>20</sup> Specific international standards for the conduct of all kinds of law enforcement officials, which also apply at border crossings and ports, and in conducting investigations, are the United Nations Code of Conduct on Law Enforcement Officials and the United Nations Basic Principles on the Use of Force and Firearms. These two sets of standards address such issues as corruption, human rights, and the use of appropriate force as opposed to arbitrary and abusive force or violence by officers. Article 1 of the Code defines the term "law enforcement officials" to include all officers of the law, whether appointed or elected, who exercise police powers, especially the powers of arrest or detention, and the official commentary notes that "In countries where police powers are exercised by military authorities, whether uniformed or not, or by State security forces, the definition of law enforcement officials shall be regarded as including officers of such services".

<sup>21</sup> Wassenaar Arrangement, "Best Practice Guidelines for Transit or Trans-shipment", 2015.

<sup>22</sup> ATT article 15(4).

<sup>23</sup> ATT Working Group on Effective Treaty Implementation, Chair's Draft Report to CSP4, 20 July 2018, p. 23, [https://thearmstradetrety.org/hyper-images/file/ATT\\_CSP4\\_WGETI\\_Draft\\_Report\\_EN/ATT\\_CSP4\\_WGETI\\_Draft\\_Report\\_EN.pdf](https://thearmstradetrety.org/hyper-images/file/ATT_CSP4_WGETI_Draft_Report_EN/ATT_CSP4_WGETI_Draft_Report_EN.pdf).

documentation, etc.) be retained and accessible for competent authorities to use in decision-making and investigations, as well as to be available for sharing, where permissible and appropriate, with other States Parties.

National authorities also need functioning information management systems to cooperate and share relevant information with other ATT States Parties to prevent, detect, and address diversion at different stages in the transfer cycle. As noted in table 1 above, the ATT provides for information exchange between States Parties involved in an international arms transfer. In article 15(4), States Parties are encouraged to cooperate, pursuant to their national laws, "through sharing information regarding illicit activities and actors and in order to prevent and eradicate diversion of conventional arms". Systemic measures might take the form of a standing bilateral arrangement as well as via available multilateral information exchange mechanisms.

For example, the European Union (EU), the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, the Economic Community of Central African States, and the Economic Community of West African States all provide for member States and participating States to exchange information on authorizations, entities involved in transfers, and licence denials for exports and/or imports of conventional arms due to diversion concerns.<sup>24</sup> Regarding diversion, the national control systems of States Parties are encouraged under article 11(5) to permit the sharing of information where appropriate and necessary with other States Parties. This may include information on "illicit activities including corruption, illicit brokers, sources of illicit supply, methods of

concealment, common points of dispatch, or destinations used by organized groups engaged in diversion".<sup>25</sup> Relevant national regulations and administrative procedures therefore need to be in place to ensure that potentially sensitive information can be shared between States before and during an international transfer, if necessary to prevent, detect or prosecute instances of diversion.

Each State Party is obliged to take appropriate measures, pursuant to its national laws and in accordance with international law, to address a diversion of transferred conventional arms if it is detected. Article 11(4) indicates that alerting other potentially affected States Parties is one of the practical measures that can be taken. Other practical law enforcement measures are mentioned in article 15(5), which obliges States Parties to afford "one another the widest measure of assistance in investigations, prosecutions and judicial proceedings in relation to violations of national measures ... where jointly agreed and consistent with national laws". Thus, provisions should be included in national legislation to ensure customs and judicial cooperation, including for mutual legal assistance, to address specific cases of diversion. Under article 15(6), States Parties are also encouraged to take national measures and to cooperate with each other to prevent international transfers from becoming subject to corrupt practices. International organizations concerned with law enforcement, such as the United Nations Office on Drugs and Crime, INTERPOL and the World Customs Organization, are mandated to assist their members with such issues.

Tracing efforts are an effective practical means of international and bilateral cooperation to detect and respond to instances of diversion. Tracing is defined

<sup>24</sup> States Parties of the Inter-American Convention against the Illicit Manufacture of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials (CIFTA) exchange information relevant to illicit trafficking, legislation and on authorized producers and dealers, but not on export and import authorizations or denials.

<sup>25</sup> ATT article 11(5).



in the United Nations Firearms Protocol as “the systematic tracking of firearms and, where possible, their parts and components and ammunition/munitions from manufacturer to purchaser for the purpose of assisting the competent authorities of States Parties in detecting, investigating and analyzing illicit manufacturing and illicit trafficking”.<sup>26</sup> States have agreed to follow specific international procedures for such cooperation set out in the Firearms Protocol and also the International Tracing Instrument.<sup>27</sup>

Identifying and documenting arms diverted to and used in active armed conflict zones is very difficult especially when State authorities lack capacity and control. Such work is sometimes undertaken by international or regional peace operations, as well as by specialist non-governmental experts.<sup>28</sup> In order to identify the source of a seized, collected, or recovered illicit weapon and determine its provenance and point of diversion, competent authorities can seek to trace the item’s international chain of custody in the hope of clearly determining point(s) of diversion. If there are effective national control systems in place backed up by sufficient political will and by anti-trafficking and anti-corruption practices, such tracing efforts can lead to successful corrective actions, including prosecutions that can act as a deterrent.<sup>29</sup>

## 2.3 OUTREACH TO INDUSTRY TO PREVENT DIVERSION OF TRANSFERS

Another important element of a national transfer control system is to conduct outreach to key actors, such as companies in the defence industry and those in banking, finance, law, transport, and other services that provide practical support for arms trading activities. Such outreach can be done in a systemic way.<sup>30</sup> It should be recognized that such private sector entities vary considerably in their roles and responsibilities but can have a profound impact on diversion wherever they operate. Therefore such private actors should exercise due diligence to respect laws, regulations, and administrative procedures designed to prevent such diversion and to actively assist national authorities where possible to meet their obligations to that end.<sup>31</sup> The Paper on Possible Measures notes that national authorities could organize “industry outreach programmes (such as with industry associations) to share diversion risk assessment guidance and encourage industry to play a cooperative role in risk assessment and management”.<sup>32</sup> For outreach activities to have an impact on assessing, preventing, and detecting diversion risks, States Parties could consider requiring companies involved in conventional arms transfer activities to produce evidence that they operate an effective internal compliance programme

<sup>26</sup> United Nations Firearms Protocol, article 3(f). The Protocol was adopted by resolution 55/25 on 31 May 2001 and in force 3 July 2005, now has 147 State Parties and 190 signatories.

<sup>27</sup> United Nations Firearms Protocol article 12, para. 4, which requires States Parties to cooperate in the tracing of firearms that may have been illicitly manufactured or trafficked, and this cooperation must include the provision of prompt responses to requests for assistance in tracing such firearms; and the International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons, 8 December 2005, in particular parts III, IV, V and VI concerning marking, record-keeping, tracing and international cooperation, and assistance to identify illicit small arms and light weapons.

<sup>28</sup> Conflict Armament Research (CAR) is a non-governmental organization established in 2011 that has undertaken such tracing in conflict situations; its work is supported by the EU and other governments. See <https://www.conflictarm.com/about-us/>.

<sup>29</sup> Peter Danssaert and Brian Wood, “Surplus and Illegal Small Arms, Light Weapons and their Ammunition: The Consequences of Failing to Dispose and Safely Destroy Them”, International Action Network on Small Arms, 2017.

<sup>30</sup> See, for example, Wassenaar Arrangement, “Best Practice Guidelines on Internal Compliance Programmes for Dual-Use Goods and Technologies”, 2011.

<sup>31</sup> See UNIDIR, “Enhancing the Understanding of Roles and Responsibilities of Industry and States to Prevent Diversion”, 2019. <https://www.unidir.org/publication/enhancing-understanding-roles-and-responsibilities-industry-and-states-prevent>

<sup>32</sup> ATT Working Group on Effective Treaty Implementation, Chair’s Draft Report to CSP4, 20 July 2018, p. 23, [https://thearmstradetreaty.org/hyper-images/file/ATT\\_CSP4\\_WGETI\\_Draft\\_Report\\_EN/ATT\\_CSP4\\_WGETI\\_Draft\\_Report\\_EN.pdf](https://thearmstradetreaty.org/hyper-images/file/ATT_CSP4_WGETI_Draft_Report_EN/ATT_CSP4_WGETI_Draft_Report_EN.pdf).

(ICP).<sup>33</sup> States Parties could make this a requirement of companies that are seeking to register with the relevant national authorities in order to engage in the international arms trade or a requirement before a company can be granted certain types of licences. An ICP is:

“an arrangement in which a company ensures that it is completing legal transactions, obeying the regulations enacted by the government, and fulfilling company export policies. Internal compliance systems typically include a set of procedures that company officials must satisfy before an item leaves the company. Such procedures include a thorough investigation of the buyer and end-user prior to the shipment of a purchased item off-site.”<sup>34</sup>

Thus, an ICP should mean that, as a practical measure, an arms trading entity already conducts its own ‘risk assessment’ before seeking a transfer authorization from the competent authorities in the State Party in which the arms or related items are located.<sup>35</sup> The ICP should ensure clear information flows within a company and also between an arms trading entity and competent national authorities, in the process helping to build trust and confidence on both sides. Concretely, an ICP should help companies to:

- keep up to date with legislation and requirements for exports of conventional arms;
- know which items are subject to export controls;

- screen for concerns relating to their customers, such as particular destinations, end users, end-use concerns; and
- designate responsible and competent persons to oversee international arms trade activities.

In order to provide practical support for the implementation of ATT provisions to prevent diversion, the ICP could also explicitly include anti-corruption and anti-bribery procedures, which could include a zero tolerance policy, training for employees in sensitive positions, due diligence on all third-party contractors and independent audits, including for State-owned companies.<sup>36</sup> Several States have introduced requirements for an ICP to be established before a company can apply for particular types of arms transfer licences, and some ATT States Parties have begun to provide guidelines to assist companies in this regard.<sup>37</sup>

<sup>33</sup> Another name used for an internal compliance programme is ‘internal compliance system’.

<sup>34</sup> Institute for Science and International Security, *Key Elements of an Effective Export Control System*, 2003, [http://www.exportcontrols.org/print/key\\_elements.htm](http://www.exportcontrols.org/print/key_elements.htm).

<sup>35</sup> The Wassenaar Arrangement provides a guide for companies to assess export risks in the “List of Advisory Questions for Industry”, 2003, amended 2018.

<sup>36</sup> This list is adapted from Transparency International UK, ‘Out of the Shadows: Promoting Openness and Accountability in the Global Arms Industry’, 2018, p.2.

<sup>37</sup> See for example the guidance prepared by Germany and the Netherlands in this regard: German Federal Office of Economics and Export Control, *Internal Compliance Programmes – ICP. Company-Internal Export Control Systems*, 2018, 2nd ed.; Ministry of Foreign Affairs of the Netherlands, *Internal Compliance Programme: Guidelines for Compiling an Internal Compliance Programme for Strategic Goods, Torture Goods, Technology and Sanctions*, 2019, version 1.2.

# 3. PRACTICAL MEASURES TO ADDRESS DIVERSION THROUGHOUT THE TRANSFER CHAIN

Since instances of diversion of conventional arms can take place at any point along the transfer chain, specific practical measures are often necessary in addition to the systemic measures outlined above. For example, studies show that arms and related items may be diverted through complex international arrangements made by unscrupulous dealers and brokers,<sup>38</sup> and illustrate how sometimes conventional arms continue to be at risk of diversion after shipments arrive in an importing State, particularly those affected by armed conflict, pervasive armed crime and corruption.<sup>39</sup> A long-standing principle in export controls has been that it is best to deny a 'risky' transfer at the first stage in the transfer chain when the authorization is being considered, rather than authorize such a transfer in the hope that measures put in place to mitigate the risk of diversion

during other stages in the transfer chain will suffice.<sup>40</sup>

The ATT requires that prevention measures, including mitigation measures, be utilized to reduce the probability of a diversion of conventional arms taking place throughout the transfer chain to an absolute minimum. Certain situations warrant additional measures and safeguards due to the increased risks of diversion and abuse of conventional arms. In 2018, the sub-working group on diversion noted that, since "the measures taken to prevent and address in-transfer diversion may differ from those taken to prevent and address post-delivery diversion, it is necessary to assess the risk of diversion at every stage of the life-cycle of the arms, noting that risks are different at each stage of the life-cycle".<sup>41</sup>

<sup>38</sup> On illicit brokering and diversion cases, see the reports of United Nations arms embargo investigations and also Conflict Armament Research, *Weapon Supplies into South Sudan's Civil War*, November 2018, <https://www.conflictarm.com/reports/weapon-supplies-into-south-sudans-civil-war/>; as well as Brian Wood and Peter Danssaert, "Africa and the Regulation of Transnational Arms Brokering: Challenges to Implement International Standards" in Yihdego et al (eds), *Ethiopian Yearbook of International Law* 2019, 2020.

<sup>39</sup> See, for example, Conflict Armament Research, *Diversion Digest Issue 1: Typology of Diversion*, 2018.

<sup>40</sup> See for example, Wassenaar Arrangement, "Elements for Objective Analysis and Advice Concerning Potentially Destabilising Accumulations of Conventional Weapons", 1998; subsequent Plenary Meetings of the Wassenaar Arrangement adopted additional best practice standards to address the issue of diversion risks. See <https://www.wassenaar.org/public-documents/>.

<sup>41</sup> ATT Working Group on Effective Treaty Implementation Chair's Draft Report to CSP4, 20 July 2018, para. 11, p. 2, [https://www.thearmstradetreaty.org/hyper-images/file/ATT\\_CSP4\\_WGETI\\_Draft\\_Report\\_EN1/ATT\\_CSP4\\_WGETI\\_Draft\\_Report\\_EN.pdf](https://www.thearmstradetreaty.org/hyper-images/file/ATT_CSP4_WGETI_Draft_Report_EN1/ATT_CSP4_WGETI_Draft_Report_EN.pdf).

While systemic measures should be put in place to enable States Parties to fulfil their ATT obligations, practical measures can also be taken at each stage in the transfer chain. The Paper on Possible Measures identified various entities that can take such measures to enhance efforts to prevent, detect, and address diversion. The majority of such recommended measures are elaborated for exporting States to take before a transfer is authorized (or denied), because current best practice guidelines do not devote so much attention to other stages and actors involved in the transfer chain.<sup>42</sup> The Paper on Possible Measures is a starting point for cataloguing effective best practices to be taken by all States Parties throughout the transfer chain.

### **3.1 MEASURES APPLICABLE BEFORE A TRANSFER IS AUTHORIZED OR DENIED**

This sub-section addresses the types of indicators that States Parties could incorporate when assessing the risk of diversion and the various sources of information for making a decision on whether to authorize or deny an export (or another type of transfer), including end-use/r documentation. It considers mitigation measures and the denial of authorizations for transfers. It also provides information on practical measures that exporting and importing States Parties can take to implement article 11(2).

The first Issue Brief in this series noted that ATT States Parties are required to refuse authorizing transfers prohibited under article 6 of the Treaty. If an export is not prohibited, article 7 requires that a comprehensive and objective risk assessment be undertaken by the exporting State. Where relevant for the same export, States Parties may as a practical matter choose to conduct a diversion risk

assessment required under article 11(2) in parallel with the mandatory export risk assessment for article 7. However, the purpose of an export risk assessment under article 7 and article 11 are different. Under article 7, the exporting State must assess whether there would be an overriding risk of a potential negative consequence, as defined in the relevant international law listed in article 7, if the export was authorized, even if available risk mitigation measures were taken. In contrast, under article 11 the aim of the assessment is to determine whether there would remain a risk of diversion even if the risk can be reduced by taking specific prevention and mitigation measures.

#### **3.1.1 Diversion Risk Indicators**

There is no internationally agreed upon common list of indicators to assess the risk of diversion of a potential arms export in any particular case. Since the 1990s, several multilateral export risk assessment guidelines to prevent proliferation have been developed that include diversion risk indicators. For example, in 1998 the participating States of the Wassenaar Arrangement adopted the Elements for Objective Analysis and Advice Concerning Potentially Destabilising Accumulations of Conventional Weapons, which presents a series of questions to be addressed by national arms export licensing authorities when confronted with an application for an authorization to export conventional arms.<sup>43</sup> The Elements, which were updated in 2004 and again in 2011, call on States to consider a range of factors when determining whether there is a risk of diversion to unauthorized end use or end users, or to the illicit trade. Recommended key questions are posed for a more comprehensive assessment of whether the export would contribute to a potentially destabilizing accumulation of conventional

<sup>42</sup> Paul Holtom and Benjamin Jongleux, "Preventing Diversion: Comparing ATT and African Measures for Importing States", Small Arms Survey, 2019, p. 4.

<sup>43</sup> Wassenaar Arrangement, "Elements for Objective Analysis and Advice Concerning Potentially Destabilising Accumulations of Conventional Weapons", 1998, amended 2004 and 2011.





weapons, taking into account regional stability, the political, economic, and military status of the prospective importing State, and its record of compliance with transfer controls, among other issues.

In addition, the European Union's User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment provides recommended questions to help EU member States conduct export risk assessments, including assessing the risk of diversion.<sup>44</sup> The latest version of the User's Guide notes that the risk of diversion needs to be considered as part of a holistic risk assessment of an arms export. It provides a list of questions that national export control authorities should ask in order to assess the risk of diversion when considering an application to export conventional arms and military equipment.

Building on these multilateral efforts, the box below in this Issue Brief proposes a series of diversion risk indicators and questions in four main areas that national authorities of ATT States Parties can incorporate into their diversion risk assessments for a potential export. The four main areas are:

- the importing State's requirements and its capacity to control transferred conventional arms;

- risks associated with the type of conventional arms and related items;
- legitimacy and reliability of the intended end user/end use of the export; and
- legitimacy and reliability of the other entities involved in the transfer of the proposed export.

These four areas and a list of suggested questions to ask in regard to these risk indicators are further elaborated in the box below. The references to conventional arms may also apply to other items included in a national control list, such as ammunition/munitions fired, launched or delivered by the conventional arms, and to parts and components where the items to be exported are covered by the State's national control list. The list does not imply a fixed order of priority among the questions and answers to be taken into account because priorities may change depending on the specific case under consideration. Nevertheless, the predictability and reliability of the importing State, the ultimate end-user and the other actors involved with regard to their record of diversion and ability to manage the particular conventional arms and related items proposed for export should form a basic starting point for any diversion risk analysis.

<sup>44</sup> European Union, "User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment", as endorsed by the Council on 16 September 2019, p. 122.

**BOX 3: EXAMPLES OF DIVERSION RISK INDICATORS AND QUESTIONS TO ASK****(a) *The Importing State's Requirements and its Capacity to Control Transferred Conventional Arms***

The quantities involved in the State's accumulation of conventional arms may be inconsistent with its likely requirements, signaling a heightened danger of diversion. Moreover, if a potential importing State has a history of conventional arms diversion or it has inadequate regulation of arms transfers due to lack of capacity or corrupt practices, then the risk of diversion will be high and comprehensive prevention and mitigation measures will need to be put in place before authorizing an export. The diversion of transferred conventional arms after delivery *within the importing State* can be distinguished from when imported conventional arms are re-exported in breach of re-export restrictions imposed by the exporting State or by relevant international legal obligations such as those in article 6 of the ATT. Either form of diversion may take place as soon as an item has reached the point of import, but could also occur years after the initial entry of the conventional arms into the importing State. Diversion of transferred conventional arms after their delivery *within the importing State* can include cases where the imported arms are sold or given to another unauthorized entity in the importing State, or cases of theft or loss of the imported conventional arms, possibly leading to illicit circulation and also to cross-border trafficking of the conventional arms. Either way, the diverted conventional arms end up in the hands of unauthorized or illicit end users. Assessing such risks of diversion within or from the importing State may require consideration of a broad range of factors.

- Are the quantities of conventional arms involved in the proposed transfer inconsistent with the importing State's likely requirements?

- Is the importing State's accumulation of conventional arms greater than that required by its legitimate defense and security interests?
- Are similar conventional arms already in service in the importing State? Are they well maintained?
- Are imported arms effectively managed in accordance with physical security and stockpile management standards such as those in the Modular Small-arms-control Implementation Compendium (MOSAIC) and the International Ammunition Technical Guidelines? Are there known cases of problems with the diversion of conventional arms and ammunition from national stockpiles in the importing State?
- Will the imported conventional arms create or contribute to a surplus? If yes, how and when will the surplus be safely disposed of in line with existing end-user commitments?
- Is the technological level of the equipment requested proportionate to the needs expressed by the importing State and to its operational capacity?
- Does the importing State have any history of diversion of conventional arms, including the non-authorized re-export of surplus equipment to States of concern?
- Is the importing State bordering or affected by a State subject to multilateral sanctions including arms embargoes or experiencing armed conflict, internal tensions, terrorism, organized crime, or corrupt practices that could give rise to diversion?
- Is there an adequate system of laws and administrative procedures in place in the importing State to effectively regulate the movement, storage, possession and use of the exported conventional arms?
- Does the importing State apply effective transfer controls encompassing

dedicated control legislation and licensing arrangements that conform to international norms and relevant international arms control frameworks?

- Does the importing State provide valid and credible end-use/end-user or retransfer assurances?
- Has the importing State agreed to include a provision in end-use/r documentation to grant the exporting State's national authorities the right to conduct on-site inspections of transferred conventional arms after delivery as a confidence-building measure?
- Are there sufficient trained personnel and infrastructural capacity in the importing State to effectively manage the quantity of transferred arms at points of delivery and storage?
- Does the importing State assist other States in conformity with its responsibilities under international law by providing them with early warnings and by exchanging information regarding acts of arms trafficking, terrorism, organized crime, and other serious crime?
- Are the conventional arms intended for use in United Nations or other international peacekeeping activity and, if so, what will be the destination of the conventional arms after participation in peacekeeping activity has ended?

#### **(b) *Risks Associated with the Type of Conventional Arms and Related Items***

Different types of conventional arms pose higher or lower risks of diversion. For example, the risk of diversion would be higher if the proposed transfer appears to be of a type of conventional weapon inconsistent with the declared end use or the inventory of the potential recipient. Risks of diversion may also be higher if the conventional arms can be used by non-military persons or easily concealed and used for criminal activities, such as the use of firearms and their ammunition, as

well as parts and components. Therefore, consideration could also be given to the risk of diversion for deactivated conventional arms that are not rendered inoperable and can be reactivated, or readily convertible weapons, such as acoustic expansion weapons and alarm pistols, which can be converted from blank to live fire and thus adapted for an unintended end use. Other items, like man-portable air-defense systems (MANPADS), weapons with night vision equipment, and high explosives, have been identified by various States as types of materiel that are highly sought after by terrorist networks, armed opposition groups and organized criminals and thus subject to higher risks of diversion.

- Would the exported conventional arms include sensitive technologies or parts and components that could be analyzed and diverted to develop similar equipment?
- Are the proposed types of conventional arms consistent with the importing State's existing inventory? If not, is the proposed acquisition consistent with new procurement and/or mission plans for the end user?
- Are the conventional arms of a type that can be easily used by nonmilitary agents or non-State actors?
- Can the conventional arms be incorporated into other weapon or munitions systems?
- Are the conventional arms easy to conceal, carry, and use in serious crime and therefore require enhanced risk assessment and mitigation measures?
- Are the conventional arms deactivated and, if so, is it permanent and irreversible so the item is rendered inoperable, or can the deactivation be reversed?
- Does the potential transfer include sensitive technology or machines and materials for production that, if diverted, would have a major impact on uncontrolled proliferation of such materiel?



- If ammunition/munitions are being requested, can the importing State safely handle, store, and use that type of material?
- If components or spares are being requested, is the importing State known to operate the relevant system that incorporates these items?

**(c) *Legitimacy and Reliability of the intended End User/End Use of the Export***

The competent authorities of the exporting and importing States should verify in advance of any final authorization whether the intended end use is lawful, and if the ultimate end user of the exported conventional arms or related items is legitimate and reliable. States should take particular care when considering exports to recipients that are neither governments nor their authorized agents. Even if the end user is a State agency and/or company whose arms-related activities are authorized and closely regulated by the authorities of the importing State, indications of unreliability may include a previous record of not honouring certified end-use/user documents. Reliability is also dependent on whether the end user or receiving entity is known to have safe storage facilities and to keep comprehensive records. A previous involvement by the end user in criminal activity related to international trade, such as fraud or organized crime, or verifiable information from a United Nations or other credible authority demonstrating that the end user has deliberately diverted arms or related material, should be a strong signal that the risk is too high to authorize the export.

- Are the conventional arms intended for use by a government agency or an individual company, and what is the role of the government agency or the company?

- Does the importing State provide clear, comprehensive, and verifiable end-use/end-user or retransfer assurances and clearly identify the ultimate end-user entity?
- Is the documentation provided by the end user 'authentic' (i.e. the document has been checked to ensure it is not a forgery or an unauthorized copy, or subject to corrupt practices)?
- Have the contents of the end-user documentation been 'verified' to establish the legitimacy and credibility of the stated end-use/r?
- Have checks been conducted through diplomatic channels or consultations between the national contact point in the competent authorities in the exporting and importing States to authenticate the end-user documentation and verify its contents?

*If the end user is a government entity:*

- Is there any reason to suspect that the government or the specific government entity is not a reliable end user, including any past track record of committing or facilitating acts of diversion?
- Has the government and the end user honoured previous end-user certificates or other provisions regarding the authorization of re-export, particularly relevant non-retransfer clauses?
- Would the export go to a military or police unit, or another branch of the security forces, accused in credible reports of criminal acts?
- Is there a risk that the procurement is driven by other factors than legitimate defense and domestic security interests?

*If the end user is a company:*

- Will the company be the final end user of the conventional arms or is it intending to trade the conventional arms?
- If intending to trade the conventional arms, what onward restrictions are in place regarding purchasers, such as

effective background checks and robust authorization requirements?

- Is the company registered and authorized to carry out such activities by the national authorities in the importing State?
- Are the company's activities and beneficiaries known to the national authorities in the importing State?
- Has the company or any of its directors or owners previously been involved in undesirable transactions, negligent conduct, or been convicted for illicit arms trafficking?
- Does the company keep comprehensive records of all stocks and transactions, and engage in transparent financial and banking practices?
- Does the company maintain safe storage facilities and robust security procedures that are inspected by the national authorities?

**(d) *Legitimacy and Reliability of the Other Entities Involved in the Proposed Export***

Arms transfers may not only involve the officials of national authorities and the intended end users in an exporting and importing State, but also involve a range of intermediaries located within and outside those two States, including brokers and various individuals and companies who 'make the deal' and arrange the delivery. If it is the case that the ultimate end user is not the same as the importer or intermediate consignee, then the exporting and importing State authorities should obtain the necessary details of those actors as well as check their reliability to handle and deliver the consignment(s). Checking the bona fides of these various businesses and individuals can help to determine if a transfer is legitimate or at risk of being diverted to an unauthorized end user or use. Unfortunately, the exact role of such entities in a proposed transfer may not always be known by the national authorities

when conducting a risk assessment before authorizing or denying the proposed export. Therefore, wherever possible such information should be sought out prior to any authorization of a transfer. Evidence of the role of some intermediaries in corrupt business practices with State entities dealing with conventional arms is an important indicator.

- Where known at the pre-authorization/transfer stage, do any of the contractual or financial arrangements raise concerns, for example the use of 'shell' companies whose beneficiaries are unknown?
- Are the details of the exporter, brokers, shipping agent, freight forwarder, intermediate consignee, distributor or other actors involved in the commercial arrangements all sufficiently identified and are their authorizations and/or registration documents as operators all authenticated?
- Has the importing authority/applicant been reluctant to provide details identifying any intermediaries involved in the transfer?
- Where known at the pre-authorization/transfer stage, does the proposed physical routing of the shipment raise concerns, for example because of unreliable controls in the transit, trans-shipment or importing locations or means of transport?
- Has any actor involved in the commercial arrangements for the transaction or physical routing of the shipment, including in previous companies linked to their ownership/directorships, been formerly convicted or accused on the basis of credible evidence for participating in conventional arms or other illicit trafficking, or for violations of arms export legislation (including the violation of multilateral arms embargoes), or for other closely related crimes such as corruption and money laundering?



### 3.1.2 Sources of Information for Diversion Risk Assessment

The primary source of information and analysis for diversion risk assessments remains government agencies dealing with curbing the illicit trade and diversion. These include customs, law enforcement, justice, intelligence, financial intelligence units, defence, and trade ministries. Intelligence agencies are a critical resource for information on individuals and companies believed to be involved in illicit arms trafficking, international trends in illicit markets, foreign corrupt practices, and information about controlled commodities sought by embargoed States, terrorist organizations and criminal networks. Diplomatic missions and other governmental institutions such as customs, police and other law enforcement services also conduct checks on entities involved in the transfer and documentation provided in support of an application for an export or other transfer authorization.<sup>45</sup> In addition to government sources, officials also use credible open source information, generated via multilateral organizations (for example, the reports of United Nations panels of experts that monitor and investigate the implementation of United Nations arms embargoes) and reputable NGOs; as well as, reliable information contained in commercial directories and specialized online resources can provide accurate, timely and objective information on diversion risks. The diversion reference

documents prepared by the sub-working group on article 11 indicate some of the sources of information that could be used to inform an export authority's assessment of diversion risks.<sup>46</sup>

An important source of information for a diversion risk assessment is the documentation provided in support of an export authorization application. This can include the export application form, the import authorization, the end-use/r documentation, the contractual information plus any other supporting documents. As part of the export authorization application process in the majority of significant exporting States, government procurement agents and companies are normally required to formally submit information on the end use/r, the intermediate and final consignee, the type, characteristics, value and quantities of the arms to be exported, reference to the contract or order number concluded with the end user, and a relevant import authorization from the country of final destination.<sup>47</sup> Other documentation and types of information from the parties involved in the potential transfer, including brokers and other intermediaries, also need to be considered in the risk assessment and may have to be cross-checked with other States.<sup>48</sup>

End-use/r documentation "comprises documents whose purpose is to identify, authorize, commit to certain undertakings and verify delivery".<sup>49</sup> Conflict Armament

<sup>45</sup> Brian Wood and Peter Danssaert, "Study on the Development of a Framework for Improving End-Use and End-User Control Systems", United Nations Office for Disarmament Affairs, 2011, pp. 69-70.

<sup>46</sup> ATT Working Group on Effective Treaty Implementation Chair's Draft Report to CSP4, 20 July 2018, pp. 16-17, [https://thearmstradetreaty.org/hyper-images/file/ATT\\_CSP4\\_WGETI\\_Draft\\_Report\\_EN/ATT\\_CSP4\\_WGETI\\_Draft\\_Report\\_EN.pdf](https://thearmstradetreaty.org/hyper-images/file/ATT_CSP4_WGETI_Draft_Report_EN/ATT_CSP4_WGETI_Draft_Report_EN.pdf).

<sup>47</sup> European Union, "User's Guide to Council Common Position 2008/944/CFSP" defining common rules governing the control of exports of military technology and equipment", as endorsed by the Council on 16 September 2019; Wassenaar Arrangement, "Best Practice Guidelines for the Licensing of Items on the Basic List and Sensitive List of Dual-Use Goods and Technologies", 2006; OSCE, "Export Control of Small Arms and Light Weapons, Vienna", in *Handbook of Best Practices on Small Arms and Light Weapons*, 2003; League of Arab States, *Arab Model Law on Weapons, Ammunitions, Explosives and Hazardous Material*, 2002.

<sup>48</sup> United Nations Firearms Protocol, article 15; Wassenaar Arrangement, "Statement of Understanding on Arms Brokerage", December 2002; OSCE, "Best Practice Guide on National Control of Brokering Activities", in *Handbook of Best Practices on Small Arms and Light Weapons*, 2003.

<sup>49</sup> United Nations Coordinating Action on Small Arms, "Module 6 End-User and End-Use documentation", MOSAIC 03.20: National Controls over the International Transfer of Small Arms and Light Weapons, 17 June 2014, p. 3. For more information on different types of end-use/r documentation, see Paul Holtom, Hardy Giezendanner, and Himayu Shiotani, "Examining Options to Enhance Common Understanding and Strengthen End Use and End User Control Systems to Address Conventional Arms Diversion", UNIDIR, 2015, pp. 42-44.

#### BOX 4: LIMITATIONS OF RELYING ON END-USE/R DOCUMENTATION AND ASSURANCES TO PREVENT DIVERSION

Research into the diversion of conventional arms and ammunition has repeatedly shown that relying only on end-use/r documentation with an official stamp and a signed assurance not to re-export the imported items to prevent diversion is insufficient for preventing diversion. Documents that have been used as a basis for issuing export licenses have been incomplete and did not even fulfil the recommended 'essential' elements of best practice guidelines, or can include vague or imprecise re-export commitments.<sup>53</sup> Unfortunately, undertakings and assurances on re-export are not always fully understood or adhered to by end users in importing

States.<sup>54</sup> Due to negligence, ignorance, or willful disregard, such undertakings and assurances all too often prove an ineffective measure for preventing diversion. As a result, more States Parties are including clauses in end-use/r documentation to provide for post-delivery cooperation between the competent authorities in the exporting and importing States. As discussed below, this post-delivery measure is being developed by several major arms exporters to ensure that end-use/r assurances by the end user are respected, thus preventing diversion and ensuring the security of further supply.

Research, the Small Arms Survey, UNIDIR, and the United Nations Office for Disarmament Affairs have extensively reviewed the misuse of such documentation to divert conventional arms and ammunition to unauthorized end users and uses.<sup>50</sup> Therefore, while such documentation can be useful for risk assessment purposes, the receipt of such documents on their own is insufficient for reassuring a national export licensing authority that diversion risks have been prevented or sufficiently mitigated to not pose a realistic danger.

In contrast to most existing multilateral best practice guidelines, which focus on the role and responsibilities of the competent authorities in the *exporting* State, the Paper on Possible Measures recommends

instituting "national procedures for issuing [end-use/r documentation] for government and private end-users"<sup>51</sup> by authorities in *importing* States, with which the exporting State authorities must then cross check. In addition, the sub-working group on article 11 has recommended several practical measures that States Parties can take to mitigate the risk of the misuse of end-use/r documentation that could facilitate diversion. For example, CSP5 recommended the development of a guide to end-use/r documentation and encouraged States Parties to share information on end-use/r documentation through the ATT Secretariat to inform this guide.<sup>52</sup>

50 Conflict Armament Research, "Diversion Digest Issue 02: End-User Documentation", 2019; Paul Holtom, Hardy Giezen-danner, and Himayu Shiotani, "Examining Options to Enhance Common Understanding and Strengthen End Use and End User Control Systems to Address Conventional Arms Diversion", UNIDIR, 2015, pp. 5–23; Glenn McDonald, "Who's Buying? End User Certification", in *Small Arms Survey 2008: Risk and Resilience*, 2008; Brian Wood and Peter Danssaert, "Study on the Development of a Framework for Improving End-Use and End-User Control Systems", United Nations Office for Disarmament Affairs, 2011.

51 ATT Working Group on Effective Treaty Implementation, Chair's Draft Report to CSP4, 20 July 2018, p. 19, [https://thearmstradetreaty.org/hyper-images/file/ATT\\_CSP4\\_WGETI\\_Draft\\_Report\\_EN/ATT\\_CSP4\\_WGETI\\_Draft\\_Report\\_EN.pdf](https://thearmstradetreaty.org/hyper-images/file/ATT_CSP4_WGETI_Draft_Report_EN/ATT_CSP4_WGETI_Draft_Report_EN.pdf).

52 ATT Working Group on Effective Treaty Implementation Chair's Draft Report to CSP5, 26 July 2019, para. 31, p. 5, [https://www.thearmstradetreaty.org/hyper-images/file/ATT\\_CSP5\\_WGETI%20Draft%20Report\\_EN/ATT\\_CSP5\\_WGETI%20Draft%20Report\\_EN.pdf](https://www.thearmstradetreaty.org/hyper-images/file/ATT_CSP5_WGETI%20Draft%20Report_EN/ATT_CSP5_WGETI%20Draft%20Report_EN.pdf).

53 Conflict Armament Research, "Diversion Digest Issue 02: End-User Documentation", 2019, p. 17.

54 Paul Holtom, Irene Pavesi, and Christelle Rigual, "Trade Update: Transfers, Retransfers, and the ATT", *Small Arms Survey 2014: Women and Guns*, Oxford University Press, 2014, pp. 117–28.

### 3.1.3. Mitigation Measures to Prevent Diversion

Two paragraphs in article 11 note that States Parties involved in an international transfer could consider establishing measures to prevent or mitigate the risk of diversion, such as confidence-building measures or jointly developed and agreed programmes by the exporting, importing, transit and trans-shipment States where appropriate. States can and do use end-use/r documentation, as well as contracts and transfer authorizations, to provide assurances or provide for legally binding obligations for the end-user not to retransfer or re-export the imported arms, at least not without the authorization of the exporting State or the authorization of the importing State authorities. Several ATT States Parties indicated in their initial reports that end-use/r documentation and such assurances are regarded as 'mitigation measures' under article 11. The EU User's Guide, the Organization for Security and Cooperation in Europe best practice guidelines on export controls for small arms and light weapons, and the Wassenaar Arrangement's End User Assurances Commonly Used Consolidated Indicative List all note three types of re-export clauses:

- prohibition of re-export;
- prohibition of re-export unless approval has been received from the original exporting State that re-export is permitted under certain conditions, such as authorization from the export licensing authorities of the State in which the end user/importer is located; or
- an assurance that re-export will only take place after authorization has been received from the export licensing authorities of the original exporting State.

When monitored and linked with post-delivery cooperation measures, such re-export clauses could indeed constitute systemic measures to mitigate the risk of diversion. They could also facilitate practical measures to detect the diversion of transferred conventional arms. Unfortunately, as the box on the limitations of relying on end-use/r documentation and assurances to prevent diversion shows, these assurances are not a particularly effective measure when taken in isolation.

Article 11(3) obliges exporting, importing, and transit/trans-shipment States to cooperate and share information in order to mitigate the risk of diversion. To be effective, the choice of risk mitigation measures should not only be based on what measures are feasible, but also which mitigation measures would actually reduce the types of risk indicated in the assessment conducted by the national authorities to the absolute minimum risk of diversion. For example, if an importing State is seeking to import small arms to replace its current stock, the exporting State could require the importing State to destroy its current small arms, which should be considered surplus after the new small arms have been delivered, as a precondition for authorizing the export of new small arms (that is, a 'new for old' approach). Or, there could be an agreement that newly imported arms will be destroyed when deemed surplus to requirements.<sup>55</sup> Mitigation measures to prevent diversion should therefore be tailored to the risks identified in relation to several factors: the record of the end user and conditions in the importing country (including security arrangements for items once transferred), the reliability of other entities involved in the transfer, and the type of conventional arms being transferred.

<sup>55</sup> Germany has provided information on its 'New for Old' principle for mitigating the risk of diversion for exports of small arms and light weapons in its ATT initial report.



### **3.1.4 Information Sharing on Denials Due to Diversion Risks**

Relevant information should be made available to other States Parties as a practical measure to ensure that another State Party, which did not have access to the same risk indicators and information sources, does not inadvertently authorize a transfer that is at risk of diversion. This would be in line with provisions for sharing information contained in article 11. It could help to bolster efforts to build confidence and share operationally useful information as discussed below. Throughout the ATT negotiations, several States mentioned the option of including provisions for a denial notification system in the ATT, comparable to that used by the EU for supporting the implementation of the Common Position. While this was not included in the treaty text, it remains an option to be considered within the ATT framework and could be explored under the diversion information exchange forum.

### **3.2 MEASURES APPLICABLE DURING A TRANSFER**

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Shipments of arms and related items are carried out by various modes of transport—sea, air, rail and land transport (including internal waters)—and are often routed through transit and trans-shipment States. Each State Party is required by ATT article 9 to take “appropriate measures to regulate” the transit or trans-shipment of conventional arms under its jurisdiction “where necessary and feasible”. As discussed in section 2, the national control system should provide the necessary authority for the following two main types of practical measures to be taken by States Parties to prevent or mitigate the risk of diversion during the transfer:

- diversion risk assessment indicators for transit and trans-shipment States; and
- cooperation and information-sharing, including monitoring of shipments.

Exporters, shipping agents and carriers are obliged to follow various international laws and regulatory systems for the control of transit and trans-shipment of conventional



arms and ammunition/munitions and that also relate to these modes of transport.<sup>56</sup> In 2011 almost all significant conventional arms exporters agreed that the responsibility of transporters should be limited to transportation of arms with genuine manifests and/or valid export/import licences unless the transporter is aware or should have been aware that the manifest and/or the export or import licence is falsified.<sup>57</sup> Some States require transit or trans-shipment authorizations in accordance with their national transfer control systems. In any case, coordination and communication with exporting and importing States may be required to ensure that conventional arms intended for transit or trans-shipment have been properly authorized for export or import.

### 3.2.1. Diversion Risk Assessment Indicators for Transit and Trans-shipment States

Ignorance of the laws and procedures regarding transit, trans-shipment and transport of conventional arms and munitions by manufacturers, distributors, brokers, shipping agents, freight forwarders and carriers are a danger sign for exporters when assessing a potential transfer. Best practice guidelines have been developed and promoted to address arms diversion in air and maritime transport, in particular of SALW and related ammunition/munitions to destinations or entities subject to United Nations arms embargoes.<sup>58</sup> Government-backed awareness programmes to

encourage relevant private and public sector actors dealing with arms shipments to alert the authorities to possible diversion of consignments is one means of reducing such risks.

Furthermore, the identification of inconsistencies in documentation and irregular conduct should immediately raise suspicion among customs, border guards and other officials dealing with transport operators and ports, which should then launch an investigation to find out whether the consignment of conventional arms or related items is being diverted in whole or part, or if there is a plan to divert the items. Some of the methods employed to facilitate such diversions include:

- falsifying transport documentation;
- concealing actual flight plans, routes, and destinations;
- turning off transponders;
- falsifying aircraft registrations; and
- quickly changing registration numbers and vessel names or national flag registries.

Risks of diversion can also be reduced by implementing international standards for customs administrations which encourage the 'pre-shipment inspection' of high-risk cargoes, ensuring that before a commercial shipment is loaded or leaves port, the standard cargo manifest can be checked against the relevant export authorization

<sup>56</sup> These include the Chicago Convention on Civil Aviation and the Convention on the Law of Sea. Standards for the safe and secure delivery of consignments of conventional arms and ammunition/munitions have been agreed by States in the World Customs Organization, the International Maritime Organization and the International Labour Organisation. Of particular relevance is the World Customs Organization's SAFE Framework of Standards to Secure and Facilitate Global Trade; the International Maritime Organization's Convention for the Safety of Life at Sea, chapter VII on "Carriage of Dangerous Goods" and chapter X1-2 on "Special Measures to Enhance Maritime Security"; the International Maritime Organization's International Ship and Port Facility Code; and the Code of Practice on Security in Ports, which is contained in a joint International Maritime Organization–International Labour Organisation publication.

<sup>57</sup> Wassenaar Arrangement, "Elements for Controlling Transportation of Conventional Arms Between Third Countries", 2011.

<sup>58</sup> OSCE, "Introducing Best Practices to Prevent Destabilizing Transfers of Small Arms and Light Weapons through Air Transport and on Associated Questionnaire", FSC.DEC/11/08, 5 November 2008; United Nations Coordinating Action on Small Arms, MOSAIC 05.60, "Border Controls and Law Enforcement Cooperation", version 1.0, 27 August 2012, <https://s3.amazonaws.com/unoda-web/wp-content/uploads/2018/10/MOSAIC-05.60-2012EV1.0.pdf>; Wassenaar Arrangement, "Best Practices to Prevent Destabilising Transfers of Small Arms and Light Weapons through Air Transport", 2007; Wassenaar Arrangement, "Elements for Controlling Transportation of Conventional Arms Between Third Countries", 2011.



and initial end-use/user documentation.<sup>59</sup> The World Customs Organization encourages the use of 'automated targeting tools' for this task, assessing potentially 'high risk' shipments by reviewing the bona fides of the freight forwarder, shipping broker, and carrier firm, as well as any signs that the aircraft or vessel has a record of diversion or is taking a circuitous route or visiting suspicious ports or airports.<sup>60</sup>

### 3.2.2. Cooperation and Information-Sharing

As required under article 11(3), cooperation and information-sharing between exporting, importing, and transit/trans-shipment States during a transfer can help to mitigate the risk of diversion. Concretely, the Paper on Possible Measures recommends "requiring or encouraging delivery notification by any transit countries (through delivery receipts signed by the importations customs service, delivery verification certificate, etc.)".<sup>61</sup> To further reduce the risk of diversion while en route, the authorities at transit or trans-shipping ports and airports, including where there is a free trade zone or bonded warehouse, must be notified in advance to provide extra security for certain cargoes and open the cargo if they receive an order by law enforcement authorities. This will also help customs authorities conduct a risk assessment to determine the necessary measures for pre-clearance and clearance of cargo in-transit.<sup>62</sup>

The pre-clearance of cargo involves the review of cargo manifests prior to the arrival of a conveyance in order to identify cargo that should be subjected to a more intense review on arrival. For shipments of conventional arms and ammunition/

munitions, this should include reviewing the itinerary of the conveyance when those journeys originated from or transited through States or locations where arms trafficking is known to have taken place. In this phase, customs authorities should have access to hard copy or electronic basic documents such as bills of lading, airway bills and cargo manifests. The clearance of cargo involves reviewing documents submitted in connection with the entry and exit of goods and cargo for the purpose of identifying those that are a high risk of arms trafficking. This can also involve the physical examination of cargo and conveyances at the point of entry or exit. These steps can contribute to the detection of efforts to divert shipments of conventional arms and also mislabeled or concealed arms consignments.

The transportation providers and the shipment routes are not always known when an export authorization application is made and can indeed change due to the nature of international maritime and air trade dynamics. This can pose a challenge for timely information-sharing between the exporting State and transit and importing States. It can still be addressed by requiring the authorized exporter to inform the exporting State of the proposed route and method of transport for an international consignment of arms as soon as it is known (this could be a condition for issuing the export authorization), which can then be shared with partner States, as required.<sup>63</sup>

States Parties should cooperate with reliable freight forwarders, consignees, and transporters to monitor and protect conventional arms shipments while travelling to their intended destinations. In addition, the use of real-time tracking

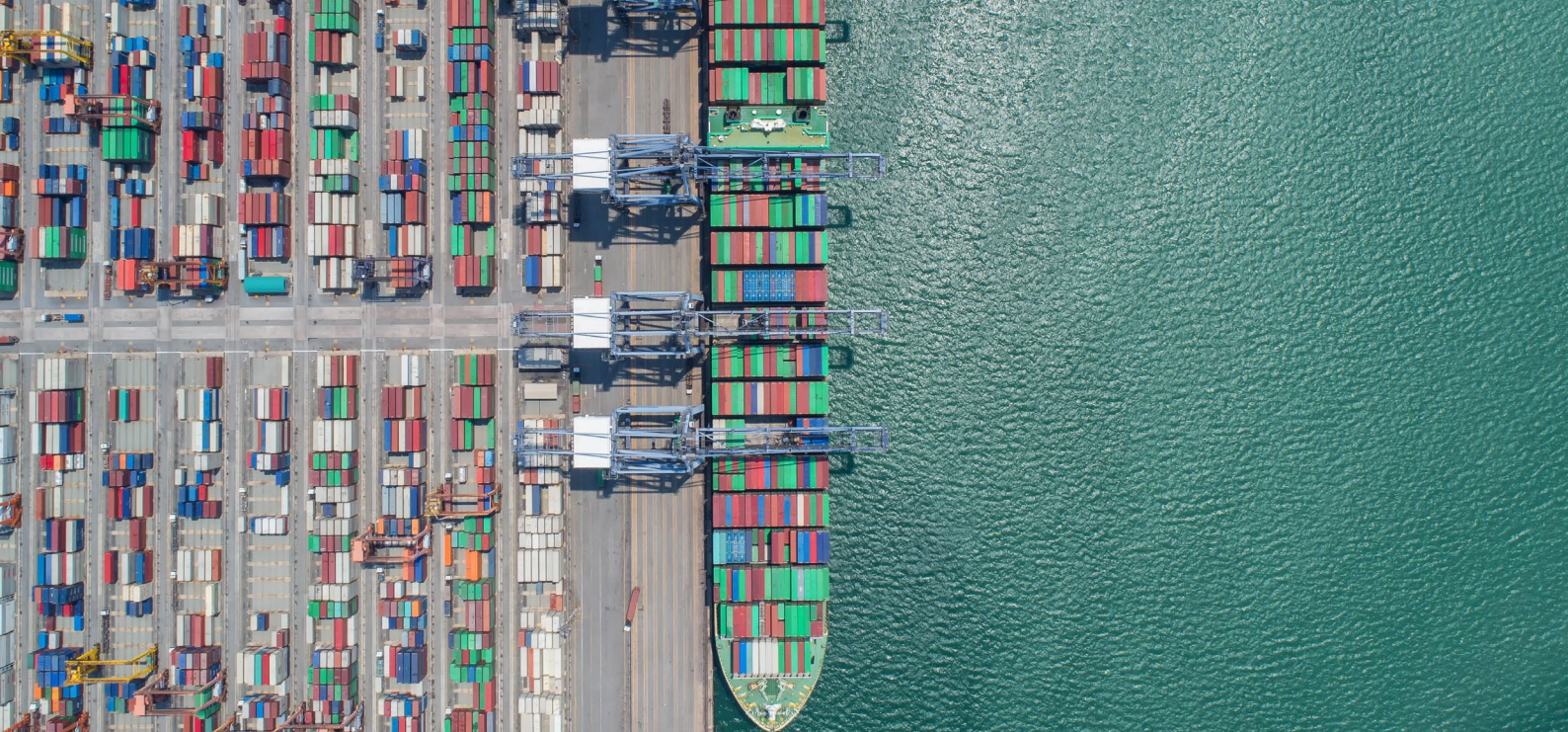
<sup>59</sup> For example, World Customs Organization, "SAFE Framework of Standards to Secure and Facilitate Global Trade", 2012.

<sup>60</sup> World Customs Organization, "SAFE Framework of Standards to Secure and Facilitate Global Trade", 2012, p. 7.

<sup>61</sup> ATT Working Group on Effective Treaty Implementation, Chair's Draft Report to CSP4, 20 July 2018, p. 21, [https://thearmstradetreaty.org/hyper-images/file/ATT\\_CSP4\\_WGETI\\_Draft\\_Report\\_EN/ATT\\_CSP4\\_WGETI\\_Draft\\_Report\\_EN.pdf](https://thearmstradetreaty.org/hyper-images/file/ATT_CSP4_WGETI_Draft_Report_EN/ATT_CSP4_WGETI_Draft_Report_EN.pdf).

<sup>62</sup> World Customs Union, "Transit Handbook to Establish Effective Transit Schemes for LLDCs", 2014, chapter VII.

<sup>63</sup> Wassenaar Arrangement, "Best Practices to Prevent Destabilising Transfers of Small Arms and Light Weapons through Air Transport", 2007.



technologies can also greatly assist in informing such automated risk assessments, and also are a measure for further mitigating the risk of diversion.<sup>64</sup> Since July 2002, all ships of 300 gross tonnage and upwards that are engaged on international voyages have to be fitted with an automatic identification system. This system sends information to the relevant authorities on the ship's identity, type, position, course, speed, navigational status, and other safety-related information. Contracting member States of the International Maritime Organization can now access ship-tracking information that can be used by the 'automated targeting tools' mentioned above. Furthermore, radio-frequency identification 'active tags' enable the tracking of containers or pallets of conventional arms and ammunition while being transported. Active tags can be tracked in real time by the supplier, the carrier and other users that have been given access to the unique serial number. Thus, unauthorized access to the container and lengthy delays or changes in route can be detected and interested parties alerted.

### **3.3. MEASURES APPLICABLE AT IMPORTATION AND POST-DELIVERY OF A TRANSFER**

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For the purposes of this Issue Brief, the measures to be taken at importation and post-delivery storage will both be addressed in this one sub-section. Thus, this sub-section will consider the following types of measures:

- on-arrival inspections, border controls, and delivery verification;
- safe and secure storage at arrival and by the end user, including record-keeping as part of inventory management and accounting;
- post-delivery cooperation to ensure mitigation measures and assurances remain in place; and
- detecting and investigating diversion of transferred conventional arms.

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<sup>64</sup> For a summary of the new technologies, see Peter Danssaert, "Anti-Diversion Measures: Real-Time Locating Systems", International Peace Information Service, 2019, <https://ipisresearch.be/publication/anti-diversion-measures-real-time-locating-systems/>.



### 3.3.1. Arrival Inspections and Delivery Verification

Most international instruments and guidelines on conventional arms do not elaborate on controls at the point of delivery. However, the Kinshasa Convention, a recent regional treaty adopted by the Economic Community of Central African States, requires States Parties to determine “the mode of transport for export and import, as well as a precise and limited number of points of entry,” and designates all SALW as ‘illicit’ if the items are not imported via official entry points.<sup>65</sup> This measure is intended to ensure that trained personnel are at hand to carry out inspections and to facilitate the safe and secure handover of materiel to authorized end users. The requirement should also enable the implementation of World Customs Organization best practice, under which the customs clearance of the cargo against the manifest can be carried out correctly by the competent authority (usually customs).

Furthermore, the customs authorities at this stage should verify the end user and can prepare and sign a delivery verification certificate (DVC) or comparable documentation.<sup>66</sup> As with end-use/r documentation, there is no international standard for the contents of a DVC or comparable document, but international best practice guidelines recommend that one should contain the following information:

- the name and address of the exporter and the importer;

- the serial number of the import certificate;
- a description of the goods;
- the quantity and value of the goods;
- the port of arrival
- the name of the carrier company; and
- the identification number of the vehicle—the International Maritime Organization number for ships, the manufacturing number for aircraft and the chassis number for trucks and railcars.<sup>67</sup>

To ensure an effective DVC process, exporting and importing States should avoid leaving a company with the sole responsibility to self-certify a delivery of arms.<sup>68</sup> National authorities may require the exporter, carrier or agent to submit a copy of the certificate of unloading or of any other relevant document confirming the delivery.<sup>69</sup> The Paper on Possible Measures recommends that importing States register and maintain records of conventional arms that enter their national territory.<sup>70</sup> Therefore the information to be provided in the DVC should also ideally be entered into a national database or databases and connected with the records of the related end-use/r documentation that were prepared in advance of the import.

The consignee to which the arms consignment is addressed, or the authorized end user, should then provide the DVC or related documentation to the exporting State, if requested. The exporting State Party can then conduct a check on the DVC or related document, ensuring it corresponds with information provided in support of the

<sup>65</sup> Economic Community of Central African States, Central African Convention for the Control of Small Arms and Light Weapons, Their Ammunition and All Parts and Components that Can Be Used for Their Manufacture, Repair and Assembly, 30 April 2010, entered into force 8 March 2017, article 18(1), 18(4)).

<sup>66</sup> Brian Wood and Peter Danssaert, “Study on the Development of a Framework for Improving End-Use and End-User Control Systems”, United Nations Office for Disarmament Affairs, 2011, p.71.

<sup>67</sup> Ibid, p. 71.

<sup>68</sup> Conflict Armament Research, Diversion Digest, Issue 2, 2019, p. 19.

<sup>69</sup> Wassenaar Arrangement, “Best Practices to Prevent Destabilising Transfers of Small Arms and Light Weapons through Air Transport”, 2007.

<sup>70</sup> ATT Working Group on Effective Treaty Implementation, Chair’s Draft Report to CSP4, 20 July 2018, p. 22, [https://thearmstradetrety.org/hyper-images/file/ATT\\_CSP4\\_WGETI\\_Draft\\_Report\\_EN/ATT\\_CSP4\\_WGETI\\_Draft\\_Report\\_EN.pdf](https://thearmstradetrety.org/hyper-images/file/ATT_CSP4_WGETI_Draft_Report_EN/ATT_CSP4_WGETI_Draft_Report_EN.pdf).

application for an authorization to export. Where the provision of a DVC or related document was a condition for issuing the original export authorization, any failure to provide such a document would then impact subsequent export decisions regarding further deliveries to the end user. Failure to comply with such a requirement might also be shared confidentially among States Parties to inform decision-making for authorizations. Officials representing the exporting State could also be present at the time of arrival of the conventional arms to verify their delivery to the importing State and to monitor the receipt of the conventional arms by the intended end user. Officials of the exporting and importing States could also accompany the delivery of the shipment to the end user's storage facility.

### 3.3.2. Safe and Secure Storage

While the issue of stockpile management is not mentioned in ATT article 11,<sup>71</sup> the Paper on Possible Measures emphasizes that a key measure to prevent the diversion of transferred arms and to enable the detection of attempted diversions is the establishment and maintenance of "robust stockpile procedures for the safe storage of conventional arms and ammunition".<sup>72</sup> The Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, the MOSAIC module "Stockpile Management", and the International Ammunition Technical Guidelines recommend practical measures to reduce the risk of diversion from storage facilities, such as:

- establishing and conducting inventory management and accounting procedures (including centralized record-keeping, which entails storing

records of transactions made by all departments in a single, central authority);

- controlling access to stockpiles;
- applying physical security measures (such as fencing and locking systems);
- ensuring the security of stockpiles that are in transport;
- destroying all surplus arms and ammunition in accordance with international norms and standards; and
- ensuring appropriate staff training in safe and secure stockpile management procedures.

### 3.3.3. Post-delivery Cooperation Between Exporting and Importing States

At the post-delivery stage, the importing State is required to abide by any non-retransfer or re-export assurances it has given to the original exporting State, often in end-use/r documentation. If the importing State has determined that the previously imported items are now surplus to requirement and would like to retransfer or re-export such items, it should ensure that this is carried out in accordance with provisions in the end-use/r documentation or contract, which can include, as noted above, a requirement for permission from the original exporting State. The Wassenaar Arrangement best practice guidelines on re-export controls call on participating States to review such requests "as expeditiously as possible and on a non-discriminatory basis", but still to apply the same criteria they would use to assess potential exports from their own territory.<sup>73</sup> Unfortunately, as has been noted above, importing States do not always seek and receive the permission of the original exporting

<sup>71</sup> "Stockpile management" is only mentioned once in the ATT (in article 16) as one possible form of international assistance.

<sup>72</sup> ATT Working Group on Effective Treaty Implementation, Chair's Draft Report to CSP4, 20 July 2018, p. 22, [https://thearmstradetreaty.org/hyper-images/file/ATT\\_CSP4\\_WGETI\\_Draft\\_Report\\_EN/ATT\\_CSP4\\_WGETI\\_Draft\\_Report\\_EN.pdf](https://thearmstradetreaty.org/hyper-images/file/ATT_CSP4_WGETI_Draft_Report_EN/ATT_CSP4_WGETI_Draft_Report_EN.pdf).

<sup>73</sup> Wassenaar Arrangement, "Elements for Controlling Transportation of Conventional Arms Between Third Countries", 2011, article 3.



State before transferring or exporting such items, and the resulting retransfer or re-export is considered by the original exporting State—and many other States and stakeholders—to be an unauthorized re-export or retransfer and thus a diversion.

The ATT contains no specific provision on post-delivery controls, yet such controls could be highly relevant to preventing diversion. Best practice guidelines developed by international and regional organizations and export control regimes refer to post-delivery cooperation measures as worth considering for particularly sensitive items, destinations, and/or end users.<sup>74</sup> The objective of post-delivery cooperation is to increase confidence and ensure that follow-on deliveries are possible. The exporting and importing States can agree on the inclusion of a provision in end-use/r documentation to grant the exporting State's national authorities the right to conduct on-site inspections of transferred conventional arms in the recipient State after delivery. These provisions are most often activated when there is an allegation of diversion or an unauthorized retransfer but can also be used as part of broader confidence-building practices. At a minimum, the importing State should agree to inform the exporting State of any losses of imported arms or related items when detected.

### 3.3.4. Detecting and Investigating Diversion of Transferred Conventional Arms

At present, there is limited international guidance on how States should respond to allegations of diversion.<sup>75</sup> A review of practices in the mid-2010s identified several

approaches used by States to investigate suspected or detected unauthorized retransfers or re-exports of conventional arms and/or ammunition:

- the recipient State government may undertake an investigation in response to a request from its parliament, the exporting State, or a United Nations panel of experts;
- the exporting State conducts a national investigation, via either its embassy or experts from its licensing authority;
- competent authorities in the exporting and recipient States undertake a joint investigation; or
- in very rare instances, an independent team of experts may be asked to investigate.<sup>76</sup>

As with the results of tracing requests and other investigations into trafficking and transfer control violations, such as lists of persons and entities convicted of trafficking and related offences and those named in United Nations arms embargo violation reports, this information can be used in future risk assessments involving the end user, other entities involved in the transfer, or the type of equipment that was transferred. It could also lead to the revocation or suspension of export authorizations that have been granted but not implemented or impose a temporary moratorium on export authorizations for a particular destination.<sup>77</sup> Additionally, sharing the outcomes and conclusions of such investigations with other States Parties would help inform the risk assessments and decision-making in other States.

<sup>74</sup> Paul Holtom, Hardy Giezendanner, and Himayu Shiotani, "Examining Options to Enhance Common Understanding and Strengthen End Use and End User Control Systems to Address Conventional Arms Diversion", UNIDIR, 2015, pp. 100–101.

<sup>75</sup> See for example, The South Eastern and Eastern Europe Clearing House for the Control of Small Arms and Light Weapons, *Addressing Unauthorized Re-Export or Re-Transfer of Arms and Ammunition*, 2014, [https://www.seesac.org/f/docs/Arms-Exports-Control-4/Addressing-Unauthorized-Re-export-or-Re-transfer-of-Arms-and-Ammun\\_1.pdf](https://www.seesac.org/f/docs/Arms-Exports-Control-4/Addressing-Unauthorized-Re-export-or-Re-transfer-of-Arms-and-Ammun_1.pdf).

<sup>76</sup> Paul Holtom, Irene Pavesi, and Christelle Rigual, "Trade Update: Transfers, Retransfers, and the ATT", *Small Arms Survey* 2014: Women and Guns, Oxford University Press, 2014, pp. 126–7.

<sup>77</sup> *Ibid.*, p. 126.





## 4. CONCLUSION

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This Issue Brief has identified a range of systemic and practical measures that can be taken to effectively implement the obligations of ATT States Parties to prevent, detect, address, and eradicate the diversion of transfers and transferred conventional arms to the illicit market, or to an unauthorized end use or end user. Many States already employ such measures to a greater or lesser extent, and they are consistent with the obligations and recommendations in ATT article 11 and related articles, as well as the Paper on Possible Measures.

The establishment and maintenance of an effective and adequately resourced national transfer control system and corresponding law enforcement system is a prerequisite to address diversion—it consists of several *systemic measures* outlined in section 2 of this paper. In order to address diversion, the legal and regulatory framework needs to define all items in the national control list including the conventional arms, the ammunition/munitions and the parts and components necessary for the assembly and maintenance of the conventional arms. The diversion of any of these items should constitute an offense under national legislation. Additionally, competent national authorities need clearly defined powers, appropriate resources, and specialist skills and knowledge. These systemic measures are essential for developing and maintaining mechanisms or comprehensive arrangements necessary for the effective functioning of national

control systems and for the regular conduct of international cooperation. Taken together, the systemic measures enable competent national authorities to take practical measures in a consistent and predictable manner in relation to specific transfers and to cases of diversion.

Practical measures have been identified in this Issue Brief as specific types of actions taken to prevent, detect, and respond to incidents of diversion before, during, and after an international arms transfer has taken place. In this regard, this Issue Brief provides four sets of indicators and related questions for competent national authorities to answer regarding possible diversion risks as part of a comprehensive risk assessment conducted before deciding whether to authorize or deny a potential export. States Parties involved in an international transfer can take a range of practical prevention and risk mitigation measures to ensure that there is an absolute minimum risk of diversion before an export is authorized, otherwise the export should be denied under the terms of the Treaty.

In addition, specific practical measures can be taken to prevent and detect diversion during a transfer, including customs pre-shipment inspections of high-risk cargoes; checking cargo manifests against relevant authorizations and end-use/r documentation; information-sharing among exporting, importing, and transit States involved in a shipment; and investing in the use of real-time tracking technologies

such as radio-frequency identification active tags. Post-shipment practical measures include on-arrival inspections, border controls, and delivery verification as well as safe and secure storage and post-delivery cooperation, including the utilization of programmes for post-delivery inspections. Other forms of cooperation between States involved in a transfer include measures to investigate suspected or detected incidents of diversion and to enable the prosecution of criminal acts facilitating diversion of conventional arms and related items.

The ATT provides a cooperative framework to share lessons learned on effective—and ineffective—measures to tackle diversion, which merits further consideration. The range of systemic and practical measures developed by ATT States Parties to prevent, detect, address, and eradicate diversion can contribute to an analytical framework for examining their application. This approach could also help to identify whether States Parties have developed sufficient political will and relevant capacities to effectively implement and coordinate such systemic and practical measures, and where they may need international assistance to do so. Such a framework could also be used to explore the direct and indirect impact of implementing types of systematic and practical measures to prevent and eradicate the illicit trade in, and diversion, of conventional arms to achieve the Treaty's purpose of reducing human suffering.





# THE ARMS TRADE TREATY: **MEASURES TO PREVENT, DETECT, ADDRESS AND ERADICATE THE DIVERSION OF CONVENTIONAL ARMS**

**This Issue Brief is intended to support the efforts of ATT States Parties to implement provisions to prevent, detect, address, and eradicate diversion in conventional arms transfers.** It provides information and guidance on systemic and practical measures to prevent diversion at every stage in the transfer chain. It presents a potential analytical framework for States to determine the direct and indirect impact of applying these measures to achieve the object and purpose of the Treaty. This paper is the second in a series of issue briefs released as part of a joint research project by UNIDIR, Conflict Armament Research, Small Arms Survey and Stimson Center. The objective of the research is to enhance knowledge and facilitate dialogue among States to strengthen shared understanding on the impact of the ATT in addressing risks of diversion, and to identify avenues to further promote effective policies and practices under the Treaty.

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