

Arms Trade Treaty

Introduction

- 3.1 The proposed treaty action is to bring into force the *Arms Trade Treaty* tabled in the Commonwealth Parliament on 12 December 2013.
- 3.2 The Treaty will enter into force 90 days after it has been ratified by 50 States in accordance with Article 22(1), a figure that is expected to be reached by mid-2014. As at 27 February 2014 there are 116 signatories to the Treaty and it has been ratified by 11 States.¹

Background

- 3.3 The trade in conventional arms is estimated to be worth \$US70 billion annually and, to date, there has not been a comprehensive, legally binding international agreement governing it. The Secretary-General of the United Nations has acknowledged the pervasive damage caused by the lack of control on the trade world-wide and the resulting difficulties. He said:

Whether it is promoting sustainable development, protecting human rights, carrying out peacekeeping efforts, delivering food aid, improving public health, advancing gender equality, building safer cities, protecting forcibly displaced persons or fighting crime and terrorism, the Organization [United Nations] faces armed violence, conflict and civil unrest involving violations of

1 United Nations Office for Disarmament Affairs, 'Arms Trade Treaty: Status of the Treaty', <<http://disarmament.un.org/treaties/t/att>> accessed 27 February 2014.

international law, abuses of the rights of children, civilian casualties, humanitarian crises and missed social and economic opportunities.²

- 3.4 The National Interest Analysis (NIA) explains that, since 2006, Australia has actively supported the development of a legally binding instrument that would set common international standards for the transfer of conventional arms. Australia was a co-author of the United Nations General Assembly (UNGA) resolution which called for the development of such a treaty, and has co-authored subsequent resolutions on the matter.³
- 3.5 In 2007, Australia outlined its position on a treaty in a submission to the United Nations Secretary-General. This submission expressed Australia's support for a treaty to address the irresponsible or illicit transfer of conventional arms, and set out its views regarding the feasibility, scope and parameters of the Treaty. Australia was actively engaged in various other preparatory processes and outreach activities.⁴
- 3.6 Australia co-authored and co-sponsored UNGA Resolution 64/48, passed in 2009, which called for a conference to be convened in 2012 'to elaborate a legally binding instrument on the highest possible common international standards for the transfer of conventional arms'.⁵
- 3.7 Australia was elected Vice-Chair of the Preparatory Committee tasked with preparing an Arms Trade Treaty in July 2010 and its views were incorporated into the draft prepared in July 2012. That draft failed to obtain the support of a number of key States.⁶
- 3.8 Australia's Ambassador to the UN in Geneva, Mr Peter Woolcott, was appointed President of the Conference convened in March 2013 to negotiate a final text which was adopted on 2 April 2013.⁷ The text passed by 154 votes, with 23 abstentions and three States voting against it: Iran, Syria and the Democratic People's Republic of Korea.⁸

2 Office for Disarmament Affairs, *United Nations Disarmament Yearbook*, vol. 36 (Part II): 2011, United Nations, New York, 2012, p. 71.

3 National Interest Analysis [2013] ATNIA 19 with attachment on consultation, *Arms Trade Treaty, done at New York, 2 April 2012* [2013] ATNIF 18 (hereafter referred to as 'NIA'), para 8. The other co-authors were Argentina, Costa Rica, Finland, Japan, Kenya and the UK.

4 NIA, para 9.

5 NIA, para 10.

6 NIA, para 11.

7 NIA, para 12 and 13.

8 Mr Jeff Robinson, Assistant Secretary, Arms Control and Counter-Proliferation Branch, International Security Division, Department of Foreign Affairs and Trade (DFAT), *Committee Hansard*, Canberra, 3 March 2014, p. 9.

- 3.9 The Committee queried the effectiveness of the Treaty given that China and Russia had abstained from the vote and that, although the United States had signed the Treaty, the US Congress may not ratify it. With regard to the US, the Department of Foreign Affairs and Trade (DFAT) explained that under the Vienna Convention on the Law of Treaties signatories are obligated 'to refrain from acts which would defeat the object and purpose of the treaty, pending its entry into force or ratification'.⁹ Further, existing US export control arrangements largely comply with the requirements of the Treaty.¹⁰
- 3.10 DFAT acknowledged that the Treaty was only the 'beginning of the process' and that the challenges ahead included engaging Russia and China.¹¹ However, they emphasised the significance of the achievement:
- We are very conscious of the importance of having a universal treaty to ensure its effectiveness. Such a treaty is the beginning of setting a new international norm that will put pressure on those countries that are not members of it to comply. ...It is not the end of the story; we intend to continue to put pressure on countries outside the treaty to become part of it. It will take time and it will take diplomatic and other pressure. Our current priority is to have an early first meeting of states parties which will provide an opportunity to set the framework for the implementation of the treaty into the future.¹²
- 3.11 Australia was one of the first States to sign the Treaty when it opened for signatures at the United Nations in New York on 3 June 2013.¹³

Overview and national interest summary

- 3.12 The objective of the Treaty is to establish common global standards for national regulation of the international trade in conventional arms. It encourages States Parties to trade conventional arms more responsibly and transparently; thereby helping to deter their diversion to the illicit

9 Dr Gregory Alan French, Assistant Secretary, Legal Division, International Legal Branch, Department of Foreign Affairs and Trade (DFAT), *Committee Hansard*, Canberra, 3 March 2014, p. 10.

10 Mr Robinson, DFAT, *Committee Hansard*, Canberra, 3 March 2014, p. 11.

11 Mr Robinson, DFAT, *Committee Hansard*, Canberra, 3 March 2014, p. 11.

12 Mr Robinson, DFAT, *Committee Hansard*, Canberra, 3 March 2014, p. 11.

13 NIA, para 7.

market and preventing the destabilising impact the illicit arms trade has on peace and security, human suffering and development.¹⁴

Reasons for Australia to take the proposed treaty action

- 3.13 According to the NIA Australia has been a long-standing advocate of a robust treaty because of its potential to advance our humanitarian objectives and serve national and international security interests. Better controls will help reduce the deleterious impact that irresponsible and illicit arms transfers have on security and development internationally – with impacts most seriously felt by vulnerable countries, including in our region. The NIA states that the establishment of a legally binding and widely supported multilateral treaty provides a strong tool in meeting these challenges.¹⁵
- 3.14 The Committee noted that the Treaty has no enforcement provisions and suggested this may detract from its effectiveness. DFAT admitted that it had proved too difficult to gain consensus for such provisions at this stage, despite a number of States wishing to include dispute settlement arrangements.¹⁶ However, DFAT maintained that the detailed reporting requirements would encourage compliance with the Treaty and that States within the jurisdiction of the International Court of Justice already come under a compulsory dispute settlement regime.¹⁷ DFAT also indicated that Article 19 provides dispute settlement guidelines and that there is provision for future amendment.¹⁸
- 3.15 Asked if the Treaty will help curb the role of non-state players in the illicit arms trade, DFAT re-iterated that the Treaty is primarily a humanitarian instrument and that it was ‘not an arms control treaty as such’.¹⁹ Notwithstanding its key objective, by imposing an obligation on States Parties to control the trade in arms crossing their borders the Treaty will limit the participation of non-state players in the illicit trade.²⁰
- 3.16 In particular, DFAT drew attention to Article 6 which deals with prohibition requirements, Article 7 which covers export and export assessment, and Article 11 which sets out measures to prevent diversion,

14 NIA, para 3.

15 NIA, para 5.

16 Dr French, DFAT, *Committee Hansard*, Canberra, 3 March 2014, p. 11.

17 Dr French, DFAT, *Committee Hansard*, Canberra, 3 March 2014, p. 11.

18 Mr Robinson, DFAT, *Committee Hansard*, Canberra, 3 March, 2014, p. 12.

19 Mr Robinson, DFAT, *Committee Hansard*, Canberra, 3 March 2014, p. 12.

20 Mr Robinson, DFAT, *Committee Hansard*, Canberra, 3 March 2014, p. 12.

as useful tools to control non-state players.²¹ They again indicated that the amendment provisions, which require a three-quarters majority rather than the consensus of all States Parties, will facilitate future changes in this area.²²

- 3.17 The Committee asked if the Treaty had the power to cover conventional arms transferred other than by sales, for example by rental agreement or as gifts. DFAT explained that, in their view, it did:

We believe that, properly interpreted, it can cover any category of physical transfer of weapons, which can include non-monetary transactions that result in the title and/or control of weapons being handed from one entity to another.²³

- 3.18 DFAT admitted that some countries did not agree with this view but maintained that 'trade' and 'transfer' are used interchangeably throughout the Treaty and that 'transfer' encompasses a broader meaning than 'trade'.²⁴ The Attorney-General's Department confirmed that the activities covered by the Treaty apply to any 'transfer' of arms:

... the activities of international trade comprise export, import, transit, transshipment and brokering, which are referred to as 'transfer' throughout the text of the treaty. Where the obligations of the treaty refer to transferring items, it is capturing the conduct, whether it is export, import, transshipment or transit.²⁵

Obligations

- 3.19 **Article 1** describes the object and purpose of the Treaty as being to establish the highest possible common international standards for regulating the international trade in conventional arms and to prevent and eradicate illicit trade in such arms, for the purposes of contributing to peace and security, reducing human suffering and promoting cooperation, transparency and responsible action by States Parties.²⁶
- 3.20 **Article 2(1)** sets out the types of conventional arms and types of activities covered by the Treaty in the following eight categories:

21 Dr French, DFAT, *Committee Hansard*, Canberra, 3 March 2014, p. 12.

22 Dr French, DFAT, *Committee Hansard*, Canberra, 3 March 2014, p. 12.

23 Dr French, DFAT, *Committee Hansard*, Canberra, 3 March 2014, p. 14.

24 Mr Robinson, DFAT, *Committee Hansard*, Canberra, 3 March 2014, p. 15.

25 Ms Anne Sheehan, Acting Assistant Secretary, International Law Trade and Security Branch, Office of International Law, Attorney-General's Department, *Committee Hansard*, Canberra, 3 March 2014, p. 15.

26 NIA, para 14.

- battle tanks;
 - armoured combat vehicles;
 - large-calibre artillery systems;
 - combat aircraft;
 - attack helicopters;
 - warships;
 - missiles and missile launchers; and
 - small arms and light weapons.²⁷
- 3.21 The Treaty does not define these categories, leaving this to States Parties' national implementation of the Treaty. While **Article 5(3)** prescribes minimum conditions for definitions for national control lists it is open to States Parties to adopt a broader, more comprehensive definition if they wish.²⁸
- 3.22 The Committee queried the absence of cluster munitions and grenades from the list of weapons covered by the Treaty. DFAT indicated that cluster munitions are covered under the United Nations Convention on Cluster Munitions. Grenades did not fit into any of the suggested categories during the negotiations and it had proved too difficult to bring them within the scope of the Treaty. Again, DFAT suggested that the amendment provisions will allow future adjustments and categories could be added as required.²⁹
- 3.23 **Article 2(2)** provides that the Treaty applies to the activities of the international trade in conventional arms, which for the purpose of the Treaty, comprise 'export', 'import', 'transit', 'trans-shipment' and 'brokering'. Likewise these terms are not defined in the Treaty but are left to the domestic implementation of States Parties.³⁰
- 3.24 **Article 2(3)** excludes from the scope of the Treaty any international movement of conventional arms by, or on behalf of, a State Party for that Party's use provided that those arms remain under the Party's ownership. This provision excludes the re-supply of arms and equipment to a Party's military or police stationed abroad provided the arms and equipment are not sold on to a third party.³¹
- 3.25 **Article 3** obliges States Parties to establish and maintain a national control system to regulate the export of ammunition/munitions fired,

27 NIA, para 15.

28 NIA, para 15.

29 Mr Robinson, DFAT, *Committee Hansard*, Canberra, 3 March 2014.

30 NIA, para 16.

31 NIA, para 17.

launched or delivered by any of the conventional arms categories covered under **Article 2(1)**. States Parties, prior to authorising the export of ammunition/munitions, are then required to apply the provisions relating to prohibited transfers (**Article 6**) and export assessment (**Article 7**), prior to authorising the export of parts and components.³²

- 3.26 **Article 5** requires States Parties to implement the Treaty in a consistent, objective and non-discriminatory manner having regard to the principles set out in the preambular section of the Treaty. **Article 5(2)** is a core provision of the Treaty and obliges States Parties to establish and maintain a national control system, including a national control list, in order to implement the provisions of the Treaty. The national control list will define which conventional arms are covered by the national control system. For Australia, the Defence Export Control Office and the Australian Customs Border Protection Service will be the key national authorities and points of contact under our national control system.³³
- 3.27 **Article 6** details the circumstances in which States Parties shall prohibit the transfer of conventional arms or their ammunition/munitions and parts or components. Paragraph 1 reaffirms the obligation of Parties to implement decisions of the UN Security Council, particularly arms embargoes or other similar measures. Paragraph 2 reaffirms existing legal obligations on Parties to abide by international agreements to which they are party and to prohibit any transfer of conventional arms that would violate those agreements. Paragraph 3 prohibits the transfer of conventional arms where a Party has knowledge at the time of authorisation that the arms would be used in the commission of genocide, crimes against humanity and certain war crimes.³⁴
- 3.28 **Article 7** requires each exporting State Party to conduct an assessment, as part of its national control system, of the proposed export of conventional arms against specific criteria, including whether the conventional arms:
- would contribute to or undermine peace and security;
 - could be used to commit or facilitate serious violations of international humanitarian or human rights law or acts constituting terrorism or a transnational organised crime;
 - could be used to commit or facilitate serious acts of gender-based violence or violence against women and children.³⁵

32 NIA, para 19.

33 NIA, para 20.

34 NIA, para 21.

35 NIA, para 22.

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- 3.29 **Article 8** obliges importing States Parties to establish import systems and ensure appropriate and relevant information is provided to the exporting State Party to assist with its export assessment.³⁶
- 3.30 **Article 9** obliges each State Party to take appropriate measures to regulate the transit or trans-shipment under its jurisdiction of conventional arms covered under **Article 2(1)** – excluding ammunition and parts and components – through its territory in accordance with relevant international law.³⁷
- 3.31 **Article 10** obliges each State Party to take measures at a national level to regulate the brokering of conventional arms covered under **Article 2(1)** – excluding ammunition and parts of components – that occurs within its jurisdiction.³⁸
- 3.32 **Article 11** outlines ways and means to prevent and react to diversion, particularly in the transfer of conventional arms covered under **Article 2(1)**.
- 3.33 **Article 12** requires each State Party to maintain national records for a minimum of ten years, pursuant to its national laws and regulations, of its export authorisations or actual exports of conventional arms under **Article 2(1)**. Each State Party is encouraged to maintain records of conventional arms that are imported to its territory as the final destination or that are authorised to transit or trans-ship through its territory.³⁹
- 3.34 **Article 13** requires each State Party to provide an initial report to the Treaty Secretariat describing its national implementation measures within one year of the Treaty's entry into force for the Party. Each Party must submit an annual report to the Secretariat concerning its authorised or actual export and imports of conventional arms covered under **Article 2(1)**. Parties are permitted to exclude commercially sensitive or national security information.⁴⁰
- 3.35 **Article 14** obliges each State Party to take appropriate measures to enforce national laws and regulations that implement the provisions of the Treaty.⁴¹
- 3.36 **Article 15** encourages international cooperation among States Parties in the effective implementation of the Treaty, including through
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36 NIA, para 23.

37 NIA, para 24.

38 NIA, para 25.

39 NIA, para 27.

40 NIA, para 28.

41 NIA, para 29.

consultation, exchange of information and lessons learned, information sharing and mutual legal assistance, and cooperation to prevent or address diversion of arms, violations of national measures and corruption.⁴²

- 3.37 **Article 16** provides for States Parties to seek assistance in implementing the Treaty and requires Parties to provide such assistance on request. It also provides for a voluntary trust fund to be established to assist requesting Parties requiring assistance.⁴³
- 3.38 **Article 17** provides that a Conference of States Parties will be held within 12 months after the entry into force of the Treaty and thereafter at such times as decided by the Conference. Its role includes reviewing the implementation of the Treaty, considering amendments and issues arising from the interpretation of the Treaty and considering and adopting recommendations regarding the implementation and operation of the Treaty.⁴⁴
- 3.39 **Article 18** establishes a Secretariat to assist States Parties in the effective implementation of the Treaty.⁴⁵
- 3.40 **Article 19** provides for any disputes regarding the interpretation or application of the Treaty to be cooperatively resolved between States Parties through mutually consenting to negotiations, mediation, conciliation, arbitration, judicial settlement or other peaceful means.⁴⁶
- 3.41 **Article 20** provides for amendments to the Treaty.⁴⁷
- 3.42 **Article 24** provides for the Treaty to be of unlimited duration and allows for a State Party to withdraw from the Treaty.⁴⁸
- 3.43 **Article 26** sets out the Treaty's relationship vis-à-vis other international agreements for States that are party to both.⁴⁹

Implementation

- 3.44 No new legislation is required to give effect to the Treaty in Australia. The legislative framework established by the *Customs Act 1901*, the

42 NIA, para 30.

43 NIA, para 31.

44 NIA, para 32.

45 NIA, para 33.

46 NIA, para 34.

47 NIA, para 42.

48 NIA, para 44.

49 NIA, para 35.

Defence and Strategic Goods List and the Customs (Prohibited Exports) Regulations (1958) already meets Australia's obligations under the Treaty.⁵⁰

- 3.45 Some new administrative procedures may be required to comply with Australia's obligations under Article 12 of the Treaty for record keeping and Article 13 for reporting.⁵¹ Defence assured the Committee that their existing export control regime will require little adjustment to comply with the Treaty requirements. Current reporting requirements for the UN Register of Conventional Arms will fulfil the reporting requirements under the Treaty and an updated IT system is expected to streamline the process.⁵²

Costs

- 3.46 To further the implementation of the Treaty, Australia has pledged \$1 million to provide assistance to developing countries with implementation of the Treaty, namely through the United Nations Trust Facility Supporting Cooperation on Arms Regulations (UNSCAR).⁵³
- 3.47 DFAT informed the Committee that currently nine projects are being funded by UNSCAR focused on ratification and implementation, including research and education programs.⁵⁴ The Committee asked what was being done in Australia's immediate region. DFAT advised that Australia was working with New Zealand in the Pacific region and Japan in the South-East Asian area on a number of projects:

For example, we worked together [with New Zealand] in a workshop in Fiji late last year, helping Pacific island countries understand what the implications of the treaty would be for them. New Zealanders have been developing model legislation which we have provided input to and which would be useful for those countries that have more limited capacity to develop their own legislation for use in, for example, the South Pacific, South-East Asia or elsewhere.⁵⁵

50 NIA, para 36.

51 NIA, para 37.

52 Ms Gabrielle Burrell, Assistant Secretary, Defence Export Control Office, Strategic Policy Division, Department of Defence, *Committee Hansard*, Canberra, 3 March 2014, pp. 15–16.

53 NIA, para 38.

54 Mr Robinson, DFAT, *Committee Hansard*, Canberra, 3 March 2014, p. 13.

55 Mr Robinson, DFAT, *Committee Hansard*, Canberra, 3 March 2014, p. 14.

- 3.48 Costs will likely arise from the Conference of States Parties and the Treaty's Secretariat. Article 17(3) of the Treaty provides that the Conference of States Parties will adopt financial rules for itself, the Secretariat and any subsidiary bodies established.⁵⁶
- 3.49 The Committee asked for clarification of the possible costs involved in the Conference and Secretariat. DFAT was unable to quantify the costs at this stage advising that it is hoped to agree on the financial arrangements during the first Conference.⁵⁷ However, they informed the Committee that to date three countries have offered to host the Secretariat, one country offering significant funding towards the costs.⁵⁸
- 3.50 The other costs that may be associated with the Treaty will be limited to travel by officers to the Conference of States Parties to represent Australia. The International Security Division of the Department of Foreign Affairs and Trade expects to be able to manage these costs within its divisional allocation.⁵⁹

Conclusion

- 3.51 The Committee recognises Australia's long-standing support for the Arms Trade Treaty and acknowledges the important milestone it represents. As the first international, legally binding agreement establishing common standards for the transfer of conventional arms, the Treaty provides the basis to curb the damaging illicit arms trade and address associated humanitarian issues.
- 3.52 The Committee is aware of the pragmatic nature of the agreement and that compromise had to be accommodated to ensure the Treaty came to fruition however it still holds some concerns. The lack of enforcement mechanisms is particularly worrying and, while the Committee accepts assurances that the reporting requirements will encourage compliance, it would like to see more substantial provisions made in this area in the future.
- 3.53 In regard to future adjustments, the Committee notes that the amendment provisions will also allow alterations to the initial categories of weapons if deficiencies are identified.

56 NIA, para 39.

57 Mr Robinson, DFAT, *Committee Hansard*, Canberra, 3 March 2014, p. 15.

58 Mr Robinson, DFAT, *Committee Hansard*, Canberra, 3 March 2014, p. 15.

59 NIA, para 40.

- 3.54 The Committee is also concerned that a lack of clear definitions could mean that non-monetary transfers of conventional arms may fall outside the scope of the Treaty. To remove the threat of legal challenges and prevent the creation of loopholes, definitions need to be tightened during future negotiations.
- 3.55 The Committee is keen to see this Treaty come into effect and for Australia to continue its leadership role in that process. To that end the Committee supports the Treaty and recommends that binding treaty action be taken.

Recommendation 2

The Committee supports the *Arms Trade Treaty (New York, 2 April 2013)* and recommends that binding treaty action be taken.