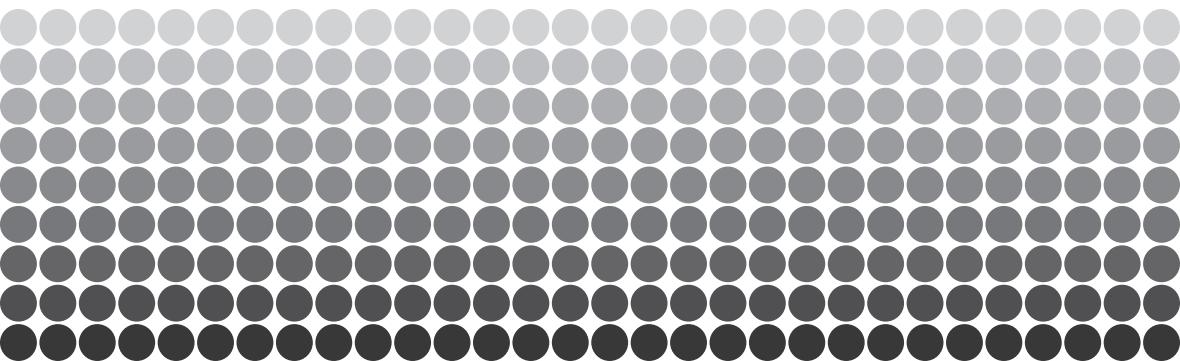


# **SIPRI YEARBOOK 2013**

## Armaments, Disarmament and International Security

### Arms trade treaty negotiations

PAUL HOLTOM AND MARK BROMLEY



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## I. Arms trade treaty negotiations

PAUL HOLTOM AND MARK BROMLEY

The United Nations process towards an arms trade treaty (ATT) brings together all UN member states in an attempt to negotiate binding international standards in the field of arms transfer controls. The UN process began in 2006 and was expected to conclude in July 2012 with the UN Conference on the ATT. However, the 2012 conference ended without agreement on a treaty text. This section provides an account of the ATT process as well as the two main issues of contention at the 2012 conference: which types of arms the treaty should cover and the types of transfer that it should seek to prevent.

### **Background to the arms trade treaty process**

The UN process towards an ATT began in 2006 when seven co-sponsors—Australia, Costa Rica, Finland, Japan, Kenya and the United Kingdom—circulated a draft resolution, entitled ‘Towards an arms trade treaty’, among the members of the UN General Assembly First Committee.<sup>1</sup> The draft resolution requested the UN Secretary-General to seek states’ views and establish a group of governmental experts (GGE) to examine the ‘feasibility, scope and draft parameters for a comprehensive, legally binding instrument establishing common international standards for the import, export and transfer of conventional arms’.<sup>2</sup> In the General Assembly, the resolution was co-sponsored by 77 states, with 153 voting in favour, 24 abstaining (including China, Russia and a large number of Arab states), and only the United States voting against.<sup>3</sup>

By the beginning of 2008, 101 states had submitted their views to the UN Secretary-General.<sup>4</sup> In August 2008 the GGE, chaired by Ambassador Roberto García Moritán of Argentina, recommended further consideration of the issue ‘on a step-by-step basis in an open and transparent manner’.<sup>5</sup> In

<sup>1</sup> ‘Towards an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms’, Draft resolution, A/C.1/61/L.55, 12 Oct. 2006. For more information on the draft resolution see Holtom, P. and Wezeman, S. T., ‘Towards an arms trade treaty?’, *SIPRI Yearbook 2007*, pp. 431–39.

<sup>2</sup> ‘Towards an arms trade treaty’ (note 1), paras 1–2.

<sup>3</sup> UN General Assembly Resolution 61/89, 18 Dec. 2006.

<sup>4</sup> United Nations, General Assembly, ‘Towards an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms’, Report of the Secretary-General, A/62/278, 17 Aug. 2007 and addenda of 24 Sep. 2007, 19 Oct. 2007, 27 Nov. 2007 and 15 Feb. 2008. See also Parker, S., *Analysis of States’ Views on an Arms Trade Treaty* (United Nations Institute for Disarmament Research: Geneva, 2007).

<sup>5</sup> United Nations, General Assembly, ‘Report of the Group of Government Experts to examine the feasibility, scope and draft parameters for a comprehensive, legally binding instrument establishing

December 2008, 133 states supported a UN General Assembly resolution asking the UN Secretary-General to establish an open-ended working group (OEWG) and set aside six one-week sessions to carry out the GGE's recommendation.<sup>6</sup> The USA was again the only state to vote against the resolution, with 19 states, including China and Russia, abstaining.

In December 2009 the UN General Assembly decided to convene a UN conference on the ATT in 2012 and tasked it with reaching consensus on a legally binding instrument to establish the 'highest possible common international standards for the transfer of conventional arms'.<sup>7</sup> The remaining four OEWG sessions became preparatory committee (PrepCom) meetings for the conference and a fifth session was added to decide 'all relevant procedural matters'.<sup>8</sup> While 151 states voted in favour of this resolution, China and Russia once again abstained along with 18 other states. Zimbabwe was the only state to vote against the resolution. The USA, having undergone a change of leadership with the election of President Barack Obama, voted in favour of the resolution. However, seeking to retain control over the final text, it made its support for the ATT process conditional on the insertion of language stating that the treaty would be negotiated on the basis of consensus.<sup>9</sup> Moritán, who had chaired the GGE and OEWG, continued in this role during the PrepCom and was named president of the 2012 conference.

### **The 2012 United Nations conference on an arms trade treaty**

When the 2012 conference commenced in New York in July it became apparent that most states could be categorized either as 'progressive' or 'sceptical' in terms of their approach to the negotiations.<sup>10</sup> Progressive states sought to promote a robust ATT that would limit the impact of the illicit arms trade, and that was compatible with the goals of humanitarian arms control treaties. These states—the most vocal being Mexico, Norway, and states from Latin America and the Caribbean—were supported by a coalition of civil society organizations. In contrast, sceptical states sought a treaty that would be limited in terms of the scope of weapons covered, and that would focus on state security concerns. The most vocal of these

common international standards for the import, export and transfer of conventional arms', A/63/334, 26 Aug. 2008, para. 27.

<sup>6</sup> UN General Assembly Resolution 63/240, 24 Dec. 2008.

<sup>7</sup> UN General Assembly Resolution 64/48, 2 Dec. 2009, paras 4, 6, 8.

<sup>8</sup> UN General Assembly (note 7).

<sup>9</sup> US Department of State, 'Secretary of State Hillary Rodham Clinton, U.S. support for the arms trade treaty', 14 Oct. 2009, <<http://www.state.gov/secretary/rm/2009a/10/130573.htm>>.

<sup>10</sup> The opening of the 2012 conference itself was delayed by a series of procedural disagreements. E.g. the Palestinian Authority, backed by Egypt, demanded full state rights. It agreed to be an observer state, but only after delaying proceedings for 2 days. 'Arms trade talks open after spat over Palestinian status', Deutsche Welle, 4 July 2012, <<http://www.dw.de/arms-trade-talks-open-after-spat-over-palestinian-status/a-16071068-1>>.

sceptical states were China, Egypt, India and Russia. A third but less significant group of states—including Cuba, Iran, the Democratic People's Republic of Korea (DPRK, North Korea), Pakistan, Syria, Venezuela and Zimbabwe—consistently opposed the ATT. These states' opposition arguably reflected concerns about the possibility of being subjected to arms embargoes, as well as their rejection of the human security agenda and its application to arms export controls.<sup>11</sup> The USA was an outlier, as it took positions that on some issues resembled those of sceptical states and on other issues supported elements proposed by progressive states. Throughout the negotiations, the USA remained the most difficult state to place on the progressive–sceptical spectrum.

As the negotiations progressed, the consensus requirement contributed to a sense that the conference would produce a 'weak' treaty, as it appeared to the progressive states that the demands of the sceptical states were being too readily accommodated.<sup>12</sup> At the end of the third week of the conference, 74 states issued a statement calling for a 'robust' treaty to promote human security.<sup>13</sup> However, on 24 July 2012 Moritán presented a draft text of the whole treaty that appeared heavily skewed towards the demands of the sceptical states.<sup>14</sup> This presentation of a 'weak' treaty is likely to have been a strategic decision by the conference president. When even the most sceptical states expressed their dissatisfaction with this version, Moritán presented a significantly revised text on 26 July that received much greater support from the progressive states (although many noted that it still needed considerable work).<sup>15</sup> Legal analysts have since highlighted a number of questions regarding terminology and inconsistencies in the draft.<sup>16</sup> While several inconsistencies were a result of the compromises that were made to try and achieve consensus, it was clear that the text produced on 26 July would still require work before it could be adopted.

Nevertheless, there were high hopes that a majority of states, including all five permanent members of the Security Council (China, France, Russia, the UK and the USA), would support a modified version of the 26 July

<sup>11</sup> Bromley, M., Cooper, N. and Holtom, P., 'The UN Arms Trade Treaty: arms export controls, the human security agenda and the lessons of history', *International Affairs*, vol. 88, no. 5 (Sep. 2012), pp. 1040–44.

<sup>12</sup> 'Germany backs global arms trade treaty, China and Russia abstain', Deutsche Welle, 31 Oct. 2009, <[http://www.dw-world.de/dw/article/0,,4842120,00.html?maca=en-en\\_nr-1893-xml-atom](http://www.dw-world.de/dw/article/0,,4842120,00.html?maca=en-en_nr-1893-xml-atom)>.

<sup>13</sup> For the full list of states see '74 states stand up for a strong #armstreaty', Control Arms blog, 20 July 2012, <<http://controlarmsblog.posterous.com/60-states-stand-up-for-a-strong-armstreaty>>.

<sup>14</sup> Moritán had also presented a discussion paper at the start of the conference but the rest of the conference was spent dealing only with discrete sections of the text.

<sup>15</sup> United Nations, General Assembly, 'The draft of the arms trade treaty', A/CONF.217/CRP.1, 26 July 2012.

<sup>16</sup> Casey-Maslen, S. and Parker, S., 'The draft arms trade treaty', Geneva Academy of International Humanitarian Law and Human Rights Briefing no. 2, Oct. 2012, <<http://www.geneva-academy.ch/academy-publications/academy-briefings>>.

text.<sup>17</sup> However, on 27 July—the final day of the conference—the US delegation stated that it needed more time to work on the text and proposed convening another conference to conclude negotiations.<sup>18</sup> Cuba, North Korea, Russia and Venezuela echoed this call.<sup>19</sup>

### **Barriers to consensus in the negotiations**

Although the draft ATT of 26 July was flawed and could have benefited from being circulated to UN member states earlier, the US delegation's call for more negotiations probably owed more to political considerations than the actual content of the draft. Support for an ATT could have been used by the Republican Party to misrepresent the potential impact of an ATT on the USA, and portray President Obama as an opponent of the rights of US citizens to keep and bear arms.<sup>20</sup>

The 2012 conference demonstrated the persistence of crucial dividing lines between states on the main objectives of an ATT, in particular on the issue of weighing state security interests against human security concerns. This division lay at the heart of discussions on defining prohibited transfers, mitigating the risks associated with particular transfers, and deciding when to authorize or deny arms exports. Another issue that consumed considerable time during the PrepCom meetings and the 2012 conference was the scope of the items to be covered by the ATT, particularly whether small arms and light weapons (SALW) and ammunition should be included. Other issues that remained unresolved at the close of negotiations included (a) whether gifts should be excluded from the scope of the treaty; (b) whether regional integration organizations—such as the European Union (EU)—should be allowed to sign and ratify the treaty; (c) the number of state signatories needed before entry into force; and (d) the types of transparency mechanism that should be included in the treaty.<sup>21</sup>

Immediately after the 2012 conference, a number of states and non-governmental organizations (NGOs) identified the USA as the main cause of the failure to conclude an ATT.<sup>22</sup> While it is questionable whether the USA was exclusively to blame for the failure of the 2012 conference, the

<sup>17</sup> 'U.N. states fail to reach global arms trade treaty', Associated Press, 28 July 2012.

<sup>18</sup> US Department of State, 'Arms trade treaty conference', Press release, 27 July 2012, <<http://www.state.gov/r/pa/prs/ps/2012/07/195622.htm>>.

<sup>19</sup> Acheson, R., 'Editorial: A pause for reflection', *Arms Trade Treaty Monitor*, vol. 5, no. 16 (July 2012), pp. 1–2.

<sup>20</sup> Holtom, P., 'The UN conference on an arms trade treaty: no treaty ... yet?', IPI Global Observatory, 16 Aug. 2012, <<http://theglobalobservatory.org/analysis/339-the-un-conference-o>>.

<sup>21</sup> Article 16 of the draft treaty stipulated the entry into force of the ATT '90 days after the deposit of the 65th instrument of ratification, acceptance, approval or accession with the depositary'. United Nations, A/CONF.217/CRP.1 (note 15), Article 16. The 1993 Chemical Weapons Convention also required ratification by 65 states before it entered into force.

<sup>22</sup> 'U.N. states fail to reach global arms trade treaty' (note 17).

process nonetheless served to demonstrate that the USA remains the predominant force in discussions on multilateral arms transfer controls. The fact that long-term advocates of an ATT were willing to make concessions and compromises in order to accommodate US concerns further illustrates this reality. Importantly, US concerns and views were at the centre of discussions on the two most contentious issues: (a) prohibited transfers and arms export risk assessments, and (b) the definition of the scope of an ATT.

#### *Prohibited transfers and arms export risk assessments*

Long-standing proponents of an ATT have emphasized that it should have a positive impact on human security, and that it should oblige states to consider international human rights and humanitarian law as well as other human security impacts before authorizing arms exports.<sup>23</sup> However, the sceptical states questioned the proposition that human security considerations have a place in arms export decision making.<sup>24</sup> Therefore, the inclusion of human security considerations in the 26 July text was particularly significant.

To a certain extent the 26 July text's three categories of prohibited transfers merely re-codified existing obligations in international law: (a) Chapter VII of the UN Charter (particularly the provisions relating to arms embargoes); (b) relevant obligations relating to arms transfers and trafficking; and (c) international law relating to genocide, crimes against humanity and war crimes as defined in Common Article 3 of the Geneva Conventions of 1949. It has been argued that the text's formulations regarding this third category of international obligations provide a narrow definition of war crimes and include a very high threshold for denials and should therefore be replaced by a knowledge-based approach.<sup>25</sup>

The idea of including a prohibition on transfers to non-state actors that had not been authorized to receive arms by the state in which they were located had a broad group of supporters among both progressive and sceptical states.<sup>26</sup> Such language has been strongly opposed by the USA in other settings, in particular in discussions relating to the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (POA).<sup>27</sup> While the USA never men-

<sup>23</sup> For a discussion of this issue see Bromley et al. (note 11), pp. 1034–43.

<sup>24</sup> Bromley et al. (note 11), pp. 1040–41. For brief descriptions and lists of members of ASEAN, the CSTO and the Arab League see annex B in this volume.

<sup>25</sup> United Nations, A/CONF.217/CRP.1 (note 15), Article 3; and Casey-Maslen and Parker (note 16), p. 23.

<sup>26</sup> This group included the African Group of UN member states; Brazil, Russia, India and China (the BRIC states); the Caribbean Community (CARICOM); the Economic Community of West African States (ECOWAS); and Turkey.

<sup>27</sup> Holtom, P., *Prohibiting Arms Transfers to Non-state Actors and the Arms Trade Treaty* (United Nations Institute for Disarmament Research: Geneva, 2012).

tioned the issue explicitly during public negotiations, its central concern was its desire to retain the ability to supply arms to non-state actors to allow them to defend themselves against armed violence committed by repressive state forces, or where the USA's own security concerns were seen to be at stake.<sup>28</sup> The 26 July text made no explicit reference to a ban on arms transfers to unauthorized non-state actors.

The 26 July text would also oblige states to carry out a risk assessment before authorizing an export. The assessment would focus on the risk that the proposed export could be used to commit or facilitate a serious violation of international humanitarian law or human rights law or an offence under international conventions and protocols relating to terrorism, but would also include a general assessment of 'whether the proposed export would contribute to or undermine peace and security'. Measures undertaken by the supplier and recipient states to mitigate these risks would be considered in the assessment, but if the exporting state finds an 'overriding risk', then it should not authorize the export.<sup>29</sup> In addition to the risk assessment, each state party would be required to

consider taking feasible measures, including joint actions with other States involved in the transfer, to avoid the arms:

- a. being diverted to the illicit market or for unauthorized end use;
- b. being used to commit or facilitate gender-based violence or violence against children;
- c. being used for transnational organized crime;
- d. becoming subject to corrupt practices; or
- e. adversely impacting the development of the importing State.<sup>30</sup>

In order to help ensure the primacy of state security, the USA supported the inclusion of language that would require exporting states to consider the potential effect of an arms export on peace and security. However, the clearest example of the way in which the 26 July text privileges state security interests is contained in Article 5(2), which states that 'This Treaty shall not be cited as grounds for voiding contractual obligations under defence cooperation agreements concluded by States Parties to this Treaty'.<sup>31</sup> India insisted on including this clause in the treaty, presumably as a means of ensuring 'security of supply' for itself and other recipients.<sup>32</sup>

#### *Defining the scope of the arms trade treaty*

A considerable amount of time during the ATT process has been spent discussing the categories of items to be covered by the treaty. Some states

<sup>28</sup> Greene, O., Kirkham, E. and Watson, C., *Developing International Norms to Restrict SALW Transfers to Non-state Actors* (Biting the Bullet Project: London, Jan. 2006), p. 2.

<sup>29</sup> United Nations, A/CONF.217/CRP.1 (note 15), articles 4 and 6.

<sup>30</sup> United Nations, A/CONF.217/CRP.1 (note 15), Article 4.

<sup>31</sup> United Nations, A/CONF.217/CRP.1 (note 15), Article 5(2).

<sup>32</sup> Casey-Maslen and Parker (note 16), p. 27.

have called for the scope of the ATT to be limited to the seven categories of the UN Register of Conventional Arms (UNROCA).<sup>33</sup> Others have called for the scope to match that of the Wassenaar Arrangement Munitions List and encompass all military equipment as well as associated parts and technologies.<sup>34</sup> The 26 July draft treaty text used the narrow ‘7 + 1 formula’—that is, its scope was limited to the seven categories of the UNROCA and an additional category for SALW. Notably, according to an unpublished document presented at the conference, several sceptical states accepted the inclusion of SALW in the scope of an ATT after previously opposing it.

Several states pushed for the inclusion of a prohibition on circumventing the treaty via licensed production arrangements and technology transfers in order to expand the range of items that would be covered by the treaty’s provisions. Such language was not included in the 26 July draft. However, the draft required states to establish national export control lists and to exchange these lists with other states parties to the ATT. The sharing of these lists could support the practice of controlling a far broader range of items than is covered by the ‘7 + 1 formula’, since this is a common practice among states that have transfer control systems in place.<sup>35</sup>

The most contested issue relating to scope was the way in which the 26 July draft addressed ammunition. While the USA was not alone in opposing the inclusion of ammunition in the ATT, most attention on this issue focused on the US position. Before the 2012 conference, the USA had identified reporting or marking ammunition as a symbolic line that it would not cross.<sup>36</sup> During the conference, US negotiators stated that ‘ammunition is a fundamentally different commodity than everything else we have discussed including within the scope of an ATT’ and strongly objected to its inclusion within the scope of the treaty.<sup>37</sup> While technical concerns relating to the monitoring of the large volume of ammunition transfers could help to explain this position, so too could political concerns about the US National Rifle Association’s ability to misrepresent to the US electorate a treaty that explicitly mentioned controls on ammunition transfers.<sup>38</sup>

Many states from the Caribbean, Central and Western Europe, Latin America and sub-Saharan Africa regard ammunition as an important element for the scope of the ATT and pushed hard for the USA to shift its

<sup>33</sup> On UNROCA see chapter 5, section IV, in this volume.

<sup>34</sup> On the Wassenaar Arrangement see section IV below; and annex B, section III, in this volume.

<sup>35</sup> United Nations, A/CONF.217/CRP.1 (note 15), Article 2.

<sup>36</sup> US Department of State, Bureau of International Security and Nonproliferation, ‘Elements of an arms trade treaty’, 4 June 2010, <<http://www.state.gov/t/isn/rls/fs/148314.htm>>.

<sup>37</sup> Pecquet, J., ‘Obama administration: UN arms trade treaty shouldn’t regulate ammunition’, The Hill, 10 July 2012, <<http://thehill.com/blogs/global-affairs/un-treaties/236969-us-says-un-arms-trade-treaty-shouldnt-cover-ammunition>>.

<sup>38</sup> Goodman, C., ‘Why is the United States opposing small arms ammunition in an ATT?’, Arms Trade Insider, 1 Mar. 2011, <<http://armstradeinsider.com/2011/03/01/why-the-united-states-is-obstinate-on-small-arms-ammunition-in-an-att>>.

position. The 26 July text offered an alternative solution that was widely regarded as unacceptable by the progressive states. It proposed that 'Each State Party shall establish and maintain a national control system to regulate the export of ammunition for conventional arms under the scope of this Treaty'. It would also require that exports of ammunition not be authorized if they would be classed as 'prohibited transfers' or if there were a risk that they would be used to commit or facilitate a serious violation of international humanitarian law, human rights law or an offence under international conventions and protocols relating to terrorism.<sup>39</sup> However, states parties to the ATT would not be required to consider taking feasible measures to prevent risks relating to (a) diversion; (b) use in gender-based violence or violence against children; (c) transnational organized crime; (d) corruption in the deal; or (e) a negative impact on the development of the importing state. In addition, they would not be required to keep records or submit reports on their respective transfers.

### **The 2013 United Nations conference on an arms trade treaty**

Following the 2012 conference, negotiators faced three broad options for further action: (a) make minor amendments to the 26 July draft ATT and table it for a vote in the UN General Assembly in late 2012; (b) convene another UN negotiating conference to further consider the draft ATT; or (c) take the process outside the UN framework, strengthen the human security references in the draft ATT and include ammunition in its scope.<sup>40</sup>

During the General Assembly First Committee meetings in the autumn of 2012, the seven original co-sponsors of the General Assembly resolutions for the ATT tabled a resolution to hold a final conference in early 2013, in line with the requests of Russia and the USA.<sup>41</sup> As a whole, the resolution was adopted by a vote of 157 to none, with 18 abstentions (including Russia). Separate votes approved the use of the same rules of procedure for the 'final conference', and the use of the 26 July text as the basis for future work. Only Iran voted against these proposals, although Russia abstained. The draft resolution called for a report on the final outcome to be presented 'as soon as possible after 28 March 2013'.<sup>42</sup>

The vote on the resolution in the UN General Assembly on 24 December 2012 was adopted by 133 votes to none, with 17 abstentions.<sup>43</sup> The 2013

<sup>39</sup> Parts and components were also dealt with in the same manner. United Nations, A/CONF.217/CRP.1 (note 15), Article 6.

<sup>40</sup> Bromley et al. (note 11), pp. 1029–48.

<sup>41</sup> United Nations, General Assembly, First Committee, 'The arms trade treaty', A/C.1/67/L.11, 18 Oct. 2012.

<sup>42</sup> United Nations, A/C.1/67/L.11 (note 41), para. 7.

<sup>43</sup> UN General Assembly Resolution 67/234, 24 Dec. 2012.

conference, which was due to commence on 18 March, was therefore considered an extension of 2012 conference. One of the key changes would be that Moritán would not be the president of the 2013 conference. Despite widespread support from the international community to continue in this role, he did not have the support of the Argentinian Government. In December 2012 Ambassador Peter Woolcott of Australia was confirmed as president-designate of the conference.<sup>44</sup>

<sup>44</sup> ‘Australian Department of Foreign Affairs and Trade, Ministers welcome the adoption of the UN Resolution on the Final Conference on the Arms Trade Treaty’, Press release, 24 Dec. 2012, <<http://www.dfat.gov.au/media/releases/department/2012/dfat-release-20121224.html>>.