

Dear all,

On 01 March 2021, States Parties welcomed the multi-year workplans for the Sub-working Groups of the Working Group on Effective Treaty Implementation (hereinafter WGETI), which identified the priority topics and issues to be covered by each Sub-working Group. On the basis of their respective workplans, the Sub-working Group on Articles 6 & 7 (Prohibitions & Export and Export Assessment), the Sub-working Group on Article 9 (Transit or trans-shipment), and the Sub-working Group on Article 11 (Diversion) conducted their work throughout the CSP7 and CSP8 cycles.

The Sub-working Group on Articles 6 & 7 (Prohibitions & Export and Export Assessment) and the Sub-working Group on Article 9 (Transit or trans-shipment) will continue with their work with a view of achieving outcomes that will assist states in the practical implementation of the Treaty at a national level.

The Sub-working Group on Article 11 (Diversion) reached the end of its multi-year workplan during the CSP8 cycle, but in accordance with the decision at CSP8, the Group will continue its work for one additional year to focus on the topic of post-delivery cooperation.

Facilitators of the Sub-working Groups

The discussions in the Sub-working Groups will be facilitated as follows:

1. Articles 6 & 7 (Prohibitions & Export and Export Assessment) will be facilitated by myself, **Ambassador Ignacio SÁNCHEZ DE LERÍN** of Spain;
2. Article 9 (Transit or trans-shipment) will be facilitated by **Mr. Rob WENSLEY** of South Africa; and
3. Facilitation of Article 11 (Diversion) is under consideration.

I would like to express my heartfelt appreciation to Mr. WENSLEY for his willingness to continue in his role that he already held throughout the CSP6 to CSP8 cycles.

Objectives and preparation for the WGETI meeting in February

In preparation for the WGETI meeting in February, facilitators of each Sub-working Group have prepared work plans and background papers that you will find herewith as Annexes A and B. These work plans cover both organizational and substantive elements of the work ahead. They include a summary of progress made so far in each Sub-working Group and a description of the key issues that each Sub-working Group will address. The Sub-working Groups on Articles 6 & 7) and Article 9 will have a joint meeting this time because of coinciding topics in their multi-year workplans.

Participants in the WGETI are invited to rely on these documents in preparing for the WGETI meeting and are strongly encouraged to participate actively in the respective sessions. Exchanging information on national approaches to Treaty implementation will be key for the WGETI to be able to fulfil its mandate and deliver concrete outcomes.

Programme of Work for the WGETI Sub-working Groups

The meeting of the WGETI will take place on 14 – 15 February 2023. The WGETI has been given three three-hour sessions (nine hours) to conduct its meetings, which will be allocated as follows:

Table 1. Schedule of WGETI Sub-working Group Meetings (February 2023)

	Tuesday	Wednesday
10:00 – 13:00	WGETI Sub-working Groups on Articles 6&7 and Article 9	WGETI Sub-working Group on Article 11
15:00 – 18:00	WGETI Sub-working Groups on Articles 6&7 and Article 9	WGTU

I look forward to working closely with all of you in steering our work towards a successful CSP9.

Yours sincerely,

Ambassador Ignacio SÁNCHEZ DE LERÍN
Permanent Representative of Spain to the Conference on Disarmament
Chair of the ATT Working Group on Effective Treaty Implementation

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ANNEX A, PART I

WORK PLAN SUB-WORKING GROUP ON ARTICLES 6 & 7

Tuesday, 14 February 2023, 10:00-18:00

Introduction

1. The first Chair of the Working Group on Effective Treaty Implementation (WGETI), Ambassador Sabrina DALLAFIOR of Switzerland, established the Sub-Working Group on Articles 6&7 (Prohibitions & Export and Export Assessment) at the commencement of the preparatory process for the Fourth Conference of States Parties (CSP4) to the Arms Trade Treaty (ATT) in January 2018, and appointed Sweden to facilitate the work of the Sub-working Group in the lead up to CSP4 and CSP5. The Sub-working Group made significant progress during its first two years of work, and identified many areas to take forward (see paragraph 22(c) of the Report to the Fifth Conference of States Parties (CSP5) ([ATT/CSP5/2019/SEC/536/Conf.FinRep.Rev1](#)) presented by the Chair of the WGETI to CSP5).
2. The next Chair of the WGETI, Ambassador Jang-keun LEE of the Republic of Korea, appointed Spain, who nominated Ambassador Ignacio SÁNCHEZ DE LERÍN, to facilitate the work of the Sub-working Group on Articles 6&7 at the commencement of the preparatory process for CSP6. His successor, Ambassador Sang-beom LIM, re-appointed Ambassador Ignacio SÁNCHEZ DE LERÍN for the CSP7 and CSP8 cycles.
3. As the new Chair of the WGETI, Ambassador Ignacio SÁNCHEZ DE LERÍN has, after consultation with the CSP9 President, decided to continue facilitating the discussions in the Sub-working Group during the CSP9 cycle.
4. The work of the Sub-working Group will build on the work undertaken and progress made during the previous cycles.

Summary of progress so far

5. During its work so far, the Sub-working Group on Articles 6 and 7 has heard several case studies of national practice in this area and has developed a *List of Possible Reference Documents to Be Used by States Parties in Conducting Risk Assessments* under Article 7 that includes existing guidance documents relating to the implementation of Article 7.4 on gender-based violence. The List was welcomed by CSP5 as living document to be reviewed and updated regularly.
6. On the strength of discussions during the CSP5 cycle meetings and progress made between CSP3 and CSP4, the first WGETI Chair concluded that the development of a multi-year workplan pertaining to the work of the Sub-working Group on Articles 6 and 7 seems warranted, which could notably provide for the further unpacking of the following aspects of Articles 6 and 7: the interpretation States Parties give to key concepts in Article 7 such as 'facilitate', 'serious' and 'overriding risk' and the measures undertaken by States Parties to mitigate risks identified. She also noted that consideration may also be given to the elaboration of elements of a voluntary training guide on gender-based violence (see paragraph 31 of the [Chair's Report](#)).
7. In addition, in the context of the thematic discussion on Gender and Gender Based Violence and the draft decision contained in document ATT/CSP5/2019/PRES/528/Conf.Gender GBV submitted by the

CSP5 President, CSP5 decided that the WGETI should consider the following issues in conjunction with other relevant elements to enhance States Parties' ability to implement Articles 6 and 7:

- i. Encourage discussion on States' practice in interpreting the language and standards entailed in Article 7(4), including "serious", "facilitate" and "overriding" risk, in order to assist States Parties in considering GBV issues in implementing the Treaty.
- ii. Encourage States Parties to provide information on their national practices relating to "mitigating measures" in the context of Article 7(4): what these can be and how they are implemented.
- iii. Encourage States Parties to provide information on their national practices in GBV risk assessment in order to facilitate learning between States Parties.
- iv. Elements for a voluntary training guide to assist States Parties on the issues of GBV, including best practices for risk assessment, should be developed with voluntary funding, and with the participation of all stakeholders.

8. Following his appointment to facilitate the work of the Sub-working Group on Articles 6 and 7 at the commencement of the preparatory process for CSP6, Ambassador Ignacio SÁNCHEZ DE LERÍN further developed the multi-year workplan for the Sub-working Group, prepared a draft outline of a potential voluntary guide to implementing Articles 6&7, and prepared a draft methodology template designed to capture information and input from States Parties on their national practices and approaches to interpreting key concepts. The documents prepared by the Facilitator were considered and discussed during the meeting of the Sub-working Group on Articles 6 and 7 on 04 February 2020, and participants were invited to complete the template and submit their inputs regarding national practice to the Facilitator, via the ATT Secretariat.

9. The Facilitator collated and reviewed all inputs to the methodology template that were received and prepared a summary report of the responses to the methodology template for unpacking key concepts, which he presented during the CSP7 preparatory meeting of the Sub-working Group on Articles 6 and 7 on 26 April 2021.

10. In addition, the multi-year workplan was further refined and was ultimately agreed by States Parties via silence procedure on 01 March 2021 (an extract pertaining to the agenda for the meeting of the Sub-working Group on 14 February 2023 is included as Attachment 1 to this Annex).

11. During the CSP8 preparatory meetings, the Sub-working Group continued its work on the list of possible draft elements for Chapter 1 (Key concepts) of the proposed Voluntary Guide. During the last CSP8 preparatory meeting, the Group also continued its discussions on the next topic in the multi-year workplan, the scope of Article 6 obligations.

12. At CSP8, the Conference noted the completion of the draft Chapter 1 of the proposed Voluntary Guide as a living document of a voluntary nature to be reviewed and updated regularly, and reiterated that when the elaboration of the foreseen draft chapters of the proposed Voluntary Guide to assist States Parties in implementing Articles 6 and 7 is concluded, the proposed Voluntary Guide should be submitted to Conference for endorsement.

The work ahead

13. In accordance with the multi-year workplan, the Facilitator has prepared a list of possible draft elements for Chapter 2 (Article 6 – Prohibitions) of the proposed Voluntary Guide to assist States Parties in implementing Articles 6 and 7, deriving from views exchanged during discussions held in the CSP8 cycle

(included as Attachment 2 to this Annex). He will present these draft elements during the meeting on 14 February.

14. Following this presentation, the Facilitator will commence focused discussions on the relationship between Article 6 and other Articles. Because the relationship between Article 6 and Article 9 is also a topic in the multi-year workplan of the Sub-Working Group on Article 9 (Transit or trans-shipment), he will be joined by the Facilitator of the Sub-Working Group on Article 9, Mr. Rob Wensley for this discussion. To facilitate the discussion, the Facilitators have prepared a joint background paper on the relationship between the articles mentioned in the respective multi-year workplans (included as Attachment 4 to this Annex).

ANNEX A, PART II

WORK PLAN SUB-WORKING GROUP ON ARTICLE 9

Tuesday, 14 February 2022, 10:00-18:00

Background

1. The then Chair of the WGETI, Ambassador Jang-keun LEE of the Republic of Korea, established the Sub-Working Group on Article 9 (Transit and trans-shipment) at the commencement of the preparatory process for CSP6 in December 2019, and appointed South Africa, who nominated Mr. Rob WENSLEY to facilitate the work of the Sub-working Group in the lead up to CSP6. His successor, Ambassador Sang-beom LIM, re-appointed Mr. Rob WENSLEY to facilitate the work of the Sub-working Group in the lead up to CSP7 and CSP8. The current Chair of the WGETI, Ambassador Ignacio SÁNCHEZ DE LERÍN of Spain, subsequently re-appointed Mr. WENSLEY for the CSP9 cycle.

2. To start the work of the Sub-working Group, the Facilitator prepared a background paper, which was derived from the list of topics and elements for consideration that was compiled by the WGETI to guide the work of a Sub-working Group and was included as Annex E to the WGETI Chair's Draft Report to CSP5 (contained in document ATT/CSP5.WGETI/2019/CHAIR/529/Conf.Rep). The background paper was considered and discussed during the first meeting of the sub-working on Article 9 on 05 February 2020.

3. Following the first meeting of the Sub-working Group, the Facilitator developed a programme of work and multi-year workplan for the Sub-working Group, which was agreed by States Parties via silence procedure on 01 March 2021 (an extract pertaining to the agenda for the meeting of the Sub-working Group on 14 February 2023 is included as Attachment 1 to this Annex).

4. During its CSP7 and CSP8 meetings, the Sub-working Group held discussions dedicated to the various topics in the multi-year workplan, which focused on the exchange of national approaches and the exploration of common practices with a view to the possible development of a compendium of national practice and/or voluntary guide. These discussions were systematically held on the basis of guiding questions and relevant input in background papers prepared by the Facilitator, and kicked off by one or more expert presentations on the topic at hand.

5. Following the sessions of the Sub-working Group during the CSP8 cycle, the Conference noted at CSP8 that the Facilitator would begin his work on draft elements for a possible voluntary guide on the implementation of Article 9, deriving from the views exchanged during discussions thus far.

The work ahead

6. In line with the announcement in the WGETI Chair's Report to CSP8, the Facilitator has prepared draft elements for a possible voluntary guide on the implementation of Article 9, deriving from the views exchanged during discussions thus far (included as Attachment 3 to this Annex). He will present these draft elements during the meeting on 14 February.

7. Following this presentation, the Facilitator will commence focused discussions on the relationship between Article 9 and other Articles. Because the relationship between Article 9 and Article 6 is also a topic in the multi-year workplan of the Sub-Working Group on Articles 6 & 7, both Sub-Working Groups will hold joint discussions, led by both Facilitators. To facilitate the discussion, the Facilitators have also prepared a joint background paper on the relationship between the articles mentioned in the respective multi-year workplans (included as Attachment 4 to this Annex). Concerning the relationship between Article 9 and Article 11, the Facilitator also refers to last year's

discussions on this topic in the Sub-Working Group on Article 11 (Diversion) and the background paper on the role of transit and trans-shipment states in preventing diversion which informed those discussions. The Facilitator of that Sub-Working Group will also join in leading the discussions on the relationship between Article 9 and Article 11, as was also suggested during the discussions on the background paper.

8. With the latter topic, the Sub-working Group on Article 9 has reached the end of its multi-year workplan that was agreed by States Parties. The workplan does provide that based on the previous discussions, further discussions can be held on themes addressed in previous sessions that require more time, or new themes or elements of Article 9 that have arisen during previous sessions, but have not yet been addressed. The Facilitator intends to use part of the time allocated to his Sub-Working Group during the WGETI meeting in May to finalize the draft elements that are currently under consideration, but he invites all participants to suggest any topics that they still want to see addressed in the Sub-Working Group.

ATTACHMENT 1
DRAFT AGENDA FOR THE MEETING OF
THE SUB-WORKING GROUP ON ARTICLES 6&7
AND THE SUB-WORKING GROUP ON ARTICLE 9
(EXTRACT OF MULTI-YEAR WORKPLANS)

Tuesday, 14 February 2022, 10:00-18:00

1. Voluntary Guide to assist States Parties in implementing Articles 6 and 7 – Draft Elements of Chapter 2 (Article 6 (Prohibitions))

Introduction by Facilitator

Open discussion

The Facilitator will present a list of possible draft elements for Chapter 2 (Article 6 (Prohibitions)) of the proposed Voluntary Guide to assist States Parties in implementing Articles 6 and 7, derived from the views exchanged during the discussions held so far during the meetings of the WGETI Sub-working Group on Articles 6 and 7. Participants will have the opportunity to review and comment on the draft elements.

2. Elements of a voluntary guide to implementing article 9 of the arms trade treaty

Introduction by Facilitator

Open discussion

The Facilitator will present draft elements for a possible voluntary guide on the implementation of Article 9, deriving from the views exchanged during discussions thus far. Participants will have the opportunity to review and comment on the draft elements.

3. Relationship between Treaty Articles

a) Article 6 in relation to Articles 7, 8, 9 and 10

This discussion will explore the question: What are the implications of the phrase ‘shall not authorize any transfer’ in Article 6? Participants will be invited to discuss the relationship between Article 6 and other Articles in the Treaty, and share views on the following issues:

- What is the relationship between Article 6 and Article 7 (Export and Export Assessment), since the term ‘transfer’ includes ‘export’ under Article 2(2)?

- What is the relationship between Article 6 and Article 8 (Import), since the term ‘transfer’ includes ‘import’ under Article 2(2)?

- *What is the relationship between Article 6 and Article 9 (Transit and Trans-shipment), since the term 'transfer' includes 'transit' and 'trans-shipment' under Article 2(2)?*
- *What is the relationship between Article 6 and Article 10 (Brokering), since the term 'transfer' includes 'brokering' under Article 2(2)*

b) Article 9 in relation to Articles 6, 7 (6), 11 and 12 (2)

This discussion will explore other areas of the Treaty where transit and trans-shipment States may have obligations or responsibilities, including:

- *What is the relationship between Article 6 (Prohibitions) and Article 9 (Transit and Trans-shipment), since the term 'transfer' includes 'transit' and 'trans-shipment' under Article 2(2)?*
- *What is the relationship between Article 7(6) (Export and Export Assessment) and Article 9, since Article 7(6) contemplates that transit or trans-shipment States Parties may request information pertaining to export authorizations?*
- *What is the relationship between Article 11(1) (Diversion) and Article 9, since Article 11(1) obliges each State Party 'involved in the transfer' of conventional arms to take measures to prevent their diversion and 'transfer' is described or defined under Article 2(2) to include transit and trans-shipment?*
- *What is the relationship between Article 11(3) (Diversion) and Article 9, since Article 11(3) obliges transit and trans-shipment States Parties to cooperate and exchange information, pursuant to their national laws, to mitigate the risk of diversion?*
- *What is the relationship between Article 12(2) (Record keeping) and Article 9, since Article 12(2) encourages States Parties to maintain records of conventional arms that are authorized to transit or trans-ship territory under its jurisdiction?*

The topic(s) for discussion is to be determined according to previous discussions and may include continuation of themes addressed in previous sessions that require more time, or new themes or elements of Article 9 that have arisen during previous sessions, but have not yet been addressed.

ATTACHMENT 2

**ELEMENTS OF A VOLUNTARY GUIDE TO IMPLEMENTING ARTICLES 6 & 7
OF THE ARMS TRADE TREATY**

Draft Chapter 2 – Prohibitions

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Background

1. On 15 February 2022 and 26 April 2022, the ATT Working Group on Effective Treaty Implementation (WGETI) Sub-working Group on Articles 6&7, facilitated by Ambassador Ignacio SÁNCHEZ DE LERÍN of Spain, discussed the obligations in Article 6 of the Treaty, as contemplated in the [multi-year workplan](#) for the Group. This discussion followed the earlier discussions in the Sub-working Group in the context of the “methodology exercise” for unpacking key concepts in Articles 6 and 7 of the Treaty, which formed the basis for [draft Chapter 1 \(Key concepts\) of the proposed Voluntary Guide to assist States Parties in implementing Articles 6 and 7](#). In line with the multi-year workplan, it was noted at CSP8 that the views exchanged during the discussions on the Article 6 obligations would form the basis for a list of possible draft elements for Chapter 2 (Article 6 – Prohibitions) of the proposed Voluntary Guide.

2. In line with the overall goal of the Voluntary Guide, the aim of the discussions and the list of possible draft elements on the Article 6 obligations was to provide a picture of how States Parties approach the implementation of these obligations. In that regard, this chapter builds on draft chapter 1, which provided an overview of national practices with respect to the interpretation of key concepts in Articles 6&7, including the jurisprudence and ongoing legal discussions which surround some of these key concepts. The chapter also attempts to operationalize the obligations in Article 6 to support the practice of arms transfer decision-making. Just like draft chapter 1, this chapter does not intend to prescribe, create new norms and standards or establish an agreement on a single interpretation of the Article 6 obligations, nor to reinterpret established definitions. Where legally binding definitions apply this is explicitly mentioned as such.

3. The discussions were held on the basis of guiding questions provided by the Facilitator, which also provide the structure of the draft elements below. These draft elements were drafted to reflect and build on the interventions of participants during the relevant discussions of the Sub-working Group and the expert presentation provided by the International Committee of the Red Cross (ICRC) on the concept of “knowledge” and other terms in Article 6 (3) of the Treaty, taking into account the elements included in draft chapter 1 and previous work of the WGETI. In that respect, it is noted that throughout the discussions on the guiding questions, interventions were made by States and Non-Governmental Organisations, as well as the ICRC.

Treaty text

4. The text of Article 6 is recited below to help readers/users situate the specific elements of the Article 6 obligations that were discussed in the WGETI. These elements are highlighted in the text.

ARTICLE 6 – PROHIBITIONS

1. A State Party **shall not authorize any transfer** of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, if the transfer would violate **its obligations under measures adopted by the United Nations Security Council** acting under Chapter VII of the Charter of the United Nations, in particular arms embargoes.
2. A State Party shall not authorize any transfer of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, if the transfer would violate its relevant **international obligations under international agreements** to which it is a Party, in particular those relating to the transfer of, or illicit trafficking in, conventional arms.
3. A State Party shall not authorize any transfer of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, if it has **knowledge at the time of authorization**

*that the arms or items would be used in the commission of **genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party.***

What does ‘shall not authorize any transfer’ entail in the context of Article 6?

5. The phrase ‘shall not authorize any transfer’ is not defined in the Treaty. In their interventions during the discussions on this topic, States Parties focused on the aspect that the obligations in Article 6 extend to all the types of transfer covered under Article 2 (1), namely export, import, transit, trans-shipment and brokering. States Parties also indicated that in their national control system, an export involves the transfer of title to and control over the arms in addition to the physical movement of the arms.

6. Factoring in their general obligation in Article 5 (2) to establish and maintain a national control system in order to implement the provisions of the Treaty, and Articles 2, 3 and 4, it entails that as part of their national control system, States Parties cannot allow any export, import, transit, trans-shipment and brokering shipment under its jurisdiction of conventional arms covered under Article 2 (1) of the Treaty and of items covered under Article 3 or Article 4 that is prohibited in paragraphs 1 to 3 of Article 6.

What ‘obligations under measures adopted by the United Nations Security Council’ are covered under Article 6(1)?

7. This question was partially addressed within the ATT process as part of the discussions in the WGETI during the CSP4 cycle on [possible voluntary guiding and supporting elements in implementing obligations under article 6 \(1\)](#). The document with these elements was welcomed by States Parties at CSP4 as a living document of a voluntary nature and is available in the *Tools and Guidelines* section of the ATT website at <https://www.thearmstradetreaty.org/tools-and-guidelines.html>.

8. The use of the phrase “*in particular arms embargoes*” indicates that the obligation in Article 6 (1) applies to arms embargoes as well as all other binding measures adopted by the United Nations Security Council acting under Chapter VII of the Charter of the United Nations. It therefore applies to all binding economic sanctions regarding the relevant State and designated individuals and entities, which concern the export, import, transit, trans-shipment and brokering of the conventional arms covered under Article 2 (1) of the Treaty and/or of items covered under Article 3 or Article 4. In that respect, it is not necessary that the measures in question are explicitly designated as an “arms embargo”, which is not defined in the Treaty or the UN Charter, neither in international law in general.

9. The abovementioned document also includes instructions on how to apply the obligation in Article 6 (1) in practice and where to find the relevant measures.

What ‘international obligations under international agreements’ are ‘relevant’ under Article 6(2)?

10. This question was already addressed within the ATT process as part of the discussions in the Working Group on Transparency and Reporting (WGTR) during the CSP6 and CSP7 cycles on the review

of the ATT Initial Reporting Template. In the relevant section about the implementation of Article 6 (Prohibitions), the amended Initial Reporting Template that was endorsed and recommended for use at CSP7 contains a reference to a non-exhaustive list of examples of the international agreements which States Parties have reported 'are relevant' to Article 6(2) in their Initial Reports. The list is maintained by the ATT Secretariat, and will be updated every time a new State Party includes one or more agreements in its Initial Report which were not yet mentioned. The list is available in the *Tools and Guidelines* section of the ATT website at <https://www.thearmstradetreaty.org/initial-report-list-of-examples-for-q-2-b-2-c.html>.

11. In their interventions during the discussions on this topic, States Parties and other stakeholders referred to a mixture of agreements, including but not limited to the UN Charter, the Convention on Certain Conventional Weapons (CCW), the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines, the Convention on Cluster Munitions, the UN Convention against Transnational Organized Crime and its Firearms Protocol, the UN Convention against Corruption and several human rights treaties.¹

12. In respect of these listed agreements, it needs to be noted that States Parties only need to take into account those agreements that it itself is a Party to. The listed agreements are merely examples which States Parties provided as relevant on the basis of their own practice and international commitments.

What constitutes 'knowledge at the time of authorization' under Article 6(3)?

13. The concept of 'knowledge at the time of authorization' is already addressed in draft chapter 1 of this Voluntary Guide, which includes an overview of national practices with respect to the interpretation of this concept, which were submitted by States Parties in the context of the "methodology exercise" for unpacking key concepts in articles 6 and 7 of the Treaty.

14. Subsequent to the completion of the "methodology exercise", the interpretation of the term 'knowledge' in international law was also addressed in the aforementioned expert presentation of the ICRC. On the basis of its overview, the ICRC recommends that "*the term 'knowledge' in Art. 6.3 should be interpreted objectively to include what a State Party can normally be expected to know, based on information in its possession or reasonably available to it*".

15. Concerning practical implementation and application, the ICRC holds the position that "*A State Party must deny a transfer under Art. 6.3 if it has substantial grounds to believe, based on information in its possession or that is reasonably available to it, that the weapons would be used to commit genocide, crimes against humanity or war crimes*". States Parties need to make a prospective assessment of the future behaviour of a recipient, how he is likely to behave and how the arms to be transferred will likely be used. Next to present circumstances and reasonable expectations, this can be based on the historic behaviour, yet without any requirement of evidence beyond reasonable doubt of past crimes. Also taking into account States' due diligence requirements of international law, States have an obligation to actively seek out information to make their assessment.

¹ Mention was also made of States' obligations under customary international law, but as Article 6 (2) only refers to States' international obligations under international *agreements*, customary law obligations are outside the scope of Article 6 (2).

16. Concerning relevant sources of States Parties' 'knowledge', intelligence and information exchange between States were mentioned, and reference was made to sources listed in two other WGETI documents, the previously mentioned document with on [possible voluntary guiding and supporting elements in implementing obligations under Article 6 \(1\)](#) and the [list of possible reference documents to be considered by States Parties in conducting a risk assessment under Article 7](#) (both welcomed at CSP4).

17. As indicated in the WGETI Chair's report to CSP8, during the discussions following the expert presentation, States Parties shared their approaches to interpreting the term 'knowledge' under Article 6(3), whether it encompasses 'actual' and 'constructive' knowledge, what level of knowledge is contemplated, and the extent to which there is a common view on this. It was put forward by intervening State Parties that only a 'constructive' knowledge standard, as presented by the ICRC, is in line with the object and purpose of the Treaty, arguing that absolute certainty will rarely be obtained. It was also pointed out that most respondents in the "methodology exercise" apply a 'constructive' knowledge standard. Other participants asserted that the Treaty requires the 'actual' knowledge standard as a minimum. It is noted in this context that States Parties also need to respect the parameters of their relevant underlying obligations (see paragraphs 20 and 30 about the Genocide Convention and the Geneva Conventions).

How is 'genocide' defined under international law?

18. This question was addressed in the aforementioned expert presentation of the ICRC, with intervening States Parties subsequently indicating that this guide should not redefine the existing definition.

19. The crime of "genocide" is defined in Article II of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention"). This definition is considered to have the status of customary international law. That entails that this definition is binding on all States, regardless whether they are a Party to the Genocide Convention or not.

Box X. 'Genocide' (Article II Genocide Convention)

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.

20. In terms of the practical application of the obligation in Article 6 (3), States Parties will need to comply with the parameters of their general obligation to prevent genocide, laid down in Article I of the Genocide Convention. In reference to the parameters set out by the International Court of Justice (ICJ) in the case on the application of the Genocide Convention, this entails that States Parties need to

halt arms transfers from the moment that they are aware *or should normally be aware* that acts of genocide are occurring or imminent and that the arms in question would be used to commit these acts.²

21. In order to establish the occurrence or imminent danger of acts of genocide, the ICRC referred to two important elements in its presentation: 1) genocide can be committed in and outside the context of armed conflict and both by State and non-state actors; and 2) in addition to the occurrence of the above acts, States Parties need to establish the specific intent to destroy, in whole or in part, the national, ethnical, racial or religious group, as such. Concerning the latter, the aforementioned ICJ case on the application of the Genocide Convention refers to a concerted plan or a consistent pattern of conduct which could only point to the existence of such specific intent.

22. To make the determination in the practical context of an upcoming arms transfer, coordination between different State authorities is likely required. The elements mentioned in paragraphs 15 and 16 above are relevant in this regard.

How are ‘crimes against humanity’ defined under international law?

23. The prevention and punishment of crimes against humanity has been under consideration by the International Law Commission since 2013.³ Its 2019 Draft articles on Prevention and Punishment of Crimes Against Humanity, submitted to the UN General Assembly, provides the following definition in Article 2⁴:

Box X. ‘Crimes against humanity’ (Article 2 Draft articles on Prevention and Punishment of Crimes Against Humanity)

1. For the purpose of the present draft articles, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) murder;

(b) extermination;

(c) enslavement;

(d) deportation or forcible transfer of population;

(e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(f) torture;

(g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

² ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, § 432: “By contrast, a State may be found to have violated its obligation to prevent even though it had no certainty, at the time when it should have acted, but failed to do so, that genocide was about to be committed or was under way; for it to incur responsibility on this basis it is enough that the State was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed.”.

³ See https://legal.un.org/ilc/texts/7_7.shtml.

⁴ See https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_7_2019.pdf.

(h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph;

(i) enforced disappearance of persons;

(j) the crime of apartheid;

(k) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

(a) "attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

(b) "extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(c) "enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(d) "deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(e) "torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(f) "forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(g) "persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(h) "the crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(i) "enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. This draft article is without prejudice to any broader definition provided for in any international instrument, in customary international law or in national law.

24. In their interventions during the discussions on this topic, States Parties also referred to the definition of crimes against humanity in Article 7 of the Rome Statute of the International Criminal

Court (ICC).⁵ It needs to be noted, however, that this definition in the ICC Statute specifically concerns the jurisdiction of the ICC and the establishment of individual criminal responsibility, and does not concern the establishment of state responsibility for crimes against humanity. The ICC Statute is also only binding on ICC States Parties.

25. Just like genocide, crimes against humanity can be committed in and outside the context of armed conflict and both by State and non-state actors. Unlike in the case of genocide, States Parties do not need to recognize a specific intent on behalf of the recipient to determine that crimes against humanity are occurring or imminent.

26. In line with the definition above in the Draft Articles on Prevention and Punishment of Crimes Against Humanity, as well as the Rome Statute, the ICRC emphasized in its expert presentation that States Parties do need to establish that the above acts which are occurring or imminent are: 1) committed as part of a *widespread or systematic* attack; and 2) *multiple* and committed pursuant to or in furtherance of a *State or organizational policy* to commit such. These requirements essentially exclude spontaneous or isolated acts of violence from constituting crimes against humanity (which does not exclude that such acts could constitute war crimes if committed in the context of armed conflict).

27. The widespread or systematic attack requirement is not cumulative, meaning that the attack does not need to be widespread and systematic for the committed acts to constitute crimes against humanity. The commentaries to the aforementioned Draft Articles elaborate on the meaning of these terms in reference to the jurisprudence of the ICTY, ICTR and the ICC. In short, “widespread” involves factors such as the large scale of the attack (in acts and/or area) and the number of victims, which are assessed case-by-case. For an attack to be “systematic”, factors such as the organized nature or a regular pattern of acts are relevant.

28. The distinct State or organizational policy requirement essentially requires a link between the widespread or systematic acts of violence and the State or an organization (i.e. an organized non-state actor). Its scope and standard of proof are debated. For the purpose of this voluntary guide, it suffices to refer to the guidance on this in the commentaries to the relevant Draft articles and the Elements of Crimes of the Rome Statute.⁶ The latter indicate that a “policy to commit such attack” requires that the State or organization actively promote or encourage such an attack against a civilian population. The Elements further specify that a policy which has a civilian population as the object of the attack would be implemented by State or organizational action. Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organizational action. The commentaries to the abovementioned Draft articles also elaborate on this topic, referring to the Elements of Crimes of the Rome Statute and the jurisprudence of the International Criminal Court, as well as the jurisprudence of the ICTY and previous work of the ILC. In doing so, it also recalls the ILC’s 1996 draft Code of Crimes against the Peace and Security of Mankind, which required that the abovementioned acts were committed “*in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group*”.⁷ It is important to note for assessment purposes that regardless a policy requirement does not entail proof that a formal policy was established or promulgated; a policy can also be deduced from circumstantial

⁵ See <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

⁶ Elements of Crimes, <https://www.icc-cpi.int/publication/elements-crimes>, page 3.

⁷ 2019 Draft articles on Prevention and Punishment of Crimes Against Humanity with commentaries, https://legal.un.org/ilc/texts/instruments/english/commentaries/7_7_2019.pdf; page 38.

elements such as the way in which acts occur, a regular pattern, their repetition and preparatory activities.

What are ‘grave breaches of the Geneva Conventions of 1949’?

29. Grave breaches of the Geneva Conventions of 1949 are already mentioned in draft chapter 1 of this Voluntary Guide, as States included them in their description of what they consider ‘serious violations of International Humanitarian Law (IHL)’ to cover. In that regard, grave breaches of the Geneva Conventions of 1949 are the serious violations of IHL included in respectively Articles 50 of Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Article 51 of Geneva Convention (II) on Wounded, Sick and Shipwrecked of Armed Forces at Sea, Article 130 of Geneva Convention (III) on Prisoners of War, and Article 147 of Geneva Convention (IV) on Civilians. Annex A of draft chapter 1 contains the full text of these provisions.

30. In terms of the practical application of the obligation in Article 6 (3), the ICRC indicated in its expert presentation that States Parties will need to take into account their underlying general obligation to ensure respect for the Geneva Conventions in all circumstances, laid down in Article 1 common to the Geneva Conventions. In that respect, the (updated) Commentary to Article 1 explicitly mentions the context of arms transfers as an illustration of the negative obligation not to encourage, nor aid or assist in violations of the Convention.⁸ It indicates that common Article 1 requires High Contracting Parties to refrain from transferring weapons if there is an *expectation, based on facts or knowledge of past patterns*, that such weapons would be used to violate the Conventions. In terms of their positive obligation to prevent violations, the Commentary to Article 1 identifies this as a due diligence obligation to act if there is a foreseeable risk that violations will be committed and to prevent further violations in case they have already occurred. It should be noted that this obligation concerns all violations of the Conventions, not only grave breaches.

What are ‘attacks directed against civilian objects or civilians protected as such’?

31. The phrase “attacks directed against civilian objects or civilians protected as such” is part of a three-part enumeration of serious violations of international humanitarian law in Article 6 (3), in between “grave breaches of the Geneva Conventions of 1949” and “other war crimes as defined by international agreements to which [the transferring State Party] is Party”.

32. The exact phrase by itself is not taken from any international legal instrument on international humanitarian law, but recalls the wording of Articles 51(2), 52(1) and 85 (3) of Additional Protocol (I) to the Geneva Conventions. The acts described in these articles are grave breaches of Additional Protocol (I) to the Geneva Conventions, applicable to international armed conflicts, but also constitute war crimes in international and non-international armed conflicts under customary international law.

33. It should be noted that these provisions do not explicitly include the phrase “directed against” that is used in Article 6 (3). This phrase is nevertheless mentioned in the definition of crimes against humanity, which involves a widespread or systematic attack *directed against* any civilian population (see above). In that context, the commentaries to the abovementioned Draft articles on Prevention

⁸ Geneva Convention (III) of 12 August 1949 relative to the Treatment of Prisoners of War, commentary of 2020, article 1 : respect for the convention, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=24FD06B3D73973D5C125858400462538#83_B.

and Punishment of Crimes Against Humanity cite case law of the ICTY, stating that “the phrase “directed against” requires that civilians be the *intended primary target* of the attack, rather than incidental victims”.⁹ Further elaboration clarifies, however, that taking into account several factors, also attacks which fail to discriminate between military objectives and civilians (indiscriminate attacks) or are disproportionate in terms of the incidental damage to civilian objects or the injury to civilians (disproportionate attacks) can give rise to the inference of direct attacks on civilians. Consistent with that position, the ICRC mentioned in its expert presentation that in the ICRC’s view, “*depending on circumstances, [also] indiscriminate attacks and disproportionate attacks could qualify as attacks directed against civilian objects or civilians protected as such*”.

Box X. Attacks [directed against] civilian objects or civilians in Additional Protocol (I) to the Geneva Conventions

Article 51 (2):

2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

Article 52 (1):

1. Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.

Article 85 (3)

3. In addition to the grave breaches defined in Article 11, the following acts shall be regarded as grave breaches of this Protocol, when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health:

(a) making the civilian population or individual civilians the object of attack;

(b) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a) (iii);

(c) launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a) (iii);

What other ‘war crimes’ may be included?

34. This question was already partially addressed in draft chapter 1, which includes States’ descriptions of what they consider serious violations of IHL to cover (for clarity, war crimes are serious violations of IHL that entail individual criminal responsibility). In that respect, Draft chapter 1 also includes an annex with the text of all the provisions of the Geneva conventions and the Rome statute that define /are relevant to ‘serious violations of international humanitarian law’. In that list, “*other war crimes*” are then those that are not ‘grave breaches of the Geneva Conventions of 1949’ or ‘attacks against civilian objects or civilians protected as such’. It should be noted, however, that Article 6(3)

⁹ 2019 Draft articles on Prevention and Punishment of Crimes Against Humanity with commentaries, https://legal.un.org/ilc/texts/instruments/english/commentaries/7_7_2019.pdf; page 34.

specifically refers to other war crimes ‘*as defined by international agreements to which [the State Party in question] is a Party*’. This excludes those that are *only* war crimes under customary international law.

35. During the 26 April 2022 meeting of the WGETI Sub-working Group on Articles 6&7, the ICRC also addressed this topic. The ICRC recommended that States Parties adopt a broad scope of war crimes to implement Article 6 (3) and referred to the Commentary to Convention (III) relative to the Treatment of Prisoners of War and Rule 156 in the ICRC study on customary international humanitarian law. As indicated, the war crimes included in this Rule that are *only* war crimes under customary international law go beyond the mandatory scope of Article 6 (3).¹⁰

Concluding remarks

36. As indicated above, these draft elements were drafted to reflect and build on the interventions of participants during the discussions of the WGETI Sub-working Group on Articles 6&7 on 15 February 2022 and 26 April 2022, and the expert presentation provided by the International Committee of the Red Cross (ICRC) on the concept of “knowledge” and other terms in Article 6 (3) of the Treaty. They also take into account the elements included in draft chapter 1 and previous work of the WGETI.

37. In line with the intention of the voluntary guide, no definitive recommendations or conclusions on the application of the prohibitions in Article 6 are included. This is not a norm setting exercise on how to apply the Treaty’s obligations. It needs to be noted, however, that these prohibitions mostly relate to concepts and obligations that are enshrined in other international agreements or even customary international law. In that respect, when States Parties apply the prohibitions in Article 6 in practice, they are expected to comply with their relevant underlying obligations.

¹⁰ These war crimes do remain relevant for the implementation of Article 7(1)(b)(i). This provision requires exporting States Parties to assess the potential that the conventional arms or items could be used to commit or facilitate a serious violation of international humanitarian law. This obligation applies to all war all war crimes in international and non-international armed conflicts, both under conventional and customary international humanitarian law.

ATTACHMENT 3

ELEMENTS OF A VOLUNTARY GUIDE TO IMPLEMENTING ARTICLE 9
OF THE ARMS TRADE TREATY

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Background

5. At the Fifth Conference of States Parties to the ATT (CSP5), the Conference endorsed the recommendation of the Chair of ATT Working Group on Effective Treaty Implementation (WGETI) for the Working Group to initiate work on Article 9 (transit and trans-shipment) in the intersessional period of CSP6 and to develop a medium-term workplan to that effect, bearing in mind the draft list of proposed topics and elements for consideration in Annex E of the Chair's Report to CSP5. For that purpose, the WGETI Sub-working Group on Article 9 was established, facilitated by Mr. Rob WENSLEY of South Africa. Following discussions during the Sub-working Group's first meeting on 4 February 2020, a multi-year work plan was eventually welcomed by States Parties via silence procedure in March 2021 as a living document of a voluntary nature.¹¹

6. The Sub-working Group began its substantive work in the intersessional period of CSP7 with discussions dedicated to the various topics in the multi-year plan, which focused on the exchange of national approaches and the exploration of common practices with a view to the possible development of a compendium of national practice and/or voluntary guide. These discussions were systematically held on the basis of guiding questions and relevant input in background papers prepared by the Facilitator, and kicked off by one or more expert presentations on the topic at hand. Following the sessions of the Sub-working Group during the intersessional period of CSP8, the Conference noted the conclusion of the WGETI Chair in his Chair's Report to CSP8 that the Facilitator of the Sub-working Group would begin his work on draft elements for a possible voluntary guide on the implementation of Article 9, deriving from the views exchanged during discussions thus far.

7. In line with this conclusion, the draft elements below are structured according to the list of topics in the multi-year work plan of the Sub-working Group on Article 9. They were drafted to reflect and build on the interventions of participants during the various sessions of the Sub-working Group, the background papers and expert presentations that kicked-off every session, as well as the relevant international and regional instruments and reference documents which experts and participants directed attention to.

8. Throughout the sessions, interventions were made by States, UN agencies, Non-Governmental Organisations and industry.

The following expert presentations kicked off the different sessions:

1. Dr. Paul HOLTOM, Small Arms Survey - [Article 9 - Transit and Transshipment provisions in initial reports](#)
2. Dr. Diederik COPS, Flemish Peace Institute - [Transit controls of military goods in seven European countries](#)
3. Prof. dr. Anna PETRIG, University of Basel - [Article 9 ATT - A Law of the Sea Perspective](#)
4. Dr. Julia HÖRNIG, Erasmus University Rotterdam - [Transport and Transit of Arms by Road and Air](#)
5. Dr. Julia Hörnig, Erasmus University Rotterdam - [Transport and Transit of Arms by Sea](#)
6. Mr. Richard Patterson, Firearms and Ammunition Import/Export Roundtable – *An industry perspective*¹²

¹¹ Multi-year Workplan for the WGETI Sub-working Group on Article 9 (Transit or trans-shipment), available at: [https://www.thearmstradetreaty.org/hyper-images/file/Annex%20B%20-%20Draft%20WGETI%20Multi-year%20Workplan%20for%20Article%209%20\(19%20Feb%202021%20cl\)/Annex%20B%20-%20Draft%20WGETI%20Multi-year%20Workplan%20for%20Article%209%20\(19%20Feb%202021%20cl\).pdf](https://www.thearmstradetreaty.org/hyper-images/file/Annex%20B%20-%20Draft%20WGETI%20Multi-year%20Workplan%20for%20Article%209%20(19%20Feb%202021%20cl)/Annex%20B%20-%20Draft%20WGETI%20Multi-year%20Workplan%20for%20Article%209%20(19%20Feb%202021%20cl).pdf).

¹² This presenter did not use a PowerPoint presentation or other documentation for his presentation.

9. A non-exhaustive overview of the international and regional instruments as well as reference documents that were mentioned during the discussions and presentations is included in [Annex A](#) (building further on the lists included in the background papers that guided the discussions in the Sub-working Group).

10. The overall aim of this voluntary guide is to provide a picture of how States Parties approach the implementation of the obligations in Article 9 of the Treaty, also in relation to other articles, as well as to provide some understanding of the key concepts in the Article and the legal and policy discussions surrounding those concepts. It is not the purpose of the voluntary guide to prescribe, create new norms and standards or establish an agreement on a single interpretation of the Article 9 obligation, nor to reinterpret established definitions. Where legally binding definitions are applicable, this is explicitly mentioned as such.

Treaty text

7. The text of Article 9 is included below to help readers/users situate the key concepts in the context in which they appear in the Treaty. The text of other relevant articles is included in [Annex B](#).

ARTICLE 9 – TRANSIT OR TRANS-SHIPMENT

Each State Party shall take appropriate measures to regulate, where necessary and feasible, the transit or trans-shipment under its jurisdiction of conventional arms covered under Article 2 (1) through its territory in accordance with relevant international law.

National approaches to the terms ‘transit’ and ‘trans-shipment’

8. States Parties approaches on this topic were not addressed in the background paper and the expert presentation on transit and trans-shipment provisions in initial reports because the Initial Reporting Template does not explicitly deal with transit and trans-shipment definitions. The expert presentation did refer to the section on this topic in the Small Arms Survey’s *“The Arms Trade Treaty: A Practical Guide to National Implementation”*.¹³ The presentation emphasized in that regard that the terms transit and trans-shipment are rarely defined in treaties because there is no consensus on their scope; it made reference to the simple meaning of transit as “passing through a place” and to the definition of trans-shipment in the amended International Convention on the Simplification and Harmonization of Customs Procedures (also known as the Revised Kyoto Convention), which alludes to a transfer from the importing means of transport to the exporting means of transport.

9. The reference to simplicity was also reflected in the interventions of States Parties about their national definitions of transit and trans-shipment. All intervening States Parties shared broad definitions, without references to specific customs procedures as part of those definitions. The common ground was the simple reference to **a movement through the (customs) territory of goods that are not destined for the local market, but for a destination outside the (customs) territory**. Such broad definitions allow States Parties to capture all potentially unlawful transactions within the scope of their transit and trans-shipment regulations.

10. The interventions further demonstrated that States do not consider transit and trans-shipment as different types of transfers, but that **trans-shipment is regarded as an element or sub-component of transit**: it is simply transit that involves transferring goods from one transportation vessel to another.

¹³ This guide is available at <https://www.smallarmssurvey.org/resource/arms-trade-treaty-practical-guide-national-implementation>.

11. Some States apply the same regulatory measures to transit with or without trans-shipment, while others apply different measures. For the latter group, the element of trans-shipment is a very relevant factor when they consider which type of regulatory measures to apply to different forms and situations of transit. This was discussed more extensively during the different sessions on regulatory measures.

12. By way of illustration, the box below contains a sample of definitions of transit and trans-shipment in instruments that deal with the transfer of arms or related goods.

Box. Definitions of transit and trans-shipment in strategic goods related instruments

International definitions

[Decision of the Conference of the States Parties to the Chemical Weapons Convention on guidelines regarding declaration of import and export data for schedule 2 and 3 chemicals](#)

‘transit operations’ [...] shall mean the physical movements in which scheduled chemicals pass through the territory of a state on the way to their intended state of destination. Transit operations include changes in the means of transport, including temporary storage only for that purpose’

[UN Modular Small-arms-control Implementation Compendium \(MOAIC\) 01.20: Glossary of terms, definitions and abbreviations](#)

transit: “movement of goods across the territory of a State as part of a transfer between two other States, including the transloading of the goods at the points of entry into and exit from the transit State” (transloading is understood as “transferring goods from one transportation vessel to another”, which includes “transfers from one mode of transportation to another (e.g. from ship to truck) and transfers between different vessels of the same mode of transportation (e.g. from one ship to another)”

transshipment: “transport of goods to an intermediate location outside the exporting and importing States, where they are loaded to a different transport vessel and transported to their final destination (or additional point of transshipment) without crossing the territory of the State in which the transloading takes place (NOTE: Transshipment usually takes place in transport hubs at ports and often takes place within designated customs areas, which are not subject to customs checks or duties.)”

Regional definitions

[User's Guide to the European Union Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment](#)

Transit': movements in which the goods (military equipment) merely pass through the territory of a Member State

- 'Transshipment': transit involving the physical operation of unloading goods from the importing means of transport followed by a reloading (generally) onto another exporting means of transport

[Regulation \(EU\) 2021/821 of the European Parliament and of the Council of 20 May 2021 setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items \(recast\)](#)

‘transit’ means a transport of non-Union dual-use items entering and passing through the customs territory of the Union with a destination outside the customs territory of the Union where those items:

(a)

are placed under an external transit procedure according to Article 226 of the Union Customs Code and only pass through the customs territory of the Union; (b) are trans-shipped within, or directly re-exported from, a free zone; (c) are in temporary storage and are directly re-exported from a temporary storage facility; or (d) were brought into the customs territory of the Union on the same vessel or aircraft that will take them out of that territory without unloading;

Phrases ‘under its jurisdiction’ and ‘through its territory in accordance with international law’

13. The phrases ‘under its jurisdiction’ and ‘through its territory (in accordance with international law)’ delineate the scope of the obligation in Article 9 in a cumulative manner. States Parties need to regulate transit and trans-shipment that is both ‘under its jurisdiction’ and occurs ‘through its territory’. The Treaty therefore does not *oblige* States Parties to regulate transit and trans-shipment outside their territory, even if it involves vessels that are under their jurisdiction (see paragraph 22).

14. What is considered the “territory” of a State is not defined in the Treaty. During the presentation on this topic, it was explained that on the basis of general international law, including the Convention on International Civil Aviation (also known as the Chicago Convention) and the United Nations Convention on the Law of the Sea (UNCLOS), the State territory extends to all its land territory, its internal waters (including seaports), its territorial sea and the airspace above these land and maritime zones (it does not extend to the so-called exclusive economic zone or the high seas). This entails that the obligation in Article 9 intrinsically covers transit and trans-shipment by land, water and air; the Treaty itself does not differentiate between them. Based on their specific characteristics, national considerations or international obligations, States may opt to treat them differently (see paragraph 27).

15. The term jurisdiction is also not defined in the Treaty. Under general international law, State jurisdiction relates to the authority of a State to prescribe rules, to enforce those rules and to adjudicate cases concerning those rules. Concerning the regulation of transit and trans-shipment through the State territory, the expert presentation on this topic made it clear that States Parties in principle have full jurisdiction to prescribe and enforce regulatory measures, but that certain limits arise from international law.

16. Focusing on transit by water, the presentation addressed limitations concerning transit through the internal waters (including ports) and the territorial sea of a State.

17. Concerning the internal waters and ports, few limitations apply. The main restriction is that States cannot enforce their regulations against sovereign immune vessels, which are war ships and ships used only on government non-commercial service. Such vessels cannot be subject to onboard search or inspection. States will usually not exercise their jurisdiction towards vessels in their internal waters and ports if the issue at hand concerns internal affairs of the ship that do not affect their interests. It could be argued, however, that violations of the Treaty do not constitute “internal affairs of the ship”. Lastly, States need to apply their measures in a non-discriminatory manner. In that regard, for all vessels that are not sovereign immune vessels, States can apply a wide array of measures to enforce its transit and trans-shipment regulations in their internal waters, for example setting conditions for port entry, denial of landing, trans-shipment or processing of cargo, denial of use of

other port services, boarding and inspection and detention until compliance with the relevant regulations.

18. Concerning transit through the territorial sea, the so-called “right of innocent passage” applies, a rule of customary international law codified in Article 17 of the UNCLOS. The right of innocent passage limits the right of States – or the methods they use – to enforce its transit regulations against foreign ships that continuously and expeditiously pass through their territorial sea, provided that this passage is “innocent”, as described in Article 19 of the UNCLOS, and takes place “in conformity with [the UNCLOS] and with other rules of international law”. The scope of this limitation is not beyond debate. The expert presentation put forward that under international law, the mere fact of having arms on board does not render passage not innocent, but that the meaning of “conformity with [...] international law” is not clear, and that the requirements of the rule arguably leave room for States to include certain considerations concerning the application of the ATT and UNSC arms embargoes when they work out their regulatory and enforcement measures regarding transit through the territorial sea. As a minimum, States Parties need to be able to interdict transit – including through the territorial sea – that would be in violation of the prohibitions in Article 6 of the Treaty, most notably if a UN Security Council arms embargo would be violated or if the State has knowledge that the arms or items would be used in the commission of genocide, crimes against humanity or war crimes (see paragraph 49 *et seq.* on the relationship with Article 6).¹⁴ Yet, in doing so, taking into account the right of innocent passage, States Parties should adapt their controls to avoid undue interference with genuine innocent passage, for example by focusing on ad hoc controls and inspections in case of a reasonable suspicion of an illicit transfer rather than systematic licensing obligations.

19. It should be noted that this right of innocent passage only applies to transit through the territorial sea and not to transit through the internal waters and ports. It is also noted that a similar concept does not apply to the national airspace (see paragraph 39).

20. It should be borne in mind that the phrase ‘in accordance with international law’ does not only refer to international law *limitations* on States Parties’ authority to prescribe and/or enforce transit and trans-shipment controls, but also to their international law *obligations* to do so. For example, States Parties which are also a party to the UN Firearms Protocol will need to take into account the obligations regarding transit in Articles 10 and 11 of the Protocol.

21. During the discussion on this topic, intervening States Parties mentioned that their transit controls only extend to transit on their territory. They pointed to a number of options for transit control, such as general customs control, systematic and ad hoc inspections, and prior notifications allowing to inspect or seize cargo.

22. On the obligations of flag States, the expert presentation emphasized that even though Article 94 of the UNCLOS requires States to exercise jurisdiction over their ships, these ships are not considered part of the territory of the State. This entails that Article 9 of the Treaty does not oblige States Parties to regulate their vessels in transit, because the Treaty only requires States Parties to regulate transit or trans-shipment “through its territory”. During the discussions it was pointed out, however, that States Parties which are also party to the UN Firearms Protocol do have certain obligations regarding cases where their vessels are involved in illicit transit of firearms outside of their territory, as it is understood that the obligation in Article 11 of the Protocol to take appropriate measures to increase the effectiveness of import, export and transit controls extends to their extraterritorial jurisdiction.

¹⁴ This topic was also addressed in the Small Arms Survey’s Practical Guide to National Implementation of the ATT, previously mentioned in paragraph 8.

Measures to regulate the transit and trans-shipment of arms

23. In line with the multi-year workplan, the Sub-working Group dedicated separate sessions to measures to regulate the transit and trans-shipment of arms according to the mode of transport, by land, air and sea. The interventions of States Parties during these sessions demonstrated, however, that the mode of transport is generally not the ultimate conclusive factor in differentiating the types of control measures that States Parties apply to transit and trans-shipment of arms. For that reason, this section addresses measures to regulate the transit and trans-shipment of arms in general first, regardless of the mode of transportation, before going into the relevant specifications of transit and trans-shipment by land, air and sea.

24. The presentation on transit and trans-shipment provisions in initial reports and subsequent interventions of States Parties demonstrated that it is generally understood that States Parties need to regulate all these forms of transit, but that in requiring “*appropriate measures where necessary and feasible*”, the Treaty allows flexibility and variation based on States Parties’ national situation, provided that they comply with the limitations and obligations of international law, as well as other articles of the Treaty, in particular Article 6. As Article 6 applies to all types of transfer mentioned in Article 2 (2), including transit and trans-shipment, as a minimum States Parties will have to regulate transit and trans-shipment in order to fulfil its obligations under Article 6. This topic, the material scope of the Treaty’s transit and trans-shipment obligations, was not explored in full during the sessions on regulatory measures, but forms part of the discussion on the relationship between Article 9 and other Articles (see paragraph 49 *et seq.*).

25. Concerning practical measures and options, in every session the following aspects were systematically addressed: the general options and common practices for regulating transit and trans-shipment, the specific forms of regulatory measures that States Parties take and the government departments and agencies that are involved in implementing these regulatory measures. In their interventions States Parties also addressed the different parties/entities involved in transit and trans-shipment that are responsible for compliance with their regulations. Overall reference can be made to the check list that was part of the expert presentation on transit and trans-shipment provisions in initial reports, and that was taken from the transit and trans-shipment section in the Small Arms Survey’s “*The Arms Trade Treaty: A Practical Guide to National Implementation*” (see box below). This section also provides extensive guidance on all these aspects.

Box. Possible checklist for the regulation of transit / trans-shipment

- Definition of transit and trans-shipment
- Feasible control measures in accordance with international law
- Defined scope for regulated items
- Responsibility for compliance with regulations
- Assessment criteria for authorization
- Effective administrative provisions
- Robust enforcement regime (i.e. sanctions, interagency cooperation, powers to interdict, suspend a shipment, training, outreach)

Expert presentation by Dr. Paul HOLTOM, Small Arms Survey: [Article 9 - Transit and Transshipment provisions in initial reports](#) (taken from Small Arms Survey’s “*The Arms Trade Treaty: A Practical Guide to National Implementation, 2016*”)

26. On the topic of regulatory measures, the interventions during the different sessions demonstrated that States Parties combine a range of tools to regulate transit and trans-shipment, in line with the flexibility that the Treaty provides. The most commonly used tool is the prior authorization requirement, sometimes in the form of different types of licences with varying degrees of control. This is often combined with exemptions from authorization, prior notification requirements and/or ad hoc controls for certain circumstances. Some States Parties integrate these controls in their general customs control system. Some States Parties also only allow specifically registered actors to carry out transit and trans-shipment operations.

27. States Parties differentiate their controls on the basis of a number of factors. One factor concerns the international law limitations mentioned above, which might entail that a systematic licence requirement is not feasible and ad hoc controls such as the right to temporally seize and inspect shipments might be more appropriate. At the same time, also international law obligations might play a role, such as the abovementioned UN Firearms Protocol. States Parties also mentioned other factors, such as the element of trans-shipment, where different measures are applied depending on whether the arms are trans-shipped from one means of transport to the other, or stay on board throughout the whole transit phase. States Parties also indicated that certain activities or purposes are exempt from transit and/or trans-shipment obligations, such as hunting, sport shooting or movements of arms owned by (friendly) armed forces or security personnel. The expert presentation of the Flemish Peace Institute also mentioned the type of military goods, the countries of destination or of origin of the controlled goods as factors that are used by States to differentiate their transit and trans-shipment controls.

28. In order to apply these measures in practice, State Parties require the relevant parties in the transfer to provide information on forthcoming transits and trans-shipments that they have made subject to their control. During the session, reference was made to a wide range of information, including copies of export, import and other transit authorizations (or alternatives), packing lists, contracts, invoices, information on the means of transport and the actors involved, relevant transport documentation and contact details of relevant authorities.

29. On the topic of relevant government departments and agencies, the presentation on transit and trans-shipment provisions in initial reports demonstrated that in most States Parties multiple ministries and government agencies are involved in the regulation of transit and trans-shipment. Explicit reference was made to: 1) the ministries of Defence, Interior and Public Security (including police); 2) the ministries of Business, Economy, Finance and Trade (including customs); 3) the ministry of Foreign Affairs; and 4) the export (transfer) control agency. This was also reflected in the interventions of States Parties during the different sessions. The customs authorities are often at the forefront of transit and trans-shipment controls, but usually there is inter-agency cooperation, involving some or all of the authorities mentioned above. Sometimes different authorities are competent for different types of transit (land, air and sea).

30. Inter-agency cooperation does not only concern the decision-making process for approving or denying transactions, but also the enforcement of regulatory measures. This includes monitoring transactions and exchanging relevant information between relevant departments and agencies.

31. On the topic of which parties/entities are (legally designated as) responsible for compliance with transit and trans-shipment regulations, intervening States Parties pointed out that transit and trans-shipment generally involves a wide range of parties which may or may not be established in the transit state. In that respect, States Parties often do not (only) hold the exporter responsible for compliance with their transit and trans-shipment regulations, but also the carrier, as well as logistical actors that are involved in the transit State itself. It is noted that this differs from transport law, which

was the focus of the expert presentations on transit and trans-shipment of arms by land, air and sea. As indicated in the expert presentation, in the context of transport law, the focus is primarily on the relationship between the seller/shipper and the carrier, in which the former has the duty to provide the latter with all the necessary information, documents and licences, while the latter has duties of care concerning the cargo, including the storing, stowage and loading of goods (see paragraphs 33 and 41).

32. One specific issue that was included in the multi-year work plan, but was not extensively addressed during the sessions on regulatory measures concerns the implications of free trade / free movement of goods zones. While the background paper for the session on transit by land named a free trade area as one of the examples that States Parties included in their initial reports of circumstances where transit and/or trans-shipment is permitted without regulation or under a simplified procedure, during the sessions, one State Party shared that conventional arms are restricted goods and are not subject to the principles of free trade and are subject to specific rules.¹⁵

Overview of options for regulating transit and trans-shipment cited in interventions and expert presentations			
<i>Regulatory (control) measures</i>	<i>Relevant factors to differentiate controls</i>	<i>Relevant government departments and agencies</i>	<i>Responsible parties</i>
prior authorization (different types of licences)	international law limitations and obligations	Various ministries, including ministries of Foreign Affairs, Defence, Interior and Public Security (including police)	Exporter
prior notification	element of trans-shipment	various ministries including Business, Economy, Finance and Trade (including customs)	Carrier
ad hoc controls	type of items	various ministries including Foreign Affairs	logistical actors (e.g. freight forwarder)
	countries of destination or of origin of	export (transfer) control agency	
	specific purposes (e.g. hunting or sport shooting)		

Measures to regulate the transit and trans-shipment of arms by land

33. The background paper for the session on this topic listed a number of examples of international and regional instruments governing transit and transportation of goods by road and rail, of which most were also addressed in the kick-off expert presentation. These are included in [Annex B](#). None of these

¹⁵ To illustrate, the issue of free-trade zones is addressed in the Best Practice Guidelines for Transit or Trans-shipment of the Wassenaar Arrangement (<https://www.wassenaar.org/app/uploads/2019/consolidated/01Best-Practice-Guidelines-for-Transit-and-Trans-shipment.pdf>). These guidelines provide that the authority to stop, inspect and seize a shipment, as well as legal grounds to dispose of a seized shipment should extend fully to activities taking place in special Customs areas located within a sovereign state's territory, such as free-trade zones, foreign trade zones and export processing zones.

instruments specifically address transit and trans-shipment regulations, nor conventional arms. As indicated in the expert presentation, these agreements concern transport law and deal with the obligations and rights of parties to a transport contract, on issues such as documentation, labelling, packaging, storing and the duty of care during transport.

34. The significance of these instruments for the practical implementation of the ATT and regulating (the permissibility of) transit and trans-shipment of conventional arms is therefore limited. Also the types of actors that are responsible to comply with arms transfer regulations might be different or broader than those who are responsible under (private) transport law.

35. One possibly relevant element could be the documentation that must accompany the goods during transport according to these instruments. Detailed descriptions of cargo that are required for safety purposes might in some circumstances be a source of information for arms transfer control authorities as a basis for risk assessments and to conduct ad hoc inspections. In that regard, it could be opportune for States to have communication and cooperation between their authorities in charge of the implementation of the ATT and transit controls and those involved in relevant road safety procedures. In this context, the expert presentation on this topic referred to certain dangerous goods regulations that are relevant for the transport of ammunition. While the presentation remarked that ammunition, regulated in Article 3 of the Treaty, is not directly included in the material scope of Article 9, States Parties should still take this into account, as ammunition is included in the scope of Article 6, which applies to all types of transfer, including transit and trans-shipment (see paragraph 49 *et seq.*).

36. Following the expert presentation, States Parties focused on the general transit and trans-shipment measures as described above. In terms of international and regional agreements, mention was made of the ECOWAS Convention on Small Arms and Light Weapons, which includes transit and trans-shipment as well as “transport” in its definition of transfer. The Convention provides a system of a general transfer ban and possible exemption requests that are processed via the ECOWAS Secretariat. Also the Central African Convention for the Control of Small Arms and Light Weapons was mentioned. This convention also includes transit and “transport” in its definition of transfer and requires authorization for all types of transfer. Both conventions are regional examples of positive international law obligations States Parties need to take into account when regulating transit and trans-shipment. On this subject, States Parties also referred to *bilateral* treaties that concern transit of goods through their territory.

Measures to regulate the transit and trans-shipment of arms by air

37. The background paper for the session on this topic listed a number of examples of international instruments governing transit and transportation of goods by air, of which most were also addressed in the expert presentation.

38. The focus in both was on the Chicago Convention, in reference to its articles 3 and 6 and to article 4 (6) of its Annex 17. The articles in the Convention clarify the following elements: 1) the Convention only applies to civil aircraft; 2) state aircraft, such as aircraft used in military services, can only fly over the territory of another State or land thereon with authorization by special agreement or otherwise; and 3) States cannot use civil aviation for any purpose inconsistent with the aim of the Convention. The article in the Annex concerns measures to take relating to cargo to ensure a secured transport chain. Additionally, also Annex 18 to the Convention was mentioned, which deals with the safe transport of dangerous goods by air.

39. None of these articles specifically address transit and trans-shipment regulations and conventional arms. As with the abovementioned instruments governing transit and transportation by land, their significance for regulating (the permissibility of) transit and trans-shipment of conventional arms is limited. States Parties could nevertheless consider the information-sharing requirements concerning transport of dangerous goods as a source of information for transit and trans-shipment of goods within the scope of the relevant regulations, namely ammunition (see paragraph 35). Additionally, concerning all conventional arms within the scope of the Treaty, States Parties should also note Article 35 of the Chicago Convention, however, as explained in the box below.

Box. Munitions of war or implements of war on board of aircraft engaged in international navigation

Article 35a of the Chicago Convention explicitly provides that *“no munitions of war or implements of war may be carried in or above the territory of a State in aircraft engaged in international navigation, except by permission of such State”*. This provision entails that for transit by air there is no *“right of innocent passage”* under international law as there is for transit through the territorial sea.

Concerning the scope of *“munitions of war or implements of war”*, the article provides that *“each State shall determine by regulations what constitutes munitions of war or implements of war for the purposes of this Article, giving due consideration, for the purposes of uniformity, to such recommendations as the International Civil Aviation Organization may from time to time make”*.

Since this provision is directly relevant for the regulation of transit of conventional arms, it could be opportune for States Parties to foresee some type of coordination between their authorities in charge of the implementation of the ATT and those in charge of the implementation of the Chicago Convention.

40. In their interventions following the expert presentation on this topic, none of the intervening States Parties specifically addressed the abovementioned instruments or any other topic specific to transit by air.

Measures to regulate the transit and trans-shipment of arms by sea

41. The expert presentation on this topic addressed a number of international and regional instruments on transport by sea, with a focus on private transport law and its so-called *“Hague Visby Rules”*.¹⁶ These instruments do not specifically address transit and trans-shipment regulations, nor conventional arms; they mostly regulate the relationship between the seller/shipper and the carrier vis-à-vis the transport, including loading and discharge. In that specific context the seller/shipper has the duty to provide the latter with all the necessary information, documents and licences. Interventions following the expert presentation demonstrated, however, that in States Parties’ transit and trans-shipment regulations also other actors bear responsibility for compliance, including the carrier and certain logistical actors (see paragraph 31 above and the section on the role of the private sector below).

42. On this topic of relevant actors, the issue was raised in the discussion that despite rules on the training of crew in maritime transport regulations, the personnel of carriers often lack sufficient training, which disables them from carrying out basic controls and hampers compliance. This was further addressed in the session on the role of the private sector.

¹⁶ The basic document of these *Hague-Visby Rules* concerns the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading of 25 August 1924, known as the *Hague Rules*. The Convention was amended by the so-called *Visby Protocol* of 23 February 1968.

43. Concerning regulatory measures on maritime transport, mention was made of instruments such as the International Maritime Dangerous Goods (IMDG) Code and the aforementioned UNCLOS. In that respect, the expert presentation returned to the topic of transit restrictions and the right of innocent passage. The presentation emphasized the right of the coastal state to regulate non-innocent passage and to stop, inspect and divert vessels from the territorial sea, also indicating that UN Security Council's arms embargoes must enjoy preference over innocent passage (in reference to article 103 of the UN Charter). One intervening State Party subsequently indicated that not all transit operations are subject to prior authorization, but that the custom authorities control all flows and can intervene. Similar to the aforementioned dangerous goods regulations on land and air transport, the IMDG code was raised in the expert presentation as only relevant for transport of ammunition (see paragraphs 35 and 39).

Box. Deviation of original itinerary / unscheduled transit

The expert presentation also addressed the special issue of deviation, where a ship changes its scheduled itinerary *en route* and performs an unscheduled transit through the territorial waters (sea and/or internal waters) of a State, either due to an emergency or for unforeseen circumstances (for example to pick up extra cargo). The question was raised whether such passage is considered "diversion" if the ship is carrying conventional arms and had not previously obtained a transit authorization from that State.

The expert presentation addressed the topic from the transport law perspective, in reference to the "Hague Visby Rules" and the International Code for the Security of Ships and of Port Facilities (ISPS). The presentation indicated that in the specific transport law context, a "reasonable deviation" is not deemed an infringement, but also that the international code for the security of ships and of port facilities (ISPS) includes "*preventing the introduction of unauthorized weapons, incendiary devices or explosives to ships or port facilities*" in its functional requirements.

In terms of transit and trans-shipment regulations, regardless of any classification of such deviation as "diversion", it should be noted that States Parties cannot discriminate between ships that make a scheduled stop, which was part of their initial itinerary, and ships that have changed their itinerary *en route* for unforeseen circumstances. If they have arms on board, these ships need to be subject to the States' transit and trans-shipment regulations in an equal manner. In line with the flexibility that Article 9 provides, this does not mean that in practice States have to necessarily sanction every specific instance where an unscheduled transit happens contrary to their transit regulations, but, as a minimum, they will need to apply regulatory measures to ensure their compliance with Articles 6 of the Treaty and their other relevant international obligations.

The role of the private sector in the transit and trans-shipment of arms

44. The role of the private sector was first addressed in Sub-working Group in the general presentation of the Flemish Peace Institute – in reference to its research report on transit – pointing to the variety of actors involved in transit and trans-shipment operations and their responsibility to comply with transit regulations. During the different sessions on regulatory measures, several States Parties subsequently referred to the responsibility of various actors in the transit and trans-shipment phase next to the exporter and the carrier. The box below contains an overview of such actors, based on a similar box in the Small Arms Survey's "*The Arms Trade Treaty: A Practical Guide to National Implementation*", which was the background of the expert presentation of the Small Arms Survey in the Sub-working Group (see paragraph 8).

Box. Examples of actors involved in transit and trans-shipment operations

Carrier or transport service provider: the company that transports the goods for the exporter; in cases of trans-shipment, two or more carriers may be involved, such as a shipping company followed by an airline.

Customs broker, customs agent, or clearing agent: the company that is contracted to fulfil customs obligations on behalf of the exporter or the importer.

Freight forwarder: the company that is contracted by the exporter to organize the shipment of goods to the importer. This service comprises all related procedures, in some cases including customs formalities. In general, the forwarder does not move the goods directly, but contracts a carrier. In cases of trans-shipment, a freight forwarder will be responsible for carrying out the operation of trans-shipment. The forwarder may also involve other parties in these processes.

Shipping agent: the representative of the carrier with whom the customs broker and the freight forwarder deal.

45. A common challenge that was raised in the presentations and interventions was that these actors sometimes lack an adequate understanding of their transit and trans-shipment obligations. For logistical actors it was also raised that they not always have an understanding of indicators that could point to suspicious transactions. Contributing factors to this are a general lack of compliance awareness and cooperation between actors involved in a transfer, as well as the complexity of the regulations and the divergence between States. The latter was also highlighted in the industry presentation in this session, which focused on the exporter perspective and pointed to the impact on the legal trade, as some carriers are hesitant to accept conventional arms as cargo.

46. In that respect, a common recommendation from the presentation and interventions is to establish close cooperation between the competent authorities and these various actors through systematic outreach, monitoring and assistance. In addition, States Parties can also partner with representative organisations of such actors. Furthermore, States Parties also need to impel actors involved in arms transfers to share the necessary information with each other in order to comply with transit and trans-shipment obligations.

47. Recommendations to this effect were also made in the context of the Sub-working Group on Article 11, where the role of transit and trans-shipment states in preventing diversion was examined (see box).

Box. Possible measures towards the private sector in background paper on the role of transit and transshipment states in preventing diversion:

“Awareness-raising and due diligence requirements towards freight forwarders, shipping agents, customs agents and carriers etc., to help them become partners in preventing or detecting diversion: E.g., a prior authorization requirement for service providers that want to handle transit operations involving the transport of arms.”

48. Awareness-raising of this kind is an important basic function of the competent authorities, but is also often referred to in the context of enforcement. That is because the criminal and administrative liability of involved actors is at stake and outreach efforts seek to enhance compliance. At the same

time, these actors also have a role to play in risk assessment of the enforcement authorities, for example through effective information-sharing.

Relationship between Article 9 and other Articles

49. *[This section will be developed following the discussions on this topic in the Sub-working Group.]*

Conclusion

50. *[The conclusion will be included upon completion of the guide.]*

ANNEX A. CITED INTERNATIONAL AND REGIONAL INSTRUMENTS AND REFERENCE DOCUMENTS**National approaches to the terms 'transit' and 'trans-shipment'**

1. Instruments and documents cited in expert presentation by dr. Paul Holtom, Small Arms Survey - [Article 9 - Transit and Transshipment provisions in initial reports](#)
 - ❖ International instruments
 - [International Convention on the Simplification and Harmonization of Customs Procedures \("Revised Kyoto Convention"; 2008\)](#)
 - ❖ Best practice and reference documents
 - [Small Arms Survey, The Arms Trade Treaty: A Practical Guide to National Implementation \(2015\)](#)
2. Instruments and documents cited in expert presentation by dr. Diederik Cops, Flemish Peace Institute - [Transit controls of military goods in seven European countries](#)
 - ❖ Regional instruments
 - [EU Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment](#)
 - [EU User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment \(2019\)](#)
 - ❖ Best practice and reference documents
 - [Flemish Peace Institute, Under the radar: Transit of military goods – from licensing to control \(2022\)](#)

Phrases 'under its jurisdiction' and 'through its territory in accordance with international law'

1. Instruments and documents cited in expert presentation by prof. dr. Anna Petrig, University of Basel - [Article 9 ATT - A Law of the Sea Perspective](#)
 - ❖ International instruments
 - [United Nations Convention on the Law of the Sea \("UNCLOS"; 1982\)](#)
 -

Measures to regulate the transit and trans-shipment of arms by land

1. Examples of international and regional instruments governing transit and transportation (Annex A of the background paper on measures to regulate the transit and trans-shipment of arms by land and air, attached to [ATT/CSP8.WGETI/2022/CHAIR/713/M1.LetterSubDocs](#))
 - ❖ International instruments relevant to transportation by road
 - [Convention on the Contract for the International Carriage of Goods by Road \("CMR"; 1956\)](#)
 - [Protocol to the Convention on the Contract for the International Carriage of Goods by Road \(1978\)](#)
 - ❖ Regional instruments relevant to transportation by road
 - [ECOWAS Convention Regulating Inter-State Road Transportation between ECOWAS Member States \(1982\)](#)

- [ECOWAS Convention relating to Inter-States Road Transit of Goods \(1982\)](#)
 - [OAS Agreement on the Adoption of the Inter-American Manual on Traffic Control Devices for Streets and Highways \(1979\)](#)
 - [Inter-American Convention on Contracts for the International Carriage of Goods by Road \(1989\)](#)
 - [European Agreement concerning the International Carriage of Dangerous Goods by Road \("ADR"; 1957\)](#)
 - [Intergovernmental Agreement on the Asian Highway Network \(2003\)](#)
 - ❖ International instruments relevant to transportation by rail
 - [International Convention to Facilitate the Crossing of Frontiers for Goods Carried by Rail \(1952\)](#)
 - [Convention on International Customs Transit Procedures for the Carriage of Goods by Rail under Cover of SMGS Consignment Notes \(2007\)](#)
 - [United Nations Convention on International Multimodal Transport of Goods \(1980; not in force\)](#)
 - ❖ Regional instruments relevant to transportation by rail
 - [Agreement on International Railways in the Arab Mashreq \(2003\)](#)
2. Additional instruments and documents cited in expert presentation by dr. Julia Hörnig, Erasmus University Rotterdam - [Transport and Transit of Arms by Road and Air](#)
- ❖ International instruments
 - [UN Firearms Protocol supplementing the UN Convention against Transnational Organized Crime \(2001\)](#)
 - ❖ Regional instruments
 - [EU Directive 2009/43/EC of the European Parliament and of the Council of 6 May 2009 simplifying terms and conditions of transfers of defence-related products within the Community](#)
 - [EU Regulation No 258/2012 of the European Parliament and of the Council of 14 March 2012](#)
 - ❖ Best practice and reference documents
 - [Wassenaar Agreement Compendium of Best Practice Documents](#)

Measures to regulate the transit and trans-shipment of arms by air

1. Examples of international and regional instruments governing transit and transportation (Annex A of the background paper on measures to regulate the transit and trans-shipment of arms by land and air, attached to [ATT/CSP8.WGETI/2022/CHAIR/713/M1.LetterSubDocs](#))
- ❖ International instruments relevant to transportation by air
 - [Convention for the Unification of Certain Rules relating to International Carriage by Air \("Warsaw Convention"; 1929\)](#)
 - [Convention for the Unification of Certain Rules Relating to International Carriage by Air \("Montreal Convention"; 1999\)](#)
 - [Convention on International Civil Aviation \("Chicago Convention"; 1944\)](#)
 - ❖ Best practice and reference documents
 - [Wassenaar Arrangement Best Practices to Prevent Destabilising Transfers of Small Arms and Light Weapons \(SALW\) through Air Transport \(2007\)](#)
 - [Wassenaar Arrangement Elements for Controlling Transportation of Conventional Arms Between Third Countries \(2011\)](#)

2. Additional instruments and documents cited in expert presentation by dr. Julia Hörnig, Erasmus University Rotterdam - [Transport and Transit of Arms by Road and Air](#)

- ❖ International instruments relevant to transportation by air
 - [IATA Dangerous Goods Regulations \("IATA DGR"\)](#)
- ❖ Regional instruments relevant to transportation by air
 - [EU Commission Regulation No 965/2012 of 5 October 2012 laying down technical requirements and administrative procedures related to air operations pursuant to Regulation \(EC\) No 216/2008](#)
 -

Measures to regulate the transit and trans-shipment of arms by sea

1. Instruments and documents cited in expert presentation by dr. Julia Hörnig, Erasmus University Rotterdam - [Transport and Transit of Arms by Sea](#)

- ❖ International instruments relevant to transportation by sea
 - "Hague-Visby Rules"
 - [International Convention for the Unification of Certain Rules of Law relating to Bills of Lading \(1924\)](#)
 - [Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading \(1968\)](#)
 - [United Nations Convention on the Carriage of Goods by Sea \(1978\)](#)
 - [International Convention for the Safety of Life at Sea \("SOLAS" 1974\)](#)
 - [International Convention on Arrest of Ships \(1999\)](#)
 - [International Maritime Dangerous Goods Code \("IMDG Code"; 2020\)](#)
- ❖ Regional instruments relevant to transportation by sea
 - [European Union Customs Code \(2013\)](#)

ANNEX B. OTHER RELEVANT ARTICLES OF THE TREATY**ARTICLE 2 – SCOPE**

1. *This Treaty shall apply to all conventional arms within the following categories: (a) Battle tanks; (b) Armoured combat vehicles; (c) Large calibre artillery systems; (d) Combat aircraft; (e) Attack helicopters; (f) Warships; (g) Missiles and missile launchers; and (h) Small arms and light weapons.*
2. *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.*
3. *This Treaty shall not apply to the international movement of conventional arms by, or on behalf of, a State Party for its use provided that the conventional arms remain under that State Party's ownership.*

ARTICLE 5 (3) – GENERAL IMPLEMENTATION

3. *Each State Party is encouraged to apply the provisions of this Treaty to the broadest range of conventional arms. [...]*

ARTICLE 6 – PROHIBITIONS

4. *A State Party shall not authorize any transfer of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, if the transfer would violate its obligations under measures adopted by the United Nations Security Council acting under Chapter VII of the Charter of the United Nations, in particular arms embargoes.*
5. *A State Party shall not authorize any transfer of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, if the transfer would violate its relevant international obligations under international agreements to which it is a Party, in particular those relating to the transfer of, or illicit trafficking in, conventional arms.*
6. *A State Party shall not authorize any transfer of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, if it has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party.*

ARTICLE 7 (6) – EXPORT AND EXPORT ASSESSMENT

6. *Each exporting State Party shall make available appropriate information about the authorization in question, upon request, to the importing State Party and to the transit or trans-shipment States Parties, subject to its national laws, practices or policies.*

ARTICLE 11 (1) AND (3) – DIVERSION

1. *Each State Party involved in the transfer of conventional arms covered under Article 2 (1) shall take measures to prevent their diversion.*
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).*

ARTICLE 12 (2) – RECORD-KEEPING

2. *Each State Party is encouraged to maintain records of conventional arms covered under Article 2 (1) that are transferred to its territory as the final destination or that are authorized to transit or trans ship territory under its jurisdiction.*

ARTICLE 15 – INTERNATIONAL COOPERATION

1. *States Parties shall cooperate with each other, consistent with their respective security interests and national laws, to effectively implement this Treaty.*
2. *States Parties are encouraged to facilitate international cooperation, including exchanging information on matters of mutual interest regarding the implementation and application of this Treaty pursuant to their respective security interests and national laws.*
3. *States Parties are encouraged to consult on matters of mutual interest and to share information, as appropriate, to support the implementation of this Treaty.*
4. *States Parties are encouraged to cooperate, pursuant to their national laws, in order to assist national implementation of the provisions of this Treaty, including through sharing information regarding illicit activities and actors and in order to prevent and eradicate diversion of conventional arms covered under Article 2 (1).*
5. *States Parties shall, where jointly agreed and consistent with their national laws, afford one another the widest measure of assistance in investigations, prosecutions and judicial proceedings in relation to violations of national measures established pursuant to this Treaty.*

ATTACHMENT 4

BACKGROUND PAPER ON RELATIONSHIP BETWEEN TREATY ARTICLES

Article 6 in relation to Articles 7, 8, 9 and 10

Article 9 in relation to articles 6, 7 (6), 11 and 12 (2)

Background

- A. Multi-Year Work Plan for the WGETI Sub-Working Group on Articles 6&7 – Topic 9: Relationship between Article 6 and other Articles

This discussion will explore the question: What are the implications of the phrase ‘shall not authorize any transfer’ in Article 6? Participants will be invited to discuss the relationship between Article 6 and other Articles in the Treaty, and share views on the following issues:

- *What is the relationship between Article 6 and Article 7 (Export and Export Assessment), since the term ‘transfer’ includes ‘export’ under Article 2(2)?*
- *What is the relationship between Article 6 and Article 8 (Import), since the term ‘transfer’ includes ‘import’ under Article 2(2)?*
- *What is the relationship between Article 6 and Article 9 (Transit and Trans-shipment), since the term ‘transfer’ includes ‘transit’ and ‘trans-shipment’ under Article 2(2)?*
- *What is the relationship between Article 6 and Article 10 (Brokering), since the term ‘transfer’ includes ‘brokering’ under Article 2(2)?*

- B. Multi-Year Work Plan for the WGETI Sub-Working Group on Article 9 – Topic 7: Relationship between Article 9 and other Articles

This discussion will explore other areas of the Treaty where transit and trans-shipment States may have obligations or responsibilities, including:

- *What is the relationship between Article 6 (Prohibitions) and Article 9 (Transit and Trans-shipment), since the term ‘transfer’ includes ‘transit’ and ‘trans-shipment’ under Article 2(2)?*
- *What is the relationship between Article 7(6) (Export and Export Assessment) and Article 9, since Article 7(6) contemplates that transit or trans-shipment States Parties may request information pertaining to export authorizations?*
- *What is the relationship between Article 11(1) (Diversion) and Article 9, since Article 11(1) obliges each State Party ‘involved in the transfer’ of conventional arms to take measures to prevent their diversion and ‘transfer’ is described or defined under Article 2(2) to include transit and trans-shipment?*
- *What is the relationship between Article 11(3) (Diversion) and Article 9, since Article 11(3) obliges transit and trans-shipment States Parties to cooperate and exchange information, pursuant to their national laws, to mitigate the risk of diversion?*
- *What is the relationship between Article 12(2) (Record keeping) and Article 9, since Article 12(2) encourages States Parties to maintain records of conventional arms that are authorized to transit or trans-ship territory under its jurisdiction?*

Relationship between Article 6 and Article 7

1. Articles 6 and 7 both include requirements concerning the substance or material scope of the States Parties' export controls, i.e. circumstances that should be subject to control (and prevented), and assessment criteria to apply. Although some provisions in these articles refer to similar elements, the obligations in both articles are very different in nature. Article 6 involves absolute prohibitions, whilst Article 7 requires a risk assessment, weighing several factors, as well as the mandatory consideration of mitigating measures.
2. In that respect, the following questions aim to identify national approaches that could provide elements for the chapter on prohibitions of the proposed Voluntary Guide:

- Where applicable, how have States Parties integrated the prohibitions in Article 6 and the export risk assessment criteria in Article 7 in their national regulations?
- How do States Parties combine the prohibitions in Article 6 and the export risk assessment in Article 7, including the mandatory consideration of mitigating measures, in practice?

Relationship between Article 6 and Articles 8, 9 and 10

3. The relevant questions on the relationship between Article 6 and Articles 8, 9 and 10 are similar because unlike Article 7 on Export and Export Assessment, Articles 8, 9 and 10 all lack any requirements or guidance concerning the substance or material scope of States Parties' import, transit and trans-shipment and brokering controls. They do not refer to circumstances that should be subject to control (and prevented), nor to any assessment criteria to apply. In that regard, the fact that Article 6 also applies to those types of transfers is crucial in terms of understanding the required minimum scope of States Parties' import, transit and trans-shipment and brokering controls. This importance is also acknowledged in the ATT Initial Reporting Template, which systematically includes the question whether the national control system includes measures to prevent imports, transit and trans-shipment and brokering in violation of Article 6.¹⁷
4. Concerning transit and trans-shipment, whilst the relationship between Article 6 and Article 9 was not yet fully explored during the sessions on regulatory measures in the Sub-Working Group on Article 9, participants did already allude to Article 6 in the discussions, which was reflected and build on in the draft elements of a voluntary guide to implementing article 9. In that respect, the draft elements indicate that in requiring "*appropriate [transit and trans-shipment] measures where necessary and feasible*", Article 9 of the Treaty allows flexibility and variation based on States Parties' national situation, provided that they comply with the limitations and obligations of international law, as well as other articles of the Treaty, in particular Article 6. As Article 6 applies to all types of transfer mentioned in Article 2 (2), including transit and trans-shipment, as a minimum States Parties will have to regulate transit and trans-shipment in order to fulfil its obligations under Article 6. Regarding transit through the territorial sea and the limitations on States' power to intervene flowing from the so-called right to innocent passage, the draft elements also indicate that, as a minimum, States Parties need to be able to interdict transit – including through the territorial sea – that would be in violation of the prohibitions in Article 6 of the Treaty, most notably if a UN Security Council arms embargo would be

¹⁷ This concerns the revised Initial Reporting Template, endorsed and recommended for use at CSP7.

violated or if the State has knowledge that the arms or items would be used in the commission of genocide, crimes against humanity or war crimes.¹⁸

5. Building on these elements, the following questions could be relevant:

- Do States Parties have specific regulations to prevent transit and trans-shipment in violation of Article 6 in practice?
 - Do these regulations apply to all transit and trans-shipment through all land, maritime and air components of the territory, regardless the mode of transport?
 - Do the transit and trans-shipment controls go beyond the circumstances which Article 6 requires States Parties to prevent, for example to prevent diversion?
- These three questions also apply to imports and brokering.

6. The relationship between Article 6 and Articles 8, 9 and 10 is also important in terms of the items should be subject to the required controls. Whilst Article 8, 9 and 10 only refer to conventional arms covered under Article 2 (1), the prohibitions in Article 6 also apply to the items covered under Article 3 (Ammunition/Munitions) and Article 4 (Parts and Components). In that regard, the following question is relevant:

- To what extent do States Parties subject the items covered under covered under Article 3 (Ammunition/Munitions) and Article 4 (Parts and Components) to their import, transit and trans-shipment controls?

Relationship between Article 9 and Articles 7 (6) and 11

7. The relationship between Article 9 and Article 11, as well as the specific provision in Article 7 (6), was already explored last year in the Sub-Working Group on Article 11 (Diversion), and the background paper on the role of transit and trans-shipment states in preventing diversion which informed those discussions.¹⁹

8. Concerning the general obligation in Article 11 (1) for all States Parties involved in arms transfers to take measures to prevent diversion, the bulk of the challenges and measures included in the background paper concerned the enforcement of States Parties' transit and trans-shipment regulations, as well as compliance by private actors. This was also the focus of the discussions in the Sub-Working Group on Article 11. For the purpose of the proposed Voluntary Guide, the Facilitator considers that concerning these issues, a reference to the background paper and to the report of the WGETI Chair on the discussions in the Sub-Working Group on Article 11 might suffice at this point.

9. From the regulatory perspective and the substance or material scope of the States Parties' transit and trans-shipment controls, the following question remains relevant in this specific exercise:

¹⁸ For clarity, on this topic the draft elements further specify that, taking into account the right of innocent passage, States Parties should adapt their controls to avoid undue interference with genuine innocent passage, for example by focusing on ad hoc controls and inspections in case of a reasonable suspicion of an illicit transfer rather than systematic licensing obligations.

¹⁹ This paper was included as Attachment 2 of Annex C in the WGETI Chair Letter and Sub-Working Group documents for the 15-16 February 2022 WGETI meeting ([ATT/CSP8.WGETI/2022/CHAIR/713/M1.LetterSubDocs](https://www.atts.org/ATT/CSP8.WGETI/2022/CHAIR/713/M1.LetterSubDocs)). In terms of measures, the paper drew on the preceding paper titled 'Possible measures to prevent and address diversion', which was welcomed at CSP4 and is available in the [Tools and Guidelines section of the ATT website](#).

- Have States Parties subjected certain types of transit and trans-shipments to control measures (licence or notification requirements, ad hoc controls) with the specific aim to prevent diversion?

10. Concerning information-exchange, specifically that referred to in Article 7 (6) and Article 11 (3) of the Treaty, the background paper identified as a practical challenge the difficulty for transit States to rely on exporting States to systematically provide data about the shipment to the transit State. It included as an example the fact that information on the means and route of transport is not always known at the licensing stage (as transportation is often only secured *after* obtaining the export licence) and may be subject to change.

In that respect, the following questions aim to identify existing State practice on this:

- What kind of information about transit or trans-shipment authorizations do exporting States Parties share with transit or trans-shipment States Parties and how?
- What kind of information about transit or trans-shipment authorizations are importing States Parties requesting and what would be useful?
- What are the concrete challenges to conducting this information exchange?

11. Continuing with the obligation in Article 11 (3) for importing, transit, trans-shipment and exporting States Parties to cooperate and exchange information in order to mitigate the risk of diversion, the background paper provides a number of recommendations that go further than the provision of documentation by the exporting State to the transit or trans-shipment State in advance of the export. These are the following:

- i. *Exporting States should alert transit and transshipment States in advance of shipments that are legal and properly authorised (advanced notification), so transit states are in a better position to focus their attention and resources on those shipments that have not been prenotified or which may raise suspicion;*²⁰
- ii. *Exporting States should alert transit and transshipment States when they are aware of diversion risks associated with a particular shipment in transit;*
- iii. *All States involved in a transfer should, in accordance with national laws, share intelligence information gathered through national and regional networks and operations; etc.*

12. With a view to identify national approaches, the following questions are relevant:

- What kind of exchanges are States Parties engaging in in practice?
- What kind of exchanges are the most useful for more effective transit and trans-shipment controls?

²⁰ In this context, as an example, reference can be made to Article 10 (2) (b) of the UN Firearms Protocol. This provision provides that *before issuing export licences or authorizations* for shipments of firearms, their parts and components and ammunition, each *State Party shall verify* that, without prejudice to bilateral or multilateral agreements or arrangements favouring landlocked States, the *transit States have, at a minimum, given notice in writing, prior to shipment, that they have no objection to the transit*. This is naturally only an obligation for States Parties that are also Party to the UN Firearms Protocol and limited to firearms, their parts and components and ammunition.

Relationship between Article 9 and Article 12 (2)

13. The last Article mentioned in the multi-year workplan concerns Article 12 (2), which encourages States Parties to maintain records of conventional arms that are authorized to transit or trans-ship territory under its jurisdiction.

14. Concerning this provision, the following question aim to identify existing State practice on this:

- Are States effectively maintaining such records? If so, which details are included and what sources are used to collect the information in question?
- What is the information used for?

Concluding remarks

15. The Facilitators are conducting these discussions with the aim to identify national approaches that could provide elements for the relevant chapters of their respective proposed Voluntary Guides to assist States Parties in implementing Articles 6&7 and Article 9. This is in line with the overall aim of the proposed Voluntary Guides to provide a picture of how States Parties approach the implementation of the obligations in Articles 6&7 and Article 9, not to prescribe, create new norms and standards or establish an agreement on a single interpretation of these obligations. In that respect the Facilitators encourage all participants use the questions above in preparing for this joint discussion in February and also welcome any written input via e-mail to Facilitators and the ATT Secretariat, before or after the meeting.

ANNEX B

WORK PLAN SUB-WORKING GROUP ON ARTICLE 11

Wednesday, 15 February 2023, 10:00-13:00

Introduction

1. The WGETI Sub-working group on Article 11 (Diversion) was established by the WGETI Chair after consideration of recommendations and decisions of the Fourth Conference of States Parties (CSP4). Article 11 (Diversion) is recognized as one of the key objectives of the Arms Trade Treaty (ATT).

Summary of progress so far

2. During its previous meetings, the Sub-working Group on Article 11 developed a multi-year workplan as a living document to guide continued work in this area, which was welcomed by CSP5 (this formed Annex C to the WGETI Chair's Draft Report to CSP5, contained in document ATT/CSP5.WGETI/2019/CHAIR/529/Conf.Rep). The multi-year workplan was further refined and a revised version was agreed by States Parties via silence procedure on 01 March 2021 (an extract pertaining to the agenda for the meeting of the Sub-working Group on 15 February 2023 is included as Attachment 1 to this Annex).

3. The multi-year workplan was focused on three parts:

1. Before the transfer
2. During the transfer
3. At or after importation/ Post delivery

4. All stages of the transfer chain were divided into smaller areas, each with their own questions and discussion guidance. The first two meetings during the CSP5 cycle considered the first item on the multi-year workplan on the issue of import documentation. Challenges were detected in the lack of shared understanding on terminology for end use and end user documentation. It was indicated that much remains to be done to address challenges posed by implementation of the Article 11. CSP5 further validated the elaboration of a voluntary guide on end use/r documentation that serves as a repository of State Practice in this area on the basis of *Elements of a guide to end use and end user documentation*. States Parties were encouraged to share information on end use/r documentation, through the ATT Secretariat, to inform this guide.

5. The meeting of Sub-working group on Article 11 held during the CSP6 cycle on 05 February 2020, focused on chain stage 1 – Before the transfer, namely: Assessing the risk of diversion, and the role of private sector in mitigating diversion risk.

6. During the meeting of the Sub-working group on Article 11 held during the CSP7 cycle on 28 April 2021, the Facilitator presented a draft paper outlining the elements of a process for assessing the risk of diversion, based on the discussion that took place during the meeting on 05 February 2020. CSP7 endorsed a revised version of the draft paper, that incorporated comments received from ATT stakeholders, as a living document of a voluntary nature to be reviewed and updated regularly by the Working Group, as appropriate, and welcomed the publication of the document on the ATT website.

7. During the CSP8 cycle, the Sub-working group on Article 11 discussed the last topics in its multi-year workplan. In the first meeting the Facilitator presented a background paper on the role of transit and

trans-shipment States in preventing diversion, which was followed by an exchange on States' transit measures and issues such as the need for timely provision of information and effective inter-agency cooperation. Some States also gave examples of cases where transit was denied based on diversion risks and discussed compliance measures for transport operators. The relationship between transit controls and diversion will be further explored in the Sub-working group on Article 9, as part of its discussion on the relationship between Article 9 and other Articles. In the second meeting, the Sub-working group covered the third stage in the transfer chain – after importation or post-delivery. Discussions were held on three topics: the role of importing states in preventing diversion, post-delivery cooperation and the role of the private sector and civil society in mitigating diversion risk post-delivery. Following that meeting, at CSP8, the Conference endorsed the recommendation of the Working Group Chair to extend the work of the of the Sub-working Group on Article 11 by one additional year to enable it to focus on the topic of post-delivery cooperation.

The work ahead

8. For the further discussion on the topic of post-delivery cooperation, the Facilitator has prepared a background paper that outlines the intended approach and includes a number of questions aimed at identifying which specific topics regarding post-delivery cooperation States Parties still want to take up in the Sub-working group during this cycle, and which possible outcomes States want to achieve for CSP9. This paper is included as Attachment 2 to this Annex.

ATTACHMENT 1

**DRAFT AGENDA FOR THE MEETING
OF THE SUB-WORKING GROUP ON ARTICLE 11**

Wednesday, 15 February 2023, 10:00-13:00

1. Intended approach for further discussion on post-delivery cooperation

The Facilitator will present the intended approach for the further discussion on the topic of post-delivery cooperation, as decided by States Parties at CSP8.

2. Presentation by SIPRI: Post-shipment On-site Inspections – Multilateral Steps for Debating and Enabling Their Adoption and Use

The Facilitator will invite the Stockholm International Peace Research Institute (SIPRI) to present their recent paper on this topic.

3. Open discussion

The Facilitator will seek the views of participants about which specific topics regarding post-delivery cooperation they still want to take up in the Sub-working group during this cycle, and which possible outcomes they want to achieve for CSP9.

4. Next steps

The Facilitator will inform participants about his intended preparations for the meeting of the Sub-working Group in May.

ATTACHMENT 2**BACKGROUND PAPER: POST-DELIVERY COOPERATION****Background**

9. Post-delivery cooperation was the priority theme of the CSP8 President. For that purpose, during the CSP8 cycle, a workshop and a thematic debate were organized, and a working paper was submitted to the Conference by the CSP8 President.²¹ This paper provided a comprehensive toolbox for the introduction and implementation of post-shipment controls and coordination, as well as further discussions on the topic, both in reference to current national approaches and to the work that already has been done within the ATT framework. Concretely, the paper included: i) an extensive overview of measures to identify and/or prevent “diversion; ii) a substantive outline of post-shipment controls and post-delivery coordination; iii) a review of the previous and current initiatives concerning post-shipment controls within the scope of the ATT; iv) operational steps for the introduction and implementation of post-shipment controls; and v) recommendations and suggestions for the next steps within the scope of the ATT. Considering these recommendations and suggestions, at CSP8 the Conference decided that:

- a. States Parties are encouraged to continue discussing approaches and understandings of “post-shipment controls” or “post-delivery coordination” in the context of diversion control.
- b. States Parties are encouraged, where appropriate and on strictly voluntary basis, to share their experiences regarding the implementation of post-shipment controls/post-delivery coordination measures within the scope of the ATT, through means such as the Initial Report; the Annual Report; the Working Group on Effective Treaty Implementation and sub-working group on Article 11; the Diversion Information Exchange Forum; the information exchange platform within the ATT website; and the Conference of States Parties, without setting additional burdens beyond the obligations of the Treaty.

10. During the CSP8 cycle, also the WGETI Sub-working Group on Article 11 devoted a session to post-delivery cooperation, in line with its multi-year workplan, which was part of its discussions about diversion in the after importation / post-delivery phase of the transfer chain stage. During that session, participants discussed the role of cooperation between exporting and importing states and gave examples of State practice with respect to post-delivery inspections. They discussed some of the benefits and challenges of post-shipment controls, including the resources required to conduct effective post-shipment controls and national security considerations and/or sensitivities. In line with the conclusion of the WGETI Chair that this seemed to be an area where further exploration and exchange of ideas and experiences is warranted, CSP8 decided to extend the work of the Sub-working Group on Article 11 by one additional year to enable it to focus on the topic of post-delivery cooperation.²²

11. It also needs to be noted that the Sub-working Group already addressed post-shipment controls in its earlier sessions. In particular during discussions in the CSP4 cycle and the ensuing

²¹ For the workshop, see <https://www.thearmstradetreaty.org/CSP8-1st-working-group-and-preparatory-meeting> (15 February, bottom of the page). For the thematic debate, see <https://www.thearmstradetreaty.org/CSP8-2nd-working-group-and-preparatory-meeting> (26 April, bottom of the page). The working paper is attached to the background paper and also available at <https://www.thearmstradetreaty.org/conference-documents-csp8> (CSP8 President).

²² WGETI Chair’s Draft Report to CSP8 and CSP8 Final Report, available at <https://www.thearmstradetreaty.org/conference-documents-csp8>.

document with Possible Measures to Prevent and Address Diversion, welcomed by the Conference at CSP4, reference was made to post-delivery measures.²³

Intended approach

12. In its decision to further discuss post-delivery cooperation in the Sub-working Group on Article 11, the Conference did not identify any concrete topic or outcome to be addressed. In this context, the Facilitator therefore considers it opportune to use the February meeting of the Sub-working Group to identify which specific topics regarding post-delivery cooperation States Parties still want to further discuss in the Sub-working Group during this cycle, and which possible outcome they want to achieve for CSP9.

13. For that purpose, the Facilitator firstly refers to the aforementioned Working Paper of the CSP8 President, in particular to the section about operational steps for the introduction and implementation of post-shipment controls and the section with recommendations and suggestions for the next steps within the scope of the ATT.

14. The section about operational steps includes effective practice recommendations for States considering to introduce post-delivery cooperation. **States Parties need to consider whether they see merit in elaborating additional voluntary guidance on post-delivery cooperation in this CSP9 cycle, beyond the basic measures that are already included in the aforementioned document with Possible Measures to Prevent and Address Diversion, for example as an appendix to this Possible Measures document.** If so, States Parties could consider whether the effective practice recommendations in the Working Paper are suitable basis for such additional guidance.

15. The recommendations and suggestions for the next steps within the scope of the ATT, of which a number were endorsed by the Conference at CSP8, concern both specific substantive issues as well as continued attention to the topic within the broader ATT framework. **In that regard, States Parties need to consider whether they still want to follow-up on any of these recommendations and suggestions in this Sub-working Group, taking into account that it is the general intention to complete the work of the Sub-working Group this year, to allow consideration of other issues.**

16. In addition to the Working Paper, the Facilitator also considered it useful to provide an expert stakeholder view on the work that could still usefully be undertaken within the ATT framework on the topic (in this CSP9 cycle). In that respect, the Facilitator has invited the Stockholm International Peace Research Institute (SIPRI) to present their recent paper to the Sub-working Group, which deals with multilateral steps for debating and enabling adoption and use of post-shipment on-site inspections.²⁴

Concluding remarks

17. At the February meeting, the Facilitator will first present the intended approach for the discussion in the Sub-working Group and subsequently ask SIPRI to kick-start the discussion with their presentation, before opening the floor for participants. The Facilitator encourages all participants to consider the working paper submitted to the Conference by the CSP8 President and the questions above in preparing for the discussion. If participants see merit in providing additional guidance on post-delivery coordination during this CSP9 cycle or see the need to discuss specific issues, the Facilitator will prepare draft elements to be discussed during the May meeting of the Sub-working Group. If not,

²³ This document is attached to this background paper and also available on the *Tools and Guidelines* page of the ATT website: <https://www.thearmstradetreaty.org/tools-and-guidelines.html>.

²⁴ This paper is available at <https://www.sipri.org/publications/2022/sipri-policy-papers/post-shipment-site-inspections-multilateral-steps-debating-and-enabling-their-adoption-and-use>.

the Facilitator will simply circulate an invitation to States Parties to share and discuss national approaches and experiences concerning post-delivery coordination during the May meeting.

Arms Trade Treaty
Eighth Conference of States Parties
Geneva, 22 - 26 August 2022

**WORKING PAPER PRESENTED BY THE PRESIDENT OF THE EIGHTH CONFERENCE OF STATES PARTIES
TO THE ARMS TRADE TREATY (ATT)**

**POST-SHIPMENT CONTROLS AND COORDINATION
EFFECTIVE EXPORT VERIFICATION AND GOOD-FAITH COOPERATION BETWEEN EXPORTERS AND
IMPORTERS**

- STATUS QUO AND GUIDANCE (“TOOLBOX”) -

Table of contents:

- I. Executive summary**
- II. Introduction**
- III. Measures to identify and/or prevent “diversion” – an overview**
- IV. Post-shipment controls and post-delivery coordination**
- V. Post-shipment controls – previous and current initiatives within the scope of the ATT**
- VI. Operational steps for the introduction and implementation of post-shipment controls**
- VII. Recommendations and suggestions for the next steps within the scope of the ATT**

- I. Executive summary**

Preventing diversion is one of the key priorities of the Arms Trade Treaty (ATT). By joining the ATT, States Parties have committed to take effective measures to address this risk and prevent diversion. In addition to the further development of traditional control and coordination approaches, other monitoring options are to be discussed within the scope of the ATT in order to ensure holistic monitoring of arms. One such option is the implementation of on-site post-shipment controls.

On this basis, this working paper follows on from the previous discussions within the scope of the ATT and aims to assist States Parties in taking measures to prevent diversion while preserving the cooperative and coordinative approach of the ATT, including in the post-shipment phase. It should be emphasised that this approach complements existing control measures. Post-shipment controls do not replace the thorough ex-ante assessment of the end-use control of arms exports.

Finally, the working paper provides ideas and recommendations for further discussions among the ATT’s States Parties and stakeholders.

II. Introduction

Preventing diversion is one of the key priorities of the Arms Trade Treaty (ATT). By ratifying the Treaty, States Parties have committed to take effective measures to address this risk and prevent diversion. The ATT requires States Parties to take measures to prevent, detect and address the diversion of ATT items.

On this basis, the present working paper aims to assist States Parties in taking measures to prevent diversion while preserving the cooperative approach of the ATT in a post-shipment phase. One possible measure is the implementation of on-site post-shipment controls.

So far, there is neither an internationally agreed definition of the term “diversion” nor any definition in the ATT. However, the very mention of the term at the beginning of the preamble indicates its meaning in the context of the ATT: *“Underlining 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 in the commission of terrorist acts”*.

There is a common understanding that diversion is in general terms the transfer of items from an authorised owner or user to an unauthorised user¹. While diversion can occur at any time during the lifecycle of arms, the risk is certainly greatest during transfers. Article 11 (1) of the ATT² therefore requires specifically that each State Party that engages in the “transfer” of ATT items “take measures to prevent their diversion”. In addition, Article 11 (2) stipulates that States Parties shall consider the “establishment of mitigation measures” to prevent the diversion of transferred ATT items.

Furthermore, Article 15 (1), (2) and (3) calls upon States Parties to cooperate in the implementation of the Treaty, facilitate international cooperation and consult on matters of mutual interest. This cooperative approach is the basic rationale of the ATT. The responsibility to prevent diversion is not assigned solely to the exporting State. Cooperation and the exchange of information between exporting, transit, trans-shipment and importing States as one of the main principles of the ATT should be promoted in order to mitigate the risk of diversion. Post-shipment controls are an area where such international cooperation could in particular take place among States Parties.

III. Measures to identify and/or prevent “diversion” – an overview

The ATT lists a wide range of measures that States Parties may consider in order to prevent and address diversion.

1. Traditional control and monitoring approach by licensing and customs authorities

Combating diversion begins at the pre-export stage. Therefore, a national control system needs to evaluate the risk of each transfer of ATT items included in the national control list. All such transfers are subject to prior authorisation (i.e. a licence). During the licensing process, the risk of diversion of the export should be assessed, including an examination of all parties involved in the transfer.

Exporting States should conduct thorough reviews of the documentation, such as contracts or agreements, international import certificates, transit approvals, end-use/r certificates (EUCs), and various other assurances provided by importing States (Articles 8 (1) and 11 (2)). The licence may

¹ UN Office for Disarmament Affairs, ATT Implementation Toolkit, Module 10 – Preventing Diversion

² Unless otherwise stated, Articles mentioned in this working paper are Articles of the ATT.

contain mitigation measures for any risks deemed overriding or otherwise concerning. Such mitigation measures could include specific terms and conditions, such as reporting requirements, cancellation provisos or post-shipment measures.

Customs authorities form the last line of defence of the exporting States and also play an important role in the transit and import control phase. Cooperation and coordination between licensing and customs authorities is the cornerstone of the traditional approach to arms trade controls. Usually, the possibility of monitoring the transaction ends when the arms have left the territory of the exporting State.

2. In addition: Establishing controls and coordination measures in the post-delivery or post-shipment phase

In order to address the risk of diversion even more effectively and implement the requirements of Article 11 (1) and (2), the integration of measures in the post-shipment phase into the national export control system is particularly relevant. In this phase, it is possible to check whether the guarantees given by the end-user have been adhered to. The responsibility of the exporting States does not end with the granting of the export licence. Importing States should be encouraged to cooperate with exporting States to coordinate their efforts to prevent diversion. This applies in particular to the post-shipment phase. States are therefore encouraged to take or strengthen measures in the post-shipment phase in addition to their pre-export controls that are already in place.

On this basis, this working paper contains voluntary measures that States Parties may consider in order to foster the goal of combating diversion of ATT items. It contains a non-prescriptive and non-exhaustive list of measures that could be taken into account as potential components to be adopted by States in the post-shipment stage of transfers of ATT items.

IV. Post-shipment controls and post-delivery coordination

1. Post-shipment controls – definition

There is a wide range of possible measures to ensure that arms which have been supplied have not been diverted in an unauthorised way. These measures include various forms of controls or checks *post-shipment*, i.e. after the arms have been shipped:

- Formal assurances by the importing State (requesting of end-user assurances such as end-user declarations and/or delivery verification certificates), including assurances that prior permission will be requested for re-exports and or domestic transfers
- Reporting requirements concerning the actual export
- Regular screening of reports of possible diversion incidents (including via information exchanges within the scope of the ATT, e.g. the Diversion Information Exchange Forum – DIEF)
- Audits of the exporting entities by the competent authorities of the exporting State
- Measures that allow an exporting State to inspect the supplied military items itself *on-site* on the premises of the end-user

The physical on-site inspection after the export, i.e. *post-shipment*, has been variously referred to as an end-use check (USA), post-shipment verification (CHE), post-shipment control (DEU), on-site verification (CAN) or on-site visit (UNODA).

For the purposes of further discussion, the term “post-shipment control” will be primarily used in the following to describe the physical on-site inspection of items by the exporting State after they have been delivered to the final end-user.

Post-shipment controls enable a State to perform checks on military equipment after it has been exported and delivered to the end-user to ensure that exported military equipment remains in the possession of the authorised end-user.

2. Post-delivery coordination

However, post-shipment controls should not be perceived as unilateral verification measures with the sole purpose of controlling the end-use of the arms supplied.

By conducting post-shipment controls, the exporting and importing States can jointly document their individual and common efforts to combat the diversion of arms. Post-shipment controls are therefore a bilateral instrument that requires and strengthens cooperation between the exporting and importing States in monitoring the end-use of arms. Coordinated action by the exporting and importing States has the potential to establish and/or increase trust and to build confidence in the control system in question. It underlines the cooperative approach of the ATT. In this sense, the increasing use of the term “*post-delivery coordination*” demonstrates the growing interest in and understanding of this approach among ATT States.

V. Post-shipment controls – previous and current initiatives within the scope of the ATT

There are a number of past initiatives under the ATT on preventing and addressing diversion and post-shipment controls. “Post-shipment controls” as a subtopic of “post-delivery controls” were highlighted by the ATT Working Group on Effective Treaty Implementation (WGETI) and the sub-working group on Article 11. At CSP4, the WGETI Chair’s Draft Report included a paper on “Possible measures to prevent and address diversion”. This comprehensive document considered a series of measures that could be taken at all stages of the transfer of arms – including the post-delivery stage – by the ATT States Parties to address possible instances of diversion. In addition, the instrument was emphasised in the “Multi-year work plan for the WGETI sub-working group on Article 11 (Diversion)” in March 2021.

In 2020/2021, Canada prepared an initial survey in order to gather information on potential interest in discussions of “post-delivery verification measures” within the scope of the ATT; the majority of the consulted States considered that post-delivery measures could help mitigate the risk of diversion.

Furthermore, events were organised by Switzerland and Germany to share their national experiences with the implementation of post-shipment controls on the margins of past ATT meetings. Most notably, at the first preparatory meeting for CSP8 in February 2022, a first workshop was organised by Germany with support from Switzerland and Mexico that focused on the perspective of States Parties. A second workshop supported by Switzerland and Canada at the preparatory meeting in April 2022 included the perspective of civil society actors (SIPRI and UNIDIR) and industry (Dynamit Nobel Defence – DND).

Those initiatives aimed to promote voluntary discussions between ATT States Parties on post-shipment controls. Building on these discussions, the following section will set out a toolbox for possible implementation of post-shipment controls. The toolbox is mainly based on German experiences; the individual components will have to be adapted to national circumstances.

VI. Operational steps for the introduction and implementation of post-shipment controls

1. Political commitment and buy-in

A basic policy paper may be useful for documenting and explaining the motivation for the introduction of post-shipment controls, be it for domestic policy reasons (e.g. in response to instances of diversion in the past) or as a way to demonstrate willingness to join international efforts to mitigate diversions of arms. It may also be helpful to involve exporters and other stakeholders (e.g. civil society, parliamentarians) at an early stage. Other major exporting States have already demonstrated that the introduction of post-shipment controls has not negatively affected the exporting industries in those States.

Effective practice recommendations:

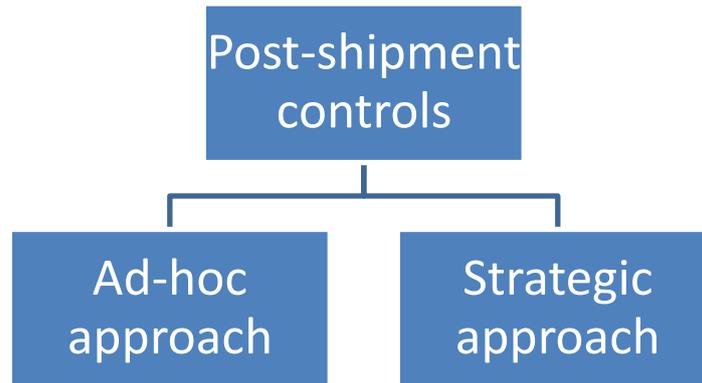
- Consider States that have already introduced post-shipment controls in order to learn from their experiences.
- Carry out an initial pilot phase of post-shipment controls in order to gain first-hand experience and to test domestic decision-making and coordination structures or identify the optimal structures, then subject the results to an internal evaluation process before more formal structures are established.
- Establish a dialogue with exporters and parliaments to explain the motivation for post-shipment controls as well as their limitations.
- Draw on the reference document “Key points for the introduction of post-shipment controls for German arms exports”³ for an initial general policy paper.
- Define the scope of controls, in geographical terms and in terms of the items subject to control. Focusing on final and complete products may be useful as it may be difficult to trace and control components or assemblies that are to be incorporated into weapons systems abroad; a risk-guided approach could focus on those items that are most likely to be diverted.

2. Structure, organisation, staff

Various configurations of post-shipment controls currently exist. A distinction is made between ad-hoc verifications and a more strategic approach. “Ad-hoc” refers to short-notice reactions to individual indications of a possible diversion.

The strategic approach, on the other hand, is to carry out a certain number of checks every year, based on formal selection criteria and ideally on a national policy. The choice of the end-user to be controlled may be primarily random or it may be based on a risk assessment. With this approach, the question arises of how many controls should be carried out and where the control officers should be stationed. Control officers could conceivably be based at regional centres abroad or travel from the exporting State to the end-user in the importing State.

³ https://www.bmwk.de/Redaktion/EN/Downloads/eckpunkte-einfuehrung-post-shipment-kontrollen-deutsche-ruestungsexporte.pdf?__blob=publicationFile&v=2.



The advantage of the ad-hoc approach is the very low use of both human and financial resources. Such ad-hoc controls can be carried out, for example, by embassy staff in the importing State or by national officials at short notice. The situation is different for the strategic approach. With this approach, organisational structures should be established, e.g. to initiate selection decisions and to prepare, conduct and/or monitor the on-site verification visits.

Effective practice recommendations:

- A standardised procedure is helpful to guide the inter-agency process for the checks to be performed in any given year.
- A specialised unit could be established, for example within the licensing authority.
- Staff should be identified in part based on the following skills that may be useful: flexibility, multilingualism, diplomatic competence, intercultural understanding, legal knowledge, technical understanding and possibly an enforcement background.
- Special guidance documentation could be drawn up for embassy personnel.
- Possible indicators for risk-based selection criteria could be based on the destination country, the items in question (some items are more likely to be diverted than others) or the scope of the delivery. The selection may also be guided by the time that has elapsed since the initial delivery or the number of on-site visits to a particular end-use destination in the past. Guidance can be provided by embassy personnel, intelligence or media reports or as a result of information-sharing among State Parties.

The number of officers to be selected for the post-shipment controls will depend on the number of controls scheduled. Experience shows that States that schedule about 10 controls per year have assigned one or two officials to organise and carry out the post-shipment controls. Furthermore, it is vital to consider the safety aspects of the verification visits beforehand.

Effective practice recommendations:

- The visit needs to be coordinated between the exporting and the importing State beforehand.
- The verification team should ideally be accompanied by embassy officials in the importing State.
- Control officers could be provided with diplomatic passports. This may be more flexible than asking for formal assurances from the importing State.

3. Legal considerations

Depending on national circumstances, the introduction of post-shipment controls may require amendments to national export control legislation, in order to have a basis in domestic law for making use of these on-site verification measures. Most importantly, it is necessary to find a way to obtain the prior approval of the importing States for on-site inspections on their national territory.

Effective practice recommendations:

- National legislation could clarify that the approval of a licence (possibly for a defined range of end-use destinations) would be dependent on the submission of written assurances by the end-user that consent is given for subsequent on-site verifications.
- National legislative steps may also be necessary to allow the control unit to trace the transaction in question (e.g. reporting requirements for the actual export, including the submission of serial numbers to the control authority).
- As permanent exports are usually dependent on the presentation of an end-use certificate, end-use documents are a simple and helpful tool to obtain the necessary assurances/approval from the end-user of the items in question. The template could simply be amended. For example, the German and Swiss templates for end-user certificates require the end-user to sign the following assurance: *“Additionally, the end-user certifies that the German/Swiss authorities have the right to verify the end-use of the above-mentioned weapon on-site upon their request at any time”*.
- The exchange of diplomatic notes may also be a way to obtain the consent of the importing State.

4. Communication with importing States

Since the control instrument has an impact on the relationship with the importing State, addressing the implementation of post-shipment controls is of particular importance. In order to promote the coordination of post-shipment controls in a spirit of mutual trust, it is useful to provide detailed information to (importing) States.

Effective practice recommendations:

- Embassies may play a crucial role in explaining the motivation for post-shipment controls. They could conduct more general outreach when post-shipment controls are initially introduced; more detailed information could be provided during preparations for an actual on-site verification. Embassy staff should be provided with guidance material.
- It may be helpful to provide information material for the exporters that can be forwarded to their customers.
- Conducting international outreach or participating in international outreach efforts may help to raise awareness and acceptance of post-shipment controls.

5. Pre-control phase – preparation of individual controls

It is useful to consider conducting post-shipment controls at least two or three years after the delivery of the items to the end-user. It should also be noted that the preparation of an inspection and in particular coordination with the importing State and the end-user in a spirit of mutual trust may take at least six months.

Effective practice recommendations:

- Embassies can facilitate the communication with the authorities of the importing State.
- Clear and direct communication lines between the verification team and the local embassy are necessary in the run-up to an on-site visit.
- The preparation of a dossier for the embassy (e.g. export licence, information about the consignee/end-user, EUC, description of the arms, serial numbers) may be useful for the initial talks with the authorities of the importing State.
- The verification measure should be planned beforehand and a strategy should be in place, i.e. what kind of items will be subject to inspection? Under which circumstances? What sort of preparation will be necessary?
- Typical issues to be coordinated between the verification team and the local authorities include the location and time of the verification visit. In importing States with a large territory where items may have been distributed across the country, verification officers may need to travel to different locations or the items could be gathered in a central location.
- Officers charged with the verification visit could be trained by military staff in safety measures for handling the weapons in question; they could also be trained in identifying the items that are subject to inspection. The exporter may also be a useful source of information in the run-up to a verification visit, e.g. by providing in-depth presentations of the items in question or merely by providing photographs that may help in identifying the weapons.
- The involvement of the importing State's authorities should be discussed beforehand. It may be helpful to plan for extra meetings for example at the MFA, MoD or other local authorities that may wish to gain a better understanding of the motivation for the verification visit.
- Coordination with the importing State at an early stage may also facilitate the issuing of visas or other required travel documents.

6. Control phase – conducting of controls

Cooperation between the verification team and the local authorities in a spirit of mutual trust is key to conducting successful verification visits on the premises of the end-user, especially if these premises belong to the armed forces or other security units. The essential security interests of the end-user should be taken into account by the verification team. It has already been mentioned that the exporting State needs to consider the safety and security of its verification team.

Effective practice recommendations:

- Logistics to consider include issues such as access to the verification site, the use of translators, transport services, permission to take pictures of the arms and serial numbers.
- It is useful to consider alternative means of verification, e.g. if items cannot be presented or have been used or destroyed. This could include the presentation of documents or pictures of arms.
- There should be clear communication on the handling of the inspected items; arms should be safe and unloaded.
- A visual check of all transferred arms – based on their serial number – is recommended; in the case of larger volumes of arms, a smaller sample check may also be acceptable.

7. Post-control phase

The results of the post-shipment controls should be documented. Possible sensitivities of the importing State should be respected, e.g. by keeping the reports confidential.

Effective practice recommendations:

- A template for reporting should be in place.
- It is also useful to consider who the addressees of the reports will be (e.g. other agencies, parliament) and how often these reports will be made (e.g. after each visit or annually?).
- Other issues to consider include the following: Will the information be shared with international partners? What kind of feedback should be provided to the importing State?
- Will reports also be shared with other partners? It is important to consider how the outcome of the verification visit can inform subsequent export licensing processes for the end-user in question and what to do in the case of non-compliance with the end-user's assurances. Such cases could also be presented to ATT partners.
- Appropriate sanctions in the case of non-compliance could include the suspension of export control licensing decisions until the incidents of non-compliance have been clarified. It is recommended to first discuss the instance of non-compliance with the importing State and to identify the source of the problem encountered. It may also be helpful to offer support in helping to prevent future incidents, e.g. training or capacity-building measures in the field of export controls, safe storage, anti-bribery measures etc.

VII. Recommendations and suggestions for the next steps within the scope of the ATT

- a) States Parties are encouraged to share their experiences with the implementation of post-shipment controls / post-delivery coordination measures within the scope of the ATT, through means such as the Initial Report; the Annual Report; the Working Group on Effective Treaty Implementation and sub-working group on Article 11; the Diversion Information Exchange Forum; the information exchange website; and the Conference of States Parties.
- b) Furthermore, States Parties are encouraged to define a common approach and understanding of the term "post-shipment controls" or "post-delivery coordination" within the scope of the ATT.
- c) States Parties should consider sharing their experiences with the implementation of post-shipment controls on the margins of the ATT, through side-events, updates to this working paper and other means.
- d) Discussions with all ATT stakeholders may be considered in order to promote further understanding and awareness of post-shipment measures and develop common standards for post-shipment controls.

POSSIBLE MEASURES TO PREVENT AND ADDRESS DIVERSION¹

States Parties to the Arms Trade Treaty involved in the transfer of conventional arms have a legal obligation to take measures to prevent their diversion (Article 11(1)). This paper presents a non-exhaustive list of practical measures which States Parties may draw from, where relevant, useful and feasible within the available resources of each State, to prevent diversion as it may occur in their particular national context.

The measures have been drawn from a range of sources, including documents in the “List of possible reference documents on diversion” and input from States Parties and civil society. Some measures relate directly to specific legal obligations or guidance in the text of the Treaty. In these cases, the measures listed are to be understood only as suggested options for implementation of the relevant obligations or guidance. The measures are not intended to reinterpret, add to, or derogate from relevant obligations in any way.

Transfer chain stage 1: Before the transfer/Country of origin/point of embarkation

1. Requiring all conventional arms transfers to be subject to prior authorisation (Article 5).
2. Performing consistent and objective transfer risk assessments that take into account the risk of diversion (Articles 7(1) and 11(2)).
3. Requiring that importing States provide proper documentation (such as contracts or agreements, international import certificates, transit approvals, end-use/r certificates (EUCs), and various other assurances) to the competent authorities in exporting States, upon request (Articles 8(1) and 11(2)).
4. Not authorising the export if a significant risk of diversion is detected (Article 11(2)).
5. Including the following measures in their consistent and objective transfer risk assessments:
 - Establishing the legitimacy and credibility of all parties involved in the transfer, such as the exporter, brokers, shipping agents, freight forwarders/intermediate consignees and stated end-use/r (Article 11(2)).
 - Also examining the risks:
 - Arising from the proposed shipment arrangements.
 - Arising from the potential unreliability of controls in the importing country and the transit country (if applicable).
 - Arising from insufficient resources to allow for effective enforcement of national laws concerning the transfer of conventional arms.
 - Arising from political instability in the importing country.

¹ Annex D to the Draft Report to the Fourth Conference of States Parties (CSP4) ([ATT/CSP4.WGETI/2018/CHAIR/355/Conf.Rep](#)) presented by the Chair of the Working Group on Effective Treaty Implementation (WGETI).

- That a conventional arms transfer would increase the risks of diversion of the existing holdings of the end-user.
 - Utilising interdepartmental / inter-agency examination of the exportation requests, enabling analysis of diversion risks to be based on reliable information, from diverse sources (diplomatic, customs, intelligence unit, UN experts' reports, information exchanges between States).
 - Maintaining and/or consulting national databases identifying natural or legal persons previously sanctioned and /or involved in illicit trafficking.
6. Conducting a thorough review of the proper documentation (such as contracts or agreements, international import certificates, transit approvals, end-use/r certificates (EUCs), and various other assurances) (Articles 8(1) and 11(2)) provided by importing States, including:
- Authentication of documentation (including checks for forged or inauthentic documentation, including authentication of EUCs through diplomatic channels or the importing country's national authority by using the declared Point of Contact).
 - Verification of contents of the documentation through establishing the legitimacy and credibility of the stated end-use/r.
 - To prevent any falsification risk, importing States could institute national procedures for issuing EUCs for government and private end-users.
7. Including the following details in EUCs (Articles 8(1) and 11(2)), required for the contents of the documentation to be verified for end-use and user, as well as to inform a risk assessment:

Element	Essential	Optional
Parties involved in the transfer	<ul style="list-style-type: none"> • details of the exporter and end-user, such as name, business name, address, phone, etc. 	<ul style="list-style-type: none"> • details of the intermediate consignee and final consignee
Goods to be transferred	<ul style="list-style-type: none"> • description; • reference to contract, purchase order, invoice or order number; • quantity and/or value. 	
End-use	<ul style="list-style-type: none"> • indication of end-user; • undertaking, where appropriate, that the goods will not be used for purposes other than the declared end-use and/or used for Chemical Biological Radiological and Nuclear (CBRN) etc. 	
Location		<ul style="list-style-type: none"> • certification that goods are to be installed at/used at premises of end-user;

		<ul style="list-style-type: none"> • agreement to on-site inspections.
Documentation	<ul style="list-style-type: none"> • signature, name, title of consignee/end-user representative; • original or legally-certified copy. 	<ul style="list-style-type: none"> • signature and certification by government of final consignee/end-user and only by specific representatives of that government; • unique identifier/number provided by the government authority; • validity terms and date of issue; • kept with conventional arms all along the transfer
Re-export / diversion		<ul style="list-style-type: none"> • an undertaking not to re-export/transship at all, or at least not without notification or express permission from original exporting state's competent authorities
Delivery verification		<ul style="list-style-type: none"> • provide a Delivery Verification Certificate / proof of arrival

8. Encouraging all parties involved in conventional arms transfers (exporters, freight forwarders/intermediate consignees, brokers (Article 10), shipping agents, and end-users) to be registered with national authorities.

9. Applying the following measures when they are transit, trans-shipment, or importing States in an international transfer:

- Requiring prior authorisation for the transit and importation of conventional arms through and to their territory (Article 9).
- Requesting or providing documents that indicate whether the transfer has been authorised or is subject to any objection (Article 11(3)).

10. Requiring particular conditions to be met prior to export authorisation, such as:

- Provision of information related to transport prior to the grant of the exportation authorisation: mode of transport, name of the transporter, nationality, route to be taken.
- Agreement to specific conditions on storage facilities (location, conditions, specific management measures and security).
- Verification through physical inspections of the adequacy of the recipient's storage facilities.

- Enforcement of technical conditions to secure conventional arms, such as systematic marking and implementation of systems preventing use by non-authorized persons.
- Agreement to particular disposal requirements (e.g. conditioning the sale of new small arms and light weapons on the verified destruction of old stocks).

11. Including concrete, unambiguous suspension or cancellation clauses in the wording of all conventional arms contracts other relevant documentation / inter-governmental agreements.

12. Encouraging parties involved in conventional arms transfers to introduce internal export control compliance programs to assist them in complying with national export control legislation and regulations, and increase awareness and mitigation of diversion risks.

- Internal compliance programs could include provisions for parties to conduct their own risk assessments, record-keeping on international commercial operations, and cooperation and information sharing with competent authorities (e.g. regular reporting on licences used, cooperation with compliance visits by government agencies etc.).

Transfer chain stage 2: During the transfer / En route to the intended end-user / In transit

1. Ensuring close cooperation and information sharing, pursuant to their national laws, where appropriate and feasible, with the governments of transit States (Article 11(3)).

2. Requiring or encouraging delivery notification by any transit countries (through delivery receipts signed by the importations customs service, delivery verification certificate, etc.) (Article 11(3)).

- Note that in the case of delivery by air, the exporter may be required to provide a 'certificate of unloading' to confirm delivery.

3. Monitoring and protecting conventional arms shipments, in cooperation with industry parties involved (e.g. freight forwarders/intermediate consignees, transporters etc) from the time the arms leave the warehouse in the exporting state until the intended end-user receives them (and verifies delivery), including through:

- Physically accompanying the shipment or remote monitoring via satellite.
- Stringent physical security requirements (such as ensuring that arms and ammunition are transported in separate vehicles, the use of alarm systems on transport vehicles and container seals, and physical inspection during transit and at the point of delivery).
- Scrutiny of arms shipments and documentation by customs agents in all the States involved in the transfer (exporting, transit, and importing States).

Transfer chain stage 3: At or after importation / Post-delivery

1. Requiring or encouraging delivery notification by the importing State (through delivery receipts signed by the importations customs service, delivery verification certificate, etc.) (Articles 8(1) and 11(3)).

- Note that in the case of delivery by air, the exporter may be required to provide a ‘certificate of unloading’ to confirm delivery.
2. For exporting States: conducting post-delivery checks in cooperation with competent authorities in the importing State to verify compliance with end-use conditions, such as the condition that no re-export can take place without prior notification to the country of origin, including through:
 - Checking end-use certificates by, for instance, checking delivery signatures against the list of authorised signatories by directly contacting such signatories using contact information provided in advance of the certificate.
 - Organising regular on-site visits to verify the ongoing use(r) of the arms.
 - Conducting physical inventories of exported conventional arms to ensure they are properly accounted (Article 12(1)).
 - Investigating suspected violations of end-use and re-transfer conditions agreed to by the end-user.
 3. For importing States: registering and maintaining records of conventional arms entering their national territory, as well as the secure transfer of these to the authorised end-user (Article 12 (2)).
 4. For exporting and importing States: initiating and responding in a timely manner to tracing requests, including through utilisation of existing tools such as the INTERPOL Illicit Arms Records and Tracing Management System (iARMS).

Transfer chain stage 4: Post-delivery storage / National stockpiles

1. Establishing and maintaining robust stockpile management procedures for the safe storage of conventional arms and ammunition, including by:
 - 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.
 - Ensuring appropriate staff training in safe and secure stockpile management procedures.
 - Note useful guidance provided in the ISACS Module on ‘Stockpile management’ and the International Ammunition Technical Guidelines (IATG).

2. Ensuring adequate border controls and patrols.

Other comprehensive measures applicable across the transfer chain

1. Establishing a strong national control system for of the authorisation of international transfers of conventional arms (including transit and trans-shipment), and the enforcement of national laws and regulations (Articles 5 and 14).
2. Ensuring that when a diversion is detected, appropriate legal and administrative measures are taken to address the diversion, enabling the competent national authorities to seize the illicit conventional arms (Article 5).
3. Ensuring close cooperation and information-sharing with other States involved in the arms transfer chain, including information on: weapons transportation providers; denials of export and import licences export/import, transit/trans-shipment licence/authorisation; end-user certificates data; international trafficking routes; illicit brokers, sources of illicit supply and methods of concealment (Articles 8(1), 11(3), 11(4), 11(5), and 15(4)).
4. Sharing information with other States on measures taken that have been proven effective in addressing the diversion, including through: the ATT Secretariat; other mechanisms such as the Working Group on Effective Treaty Implementation; and databases for information exchange such as the ATT website (Article 13(2)).
5. Taking the following measures when a diversion is detected:
 - Alert potentially affected States Parties.
 - Examine diverted shipments of conventional arms.
 - Take follow-up measures through investigation and law enforcement, including the establishment of criminal offences and the capacity for sanctioning violators in relation to diversion detected during post-delivery checks or at any time during an arms transfer (Article 11(4)). It is recommended that available sanctions should be both administrative (including confiscation of conventional arms) and criminal (sufficiently high to serve as deterrents).
6. Ensuring that officers responsible for administering the national control system are trained in the detection of fraudulent behaviour across the different stages of the transfer chain.
7. Maintaining open communication and cooperation across licensing, customs, law enforcement, intelligence and other government agencies domestically and amongst States.
8. Providing sufficient resources to national authorities, especially customs authorities, to ensure they have effective control over conventional arms flows into and out of their territory.
9. Pursuing cooperation through regional and sub-regional groups, such as the EU.
10. Ensuring effective legislation for investigating and punishing theft, corruption, and other diversion-related offences.
11. Running 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.

12. Reinforcing cooperation between national authorities and the private sector (armament industry, transporters, banks, etc.) to ease the detection and the interception of the illicit flows.
13. For both exporting and importing States: jointly developing and agreeing programmes to identify challenges identified, which may take various forms depending on the challenges identified (Article 11(2)).
 - For example, the exporting and importing States could collaborate on measures to improve the security of stockpiles and the disposal of surplus stocks, or to eradicate organised criminal activity and combat corrupt practices
14. Ensuring transparency through communicating information on authorised or completed- legal transfers of conventional arms in annual reports (Article 13(3)).

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