

Transparency and the ATT - The case for a strong anti-corruption mechanism

Summary

It is widely recognised that the arms trade is significantly influenced by corruption. Despite the strong measures taken by countries and companies in recent years to try to tackle corruption, it is clear that corruption still plays a major role in undermining both an open and fair market and the effective control of arms worldwide. For many States, the relevance of corruption to the United Nations Arms Trade Treaty (ATT) is new. However a number of States have recognized the significance of corruption to the ATT, and many of them have requested an anti-corruption focus in the ATT.

Corruption damages the arms trade in two ways: Firstly, it inflates the cost and reduces the quality of the weapons which nations acquire to defend themselves. This undermines the promotion of “the establishment and maintenance of international peace and security with the least diversion for armaments of the world’s human and economic resources” (UN-Charter, Art. 26). Secondly, corruption undermines the ability of states to control the diversion of weapons from their intended end-users within the country or abroad.

The aim of the Arms Trade Treaty is to agree standards and controls that can be put in place by States to assure each other of their ability at a national level to control both the acquisition of arms and the movement of arms within and from their territory. The challenge for the international community is to find a way of incorporating these aims within the Treaty so that they can be operationalised effectively both by governments and by business.

The international community is committed to developing high standards and effective controls through the ATT. But those standards and controls will be highly susceptible to being undermined by corruption and by corrupt practices. A robust ATT must be underpinned by robust measures to address corruption. If it is not, its effectiveness will be severely, and potentially fatally, curtailed.

Introduction

Corruption bites at two main levels in the arms trade:

(i) by inflating the cost, or reducing the quality of the arms that nations need to buy to defend themselves. This undermines the promotion of “the establishment and maintenance of international peace and security with the least diversion for armaments of the world’s human and economic resources” (UN-Charter, Art. 26); and

(ii) by undermining the ability of States to control the diversion of weapons from their intended end-users either within the country or through exports across borders.¹

¹ Corruption is one if not *the* main driving force and facilitator leading to diversion, which can undermine all other parameters essential for a strong ATT: e.g. denying exports to conflict regions, not arming suppressive regimes that violate human rights, and ensuring sustainable development. Countries whose weapons have found to be diverted include amongst others the

A number of recent examples are summarised in **Annex A**.

A robust ATT will need to:

- (1) encourage nations to put in place measures to tackle corruption along the entire line of transfer (from suppliers, brokers, other intermediaries, to the end-users);
- (2) recognise that corruption within the licit arms transfer leads to diversion of vital financial resources;
- (3) address corruption leading to the diversion and leakage of arms; and
- (4) encourage improvements in current standards of transfer licensing, broker registration, end-use and end-user certification, as well as transparency measures and reporting obligations.

States want anti-corruption measures to be included in the ATT

In their submissions to the Open-ended Working Group, many states explicitly recognised the need for a strong anti-corruption mechanism in a robust ATT.

Among those pushing for “corrupt practices” as a transfer criterion are Bosnia and Herzegovina, Burkina-Faso, Chile, Côte d’Ivoire, Iceland, Japan, Liberia, Mali, the Netherlands, Niger, Norway, Spain, Sweden, Togo, and Zambia. Bangladesh has proposed that transfers should not be authorised if they “involve corrupt practices at any stage – from the supplier, through any middlemen/broker, to the recipient.” The UK stated that it should be a key goal that “in the conduct of the arms trade States subscribe to the highest standards of good governance, including the need to tackle bribery and corruption”. France suggests a clause on “combating the bribery of foreign public officials in the context of international commercial transactions, a clause which forms the subject matter of several existing instruments.”

Existing international arms treaties with anti-corruption provisions

As a first step, the ATT needs to recognise and build upon the very wide range of voluntary and regional anti-corruption commitments made by States in existing international and regional arms trade instruments.

These include, for example:

- the legally binding ECOWAS (Economic Community of West African States) Convention on SALW².

United States (in drug cartel killings in Mexico, crimes in Brazil after the weapons had been diverted from Paraguay, as well as conflicts in Iraq and Afghanistan), China, Egypt, Russia, Serbia, Ukraine, Fiji, the Solomon Islands, and Papua New Guinea but also EU member states such as Bulgaria and both Belgium and Germany, the latter two lobbying actively for a robust ATT. Russia views counter-efforts to diversion as its “primary goal”, pointing out in their official statement that the “risk of diversion to illegal traffic is relevant at every stage of the circulation”.

² The ECOWAS Convention on SALW is a legally binding regional instrument applying to Benin, Burkina Faso, Cape Verde, Côte d’Ivoire, Gambia, Ghana, Guinea-Bissau, Liberia, Mali, Nigeria, Sierra Leone, Senegal, and Togo. It incorporates corruption prevention measures “at any stage –

the legally binding Nairobi Protocol;

the politically binding UN Disarmament Commission Guidelines on Arms Transfers;

the politically binding OSCE Document on SALW (Small Arms and Light Weapons); and

the UNDP Guide to SALW Legislation³.

Criteria to enhance transparency

The ATT is expected to define a set of criteria that nations will commit to take into account before approving the export of arms. These criteria will have two key features:

(i) they will be risk based. They will require nations to consider the risk of a consequence (e.g. contributing to regional conflict, or being used for internal repression) before deciding whether or not to approve an export;

(ii) they will require judgement. It is in the nature of these considerations that it will rarely be the case that a nation can conclude that there is certainty, either of a particular consequence or of the absence of the risk of a certain consequence. So these criteria cannot be applied as a “gateway”. Export authorities will need to reach a view on the extent of any risk before approving or disapproving an export.

The assessment of these two cross-cutting risks is fundamental to the effective operation of an ATT and to the effective control of individual arms exports. The first is the risk of diversion. Nations need to assure themselves that the arms they are exporting will be controlled by the end-users to which they are destined. Assessing the risk of diversion must be fundamental to the operation of any risk-based criterion assessment.

Second, nations must consider the risk of corruption, and the measures in place in importing countries to control corruption. Corruption has the potential to completely undermine any parallel judgements made about the risk of certain consequences and/or the risk of diversion. Assessing the risk of corruption undermining the control of the relevant exports must equally be fundamental to the operation of any risk-based criterion.

from the supplier, through any middlemen or brokers, to the recipient”. It also focuses on diversion. The request for exemption for an arms transfer is transmitted for examination to the ECOWAS Secretariat and must contain information on details of the arms; details of the supplier; details of the supply process; details of the final end user; and details of the end-use.

³ The UNDP Guide was created to assist national authorities in developing an effective comprehensive legal framework to regulate manufacturing, possession, transfer, and tracing of SALW. It suggests that export authorities be required to examine “likely involvement in corrupt practices at any stage, with the supplier, brokers, intermediaries or the recipient”, thus targeting diversion, transparency, and corruption at all stages.

It is against this background that Transparency International believes that any effective ATT must include:

- (a) a requirement to assess the risk of diversion undermining the expected control of any exported arms; and
- (b) a requirement to assess the risk of corruption undermining the expected control of any exported arms.

These judgements will need to be made by the export authorities of countries individually and they will need to be made on a case by case basis, in the light of the arms to be exported, the end-users to which they are being sent, and the relevant controls within the country/ies within which the end-users are based.

Where transparency matters (most)

The ATT must provide a means not only to encourage nations to strengthen their arms controls, but also for nations to hold each other to account for the exercise of the judgement implicit in the criteria in the Treaty. Transparency is fundamental to this.

To that end, it will be essential for the ATT to require nations:

- (1) to report regularly on the *exports and re-exports* they license. This will enable the public and importing countries to know which commodity has been approved for transfer where and when;
- (2) to report regularly on their *control processes*, so that the public and exporting countries can take a view on the extent to which those processes give confidence that the exported arms will be used only for the purposes for which they were exported;
- (3) States are responsible for ensuring that the exports they license are used for the purposes for which they were exported. Exporting countries should be required to report regularly on the steps they take to monitor end uses and on the results of their *monitoring*. This will in turn help other nations to establish the risk involved in transferring arms in subsequent exports.

Factoring in corruption

The ATT will need to create a set of expected standards which states will use to assess specific transfers on a case by case basis. It is not realistic to expect the overall corruption performance of certain nation states to be a pre-determinant of any judgement about the risk of exporting to those nations, although it may be one factor that exporting authorities should take into account in considering whether or not to approve an export. An index of corruption perception, such as that of the World Bank could be used as a proxy for corruption risk. Where an exporting country judges that the risk of corruption is likely to have a significant bearing on the effective management of the arms, once exported, it should carry out additional background checks on the recipient organisation or consider refusing the licence, or placing additional controls on the approval.

Which transparency measures should a robust ATT include?

In considering applications for the export of arms and coming to a view on the extent to which corruption risks undermining the control of an export, government licensing authorities should be required to take into account the following factors:

- whether the government of the importing or transfer entities is a signatory to the main anti-corruption conventions and protocols (UNCAC⁴, Nairobi protocol, etc);
- whether the importing and/or transfer countries have in place appropriate and effective controls to ensure that (a) arms go to the end-users for which they were intended and (b) that end-users are required to obtain approval before those arms are re-exported;
- whether the importing government makes publicly available (annually) information on the export and re-export licenses that they issue (what has been exported and to whom);
- whether the importing government makes publicly available (annually) information on entities that are found to have failed to comply with national export licensing requirements;
- whether the importing and/or transfer governments have in place adequate anti-corruption legislation and measures to enforce it;
- whether the importing and/or recipient entities have in place appropriate anti-corruption and compliance arrangements and measures to enforce them;
- whether the exporting entities have in place appropriate anti-corruption and compliance arrangements and measures to enforce them.
- Whether either the exporting or the importing government will rely on agents and/or intermediaries at any stage of the process.

Before issuing export licences, exporting governments should take account of the parameters above. The absence of them, or serious concerns about their effectiveness, should create a presumption against the issue of a licence.

If an end user is found to have failed to meet its obligations in the parameters above, the issuing government should also rescind any relevant export licences [i.e. stop any further exports to that entity] until such time as a further judgement has been reached on the extent to which the importing country/entity has put in place measures that are likely effectively to reduce the risk of corruption undermining the controls that are expected to be in place.

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⁴ If referring to and listing international obligations, we suggest the wording “including without limitations”. This means that States would not have the opportunity to argue that international obligations which are not mentioned are excluded. At the same time, including the UNCAC would only apply to those States that have ratified it. It has to be made very clear that this does by no means intend to ‘force’ the UNCAC on non-signatories.