



Anti-Corruption in a UN Arms Trade Treaty (ATT)

February/March 2011

*For further information, please contact Tobias Bock at
tobias.bock@transparency.org.uk*

Anti-Corruption in a UN Arms Trade Treaty (ATT)

Summary:

- there is a material risk that the stronger controls over arms exports that are expected to result from the Arms Trade Treaty will be undermined by corruption;
- the Treaty should recognise this by including a requirement on exporting states to consider the risk of corruption alongside the other factors they will take into account in deciding whether or not to approve individual arms exports;
- this requirement needs to be built into the Treaty at the level of parameters/criteria which will facilitate practical and uncomplicated implementation
- States are urged to seek appropriate language to achieve this. A draft is suggested.

1. Why a robust ATT needs a strong anti-corruption mechanism

Given the high levels of secrecy that surround many arms deals, the international arms trade is particularly corruption-prone. Corruption in the sector damages countries in two main ways. First, it inflates the cost and/or reduces the quantity or quality of the weapons which nations acquire to defend themselves. Second, corruption undermines the ability of states to control the diversion of weapons from their intended end-users.

A number of States have recognised the need for the ATT to address the issue of corruption.¹ Corruption has been included in the Chairman's Draft Paper under '7. Implementation and Application – f. Criminalisation of Violations by individuals/entities'. The Facilitator's Summary on Parameters mentions as a specific parameter the "Consideration of other issues such as the proliferation record and other patterns of behavior of the actors involved, the risk of corruption associated with the transfer, and the potential of transit of the arms through or to zones of conflict."

Many importing states are concerned that corruption wastes scarce resources or results in them securing less effective weapons than they need to defend themselves. Countries whose security is challenged by the unregulated import of illegal arms, often from uncontrolled neighbouring states, also have a strong interest in the ATT addressing the

¹ At the first and second back-to-back PrepCom in July 2010, states and international organisations that emphasised the importance of addressing corruption in an ATT included the European Union, Colombia, Costa Rica, India, France, Mexico, Morocco, South Africa, and Sweden. In their 2007 replies pursuant to paragraph 1 of General Assembly resolution 61/89, many states explicitly recognised the need for a strong anti-corruption mechanism in a robust ATT. The urgent need to tackle corruption and bribery in the ATT was emphasised by Bangladesh, Bosnia and Herzegovina, Burkina-Faso, Chile, Côte d'Ivoire, France, Iceland, Japan, Liberia, Mali, the Netherlands, Niger, Norway, Spain, Sweden, Togo, the UK, and Zambia.

question of corruption. And exporting countries, as well as the global defence industry that they support, have a strong incentive to ensure that corruption is addressed in the ATT. All have a reputation to defend which is undermined by corruption. Some have already put in place legislation to reduce the risk of corruption in the arms trade. This in many cases reflects the wide extra-territorial reach of the US Foreign Corrupt Practices Act (FCPA) and soon the UK Bribery Act.²

2. How corruption can best be addressed in an ATT

The aim of the ATT is to encourage States to exercise more effective control over the weapons under their jurisdiction. It has a particular focus on improving the way States exercise their authority in relation to arms exports or re-exports. It is expected that the Treaty will set out common principles for the control of transfers and provide a basis for transparent national standards and controls. States will be expected to assess specific arms transfers on a case by case basis against these principles, taking into account the nature of the end-users to which they are being sent and the relevant controls within the country/ies within which the end-users are based. States will hold each other to account, both bilaterally and internationally, for the application of the principles and the standards underpinning them.

The standards are expected to help improve national decision-making. They will not substitute for decisions at national level. The application of the standards will require the assessment of risks. And that assessment will require, case by case, judgements based on information sources which are as far as possible reliable, credible, and objective.

Consideration of the risk of corruption will fit very naturally alongside the consideration of risks in relation to a number of other parameters that are likely to be part of the Treaty. The vast majority of export licence applications will not raise corruption concerns. Addressing the risk of corruption will only require some additional scrutiny of a proportion of licences (see Box below). The additional work involved in such consideration will be minimal. Most of the information needed for such judgements will already be available within the export licensing process, although it may not currently be used to assess the risk of corruption. Much relevant information can be obtained from exporters. Where States have them, export risk assessment models should be capable of being adapted simply and easily to include the risk of corruption.

² **UK Bribery Act:** persons are liable for sections 1, 2 or 6 offences committed outside the UK if they have a 'close connection' with the UK. The 'failure to prevent bribery' offence applies to: (i) UK entities that conduct business in the UK or elsewhere; and (ii) any corporation, wherever formed, which carries on business or part of a business in the UK (section 7(5)). The **US Foreign Corrupt Practices Act** applies to violative acts by US issuers, domestic concerns and their agents and employees that occur wholly outside US territory, and to acts by US citizens or residents, wherever they occur.

Practical issues underpinning anti-corruption measures in an ATT^a

In considering the risk of corruption, government licensing authorities would be expected to take into account whether:

- the government of the importing or transfer entities has in place appropriate anti-corruption and compliance legislation together with arrangements and measures to enforce them (e.g. by being a signatory to the main anti-corruption conventions);
- 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;
- the importing and exporting government makes publicly available (annually) information on the export and re-export licenses that they have issued, consistent with the broader reporting requirements of the ATT;
- either the exporting or the importing entities will rely on agents or intermediaries at any stage
- the price is reasonable, the end-user is a well known entity that has bought similar items before, and the goods exported are appropriate for the declared end-use.

To support these considerations, States could require companies as part of the licensing process to identify commissions paid to anyone who helps secure the sales of defence articles and services. Companies could then be required to identify those commissions as well as the person or entity receiving the commissions and the amounts paid in a statement. Companies could also be asked to obtain from purchasers a declaration of any commissions and fees paid.

a Proposals on these lines might be included in an implementation annex to the Treaty. Steps to help States introduce appropriate measures might be included in any Technical Assistance component of the Treaty. The development of good practice might be supported by a requirement for national reporting of measures and activities to support the Treaty, on the lines of that required under UNSCR 1540.

3. What are the options for including anti-corruption language in an ATT?

Given the wide range of ways in which corruption has the potential to undermine the intentions of the Treaty, corruption needs to be addressed through a stand-alone criterion, as mapped out in the Facilitator's summary on parameters from the First and Second back-to-back PrepCom.

It will need otherwise to be a part of a number of criteria, e.g.:

- (a) to be recognised as a major element in the diversion of arms to illicit markets; **and**

(b) to be recognised as a widespread contributor to the illegal use of transferred arms, including in the commission of organised crime; **and**

(c) to be recognised as a significant factor undermining sustainable economic and social development by, for example, increasing the costs of defence and thereby consuming sometimes very large volumes of resource that would more properly be devoted to development needs.

Including corruption only in guidelines or in an annex to the Treaty, none of which appears to be a certain part of the ATT at this point, would leave effectively unaddressed the potential for corruption to eat away at the very essence of the Treaty in which so many States are investing considerable effort and hope.

4. Possible draft text for anti-corruption language in an ATT

At minimum, the Treaty should include language on the lines that:

“A State Party shall not authorise a transfer of arms when there are substantial grounds for believing that there is a material risk of an arms transfer involving corrupt practices or corruption at any stage of the transfer.”

Weaker language than this would materially weaken the Treaty as a whole. This language explicitly preserves the principle that the Treaty will be based on national decisions about the transfer of arms case by case.

It is notable that this language is supportive of, and consistent with, a 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 SALW (Small Arms and Light Weapons).

the legally binding Nairobi Protocol;

the politically binding UN Disarmament Commission Guidelines on Arms Transfers;

the politically binding OSCE Document on SALW;

the EU User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment;³ and

the UNDP Guide to SALW Legislation.⁴

³ See the User Guide explanations on Criterion Two (“human rights”) and Seven (“risk of diversion”).

⁴ 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.