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Understanding the Role of U.S. Industry in the Arms Trade Treaty

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COVER: U.S. AIR FORCE (TOP); U.S. NAVY (BOTTOM LEFT);
FLICKER.COM/ DOD INSPECTOR GENERAL (BOTTOM RIGHT)



PHOTO: FLICKER.COM/ THE U.S. ARMY

INTRODUCTION

Adopted by the United Nations in 2013, the Arms Trade Treaty entered into force on 24 December 2014. The ATT is the first legally binding international agreement to regulate the global trade in conventional arms by establishing common international standards for countries to incorporate into their national transfer control systems. As of 1 July 2019, the ATT has 104 States Parties and an additional 33 signatories.

The ATT aims to stop the irresponsible and illegal transfer of conventional arms, which are often used to commit violations of human rights and international humanitarian law. The treaty promotes cooperation in the global arms trade by establishing clear elements for national control systems and facilitating transparency to build confidence among trading partners.

The U.S. Industry Working Group on the ATT was convened in Washington, D.C. in 2010 during the early phases of the treaty negotiations. This group includes the largest U.S. arms manufacturers/exporters and industry associations, as well as U.S. subsidiaries of foreign companies. The group no longer includes U.S. small arms industry associations or manufacturers due to their opposition to the ATT.

The U.S. Industry Working Group on the ATT aims to ensure that the treaty does not inadvertently harm the U.S. defense industry. U.S. laws and regulations already comprehensively control American weapons exports and imports in order to protect U.S. national security interests and keep weapons out of the hands of terrorists, human rights abusers, and other nefarious actors.¹ The group recognizes that, when implemented, the ATT encourages efficiency and predictability in arms transfer decision processes, which is of great importance to the defense industry and can help bring order to the conventional arms trade.

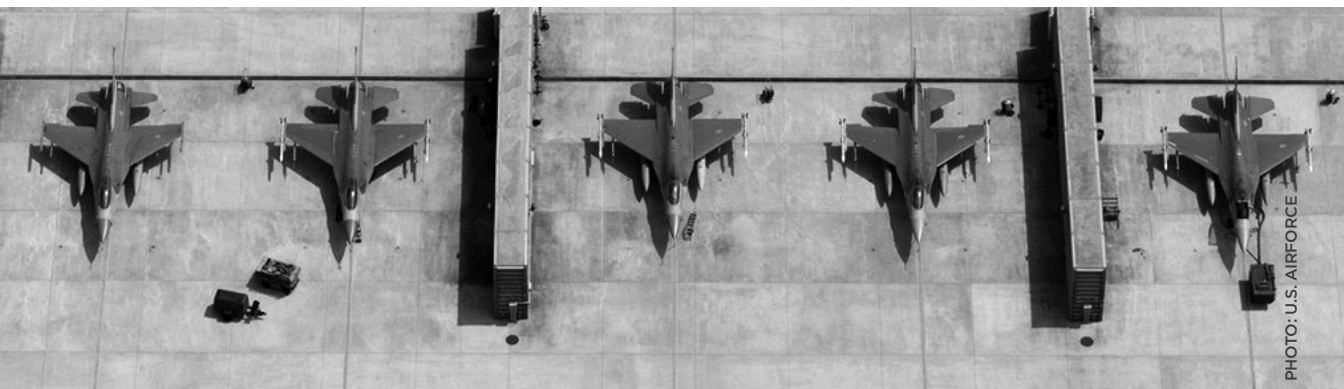
1 U.S. State Department, Directorate of Defense Trade Controls, "The International Traffic in Arms Regulations," https://www.pmddtc.state.gov/ddtc_public?id=ddtc_kb_article_page&sys_id=%2024d528fddbfc930044f9ff621f961987

ROLE OF INDUSTRY IN THE ATT

From the outset, industry recognizes and underscores that it is the responsibility of national governments to implement the ATT – an understanding that is fundamental in outlining industry’s role in the ATT process. Governments are responsible for developing national laws, regulations, processes and procedures to fulfill their ATT obligations. Governments share these processes with industry to ensure compliance with national laws, regulations, policies, and procedures; industry complies with these measures in order to comply with national regulations, not the ATT directly. Industry actors are not parties to the treaty, nor are they responsible for ATT implementation. However, industry does have a recognized role in supporting ATT implementation and can be a resource for better understanding the practicalities of the treaty’s provisions as well as for advocating for ATT universalization.

The U.S. defense industry’s involvement in the ATT negotiations helped ensure that the ATT reflected the realities of the global arms trade and did not undermine legitimate and legal business. There were several motivations for industry involvement in seeing the ATT successfully negotiated. First, when implemented effectively, the ATT helps level the playing field by requiring other countries to adopt standards similar to those that U.S. companies must follow. In short, the ATT provides a principled basis for the United States and its allies to challenge arms exports if they are inconsistent with the international norms laid out in the treaty.

The ATT also contributes to greater convergence of arms transfer laws and regulations around the world. The ATT establishes clear elements of a national control system and criteria for States to consider when making arms transfer decisions. Moreover, as the international arms trade continues to become increasingly globalized, industry relies on a diverse set of actors across the supply chain. Many of the most active members in that supply chain are ATT members, and thus it is important that States play by the same rules and operate by the same basic principles to ensure that items are not delayed due to differences in understandings of ATT obligations within the global supply chain.



Industry played a key role in the ATT negotiations, working to ensure there were no unintended consequences that would undermine the legitimate trade in conventional weapons or create additional costs or burdens for industry doing business in legal and responsible ways. In some cases, such guidance was practical – explaining to government representatives the shipping process and what paperwork is required to finalize an arms transfer from end to end. Similarly, industry experts explained the complexity of IT requirements for record keeping and highlighted the steps necessary to modify a database system to house records for 20 years, as opposed to the U.S. practice of nine or ten years.

Throughout the negotiations and since the adoption of the treaty, industry has expressed several motivations for seeing the ATT implemented effectively. Among these motivations are that:

- ▶ **Convergence can make it easier for industry to achieve concurrent compliance with the various national systems that may apply to a given transaction.**

The ATT can promote convergence amongst defense trade control systems, which provides significant benefits to the defense industry. Such convergence can make it easier for industry to comply with the various national systems that may apply to a given transaction. The defense industry is not national in nature. It relies on a global supply chain to manufacture, develop, and transfer goods. Yet different regulations in each country can make it difficult and expensive for industry to conduct business. The increasing globalization of the defense industry means that it would benefit if international standards were harmonized within realistic limits that do not require any government to reduce its desired level of control.

- ▶ **The ATT can help clarify the obligations and responsibilities of industry around the world.**

The ATT can help clarify the obligations and responsibilities of industry around the world, and thereby allow industry and governments to validate the extension of the global supply chain. For instance, the ATT could promote stronger governmental and industry controls among industry, facilitating cooperation with companies worldwide and ensuring compliance with treaty obligations and multi-national regulatory regimes.

- ▶ **The ATT levels the playing field.**

Defense industry generally seeks to achieve international sales through cooperative arrangements supported by exporting governments that seek to develop bilateral defense relationships that are consistent with regional and international stability. It is not in the national security interests of States or of responsible exporters to see other exporters, through irresponsible transfers, promote instability and disrupt long-term relationships. With clearly defined rules, all exporters operate under a broadly similar framework.

► **Adherence to the ATT reduces reputational risk.**

Reputational risk is a significant driver for industry in making its business decisions and deciding what to transfer and to whom. Many companies now find themselves regularly receiving questionnaires from bodies representing investors, specifically to review risk and corporate responsibility. Some of these questionnaires now include specific reference to promoting responsible trade and involvement in measures to mitigate the potential for inappropriate transfers.

External criticism may also arise concerning the desirability of a transfer that could be seen to perpetuate potential human rights abuses, facilitate organized crime, violence, or terrorism, or divert resources from other crucial development needs. For example, the recent court case in the United Kingdom, where questions have been raised about the legality of certain U.K. government national arms transfer decisions, may weigh heavily on the minds of industry as they consider future license applications.²

The ATT provides a framework for arms transfers that could insulate defense trade from these concerns to some degree. The ATT is based on the moral arguments of human security, social and economic development, and international peace and security. All of these are compatible with good business practice.

Under the ATT, governments have clearly delineated criteria about whether or not arms sales should go forward after having considered many factors. The fact that governments and national regulatory bodies will have explicitly considered such factors against internationally agreed upon standards can provide some protection for industry against accusations of irresponsible behavior.



PHOTO: U.S. MARINES

2 The Queen (on the application of the Campaign Against the Arms Trade) v Secretary of State for International Trade, 2019 EWCA Civ 1020, United Kingdom, <https://www.judiciary.uk/wp-content/uploads/2019/06/R-CAAT-v-SSIT-Press-Summary-v3.pdf>

TRANSPARENCY, RECORD KEEPING, AND REPORTING

Transparency is a central aim of the ATT. Transparency allows governments to identify potentially destabilizing arms transfers and to build confidence in their legal transactions with trusted partners. In broad terms, industry supports the idea of transparency in the global arms trade. ATT reporting is in line with industry's support of transparency in the arms trade, most of which is long-established at the international level under the UN Register of Conventional Arms and multilateral regime reporting such as under the Wassenaar Arrangement. As such, industry can support national governments in fulfilling their reporting obligations through existing processes and practices. But it is important to remember that it is incumbent on governments to submit their national reports, not industry.

Record keeping by exporting and importing companies can assist States in collecting and reporting data on actual and authorized exports and imports. However, since the treaty negotiations, U.S. industry has been clear that the ATT should not create additional reporting obligations or burdens for industry. States must develop national processes for compiling and submitting their reports and inform industry of the requirements to comply with regulatory and legal requirements at the national level.

Reporting should reflect actual national practices and not try to create new responsibilities and obligations. For example, in the United States, information on imports can only include what is currently kept electronically and easily reportable by U.S. Customs under U.S. law.

Although States are responsible for submitting and compiling reports, industry can and does provide information, upon request, to national agencies to supplement nationally collected information that can then be submitted. Record keeping requirements are also a common feature of complying with national export license conditions. Industry has vast experience, therefore, with record keeping and can provide advice and counsel on ways in which information can be stored, collated, and accessed.

Industry is keen to protect proprietary information and not be required to provide information that can undermine legitimate trade practices. For some, there is concern about how others may use this information and whether such information may interfere with current export/import arrangements if other governments use the information for their own competitive advantage. For example, many authorizations or temporary exports could give insight into future business deals, mergers, acquisitions, and divestitures.

Companies maintain records in a variety of ways. Often, these records can be as simple as an excel spreadsheet or multiple excel spreadsheets separated by authorization, or this can be through complex Enterprise Resource Planning Software (ERP) that require expensive and complex set-up. Thus, industry needs clear advice from States as to what is



required for reporting. Authorizations, for example, can be challenging for industry to report, as authorizations may not be fulfilled and may have been obtained for marketing purposes. Moreover, some exports of defense articles are done temporarily for trade shows and would not be included in any annual reporting requirement under the ATT but may have national reporting obligations.

Moreover, bureaucratic policies may make reporting and record keeping challenging in various States. Even within a given State, rules for maintaining data may differ across relevant institutions depending on the time of transfer and the agencies involved. In the United States for example, different processes guide data collection and publication for commercial arms exports, government-to-government sales, and transfers that fall under the regulations of the U.S. Department of Commerce. For government-to-government sales, industry may not be the crucial record keeper. But for commercial sales, industry must have a license from the government for any export of a defense article or service under the direct commercial sales program. The government then collects data at the border on articles being exported (and matches this information against licenses). One key challenge is that the data is never put together in a cohesive fashion and often U.S. government data is not stored in an organized manner that is easily accessible or usable by those compiling transfer reports. Thus, industry is often called upon to provide checks to commercial transfers.

Although compliance with the ATT occurs at a national level, U.S. industry has expressed concern about what liability may be created for companies if record keeping is not maintained as required under the treaty. Who is responsible if there have not been changes to national laws/regulations requiring a change in practice by industry?

CONCLUSION

In April 2019, during a speech at the annual meeting of the National Rifle Association, President Trump announced that the United States would “unsign” the ATT.³ The United States signed the treaty in September 2013 but has never ratified it. Although there was significant attention to the announcement in diplomatic circles, and the decision was widely criticized as a mistake for undermining the United States’ role in multilateral diplomacy, scant attention was given to the impact of the decision on the U.S. arms industry.

The Trump administration’s decision could potentially harm U.S. defense industry, as it leaves industry isolated from U.S. allies and undermines the United States’ ability to advocate for and secure its own interests in an important multilateral forum. In indicating its intent to walk away from the ATT, the United States is effectively abdicating a leadership role in influencing processes aimed at ensuring greater responsibility in the global arms trade and choosing not to participate in a unique forum to share good practices and encourage other governments to follow the U.S. example. As the world’s largest arms exporter, the United States would be well served to ensure that treaty interpretation and implementation are consistent with U.S. policy and practice, as U.S. industry strongly advocated during the treaty negotiations.



PHOTO: NORFOLK SOUTHERN

3 Donald Trump, “Remarks by President Trump at the NRA-ILA Leadership Forum” (Indianapolis, Indiana, April 26, 2019), White House, <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-nra-ila-leadership-forum-indianapolis/>

The defense industry's involvement in the ATT process is essential to avoid potential consequences subjecting transactions to multiple, inconsistent export control regimes. If industry engages more directly in the ATT process, it could avoid unintended consequences for the legitimate arms trade.

Global commerce benefits from equal treatment and clearly understood rules of the game, and the defense industry is no exception. Industry involvement in the ATT process will ensure that such a framework for the global trade in conventional arms occurs.

In short, industry is an implementer of national practice, which often reflects international obligations. Industry needs to be kept up to date if these processes change and will provide information and data upon request. Defense companies have expertise on their own internal compliance mechanisms, but their primary role is in complying with national provisions and streamlining national obligations.

PHOTO: FLICKER.COM/GONZALO ALONSO



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