

The Evolution of Arms Control Instruments and the Potential of the Arms Trade Treaty

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Abstract

Although the *Arms Trade Treaty* (*ATT*) has the potential to create an effective international legal framework for controlling the international arms trade, much depends on the subsequent development of its legal framework. This article therefore analyzes how the *ATT*, as a multilateral arms control treaty, can develop its own legal framework in accordance with international law and what role the organs established by it can play in that process. It will be shown that in its current form the *ATT* has significant shortcomings that may prevent it from achieving this goal, but there certainly is room for the lawful development of its norms, which will depend on amassing political will and the establishment of practice.

A. Introduction

This article analyzes the potential of the *Arms Trade Treaty* (*ATT*) to establish a strong international regime for the control of conventional weapons transfers in accordance with the applicable rules of international law.¹ The possession of conventional armaments is generally not in contravention of the rules of international law.² Conventional weapons and strategic items are inherently *dual-use*, which means that they can be obtained and used for legitimate purposes such as national self-defense, contributing to UN missions, policing, or private purposes such as hunting, as well as for committing violations of national and international laws. Surpluses of conventional weaponry have a tendency to prolong or stimulate conflict; war or civil unrest can, in fact, stimulate arms sales. The availability of arms is a necessary precondition for the commission of crimes, war crimes, human rights violations, or acts of terrorism.³ The global arms trade mirrors this dual nature, consisting of legitimate transactions between

¹ UNTC, *Arms Trade Treaty*, 2 April 2013, available at https://treaties.un.org/doc/Treaties/2013/04/20130410%2012-01%20PM/Ch_XXVI_08.pdf (last visited 4 Oktober 2016).

² As opposed to Weapons of Mass Destruction (WMD), which are generally banned by treaty. Exceptions are weapons covered by instruments such as the Certain Conventional Weapons (CCW), mine-ban and cluster conventions.

³ See e.g., United Nations Office for Disarmament Affairs, *United Nations Coordinating Action on Small Arms: The Impact of Poorly Regulated Arms Transfers on the Work of the United Nations*, UNODA Occasional Papers No.23, March 2013; R. Stohl & S. Grillot, *The International Arms Trade, War and Conflict in the Modern World Series* (2009); Z. Yihdego, *The Arms Trade and International Law* (2007).

States and/or non-State actors alongside illegal, black market trade; in between these two, a large grey area exists.⁴

The *ATT* essentially tries to increase control over the global arms trade in order to contain the illicit side thereof. Its preamble reflects the dual-use nature of conventional weapons by 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 [...]”

while at the same time mentioning “legitimate trade”, “lawful ownership”, and the “use of certain conventional arms for recreational, cultural, historical, and sporting activities”. Attempts to control the trade in conventional weapons are not new – the *ATT* builds on existing instruments such as the UN Register of Conventional Arms (UNROCA), the UN Program of Action on Small Arms, and various UN resolutions and reports.⁵ The treaty was negotiated at two special conferences in 2012 and 2013; after Iran, the Democratic People’s Republic of Korea and Syria blocked consensus on the final text, it was submitted to and endorsed by the UN General Assembly.⁶ The *ATT* was opened for signature shortly thereafter, and entered into force in December 2014 upon its fiftieth ratification.⁷

⁴ A. Feinstein, *The Shadow World: Inside the Global Arms Trade* (2011); Z. Yihdego, ‘The UN Arms Trade Treaty Negotiations: A Battle Between Codifying Frail and Robust Legal Principles’, *Arms Control Law – A Blog* (7 July 2012), available at <http://armscontrollaw.com/2012/07/07/the-un-arms-trade-treaty-negotiations-a-battle-between-codifying-frail-and-robust-legal-principles/> (last visited 27 April 2016).

⁵ *General and complete disarmament – Transparency in armaments*, UN Doc A/RES/46/36 L, 6 December 1991; *Report of the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects*, UN Doc A/CONF.192/15, 2001; *Towards an Arms trade treaty*, UN Doc A/RES/61/89, 18 December 2006; *Report of the Secretary General: The illicit trade in small arms and light weapons in all its aspects*, UN Doc A/68/171, 22 July 2013.

⁶ UNGA Resolution, *The Arms Trade Treaty*, UN Doc A/RES/67/234 B, 11 June 2013; see for comments of the *ATT* negotiations M. Bromley, N. Cooper & P. Holtom, ‘The UN Arms Trade Treaty: Arms Export Controls, the Human Security Agenda and the Lessons of History’, 88 *International Affairs* (2012) 5, 1029; M. Brandes, “‘All’s Well That Ends Well’ or ‘Much Ado About Nothing’?: A Commentary on the Arms Trade Treaty”, 5 *Goettingen Journal of International Law* (2013) 2, 399.

⁷ UNTC, *Arms Trade Treaty – entry into force*, available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&cmdsg_no=XXVI-8&chapter=26&clang=_en (last

According to its text the *ATT* aims to establish standards for regulating the trade in conventional arms, as well as to prevent illicit trade in and diversion of such weapons.⁸ Article 2(1) *ATT* lists the types of arms the treaty applies to: tanks, armored vehicles, artillery systems, aircraft, helicopters, warships, missiles, missile launchers, and small arms and light weapons (SALW). In addition, Articles 3 and 4 *ATT* expand the scope of the treaty to include munitions and ammunition for these weapons, as well as parts and components thereof, when these are exported in a form that provides the capability to assemble them. Member States are obliged to establish a national control system to regulate the export of such items. In addition, they must regulate the import, transit, transshipment and brokering of the armaments listed in Article 2(1).⁹ The *ATT* prohibits transfers of weapons, ammunition or components in contravention of UN Security Council resolutions or any other binding international obligations; States are furthermore banned from authorizing transfers if they have knowledge that the items in question will 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 [...]”¹⁰

If none of these situations apply, member States are still obliged to assess the possible consequences of any export of convention weapons, ammunition or components in terms of its impact on peace and security, or its potential to facilitate violations of humanitarian law, human rights law, acts of terrorism, or acts related to transnational organized crime.¹¹ *ATT* member States are furthermore obliged to take measures to prevent the diversion of arms, to keep records of transfers; they are encouraged to share these reports, as well as to cooperate to further the prevention of illicit trade in convention weapons. These latter provisions, however, only apply to arms covered in Article 2(1) *ATT*, not to ammunitions or components.

The *ATT* has established a Secretariat in order to “assist State Parties in the effective implementation” of the treaty.¹² It shall be responsible to the

visited 4 October 2016).

⁸ Article 1 *ATT*.

⁹ Articles 8-10 *ATT*.

¹⁰ Article 6(3) *ATT*.

¹¹ Article 7 *ATT*.

¹² Article 18 *ATT*.

member States and undertake, “within a minimized structure”, the following responsibilities:

- Receiving, making available and distributing reports required by the *ATT*;
- Maintaining the list of national points of contact and making it available to member States; and
- Facilitating the matching of requests for, and offers of, assistance and promoting international cooperation on request.¹³

In addition, the Secretariat has convened a Conference of States Parties (CSP), which is tasked to:

- Review the implementation of the *ATT*, including developments in the field of conventional arms;
- Consider and adopt recommendations regarding the implementation and operation of the *ATT*, in particular the promotion of its universality;
- Consider amendments to the *ATT*;
- Consider issues arising from its interpretation;
- Consider and decide the tasks and budget of the Secretariat; and
- Consider the establishment of any subsidiary bodies as may be necessary to improve the functioning of this Treaty; and
- Perform any other function consistent with the *ATT*.¹⁴

The CSP has focused mainly on procedural and institutional issues, establishing the seat of the Secretariat, discussing reporting issues, and adopting its rules of procedure. It shall henceforth convene at its own discretion; its next meeting is in 2016.¹⁵ The *ATT* emphasizes that the Secretariat shall perform the duties the CSP decides upon as well as facilitate its work.¹⁶

The *ATT* is expected to contribute to the establishment of the highest possible international standard for the regulation of the international arms trade.¹⁷ It has a role in raising attention and awareness; an increase in oversight

¹³ Article 18(3) *ATT*.

¹⁴ Article 17 *ATT*.

¹⁵ *Ibid.*; see also Arms Trade Treaty First Conference of State Parties, *Draft Final Report*, ATT/CSP1/2015/..., 27 August 2015, para. 40.

¹⁶ Article 18 *ATT*.

¹⁷ Article 1 *ATT*; Yihdego, *supra* note 4; Bromley, Cooper & Holtom, *supra* note 6; J. Morely, ‘Arms Survey Highlights ATT Challenge’, *Arms Control Association* (2 July

over the arms trade through the *ATT*'s provisions increasing transparency may further help control it by "creating an environment of accountability" for weapons transfers.¹⁸ International standards may furthermore be improved by making them more objective. Some have pointed, in this context, at the connection that the *ATT* establishes between the arms trade and human rights law, international criminal law or international humanitarian principles.¹⁹ States may be able to use such norms, featured in the provisions of the *ATT*, to increase political and diplomatic pressure on those States they consider to be acting in contravention of the principles of the treaty.²⁰ On the other hand, the *ATT* is regarded by many as an incomplete treaty: its scope is limited at certain points, and its provisions are unclear or undefined on many points, including qualifications or large margins of appreciation for States that may be used as loopholes to circumvent scrutiny of arms transfers. Much depends on the powers of the CSPs and the Secretariat to review and supervise the *ATT*. While some have indicated the importance of an institutional framework for the development of an effective conventional arms trade regime arguing that the "[...] establishment of dedicated bureaucracy with powers to monitor, interpret and implement an *ATT* will be key to an effective agreement [...]" or commending the *ATT* for providing a dispute settlement mechanism and creating a multilateral forum to discuss arms trade issues, others have pointed out the limits of the mandate of the Secretariat as *very minimal*, stressing that it will not be a *new UN bureaucracy*.²¹ Neither the Secretariat nor the CSP have international legal personality.

2014), available at https://www.armscontrol.org/act/2014_0708/Newsbriefs/Arms-Survey-Highlights-ATT-Challenge (last visited 29 April 2016); *Political Declaration Delivered by Mexico on behalf of 98 States – Adoption of the ATT by the General Assembly*, 2 April 2013 [ATT Adoption/Declaration by Mexico], available at https://mision2.sre.gob.mx/onu/images/disc_att_2abril13.pdf (last visited 20 June 2016).

¹⁸ Comments by R. Stohl during the Arms Control Association Briefing for Reporters, in 'Transcript – The Arms Trade Treaty: Just the Facts' (2013), available at <http://www.armscontrol.org/events/The-Arms-Trade-Treaty-Just-the-Facts#transcript> (last visited 29 April 2016) [Transcript].

¹⁹ See e.g., Bromley, Cooper & Holtom, *supra* note 6, 1035; comments made by A. Akwei during the *Arms Trade Treaty: Just the Facts* briefing, in 'Transcript', *supra* note 18.

²⁰ 'Comments made by T. Countryman during the *Arms Trade Treaty: Just the Facts* briefing', in 'Transcript', *supra* note 18.

²¹ C. Carneiro, 'From the United Nations Arms Register to an Arms Trade Treaty – What Role for Delegation and Flexibility?', 14 *ILSA Journal of International and Comparative Law* (2007) 2, 477, 494; 'comments by R. Stohl and D.G. Kimball during the *Arms Trade Treaty: Just the Facts* briefing', in 'Transcript', *supra* note 18; P. Holtom & M. Bromley, 'Implementing an Arms Trade Treaty: Mapping Assistance to Strengthen Arms Transfer Controls', *SIPRI Insights on Peace and Security* (2012) 2, 1 [Holtom & Bromley,

Thus, although the *ATT* has the potential to create an effective international legal framework for controlling the international arms trade, much depends on the subsequent development of its legal framework. This article therefore analyzes how the *ATT*, as a multilateral arms control treaty, can develop its own legal framework in accordance with international law and what role the organs established by it can play in that process. To this end, the following section analyzes the characteristics and dynamics of the law of arms control, evaluating how such influences have shaped the *ATT*. Section three discusses the potential role of the *ATT* CSP in developing the treaty by way of its progressive interpretation in light of international treaty law and the experience of the review mechanisms of the *Nuclear Non-Proliferation Treaty (NPT)* and the *Biological Weapons Convention (BWC)* in this area. Section four assesses the potential role, in this context, of the future *ATT* Secretariat and its supervisory mandate.

B. The *ATT* as an Arms Control Instrument

The *ATT* is part of the international law of arms control, an area of public international law with its own characteristics and features.²² It is a special legal regime of

“rules on a limited problem together with the rules for the creation, interpretation, application, modification, or termination – in a word, administration – of those rules”,

Implementing an Arms Trade treaty]; comments by States parties to the *ATT* CSP Preparatory Committee in Berlin at 27-28 November 2014, as reflected by the report by G. Irsten, *CSP preparatory committee: Berlin*, available at <http://www.reachingcriticalwill.org/disarmament-fora/att/csp-prep/berlin> (last visited 29 April 2016).

²² Different terms are used by different authors to refer to parts of this field of law; see in general, E.P.J. Myjer & G. Den Dekker, ‘Wapenbeheersingsrecht’, in N. Horbach, R. Lefeber and O. Ribbelink (eds), *Handboek Internationaal Recht* (2007); E.P.J. Myjer (ed.), *Issues of Arms Control Law and the Chemical Weapons Convention* (2001) [Myjer, Issues of Arms Control]; G. Den Dekker, *The Law of Arms Control, International Supervision and Enforcement*, (2001)[Law of Arms Control]; D.H. Joyner (ed.), *Arms Control Law* (2012); J. Dahlitz (ed.), *Future Legal Restraints on Arms Proliferation*(Vol.III) (1996); J. Kolasa, *Disarmament and Arms Control Agreements: A Study on Procedural and Institutional Law* (1996); J. Dahlitz & D. Dicke (eds), *The International Law of Arms Control and Disarmament – Vol I Arms Control and Disarmament Law* (1991).

including rules for determining the consequences of a breach of substantive rules.²³ In other words, the implementation and development of the *ATT* will be affected by specific arms-control related dynamics.²⁴

The history of arms control law indicates that the goals of arms control instruments traditionally relate to minimizing human suffering in conflicts and enhancing peace and security.²⁵ Or, in the words of the US Arms Control and Disarmament Agency, it is an effort “to reduce the likelihood of war and to limit the effects if it occurs”.²⁶ The preamble and Article 1 of the *ATT* confirm the presence of both a humanitarian and a security-related purpose of the treaty. Under *principles*, it refers to the right of self-defense of States under Article 51 of the *UN Charter*, the peaceful settlement of disputes, the prohibition on the threat or use of force, as well as to the *Geneva Conventions of 1949* and human rights; Article 1 *ATT* establishes that the purpose of the treaty is to contribute to international and regional peace, security and stability, to reduce human suffering, and to build confidence between States.

Observers have emphasized the humanitarian or human rights dimension of the *ATT*, arguing that the treaty centralizes human rights or that human security constitutes its foundation.²⁷ Indeed, these occupy a significant

²³ *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission*, UN Doc A/CN.4/L.682, 13 April 2006, 81; there is an ongoing discussion on whether rules on creation, interpretation, application, etc. should also be considered as secondary rules of a regime, see e.g. D.H. Joyner & M. Roscini (eds), *Non-Proliferation Law as a Special Regime* (2012); B. Simma and D. Pulkowski, ‘Of Planets and the Universe: Self-contained Regimes in International Law’, 17 *European Journal of International Law* (2006) 3, 483.

²⁴ This does not mean that general rules of public international law – in the context of this article mainly consisting of treaty interpretation rules in the *Vienna Convention on the Law of Treaties (VCLT)* – do not apply, see therefore e.g. A. Lindroos & M. Mehling, ‘Dispelling the Chimera of ‘Self-Contained Regimes’ International Law and the WTO’, 16 *European Journal of International Law* (2013) 5, 857, 875.

²⁵ See W.H. Boothby, *Weapons and the Law of Armed Conflict* (2009); see also for a short history of arms control, J. Goldblat, *Arms Control: A Guide to Negotiations and Agreements* (1994); G. Lysén, *The International Regulation of Armaments: The Law of Disarmament* (1990).

²⁶ Arms Control and Disarmament Agency, *Arms Control and National Security* (1968), 3.

²⁷ PAX, ‘Mensenrechten staan centraal in historisch Wapenhandelverdrag’, *PAX* (2 April 2013), available at <http://www.paxvoorvrede.nl/actueel/nieuwsberichten/mensenrechten-staan-centraal-in-historisch-wapenhandelverdrag> (last visited 29 April 2016); comments by A. Akwei during the *Arms Trade Treaty: Just the Facts* briefing, in ‘Transcript’, *supra* note 18; Bromley, Cooper & Holtom, *supra* note 6.

position in the *ATT*, especially when comparing it to arms control instruments such as the *Treaty on Conventional Armed Forces in Europe Treaty (CFE)*²⁸ or other bilateral Cold War arrangements. While the latter heavily rely on concepts of international security and (military) stability, Articles 6 and 7 *ATT* explicitly make arms transfers subject to considerations related to international criminal law, human rights law and humanitarian law. On the other hand, it has been pointed out that nearly every provision in the *ATT* is “part and parcel of peace and security”.²⁹ A lead US negotiator on the *ATT* has emphasized the peace-and-security related elements of the treaty, referring to preventing transfers of *undesirable actors* – which were primarily taken to be more *classical* security-related threats such as States, criminal organizations, and terrorists.³⁰ The text of the *ATT* itself also appears to position aspects related to peace and security at a slightly more prominent place than those related to humanitarian or human rights considerations. The preamble is an example of this. So are also Articles 6 and 7, which reserve their strongest provisions for the prohibition to violate UN SC-based embargoes or other, existing international agreements – as opposed to the undefined qualification that States must have *knowledge* of the fact that an arms transfer will lead to violations of human rights or humanitarian law.³¹ Thus, the *ATT* has multiple purposes, which is not uncommon for arms control instruments. They should not be regarded as completely independent goals. Rather, one is subservient to the other. As one commentary concludes, instead of a bottom-up, NGO-dominated instrument based on human security, the *ATT* is the result of an agenda produced from below but accommodated within its security environment.³² The negotiations eventually saw a pushback against the influence of human security and a reassertion of the primacy of security and State sovereignty.³³

The connection between law and national, regional, and international security is extremely strong in the field of arms control law. The reason for this is that States, under international law, are not under any obligations to limit the level or types of armaments they possess unless they are bound by a rule of arms

²⁸ OSCE, *Treaty on Conventional Armed Forces in Europe*, 19 November 1990, available at <http://www.osce.org/library/14087?download=true> (last visited 13 July 2016).

²⁹ Yihdego, *supra* note 4.

³⁰ Comments made by T. Countryman during the *Arms Trade Treaty: Just the Facts* briefing, ‘Transcript’, *supra* note 18.

³¹ Article 6(3) *ATT*.

³² Bromley, Cooper & Holtom, *supra* note 6.

³³ *Ibid.*

control law.³⁴ Such obligations, in turn, affect States' capacities to use force as a means of self-defense, individually or collectively or when asked to do so by the UN Security Council under Chapter VII of the *UN Charter* to prevent or address threats to peace and security, breaches thereof, or acts of aggression. This means that the law of arms control directly affects States' capability to defend their territorial sovereignty, to protect their wider interests, or to withstand other threats or forms of indirect coercion thereon.³⁵ As a result of this impact on national and international security arms control warrants predictability, stability and reciprocity; instruments are normally a confirmation of the political *status quo*, arranged between dominant States to codify a *de facto* political or military situation that is in their best interest.³⁶ Once a treaty has been concluded, the adherent States benefit from the predictability and stability that is created by the legal certainty of written norms. This need for legal certainty has also led to a strong tendency by States that are party to multilateral treaties to preserve that treaty-regime and, if possible, attempt to achieve universal membership.³⁷ On the other hand, States will attempt to preserve some political and legal flexibility under arms control instruments as they are generally unwilling to be constrained by too rigid treaty rules to take measures, if necessary, to protect vital interests. Political, military, technological or economic developments will normally outpace the development of international law, necessitating the need for flexibility in the context of arms control law.³⁸ Thus, arms control instruments necessarily combines elements of flexibility with legal certainty in order to be most effective.

³⁴ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports 1986, 14, 135, para. 269; see also *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226, 239, para. 21.

³⁵ On deterrence and concepts of security, see T.V. Paul, R.J. Harknett & J.J. Wirtz (eds), *The Absolute Weapon Revisited. Nuclear Arms and the Emerging International Order*, 4th ed. (2001); L. Freedman, *The Evolution of Nuclear Strategy*, 3rd edition (2003); E.P.J. Myjer, *Militaire Veiligheid door Afschrikking* (1980).

³⁶ K. Ipsen, 'Explicit Methods of Arms Control Treaty Evolution', in Dahlitz & Dicke (eds), *supra* note 22, 75.

³⁷ According to officials and observers, universalization and inclusivity were important topics at the CSP Preparatory Committee in Berlin at 27-28 November 2014; the desire of the *NPT* member States, for example, to achieve universal adherence to the treaty is reflected in its *Review Conference 2010 Final Document*, Review section, UN Doc NPT/CONF.2010/50 (Vol.I), 4 June 2010, 17-18.

³⁸ See e.g. T. Coppen, 'The Role and Rationale of the Nuclear Non-Proliferation Treaty in the Twenty-First Century', 7 *Romanian Journal on Society and Politics* (2012) 2, 95.

The element of legal certainty is reflected in the *ATT* in several ways, starting with its unlimited duration.³⁹ Second, the *ATT*'s object and purpose contribute to stability and transparency by regulating the arms trade through the creation of international standards.⁴⁰ Articles 6 and 7 provide more details on these standards, which are legally binding for every member State. This means that there is, in theory, no possibility for a *race to the bottom* amongst participating States in terms of making arms transfers conditional upon humanitarian, human rights or other considerations without violating the terms of the *ATT*. To stimulate implementation and increase transparency, thus reinforcing the standards of Articles 6 and 7, the *ATT* obliges member States to establish national control systems, make available their national control lists, and designate national points of contact for the exchange of information.⁴¹ It furthermore contains articles on record-keeping, reporting and international cooperation; the Secretariat is tasked with stimulating transparency and cooperation between States.⁴² Cooperation should not only lead to transparency but also to further harmonization of trade controls, thus contributing to enhancing legal certainty in multiple ways. The *ATT* has, moreover, emphasized achieving consensus both throughout the process of its negotiation and in its provisions on the CSP.⁴³ The rules of procedures for CSPs emphasize the importance of consensus, obliging States to “make every effort to achieve consensus on matters of substance”.⁴⁴ If this is not possible, there is an obligatory suspension of proceedings for 24 hours, only if after such a grace period consensus remains unattainable, the CSP can take decisions by two-thirds majority.⁴⁵ The importance of consensus ensures a large share of control of individual member States over these processes, thereby

³⁹ Article 24(1) *ATT*.

⁴⁰ Article 1 *ATT*.

⁴¹ Article 5 *ATT*.

⁴² See Articles 12, 13, 15, 16, 18 *ATT*.

⁴³ Comments by P. Holtom & M. Bromly, ‘Commentary – Looking back to ensure future progress: developing and improving multilateral instruments to control arms transfers and prevent illicit trafficking’ (19 June 2014), *Stockholm International Peace Research Institute* (SIPRI), available at <http://www.sipri.org/media/newsletter/essay/june-12> (last visited 15 December 2014); Brandes, *supra* note 6, 409.

⁴⁴ Rule 33, *Rules of Procedure of the Conference of States Parties of the Arms Trade Treaty Facilitator’s Report*, ATT/CSP1/2015/WP.1, 24 August 2015.

⁴⁵ *Ibid.*, the rules resemble, in terms of decision-making, those of the *NPT* Review Conferences with voting as a last resort if consensus cannot be reached, see Irsten, *supra* note 21. In practice, however, the *NPT* Review Conferences never saw such a vote; if no consensus could be reached, no outcome document was adopted.

increasing legal certainty, which in turn will help to maximize the number of future member States.

This process also illustrates the challenge of combining legal certainty with flexibility. This paradox is based on the fact that in order to convince as many States as possible to join and implement the treaty, compromises had to be made that limited the specificity or scope of some of the provisions of the *ATT*, or that involved foregoing legally binding provisions on a number of issues. Thus, in order to ensure the successful conclusion of the negotiations as well as the support by relevant States, the proponents of the *ATT* had to compromise on certain points that limit the impact of the treaty. Writing on the role of flexibility and delegation in the context of the *ATT* negotiations, Cristiane Carneiro has referred to three aspects of legalization: Obligation (the degree to which commitments are legally binding), precision (the degree to which the content of commitments clearly identifies the conduct required of member States), and delegation (the degree to which the interpretation and supervision is transferred to a third party).⁴⁶

Regarding *delegation*, the previous paragraph already indicated that the emphasis on consensus in the context of the CSP gives States greater control over the future direction and implementation of the treaty. In this way, it safeguards State sovereignty over *ATT*-related decisions and limits the flexibility of the treaty regime. This conclusion is reinforced by the limited mandate of the Secretariat. The *ATT* text clearly restricts the Secretariat to an administrative and facilitating role, minimizes its structure, and emphasizes its subservience to member States and the CSP, avoiding all allusions to any form of decision-making power for the Secretariat.⁴⁷ It is the member States, through the CSP, which are designated by the *ATT* to define the role of the Secretariat. They have already begun doing so at the first CSP, specifying the tasks of the Secretariat under its mandate of Article 18(3) *ATT*.⁴⁸ Compared to arms control organizations such as the International Atomic Energy Agency (IAEA) or the Organization for the Prohibition of Chemical Weapons (OPCW), the role of the *ATT* Secretariat is greatly restrained.⁴⁹

⁴⁶ Carneiro, *supra* note 21, 482.

⁴⁷ Cf. Article 18(3) *ATT*, which refers to the Secretariat's 'minimized structure'; see also *supra* note 21.

⁴⁸ *Directive of the States Parties to the Secretariat of the Arms Trade Treaty*, ATT/CSP1/2015/WP.2/Rev.2, 25 August 2016.

⁴⁹ This is due to the difference in mandate of these organs, see in general, H.G. Schermers & N.M. Blokker, *International Institutional Law*, 5th ed. (2011); on the OPCW; W. Krutzsch, E.P.J. Myjer & R. Trapp (eds), *The Chemical Weapons Convention: A*

In terms of *obligation*, it is notable that the wording of a number of *ATT* provisions reflects the fact that they are non-binding. These provisions are mainly related to the implementation and oversight of the *ATT*. They deal, for example, with reporting, transparency measures, or international cooperation.⁵⁰ This reinforces the idea that the drafters of the *ATT* were very averse to the concept of any form of international oversight with regards to the implementation of the treaty, falling in line with the limitation of the Secretariat's mandate. The scope of the *ATT*, moreover, was restricted during negotiations. One example is the deletion of the words 'at a minimum' from Article 2(1) *ATT*, suggesting that the scope of the treaty is exhaustive.⁵¹ Although ammunitions and components are included in the treaty, section 1 illustrated how several provisions do not apply to these categories. All in all, it has been concluded that the scope of the *ATT* is a compromise between those supporting a more comprehensive regulation of the arms trade and those motivated by commercial or security-related interests.⁵² Article 24(2) on withdrawal furthermore increases flexibility by giving States the option of leaving the *ATT* regime in case it ceases to serve their national interests.⁵³

Third, the provisions of the *ATT* lack in *precision*. In particular, this concerns a lack of definition of key terms in the treaty pertaining to substantive obligations therein as well as to reporting obligations.⁵⁴ Examples on the latter category can be found in Article 13, which obliges States to report to the Secretariat on new measures to be taken when "appropriate", but fails to mention when that is. Moreover, reports on exports and imports may exclude "commercially sensitive or national security information", creating a loophole in

Commentary (2014); on the practice of the IAEA Secretariat, see e.g., D. Fischer, *History of the International Atomic Energy Agency: The First Forty Years* (1997); M. Hibbs, 'Ten Lessons from September's IAEA Diplomacy', *Carnegie Endowment for International Peace* (7 October 2010), available at <http://carnegieendowment.org/2010/10/07/ten-lessons-from-september-s-iaea-diplomacy/5qa> (last visited 29 April 2016); M. Hibbs, 'Amano influence and the IAEA fall meetings', *Carnegie Endowment for International Peace* (9 September 2011), available at <http://carnegieendowment.org/2011/09/09/amano-s-influence-and-iaea-fall-meetings/52gz> (last visited 29 April 2016).

⁵⁰ Cf. the use of words such as 'may', 'are encouraged to', and 'voluntary' in Articles 12(2) and (3), 13(2), 15(2)-(4), (6) and (7), and 16.

⁵¹ Brandes, *supra* note 6, 407.

⁵² *Ibid.*, 409.

⁵³ On withdrawal and flexibility, see G. Den Dekker & T. Coppen, 'Termination and Suspension of, and Withdrawal from, WMD Arms Control Agreements in Light of the General Law of Treaties', 17 *Journal of Conflict and Security Law* (2012) 1, 25.

⁵⁴ See also Brandes, *supra* note 6.

the reporting obligation by leaving it to the discretion of States themselves to determine what information qualifies as such.⁵⁵ The obligations in Articles 6 and 7 contain similar loopholes. Transfers must be prevented if the exporter knows the arms may be used for certain purposes, yet there is no definition of what constitutes *knowledge* in this context. Reference may be made to international criminal law in this case, but it is more difficult to define knowledge when it comes to entities such as States. In the context of humanitarian law, it has been pointed out that explicit references to non-international conflicts have been deleted, and that a reference to customary international law in this regard may have increased the uniformity of the application of the *ATT*.⁵⁶ Article 7, on the control procedures, likewise contains many ambiguous and undefined terms such as “negative uses” of arms, “serious” human rights violations, and “overriding risks”. Article 13 fails to clarify what “diversion” means. Although the inclusion of human rights principles has been hailed as a step towards objectifying the standards for the arms trade, these too can quickly turn into subjective rather than objective factors, especially when political considerations play a role, thus further increasing the flexibility of States to determine their export policies notwithstanding the provisions of the *ATT*.⁵⁷ Such flexibility offers States the possibility to use the resulting legal grey area to approve sensitive exports for commercial or strategic reasons if necessary.

In short, particular arms control dynamics underlying the negotiation of the *ATT* have led to what are regularly perceived as shortcomings of the treaty. Although States benefit from the stability and predictability that could result from more harmonized standards for arms trade, sovereignty-related concerns have led to undefined and multi-interpretable terms in the treaty, to limitations on scope, to non-binding provisions on reporting, as well as to a limitation of the mandate for the CSP and Secretariat. The role of States is

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ Council of the European Union, *Council Common Position of 8 December 2008 defining common rules governing control of exports of military technology and equipment*, EU 2008/944/CFSP, 8 December 2008, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008E0944&from=EN> (last visited 13 July 2016) e.g. includes criteria such as “Respect for human rights in the country of final destination as well as respect by that country of international humanitarian law” or “the internal situation in the country of final destination, as a function of the existence of tensions or armed conflicts”, without defining these further or referring to specific standards or human rights documents. The assessment of the internal situation or that country’s human rights is left to the exporting States’ authorities, giving them large margins of discretion in deciding on export licenses.

maximized by limiting the power of the *ATT*'s oversight mechanisms to develop the legal framework of the *ATT* as well as by increasing the flexibility for States individually by enlarging the margin of appreciation left to national authorities for the implementation of treaty provisions.

C. The Conference of States Parties and the Interpretation of the *ATT*

Having thus explored the current substantive and institutional limits of the legal framework established by the *ATT* along with the particular dynamics of the law of arms control that underlie these limitations, the question to be addressed is what capabilities, under international law, the organs of the *ATT* will have to develop the legal framework of the *ATT* despite their limited mandates. Starting with the CSP, the simple answer is that Articles 17 and 20 envision a significant role for the CSP in the consideration and adoption of formal amendments to the *ATT*. Although this may appear to give the CSP an important role in the development of the *ATT*, the reality is that this function will not affect the role of the CSP much, since it is extremely unlikely that the *ATT* will be formally amended in the foreseeable future.⁵⁸ Article 17, however, also attributes certain other functions to the CSP, which are mostly related to the review, implementation, and interpretation of the *ATT*, as well as to the establishment of the Secretariat and the direction of the work thereof.⁵⁹ Specific examples of substantive issues that have been named as possible topics for deliberation by the CSP are the development of standardized reporting forms, matrixes for reviewing reports, changes to the scope of the *ATT*, or the discussion of including benefits to *ATT* membership such as a preferential trade status.⁶⁰

⁵⁸ The procedure for amendment is complicated and burdensome; amendments require the support of $\frac{3}{4}$ of votes, and will only be in force for States that formally accept it. In this, it resembles the procedure of other arms control instruments. As a consequence, no major arms control treaty has ever been formally amended. The Statute of the IAEA, as an international organization, has been amended twice, but only in relation to procedural issues.

⁵⁹ Article 17 *ATT*; see also Holtom & Bromley, 'Implementing an Arms Trade Treaty', *supra* note 21.

⁶⁰ Based on discussions with officials and observers involved with the preparations for the first CSP as mentioned before, the first CSP mainly focused on procedural and institutional issues, although reporting templates were on the agenda as well, see also Brandes, *supra* note 6; Carneiro, *supra* note 21; P. Holtom & M. Bromley, 'Next Steps for the Arms Trade Treaty: Securing Early Entry Into Force', *Arms Control Association* (3

This mandate may make it possible for the CSP, based on general rules of treaty interpretation in the *Vienna Convention on the Law of Treaties (VCLT)*, to develop the legal framework of the *ATT* without resorting to its formal amendment procedure.⁶¹ Articles 31 and 32 *VCLT* combine three main approaches to treaty interpretation: The textual, subjective, and the teleological approach. As the first two emphasize, respectively, the text on itself and the text as the reflection of the meaning of the drafters of a treaty, they are more static than the teleological approach, which advocates interpreting the terms of a treaty primarily in light of its *object and purpose*.⁶² As this may involve “[...] teleological interpretations of the text which go beyond, or even diverge from, the original intentions of the parties as expressed in the text”⁶³, it is a more dynamic, flexible approach that leaves room for the development of the law. A teleological interpretation can be used to fill gaps, make corrections, expand or supplement a text, as long as this is “[...] consistent with, or in furtherance of, the objects, principles and purposes in question.”⁶⁴ This may include looking at the possible evolution of the meaning given to the terms of the treaty, especially if these are abstract or undefined – as many of the *ATT*’s terms are.⁶⁵

The teleological approach to treaty interpretation is reflected in the *VCLT* in Article 31(1), which states that treaties must be interpreted in good faith, in accordance with the ‘ordinary meaning’ of its text in its context and the ‘light of its object and purpose’. Article 31(3) *VCLT* embodies a clearly dynamic element of treaty interpretation by establishing that, together with the context of the treaty text (which consists of interpretative statements and agreements in connection with the conclusion of a treaty between its members), the interpretation of a treaty should take into account any subsequent agreement regarding the application of the treaty between its members, as well as any

June 2013), available at https://www.armscontrol.org/act/2013_06/Next-Steps-for-the-Arms-Trade-Treaty_Securing-Early-Entry-Into-Force (last visited 3 May 2016).

⁶¹ *Vienna Convention on the Law of Treaties*, 23 May 1969, Articles 31 and 32, 1155 UNTS 331 [*VCLT*].

⁶² See e.g., F.G. Jacobs, ‘Varieties of Approach to Treaty Interpretation: with Special Reference to the Draft Convention on the Law of Treaties Before the Vienna Diplomatic Conference’, 18 *International Comparative Law Quarterly* (1969) 2, 318; M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2008), 422.

⁶³ *Third report on the law of treaties*, Yearbook of the International Law Commission (1964), Vol. II, 53-54, para. 4.

⁶⁴ G.G. Fitzmaurice, *The Law and Procedure of the International Court of Justice* (1986), 8.

⁶⁵ R.M. Dworkin, *Taking Rights Seriously* (1977), 165-169; U. Lindelfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (2007), 77-78.

subsequent practice in the application of the treaty “[...] which establishes the agreement of the parties regarding its interpretation.” It has been pointed out that it is

“[...] arguable that the main significance of subsequent practice in the [VCLT] is not in clarifying the original intentions of the parties, but in enabling effect to be given to their subsequent intentions, at least within the framework of the original text.”⁶⁶

Thus, subsequent agreement or practices can be used to establish an object and purpose that may differ from the original ones, as long as this does not lead to an interpretation of the treaty’s terms that runs contrary to its text. The ILC noted that adopting an interpretation contrary to the text of a treaty would amount to a revision of that treaty, not its interpretation.⁶⁷ There is no hierarchy between the elements of Article 31 – they form a singular, integral approach.⁶⁸ On the other hand, the commentary to the VCLT makes clear that the *travaux préparatoires* of a treaty constitute only a *supplementary* means of interpretation.⁶⁹

It is fair to ask why a teleological, dynamic approach primarily based on Article 31(3) VCLT should take precedence over the other approaches when interpreting the ATT over an extended period of time. The answer is that this is related to the type of treaty that the ATT is. The previous section explained how the particular nature of its inception and its subject-matter, the conflicting interests of flexibility and legal certainty, have led to the inclusion in the ATT of numerous undefined or *open terms*. Ninety-eight States supported a political declaration at the adoption of the ATT in which they stated that the treaty enables its members “[...] to make it stronger, and through its implementation, to adapt it to future developments.”⁷⁰ Thus, the ATT is widely viewed as a work

⁶⁶ Jacobs, *supra* note 62, 329-330.

⁶⁷ *ILC Draft Articles on the Law of Treaties*, Yearbook of the International Law Commission (1966), Vol. II, 219 [ILC Draft Articles on the Law of Treaties]. More recently, this principle has been referred to as ‘modification’. The debate on whether the modification of a treaty text through subsequent agreement and practice can be lawful has to date not been settled. The ILC concluded in its 2014 session that the “possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized”, see *Report of the International Law Commission on the Work of Its Sixty-Sixth Session*, UN Doc. A/69/10, 2014, 169 [ILC Report (2014)].

⁶⁸ *Ibid.*, 219-220; see also Villiger, *supra* note 62.

⁶⁹ See Article 32 VCLT; *ILC Draft Articles on the Law of Treaties*, *supra* note 67, 223.

⁷⁰ *ATT Adoption/Declaration by Mexico*, *supra* note 17. This position is also supported by the majority of NGOs involved in the creation and implementation of the ATT.

in progress. Moreover, it can be classified as a *law-making* rather than a *contract* treaty. Whereas the latter contain specific obligations for each member, or group of members, in a *quid pro quo*, law-making treaties create general norms for the future conduct of the parties, containing obligations that are basically the same for all parties.⁷¹ It is generally accepted that the teleological method of interpretation is best suited for law-making treaties or – to put it differently- in “[...] the field of general multilateral conventions, particularly those of the social, humanitarian, and law-making type.”⁷² The *ATT* is a multilateral arms control instrument setting norms for the behavior of all its member States. Article 1 states its object as the establishment of the *highest possible* standards for arms transfers. This goal can be only achieved through the adaptation of its provisions and its development into a more precise and elaborated legal framework, in line with the fact that such flexibility helps to guarantee the continued relevance of the *ATT* in response to military, political or technological changes. Its interpretation therefore warrants emphasizing the role of its object and purpose and the evolution of its terms as evidenced by subsequent agreement and practice.

Future CSPs may play an important role therein. International law has not defined ‘subsequent agreement and practice’ very clearly. Moreover, the distinction between subsequent agreement and practice is not always very clear.⁷³ To establish whether the discussions and documents of *ATT* CSPs may constitute subsequent agreement and practice in the sense of the *VCLT* it is necessary to turn to the case-law of the ICJ and examine the comments by the ILC in order to discern certain parameters. First, this illustrates that there are no clear conditions as to the *form* subsequent agreement and practice

⁷¹ J. Crawford, *Brownlie’s Principles of Public International Law*, 8th ed. (2012), 31; D. H. Joyner, *International Law and the Proliferation of Weapons of Mass Destruction* (2009), 9 considers the contract treaties to have as their chief characteristic “[...] a set of rules which are applied universally across the full spectrum of states parties”; see also, in general, A.D. McNair, ‘The Functions and Differing Legal Character of Treaties’, 11 *British Yearbook of International Law* (1930), 100; N. White, ‘Interpretation of non-proliferation treaties’, in Joyner & Roscini, *supra* note 23, 87.

⁷² Fitzmaurice, *supra* note 64, 2; see also H. Abromeit & T. Hitzel-Cassagnes, ‘Constitutional Change and Contractual Revision: Principles and Procedures’, 5 *European Law Journal* (1999), 1, 23, 29-30; M. Bos, ‘Theory and practice of treaty interpretation’, 27 *Netherlands International Law Review* (1980) 2, 135, 159-160.

⁷³ *ILC Report (2014)*, *supra* note 67, 173.

must have.⁷⁴ It may include, for example, silent acquiescence.⁷⁵ The ILC pointed out that inaction, too, can under specific circumstances constitute subsequent practice.⁷⁶ Silence, moreover, may constitute acceptance of a practice, although it is necessary that all parties are aware of and accept the existence of a common understanding regarding the interpretation of a treaty.⁷⁷

What is clear is that bodies such as the CSP, which are established by the treaty itself, may play a role in its subsequent interpretation even if they do not possess international legal personality. Draft conclusion 10 of the 2014 ILC Report states that the legal effect of decisions by CSPs “depends primarily on the treaty and any applicable rules of procedure”.⁷⁸ They may, in effect, amount either to subsequent agreement or practice, depending on the modalities of the decision.⁷⁹ In 1952, the ICJ looked at documentation of a committee established by the 1906 *General Act of Algeciras* for the interpretation of the terms of the latter.⁸⁰ More recently, however, the Court rejected an interpretation of the *Whaling Convention* based on resolutions issued by the International Whaling

⁷⁴ *ILC Report (2014)*, *supra* note 67, 169 concluding that subsequent agreement and practice can take a “variety” of forms, as long as they constitute a determination that the parties have taken a position regarding the interpretation of a treaty.

⁷⁵ The ICJ, at least, has left this possibility open, see e.g. in *Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, Judgment, ICJ Reports 1994, 6 when interpreting a 1955 treaty between Libya and France to settle a border dispute, the ICJ pointed out that no subsequent agreement had called the frontier deriving from the 1955 treaty into question, moreover, in a later treaty the same frontier was mentioned “with no suggestion of there being any uncertainty about it” *Territorial Disputes*, *ibid.*, 34, para.66; in *Kasikili/Sedudu Island (Botswana v. Namibia)*, Judgment, ICJ Reports 1999, 1045, 1076, paras 52, 53, 66 the ICJ did not challenge the assertion by one of the parties that international law does not require any particular formality for the conclusion of an international agreement, and that the only criterion is the intention of the parties to conclude a binding agreement, it merely found that the agreement in question did not indicate agreement on the boundaries of the disputed territory and did therefore not constitute a ‘subsequent agreement’ as meant in Article 31.3 *VCLT*; see also I. Buga, *The Modification of Treaties by Subsequent Practice: The Implications of Practice Going Beyond the Limits of Treaty Interpretation*, Ph.D dissertation, Utrecht University (2015), 54 stating that it must be clear that the acquiescing party is aware of the practice.

⁷⁶ *ILC Report (2014)*, *supra* note 67, 169-170.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*, 170.

⁷⁹ *Ibid.*

⁸⁰ *Case concerning rights of nationals of the United States of America in Morocco (France v. United States of America)*, Judgment, ICJ Reports 1952, 176, 211.

Commission (IWC).⁸¹ The IWC was established by the Convention, and given powers to, *inter alia*, engage in studies and investigations, collect and analyze relevant data, disseminate and publish information, amend the scope of the Convention, or make recommendations to member States; to do so, it appoints its own Secretary, staff and can set up sub-committees.⁸² The reason that its resolutions were not admitted as subsequent agreement or practice by the ICJ, however, had nothing to do with the composition or role of the IWC but was based on the fact that the resolutions in question were not adopted by consensus – Japan, for example, party to the proceedings, had opposed them.⁸³ What matters most therefore appears to have less to do with the form of the subsequent agreement or practice but all the more with the intention behind it: Do States agree that it should be a basis for interpretation?⁸⁴

It certainly appears that future *ATT* CSPs have the potential to meet this standard. The text of the treaty states that the CSP is to review the implementation of the *ATT*, consider recommendations, amendments, and – notably – ‘issues arising from its interpretation’.⁸⁵ The CSP furthermore has complete control over the size, mandate and activities of the *ATT* Secretariat.⁸⁶ It is very likely that the exact meaning of treaty terms such as “overriding risks”, “grave” or “serious” breaches of international law, and “knowledge” will be discussed at CSPs, along with the creation of reporting tools and determining the role and influence of civil society in reviewing and implementing the *ATT*. Based on the judgment of the ICJ in the *Whaling-case*, however, it does seem likely that in order to have interpretative value, CSP decisions will have to be taken by consensus.

⁸¹ *Whaling in the Antarctic (Australia v. Japan, New Zealand intervening)*, Judgment, ICJ Reports 2014, 226 [*Whaling Case*].

⁸² *International Convention for the Regulation of Whaling*, 2 December 1946, Articles III, IV, V, VI, 161 UNTS 72, 76-83.

⁸³ *Whaling Case*, *supra* note 81, para. 83; see also J. Arato, ‘Subsequent Practice in the Whaling Case, and What the ICJ Implies about Treaty Interpretation in International Organizations’, *EJIL: Talk! – Blog of the European Journal of International Law* (31 March 2014), available at <http://www.ejiltalk.org/subsequent-practice-in-the-whaling-case-and-what-the-icj-implies-about-treaty-interpretation-in-international-organizations/> (last visited 29 April 2016).

⁸⁴ See *ILC Report (2014)*, *supra* note 67, 170; *Kasikili/Sedudu Island Case*, *supra* note 75, in which the ICJ did not challenge the assertion by one of the parties that international law does not require any particular formality for the conclusion of an international agreement, and that the only criterion is the intention of the parties to conclude a binding agreement; R.K. Gardiner, *Treaty Interpretation* (2008), 17.

⁸⁵ Article 17(4)(d) *ATT*.

⁸⁶ Article 17(4)(e) *ATT*.

Other arms control instruments provide insights on how review mechanisms can contribute to the development of treaty regimes in combination with State practice. The *NPT*, which entered into force in 1970, mainly contains short, undefined provisions. Article VIII *NPT* called for a Review Conference in 1975; this provision has formed the basis for a review mechanism consisting of five-yearly Review Conferences, which are since 1995 preceded by Preparatory Committees.⁸⁷ The documents of these meetings have reflected, in a number of cases, subsequent agreement and practice of *NPT* member States that provides a legal basis for the dynamic interpretation of the treaty. The text of the core non-proliferation provisions of the *NPT* in Articles I and II, for example, left a number of possible loopholes for proliferation in the sense that they did not cover all possible scenarios of nuclear proliferation, such as proliferation via non-State actors, giving assistance to a nuclear weapons effort by a nuclear-weapon State to another nuclear-weapon State, or to a non-*NPT* State; or by an non-nuclear-weapon State to any other State.⁸⁸ A review of the *NPT* Review Conferences, however, indicates that Articles I and II *NPT* have been consequently interpreted by its member States in a way that closes off these loopholes. The 2010 Review Conference clearly states the obligation of *all NPT* members to ensure that their exports do not directly or indirectly assist nuclear weapons programs, and that they are in conformity with the *NPT*'s objectives and purposes as stipulated in Articles I, II and III of the treaty, not distinguishing in this context between *NPT* and non-*NPT* recipient States.⁸⁹ Similarly, the text of Article IV (1) *NPT*

⁸⁷ *Final Document of the 1995 Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons*, UN Doc NPT/CONF.1995/32 (Part I), 12 May 1995, Annex, Decision I, [NPT Conference 1995].

⁸⁸ Cf. M. Shaker, *The Nuclear Non-Proliferation Treaty: Origin and Implementation, 1959-1979* (1980); M. Willrich, *Non-Proliferation Treaty: Framework for Nuclear Arms Control* (1969); E. Young, *A Farewell to Arms Control?* (1972).

⁸⁹ *Final Document of the 2010 Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons*, UN Doc NPT/CONF.2010/50 (Vol. I), issued 28 May 2010, reissued 18 June 2010, 26 [NPT Conference 2010]; similar obligations were articulated by the Review Conferences of 1975, 1985, 1995, and 2000, see therefore *Final Document of the Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons*, NPT/CONF/35/I, Annex I, 30 May 1975, 3-4; *Final Document of the 1985 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons*, NPT/CONF.III/64/I, Annex I, 25 September 1985, 3; NPT Conference 1995, *supra* note 87, 11; *Final Document of the 2000 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons*, NPT/CONF.2000/28 (Part I), 19 May 2000, 6 [NPT Conference 2000]; at the same time, extensive practice has been built up with the creation of the NSG and a near-universal system of domestic trade controls,

requires States to exercise their right to use nuclear energy for peaceful purposes in accordance with Articles I and II. Subsequent Review Conferences have clarified that they must also comply with safeguards obligations in Article III *NPT*.⁹⁰

The *BWC* went through a number of developments as well, despite the fact that its drafters gave little consideration to the possibility of the treaty being at the basis of an evolving regime.⁹¹ It did, however, call for a CSP to be organized within five years to review the operation of the *BWC*, taking into account “any new scientific and technological developments relevant to the Convention”.⁹² Gradually, the focus of the CSPs changed from simply reviewing the treaty to adapting it based on subsequent agreement and practice.⁹³ Article V *BWC*, for example, originally established a bilateral (consultations) and a multilateral (resort to the UN) mechanism for the resolution of conflicts arising out of the application of the *BWC*. Over time, however, a multilateral consultative mechanism was set up that did not necessarily involve the UN but involved expert meetings instead.⁹⁴ This, of course, implied a reinterpretation of the text of the *BWC*. The *BWC* Review Conference additionally added various confidence-building mechanisms to the treaty regime, often building on existing practices. Such developments did not necessarily happen at a very high pace, but gradually took place in a timespan covering multiple CSPs.⁹⁵

Thus, while it is unlikely that the CSP will manage to adopt formal amendments to the *ATT*, it has much potential to contribute to the development of the legal regime on arms transfers through the progressive interpretation of the terms of the *ATT*. This conclusion is not only supported by legal theory – both the *NPT* and the *BWC* provide ample evidence of how review mechanisms can be the basis of the evolution of treaty-based arms control regimes. This does not mean, of course, that every declaration or document of a CSP meeting amounts to subsequent agreement. Developments of the *NPT* and *BWC* took

cf. T. Coppen, *The Law of Arms Control and the International Non-Proliferation Regime: Preventing the Spread of Nuclear Weapons*, (2016 [forthcoming]), Chapter 4.

⁹⁰ NPT Conference 1995, *supra* note 87, Annex, para. 11; see also NPT Conference 2000, *ibid.*, paras 8, 10; NPT Conference 2010, *ibid.*, para. 31; see in general, Coppen, *supra* note 38.

⁹¹ N. A. Sims, *The Evolution of Biological Disarmament* (2001), 17.

⁹² *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (BWC)*, 10 April 1972, Article XII, 1015 UNTS 163, 168.

⁹³ Sims, *supra* note 91, 17.

⁹⁴ *Ibid.*, 31-43.

⁹⁵ *Ibid.*, 82-119.

years or decades. Discussions at CSP meetings must reflect the intention of *ATT* member States to interpret the treaty.

Furthermore, this intention should be supported by State practice. The Appellate Body of the World Trade Organization has concluded that a practice had to be “concordant, common and consistent”⁹⁶ to amount to subsequent practice in the sense of the *VCLT*.⁹⁷ The ICJ has applied Article 31 even more flexibly. The ILC has followed the latter approach, focusing on the specificity and clarity of the practice, as well as on whether and how it is repeated.⁹⁸ It concludes that while the formula of the WTO Appellate Body “may be useful for determining the weight of subsequent practice in a particular case” it is not sufficiently well-established to articulate a minimum threshold.⁹⁹ Instead, the value of the practice may vary, leaving room for one-off instances of State practice to fall under Article 31 *VCLT* as well.¹⁰⁰ For analytical purposes, this article will follow the higher standard, in example that of the WTO.¹⁰¹ In the case of the *ATT*, it is most likely that such practices will be stimulated, encouraged and documented by the Secretariat.

D. The Creative Function of the *ATT* Secretariat

As mentioned, the *ATT* does not attribute to its Secretariat any explicit law-making or interpretive mandate. Moreover, the Secretariat has no international legal personality and lacks the power to enforce compliance with the *ATT* by, for example, recommending or adopting punitive measures against States.¹⁰²

⁹⁶ M. K. Yasseen, ‘L’interprétation des traités d’après la Convention de Vienne sur le Droit des Traités’ (1976-III) 151 *Recueil des Cours* (1976) 3, 1, 4; Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed. (1984), 137.

⁹⁷ Reports of the Appellate Body, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 4 October 1996, 11-13.

⁹⁸ *ILC Report (2014)*, *supra* note 67, 169 stating that the “element of time and the character of the repetition also serves to indicate the “grounding” of a particular position of the parties regarding the interpretation of a treaty”; repetition should, in this context, be more than a technical or unmindful repetition of a practice.

⁹⁹ *Ibid.*, 195.

¹⁰⁰ *Ibid.*, 195-196.

¹⁰¹ The reason for this is not only that meeting this threshold would mean meeting that of the ICJ/ILC as well; it is also a reflection of the importance of legal certainty in this particular field of international law, described in section B.

¹⁰² Cf. e.g. Article 18 *ATT* with the powers of the IAEA in *Statute of the International Atomic Energy Agency*, 29 July 1957, Articles XII and XIX, 276 UNTS 3 or the organs of the OPCW in *Convention on the Prohibition of the Development, Production, Stockpiling and*

This does not mean, however, that it cannot contribute to the development of the treaty in other ways, for instance by carrying out certain supervisory tasks.

The necessity of an adequate system for the supervision of arms control arrangements has been discussed extensively.¹⁰³ Although non-compliance may be hard to detect in the case of the *ATT*, States will nevertheless demand some certainty that other States are indeed adhering to the rules of the treaty. The process of doing so can be referred to as *supervision*.¹⁰⁴ Supervision entails more than simply enforcing compliance with treaties. It also includes those parts of the process that help establish whether States have breached certain norms. Thus, we can distinguish different stages or phases of the supervisory process: information gathering, review, assessment and compliance management.¹⁰⁵ The first of these, *information gathering*, is rather self-explanatory, consisting of “[...] efforts to detect, identify, and measure developments and activities of interest.”¹⁰⁶ Information gathering may be done on a continuous, general basis or with a specific aim. Prevalent methods are national technical means such as satellite imagery or espionage, information exchanges, reporting requirements, inspections or cameras. During the *review* stage, the data yielded by information gathering activities is analyzed according to, mainly, technical and legal standards. The review stage is based on concepts such as objectivity,

Use of Chemical Weapons and their Destruction, 29 April 1997, Article XII, 1974 UNTS 45.

¹⁰³ Cf. Den Dekker, *Law of Arms Control*, *supra* note 22; S. Sur (ed.), *Verification of Current Disarmament and Arms Limitation Agreements: Ways, Means and Practices* (1991); E.P.J. Myjer, ‘The Law of Arms Control and International Supervision’, 3 *Leiden Journal of International Law* (1990) 3, 99; E.P.J. Myjer & J. Herbach, ‘Violation of Non-proliferation Treaties and Related Verification Treaties’, in Joyner & Roscini, *supra* note 23, 119.

¹⁰⁴ See Den Dekker, *Law of Arms Control*, *supra* note 22; G. Den Dekker, ‘The Effectiveness of International Supervision in Arms Control Law’, 9 *Journal of Conflict and Security Law* (2004) 3, 315 [Supervision of Arms Control Law]; others have referred to this process as ‘verification’ cf. e.g., *Fifth Report of the Committee on Arms Control and Disarmament Law – National and International Verification Measures*, International Law Association London Conference, 20 January 2000, available at www.ila-hq.org/download.cfm/docid/1250C212-4417-4682-A2BCDAF39C36AEF2 (last visited 13 June 2016); J. Mackby, ‘Nonproliferation Verification and the Nuclear Test Ban Treaty’, 34 *Fordham International Law Journal* (2011) 4, 697; L. Tabassi, ‘The Chemical Weapons Convention’, in G. Ulfstein (ed.), *Making Treaties Work: Human Rights, Environment and Arms Control* (2007), 273; L. Rockwood, ‘The Treaty on the Non-Proliferation of Nuclear Weapons (NPT) and IAEA Safeguards Agreements’, in Ulfstein *ibid.*, 301.

¹⁰⁵ See in general, Den Dekker, *Law of Arms Control*, *supra* note 22; Den Dekker, ‘Supervision or Arms Control Law’, *supra* note 104.

¹⁰⁶ Den Dekker, *Law of Arms Control*, *supra* note 22, 102.

negotiation and consultation. It is in certain cases followed by *assessment*, which entails a more formal political-legal qualification of the reviewed data. In this stage, States come to a conclusion whether evidence of certain State behavior constitutes non-compliance with its treaty obligations. A fourth part of the supervisory process is that of *compliance management*. It is a continuous process between States – or between States and international supervisory bodies such as the *ATT* Secretariat. Compliance management includes what is often referred to as *enforcement* of compliance or *correction* of State behavior. These elements have a strong punitive side to them, as they aim to “[...] persuade States to adapt their behavior and again render it consistent with what is required by the treaty provisions.”¹⁰⁷ Enforcement measures can first of all be of a unilateral character based on the concept of self-help under international law.¹⁰⁸ Such measures may include, for example, countermeasures, retorsions, but also political or even military pressure.¹⁰⁹ Many arms control treaties contain, in addition, a number of measures that can be adopted against a non-compliant State by a multilateral supervisory body, such as the suspension of certain rights or benefits a State enjoys under the treaty in question, or even a referral of the situation to the UN Security Council, which may subsequently adopt collective measures.¹¹⁰ Non-compliance resolution or other forms of diplomatic pressure are, moreover, a form of punitive measure on themselves as they can lead to a loss of status for the State involved.

In the context of the *ATT*, it is clear that any political pressure regarding the implementation of its terms should come, for the foreseeable future, from individual member States or from civil society. The Secretariat simply lacks the mandate to make a political assessment of State compliance with the *ATT* or to take coercive measures against non-compliant States. Scholars have recognized, however, that enforcement is not always the most effective way of ensuring compliance with a treaty: It can create adversary relations between parties to a treaty that ought to be cooperating to achieve a common goal.¹¹¹ Thus, a

¹⁰⁷ *Ibid.*, 110.

¹⁰⁸ Schermers & Blokker, *supra* note 49, para. 1445.

¹⁰⁹ See e.g., B. Kaussler, *Iran's Nuclear Diplomacy: Power Politics and Conflict Resolution* (2014).

¹¹⁰ NPT Conference 2010, *supra* note 89.

¹¹¹ C.P. Hindawi, ‘The Controversial Impact of WMD Coercive Arms Control on International Peace and Security: Lessons from the Iraqi and Iranian Cases’, 16 *Journal of Conflict and Security Law* (2011) 3, 417, 441; see also A. Chayes & A.H. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1995)[New Sovereignty]; A.H. Chayes & A. Chayes, ‘From Law Enforcement to Dispute Settlement:

new, more managerial, approach was identified. This cooperative approach is based on elements of transparency, dispute settlement, capacity building and persuasion. The first two speak for themselves: transparency is necessary for confidence-building between States, fostering cooperative relations, and dispute settlement (whether through formal or informal means) is necessary as a result of the ambiguity of both arms control instruments as well as the behavior of States thereunder.¹¹² Capacity building entails assistance given to States with the aim of increasing that State's capabilities of implementing treaty provisions; persuasion is based on offering States positive incentives in exchange for adhering to an arms control regime.¹¹³

Thus, even though the Secretariat lacks the capacities and/or mandates for assessment and enforcement of compliance with the *ATT*, this does not mean that it is not a supervisory organ, as supervision entails much more than assessment and enforcement. As such, it can contribute to the development of the *ATT* treaty regime. Supervision, it has been pointed out, has a distinct creative function in the sense that it involves the elaboration, clarification and creation of new rules as both political and legal standards are being developed to measure State behavior against.¹¹⁴ Compliance management, too, incorporates a creative element: through negotiation and consultations, through the spreading of practices and knowledge, norms can be adapted to changing circumstances in a non-adversarial context.¹¹⁵ A clear example of this would be the creation of legal standards through the resort by States to the *ATT*'s formal dispute settlement mechanism in Article 19, but the practice of the future *ATT* Secretariat may also contribute to the development of the law.

This starts with its information-gathering and transparency-related functions. The *ATT* establishes that the Secretariat shall receive, make available and distribute the reports required by the treaty.¹¹⁶ States are, under the provisions of the *ATT*, required to report on their national control lists, national points of contact, implementation measures as well as imports and exports covered by the treaty. Additionally, they are encouraged to make such reports publicly available

A New Approach to Arms Control Verification', 14 *International Security* (1990) 4, 147; M. ElBaradei, *The Age of Deception* (2011), 111-113.

¹¹² Chayes & Chayes, *New Sovereignty*, *supra* note 111, 201.

¹¹³ *Ibid.*

¹¹⁴ E.P.J. Myjer, 'The Organization for the Prohibition of Chemical Weapons: Moving Closer Towards an International Arms Control Organization? A Quantum Leap in the Institutional Law of Arms Control', in Myjer, *Issues of Arms Control*, *supra* note 22, 61.

¹¹⁵ Chayes & Chayes, *New Sovereignty*, *supra* note 111.

¹¹⁶ Article 18(3) *ATT*.

and report on measures they have taken to prevent the diversion of armaments covered by the *ATT*.¹¹⁷ The role of transparency under the *ATT* is reminiscent of UNROCA and of the Committee for the implementation of UN Security Council resolution 1540 (1540 Committee). Both of these mechanisms relied on voluntary reporting by States. The UN Program of Action against SALW trade proposes, furthermore, that States publish relevant national laws and data. Participation in the UNROCA and the Programme of Action has not been optimal, which has been blamed on the influence of security-related, political and economic factors, State capacities, cultures of secrecy, reporting fatigue or simple opposition against the initiative at hand.¹¹⁸ The 1540 Committee has partly addressed these problems by establishing a more sophisticated supervisory mechanism that comprises strong elements of cooperation, knowledge transfer and capacity building. The *ATT* mechanism, in turn, can build on the combined experience of the 1540 Committee, UNROCA, and the Programme of Action. The *ATT* provides several ways to assist States with their reporting requirements, as the 1540 Committee does. The latter's experience has already proven that better dissemination of information will help spread best practices and harmonize standards in practice. Furthermore, Committee experts are often in a better position to comprehend decentralized national export control systems than State officials that work for one department only, and so increase national awareness and set up national inter-agency bodies.¹¹⁹ The *ATT* is ambivalent on the question whether State reports will be made publicly available, but if this happened civil society could apply further pressure on States to raise their standards.¹²⁰

Additionally, the experience of the 1540 Committee demonstrates that information-sharing is a task that incorporates an element of review. First, national authorities themselves will have to review their actions in the context of the treaty in order to comply with the reporting requirements. Second, the 1540 Committee has created a matrix to streamline the reporting process: States answer questions and the Committee evaluates how national measures address the questions posed in the matrix. Follow-ups with the State in question are possible. This practice has further contributed to the development and integration

¹¹⁷ Articles 5, 11 and 13 *ATT*.

¹¹⁸ P. Holtom, 'Nothing to Report: The Lost Promise of the UN Register of Convention Arms', 31 *Contemporary Security Policy* (2010) 1, 61, 67.

¹¹⁹ Comments by senior official, Washington DC, 15 January 2014 given during an interview with the author.

¹²⁰ Comments by an expert of a Dutch arms control NGO, October 2014 given during an interview with the author.

of international standards on dual-use export controls. There is no reason why the *ATT* Secretariat could not play a similar role. Through such matrixes, for example, it could stimulate the practice of extending the reporting requirements to ammunition and components, or streamline national control lists and thereby harmonize practices in terms of the scope of the treaty.¹²¹

The *ATT* Secretariat, moreover, has a lot of potential in terms of capacity building, as the *ATT* emphasizes the importance of the Secretariat in relation to facilitating offers and request for assistance in the implementation of the treaty.¹²² There are, furthermore, a number of other provisions in the treaty on to international cooperation and assistance. These are related to assistance with criminal investigations, prosecutions and judicial proceedings, anti-corruption initiatives, the exchange of expertise and lessons learned in relation to the implementation of the *ATT*, as well as the setting up of a voluntary trust fund to assist member States with implementing the treaty.¹²³ Although the text of the *ATT* does not envision a role for the Secretariat in these spheres, the CSP may, under Article 17, consider the tasks of the Secretariat – given that its role already is that of a clearing-house for assistance requests and offers, as well as that of a distributor of information, it is not a stretch to imagine that the Secretariat's role in international assistance and cooperation will be increased by *ATT* member States. The 1540 Committee was given stewardship of a multilateral fund for increasing cooperation as well. Furthermore, the CSP of the *BWC* decided to establish a similar sponsorship program to support and increase the participation of developing member States in meetings, tasking the Implementation Support Unit of the treaty with its administration.¹²⁴

Through supervising the implementation of the *ATT*, the Secretariat therefore possesses significant potential to contribute to the establishment of standard practices under the treaty. It does not require to have international legal personality, or to be part of an existing UN structure, for this. Based on its current tasks and mandate it will already be able to play a significant role and disseminating information, best practices, assist in facilitating cooperation and capacity-building, as well as streamline reporting and interpretation of the treaty, thus furthering its harmonized implementation. Moreover, the *ATT*

¹²¹ Cf. Holtom & Bromley, 'Implementing an Arms Trade Treaty', *supra* note 21.

¹²² Article 18 (3)(c) *ATT*.

¹²³ Articles 15, 16 *ATT*.

¹²⁴ *Seventh Review Conference of the States Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction – Final Document*, UN Doc. BWC/CONF.VII/7, 13 January 2012, paras 21, 23.

membership may elect to expand its mandate and structure over the years, further increasing its impact on international practice.

E. Conclusion

The *ATT* is a significant step towards effective international regulation of the arms trade and, with that, towards the increased accountability for arms transfers. At the same time, however, it is clear that the *ATT* in its current form has significant shortcomings that may prevent it from achieving this goal. Security-related concerns have led States to ensure that the treaty provisions do not encroach, to a too great extent, upon their sovereign decision-making powers related to strategic imports and exports. These efforts have most notably led to the introduction of certain *open* qualifications in the *ATT* that may be used to circumvent its obligations, to a limitation of the scope of the provisions of the treaty, and to a limited mandate for its Secretariat. Thus, if the *ATT* is to form a legal basis for the harmonization of export policy standards and to contribute to greater accountability through improved transparency of the arms trade, it must develop its scope and norms into a more comprehensive international legal framework.

This article pointed out that in this sense the *ATT* conforms to the dynamics that influence the creation and development of most arms control instruments. It then illustrated how both legal theory and experiences with the development of other arms control instruments indicate that there is sufficient latitude for the *ATT* to develop its framework under applicable rules of general international law in order to realize its potential. Both the CSP and the Secretariat can play an important role in the *ATT*'s evolution without transgressing the boundaries set by the treaty to their mandates. The concept of the dynamic interpretation of treaties, based on the *VCLT*, is a key part of this process. Treaties such as the *ATT*, with its open terminology and qualified obligations, can evolve through the establishment of authoritative subsequent agreement and practice in relation to the meaning of its provisions. This article illustrated how such subsequent agreement and practice may originate from the *ATT* CSP and Secretariat. The treaty itself lays the foundation for this process by attributing functions to these bodies in terms of review (CSP) and supervision (Secretariat). Much like the Review Conference mechanisms of the *NPT* and the *BWC*, consensus discussions, conclusions, decisions or recommendations of the CSP may be the basis of a progressive interpretation of the *ATT* in case they are supported by concordant, common and consistent practice of its member States. It is the Secretariat that will have a major role in this particular context: although

it has few real powers, its function as a clearing-house for information, match-maker and facilitator will put it in a position to contribute to the development and harmonization of international practice in the implementation of the terms of the *ATT*. Together with CSP documents that, over time, indicate a shifting *opinio juris* of States regarding the interpretation of corresponding treaty provisions, this constitutes subsequent agreement and practice under the *VCLT*.

Thus, while neither the actions of the CSP (unless explicitly stated in the *ATT*) nor those of the Secretariat will have any direct binding legal consequences they may, subject to the rules of the *VCLT*, establish an authoritative interpretation of the *ATT*'s terms, which do bind the member States of the treaty. In this way the treaty regime may evolve in order to effectively carry out the task it was intended to. This mechanism for the development of a legal regime is – as already suggested by the examples of the *NPT* and *BWC* – common and well-suited to arms control instruments. It satisfies the demand for flexibility in that the treaty needs to develop in order to adapt to changing circumstances and so remain effective without having to resort to burdensome amendment procedures. Moreover, it allows for the initial insertion of more open terms in the text of the treaty, as well as for an initial limitation of its scope, in order to acquire the greatest number of signatories as possible. Subsequently, following existing practice and consensus (or, at the very least, acquiescence), the treaty can evolve, maintaining and expanding its membership. This process serves legal certainty because it translates existing practices into legal rules, thereby providing clear standards and increasing predictability for States adhering to the treaty. At the same time, because it is based on existing practices (although these may be stimulated by the organs of the *ATT*, in turn) the progressive development of the treaty will have a significant bottom-up, State-driven aspect to it, which should satisfy arms-control related State concerns about their sovereignty. The requirement of consensus, recently stressed by the ICJ, ensures that this way of treaty development will not bind States against their will.

It can therefore be concluded that while *ATT* may yet be inadequate to fulfill the promise of an effectively regulated and controlled international arms trade, there certainly is room for the lawful development of its norms, which will depend on amassing political will and the establishment of practice. Experience with implementing the *ATT* will contribute to both; so will diplomatic efforts, a well-staffed, able and efficient Secretariat, as well as the continuous involvement of civil society. The *ATT* provides the foundation for a more comprehensive legal framework on the arms trade, international law provides the means to develop it; now it is up to those involved to realize this aim.