Federal Foreign Office

# MEMORANDUM
# OF THE FEDERAL GOVERNMENT

## ON THE

# ARMS TRADE TREATY

*Unofficial Translation*

*LAST UPDATED ON 1 MARCH 2014*[1]

## I. GENERAL

1. The dangers and adverse effects that emanate from the unregulated trade in arms are considerable. They manifest themselves in the regular misuse of arms to violate human rights and infringe international humanitarian law and in the existence of an extensive illegal arms market. The present situation, in which there are no globally valid standards for the trade in arms, has been a target of perennial criticism, especially on the part of civil society.

This is where the Arms Trade Treaty comes in. The Treaty is also known as the International Arms Trade Treaty but is referred to generally and in the present memorandum by the abbreviation ATT. This unprecedented agreement on globally valid, legally binding common minimum standards for cross-border trade in conventional arms puts the onus on states. They undertake to control the export, import, transit, trans-shipment and brokering, hereafter referred to as 'transfer', of arms and, in particular, to subject exports to structured risk assessment based on internationally comparable decision-making criteria.

2. Especially in the light of Germany's history, the German Government has been controlling transfers of arms, particularly weapons of war, for decades and applies highly restrictive criteria. The German control system for exports of conventional arms has undergone continuous development throughout this period and enjoys worldwide recognition today. At the same time, the German Government has been a global advocate of advances in international export control standards, for instance as one of the original Participating States in the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, which was initiated in late 1995 and to which major arms-exporting states belong. In the European Union framework too, the German Government played a formative role in the negotiations on the EU Code of Conduct on Arms Export, which entered into force in 1998 and was subsequently updated and replaced by Council Common Position 2008/944/CFSP of December 2008 defining common rules governing control of exports of military technology and equipment. All of these instruments, however, were concluded at a regional level or with selected major exporting nations and so do not apply globally.

3. The core principle of the Treaty is the *regulation* of transfers of conventional arms along with the associat-

[1] *Memoranda are commentaries regarding the meaning, object and purpose, history and contents of treaties that require parliamentary consent in accordance with Art. 59 (2) 1 of the Basic Law of the Federal Republic of Germany. They are submitted by the German Federal Government in conjunction with a draft treaty law.*

*The Memorandum on the "Arms Trade Treaty of 2 April 2013" reproduced here corresponds to the Memorandum attached to the draft treaty law by the Federal Government dated 23 May 2013 as published in Bundesratsdrucksache 430/13 (http://dipbt.bundestag.de/dip21/brd/2013/0430-13.pdf). Owing to subsequent modifications in the authentic Spanish text of the treaty the German translation of Article 7(3), the interpretation of this article and the corresponding part of the Memorandum had to be modified. The modification of the treaty law took place after adoption by Bundestag and Bundesrat and was retroactively approved by those two bodies. These modifications have therefore not been published e.g. as Bundesratsdrucksache or Bundestagsdrucksache. These modifications have been consolidated into the present version of the Memorandum.*

ed objective of more effectively combating the misuse of armaments and illicit arms trading. In the existing global constellation comprising the provisions of international law and politically binding agreements, the Treaty is an innovation in this respect, even though it is not unconnected with existing rules and practices.

4. The proposal for a legally binding international agreement on trade in conventional arms goes back originally to an initiative launched by several Nobel laureates and a campaign waged by non-governmental organisations. The process was closely linked with the Arias Foundation, established by Óscar Arias, former President of Costa Rica. Right up to the end of the negotiations, the activities of civil society were coordinated by the Control Arms campaign, to which organisations such as Amnesty International and Oxfam belong, and which strongly influenced the process.

The initiative was introduced in the United Nations in 2006 by its "Co-Authors" Argentina, Australia, Costa Rica, Finland, Japan, Kenya and the United Kingdom, with the UK playing the leading role. On 6 December 2006, the UN General Assembly adopted Resolution 61/89 – *Towards an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms* – which was co-sponsored by 116 states, including Germany; the resolution was carried by 153 votes to one (the United States) with 24 abstentions, including the People's Republic of China, Russia, India, Pakistan, Israel, Iran, Egypt and other Arab states. The resolution requested the UN Secretary-General to seek the views of member states on an arms trade treaty in the course of 2007. In response to the resolution, moreover, a group of governmental experts, comprising representatives of 28 member states, including Germany, was convened for 2008. In the light of the report from the group of governmental experts, the UN General Assembly adopted Resolution 63/240 on 24 December 2008, in which it agreed that the UN process should be continued until 2011 in the form of an open-ended working group (OEWG). This group was to be open to all UN member states, and its task was to discuss elements of a potential ATT where consensus could be developed. No formal negotiations were involved at that stage.

In the summer of 2009, following two one-week sessions, the open-ended working group adopted a mainly procedural consensus report in which all UN member states acknowledged for the first time that unregulated international arms trade was a problem. The report, however, made no explicit reference to key issues such as respect for human rights and international humanitarian law or to the effects of arms trading on armed conflicts.

5. In October 2009, the group of co-authors presented a draft resolution which, despite the wide gulf that remained between the positions of major states, provided for the conversion of the OEWG sessions planned for 2010 and 2011 into sessions of a body known as the Preparatory Committee (PrepCom) as well as deciding to convene a United Nations Conference on the Arms Trade Treaty to meet in 2012. On 2 December 2009, the UN General Assembly, by adopting Resolution 64/48, agreed to begin negotiations and launch the corresponding accelerated preparatory process for an ATT as well as approving the timetable for the years 2010 to 2012; the resolution was adopted by 151 votes, including that of the United States this time, while the 20 abstentions included Russia, China, India, Pakistan, Egypt and other Arab states; only Zimbabwe voted against the resolution.

Between July 2010 and February 2012 came a sequence of four sessions of the Preparatory Committee with Ambassador Roberto García Moritán of Argentina in the chair, when the committee discussed substantive elements of the Treaty as well as making procedural arrangements for the Conference.

The UN Conference on the Arms Trade Treaty ultimately took place at the United Nations Headquarters in New York from 2 to 27 July 2012. Ambassador García Moritán was once again in the chair. In spite of some very intensive negotiation and convergence of positions on many important issues, the Conference, while making significant progress, ended without agreement on the text of a treaty.

One of the main reasons was indecision on the part of major participants, such as the United States and Russia, on the last day of the conference, in which they were joined by Belarus, Cuba, Syria and North Korea. In a joint statement adopted at the end of the Conference of July 2012, Germany, the other EU member states and numerous other nations – a total of 91 in all – undertook to remain committed to the goal of achieving a strong and globally valid Arms Trade Treaty as soon as possible and to continue the process in the UN framework on the basis of the progress that had already been made.

6. The UN General Assembly gave the green light for the conclusion of the negotiations by adopting Resolution 67/234 on 24 December 2012 by 133 votes – including, for the first time, those of India and China – to none, with 17 abstentions. This resolution provided for a Final United Nations Conference on the Arms Trade Treaty to be convened in New York from 18 to 28 March 2013 on the basis of the draft text of the Arms Trade Treaty submitted on 26 July 2012 and of the same rules of procedure that had been adopted for the July conference, which included a consensus requirement for the adoption of the final outcome.

7. Parallel to the preparatory process and with a view to the negotiations in the United Nations framework, the European Union had, on the basis of two Council decisions, been funding a number of regional seminars since 2009 in various parts of the world to canvass global support for an Arms Trade Treaty. Representatives of the Federal Foreign Office are among the experts who have contributed to those seminars. In addition, interested parties from civil society, particularly the Control Arms campaign and the non-governmental

organisation Saferworld, have conducted numerous seminars and campaigns. The Stockholm International Peace Research Institute (SIPRI) has also been following the ATT process with great interest. The German Government also participated in the preparatory process, supporting a two-day seminar for African states that was held in Addis Ababa in early March 2013, funding a meeting of African parliamentarians in Windhoek and hosting a three-day preparatory meeting of major states (the 'new global players') in Berlin at the end of February 2013.

8. The Final United Nations Conference on the Arms Trade Treaty met at the United Nations Headquarters in New York from 18 to 28 March 2013. During the conference, its President, Ambassador Peter Woolcott from Australia, having presented two intermediate drafts of the Treaty on 20 and 22 March, presented his final draft for adoption to the Conference on 27 March 2013. This was the culmination of some highly intensive negotiation, which took place chiefly at meetings chaired by diverse facilitators on various issues, in informal discussions and in bilateral consultations but also during plenary sessions.

The conference ended on 28 March 2013 after nine days of negotiation, with the quest for consensus thwarted by Iran, North Korea and Syria, which meant that this treaty text was not adopted. This open rejection of the previous day's draft ATT by Iran, Syria and North Korea and the implicit rejection that surfaced in concluding declarations made by a number of other opponents of the ATT, such as Cuba and Venezuela, and by sceptics such as Belarus, Egypt and other Arab states, along with the distinctly critical positions adopted by India, Pakistan, Algeria and Indonesia, could not be bridged at the concluding session of the conference. The tangible will of a great majority of the states represented at the conference to reach a consensus, even if it meant endorsing some difficult compromises, was thus frustrated by a small group of states. The great majority of the UN member states in their declarations advocated a strong and robust treaty and made it clear that they supported the draft treaty of 27 March 2013 as a desirable outcome of the negotiations.

9. A draft resolution for the UN General Assembly which was introduced during the last hour of the conference and which provided for the adoption without amendment of the final draft treaty of 27 March 2013, instantly attracted more than 60 co-sponsors. Other states endorsed this draft resolution, with the result that it was ultimately introduced in the UN General Assembly by 110 co-sponsors on 2 April 2013 and was adopted that same day by an overwhelming majority of 155 to 3 (Iran, North Korea and Syria) with 22 abstentions, including Russia, China, India and Indonesia, and 13 non-voters. The Treaty which was the subject of that resolution has been open for signature at the United Nations in New York since 3 June 2013.

10. The text of the Treaty has lived up to expectations to a great extent. It is a legally sound instrument that sets substantively significant rules and standards. Particularly in view of the current total absence of globally valid rules, it represents considerable progress as well as sending out an encouraging signal that the UN is demonstrably capable of negotiating and concluding treaties on major issues in the realm of peace and security. The present Treaty, born of a process of convergence and compromise at the negotiating table, is a usable benchmark – and, above all, a fundamentally new benchmark for many states – for the creation and/or improvement of rules governing cross-border trade in military goods.

Besides large weapon systems (covering at least all categories in the UN Register of Conventional Arms), small arms and light weapons as well as a wide range of ammunition/munitions and major parts and components for the arms covered by the Treaty fall within its scope. The criteria for export assessment, the core of the Treaty, reflect a great many of the assessment criteria that have already been in force for some time in Germany and the EU, although the latter are more comprehensive and stringent. In particular, the Treaty has largely incorporated the 'golden rule', whereby exports are not to be authorised if there is a clear risk of serious violations of human rights or grave breaches of international humanitarian law. Similarly, if there is a clear risk that peace and security may be undermined, exports must not be authorised. Besides absolute prohibitive circumstances in cases where the exporting state is aware of the imminent use of arms to commit e.g. war crimes or crimes against humanity, an established risk of diversion also constitutes grounds for withholding export authorisation. Special but less detailed provisions apply to import, brokering and transit or trans-shipment. The Treaty provides for a secretariat and lays down rules governing international cooperation and assistance as well as amendments to the Treaty, which may not be made until six years after the entry into force of the Treaty and require a three-quarters majority vote of the States Parties present and voting. In addition, there are reporting obligations for the States Parties on the implementation and application of the Treaty.

In many parts of the Treaty where it proved impossible to achieve consensus on a provision imposing an obligation on States Parties, the proposed provision was converted into an exhortation to adopt a particular form of conduct. The presence in the Treaty of such exhortatory provisions below the legal compulsion line expresses an expectation that the States Parties will conduct themselves in the desired manner. Especially in the case of the treaty provisions of this quality, the success of the Treaty will depend very much on the extent to which the States Parties actually heed these exhortations and underpin the behavioural expectations expressed in the Treaty by setting a good example in their national implementation upon adopting best-practice guidelines.

11. Even after the Arms Trade Treaty enters into force, decisions whether to authorise transfers, particularly exports, will still be a national responsibility. The new

factor, however, for many states is that this decision-making process will now have to be based on concrete, common and binding criteria, which will serve as minimum requirements within the national control system they must establish. Beyond the existing regional arrangements in the field of export control, such as those within the EU as well as in other regional frameworks, and international but non-universal export control regimes, such as the Wassenaar Arrangement, the Treaty thus creates an unprecedented and expandable basic structure for a globally applicable system for the control of arms transfers.

12. From the outset, the German Government played an active, assiduous, informed and consistent role in shaping both the preparations and the actual negotiations, striving in particular to find appropriate solutions, and above all solutions reflecting the humanitarian ethos of the Treaty, to the core problems of scope (range of goods and types of transfer), assessment criteria, reduction of diversion risks and transparency. This commitment has drawn unstinting praise, especially from non-governmental organisations. On numerous occasions Federal Foreign Minister Guido Westerwelle, along with his European and non-European counterparts, expressed strong governmental support for an ATT. Among the interests pursued by the German Government were the inclusion of all conventional arms, additional assessment criteria, a clear definition of legal consequences arising from risk assessments – and particularly an unequivocal obligation to withhold authorisation where there was a clear risk –, more comprehensive transparency reporting with explicit public accessibility, unambiguous subjection of arms-cooperation agreements to the provisions of the Treaty and a national obligation to criminalise infringements of domestic provisions implementing the ATT. The objective of all EU member states, moreover, was to secure the right of regional integration organisations to accede as Parties to the Treaty.

13. The European Union, through intensive preparatory work and close coordination of its member states' positions, displayed a high degree of solidarity, which enabled it to exert decisive influence on the negotiations under the leadership of the European External Action Service. This fact, along with the support given to the process by the worldwide regional seminars initiated and funded by the EU, served to ensure that key features of the German and European export control regimes were embedded in the ATT.

14. Non-governmental organisations played a pivotal role in mobilising governments and public opinion behind the ATT process and helped significantly to raise awareness and foster understanding of the problems arising from what had hitherto been a largely unregulated international arms market. The group of co-authors involved NGOs in the entire ATT process, sometimes assigning them a pre-eminent role. They may also play an important part in the rapid entry into force and subsequent implementation of the Treaty.

15. The consensus requirement for the adoption of the Treaty at the end of the negotiating conferences enabled states, especially leading arms importers and exporters, without whose involvement the effectiveness of a treaty-based arms-trade regime can only be limited, to defend their negotiating positions with great vigour. They and other parties succeeded in some cases in blocking, amending or diluting rules that were at odds with their interests, visions and national control systems. As can generally be expected with this consensus requirement, it proved far more difficult to ensure that any particular rule would be satisfactorily enshrined in the Treaty. The consensus rule did, however, make it possible that, in the medium term, a clear majority of the international community would ratify or at least observe a Treaty adopted in that way.

The keys to the German Government's ultimate consent to the draft ATT of 27 March 2013 were the nature of the overall package as a compromise, which would probably enable a wide spectrum of negotiating parties, and particularly the major importers and exporters of armaments, to sign and ratify the Treaty, and the fact that the draft provided a solid, expandable basis for a globally applicable system of transfer controls for arms.

It is also worth highlighting the broad consensus of industrialised 'Western' nations, of newly industrialised countries and of developing countries, a consensus that is not always in evidence on the overarching issues of peace, security and disarmament. This broad majority of states strove throughout the negotiations for a strong and robust ATT. In these conditions and in view of the solid basis of the Treaty, the prospects for its entry into force and effective implementation, for its establishment as a model and, in due course, for its global observance certainly seem to be good.

Much will also depend on whether states, and especially developing countries that have never yet possessed a significant system for controlling arms transfers, are offered practical assistance and support. This will be a crucial factor in determining how rapidly they acquire the ability to implement and apply the Treaty and thus submit to its requirements. The German Government is ready to assist other states in this process.

## II. PARTICULAR FEATURES

### Preamble and principles

The Preamble contextualises the content of the Treaty thematically and establishes the framework for its substantive provisions. The Treaty deviates from the standard format for international legal instruments in that its Preamble encompasses a number of principles, of which some are established by this Treaty and some are taken from existing instruments, especially the Charter of the United Nations. Nevertheless, by virtue of their placement *before* the formula '*Have agreed as follows*', they are also preambular in character and are not part of the legally binding provisions of the Treaty. Such non-binding treaty elements may, however, be used to establish the negotiating states' political understanding of the Treaty.

In general terms, this section – the Preamble and the Principles – is dominated by a dichotomy between the repetition of humanitarian objectives and reaffirmation of the security interests of the States Parties. These include, on the one hand, the prevention of illicit trade in conventional arms, the emphasis on peace, security and development, compliance with international humanitarian law and respect for human rights. On the other hand, the text cites the principles of sovereignty, political independence, refraining from the threat or use of force, the right to individual or collective self-defence and non-intervention in domestic matters, which are taken from the Charter of the United Nations (Principles 1 to 4) as well as reaffirming that states are primarily responsible for regulating the international trade in conventional arms.

The framing of the Preamble and Principles was the subject of intensive negotiation; the main protagonists on one side were in particular the Arab states, led by Egypt, Algeria and Syria, and a number of major arms importers, such as Indonesia. This group regarded the Preamble and Principles as a necessary corrective and counterweight to Articles 6 and 7, which deal primarily with the assessment of exports and which unequivocally assign authority for licensing decisions to the exporting state. The prominent role given to the Principles in the draft of 26 July 2012, a role that was ultimately watered down to a great extent, was regarded by this group of states as 'immunisation' against a feared 'misuse' of the Treaty to create obstacles to their import of arms. Their gambit was successfully opposed, particularly by European nations but also by the United States and others. The aims of the German Government were to make this part of the Treaty clearly recognisable as preambular as well as to prevent any adulteration of the substance resulting from the inclusion of alien elements.

For this reason, the subsection devoted to Principles is now unmistakably formulated as only politically binding.

The following are some of the noteworthy features of this section:

- the reference to the dangers of terrorism, which was incorporated into the third recital at the wish of India,
- the sovereign right of any state to regulate and control conventional arms exclusively within its territory, pursuant to its own legal and constitutional system, which is reaffirmed in the fifth recital,
- the issue of armed violence, which was incorporated into the tenth recital at the wish of the Nordic states,
- the clear statement in the twelfth recital that rules and regulations that go beyond the treaty remain possible, which was inserted at the wish of the states – chiefly European states – that already have refined and more restrictive systems of export control,
- the reference to the legitimacy of trade in arms for private use (recreational, cultural, historical and sporting activities) in certain circumstances which was made in the thirteenth recital, primarily at the insistence of the United States and Canada, and
- the recognition of the importance of regional organisations, which was expressed in the fourteenth recital at the joint insistence of Germany, Ghana and other African states.

### Article 1
### Object and purpose

From the time of General Assembly Resolution 64/48 of 2 December 2009, if not earlier, the aim of the Treaty was twofold: to regulate the legal arms trade on the one hand and to prevent and eradicate the illicit trade on the other. There was also a desire to ensure that the humanitarian purpose of the Treaty was emphasised. The preservation of this multiple logic was a major objective of the German Government. The article had remained very largely unchanged since the summer of 2011 and did not stir much debate, although some negotiating parties still harboured strong doubts about its conceptual basis because of its first half. The critics' chief concern was and remains the preservation of unrestricted sovereignty over decisions on arms exports.

In actual fact, the innovative nature of the instrument lies in this article of the Treaty. It constitutes the first agreement on legally binding standards in an area of foreign and security policy where there had previously been only recommendations, most of them limited to particular regions, such as those made in the OSCE framework, or politically binding control structures, as in the Wassenaar Arrangement. Regardless of the core substantive provisions in Articles 2 to 11 and their shortcomings, to have secured the adoption of this idea of acting and trading on the basis of common rules which had been advanced by progressive governments and civil society is an achievement.

By contrast, the purposes of the Treaty enumerated in Article 1 – contributing to peace and security, reducing human suffering and promoting cooperation, transparency and responsible action – were scarcely disputed

but play a hugely significant role in the teleological interpretation of the Treaty.

**Article 2**
**Scope**

This article essentially defines the scope of the Treaty in terms of categories of arms (paragraph 1) and the spectrum of activities (paragraphs 2 and 3). Some of the most difficult compromises had to be struck in this area, particularly to accommodate the wishes of the United States. For example, some types of items, though covered in part by the substantive rules of the Treaty, were not listed under the heading of the scope of goods but are regulated in separate articles – Article 3 in the case of ammunition/munitions and Article 4 for parts and components. Besides this optical and partially substantive separation of some items, each State Party is encouraged, in the first sentence of Article 5(3), to extend, while acting in its national responsibility, the application of the provisions of the Treaty to the broadest range of conventional arms.
The minimum range of armaments to be covered is defined by reference to existing descriptions of arms categories from the UN Register of Conventional Arms or other UN instruments. The combination of a call to apply the provisions to the broadest range of arms, the reference to particular definitions of minimum ranges of arms and the naming of specific categories in the UN Register of Conventional Arms had already emerged during the conference in July 2012. The wording drawn up at that time, however, whereby the Treaty was to apply to all conventional arms within the listed categories, 'at a minimum', posed considerable problems on account of its ambiguity.
Although the German Government's objective of *binding* coverage of *all* conventional weapons, ammunition/munitions, parts and components and technology in an arms-trade treaty has not been fully achieved, the present Treaty does offer greater clarity than the draft of July 2012. The call made in Article 5(3) to widen the range of arms when applying the Treaty clearly spells out the *desired* conduct.
Article 2(1)(a) to (g) list the specific items in the seven categories of the UN Register of Conventional Weapons and thus encompass virtually all large weapon systems. In addition, small arms and light weapons are covered by (h). The inclusion of the last-named category was a real bone of contention for a long time. One of the great 'breakthroughs' of the negotiations in July 2012 occurred when Chinese resistance to the inclusion of small arms and light weapons was overcome, primarily by the African states. Without the inclusion of this category, the ATT would scarcely have been fit for its humanitarian purpose.
Transfers of the listed armaments are covered by three German laws, namely the War Weapons Control Act (*Kriegswaffenkontrollgesetz*), the Foreign Trade and Payments Act (*Aussenwirtschaftsgesetz*) and the Firearms Act (*Waffengesetz*). It remains unclear, however, how these categories can be precisely demarcated. One noteworthy point in this context is the partially dynamic reference in Article 5(3) to the state of the UN Register of Conventional Arms at the time when the Treaty enters into force. Yet not even this reference suffices to resolve demarcation issues in certain cases, such as those relating to armoured vehicles. The only way in which this task could ultimately have been resolved is on the basis of a comprehensive common munitions list, but such a list could not be devised and compiled for want of consensus. The task of developing such lists in the interests of best practice could fall to the Conference of States Parties.
The provisions of the Treaty always relate at least to the items listed in Article 2(1). There are no special provisions that apply only to ammunition and munitions within the meaning of Article 3 or only to parts and components within the meaning of Article 4. The core prohibitions in Article 6 and the provisions on export assessment in Article 7 apply to all items covered by the Treaty, including ammunition/munitions as well as parts and components. The same does not apply, however, to the provisions on the risk of diversion in Article 11.
As far as activities are concerned, the list contained in Article 2(2) is confined to export, import, transit, transshipment and brokering, which are subsumed under the legal definition 'transfer'. The Federal Government proceeds on the understanding that this term also covers loans, leasing transactions and gifts. China, in particular, does not share this view, although the majority of states support it.

One keenly debated issue was the creation of an exemption clause for transfers made by the security and military forces of the States Parties, a clause which would not jeopardise their operational security and freedom by imposing bureaucratic export controls and possible reporting obligations that might entail general publication. The German Government played a leading role on this issue in the NATO and EU frameworks, raising the subject time and again at the negotiations. The arrangement that was reached exempts the international movement of conventional arms from controls under the Treaty if they are moved for a State Party's own use, provided that the arms remain under that State Party's ownership.

**Article 3**
**Ammunition/Munitions**

This article regulates the coverage of ammunition and munitions by the Treaty. This group of items has been deliberately separated from the arms covered by Article 2(1). Notwithstanding the apparent need for initial clarification about the nature of the link indicated by the forward slash between the terms 'ammunition' and 'munitions' in the English version, this provision applies only to ammunition/munitions fired, launched or delivered by the conventional arms covered under Article 2(1). This means that it excludes other major munitions that are delivered by different means – manually, for example – such as mines and hand grenades, as well as components of munitions. Moreover, neither the

provisions of Article 11 designed to combat diversion nor the record-keeping and reporting rules in Articles 12 and 13 are applicable to ammunition and munitions.
The German Government had pressed for far more extensive coverage of ammunition and munitions. Stiff resistance was encountered in this area from a number of delegations. The United States, invoking the Second Amendment to the US Constitution, which deprives the state of any power of enforcement, recording and archiving, rejected full coverage of ammunition/munitions by the Treaty and their subjection to all of its provisions. Compared with previous drafts of the Treaty, particularly the outcome of the conference held in July 2012, although the present Treaty does not broaden the definition of ammunition/munitions as a group of items or upgrade it in terms of the applicable criteria, it must be said that the creation of a separate article for ammunition and munitions and their closer association with the items regulated by the Treaty lends the provision more weight.

**Article 4**
**Parts and Components**

This article prescribes a national control system for certain parts and components where they provide the capability to assemble the conventional arms covered under Article 2(1).
As in the case of ammunition/munitions, neither the provisions of Article 11 designed to combat diversion nor the record-keeping and reporting rules in Articles 12 and 13 are applicable to parts and components. This provision is in great need of interpretation, because the question as to how far parts and components break down into constituent elements, and hence the question of what is really necessary for the assembly of conventional arms, remains unanswered. In a narrow interpretation, it is conceivable that only complete but unassembled 'weapon kits' might be covered, in which case the purpose of this provision would be to ensure that deliveries of full systems are not made in the form of disassembled parts with a view to circumventing the Treaty.
This is too narrow in the view of the German Government, whose consent to this Treaty was based on the understanding that it would be more broadly interpreted. It seems consistent with the spirit and purpose of this provision that all important parts and components which are needed for the functions of the system as a whole should be covered. In this way, circumvention by means of separate part-deliveries can be prevented.

**Article 5**
**General Implementation**

At the core of this article in its original form were general prescripts on the way in which the Treaty should be implemented, on its relationship with existing arms-cooperation agreements and on the prevention of diversion risks. In the course of the negotiations, the last two aspects were removed from this article and treated separately. The residual paragraphs have been used to set out general rules on the implementation of the Treaty. Accordingly, the article has a somewhat patchwork feel, since it gathers together regulatory provisions for diverse areas.

Paragraphs 1, 5 and 6 are recognisably reproduced from previous drafts. Paragraph 1 precisely mirrors the wording used in the Preamble on the consistent, objective and non-discriminatory application of the Treaty, and here there are recognisable vestiges of an attempt to import individual principles from the preliminary recitals, where they were only politically binding, into the Treaty proper as legally binding regulatory principles. This can be traced back to the need felt by some importing states, especially in the Arab world, to come up with a counterweight to Articles 6 and 7. The German Government had advocated avoidance of the practice of referring back to the Preamble.
Paragraphs 5 and 6 contain, on the one hand, the self-evident requirement to transform the provisions of the Treaty into national regulations and, on the other hand, the important obligation to establish a national control system, although this is partly a duplication of paragraph 2, and one or more national points of contact for international cooperation in the framework of the Treaty.

Significant rules are contained in paragraphs 2 to 4. They legally oblige States Parties to establish and maintain a national control system, including a nationally defined control list, and to make national control lists publicly available or at least make them available to all other States Parties. Without knowledge of this control list, the latter could scarcely assess whether and how a particular State Party was implementing the Treaty.
Key importance attaches to paragraph 3, which, on the one hand, encourages States Parties to apply the provisions of the Treaty to the broadest range of conventional arms. On the other hand, it prescribes the minimum coverage of the definitions used in the national control lists by reference to existing definitions in the UN framework. This reference is partially dynamic, since it bases the coverage of the national definitions on the descriptions used in other instruments at the time of entry into force of the Treaty; it could have repercussions on the degree of willingness to further develop these very instruments. What is more, extensive further development could deter states from signing and/or ratifying the ATT. Particular significance attaches in this respect to the UN Register of Conventional Arms, which will be subject to a periodic review even before the ATT enters into force. A balance must be struck between further developing the instruments, which Germany regards as an urgent necessity, and ensuring that large numbers of states subscribe to the ATT. This applies especially to the large importers and exporters.

**Article 6**
**Prohibitions**

Articles 6 and 7 are the core of the ATT. They contain the principal grounds for withholding export authorisation and the assessment criteria for such authorisation. The other ground for refusing authorisation, namely an assessed risk of diversion, is addressed in Article 11.

Article 6 itself does not create any new international legal prohibitions over and above those that already exist but refers to prohibitions enshrined in other parts of the body of international law. Here, however, they are gathered into an article specifically prohibiting the authorisation of transfers. In terms of its international legal content, then, the article is essentially reiterative in character. It does, however, establish an incontestably important normative framework of absolute prohibitions for national assessment processes, which – unlike the provisions of Article 7 – does not leave any scope for the exercise of discretion in the form of assessment by States Parties.
Through the use of the term 'transfer', the prohibitions are extended in principle to all of the international trade activities listed in the legal definition in Article 2(2). They apply chiefly to exports, however, since it is only for these – as can be inferred, by process of *a contrario* reasoning, from the scope of the international legal obligations set out in Articles 8 to 10 with regard to import, transit, trans-shipment and brokering – that prior authorisation is always compulsory.

Under paragraph 1, authorisation must not be issued for any transfer if the transfer would violate the State Party's obligations under measures adopted by the United Nations Security Council acting under Chapter VII of the Charter of the United Nations, such as a UN arms embargo or other restrictive measures imposed by the UN Security Council.
Under paragraph 2, a State Party must not authorise a transfer if the transfer would violate its relevant international obligations under international agreements to which it is a Party, in particular those relating to the transfer of, or illicit trafficking in, conventional arms. For EU member states, such obligations would include, for example, arms embargoes imposed by the EU under the common foreign and security policy.
The prohibitive clause in paragraph 3, which applies to breaches of international humanitarian law, was the subject of particularly contentious negotiation, partly because some negotiating parties insisted on a very precise delineation of the violations that would trigger a prohibition. Whereas prohibition would not have come into play under earlier drafts of the Treaty unless it had been *the intention of the authorising state* to support an action in breach of international law, and this provision would thus have been a dead letter in practice, it now relates to the *knowledge of the authorising state* at the time of authorisation that the armaments to be transferred are likely to be used to violate international law. The prohibition is triggered specifically by knowledge that the arms or items would be used to commit genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks immediately directed against civilian objects or civilians protected as such or other war crimes as defined by international agreements to which the authorising State is a Party.
The term 'Geneva Conventions of 1949' as used in Article 6(3) is identical in meaning with the international agreements enumerated in the first sentence of the annex to section 8(6)(1) of the Code of Crimes against International Law (*Völkerstrafgesetzbuch*) of 26 June 2002 (Federal Law Gazette 2002 I, p. 2254). The meaning of 'grave breaches of the Geneva Conventions of 1949' follows from Article 50 of the First Geneva Convention of 1949, Article 51 of the Second Geneva Convention of 1949, Article 130 of the Third Geneva Convention of 1949 and Article 147 of the Fourth Geneva Convention of 1949. The crimes referred to in these provisions are war crimes. Where Article 6(3) refers to "other war crimes as defined by international agreements to which it [*the authorising state*] is a Party", it is referring to crimes established by international agreements other than those crimes that are already covered by the listed provisions of the Geneva Conventions of 1949; it is not referring, however, to acts that are presumed in customary international law to be chargeable criminal offences. An example of one of these "other war crimes as defined by international agreements to which it [*the authorising state*] is a Party" would be Article 8 of the Statute of the International Criminal Court (Rome Statute) for States Parties to the Statute; paragraph 2(b)(xx) of that article covers serious violations of international humanitarian law consisting in the employment of weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate. The German Government, with its European partners and numerous other states, had pressed very hard for the inclusion of this reference. It may be assumed that the States Parties will apply Article 6(3) on the basis of the principle of legal certainty in criminal matters and the relevant interpretation principles enshrined in international law.
It proved impossible at the negotiations to secure the adoption of a provision prohibiting authorisation on grounds of human-rights violations.

Nevertheless, when the provisions of Article 7 are applied in practice – hereby interpreting the term 'overriding risk' in the sense of 'clear risk' (see the comments on Article 7 below) – in the assessment of the risks defined in Article 7(1)(b)(i) and (ii), taken in conjunction with Article 7(3), a less stringent yardstick than the *knowledge* of the authorising state that the arms and other items to be transferred were likely to be used to commit infringements of international law would certainly suffice to establish an obligation to withhold export authorisation. This appears to ensure that, even where there is a risk which is not covered by Article 6 of transferred arms and other items being used for the purpose of committing war crimes or grave and systematic violations of human rights, exports will not actually be authorised.

**Article 7**
**Export and Export Assessment**

Article 7, dealing with exports and the criteria to be applied when issuing export authorisations, will probably have the greatest influence on the future authorisation policies of States Parties to the ATT. This is why it was the most intensively negotiated article of the entire Treaty and underwent extensive amendment during the negotiating process. This was one of the main focal points of the German Government's negotiating effort, in particular the inclusion of the 'golden rule' that export authorisations must be withheld if there is a significant risk of grave violations of the law of armed conflict or of human rights law. This rule is laid down, for example, in the Political Principles Adopted by the Government of the Federal Republic of Germany for the Export of War Weapons and Other Military Equipment of 19 January 2000 and Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment, which binds all member states of the EU.
The application of Article 7 will go a very long way to determining whether the aims of the ATT set out in Article 1 are effectively achieved.

According to paragraph 1, Article 7 is to be applied to all authorisations for the export of conventional arms covered by the Treaty, that is to say the arms and items covered by Article 2(1), Article 3 and Article 4. Although there is no binding requirement to issue individual export authorisations, an examination and assessment based on the criteria prescribed by Article 7 must also be conducted before general and global authorisations are issued. The German Government, together with its European partners, had sought and obtained an adjustment of the text to this effect, partly with a view to harmonising this provision with the requirements of European law. Such authorisations are issued as part of the arms-export control systems of many European states, including Germany, but also for transfers of armaments within the European Union.

Paragraphs 1 to 4 prescribe a system for the application of the assessment criteria contained in paragraphs 1 and 4 in the framework of authorising states' export assessments. At the same time, it emerges clearly from the context of Article 7 and the reference to the national control system prescribed by Article 5 that export assessment is the task of the exporting state alone. In assessing exports, states must apply the assessment criteria in an objective and non-discriminatory manner, taking into account relevant factors, including information provided by the importing state in accordance with Article 8(1), which may contain documentation regarding end uses or end users.

Under paragraph 1(a), the contribution of exportable conventional arms or items to peace and security or their potential to undermine peace and security must be assessed. Where there is a significant risk that peace and security will be undermined, the legal consequence prescribed by Article 7(1), taken in conjunction with Article 7(3), is non-authorisation. Even on the basis of the US interpretation of the term 'overriding risk' in Article 7(3) as implying a process of weighing up pros and cons, which is actually a logical conclusion from the wording of Article 7(1)(a) itself (see below), considerable doubts remain as to whether it is possible, once an obvious risk of *impairment* of peace and security has been identified, to conclude that this risk is nevertheless offset by some *positive contribution* to peace and security. Hence, a significant risk that exported arms and items would undermine peace and security is a mandatory criterion for non-authorisation.

Moreover, in item (b), paragraph 1 contains the other key assessment criteria which, under the provisions of the Treaty, must rule out authorisation, namely if the conventional arms or items could be used to commit or facilitate (i) a serious violation of international humanitarian law, (ii) a serious violation of international human rights law, (iii) an offence relating to terrorism, or (iv) an offence relating to transnational organised crime; the offences referred to in (iii) and (iv) are defined as an act constituting an offence under international conventions or protocols relating respectively to terrorism and transnational organised crime to which the exporting State is a Party.

The assessment criterion of the potential to facilitate the serious violations listed in Article 7(1)(b)(i) to (iv) is not a constituent element enshrined in international criminal law but one that has been introduced for the purpose of achieving the political objectives of the Treaty.

Once fulfilment of the criteria defined in paragraph 1 has been assessed, paragraph 2 stipulates that the exporting State Party must consider whether there are measures that could be undertaken to mitigate risks identified in (a) or (b) of paragraph 1. Examples of such mitigating measures cited in paragraph 2 are confidence-building measures and programmes jointly developed and agreed by the exporting and importing states.
If, after conducting this assessment and considering available mitigating measures, the exporting State Party is of the opinion that there is an overriding risk of any of the negative consequences enumerated in paragraph 1, paragraph 3 stipulates that the exporting State Party must not authorise the export.

A key role in the interpretation of this article attaches to the meaning of the term 'overriding risk' which was a bone of contention right up to the end of the negotiations and which features in the adopted English version. This concept is well established in the administrative legislation of the US and its constituent states but had never appeared in an international agreement and was also difficult to translate into the other five authentic languages of the Treaty.

In US jurisprudence, the term opens the door to offsetting in the assessment process. The identification of

considerable risks, for example of serious violations of international humanitarian law or of international human rights law, may be offset by a favourable assessment of, for instance, the contribution of the exports in question to peace and security, which means that authorisation may still be issued on the basis of this understanding. Under this legal approach, there would be no compulsion to withhold authorisation if there were a considerable risk of serious violations of international humanitarian law or of international human rights law, contrary to the provisions of instruments such as the Political Principles Adopted by the Government of the Federal Republic of Germany and Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment. The United States had indicated very clearly during the negotiations that it would opt out of a consensus on the text of the Treaty if this approach or the term 'overriding risk' were not adopted.

There are, however, other possible interpretations of the regulatory substance expressed in the term 'overriding risk' that is used in the English version of the Treaty.
The authentic language version underlying each exporting State Party's application of the Treaty, and in particular the interpretation of the concept expressed in the English version by 'overriding risk', will be crucial in determining whether the risk criteria listed in Article 7(1)(b) trigger automatic or mandatory non-authorisation if the assessment made by the exporting state identifies a high probability that any of the listed events will occur or whether the State Party creates legal scope for assessed risks to be offset by the expectation of beneficial effects, such as a perceived contribution to peace and security. In this respect, the practice of States Parties will strongly influence the future significance of this article and its paragraph 3.

The German Federal Government has based the official German translation of Article 7(3), and will base its implementation and application, on the linguistically clear French and Spanish versions with the terms '*risque prépondérant*' and '*riesgo preponderante*' (the Spanish version of Article 7(3) reads as follows: "*3. Si, una vez realizada esta evaluación y examinadas las medidas de mitigación disponibles, el Estado parte exportador determina que existe un riesgo preponderante de que se produzca alguna de las consecuencias negativas contempladas en el párrafo 1, dicho Estado no autorizará la exportación.*"). According to this wording, if the exporting state assesses an 'overriding risk' of the occurrence of one of the undesirable events listed in Article 7(1)(a) or (b), it must not authorise the export. Germany understands an 'overriding risk' in this context to mean a risk of any of the negative consequences which remains clear in the assessment of the State Party even when the expected effect of any measures to be undertaken to mitigate *that* risk is taken into consideration. In this interpretation, in effect, a particular risk can be offset during the assessment process only by measures to reduce *the risk in question*, not on the basis of factors which do not pertain to that risk. Accordingly, Germany interprets the undesirable consequences listed in Article 7(1)(a) and (b) as mandatory grounds for withholding authorisation in the spirit of the 'golden rule'.

Because of the divergence between the language versions, however, it would be possible and permissible in international law for other States Parties to interpret, implement and apply Article 7(3) differently.

Regardless of their respective interpretations of the term 'overriding risk', the ATT offers all States Parties the option of applying more restrictive rules in the context of export control. During the negotiation of the Preamble, the German Government and its European partners had pressed for a purely declaratory flexibility clause to this effect. There is therefore no impediment to the continued application of the aforementioned Political Principles Adopted by the Government of the Federal Republic of Germany and Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment where these instruments set more stringent assessment criteria.

Under paragraph 4, the exporting State Party, in making its assessment, must take into account the risk of gender-based violence and of violence against women and children. This requirement is already covered to some extent by the criteria contained in Article 7(1)(b)(i) and (ii) regarding international humanitarian law and international human rights law, which have their own legal consequences. Paragraph 4 is therefore an assessment criterion that supplements the provision set out in Article 7(1)(b) but does not of itself give rise to legal consequences. It takes account of the fact that, in many armed conflicts, the risk of this type of gender-based violence or of violence against women and children requires particular attention when export authorisations are assessed, but its wording is not confined to armed conflicts. At the same time, there are still very few established concepts in international law, focussing on this kind of violence, that could be used to define legal consequences such as the withholding of authorisation. It should also be emphasised in this context that the interpretative framework of the Treaty certainly includes scope for the extension of such concepts from situations of armed conflict to other situations of violence involving the use of armed force.

In addition to the criteria contained in Article 7, Article 11(2) requires the exporting State Party to assess the risk of diversion of the export, which may result in non-authorisation (see below).

Other additional criteria for export authorisations that were the subject of intensive discussion during the negotiations, such as the risk of corruption, the risk of hampering sustainable development and adverse effects on social and economic development, proved impossible to enshrine in the Treaty. Even a reference

to these as criteria that should be taken into account in the assessment process without any provision specifying legal consequences did not gain general support. The main reason for rejection of the last-named criterion was the fierce resistance of newly industrialised and developing countries, which regarded such a criterion as incompatible with the fourth principle guaranteeing the sovereign right of states to decide on their own defence efforts. Most of these countries were otherwise very strongly in favour of a robust ATT. Because of the scope that the ATT gives all States Parties to apply more restrictive rules in the context of export control, however, it remains possible to go on applying the relevant Criterion Eight of Council Common Position 2008/944/CFSP.

Paragraph 5 prescribes that all authorisations for the export of military goods must be detailed and issued prior to the export. This excludes any retrospective authorisation, which would defeat the purposes of export control and of the ATT, given that the exporting state will normally be unable to exercise any control over exported military goods beyond its own national borders, which would mean that any retrospective withholding of an export authorisation, for example in the event of a prohibition under Article 6 or infringements of one of the criteria listed in Article 7(1), would be devoid of effect.

Paragraph 6 requires the exporting State Party to make, upon request, appropriate information about the authorisation issued available to the importing State Party and to the transit or trans-shipment States Parties. The scope of this obligation may, however, be restricted by existing national laws, practices or policies, which could mean, for instance, that assessments of various criteria under paragraphs 1 to 4 and the underlying reasoning need not be communicated if such communication were contrary to national legislation or if the information were not relevant to the requesting state. The purpose of the obligation imposed by paragraph 6 is to enable import, transit and trans-shipment States Parties to carry out their own transfer controls and to check whether a transfer that affects them has been authorised by the exporting State Party, thereby fulfilling their obligations under Article 8(2) and Article 9. The converse obligation of the importing State Party to ensure that appropriate and relevant information is provided to the exporting State Party to assist it in conducting its national export assessment under Article 7 is imposed by Article 8(1).

Paragraph 7 contains a generally worded exhortation to reassess the authorisation issued if new relevant information comes to light. An option or call to revoke or withdraw authorisations that was included in earlier drafts was replaced, because of sustained resistance on the part of some negotiating parties and their opposition to a reassessment *obligation*, by a more neutrally worded *encouragement* to reassess authorisations after consultations, if appropriate, with the importing state. This arrangement, however, does not rule out the revocation or withdrawal of authorisation as a result of reassessment.

**Other transactions**

From the start of the dicussions on an ATT, it was considered very important that the ATT should not only contain rules on arms exports and thus become an instrument which chiefly targeted exporting states but that its substantive rules should be addressed, in principle, to all states, which would also lend the Treaty potential universality. On the other hand, in the course of the negotiations, many states that are primarily importers or else transit and/or trans-shipment countries for military goods rejected excessively comprehensive and bureaucratic regimes for these types of transfer. Moreover, the negotiating states evidently became increasingly aware that the most effective control of an arms-transfer chain can be exerted in the exporting state.

As a result, the rules governing transfer activities other than export are distinctly less detailed, are less imperative in nature and are not designed to provide continuous verification of all transactions forming part of those transfer activities but essentially to create the legal and organisational means to control them.

**Article 8**
**Import**

Paragraph 1 requires each importing State Party to provide the exporting State Party with appropriate and relevant information to assist it in conducting its national export assessment under Article 7. This information, however, need only be provided upon request, and its scope and content are limited by the national laws of the importing State Party. Such information may include end use documentation such as certificates relating to end uses or end users.

This ensures that the necessary balance is maintained between empowering the exporting state to make a proper assessment of the export project on the one hand and avoiding the imposition of an undue administrative burden on the importing State Party on the other.

Under paragraph 2, each importing State Party has an obligation to take measures that will – or would – allow it to regulate, where necessary, imports under its jurisdiction. Such measures may include import systems. This provision does not contain any further detailed obligations and thus leaves each State Party a wide margin of discretion to shape its own import controls. Nevertheless, the basic legal and organisational means of control must be guaranteed through appropriate regulatory measures. This control relates only to the conventional arms covered by Article 2(1) but not to the ammunition/munitions covered by Article 3 or the parts and components covered by Article 4. Various states had objected to the inclusion of the latter items. The obligation is also confined to areas under the jurisdic-

tion of the State Party. This means, for example, that transfers occurring on a State Party's own territory are exempted from the regulation requirement if the transfer occurs outside the jurisdiction of that state by virtue of a belligerent occupation status or because the state has effectively lost control.
This paragraph is the basis for targeted measures for which the German Government had pressed at the negotiations. The control of arms imports practised by Germany under the relevant provisions of the War Weapons Control Act (*Kriegswaffenkontrollgesetz*) and the Firearms Act (*Waffengesetz*), a control system that encompasses the arms covered by Article 2(1), fulfils the obligation imposed by paragraph 2 in a way that is consistent with international law.

Paragraph 3 authorises the importing State Party, where it is the country of final destination, to request information from the exporting State Party concerning any pending or approved requests for export authorisation. This is intended to enable the importing state to practise better regulation and control of its imports. The converse obligation of the exporting State Party is set out in Article 7(6), which requires the latter to make available appropriate information about authorisations, subject to its national laws, practices and policies.

States Parties are merely encouraged in Article 12(2) to maintain records of import authorisations or actual imports. The *obligation* established by Article 13(3) to report on authorised or actual exports and imports, however, cannot be fulfilled unless the appropriate records have been kept.

**Article 9**
**Transit or trans-shipment**

The wording of this article imposes an obligation on States Parties in whose territory arms are in transit or are trans-shipped to take appropriate measures to regulate, where necessary and feasible, transit or trans-shipment operations that take place under its jurisdiction and within its territory by land, sea or air. The provision does not impose any other detailed obligations and so leaves States Parties a wide margin of discretion to shape their transit and trans-shipment controls. Nevertheless, the basic legal and organisational means of control must be guaranteed.
This obligation relates only to the conventional arms covered by Article 2(1) but not to the ammunition/munitions covered by Article 3 or the parts and components covered by Article 4. The obligation is also confined to areas under the jurisdiction of the State Party. This means, for example, that transfers occurring on a State Party's own territory are exempted from the regulation requirement if the transfer occurs outside the jurisdiction of that state by virtue of a belligerent occupation status or because the state has effectively lost control. The article explicitly prescribes that transit and trans-shipment must be effected in accordance with relevant international law; in particular, this means complying with the international law of the sea, in particular when exercising the right of innocent passage.
The obligation in international law to take appropriate regulatory measures for transit and trans-shipment is subject to necessity and feasibility. These conditions stem chiefly from the concerns of states with large areas of territorial waters or with major international trans-shipment ports that more extensive obligations would impose an excessively heavy administrative burden on them because of their large volumes of transit traffic and of trans-shipment operations.
The control of arms imports practised by Germany under the relevant provisions of the War Weapons Control Act (*Kriegswaffenkontrollgesetz*) and the Firearms Act (*Waffengesetz*), a control system that encompasses the arms covered by Article 2(1), fulfils the obligation imposed by Article 9 in a way that is consistent with international law.

States Parties are merely encouraged in Article 12(2) to maintain records of the authorisations they have issued. The obligation under Article 13(3) to report on exports and imports does not apply to transit or trans-shipment operations. As a result, it is possible to incorporate secrecy and confidentiality clauses, for example, into bilateral transit agreements. The absence of a reporting obligation will probably make it considerably more difficult to assess States Parties' actual compliance with the obligation to regulate transit and trans-shipment operations than in the case of obligations relating to exports and imports.

**Article 10**
**Brokering**

Under this article, each State Party is required to take measures to regulate brokering taking place under its jurisdiction. Such measures may include requiring brokers to register or obtain written authorisation before engaging in brokering. By contrast with import (Article 8(2)) and transit or trans-shipment regulation (Article 9), the obligation of States Parties is not conditional upon necessity or feasibility. The obligation in international law covers measures taken pursuant to the national laws of States Parties. The provision applies only to the conventional arms covered by Article 2(1) but not to the ammunition/munitions covered by Article 3 or the parts and components covered by Article 4. The obligation is also confined to areas under the jurisdiction of the State Party, which means that it can cover brokering transactions taking place in the State Party's own territory but may also include transactions effected outside its territory with the participation of its own nationals.
The German practice of issuing an authorisation for each individual brokering transaction, which encompasses the arms covered by Article 2(1), is underpinned by the relevant provisions of the War Weapons Control Act and the Firearms Act. It thereby fulfils the obligation imposed by Article 10 in a way that is consistent with international law.

Council Common Position 2003/468/CFSP of 23 June 2003 on the control of arms brokering provides for the options of registering arms brokers and of imposing an authorisation requirement for each individual brokering transaction. Both of these distinct measures are referred to in the second sentence of Article 10 as possible ways of fulfilling the obligation laid down in the first sentence.
The Treaty imposes no recording or reporting obligations in respect of brokering transactions, and so this is another area where it is likely to be considerably more difficult to assess States Parties' actual compliance with the regulation requirement than in the case of obligations relating to exports and imports.

**Article 11**
**Diversion**

Since the very start of the ATT process, most of the negotiating parties had regarded the aim of combating illicit trade in conventional arms and the closely associated diversion of such military goods as a major goal of the ATT; for some, indeed, it was the sole purpose of the Treaty. Although this aim had been embodied in all of the draft versions of the ATT in the course of the negotiations, it was not until the negotiations of March 2013 that a specific treaty wording was developed and a separate article devoted to diversion.
One of the reasons was surely the enduringly fruitless discussion of the following question: what exactly was the destination of these diversions that were to be prevented? The answers to this question varied from the illicit or black market to unauthorised end uses or end users, and views differed as to whether authorisation was a matter for the exporting or the importing state. In the end, the only solution was to refer simply to 'diversion' in the text of the Treaty without specifying the final destination.
This solution did not meet the demands made by many negotiating states right across the political spectrum for the explicit inclusion of the prevention of diversion to unauthorised non-state actors as one of the aims of the measures prescribed by the Treaty.
The provisions that are now enshrined in Article 11 of the Treaty present a package of important general measures designed to avert the risk of diversion of the arms covered by Article 2(1).

Paragraph 1 requires all States Parties involved in the transfer chain, that is to say from exporting states to transit and trans-shipment states to importing states, to take measures to prevent the diversion of arms.

Paragraph 2 contains a relatively comprehensive set of detailed provisions regarding the obligations of the exporting State Party. In particular, it encourages exporting States Parties to include the risk of diversion in the risk assessment performed within their national control systems and also, where appropriate, to decide on the basis of that risk to withhold an export authorisation. The risk of diversion thus takes its place alongside the other assessment criteria prescribed by Article 7(1)(a) and (b) and Article 7(4), an outcome to which the Federal Government has always been especially committed. Paragraph 2, like Article 7(2) also requires exporting states to consider the establishment of mitigation measures such as programmes jointly developed and agreed by exporting and importing states or confidence-building measures. Other listed prevention options include examining parties involved in the transfer, requiring additional documentation, certificates, assurances and other appropriate measures.
In the view of the German Government, this also covers the practice observed by most major arms-exporting states of requiring and scrutinising end-user assurances in the framework of an end-user certificate for the purpose of *ex ante* verification of end use.
It was not possible to secure general support for a reference to the similarly widespread use of re-export clauses, which require the consent of the original exporting state in the event of re-export and which are normally contained, for example, in the end-user certificate that is demanded as part of the German authorisation procedure for exports. Their use, however, is not excluded or restricted by the ATT as some other negotiating parties would have wished.

Transit, trans-shipment and importing states are required by paragraph 3 to mitigate the risk of diversion. This provision prescribes, in general terms, cooperation and exchanges of information between these and exporting states, the scope of such cooperation and exchanges being limited by the reference to national laws and by the conditions of appropriateness and feasibility. More extensive obligations were rejected by the states that are primarily involved in arms transfers as importers or as countries of transit or trans-shipment.

Paragraph 4 contains rules for states that detect diversions. They are to take appropriate measures in accordance with their national laws and international law; such measures may include alerting potentially affected States Parties, examining diverted shipments and taking follow-up measures through investigation and law enforcement.

Paragraph 5 adopts a best-practice approach to encourage information-sharing on a number of potential activities relating to diversion in a manner not binding under international law. States Parties are free to determine how they share such information. Cited examples of the subjects on which information may be shared include corruption, international trafficking routes, illicit brokers, sources of illicit supply, methods of concealment and destinations used by organised groups engaged in diversion.

In paragraph 6, States Parties are encouraged to report to other States Parties, through the ATT Secretariat, on measures taken in addressing the diversion of arms. There is no obligation in international law to do so.

Because of vehement opposition on the part of some negotiating parties, neither ammunition/munitions nor parts and components were considered in this article, despite vigorous efforts by the German Government and its European partners as well as many particularly affected African and Latin American states. It relates solely to the arms covered by Article 2(1). This remains regrettable, because it means that there is no obligation under the ATT to prevent the diversion of ammunition and munitions or parts and components, even though the nature of these items makes the risk of their diversion particularly high; moreover, the effects of diversion – at least in the case of ammunition and munitions – are especially detrimental.
Be that as it may, the Treaty does not exclude measures relating to these items, and so it is to be hoped that most States Parties, when transforming the Treaty into national provisions, will also take measures to prevent the diversion of ammunition and munitions and of components and parts. In this case too, great importance will surely attach to the development of best practices by the States Parties as well as to the anti-diversion measures taken by importing, transit and trans-shipment states to flesh out the rudimentary provisions of paragraph 3.

**Article 12**
**Record keeping**

This article creates graded obligations to record and store data on authorisations issued or on actual cross-border transfers of the conventional arms covered by Article 2(1).
Under paragraph 1, each State Party is to maintain national records of either its actual exports or its issuance of export authorisations. Each State Party is also encouraged to maintain records of conventional arms that are transferred to its territory as the final destination or that are authorised to transit territory under its jurisdiction or trans-ship there. Since import, transit and trans-shipment activities, unlike exports, are not subject to a blanket authorisation requirement, it is conceivable that records which register only authorisations will paint an incomplete picture. On the other hand, maintaining records of all actual import, transit and trans-shipment operations would be very costly and time-consuming.
From the obligation under Article 13(3) for all States Parties to report annually on either authorised or actual imports of conventional arms covered by Article 2(1) as well as on exports, it also follows that there is a *necessity*, in the form of an obligation in international law, to keep records on actual imports or import authorisations. There is no such necessity for transit and trans-shipment operations, because there is no reporting requirement.
Such records should, if possible, contain the details listed in paragraph 3 and must, under paragraph 4, be kept for a minimum of ten years.

**Article 13**
**Reporting**

In order to achieve the transparency defined as an objective in Article 1 of the Treaty and at the same time to build trust between States Parties, Article 13 imposes reporting obligations on them. This includes a requirement to provide an initial report on national measures taken to implement the Treaty, while subsequent amendments to national legislation and practice must be the subject of update reports.
In addition, States Parties are encouraged to report to other States Parties, through the Secretariat, information on effective measures taken to avert diversion risks.
Moreover, under paragraph 3 a report concerning authorised or actual exports and imports is to be submitted annually by 31 May. This report, however, relates only to the arms listed in Article 2(1), which means that it does not cover ammunition/munitions or parts and components. The report can contain the same information as corresponding reports submitted in other frameworks, such as that of the UN Register of Conventional Arms.
It may be assumed that, as in the case of other treaties, the Conference of States Parties will discuss a template for such reports and agree on them as a benchmark of best practice. In the absence of verification measures in the Treaty, particular importance attaches to the reports submitted under paragraph 3 as a means of assessing the proper application of the ATT by States Parties and thereby building mutual trust.
None of these reports is explicitly public. The German Government had pressed for public reporting, but this was categorically rejected by Russia and China in particular. Since the Treaty clearly states that the Secretariat is to distribute the reports to States Parties but does not specify *to whom* the Secretariat is supposed to *make the reports available*, there is some scope for interpretation. It is possible that the Conference of States Parties will use this scope, and this use may include the option of public accessibility, provided the reporting State Party does not object.

**Article 14**
**Enforcement**

Article 14 requires States Parties to take 'appropriate measures' to enforce the national laws and regulations that are to be adopted for the implementation of the Treaty. It is customary for such measures to include legal penalties for infringements of the national laws and regulations, but this requirement is not explicitly set.

**Article 15**
**International Cooperation**

This article begins by imposing, in paragraph 1, a general obligation for States Parties to cooperate with each other to implement the Treaty effectively, hereby taking

into account their respective security interests and national laws. In the subsequent paragraphs, States Parties are encouraged to give practical effect to this cooperation by exchanging information and consulting with each other and especially by sharing information regarding illicit activities and actors and in order to prevent and eradicate diversion. Judicial assistance in the event of violations of national measures established to implement the Treaty need only be provided where jointly agreed. States Parties are also encouraged to take national measures and to cooperate with each other to prevent corruption in connection with the trade in conventional arms. Lastly, States Parties are supposed to share experience and exchange information on lessons learned in relation to any aspect of the Treaty.
In the view of the German Government, international cooperation has a particularly important role to play in the implementation of the Treaty because of the cross-border nature of arms transfers and of the associated problems. The practice of States Parties over and above the fulfilment of their treaty obligations will largely determine the effectiveness of the ATT.

**Article 16**
**International Assistance**

Many states that have hitherto possessed only rudimentary systems of transfer control or none at all will need advice and assistance to implement the Treaty. Article 16 addresses this situation and calls for maximum mutual assistance to this end. Under paragraph 1, each State Party in a position to do so has an obligation to provide such assistance upon request. This assistance may be requested and granted in many forms; the list of examples in paragraph 1 is not exhaustive but merely illustrative.
States Parties may request, offer or grant assistance through, *inter alia*, multilateral, national and non-governmental organisations or on a bilateral basis. This is an important starting point for future assistance on the part of the EU but also for the provision of bilateral assistance by the German Government.
There have already been initial reflections within the EU on the idea of offering assistance even before the Treaty enters into force. The German Government is also willing to assist other states.
Paragraph 3 prescribes the establishment of a voluntary trust fund to assist requesting States Parties requiring assistance to implement the Treaty. Each State Party is encouraged to contribute resources to the fund. The States Parties cannot establish this trust fund, however, until the Treaty enters into force. Together with Australia, the German Government has initiated the creation of a trust facility at the United Nations Office for Disarmament Affairs (UNODA) with the aim of enabling states to support assistance programmes for preparatory measures for national implementation of the ATT and for implementation of the United Nations Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects. The initiative has already won the support of several donor countries. Pertinent projects will also be presented to the New York-based Group of Interested States in Practical Disarmament Measures, which is jointly led by Germany and UNODA.

**Article 17**
**Conference of States Parties**

Paragraph 1 prescribes that a Conference of States Parties is to be convened by the provisional Secretariat established under Article 18 no later than one year after the entry into force of the Treaty. The Conference of States Parties will then decide on further meetings to be convened.

Under paragraph 2, the Conference of States Parties is to adopt its rules of procedure by consensus at its first session.

Paragraph 3 lays down that one of the tasks of the Conference of States Parties will be to adopt financial rules for its own operations and for those of any potential subsidiary bodies as well as for the Secretariat established under Article 18. At each ordinary session, the Conference is to adopt a budget for the financial period until the next ordinary session.

Paragraph 4 describes the other tasks of the Conference of States Parties. It must review the implementation of the Treaty, including developments in the field of conventional arms. This provision is important, as it ensures that the ATT is adapted to take account of technological developments. In this way, adjustments to the range of arms and other items covered by the States Parties in their national implementing provisions can be addressed below the threshold of amending the Treaty under Article 20.
The Conference of States Parties is also to consider and adopt recommendations regarding the implementation and operation of the Treaty, in particular the promotion of its universality.
Considerable importance will attach to this point once the Treaty has entered into force, because it will serve to flesh out the terms of the Treaty that are open to or in need of interpretation as its provisions are applied in practice on the basis of the common understanding of the States Parties and to facilitate and harmonise the transformation of the Treaty into national law. The Conference of States Parties and the subsidiary bodies established by it would be authorised to formulate guidelines on best implementation practices with a view to setting standards for the control of arms transfers below the threshold of legally binding provisions.
Not least among the relevant issues in this context is the question of the range of items that should be included in the national control list to be established under Article 5(2), a list in which each State Party specifies the items it will control for the purpose of implementing the Treaty. Although the only mandatory inclusions in the list are the categories of arms and other items defined in Article 2(1) and in Articles 3 and 4, at the same time States Parties are encouraged in

Article 5(3) to apply the provisions of the Treaty to the broadest range of conventional arms.
In addition, the Conference of States Parties is to consider proposals for amendments to the Treaty in accordance with the procedure laid down in Article 20. The rules governing the adoption of amendments are laid down in Article 20 itself and hence do not depend on the rules of procedure of the Conference of States Parties for other decisions. Moreover, the Conference of States Parties is to consider issues arising from the interpretation of the Treaty, consider and decide the tasks and budget of the Secretariat established under Article 18 and consider the establishment of any subsidiary bodies as may be necessary to improve the functioning of the Treaty. Lastly, the Conference of States Parties is entrusted with the task of performing any other function consistent with the Treaty. This means that the range of tasks assigned to the Conference of States Parties can be extended and adjusted beyond the remit established by paragraph 4(a) to (f), which enables States Parties to respond flexibly to developments that occur during the term of the Treaty.

Under paragraph 5, extraordinary meetings of the Conference of States Parties will be held at such other times as may be decided by the Conference of States Parties, or at the written request of any State Party, provided that this request is supported by at least two thirds of the States Parties.

Unlike other treaties, the ATT does not have a separate provision on specific review conferences. However, the provision in Article 20(1) whereby proposed amendments to the Treaty may not be discussed and decided upon until six years after its entry into force and may only be considered at three-year intervals thereafter ought to lend something of a special status to those particular Conferences of States Parties

**Article 18**
**Secretariat**

By virtue of Article 18(1), the Treaty establishes a Secretariat to assist States Parties in the effective implementation of the Treaty. Pending the first meeting of the Conference of States Parties, whose task it is, *inter alia*, to determine the tasks and the budget of the secretariat, a provisional Secretariat will be responsible for the administrative functions covered by the Treaty. The provisional Secretariat, however, may not take up its duties formally until the Treaty enters into force. The Treaty does not make any stipulations regarding the format or seat of the provisional Secretariat. The same applies to the location of the definitive Secretariat and its links with existing structures.
Under paragraph 2, the Secretariat is to be adequately staffed in terms of numbers and expertise to fulfil its responsibilities.
Paragraph 3 specifies that the Secretariat is responsible – that is to say solely responsible – to the States Parties and describes the tasks that the Secretariat, operating within a 'minimized' structure, has to perform. These include receiving, making available and distributing reports as mandated by the Treaty (see, for example, Articles 5(4), 11(6) and 13), maintaining the list of national points of contact prescribed by Article 5(6), facilitating the matching of offers of and requests for assistance for Treaty implementation and promoting international cooperation and supporting the work of the Conference of States Parties, which includes providing services for meetings held within the framework of the Treaty. Lastly, the Secretariat is also to perform other duties as decided by the Conference of States Parties.
This last provision is an essential precondition for the necessary adaptation of the Secretariat's tasks during the term of the Treaty and ensures that the Secretariat will be as flexible and responsive as it needs to be.
The Treaty does not contain any specific arrangements with regard to the costs arising from its implementation at international level, which primarily comprises the expenditure for the Conference of States Parties and the Secretariat. According to Article 17(3), taking such decisions will be one of the responsibilities of the Conference of States Parties. As regards these financial matters, an arrangement based on the United Nations' adjusted scale of contributions does not seem to be ruled out, while funding from voluntary contributions also appears possible, at least for some tasks.

**Article 19**
**Dispute Settlement**

This article is dedicated to the mechanisms for the settlement of disputes between States Parties in connection with the interpretation and application of the Treaty but does not cover matters relating to national implementation of the Treaty.
Under paragraph 1, States Parties have at least a general obligation to consult in order to settle disputes. They are also bound to cooperate by mutual consent to resolve any dispute that may arise between them with regard to the interpretation or application of the Treaty. To this end they may have recourse to negotiations, mediation, conciliation, judicial settlement or other peaceful means.
Paragraph 2 specifies that States Parties may also, by mutual consent, resort to arbitration to settle any dispute between them regarding issues concerning the interpretation or application of the Treaty.
No explicit mention is made of referral to the International Court of Justice in accordance with the Statute of the Court. The calls made by some of the negotiating parties for the establishment of a body monitoring non-authorisation of arms transfers are not in any way reflected in the provisions of the Treaty.

**Article 20**
**Amendments**

This article establishes the procedure for amending the Treaty.

According to paragraph 1, no amendments to the Treaty may be proposed earlier than six years after its entry into force. Thereafter, proposed amendments may only be considered by the Conference of States Parties every three years. Any State Party may propose an amendment to the Treaty.
Under paragraph 2, any amendment proposal must be submitted in writing to the Secretariat, which must circulate the proposal to all States Parties, not less than 180 days before the next meeting of the Conference of States Parties at which amendments may be considered pursuant to paragraph 1. If a simple majority of States Parties so determine within 120 days, the amendment proposal must be considered at the next Conference of States Parties at which the consideration of amendment proposals is permitted under paragraph 1.
Paragraph 3 stipulates that the Conference of States Parties must initially make every effort to achieve consensus on each amendment. As a last resort, however, provision is made for amendments to be adopted by a three-quarters majority vote of the States Parties present and voting.
Amendments adopted in this way enter into force, under paragraph 4, ninety days after a majority of the States Parties have accepted the amendment by depositing their instruments of acceptance, but only for those states that have deposited an instrument of acceptance. For any State Party that accepts the amendment at a later date, it will enter into force ninety days after the date of deposit of its instrument of acceptance.

The six-year moratorium on amendments following the entry into force of the Treaty was inserted with a view to excluding any immediate amendments to a Treaty text which, under the rules of procedure of the ATT Conference, had been adopted exclusively by consensus. This rule, together with the lengthy three-year intervals at which amendments can be considered, was the basis for the decision not to require consensus among the States Parties as some negotiating parties had advocated – the same parties that had pressed at the UN ATT Conference for a consensus rule for the adoption of the Treaty. The operatively conservative arrangements for amendment of the Treaty that are laid down in paragraph 1 serve to safeguard the persistency of the treaty provisions. The process from the proposal of an amendment to its entry into force is thus not only subject to certain majorities but also takes a considerable time. The Treaty does, however, provide for a procedural simplification that is designed to support the important and probably necessary development and adaptation of the Treaty, for example in the light of developments in weapons technology.

**Article 21**
**Signature, Ratification, Acceptance, Approval or Accession**

Paragraph 1 of this article specifies that the Treaty is to be open for signature at the United Nations Headquarters in New York by all states from 3 June 2013 until its entry into force.
Paragraph 2 lays down the requirement of ratification, acceptance or approval by each signatory state. Under paragraph 3, the Treaty is to be open for accession by any state that has not signed it. Paragraph 4 prescribes that the relevant instruments are to be deposited with the Depositary.

During the negotiations, the EU member states, but also other states, pursued the aim of including in Article 21 a provision enabling regional integration organisations (RIOs) with competence in the fields regulated by the Treaty to become Parties to the treaty. This would have allowed the EU to accede to the Treaty and to play a direct part in shaping the implementation of the Treaty as well as making it easier to effect any necessary adjustments to the internal regulations of the EU. In addition, it would have enabled the EU to be more active in putting forward the measures it was already taking to support the establishment of effective transfer controls before the Treaty came into being.
The attempts to introduce a 'RIO clause', which would have opened the Treaty to accession by the EU, were thwarted, largely by vehement opposition from China, which based its case on the continuing existence of the arms embargo imposed by the EU in 1989.
This meant that other RIOs were excluded too. The Economic Community of West African States (ECOWAS), for example, which also has competence in areas regulated by the Treaty, particularly that of small arms, had announced its interest in becoming a Party to the ATT.

**Article 22**
**Entry into Force**

This article regulates the entry into force of the Treaty. Under paragraph 1, it will enter into force ninety days after the date of the deposit of the fiftieth instrument of ratification, acceptance or approval with the Depositary. Paragraph 2 lays down that the Treaty will enter into force for other states 90 days after they deposit their instruments. The higher requirement of 65 ratifications contained in previous drafts was successfully avoided, as was any linkage of entry into force with ratification of the treaty by particular specified states, such as "the main arms exporters and importers". Precisely such linkage has prevented the entry into force of the Comprehensive Nuclear Test Ban Treaty to this day.

The German Government hopes that the quorum of 50 ratifications for entry into force will quickly be achieved. Widespread international acceptance of the aims pursued by the Treaty and the declared intent of numerous states to initiate the requisite procedures as quickly as possible are promising indicators. Another crucial factor will be the support that can be offered, especially to developing and newly industrialised countries, to create the domestic conditions for acceptance of the Treaty and the obligations it imposes.

The German Government is striving to ensure the rapid creation of the domestic conditions for ratification of the Treaty. Deposit of the instrument of ratification depends, however, not only on the consent of the legislative bodies in the form of a federal law but also on a decision adopted by the Council of the EU under Article 218(6) of the Treaty on the Functioning of the European Union after the European Parliament has been consulted, because the ATT relates also to matters that fall within the exclusive competence of the EU.[2]

**Article 23**
**Provisional Application**

The sole provision of Article 23 stipulates that any state may, at the time of signature or the deposit of its instrument of ratification, acceptance, approval or accession, declare that it will apply Articles 6 and 7 provisionally, pending the entry into force of the Treaty for that state. The underlying idea is to put into practice as soon as possible the articles on prohibitions and export assessment, which are keys to an effective Treaty, and to use the momentum generated by their application to expedite further progress.[3]

The Federal Republic of Germany is actually complying with these articles already through the application of the aforementioned Political Principles Adopted by the Government of the Federal Republic of Germany for the Export of War Weapons and Other Military Equipment and of Council Common Position 2008/944/CFSP. Numerous other obligations arising from provisions of the Treaty relating to national systems for the control of arms transfers are already being fulfilled in practice by the Federal Republic of Germany through its existing national system for the control of arms transfers.

**Article 24**
**Duration and Withdrawal**

Article 24 deals with the duration of the Treaty and the possibility of withdrawal from the Treaty. As regards the lifespan of the Treaty, paragraph 1 stipulates that it will be of unlimited duration.
Under paragraph 2, however, each State Party, exercising its national sovereignty, has the right to withdraw from the Treaty by giving notice to the Depositary. The latter then notifies all other States Parties of the received notice of withdrawal. The withdrawing State Party may explain the reasons for its withdrawal but is under no obligation to do so. The notice of withdrawal takes effect ninety days after the Depositary receives the notification of withdrawal.
Paragraph 3 stipulates that withdrawal from the Treaty does not discharge any state from obligations, including financial obligations, arising from the Treaty while it was a State Party.

**Article 25**
**Reservations**

Article 25 allows each state to formulate reservations in the customary form that may be declared according to paragraph 1 at the time of signature, ratification, acceptance, approval or accession, unless the reservations are incompatible with the object and purpose of the Treaty. Under paragraph 2, these reservations may be withdrawn at any time.

**Article 26**
**Relationship with other international agreements**

Under paragraph 1 of this Article, the implementation of the ATT is without prejudice to any obligations incurred by States Parties with regard to existing or future international agreements to which they are parties, provided that those obligations are consistent with the Treaty.
Under paragraph 2, the ATT may not be cited as grounds for unilaterally voiding defence cooperation agreements concluded between States Parties to the Treaty.

In all other respects, the relationship between the ATT and other international agreements concerning the same subject matter is governed by the general principles laid down in Article 30 of the Vienna Convention on the Law of Treaties.

Article 26 was the result of a lengthy and arduous debate during the negotiations. The Indian delegation in particular insisted on the inclusion of a clause in the Treaty that would have been tantamount to exempting arms supplied in the framework of intergovernmental agreements on defence or arms cooperation from the decision-making processes to be conducted under Articles 6 and 7 of the ATT. Such a clause could have created a considerable loophole in the ATT. In the course of the conference and already during negotiations in July 2012, the German delegation as well as those of other European nations and the United States pressed very hard for the deletion of paragraph 2. The negotiations on this issue were ultimately conducted on a bilateral basis by the President of the concluding ATT

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[2] The German legislative act of ratification as well as the ATT were promulgated on October 19, 2013 (Federal Law Gazette 2013 Part II, pp. 1426, 1427). On February 5, 2014, the European Parliament, in resolution 2014/2534(RSP), called on the Council of the EU, to grant the Member States permission to ratify the ATT in the interest of the European Union, given that the ATT concerns both exclusive EU competences and national competences. On March 3, 2014, the Council of the EU adopted a decision authorising EU Member States to ratify the Arms Trade Treaty. Germany deposited her instrument of ratification on April 2, 2014.

[3] Upon the deposit of her instrument of ratification, on April 2, 2014, Germany issued a declaration on the provisional application of Articles 6 and 7 of the ATT, meaning that Germany will apply the core of the Treaty – the criteria for examining export applications – with immediate effect. This declaration was promulgated on April 8, 2014 (Federal Law Gazette 2014 Part II, p. 353).

conference, and so the proceedings are not easily retraceable.

The rule that was finally adopted is open to various interpretations and raises the question of conflicts in fulfilling obligations emanating from different treaties relating to the same subject-matter. In the view of the German Government, the result of the solution reached in Article 26 is that existing supply obligations based on an agreement on defence or arms cooperation between two or more Parties to the ATT must be seen in the light of the ATT. In other words, if the authorisation of a specific delivery under such an agreement on defence cooperation is one that would not be issuable under Article 6 or 7 of the ATT, that delivery would not be consistent with the ATT. Accordingly, the relevant *supply obligation* arising from the agreement on defence cooperation could not withstand Article 26(1) of the ATT. Since it would be illogical to assume that paragraph 1 should not apply in the specific case of agreements on defence cooperation, it seems reasonable to conclude that paragraph 2 is merely intended to exclude the possibility of the ATT being misused to justify the general voidance of an agreement on defence cooperation in the event of such restriction of a specific delivery [*i.e.* German and/or EU law, and not the ATT, would have to be relied upon when terminating an agreement on defence cooperation with other States Parties].

Taken in isolation and interpreted as broadly as possible, however, the clause remains unsatisfactory, because it could imply that no deliveries at all under agreements on defence cooperation that were concluded before accession to the ATT are covered by the ATT.

The content of the two paragraphs of Article 26 and the relationship between them, however, reflect a negotiated compromise in which the parties were prepared to accept quite a significant degree of flexibility in the phrasing of these provisions and in a corresponding freedom in applying them. It will not be possible to remedy this situation by means of systematic recourse to the existing body of international law, which may result in contradictory interpretations; the solution depends on mustering the political will to reach agreement. It must also be borne in mind that it may prove difficult to establish the international legal responsibility of a state for violating one agreement if the violation stems from compliance with another agreement.

Another crucial limitation is the fact that the clause applies only to those agreements on defence cooperation in which all contracting parties are also States Parties to the ATT. This creates a clear incentive for all states which seek to benefit from this clause, particularly India, to ratify or accede to the Treaty.

**Article 27**
**Depositary**

As is customary for treaties concluded under the aegis of the United Nations, the depositary is the Secretary-General of the United Nations.

**Article 28**
**Authentic Texts**

The texts in the six official languages of the United Nations – Arabic, Chinese, English, French, Russian and Spanish – are equally authentic.
Their equal authenticity is significant in the light of the terms in the text of the Treaty that are open to or in need of interpretation as well as in view of the virtual absence of definitions.