

June 20, 2014

The UN Programme of Action and Arms Trade Treaty - Why They Matter to the U.S. Arms Industry

By Teresa G. Ficaretta, Esq. and Johanna Reeves, Esq.
F.A.I.R. Trade Group
www.fairtradegroup.org

As we write this article, the fifth biennial conference of states parties is taking place in New York to discuss 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*. Members of the firearms and ammunition industries ask how this instrument relates to the Arms Trade Treaty, also negotiated in the United Nations. This article will provide an overview of the history of both instruments, a summary of key provisions, and the potential impact on the firearms and ammunition industries in the United States.

History of the Programme of Action

The United Nations (UN) "Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects" (PoA) is a politically binding international instrument whose goal is to curb proliferation of illicit small arms and light weapons (SALW). The PoA requires signatories to adopt national controls over SALW, establish regional mechanisms for arms control, and cooperate with the UN and member countries to ensure effective implementation of the PoA and other agreements relating to illicit trafficking in small arms and light weapons. The UN member states, including the United States, unanimously adopted the PoA in July 2001. It is important to note that because the PoA is a politically binding document, not a legally binding treaty, Senate ratification is not required for the U.S. Government to implement its provisions.¹

Obligations in the PoA

The PoA requires member states to implement national, regional and global controls over SALW to combat illicit trade. Some of these controls the United States already has in place, for example controlling production, export, import, transit and retransfers, marking requirements, and criminalizing illegal manufacture, possession and trade in SALW. However, the PoA also contains controls that, if implemented, would have a disastrous impact on lawful trade. For example, the PoA requires member states to ensure creation and *indefinite retention* of comprehensive records of SALW production and transfer. The PoA also requires tracking of imported SALW, adoption of so-called "brokering" controls, and encouraging the establishment of moratoria on transfer and manufacture of SALW.²

Implementation of the PoA

The UN has held five biennial meetings to review the progress of Member States in implementing the Programme of Action, the most recent of which took place in New York June 16-20, 2014.³

There has been criticism of the PoA (and other UN efforts to regulate small arms) as overly broad, expensive, and a pretext for controlling lawfully-owned civilian firearms and ammunition at the national level. For example, the World Forum on Shooting Activities (WFSA) has long advocated for the UN to acknowledge the undeniable, legitimate and rightful role of hunting, sport shooting and lawful civilian firearms ownership in numerous UN member States.⁴ F.A.I.R. Trade Group has also spoken out repeatedly against the UN's failure to distinguish between illicit arms dealings from the lawful and legitimate firearms trade.⁵

Despite opposition to the PoA, implementation efforts have continued for over a decade with a significant number of countries adopting measures outlined in the instrument. The support for the PoA among Non-Governmental Organizations, such as International Action Network on Small Arms (IANSA) and Control Arms has helped drive ongoing efforts to expand the PoA to include ammunition and to convert it into a legally binding instrument.⁶ Such expansion would be significant because of the PoA's application to domestic controls over firearms.

History of the Arms Trade Treaty

The Arms Trade Treaty (ATT) is a multilateral legally binding treaty that imposes controls over conventional weapons. The scope of the ATT is more limited than that of the PoA because it was drafted as an international trade treaty. For this reason, it does not include some of the law enforcement tools of the PoA, such as requirements for marking and tracing of firearms. Because it is legally binding, when the treaty enters into force and is ratified by a particular country, it will have the force and effect of law. Moreover, a legally binding instrument is enforceable through the conference of states parties established in the enforcement provisions of the treaty.

The ATT, like the PoA, is predicated upon a belief that the illicit trade in small arms is a serious problem requiring global action through the UN. The ATT was the logical outgrowth of the PoA, and was first addressed in December 2006 when 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.*" The United States was the only country to vote against resolution 61/89, stating in part its concern over loopholes in the treaty and a preference for national controls.⁷

The treaty was formally introduced to the UN General Assembly in 2009, but the first conference was not held until 2012. The delay in negotiating the treaty was due in large part to the fact that the United States refused to support the treaty until 2008, when the Obama Administration, showing an interest in supporting global arms control, expressed willingness to consider the treaty if it was negotiated on consensus to ensure widest possible support and to avoid loopholes.⁸ Information on the Department of State website related to the ATT also indicates the United States changed its position to help promote the same high standards for the entire international community that the U.S. and other responsible arms exporters already have in place.⁹

The UN General Assembly adopted the ATT in April 2013 by resolution in a vote of 154 nations in favor (including the United States), 23 nations abstaining (including China, Russia and India), and three voting against (Iran, North Korea, and Syria). Although an overwhelming majority of member countries voted to adopt the treaty, this did not mean the treaty went into effect

immediately. Before the ATT can enter into force, it must be signed by member states who intend to be a party to the treaty and ratified by at least 50 states. To date, 118 countries have signed the ATT and 40 have ratified it. The United States signed the treaty in September 2013, but the U.S. Senate has not ratified it.¹⁰

Provisions of the ATT

The object and purpose of the ATT is to establish international standards for regulating the international trade in conventional arms and to prevent and eradicate the illicit trade in the same. "International trade" is defined to comprise export, import, transit, trans-shipment, and brokering. Article 2 of the ATT defines "conventional arms" to include the following:

- Battle tanks
- Armored combat vehicles
- Large-caliber artillery systems
- Combat aircraft
- Attack helicopters
- Warships
- Missiles and missile launchers; and
- Small arms and light weapons (including parts)

Notably, the ATT covers ammunition as well as conventional firearms, requiring States to establish and maintain a national control system to regulate the export of ammunition. Other noteworthy provisions of the ATT include transfer restrictions, export information sharing, end-use certifications for imports, brokering controls and international cooperation.¹¹

Comparison of the PoA and ATT

As noted above, the PoA is a comprehensive instrument intended to combat illicit trafficking in SALW. It includes obligations to enact effective national laws, requires regional cooperation, and global cooperation. It also includes requirements to mark firearms, maintain records, and trace illicitly trafficked weapons, law enforcement tools that are useful to combat firearms trafficking. Although it is not legally binding, it is a powerful instrument that has been in force for over a decade. Countries have met five times since the PoA was approved by the UN, cooperating extensively on studying and combating arms trafficking.

By contrast, the ATT is a legally binding instrument that will have the force and effect of law when it enters into force and, if ratified by the Senate will be legally binding domestic law. However, the ATT is of limited scope, as it is intended as an international trade treaty. It has no provisions for marking and tracing of firearms and limited provisions on law enforcement cooperation.

It is tempting to speculate that the PoA will fade into the distant past, to be replaced by a focus on the ATT, the more recent instrument and one that is legally binding. However, as noted above, the PoA is a broader instrument, providing for national, regional, and global controls and utilizing law enforcement tools such as marking and tracing of firearms. Many believe the PoA is preferable to the ATT for combating illicit firearms trafficking and that the ATT will lose its luster over time.

These proponents believe the fact the PoA is politically binding is irrelevant, as political will is what makes an international instrument effective, whether binding or not. In addition, experience has shown that the collaboration required to implement the PoA has resulted in this instrument being a melting pot for all UN-related firearms trafficking activities. A number of observers state that the lines between the PoA and ATT have become blurred, so that national controls relating to the PoA are being discussed in relation to the ATT.¹² For advocates of more stringent global firearms trafficking controls, this is a plus. For those who believe the UN should not be meddling in national firearms controls, it raises concern.

It is also enlightening to consider which countries have not yet signed the ATT. Neither Russia nor China have signed the instrument, comprising two of the three largest producers of firearms and ammunition in the world (the third being the U.S.). India, another significant producer of small arms, is also noticeably absent from the list of signatories. Also missing are Syria, North Korea, and Iran, countries notorious for being the destination for illicitly trafficked small arms and ammunition. Nor are there a significant number of African countries signing on to the ATT, which is odd given the frequent protests from such states that they are the victims of arms trafficking.¹³

Finally, it is unlikely the ATT will be ratified by the U.S. Senate anytime soon. The OAS Firearms Convention was signed by President Clinton in 1998 and has been languishing in the Senate Foreign Relations Committee since that time.¹⁴ Because they share the same subject matter - firearms control - the ATT will likely suffer the same fate. These issues result in questioning the effectiveness of the ATT in establishing global standards for the international trade in conventional arms.

The final point to be made in considering the two UN instruments is funding for implementation. The UN has established a fund for financing projects that implement the ATT and the PoA. The United Nations Trust Facility Supporting Cooperation on Arms Regulation (UNSCAR) received considerable contributions from Australia and the European Union and finances proposals relating to combating arms trafficking. As long as the money holds out, it is likely it will be used to continue the push to adopt provisions of both the PoA and the ATT. Information on the trust fund can be found here: <http://www.un.org/disarmament/UNSCAR/>.

Impact of PoA and ATT on U.S. Firearms Industry

In the United States, there is a school of thought that the PoA and the ATT will not affect U.S. commercial industry because many of the provisions already exist in domestic laws and regulations, namely the Gun Control Act of 1968 (GCA) and the Arms Export Control Act (AECA). However, as F.A.I.R. Trade Group has long argued along with other trade organizations like WFSA, neither the PoA nor the ATT distinguish lawful international trade of small arms and ammunition from the supposed target of illegitimate or illicit activity. We fear the consequence of this, whether intended or unintended, will be that legitimate trade and industry will bear the brunt of “norms” that will develop out of these instruments, norms that will further restrict the ability of U.S. firms to import and export firearms and ammunition.

In fact, it is important to understand that the Executive Branch can use its existing statutory authority to change policies to be consistent with the standards in the PoA or ATT it thinks are worthwhile. For example, under the GCA and AECA, Congress gives the Attorney General and

the President tremendous latitude in implementation because the authority to control the import and export of firearms and ammunition rests on undefined terms like “national security,” “foreign policy interests,” and “sporting purposes.” It is therefore up to the respective agency’s own discretion on how it applies these standards to regulations and policies.

Consequently, U.S. companies may find themselves having to deal with increased end-use justifications and other bureaucratic hurdles that the federal government implements to comply with global norms and pressures. This, coupled with the difficulty in executing business operations in light of changing U.S. policies, may force many smaller companies out of the import or export trade entirely because of the rising and prohibitive costs of doing business in this area. With every U.S. company that ceases operations in this industry, there will be a void that foreign businesses operating under less stringent regulatory regimes will gladly fill. Illegitimate operators in the black and grey markets will continue their businesses free from government interference. Likewise, businesses supported by governments not subject to the ATT or who do not implement the ATT or PoA to the same high standard as that of the United States will also be able to secure a greater foothold in the international market.¹⁵

The Bottom Line for the U.S. Arms Industry

Members of the U.S. arms industry should pay close attention to the ATT, PoA, and the implementation of both instruments. If ratified, the ATT could result in end user requirements that will make it more difficult to import firearms and ammunition into the United States. Even if not ratified, existing law provides the Executive Branch with sufficient authority to adopt such requirements without additional legislation, whether in the context of the PoA or ATT. The PoA will continue to be used as a platform for countries to discuss international firearms trafficking. Industry members should not assume this broadly worded instrument will fade in the light being shined on the ATT. Indeed, how other countries implement the PoA and ATT will affect U.S. exporters and importers, as foreign governments could adopt requirements to provide end-user certificates concerning wholesale distributors, retail distributors, and even the ultimate consumer. Such efforts could be undertaken without understanding the U.S. firearms distribution system and the disruption that would result if such end user requirements were adopted.

The ultimate consequence of the squeeze put on legitimate international trade in firearms is it will further restrict the domestic market here in the U.S. If the market dwindles, we caution this will have a very real impact on the ability of individuals to exercise their Second Amendment freedoms.¹⁶

The F.A.I.R. Trade Group is a 501(c) (6) organization dedicated since 1994 to protecting the interests of the firearms and ammunition import and export community. F.A.I.R. operates entirely on the funds derived from our dues-paying membership. If you are interested in becoming a member or contributing to the organization, please visit our website at www.fairtradegroup.org.

¹ A politically binding instrument is one that does not have the force and effect of law. There is no mechanism for enforcement of such an instrument other than political pressure on allegedly noncompliant countries, either directly or through the UN.

² The complete text of the PoA can be accessed at <http://www.poa-iss.org/poa/poahtml.aspx>.

³ All statements presented at the Fifth Biennial Meeting of States in New York can be accessed at <http://papersmart.unmeetings.org/en/secretariat/unoda/poa-iss/bms5/statements/>.

⁴ E.g., Hans Herbert Keusgen, President, World Forum on Shooting Activities, Statement to the United Nations Fifth Biennial Meeting of States (June 19, 2014) available at <http://papersmart.unmeetings.org/media2/3501300/world-forum-on-shooting-activities.pdf>.

⁵ E.g., Press Release, F.A.I.R. Trade Group, F.A.I.R. Trade Group Testifies Before UN to Urge Rationality in International Efforts to Stem Illicit Trafficking of Arms (June 24, 2010), <http://www.fairtradegroup.org/FAIR%20UN%20News%206-24-10.pdf>.

⁶ E.g., International Action Network on Small Arms, UN Small Arms Conference Reaches Agreement on Final Afternoon, <http://www.iansa.org/news/2012/09/un-small-arms-conference-reaches-agreement-on-final-afternoon> (Sept. 11, 2012); Sarah Parker, Small Arms Survey, Ten Years of Action on Small Arms: Where Are We Now? <http://www.nato.int/docu/review/2011/Arms-control/10-years-actions/EN/index.htm>. See also, Theodore R. Bromund, Ph.D. and David B. Kopel, Heritage Foundation Web Memo #2969, July 20, 2010, <http://www.heritage.org/research/reports/2010/07/as-the-uns-arms-trade-treaty-process-begins-uns-programme-of-action-on-small-arms-shows-its-dangers>.

⁷ Bill Varner, *U.S. Backs Arms Trade Treaty at UN, Abandoning Bush Opposition*, Bloomberg (Oct. 30, 2009), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=abkyS4.975YM>.

⁸ Arshad Mohammed, *U.S. reverses stance on treaty to regulate arms trade*, Reuters (Oct. 15, 2009), <http://www.reuters.com/article/2009/10/15/us-arms-usa-treaty-idUSTRE59E0Q920091015>.

⁹ <http://www.state.gov/t/isn/armstradetreaty/>.

¹⁰ <http://www.un.org/disarmament/ATT/>.

¹¹ The full text of the ATT can be accessed at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

¹² Ted R. Bromund, PhD, Heritage Foundation Issue Brief, *U.S. Participation in the U.N.'s "Programme of Action" on Small Arms and Light Weapons Is Not in the National Interest*, http://thf_media.s3.amazonaws.com/2014/pdf/IB4238.pdf (June 13, 2014).

¹³ https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=xxvi-8&chapter=26&lang=en.

¹⁴ Johanna Mendelson Forman and Peter DeShazo, Center for Strategic & International Studies *Ratification of the OAS Firearms Treaty - What Does It Mean?* (April 17, 2009), available at <http://csis.org/publication/ratification-oas-firearms-treaty>.

¹⁵ E.g., Johanna Reeves, Executive Director of F.A.I.R. Trade Group, remarks at the Heritage Foundation Panel *Assessing the Risks of the U.N. Arms Trade Treaty* (Sept. 12, 2013), available at <http://www.heritage.org/events/2013/09/assessing-the-risks-of-the-un-arms-trade-treaty>.

¹⁶ See generally David B. Kopel, *Does the Second Amendment Protect Firearms Commerce?* 127 Harv. L. Rev. F. 230 (Apr. 11, 2014), available at <http://harvardlawreview.org/2014/04/does-the-second-amendment-protect-firearms-commerce/>.