30 January 2017
Submitted by: **Sweden**

Working Group on Effective Treaty Implementation (WGETI)

Guidance for States Parties on the practical implementation of the ATT. The Example of Art 9 on Transit and Trans-shipment - Issues paper submitted by Sweden

The mandate for the Working Group on Effective Treaty Implementation adopted by CSP2 suggests that the Group should "*where possible, elaborate guidance for consideration by all States Parties on the practical national implementation of the ATT*" (ATT/CSP2/2016/5 para 27). The purpose of this issues paper is to stimulate consideration of how this part of the mandate might be implemented, using Article 9 of the Treaty as an illustration.

Compared with the well-elaborated rules found in Article 7 on the control of exports, Article 9 is very basic. It simply states that "*Each State Party shall take appropriate measures to regulate, where necessary and feasible, the transit or trans-shipment under its jurisdiction of conventional arms covered under Article 2 (1) through its territory in accordance with relevant international law*". There are several reasons for this brevity. One was purely practical - so much time and energy was focused on export control rules that there was insufficient time to elaborate more detailed provisions on a number of other topics. The second reason was more substantive - the rules on transit and trans-shipment need to be simple in order to be applicable by countries in very different situations. Too much detail would be counterproductive.

Thus, Article 9 as it stands provides very limited guidance to States Parties implementing the Treaty, especially if they have no previous experience in this area. Two examples of important issues that are not addressed :

1. What criteria are most appropriate to apply if a transit or trans-shipment is to be vetted ? One approach would be to apply the whole set of criteria contained in Articles 6 and 7 and used by exporting countries. On closer consideration, some of these are less relevant that others. For instance, it is doubtful whether a transit country would have the resources or the practical possibility to set mitigating measures in place in the recipient country. On the other hand, there are criteria of a binding nature in Article 6 of the Treaty which have to be observed, which argues both for the need to make an assessment and for the need to have controls of some sort in place - at least to the extent necessary to fulfil Article 6, which applies not only to exporting countries but to all State Parties.

2. Does this article set in place an obligation to control air transit and sea transit in the same way as land transit ? This is something small island states, in fact most states, lack the resources to do on an ongoing basis. If the answer is no - what, then, is expected ? Can transit through

national sea territory or airspace be completely ignored ? Perhaps not, given the obligations in Article 6. Should, then, a legal basis be put in place to enable action by national authorities when clear information is available that, for instance, a sanctions-breaking shipment is expected to transit national territorial waters / airspace ?

The fact that the Treaty text does not answer questions such as these poses a difficulty to States Parties implementing the Treaty. It puts them in the uncomfortable position of not knowing whether the national approach chosen will be challenged as insufficient by other States Parties.

In addition, the broad scope of interpretation allowed by the text of the Treaty, although limited by the point established in the Vienna Convention on the Law of Treaties from 1969 that *"a treaty shall be interpreted in good faith...in light of its object and purpose"* (Art 31.1), can lead to wide differences in national approaches. Such differences can under certain circumstances facilitate the circumvention of national controls.

A conclusion that can be drawn from the above is that it makes sense for States Parties to engage in a discussion of issues such as the two outlined above, so that all can have a better idea of what the options are for fulfilling a particular obligation and what at least a majority of States Parties would consider to be sufficient. In order for all States Parties - including future adherents - to benefit from such discussions, the understandings reached also need to be documented.

In this respect, caution is necessary. A number of States Parties have stressed the importance of a stable Treaty text, of not engaging in a renegotiation or expansion the Treaty. Sweden fully agrees with this, and maintains that where the Treaty provides limited or no guidance, States Parties should be free to use the flexibility provided. At the same time, in order to provide some guidance to States Parties and avoid unnecessarily wide differences between different national approaches to implementation, we do not see a problem with exploring if there are common understandings on how to read a given part of the text. This is not the same as re-writing or expanding the Treaty. Whether or not there are such common understandings, the Treaty text remains as it is, and States Parties ultimately have the freedom to interpret it in their own way. Furthermore, it is likely that discussions of this kind will generate an awareness of the fact that there may be not just one single reading of the Treaty text, but different approaches suited to countries in different situations. This helps to safeguard the flexibility of interpretation that is a desirable aspect of the Treaty.

The Vienna Convention on the Law of Treaties (1969), in Article 31.3(a) of the section devoted to the interpretation of treaties, acknowledges the possibility of subsequent agreements between the parties of a treaty regarding the interpretation of the treaty or the application of its provisions. In terms of concerns over reinterpretation or expansion of the Treaty, the key issue is what form to give conclusions of this kind.

- Is a formal CSP decision necessarily the most appropriate or desirable way for States Parties to express a common understanding on the reading of a certain part of the Treaty text ?

- Is the concept of a 'Best Practice' meaningful if it is generally accepted that there can be different approaches to fulfilling a certain Treaty obligation ?

- Are there examples from other Treaties as to how States Parties have chosen to resolve the necessary balance between maintaining a stable Treaty and providing States Parties with some guidance ?

Sweden believes that it would be useful for the WGETI to discuss this issue, in order to arrive at a common understanding that can underpin further work in areas where the Treaty text provides only limited guidance. A more nuanced understanding of the text will be helpful in ensuring its effective implementation.

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