

Arms Trade Treaty Monitor

Independent views and reports from the Arms Trade Treaty negotiation process

Consensus in the draft procedural rules

ATT Legal

Of critical importance at this week's fourth PrepCom for the UN Arms Trade Treaty is the use of consensus in the decision making process. The Provisional Rules of Procedure for the ATT propose that consensus is both the starting and ending point of the process to adopt an Arms Trade Treaty. The Rules envision that representatives will make "every effort" to make all substantive decisions by consensus. If consensus cannot be achieved, however, the Rules allow for a two-thirds majority vote, except where the final treaty text is concerned. The final treaty text is to be adopted by consensus, without a voting alternative.

Some form of consensus decision making is at least considered if not employed in most multilateral treaties developed within the UN process. Consensus does not mean unanimity. Unanimity relates to the result of a vote indicating the affirmative vote of every representative. In contrast, the achievement of consensus does not include a vote of any kind. Consensus is often understood in the context of multilateral treaties as **the absence of a stated objection**. Rather, consensus is achieved unless a representative raises a formal objection.

In practice, use of the majority voting option is not automatic and is a last resort. It does not alleviate the burden on the Conference to take decisions on the basis of consensus. While procedural rules encourage delegates to make "every effort to reach agreement by consensus", in the event consensus cannot be achieved, many treaties put all substantive decisions to a two thirds majority vote.

For example, the Draft Rules of Procedure

of the Review Conference on the Non-Proliferation Treaty (2010) permitted a two-thirds vote on substantive matters if all efforts at consensus had failed, with no exclusions. The Rules of Procedure of the World Health Organisation Framework Convention on Tobacco Control (2005) provided that, if every effort to reach agreement by consensus failed, a three-fourths majority vote is permitted "as a last resort" on everything except financial matters. Similarly, the rules of the Convention against Transnational Organised Crime (2004) and the UN Convention on Corruption (2007) require the Conference to "make every effort" to achieve consensus but, if such efforts fail, it permits a two-thirds majority vote on anything other than budgetary matters. Rules of Procedure relating directly to the adoption of a treaty or convention also have permitted a two-thirds majority vote in the event that consensus cannot be reached.

The concern with the use of strict consensus decision-making without a voting option is that, while it encourages universal support, it can also serve to prevent progress in treaty negotiations. In the case of the ATT, the Provisional Rules of Procedure go further than other international conventions by requiring consensus, without the option of majority voting, for the adoption of the final text.

ATT Legal is a network of over 60 pro-bono lawyers providing legal support and analysis to States and NGOs on the Arms Trade Treaty process. Please contact the network via [attlegalresponse\[at\]gmail\[dot\]com](mailto:attlegalresponse[at]gmail[dot]com). •

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Vol. 4, No. 3

1 | Consensus in the draft procedural rules

2 | Day 2: Lowest common denominator or highest possible standards?

5 | Operative paragraph 5

6 | A civil society "ATT Monitor"

The Arms Trade Treaty Monitor features civil society reporting and analysis on meetings of the UN conference on an Arms Trade Treaty (ATT).

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Reaching Critical Will
a project of the Women's International League for Peace and Freedom

control arms



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Day 2: Lowest common denominator or highest common standards?

Ray Acheson | Reaching Critical Will of the Women's International League for Peace and Freedom

The second day of the preparatory committee continued to focus on the provisional rules of procedure for the July arms trade treaty (ATT) negotiating conference. Consensus and NGO participation were once again highlighted, though other elements raised included the Chair's text and other background documentation and the possibility of simultaneous meetings during the negotiations. The underlying question of the day was whether or not the procedural rules would enable the ATT process to achieve the highest possible standards, as set out as the objective of UN General Assembly resolution 64/48 (2009) that established this process, or merely the lowest common denominator.

Consensus

A number of delegations have over the past two days argued that operational paragraph 5 (OP5) of resolution 64/48, which says that the negotiating conference shall undertake its work "on the basis of consensus," means that all decisions must be taken by consensus. States espousing this view during the second day of deliberations included Algeria, Cuba, Indonesia, Iran, and Venezuela. Though it supported OP5, Viet Nam argued that consensus does not mean unanimity, but rather, no formal objections and no voting. Turkey's delegation indicated support for OP5 of resolution 64/48 but also stated that it would be flexible on the issue.

The Arab Group, Algeria, and Iran called for the amendment or deletion of all of the draft rules indicating the possibility of voting.

The Algerian and Egyptian delegations expressed surprise that the issue of consensus is even being discussed—for them, the issue was settled with the adoption of resolution 64/48. Algeria's delegation argued that all proposals in favour of including voting in the rules of procedure are "in flagrant contradiction" of OP5—"they are interpretations which verge on fantasy". It complained that some states are trying to "impose the law of the majority," which it considers to be "an empty step" that diverts from the objective of universality. "It is surprising to hear several delegations so zealously defend the unrestricted use of majority vote at this stage," said the Algerian delegation.

However, as Trinidad and Tobago pointed out, consensus would not inevitably lead to universality. Furthermore, many delegations argued that "on the basis of consensus," as stipulated in OP5, does not indicate a) what consensus means; or b) upon which

decisions it must be applied. Several delegations, such as Belize, Chile, Costa Rica, Germany, Jamaica, Kenya, Malaysia, and Sweden argued that OP5 was intended to convey the general spirit of trying to reach consensus agreement but that it does mean absolute unanimity and/or that consensus has to be applied to every decision. Many of these states echoed the "golden rule" that "nothing is agreed until everything is agreed".

New Zealand's delegation agreed with the European Union that UN practice should guide the conference on what consensus means. "While consensus has no formal status in the UN General Assembly's own rules of procedure, UN practice tells us that consensus is a process for decision-making which avoids formal objections and voting," said Ambassador Dell Higgin.

On the other hand, China's delegation argued that consensus is the usual practice in the UN on disarmament, arms control, and security issues. However, China also argued that this does not mean any country can block progress "without reason". France's delegation specified that consensus should not "open the door to a veto at each and every stage of negotiations," nor lead to anyone blocking the conduct of the conference. It also, however, argued that each part of the text must be adopted stage by stage.

Germany's delegation argued that states that advocate consensus on all decisions and on single paragraphs must be aware that all progress in July would be put at risk. It cautioned that it would make little sense to sign a treaty which has been negotiated down to "meaningless substance". Sweden's delegation argued that if the conference tries to negotiate this treaty on the basis on requiring separate consensus on every element, "we will end up with nothing because whatever we come up with will be less than perfect for someone." Sweden called for all states to exercise good faith and noted that rules of procedure are insurance policy, a fall-back for guidance if the conference reaches an impasse. Costa Rica's delegation argued that consensus is a path, not an end in itself; that it is a basis, not a normative structure.

Some states indicated concern with the rules as written. Liechtenstein's delegation expressed reservations with rule 33.3—that the conference "shall adopt the final text of the treaty instrument by consensus," cautioning that this "may set us up for failure". However, a few delegations argued that

continued on next page

Day 2 (cont.)

consensus should apply to the adoption of the final text, including Finland, France, Netherlands, and the United States. Kenya said the conference should “strive for” consensus on the final document.

On day one of the PrepCom, the Mexican delegation suggested that paragraph 1 of rule 33, which indicates that the conference “shall make every effort to ensure that all its substantive

decisions are taken by consensus,” should be retained while the rest of rule 33 should be deleted and rule 35 amended accordingly. On day two, the delegation of Grenada, Guatemala, Jamaica, and Trinidad and Tobago indicated support for this proposal.

On the other hand, the delegations of Belgium, Belize, Japan, Netherlands, Switzerland, the United Kingdom, and the United States indicated they support provisional rule 33, which they see as being consistent with resolution 64/48 and UN rules. Italy also indicated its support but suggested more clarification might be necessary to avoid misinterpretation later on. Germany’s delegation said the rules as written are a good basis for further deliberation but that flexibility is needed for moving forward. Some delegations, such as France and the Republic of Korea argued that consensus should not extend to procedural decisions.

Peru’s delegation argued that the wording in the rules of procedure should be as close as possible as what is mentioned in resolution 64/48. However, it also clearly described the nature of consensus as used within the Non-Aligned Movement, emphasizing that consensus does not demand unanimity. According to Peru, NAM rules stipulate that:

All decisions are adopted by consensus, a mechanism designed to widen solidarity and unity in the Movement. Consensus in the Movement of Non-Aligned Countries presupposes respect for diverging viewpoints and, even though it means an agreement by a considerable majority of its members, it does not demand nor does it imply unanimity. If a country does not agree it may record its reservations. For all practical purposes, consensus in the Movement of Non-Aligned Countries can be read as the existence of an “overwhelming majority” in favor of a given proposal.

Peru argued that any democratic process implies a respect for differences and that no state has the prerogative of imposing their views on others. Furthermore, since Peru has consistently called for

the abolishment of the veto within the UN Security Council, it cannot therefore support a disguised veto in this process.

NGO access and participation

A great number of delegations recognized the important contributions of civil society to the ATT process, including Chile, Costa Rica, Côte d’Ivoire, Finland, France, Germany, Jamaica, Japan, Netherlands, New Zealand, Nigeria, Republic of Korea, Sierra Leone, Spain, Sweden, Tanzania, and Turkey.

Chile and the Republic of Korea said non-government organizations should be allowed wider participation in the negotiating conference; Côte d’Ivoire called for “intensified” participation. Turkey’s delegation said NGOs should be given a “meaningful role” while the Democratic Republic of the Congo issued support for the “unrestricted” participation of civil society. Finland’s delegation called for civil society to be allowed to actively participate in the conference. Fiji welcomed the “continued engagement” of civil society “in transparent consultations that would lead to an holistic ATT,” while Jamaica said that civil society should have greater participation than that envisioned in the draft rules.

Several states, including Belgium, Germany, Italy, Liechtenstein, Netherlands, New Zealand, and Sweden, emphasized that civil society should be able to address the meeting on more than one occasion during the negotiations.

On day one, the Norwegian delegation suggested that rule 57.2 be reversed to ensure that meetings are open unless decided otherwise, rather than assuming they are closed until decided otherwise. On day two, Costa Rica and New Zealand agreed with this suggestion. Ambassador Dell Higgie of New Zealand argued, “The results of our work—the Arms Trade Treaty—will be entirely public. Why should the process leading to its adoption not also be public?”

France’s delegation issued support for the EU position on NGO participation, in which it supports “the active participation of NGO’s representatives in the Conference, while maintaining the possibility of having closed sessions when appropriate.” Algeria, Iran, and the United States indicated that they are comfortable with the provisions for civil society as they stand now. The United States argued that the proposed rules “achieve the right balance”.

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*Day 2 (cont.)***Chair's text**

Most delegations are supportive of the Chair's draft paper, issued at the third PrepCom on 14 July 2011. This paper attempts to indicate the majority view on all of the potential treaty's provisions, from scope and criteria to implementation. Delegations including Belgium, Belize, Chile, Fiji, New Zealand, Nigeria, United Kingdom, and Viet Nam want the text to be included among the background documentation for the conference and/or used as the foundation for negotiations in July. Several argued that discarding this draft would mean starting at square one. Ambassador Dell Higgie of New Zealand questioned whether any delegation suggesting that the Chair's text is unnecessary for negotiations "was committed to securing a satisfactory outcome for the ATT process."

Some states, however, want a compilation of state's views, rather than the "summary"-type text produced by the Chair last year. Algeria, Indonesia,

and Malaysia indicated they think this would be helpful in moving forward. The UK delegation, however, pointed out on day one that all states have had the opportunity to submit their views to the ATT process and that over one hundred delegations did that in the UN Secretary-General's report in 2007.

Parallel meetings

The question of simultaneous meetings during negotiations has given many small delegations pause. Due to capacity issues, it could be difficult for small delegations to participate in several meetings at once.

On day one, CARICOM suggested that "where simultaneous meetings of the conference subsidiary bodies cannot be avoided, a mechanism be established that would facilitate such bodies reporting back to the plenary at the end of each day." On day two, the delegations of Grenada, Jamaica, Liechtenstein, New Zealand, and Trinidad and Tobago issued support for this suggestion. •

Correction

The article "Day 1: Questions of consensus and transparency" in ATT Monitor Vol. 4 No. 2 stated that several delegations, including CARICOM and Mexico, indicated their support for the rules of procedure as written. This was incorrect, as many of these delegations would like to see amendments on particular rules. The online version of No. 2 has been amended to reflect this. For further clarification, please see statements available online at <http://www.reachingcriticalwill.org/legal/att/prepcom4/statements.html> or contact the editor.

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Operative paragraph 5

Nathan Sears, Reaching Critical Will of the Women's International League for Peace and Freedom

Resolution 64/48, passed by the UN General Assembly's fifty-fifth plenary meeting, gave birth to the official arms trade treaty (ATT) process on 2 December 2009. Its Operative Paragraph 5 (OP5) is worded as follows: "the United Nations Conference on the Arms Trade Treaty will be undertaken in an open and transparent manner, on the basis of consensus, to achieve a strong and robust treaty." The interpretation of OP5 has thus far proved to be the most contentious issue of the PrepCom's fourth session on procedural matters for the ATT negotiation conference.

The PrepCom has more or less coalesced into two opposing camps, with a small number of states falling somewhere in between. The first group holds that OP5 "clearly states" that the rules of procedure of the conference must be governed by the principle of "consensus," to which "consensus" is generally taken to mean a unanimity of all member states on all procedural, substantive, and drafting decisions. The delegations that have thus far indicated this position include the Arab Group, Cuba, the Democratic Republic of Korea, India, Israel, Nicaragua, the Russian Federation, Syria, and Turkey.

A second group claims that in UN practice, "consensus" is not held to be synonymous with "unanimity," but is rather a process of reaching agreement without formal objections. Furthermore, they argue that consensus should not be construed to provide a veto power to every single state, and that consensus does not apply to procedural matters, only to the substantive content of treaty text. Delegations indicating this position include Argentina, Australia, CARICOM, the European Union, Mexico, and Norway, and several others.

There are a number of ways in which the consensus decision making of resolution 64/48 has been construed in terms of its definition and application. The first is that consensus is synonymous with unanimity. The second is that this must be applied to all decision-making. The third is that consensus refers to the absence of formal objections. The fourth is that consensus decision-making is reserved for the adoption of the final treaty text (the so-called "nothing is agreed until everything is agreed" principle). The fifth is that consensus is an objective to be worked towards, but that in the event that it is unachievable, the conference should then submit to a majority of the states present and voting, or to a two-thirds majority.

With these two groups opposing one another's interpretations of OP5, the draft provisional rules of procedure on the conference attempts to strike a middle ground between the two sides. However, the work of the PrepCom could greatly benefit from hearing the views of more states on decision-making procedures, seeking clarification on what is meant by the word "consensus" in OP5, and refining the draft provisional rules of procedure to be more in keeping with the preponderant opinion of states.

In a related issue, the states in the first group of mentioned above have also found themselves endorsing a paragraph which calls for the ATT negotiation conference to be "undertaken in an open and transparent manner". The states that have endorsed rule 57, paragraph 2 of the provisional rules of procedure on the conference as it currently stands, such as the Islamic Republic of Iran and the Russian Federation, should address how "as a general rule, meetings of other organs of the Conference shall be held in private" accords with the principle of an "open and transparent" conference.

Moreover, as the delegations of the United Kingdom and New Zealand have pointed out, the states that support the language of OP5 are highly represented in the nineteen states that chose to abstain from the vote on resolution 64/48 containing OP5 in 2009: Bahrain, Belarus, Bolivia, China, Cuba, Egypt, India, Iran, Kuwait, Libya, Nicaragua, Pakistan, Qatar, Russian Federation, Saudi Arabia, Syria, UAE, Venezuela, and Yemen. It is interesting to see that some of the states that abstained back then are now quoting from the resolution verbatim in defence of a strict interpretation of the word "consensus". •

A civil society “ATT Monitor”

Nathan Sears, Reaching Critical Will of the Women’s International League for Peace and Freedom

The goal of a “strong and robust” ATT demands the development of a two-track system of inter-governmental and civil society treaty monitoring.¹ A two-track system is critical because intergovernmental organizations (IGOs) and non-governmental organizations (NGOs) possess distinct monitoring advantages. IGOs benefit from access to private information or locations that can be provided for within an ATT, such as access to states parties’ annual ATT reports, national customs data, and facilities for arms production or transit. IGOs also benefit from a regular budget funded by states parties. NGOs possess the freedom to determine their own mandate, rather than their mandate being determined by ATT negotiations. For example, *The Landmine and Cluster Munitions Monitor* (“*The Monitor*”) collects information on both states parties’ and non-parties’ implementation of the Mine Ban Treaty (MBT) and the Convention on Cluster Munitions (CCM). NGOs also have flexibility in their information sources. NGOs do not have to depend on the information provided by states parties, which can become an exercise of “self-evaluation” incongruent with the principle of independent treaty monitoring. Finally, NGOs can increase the democratic accountability

of states by reporting their findings into the public domain, while an IGO may be legally bound to hold information in confidence. A two-track monitoring system should be the goal for an ATT.

Civil society and supportive states should thus begin to develop a plan for a strong “ATT Monitor.” There are a number of existing models of civil society monitoring in the disarmament, arms control, and non-proliferation field that can provide useful lessons for an ATT Monitor. For example, *The Landmine and Cluster Munitions Monitor*’s universal monitoring of all states could be replicated by an ATT Monitor. Its operational objective to systematically collect, organize, and analyze publicly available information on states’ implementation of the MBT and CCM, and to publish high quality annual reports of its findings into the public domain, should be mirrored with respect to an ATT. *The Monitor* is structured as an international network of in-country researchers, directed by a centralized editorial staff. Its researchers are encouraged to act “in a professional and dispassionate manner” and conduct their research through “thorough, accurate and impartial fact-finding,” which includes questioning the reliability of sources, cross-checking, and verifying

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A civil society "ATT Monitor" (cont.)

all information, using only open-source materials, and doing extensive footnoting. An ATT Monitor could benefit from an international network of in-country researchers, but this may not be a necessary condition of effective monitoring. The greater lesson for an ATT Monitor is to strive towards objective, reliable, and thoroughly researched monitoring.

The Stockholm International Peace Research Institute (SIPRI)'s Arms Transfer Programme, while not intending to monitor treaty compliance, per say, provides a great methodological example of monitoring conventional arms transfers. SIPRI's Arms Transfer Database relies solely on open-source information—particularly industry sources—and aims to have three independent sources for every reported order or delivery. Its Arms Transfer Programme currently consists of six researchers—and SIPRI estimates that its Database requires the full-time work of between 2 to 2.5 researchers. SIPRI is thus able to do substantial monitoring work with a small, centralized staff. The key is knowing where to look for information on conventional arms transfers and having staff members that can do research in multiple languages.

However, SIPRI does not monitor small arms and light weapons (SALW) transfers, nor does it engage principally in treaty monitoring, which means that an ATT Monitor is likely to demand a broader monitoring initiative. An ATT Monitor should be prepared to monitor, inter alia, all types of conventional arms and transfers; states' implementation of operative treaty requirements (including reporting); states' transfer control systems (including export, import and transit controls); actions taken towards treaty implementation (including new legislation and legal action taken with respect to ATT violations); high-risk end-users and transit routes; non-state actors in the arms trade (including brokers and armed groups); orders and verified deliveries; transfer license authorizations and denials; and compliance with ATT transfer criteria. An ATT Monitor thus needs its own innovative system. For example, an ATT Monitor could compare the cases in which states authorize or deny transfer licenses in order to maintain objectivity in evaluating compliance with ATT transfer criteria.

A strong and robust ATT calls for a two-track monitoring system to achieve the distinct monitoring advantages of both IGOs and NGOs. What this demands today is collaboration between

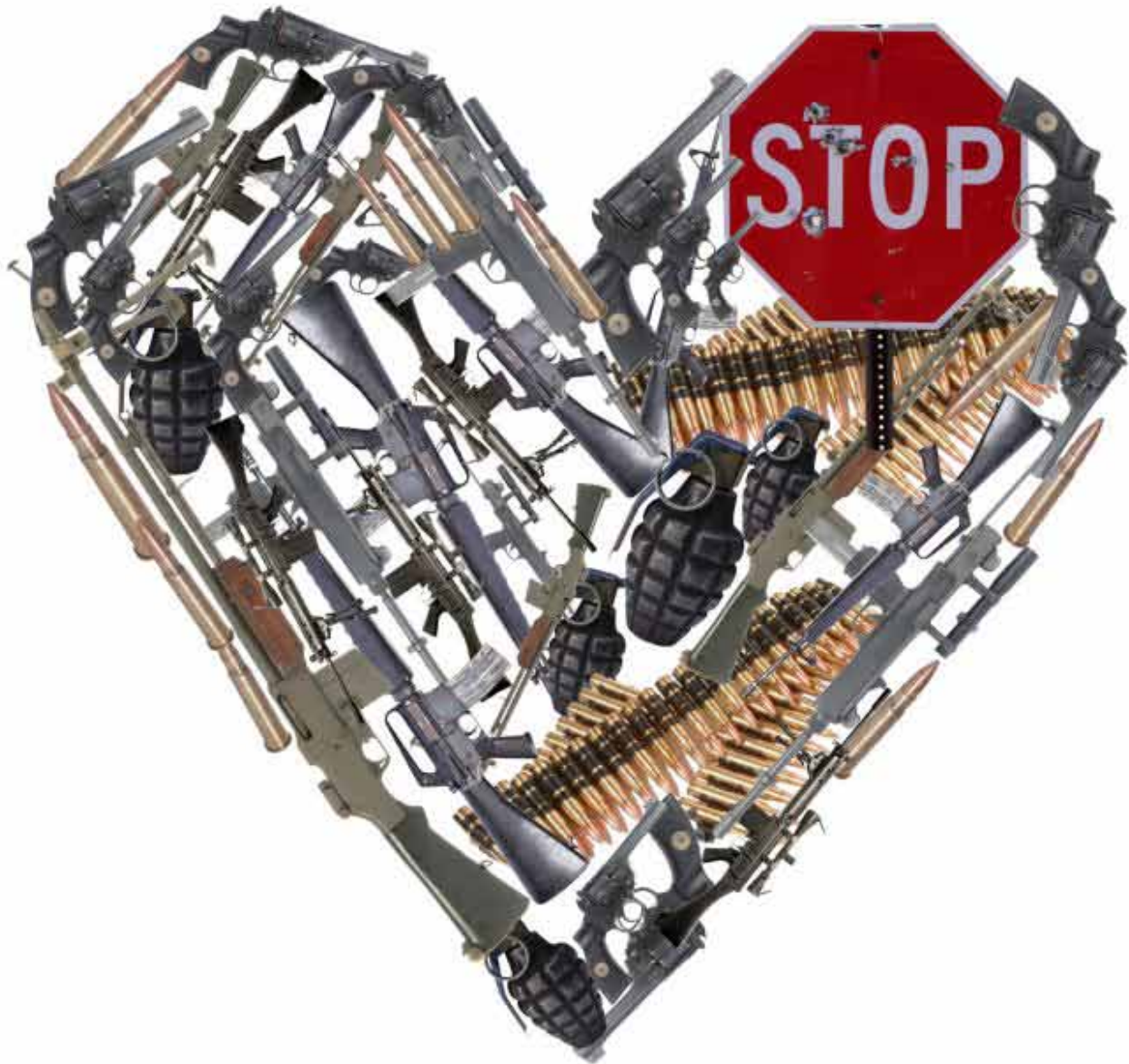
government and NGOs representatives to design a blueprint for a civil society-based ATT Monitor. An effective partnership between states and civil society is essential to an effective ATT Monitor—and ultimately to a two-track monitoring system—with supportive states standing to gain from the flexibility of civil society monitoring and civil society monitoring to benefit from the financial and political support of states.² •

Notes

1. The theme of an official inter-governmental monitoring organization was covered in the previous issue of the *ATT Monitor*.

2. Jacqueline Hansen of the Landmine and Cluster Munitions Monitor and Paul Holtom and Mark Bromely of the Stockholm International Peace Research Institute provided information in interview used for this article.





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