

# ISSUE BRIEF

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## A Simple Plan in 2017 for the Arms Trade Treaty: Return to Sender

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Though then-Secretary of State John Kerry signed the Arms Trade Treaty (ATT) on behalf of the United States on September 25, 2013, the Obama Administration waited until December 9, 2016, to transmit the treaty to the Senate. The strength of the opposition to the treaty and the fact that the Administration only acted when it had less than six weeks left in office make clear that the ATT has no chance of receiving the advice and consent of the Senate. Therefore, like a number of other treaties, it will await action by the Senate Foreign Relations Committee (SFRC) when the next Administration enters office.

The ATT is not in the interest of the United States. The process by which it was negotiated violated the Obama Administration's own red lines, and it will be used by left-wing organizations in highly selective campaigns against U.S. arms sales to allies such as Israel.<sup>1</sup> It will do nothing to improve arms export controls in the U.S. or anywhere else in the world, and other nations are already using it as a pretext to demand tighter controls on firearms inside the United States. The incoming Administration and the Senate should make it clear that the U.S. will not become a party to the ATT.

### **The ATT Deservedly Lacks Support in Congress**

Led in 2013 and 2015 by Senators Jerry Moran (R-KS) and Jim Inhofe (R-OK), 58 Senators—only four of whom will leave office on January 20, 2017—signed letters opposing the ATT. Fifty-nine Senators voted on March 26, 2015, for a budget resolution banning funding to implement the ATT. A series of appropriations acts—most recently, Section 7062 of the Consolidated Appropriations Act of 2016—have also banned implementation funding, as does Section 1285 of the fiscal year 2017 National Defense Authorization Act.

The House, led by Representative Mike Kelly (R-PA), has repeatedly opposed the treaty, and the Republican Party Platform adopted on July 19, 2016, explicitly rejects it. When the Administration transmitted the ATT, Senator Bob Corker (R-TN), the chairman of the SFRC, stated that “nothing has changed over the last four years to suggest the treaty is in our national interest, and it will remain dead in the water.”<sup>2</sup> The ATT has no chance of being voted out of the SFRC, much less of securing the advice and consent of the Senate.

Congress' opposition is well founded. There is no basis for President Obama's assertion that the treaty will “persuade other States to adopt national control systems for the international transfer of conventional arms that are closer to our own high standards.”<sup>3</sup> Nations that do not have the ability or the desire to adopt effective controls on their arms exports will not be enabled to improve or persuaded to act by a treaty.

Similarly, while the President claims that the treaty is “fully consistent with rights of U.S. citi-

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zens” and thereby implies that the ATT is not part of a gun control agenda, other nations that support the ATT proudly acknowledge that they do have such an agenda and that the ATT is part of it.

As the Secretary of Foreign Affairs of Mexico, Claudia Ruiz Massieu Salinas, stated at the Second Conference of States Parties to the ATT in August 2016,

Mexico welcomes the tenacious and sincere efforts of President Barack Obama to establish administrative measures to strengthen controls over the possession and sale of arms.<sup>4</sup>

Mexico has long argued that the ATT should apply to the sale or transfer of firearms inside the U.S., and it continues to support the ATT as a way to promote gun control in the U.S. The U.S. delegation could have objected to the Mexican statement, but chose not to do so.

## What the U.S. Should Do

The incoming Administration should take three steps on the ATT.

### 1. Withdraw Support for the ATT in the Senate.

When President Jimmy Carter decided in 1980 that the Soviet invasion of Afghanistan made it unwise to seek to ratify the SALT II treaty at that time, he notified the Senate Majority Leader (the treaty having already been voted out of the SFRC) that his Administration sought a delay in the Senate’s consideration of the treaty.<sup>5</sup>

Carter implied that the Executive Branch had the right to withdraw a treaty from the Senate, a right that he was choosing not to exercise. He

clearly established that a president can notify the Senate that the Executive Branch does not support action on a treaty. The next Administration should draw on this precedent by notifying Senator Corker that it does not support action on the ATT and that, as a result, it requests the return of the treaty from the Senate.

### 2. “Unsign” the ATT. The incoming Administration should then notify the Treaty Depository—the Secretary-General of the United Nations—that the U.S. does not intend to ratify the ATT and does not consider itself bound by the treaty.

This is colloquially known as “unsigning” a treaty, but it is actually a form of renunciation intended to free a signatory nation from constraints barring engagement in acts that defeat the treaty’s object and purpose. In short, unless the U.S. “unsigns” the ATT, it will continue to be bound by the treaty, even though the ATT has not received the advice and consent of the Senate.

It is commonly accepted that any nation has the right to “unsign” an unratified treaty.<sup>6</sup> Moreover, Article 24 of the ATT gives States Parties to the treaty the right to withdraw from it, that withdrawal to take effect 90 days after notice is given to the Depository. As the U.S. is only a treaty signatory, it is less rigidly bound to the ATT than are the nations that have ratified it. If a State Party can withdraw from the ATT, then the U.S. must be able to unsign it. In short, both accepted practice and Article 24 demonstrate that it is both possible and legal to unsign the ATT.

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1. Ted R. Bromund, “Top 10 Reasons Why the U.S. Should Not Sign the U.N. Arms Trade Treaty,” Heritage Foundation *Issue Brief* No. 4028, August 27, 2013, <http://www.heritage.org/research/reports/2013/08/top-10-reasons-why-the-us-should-not-sign-the-un-arms-trade-treaty>.
  2. News release, “Corker Reiterates Strong Opposition to Arms Trade Treaty,” December 9, 2016, <https://www.corker.senate.gov/public/index.cfm/news-list?ID=7A006EC7-917F-49CC-8D41-26361D885533> (accessed January 4, 2017).
  3. News release, “Message to the Senate – Arms Trade Treaty,” The White House, December 9, 2016, <https://www.whitehouse.gov/the-press-office/2016/12/09/message-senate-arms-trade-treaty> (accessed January 4, 2017).
  4. Claudia Ruiz Massieu Salinas, Secretary of Foreign Affairs of Mexico, statement to the Second Conference of States Parties to the Arms Trade Treaty, August 22, 2016, [https://mision.sre.gob.mx/oi/images/pdf/canciller\\_att\\_csp2016.pdf](https://mision.sre.gob.mx/oi/images/pdf/canciller_att_csp2016.pdf) (accessed January 10, 2017).
  5. President Jimmy Carter, “Strategic Arms Limitation Treaty: Letter to the Majority Leader of the Senate Requesting a Delay in Senate Consideration of the Treaty,” January 3, 1980, <http://www.presidency.ucsb.edu/ws/?pid=33072> (accessed January 12, 2017).
  6. This understanding is codified in Article 18 of the Vienna Convention on the Law of Treaties (1969). The U.S. has not ratified the Vienna Convention, but “considers many of the provisions of the Vienna Convention on the Law of Treaties to constitute customary international law on the law of treaties.” See “Vienna Convention on the Law of Treaties,” U.S. Department of State, 2016, <https://www.state.gov/s/l/treaty/faqs/70139.htm> (accessed January 14, 2017).
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**3. Commit to Attending Future ATT CSPs as an Observer State.** Finally, the next Administration should formally notify the ATT Secretariat that it plans to attend future Conferences of States Parties (CSP) to the ATT and other relevant meetings as an observer state, and that it is willing to pay a share of CSP and other meeting expenses proportionate to the size of its delegation.

The U.S. should make this commitment because, though the ATT is a failure, it is not going to go away: Nothing in the U.N. system ever does. The U.S. therefore needs to keep an eye on it. However, the U.S. should not accept the outcome of the first CSP, which decided that CSP costs should in future be assessed on a modified U.N. assessment scale and thereby sought to require the U.S. to pay 22 percent of the expenses.

The first CSP mandated weak penalties for States Parties that do not pay their dues, but it specified no penalties for observer states that do not pay. There is thus no basis for claims that if the U.S. does not pay 22 percent of the costs of future CSPs, it will be barred from attending as an observer state. States Parties should pay the core costs for the meetings they hold on the ATT: They implicitly accepted this obligation by ratifying the treaty. The U.S. should pay its fair share of CSP expenses, and no more.

### **Create A Mechanism for the Formal Return of Treaties**

The Senate has no mechanism to completely end its consideration of a treaty. Currently, even if the Senate declines to give its advice and consent to a treaty, the treaty remains in the Senate, ready for a future administration to take up years or even decades later.

The Senate should develop a formal mechanism to return treaties to the Executive Branch. This mechanism should be triggered automatically if the SFRC or the Senate rejects a treaty after a hearing or debate, or at the discretion of the Chairman of the SFRC if he determines, on the basis of a vote held prior to a hearing, that there is insufficient support in the SFRC to proceed with a full hearing on the treaty.

A treaty returned to the Executive Branch via such a mechanism should be accompanied by a Senate request that the President “unsign” the treaty in question. While such a request cannot compel the Executive Branch to act, presidents should establish and follow a precedent of respecting such requests.

After the Senate has created this mechanism, the SFRC should use it to remove the ATT from Senate consideration, as a way of giving effect to the will of the Senate, and in response to the Administration’s withdrawal of support for the treaty and request for its return. The SFRC should speedily follow the same course with other pending treaties that are not in the national interest.

This would not prevent a future Administration from retransmitting the ATT or any other returned treaty, but it would force a new administration to draft a new transmittal package, and to spend time and political capital on the question, which would discourage the Administration from acting.

### **Conclusion**

In February 2010, then-ATT Special Negotiator Donald Mahley delivered a speech on the ATT on behalf of then-Under Secretary for Arms Control and International Security Ellen Tauscher. According to Ambassador Mahley, “[N]ot getting a universal [ATT] agreement would make any agreement less than useless.”<sup>7</sup> That speech is still available on the State Department website.

China, India, Iran, Pakistan, Russia, and many other major arms exporters and importers are not party to the ATT and have stated that they will not become party to it. The ATT clearly is not universal, making it, according to the State Department’s own criterion, “less than useless.” In 2017, the U.S. should therefore follow a simple plan for the ATT: return to sender.

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7. ATT Special Negotiator Donald Mahley, U.S. Department of State, “Arms Trade Treaty,” speech, February 18, 2010, <https://www.state.gov/t/us/136849.htm> (accessed January 12, 2017).