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Key Steps for the U.S. After the Unsigning of the Arms Trade Treaty

Ted R. Bromund, PhD

On April 26, 2019, President Donald Trump announced that he would remove the U.S. signature, affixed by then-Secretary of State John Kerry in September 2013, from the Arms Trade Treaty (ATT). Known as an “unsigning,” this act would prevent the ATT, which has failed in its purported effort to prevent irresponsible international arms transfers, from having any legal effect or standing in the United States. At the same time, the President publicly signed a request to the Senate to end its consideration of the treaty and return it to the White House.¹

The President’s decision was legal, correct, and wise. The ATT was and remains a profoundly flawed treaty that the U.S. never should have signed. But even after the U.S. has unsigned the ATT, it will have to make important decisions about how to deal with the treaty from the outside and what to do about the wider structure of U.N. small arms programs, of which the ATT was a part.

Unsigning the ATT Is Legal

It is rare for the U.S. to unsign a treaty.² That is partly because most treaties are acceptable or welcome. It is also partly because most Administrations decide to ignore the few bad treaties the U.S. has signed, rather than court any controversy by unsigning them. Commendably, the Trump Administration has not taken

this weak course with the ATT, which has been regularly opposed in both the Senate and the House.³

The U.S. has the legal right to unsign the ATT. The Vienna Convention on the Law of Treaties states in Article 54 that “[t]he termination of a treaty or the withdrawal of a party may take place: (a) In conformity with the provisions of the treaty.” For its part, ATT Article 24, “Duration and Withdrawal,” states that “[e]ach State Party shall, in exercising its national sovereignty, have the right to withdraw from this Treaty. It shall give notification of such withdrawal to the Depository, which shall notify all other States Parties.”⁴

The ATT refers only to the right of a “state party”—a nation that has both signed and ratified a treaty—to withdraw from it. But Article 18 of the Vienna Convention makes it clear that treaty signatories, such as the United States, which has not ratified the treaty, have a comparable right to withdraw from a treaty by stating that a nation that has signed a treaty has an obligation to uphold that treaty until it “shall have made its intention clear not to become a party to the treaty.” Article 18, as well as common sense and precedent,⁵ thus makes it clear that the United States may legally unsign the Arms Trade Treaty.

Key Next Steps for the United States

In order to make its denunciation of the ATT effective, the Administration should:

Complete the Unsigning Process. The first and most vital step the Administration must take is to send a short formal notification—the unsigning—that it does not intend to ratify the ATT and hence has no legal obligations arising from its signature to the United Nations, which is the treaty depository for the ATT. While there is wide debate about the legal

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The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002
(202) 546-4400 | heritage.org

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effect in the U.S. of a signed but unratified treaty, many commentators, and the U.S. State Department, argue that the U.S. is obligated not to defeat the object and purpose—the core obligations—of such a treaty.⁶ Completing the unsigned via the U.N. is therefore essential.

Work Cooperatively with the Senate. President Trump’s message to the Senate states that he has “decided to withdraw the aforementioned treaty from the Senate” and he “accordingly request[s] that it be returned to me.” As the President implies, this is a request, not a command: Once a treaty has been transmitted to the Senate, as the ATT was on December 9, 2016, it remains there, and is subject to the treaty processes of which the Senate is the master. While the President’s message has great political significance, and establishes a valuable precedent,⁷ it cannot on its own remove the treaty from the Senate. The Administration should work cooperatively with the Senate to decide how best to give effect to the return of the treaty to the executive branch.

Starve the ATT Secretariat of Funding. Even after the U.S. unsigns the ATT, the treaty will still have over 100 states parties around the world. The ATT is not going away without a fight. The U.S. should take all the steps in its power to ensure that the treaty Secretariat, the official treaty body, focuses on starring at its own navel. It can do this most effectively by immediately refusing to contribute any further funding to the ATT. As of 2019, the U.S., as a signatory state, has

contributed \$387,334 of the ATT’s total funding (since 2015) of \$3,252,792.08. In other words, the U.S., even though it has not ratified the ATT, has paid 11.9 percent of its budget, and only \$165.76 less than Japan, the top contributor. By the same token, only 54 of the 127 nations that have been assessed for 2019 have actually paid their full allotment. The ATT Secretariat is running a deficit for 2019 of \$270,310.47, and in four years it has accumulated arrears of \$566,186.05.⁸

In other words, the ATT is in serious financial trouble. Ending U.S. funding is not primarily about saving money. It is about making the ATT hurt by putting it in an even deeper financial hole, which will force its states parties to fight among themselves about who will pay the bills. While they are busy doing this, they will not be able to do much else. In short, not paying is a way for the U.S. to put pressure on the treaty structure and to keep the states parties focused on arguing among themselves, instead of on promoting the treaty.

Decide Whether to Attend the ATT Conferences of States Parties as an Observer. The ATT holds an annual Conference of States Parties (CSP) which the U.S. has heretofore attended as a signatory. It is desirable, but hardly essential, for the U.S. to continue to attend these meetings, simply to keep an eye on what the treaty’s supporters are up to.

The U.S. could attend as an observer after unsigning, as eight other non-signatory nations did in 2018. But if it attends as an observer, it will be assessed costs—in other

1. “Presidential Message to the Senate of the United States on the Withdrawal of the Arms Trade Treaty,” The White House, April 29, 2019, <https://www.whitehouse.gov/briefings-statements/presidential-message-senate-united-states-withdrawal-arms-trade-treaty/> (accessed May 15, 2019).
2. Luke A. McLaurin, “Can the President ‘Unsign’ a Treaty? A Constitutional Inquiry,” *Washington University Law Review*, No. 84, No. 7 (January 2006), p. 1941, http://openscholarship.wustl.edu/law_lawreview/vol84/iss7/9 (accessed May 15, 2019).
3. The opposition was led in the Senate by Jerry Moran (R-KS) and Jim Inhofe (R-OK), and in the House by Representative Mike Kelly (R-PA). See news release, “Sens. Moran, Inhofe Commend Administration for Withdrawing from U.N. Arms Trade Treaty,” United States Senator for Kansas Jerry Moran, April 29, 2019, <https://www.moran.senate.gov/public/index.cfm/news-releases?id=4FD799AD-7025-4706-B715-5AAC42523F2A> (accessed May 21, 2019), and news release, “Kelly Applauds President’s Decision to Withdraw United States from the U.N. Arms Trade Treaty,” U.S. Representative Mike Kelly, April 26, 2019, <https://kelly.house.gov/press-release/kelly-applauds-president%E2%80%99s-decision-withdraw-united-states-un-arms-trade-treaty> (accessed May 15, 2019).
4. United Nations, “The Arms Trade Treaty,” 2013, https://thearmstradetreaty.org/hyper-images/file/ATT_English/ATT_English.pdf?templateId=137253 (accessed May 15, 2019).
5. The unsigning of the Rome Statute of the International Criminal Court by President George W. Bush on May 6, 2002, which President Bill Clinton had signed on December 31, 2000.
6. For an influential survey of the impact of signed but unratified treaties, see Curtis A. Bradley, “Unratified Treaties, Domestic Politics, and the U.S. Constitution,” *Harvard International Law Journal*, Vol. 48, No. 2 (Summer 2007), p. 307, https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2517&context=faculty_scholarship (accessed May 21, 2019).
7. Because President Clinton did not transmit the Rome Statute of the International Criminal Court to the U.S. Senate, it appears that the ATT will be the first treaty that was transmitted to the Senate and then unsigned.
8. The Arms Trade Treaty, “Status of Contributions to ATT Budgets,” April 1, 2019, https://thearmstradetreaty.org/hyper-images/file/2019%2004%2001%20-%20ATT_Budgets_ReceivedContributions_Overview/2019%2004%2001%20-%20ATT_Budgets_ReceivedContributions_Overview.pdf (accessed May 15, 2019).

words, it will receive a bill for approximately \$150,000. It will either have to pay this bill, and thereby subsidize the ATT, or not pay. If it does not pay, it will undoubtedly be criticized by the treaty's advocates, which only matters if the U.S. cares about their criticism. If it does pay, it will in practice be subsidizing not just the CSP, but the treaty itself.

The assessment structure under which the U.S. would (purportedly) owe well over \$100,000 for sending a delegation of no more than 5 officials to a meeting with hundreds of attendees was adopted at the 2015 CSP in Cancun. As a signatory state, the U.S. did not have a vote on this structure. It could therefore argue that it will pay what it regards as a fair share of the genuine costs imposed by its delegation on the CSP, not the inflated bill created by the assessment structure. But it is unlikely the states parties at the CSP would accept this U.S. procedure, and they would doubtless send it a bill for the remainder of its purported assessment.

If the U.S. did not pay this bill, there is not much the CSP could do immediately in practice. The ATT's financial rules allow for States Parties that do not pay their bills to be penalized with a loss of voting rights, but the rules do not bar observer nations that have not paid from continuing to be observers. Of course, the CSP could change these rules. But as over half the ATT's States Parties are currently delinquent, they might not want to create a precedent that could end up barring them from attending the CSP. Moreover, of the 8 observer states in 2018, only 3 have paid their assessment for 2019, so the U.S. would likely not be alone among observers in refusing to pay.

The highest priority for the U.S. is not to pay anything more to the ATT than the nominal sum genuinely imposed by any delegation it sends to the CSP. If the U.S. is willing to take the heat that will come if it shows up at the 2019 CSP and does not pay in early 2020, then that is what it should do. If it is unwilling to accumulate even pretended arrears to the ATT, then—as it has already paid its assessed contribution for 2019—it should attend

the 2019 CSP as an observer and after that be done with the ATT and its CSPs in their entirety.

Make a Diplomatic Push to Reduce the ATT's Base of Signatories and States Parties. Not counting the U.S., the ATT will shortly have 102 states parties and 43 signatories. The U.S. should pressure these states to follow its lead. Many of them in Europe will not do so, but enthusiasm in the rest of the world for the ATT has flagged badly. In practice, the treaty seeks to limit arms exports from the developed to the developing world, which means that governments in the developing world will find it harder to buy from the West and will have to turn to Russia, China, or other non-Western suppliers. While some developing nation governments will welcome this, others will not.

The U.S. should pay particular attention to developing nations, and assure them U.S. arms sales and follow-on agreements will not suffer if they too unsign the ATT. It would not be prudent or right to promise arms exports as a reward for unsigning the ATT, but it would be correct for the U.S. to point out that it does not regard the ATT as a useful treaty or as a factor that needs to be considered as part of its Conventional Arms Transfer Policy.

Be Prepared for Threats. In the wake of the President's announcement, treaty advocates asserted that the withdrawal "puts U.S. industry at risk."⁹ This hypocritical assertion ignores the fact that the treaty advocates themselves are vigorous critics of U.S. arms exports: If anything is damaging to those exports, it is the activities of the treaty advocates themselves.

It is possible that European states, who have been the main supporters of the ATT, will try to impose restrictions on defense imports from the U.S. on the grounds that the U.S. is no longer an ATT signatory. Such restrictions would, in reality, be yet another part of the EU's "Europe First" efforts to build up its own defense industries at the expense of transatlantic security.¹⁰ But as the treaty advocates have busied themselves by suing the British government¹¹ and attacking the French government¹²—two of the most

9. Rachel Stohl and Peter Lichtenbaum, "Trump's Withdrawal from Arms Trade Treaty Could Reduce US Exports," *DefenseOne*, <https://www.defenseone.com/ideas/2019/04/trump-withdrawal-arms-trade-treaty-could-harm-us-industry/156621/> (accessed May 15, 2019).

10. Guy Chazan and Michael Peel, "U.S. Warns Against European Joint Military Project," *Financial Times*, May 14, 2019, <https://www.ft.com/content/ad16ce08-763b-11e9-bbad-7c18c0ea0201> (accessed May 15, 2019).

11. "Saudi Arabia: Fresh Legal Challenge to Stop UK Government Supplying Arms for Use in Yemen," Amnesty International, April 8, 2019, <https://www.amnesty.org/en/latest/news/2019/04/saudi-arabia-fresh-legal-challenge-to-stop-uk-government-supplying-arms-for-use-in-yemen/> (accessed May 15, 2019).

12. "French Journalists Summoned Over Yemen Arms Revelations," RFI, May 14, 2019, <http://en.rfi.fr/france/20190514-french-journalists-summoned-over-yemen-arms-revelations>

important treaty supporters—for their arms sales to Saudi Arabia, neither Britain nor the EU are likely to show much enthusiasm for punishing the U.S. for abandoning a treaty that is helping to cause them so much grief.

It is also possible that totalitarian nations, such as the People’s Republic of China, will now rush to sign the ATT in an effort to make the U.S. look bad. If this happens, it will only prove that the ATT is completely ineffective, as the Chinese regime would never sign a treaty that imposed any genuine constraints on its arms exports. Nevertheless, in spite of this hypocrisy, Johanna Reeves, executive director of the F.A.I.R. Trade Group, is correct when she comments that “just because the United States withdraws from the treaty does not mean businesses can forget about it.”¹³ The same goes for the United States itself.

Recognize that the ATT Does Not Stand on its Own. The strategy of the ATT supporters was to embed it in a U.N.-led network of related institutions, to mix them all together, and to assert that the parts of this casserole that were merely political promises had, as a result, become binding on everyone, including the U.S.¹⁴ The U.S. should immediately end its participation in most of these institutions, including the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light

Weapons in All Its Aspects (PoA) and the International Small Arms Control Standards (ISACS). It should also unsign the Organization of American States’s Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials (CIFTA). While the Firearms Protocol as well as the International Tracing Instrument (ITI) are part of the U.N. network, on their own, they are either harmless or even beneficial, so the U.S. can continue to apply or cooperate with these instruments.

What the U.S. Should Do

President Trump’s decision to unsign the Arms Trade Treaty was correct. Now the Administration should take the steps necessary to make this decision fully effective. By following through at the U.N. and in the Senate, putting financial and diplomatic pressure on the ATT, and withdrawing from the U.N. network of related institutions, the U.S. can put severe pressure on what it rightly described as a “misguided agreement.”¹⁵

—*Ted R. Bromund, PhD, is Senior Research Fellow in Anglo-American Relations in the Margaret Thatcher Center for Freedom, of the Kathryn and Shelby Cullom Davis Institute for National Security and Foreign Policy, at The Heritage Foundation.*

13. The F.A.I.R. Trade Group is the acronym for the Firearms & Ammunition Import/Export Roundtable, an industry trade group, <https://www.fairtradegroup.org/> (accessed May 21, 2019).

14. For an example of how these institutions are mixed together, see “International Small Arms Control Standards, “About ISACS,” 2019, <http://www.smallarmsstandards.org/about-isacs.html> (accessed May 15, 2019).

15. “President Donald J. Trump Is Defending Our Sovereignty and Constitutional Rights from the United Nations Arms Trade Treaty,” The White House, April 26, 2019, <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-is-defending-our-sovereignty-and-constitutional-rights-from-the-united-nations-arms-trade-treaty/> (accessed May 15, 2019).