

BACKGROUND

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Why the U.S. Must Unsign the Arms Trade Treaty in 2018

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Abstract

The Arms Trade Treaty (ATT) is one of a number of treaties that work not through verifiable commitments but by promoting restrictive norms. Over time, as similar treaties have done, the ATT will shape U.S. policymaking, as the undefined standards at its heart evolve and are applied through political pressure, moral suasion, or the actions of the courts. Even by the standards of the Obama Administration, the ATT is a substantive failure, and it lacks congressional support. But for the progressive activists behind the ATT, its inevitable inability to improve the world's incompetent and malevolent nations is irrelevant. No U.S. action can eliminate the long-term risks posed by the ATT, but the U.S. can and should mitigate them by "unsigning" the treaty.

The Arms Trade Treaty (ATT) was signed by then-Secretary of State John Kerry on behalf of the United States on September 25, 2013, and was transmitted to the Senate by the Obama Administration on December 9, 2016. The ATT is one of several treaties in the field of conventional and nuclear weapons that seek to constrain the ability of the United States to make decisions about how it defends itself and its allies. The ATT has no substantive achievements and is fundamentally unserious, but its effort to promote norms to shape U.S. policymaking poses significant risks to U.S. security.

If U.S. policymakers are to understand the ATT and its risks, they must be aware of these wider contexts. While no U.S. action can eliminate these risks, the U.S. can and should mitigate them. The best way to do this is for the U.S. to make it clear that it regards the ATT as a substantive failure—and to formally notify the Treaty

KEY POINTS

- The Arms Trade Treaty (ATT) is one of several treaties in the field of conventional and nuclear weapons that seek to constrain the ability of the United States to make decisions about how it defends itself and its allies.
- The ATT has no substantive achievements and is fundamentally unserious, but its effort to promote norms to shape U.S. policymaking poses significant risks to U.S. security.
- Treaties like the ATT are not simply tools that the U.S. can use to pressure others. They have a track record of creating pressures that constrain U.S. policymaking.
- The best way to mitigate the malign effects of the ATT is for the U.S. to make clear that it regards the treaty as a substantive failure—and to formally notify the Treaty Depository that the U.S. does not intend to ratify the ATT and does not consider itself bound by it.

This paper, in its entirety, can be found at <http://report.heritage.org/bg3287>

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Depository that the U.S. does not intend to ratify the ATT and does not consider itself bound by the treaty.

The ATT in Broader Context

The ATT, like similar treaties, seeks to work not through verifiable commitments, but through moral suasion and the promotion of constraining norms. These aspirational treaties include The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (1999), known as the Ottawa Treaty; the Convention on Cluster Munitions (2008), known as the Oslo Convention; and the Treaty on the Prohibition of Nuclear Weapons (2017).

All of these treaties were the result of activist campaigns by civil society, a phenomenon that has taken a significant part of the making of national security treaties away from the nation-state.¹ Some of these treaties were the result of a breakaway from the United Nations by the nations most interested in the negotiations; others were concluded under U.N. auspices, with the threat of national breakaways in the background. Though the ATT is not an arms control treaty, all of these treaties make the error common to disarmament, which is to focus on the weapon, not on *who is using it*. None have the backing of most of the world's leading military powers, and none have meaningful verification provisions. The U.S. opposed all of these treaties at their start, has ratified none of them, and has signed only the ATT. But in spite of the lack of U.S. ratification, the land mine (Ottawa) and cluster munitions (Oslo) treaties, which have been in existence the longest, have clearly shaped U.S. policymaking.

In May 2017, Jim Shields, head of the U.S. Army's Program Executive Office Ammunition, stated that U.S. policy on land mines is driven by the "Ottawa accord[,] even though we have not signed it." Similarly, U.S. policy on cluster munitions, which was

to demilitarize all legacy munitions and so to move closer to compliance with the Oslo Convention, created "capability gaps that we are really concerned about."² The U.S. believes that the so-called nuclear "ban" treaty will create analogous problems: the U.S. has opposed this treaty partly out of concern that it will undercut the extended deterrence relationships the U.S. has with allies in Europe and Asia.³

In short, treaties like the ATT are not simply tools that the U.S. can use to pressure others. They have a track record of creating pressures that constrain U.S. policymaking. This is no accident: The activists who backed these treaties support them precisely because they want to use political suasion, legal instruments, and international law to change U.S. policy.

The ATT's International Law Criteria

The core of the ATT is the requirement it imposes on its states parties to establish a national control system for the export (and import) of almost all conventional arms. This system must prevent transfers that will be used in the commission of crimes against humanity and must assess whether an export could be used to commit or facilitate a serious violation of international humanitarian law (IHL) and international human rights law (IHRL).

Defenders of the ATT commonly argue that the treaty sets a minimum standard that is lower than the existing U.S. standard for arms exports.⁴ They therefore conclude the ATT will have no effect on U.S. policy. This argument is incorrect. The standards at the heart of the ATT are not set in stone: The definitions of crimes against humanity, IHL, and IHRL *will* evolve over time. By signing the ATT, the U.S. has committed itself to changing its practices as the standards that define the ATT change. Were the U.S. to ratify the ATT, that commitment would be even firmer. The ATT is, in effect, an escalator: Once

1. The finest summary of this phenomenon remains David Davenport, "The New Diplomacy," *Policy Review* (December 2002/January 2003), <https://www.hoover.org/research/new-diplomacy> (accessed February 14, 2018).

2. This policy of demilitarizing was rightly modified by the Trump Administration in late November 2017. See Deputy Secretary of Defense, "DOD Policy on Cluster Munitions," U.S. Department of Defense Memorandum, November 30, 2017, <https://www.defense.gov/Portals/1/Documents/pubs/DOD-POLICY-ON-CLUSTER-MUNITIONS-OSD071415-17.pdf> (accessed February 14, 2018).

3. "Briefing on Nuclear Ban Treaty by NSC Senior Director Christopher Ford," Carnegie Endowment for International Peace, August 22, 2017, <http://carnegieendowment.org/2017/08/22/briefing-on-nuclear-ban-treaty-by-nsc-senior-director-christopher-ford-event-5675> (accessed February 14, 2018).

4. "Advancing the Arms Trade Treaty: An Interview with U.S. ATT Negotiator Thomas Countryman," Arms Control Association, April 1, 2014, https://www.armscontrol.org/act/2014_04/Advancing-the-Arms-Trade-Treaty_An-Interview-With-U-S-ATT-Negotiator-Thomas-Countryman (accessed February 14, 2018).

you step onto it, you are no longer in control of your direction of travel.

For example, U.N. Secretary-General Antonio Guterres reportedly intends to start international negotiations to end the “use of explosives in urban areas.”⁵ If these negotiations change the definition of IHL as it is understood by nations, scholars, and lawyers, then the meaning of the ATT will also have changed, as will the policies the U.S. has to follow to implement the treaty. It is important to remember that, at least in intent, treaties are forever. The question the U.S. must always consider is not merely whether a treaty is bad now, but whether it could be used—or could evolve—in ways detrimental to U.S. interests in the future.

In fact, progressive activists openly acknowledge that they want to use international law and evolving international norms to change U.S. policy, U.S. law, and even existing interpretations of the U.S. Constitution. In 2012, State Department Legal Advisor Harold Koh, a former Dean of Yale Law School and a renowned progressive legal activist, stated approvingly that “twenty-first century international law-making has become a swirling interactive process whereby norms get ‘uploaded’ from one country into the international system, and then ‘downloaded’ elsewhere into another country’s laws or even a private actor’s internal rules.”⁶

Under this approach, the U.S. government is not merely—or even not primarily—supposed to transmit the choices of the American people into the world at large: It is supposed to receive the views of the world at large and transmit them to (or enforce them upon) the American people. In the context of the ATT, that “swirling interactive process” could be used to “download” norms that would change the meaning of the Second Amendment or the definition of IHL.

The Legal and Political Strategies of the ATT Activists

The activists do not rely simply on evolving norms to advance their cause. They have also resorted to the courts. In 2017, a lawsuit involving British arms sales to Saudi Arabia went all the way to the High Court. While the British government won the case, it did so only because it established, conducted, and revealed to the Court an elaborate system of tracking Saudi military activity. Moreover, the mere fact that such a case was heard is bound to have a chilling effect on future British arms exports.⁷ As treaties that the U.S. has ratified are enforceable in U.S. courts, activists could attempt to seek similar legal restraints on U.S. arms exports.

This is particularly troubling because the activists focus almost all their rhetorical and campaigning fire on the purported sins of the U.S., the U.K., and Israel. By contrast, the actual sins of other actors are described with euphemisms or in the passive voice. For example, after Flight MH-17 was shot down over Ukraine in 2014, a leading U.S. ATT activist blamed “today’s globalized environment”—not Russia—for supplying the surface-to-air missiles that downed the plane.⁸ When the High Court announced its decision in July 2017, Amnesty International—a major ATT supporter—condemned Britain and Saudi Arabia by name. It did not mention Iran’s involvement in Yemen, contenting itself with the mealy-mouthed assertion that “all parties to the conflict have committed serious violations.”⁹

These rhetorical evasions are not accidental. The ATT is the brainchild of avowedly progressive Western activists who blame their own governments for the violence and misgovernment of others. When they campaign to enforce and elaborate the treaty’s norms, they therefore naturally believe it is the West—and in

5. Tom Miles, “Exclusive: U.N. Chief Plans Major Disarmament Push But U.S. Skeptical,” Reuters, February 7, 2018, <https://www.reuters.com/article/us-un-arms-exclusive/exclusive-u-n-chief-plans-major-disarmament-push-but-u-s-skeptical-idUSKBN1FR1SF> (accessed February 14, 2018).

6. Ted R. Bromund, “The U.N. Arms Trade Treaty and the Gun Grab,” Heritage Foundation *Commentary*, March 5, 2013, <https://www.heritage.org/commentary/the-un-arms-trade-treaty-and-the-gun-grab>.

7. Ted R. Bromund, “The U.K. Defeats A Legal Challenge to Its Arms Sales - Or Does It?,” *Forbes*, July 24, 2017, <https://www.forbes.com/sites/tedbromund/2017/07/24/the-u-k-defeats-a-legal-challenge-to-its-arms-sales-or-does-it/#6a2388276f3a> (accessed February 14, 2018).

8. Ted R. Bromund, “How Do You Know This Treaty’s Working?,” *Weekly Standard*, August 28, 2015, <http://www.weeklystandard.com/how-do-you-know-this-treatys-working/article/1020956> (accessed February 14, 2018).

9. Amnesty International, “Court Ruling Over U.K. Arms Sales to Saudi Arabia A ‘Deadly Blow’ to Yemeni Civilians,” July 10, 2017, <https://www.amnesty.org/en/latest/news/2017/07/court-ruling-over-uk-arms-sales-to-saudi-arabia-a-deadly-blow-to-yemeni-civilians/> (accessed February 14, 2018). For further examples, see Ted R. Bromund, “In Cancun, the Air Leaks Out of the ATT’s Balloon,” *Weekly Standard*, August 26, 2015, <http://www.weeklystandard.com/cancun-air-leaks-out-att-s-balloon/article/1019100> (accessed February 14, 2018).

particular the U.S., especially under President Donald Trump—that deserves condemnation and correction.¹⁰

A final problem with the ATT is that—in reality, though not in law—the treaty does not stand on its own. The activists, many U.N. member nations, and the U.N. itself seek to intermingle the ATT with a number of other political instruments in the field of conventional arms, including the U.N.’s International Small Arms Control Standards (ISACS) and the U.N.’s Programme of Action to Prevent, Combat, and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (PoA). If commitments made under the ATT come to be understood in light of the PoA or ISACS—both of which are closely associated with domestic firearms regulation—the meaning of the ATT could change dramatically, even if its wording remains unaltered.¹¹

The ATT Today

In practice, the ATT has achieved nothing. That is no surprise. If a nation wants a control system for its arms exports, it can impose one: No treaty is necessary. If a nation lacks the desire or the ability to impose such a system, a treaty will not improve its governance. The ATT contains no verification provisions and creates no incentives for compliance. In short, it is a perfect example of an aspirational treaty, one defined by pious wishes, not serious commitments.¹²

The low level of national compliance with the ATT’s most minimal requirements demonstrates the treaty’s substantive failure. Over the ATT’s first two budgets, only 78 of the 140 assessed nations (55 percent) paid into the treaty.¹³ Only 49 nations out of 75 (65 percent) submitted the required national report on arms

imports and exports for 2016.¹⁴ Activists now bemoan the ATT’s failure, which they define solely as its inability to stop Western arms sales to Saudi Arabia.¹⁵

The Obama Administration abandoned the previous administration’s opposition to the ATT on the explicit understanding that the treaty would only be adopted by consensus. But when push came to shove, the Obama Administration broke its own red line and supported the ATT’s adoption by majority vote of the U.N. General Assembly. This set a dangerous precedent for future treaty negotiations: Nations are now likely to assume that the U.S. will abandon its insistence on consensus if pressed hard enough.

But even the Obama Administration recognized that “not getting a universal [ATT] agreement would make any agreement less than useless.”¹⁶ Today, China, India, Iran, Pakistan, Russia, and many other major arms exporters and importers are not party to the ATT. By the U.S.’s own criterion, the ATT is therefore “less than useless.” This is because, to the extent that the treaty reduces arms exports from the West, it can only have the perverse effects of driving potential importers to buy from China or Russia—or to develop their own indigenous arms industries that will not fall under the treaty’s purview.

As a result of these facts, the ATT deservedly lacks support in Congress. A bipartisan group of 55 current Senators, led by Senator Jerry Moran (R-KS), has signed letters opposing the ATT. A series of appropriations acts (most recently, Section 534 of the Consolidated Appropriations Act of 2017) have banned implementation funding, as does Section 1279B of the fiscal year 2018 National Defense Authorization Act. The House, led by Representative Mike Kelly (R-PA) has

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10. Jeff Abramson, “Finding Leadership Outside the White House,” Forum on the Arms Trade, December 21, 2017, <https://www.forumarmstrade.org/looking-ahead-blog/finding-leadership-outside-the-white-house> (accessed February 14, 2018).
 11. Note, for example, how the 2016 report on the illicit trade in small arms and light weapons by the U.N. Secretary-General asserts—without evidence—in paragraph 22 that the ATT is “of immediate relevance” to implementation of the PoA. See Report of the Secretary-General, “The Illicit Trade in Small Arms and Light Weapons in All Its Aspects,” U.N. General Assembly, October 4, 2016, <https://s3.amazonaws.com/unoda-web/wp-content/uploads/2016/10/english.pdf> (accessed February 14, 2018).
 12. Remarkably, the U.S. has officially recognized that the ATT’s standards are “aspirational.” See “Discussion of Next Steps for the Arms Trade Treaty,” Stimson Center, April 5, 2013, <https://www.stimson.org/discussion-of-next-steps-for-the-arms-trade-treaty> (accessed February 14, 2018).
 13. Calculated from “Status of Contributions to ATT Budgets,” ATT Secretariat, February 5, 2018, http://www.thearmstradetreaty.org/images/ATT_Control_Lists/ATT_Finance/2018_02_05_-_ATT_Budgets_ReceivedContributions_Overview.pdf (accessed February 14, 2018).
 14. Calculated from “Reporting Status,” ATT Secretariat, October 6, 2017, <http://www.thearmstradetreaty.org/index.php/en/2017-01-18-12-27-42/reports> (accessed February 14, 2018).
 15. “States Avoid Discussing Controversial Arms Trade,” Arms Control Association, October 1, 2017, <https://www.armscontrol.org/act/2017-10/news-briefs/states-avoid-discussing-controversial-arms-trade> (accessed February 14, 2018).
 16. Ted R. Bromund, “A Simple Plan in 2017 for the Arms Trade Treaty: Return to Sender,” Heritage Foundation *Issue Brief* No. 4648, January 24, 2017, <https://www.heritage.org/trade/report/simple-plan-2017-the-arms-trade-treaty-return-sender>.

repeatedly opposed the treaty. The Republican Party Platform adopted on July 19, 2016, explicitly rejects it. When the Obama Administration transmitted the ATT, Senator Bob Corker (R-TN), the chairman of the Senate Foreign Relations Committee, 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.” In October 2017, the U.S. abstained in a vote on the treaty in the U.N. First Committee.

What the U.S. Should Do

The rise of treaties like the ATT and the nuclear “ban” poses a fundamental challenge to U.S. diplomacy. The U.S. can no longer afford to take a reactive approach to such treaties. It is not enough for the U.S. to sit back as others formulate the ideas on which these treaties are based, afterwards seeking to mitigate their flaws. This approach cedes leadership to progressive activists who always blame America first, and it usually results in treaties that the U.S. regards as irresponsible but which it is pressured to sign on the grounds that many of its allies are on board. The long-run challenge to the U.S. is to take a new, more active approach that would focus not on opposing bad ideas, but on advancing good ones.

In the interim, however, the U.S. must respond to the world, and to the ATT, as it is, by taking the following steps:

Recognize the consequences of the U.S.’s responsible approach to treaties. The United States rightly takes treaties seriously. As a result, it should only sign and ratify high-quality treaties. The ATT is in every way a low-quality treaty that relies on aspirations, not carefully defined, verifiable commitments. By signing the ATT, the U.S. has bound itself to uphold standards that the treaty does not define—and for which the U.S. is not responsible. Because the ATT is based on evolving standards, it is better understood not as an event, but as an ongoing process. As it reduces or controls arms transfers, it will do so only in nations like the U.S. that have an open and democratic political process and which respect the treaties they have

signed. It will have *no effect* on the incompetent, and it will drive purchasers into becoming the customers of unconstrained, malevolent actors.

Recognize the risks posed by the ATT’s fundamental lack of seriousness. The treaty’s advocates avowedly seek to use international law to constrain the U.S., and they are reliably concerned only with chastising the West—in particular, the United States. Like the so-called nuclear “ban” treaty, the ATT will not be effective in advancing its nominal aim, and it is very likely to be counterproductive. Like the “ban” treaty, it is calculated to discredit its advocates by demonstrating that they are “fundamentally unserious about addressing the real challenges of maintaining peace and security in a complicated and dangerous world, and unserious about trying to make that world a genuinely safer place.”¹⁷

Mitigate the ATT’s risks by “unsigning” the treaty. The U.S. cannot protect itself from all the consequences of this lack of seriousness. No matter what the U.S. does, other democratic nations will slowly change their import and export policies as a result of the ATT and will seek to restrict investment in U.S. firms that they deem have exported arms in violation of the ATT’s purported norms. But the effect of the ATT on the U.S. will only be magnified if the U.S. remains a treaty signatory. As long as it does so, the U.S. is under an obligation to apply the ATT’s evolving standards to its own policies and practices. Over time, regardless of the ATT’s lack of substantive achievements, this obligation will have an effect.

For that reason, the best way to mitigate the malign effects of the treaty is for the U.S. to “unsign” the treaty by notifying the Treaty Depository—the Secretary-General of the United Nations—that the U.S. does not intend to ratify the Arms Trade Treaty, and that it does not consider itself bound by the treaty.¹⁸

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17. “Briefing on Nuclear Ban Treaty by NSC Senior Director Christopher Ford.”

18. The legality of “unsigning” is clear. Curtis Bradley, “Unratified Treaties, Domestic Politics, and the U.S. Constitution,” *Harvard International Law Journal*, Vol. 48 (2007), pp. 334-335, concludes that “[a]s a matter of international law, there seems to be little question that a nation is entitled to declare its intention not to become a party to a treaty after signing it. In fact, Article 18 of the Vienna Convention appears to contemplate exactly this possibility when it states that a nation’s object and purpose obligation continues until the nation ‘shall have made its intention clear not to become a party to the treaty.’ Nor could this action have violated the familiar *pacta sunt servanda* rule for treaties—that is, that nations are obligated to comply with their treaty obligations in good faith—because that principle applies only to treaties that a nation has ratified.”