

WebMemo



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Why the U.S. Should Be Concerned About the Domestic Effects of the U.N. Arms Trade Treaty

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Negotiations for a new U.N. Arms Trade Treaty (ATT) are supposed to be finalized in July 2012. Some of its supporters argue it would have no “impact on the ability of individuals within the United States to acquire and possess firearms.”¹ Even if this is true, it is not the only reason to be concerned about the treaty. But if the treaty comes before the Senate, its domestic effects will be of central importance. While the treaty is not yet complete, analysis of the current draft demonstrates that there are legitimate reasons to be concerned about its potential domestic effects.

Incomplete Documentation Encourages Skepticism. Analysis of the potential effects of the ATT is difficult because the U.N. has not made “essential documents” available. The U.N. states simply that “The Chair’s non-papers have been circulated to all delegations.”² In the absence of documents from official sources, analysts must rely on reports from nongovernmental organizations (NGOs), most of which support the treaty. This analysis is based on the Chair of the ATT Preparatory Committee’s “Draft Paper,” made available by one such NGO.³ One reason for skepticism about the ATT is the secrecy of the process that will define its critical concepts.

U.N. Pressure to Enforce Domestic Standards. The 2008 U.N. General Assembly resolution on the ATT called for the “highest possible standards” to keep arms away from all “criminal activity.” This requirement implies the need for stringent standards on domestic ownership, sales, and transfers.

The 2009 resolution, which the U.S. supported, called instead for the “highest possible common international standards.” It also acknowledged the existence of “national constitutional protections on private ownership,” but it placed the existence of these protections in the context of “the right of States to regulate internal transfers of arms and national ownership.” The draft paper contains similar language to the 2009 resolution.

The fact that the 2008 resolution was adopted almost unanimously shows there is broad international support for a “highest possible standards” treaty, which will put pressure on the U.S. to move toward those standards in the current negotiations.

Hunting and Related Weapons Have Not Been Excluded. The U.S. position is that the ATT should not include hunting weapons. Unfortunately, many major countries have made it clear that they want the treaty to include these weapons. The draft paper notes that the ATT will cover, *inter alia*, small arms, light weapons, their parts or components, ammunition, and equipment used to develop, manufacture, or maintain any of these items. It does not exclude

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hunting weapons. This is avowedly unacceptable to the U.S. The draft also does not exclude sporting firearms or other small arms that could conceivably have a military use but are actually for self-protection, such as revolvers.

Broad Scope of Treaty Is Unrealistic and Dangerous. The scope of the treaty—which controls everything from rifle scopes to battleships, as well as the technology necessary for their production—means it would be unenforceable without a very substantial expansion of federal authority. The U.S. should not sign treaties that are so broad that their impact cannot be precisely understood, and the ATT would affect every individual and U.S. business that deals in any way with any conventional weapon. Such a treaty could not meaningfully be subject to advice and consent by the Senate.

Treaty Requires Undefined Controls on Internal Transfers and Transits. In 2010, Mexico, speaking for eight other Central and South American nations, stated its view that “internal transfers which... might have an impact on other States should also be part of an ATT.” Since any firearm transfer—meaning any change in the ownership of a firearm—might conceivably somehow affect another nation, an ATT based on this provision would appear to require far-reaching domestic controls.

The draft paper is narrower and nominally applies only to “international arms transfers,” but in its Annex A, it defines such transfers as including “transport” across national territory, and notes that states should “monitor and control” arms in transit. It also requires nations to “enforce domestically the obligations of this treaty” by prohibiting the unauthorized “transfer of arms from any location” under its control. If applied to hunting and sporting weapons, this could be a major expansion of federal firearms controls.

Finally, the draft paper requires that nations “shall take all appropriate measures to prevent the diversion of exported arms into the illicit market or to unintended end users.” This clause can be interpreted in many ways. The U.S. cannot prevent the diversion of arms that have already been exported and have therefore left its jurisdiction. This requirement therefore appears to create an obligation to impose undefined but extensive internal controls, as these controls are supposed to include “all appropriate measures.”

Treaty Proposes Intrusive Record-Keeping and Reporting Provisions. The draft paper requires nations to “maintain records of all imports and shipments of arms that transit their territory” and notes that these records may contain information about the type of arms transferred and their “end users.” This information is to be reported to the treaty’s international Implementation Support Unit, along with the “national legislation or other measures used to regulate or control the items and transactions.” The draft treaty thus views the collection and international reporting of the identities of selected individual firearms owners—the “end users”—as constituting the best practice of treaty compliance. It also appears to suggest the creation of an international gun registry for all firearms that are either imported into or transit national territory.

Treaty Has Broad Implications for International Trade. All nations require official authorization for the commercial import or export of firearms, but authorization is not required in most cases for the import or export of items such as gun slings or scopes. The draft paper, however, states that all components “specifically and exclusively designed” for firearms must be authorized by “competent national authorities.” This phrasing implies that nations must ban the trade in components,

1. “Analysis by ATT Legal Network Shows the #NRA’s Claims On the #Armstreety Are Unfounded,” *Arms Trade Treaty Monitor*, November 17, 2011, at <http://attmonitor.posterous.com/analysis-by-att-legal-network-shows-the-nras#more> (December 8, 2011). But see notes 4 and 5 and the accompanying text, which suggests others are quite open in their aim that such international treaties supersede American constitutional protections.
2. “Arms Trade Treaty Preparatory Committee,” United Nations, at <http://www.un.org/disarmament/convarms/ATTPrepCom/index.htm> (December 8, 2011).
3. “Chairman’s Draft Paper,” U.N. Arms Trade Treaty Preparatory Committee, July 14, 2011, available through Reaching Critical Will, at <http://www.reachingcriticalwill.org/legal/att/prepcom3/docs/ChairPaper-14July2011.pdf> (December 8, 2011).

except when this trade is explicitly authorized. This requirement would impose burdens on a currently legal trade, and it raises both Second Amendment and free trade concerns.

Treaty Forbids Reservations. The Senate uses reservations to define and limit the effect of a ratified treaty. The draft paper states that reservations “incompatible with the object and purpose” of the treaty are forbidden. This is a common clause, but in the context of this treaty, it raises special concerns.

In considering this treaty, the Senate would likely, and at a minimum, require the President to certify that it has the right to adopt reservations, regardless of whether they might be deemed incompatible with the treaty. It would then likely adopt a reservation stating that the treaty has no effect on rights protected by the Second Amendment, as well as reservations rejecting the treaty’s record-keeping and reporting provisions and its inclusion of ammunition and hunting, sporting, and personal defense weapons. The Senate and House, in crafting any necessary enabling legislation, would also ensure that they respected the adopted reservations.

It could plausibly be argued that such reservations and legislation would be incompatible with the treaty’s object and purpose, as they would exclude broad classes of conventional arms included in the treaty. In that case, if the U.S. proceeded to ratification, that ratification might not be viewed as legal by other nations under the treaty’s own terms. More broadly, the U.S. should be wary of any treaty that seeks to dissuade Congress from fulfilling its responsibility to uphold the Constitution by forbidding reservations that protect fundamental individual liberties.

Treaty’s Supporters Have Backed Stronger Domestic Regulation. Before becoming the State Department’s legal adviser in 2009, Harold Koh wrote that “the only meaningful mechanism to regulate illicit [international firearms] transfers is stronger *domestic* regulation.”⁴ Koh has also questioned the legal validity of reservations and argued that judges should “construe the Constitution to invalidate domestic rules that now violate clearly established international norms.”⁵

Koh was writing as part of a broad-based legal and NGO-led movement to use international agreements to erode constitutionally protected freedoms, in particular those protected by the First and Second Amendments. It is not surprising that the ATT has been understood as a move toward the “stronger *domestic* regulation” of firearms, because this is precisely how its supporters have described and justified similar treaties.

Treaty Is Based on a Fallacy. The underlying philosophy of the treaty is that arms transfers between U.N. member states are presumptively legitimate, while private arms transfers are problematic and should be subject to national regulation. In reality, many U.N. member states supply arms to terrorists as a matter of national policy. Signing a treaty will not make them virtuous. In fact, because the treaty for the first time recognizes their explicit right to import and export arms, it may make them more dangerous.

What the U.S. Should Do. This analysis is intended to highlight only the most glaring potential flaws of the ATT as they relate to its possible domestic effects at the current stage of the negotiations. The flaws of the ATT are much broader than

4. Harold Hongju Koh, “A World Drowning in Guns,” *Fordham Law Review*, Vol. 71, No. 6 (May 2003), pp. 2354, 2358, 2355, 2345, 2361, and 2348, at <http://law2.fordham.edu/publications/articles/500flspub11111.pdf> (December 13, 2011) (original emphasis). Koh was writing in favor of CIFTA, the Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials, negotiated under the auspices of the Organization of American States.

5. Harold Hongju Koh, “On American Exceptionalism,” *Stanford Law Review*, Vol. 55, No. 5 (May 2003), p. 1483, note 14.

the possible domestic effects. On these and many broader grounds, including its need to reject vague, aspirational, and therefore irresponsible treaties, the U.S. decision to support the negotiation of the ATT was an error, and it should withdraw from the negotiations.

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