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The U.N. Arms Trade Treaty's Criteria for Transfers Pose Problems for the U.S.

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Abstract

The framework on which the U.N. Arms Trade Treaty (ATT), currently being negotiated, is likely to be based is clear: It will set out criteria that signatories must apply to proposed arms transfers and require them to decide whether the proposed transfer poses a risk under any of those criteria. But these criteria are likely to be ill defined, and the ATT's "checklist" model differs fundamentally from the "guidance" model that the U.S. currently employs. Worst of all, the ATT will enumerate criteria that will be easy to expand in ways that the U.S. cannot control. If the ATT is to exist, it should be based on a commitment by willing and democratic signatories to develop effective systems of border and export control.

This paper, in its entirety, can be found at **http://report.heritage.org/bg2706**

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The U.N. Arms Trade Treaty (ATT) is being negotiated during July in New York. One reason to be concerned about the ATT is the criteria that it will require signatories to consider before they sell or transfer arms. These criteria are disturbing in part because they are likely to be vague, undefined, and easily capable of being interpreted or elaborated in ways that would impinge on U.S. sovereignty or on the ability of the United States to conduct foreign policy.

But the way the ATT criteria are to be applied is even more disturbing. Unlike current U.S. policy, which considers and balances many criteria, the ATT is likely to recommend that its criteria be applied singly, with each separate criterion serving as a bar that must be passed if an arms transfer is to proceed. The U.S. contention that an ATT would not, and should not, result in any change in its practices is therefore not credible. If the U.S. nonetheless plans not to change its practices, it would appear that the ATT will have no effect on the authoritarian states at which it is nominally aimed.

Status and Framework of the Arms Trade Treaty

It should be understood that, as the ATT has not yet been negotiated,

Key Points

- The U.N. Arms Trade Treaty (ATT) will be finalized in late July, but its likely framework is already clear.
- This framework rests on the effort to establish criteria by which the potential consequences of arms transfers must be assessed.
- The ATT criteria are likely to be ill defined and to be incompatible in many ways with both the U.S. national interest and the criteria the U.S. currently employs.
- The ATT's model for using these criteria is incompatible with the model employed by the U.S. under Presidential Decision Directive 34, which dates from 1995.
- Unless the ATT departs fundamentally and unexpectedly from its current track, it will, if ratified, require the U.S. to revise PDD 34.
- Any ATT should be based on requiring effective border and export control by willing and democratic signatories.

the criteria to be included in it—and, indeed, many of the treaty's details—are yet to be finalized. In March, the president of the July conference, Ambassador Roberto Garcia Moritán of Argentina, released what is known as the "Chairman's Draft Paper."[1] This is the closest publicly available equivalent to a draft treaty, but it is not actually a draft treaty. It represents a good-faith effort by Ambassador Moritán to pull together, in a form approximating a treaty draft, the requests and desires of the 193 U.N. member states engaged in the ATT negotiations. It contains a number of contradictory elements, and no detail can be taken as final.

By the same token, however, the Draft Paper does set out a near-consensus position on the core elements of the ATT that is very likely to be retained in the final treaty. Moreover, simply by virtue of the fact that it sets the agenda, it will influence the course of negotiations. Finally, the United States failed to take advantage of its opportunity to submit by March 31 a statement on the provisions it seeks to embody in the ATT. This indicates that the U.S. is content with the framework of the Draft Paper.

It is therefore reasonable to take this framework as a basis for analysis. The only alternative is to wait until the final treaty text is available, which will likely happen on July 27. By that point, the treaty, having been negotiated at a large U.N. conference, will be internationally established, though the U.S. Senate will still have the legal power to amend the treaty text as it sees fit.

It thus makes sense to consider the treaty's framework as it is publicly known now so that the Senate, the U.S. House of representatives, and other interested parties can inform the Administration of concerns relevant to the treaty before the negotiation process concludes.

- The treaty is very likely to be based on requiring signatories to consider a number of factors before they sell or transfer arms, coupled with a statement that the right to buy, sell, or transfer arms is inherent in national sovereignty, so the factors the treaty enumerates cannot absolutely ban any particular transfer.

- The treaty is very likely to create a U.N.-based Implementation Support Unit to assist signatories but is very unlikely to create any supranational compliance mechanism.

- The treaty is very likely to apply to a very wide range of items and activities, including all conventional weapons, their parts and components, and technology and equipment for their manufacture. Ammunition may also be included, and—in addition to imports, exports, and transfers—brokering (i.e., third-party facilitation of transfers), technology transfers, and manufacturing under license are also very likely to be included.

- Finally, in addition to the usual extensive preamble and statements of principles and objectives, the treaty is very likely to require record keeping and reporting, to establish regular review conferences to revise and extend the treaty, and to seek to be universal (that is, ratified by all of the world's nations) in scope.

Many aspects of this framework are problematic, troubling, or even dangerous, but at the heart of the ATT will be the criteria that it seeks to apply to arms transfers: Without these criteria, it would be a fundamentally different document. The non governmental organization (NGO) campaign that has done much to drive negotiation of the ATT forward insists on even more stringently drawn and applied criteria than those contained in the Draft Paper, and there has been no indication from any of the U.N. member states involved in the July conference that they seek to reject the Draft Paper criteria altogether.[2] Thus, while these criteria will very likely undergo change in detail, they are very unlikely to be abandoned entirely.

Specific Criteria Being Considered Are Problematic

In its Article 5, the Draft Paper states that, when considering whether to authorize the export of arms, national authorities—i.e., not a U.N. organization—should consider 10 criteria. This consideration is supposed to be "objective and non-discriminatory." This is itself troubling for three reasons.

First, the treaty is supposed to encourage signatories to discriminate against supplying arms to

1. The "Chairman's Draft Paper" (hereafter referred to as the Draft Paper) is contained in "Report of the Preparatory Committee for the United Nations Conference on the Arms Trade Treaty," U.N. General Assembly, March 7, 2012, http://www.un.org/disarmament/convarms/ATTPrepCom/Documents/PrepCom4%20Documents/PrepCom%20Report_E_20120307.pdf (accessed June 4, 2012).
2. Letter to President Barack Obama, "Toward a Robust and Effective Arms Trade Treaty," May 22, 2012, http://attmonitor.posterous.com/dear-mr-obama-letter-to-the-us-president-pres#more (accessed June 6, 2012).

nations that are particularly repressive or that collude with terrorists. The paradox is obvious: The treaty will encourage discrimination, but only on a strictly non-discriminatory basis. This paradox poses a particular problem for the U.S. As the Department of State has pointed out, "specific regional or country concerns"—such as the situation of Taiwan—"create challenges for establishing criteria that can be applied without exception."[3] In other words, the more the treaty demands "non-discriminatory" decision-making, the more it runs afoul of U.S. policy, which is to discriminate in favor of some countries and against others.

Second, even if the process in a particular nation is in fact "objective," however that word is defined, it is not likely that, for example, Iran and the United States will arrive at the same objective conclusions as a result of their national processes. In other words, if the world's nations actually agreed objectively on who was fit to have arms and who was not, the treaty would have no reason for existing. The fact that they do not means that their objective decisions are going to differ wildly and thus that the criteria it sets out will have only as much effect as domestic legal and political processes allow. In Iran, Russia, China, Pakistan, and many other problematic states, that effect will be nonexistent.

Third, the Draft Paper requires that the provisions of the treaty "shall be implemented in a manner that would avoid hampering the right of self-defense of any State party." This is a nonsensical requirement. Supposedly, the entire purpose of the ATT is to limit the ability of some nations to acquire arms that they will use to oppress their own citizens or to arm terrorists, but the very same arms can also be justified as essential to that nation's self-defense. If the ATT avoids hampering self-defense, it will not deny arms to anyone.

This is not simply an academic problem. In early June 2012, President Vladimir Putin of Russia asserted that Russia does not supply Syria with weapons that are used in domestic conflicts.[4] In other words, Russia's claim is that it is only supplying Syria with arms that are for its national self-defense—a claim that Russia could obviously use under the ATT to avoid applying its criteria.

Those problems aside, most of the criteria in the Draft Paper are problematic, and because the U.S. has a functioning legal and political system, the criteria will matter to it even if they matter to no one else.

The first two criteria relate to the obligation of states not to violate U.N. Security Council arms embargoes and not to violate any other international commitments into which they have entered. These criteria are reasonable, though in practice, they are widely violated already. Indeed, one of the unintentionally hilarious tendencies of the treaty's supporters is to acknowledge this fact and then to assert that an ATT is even more vital as a result. For example, in January 2012, in the midst of the rebellion against the Syrian regime, Louis Belanger, writing on behalf of Oxfam, asserted that:

> With an ATT in force, Russia would have been clear that shipments of ammunition to states committing serious violations of human rights (as Syria) are forbidden under international law.... Iran too, would have been subject to the full force of international law. It rejects the current UN arms embargo, but with the ATT in force it would have to recognize that the actions of its Revolutionary Guards breached international law.[5]

The argument that the ATT would work by forcing Iran to recognize that its Revolutionary Guards were acting illegally by aiding in the slaughter of Syrian protesters should require no comment, but it is worth noting that if the ATT really could stop Iran from supplying weapons to the Syrian government, then Iran would never ratify the ATT. The very signature of states like Iran will be an eloquent demonstration of the treaty's uselessness.

More broadly, the U.N. Security Council is supposedly responsible for maintaining international peace and security and, under Chapter 7 of the U.N. Charter, has the power to back its resolutions with armed force.

3. U.S. Department of State, "Policy Dialogue: The Arms Trade Treaty: Policy Issues for the United States, Summary Report," June 21, 2010, http://www.state.gov/documents/organization/148527.pdf (accessed June 4, 2012). For an assessment of the Taiwan issue, see Ted R. Bromund and Dean Cheng, "Arms Trade Treaty Could Jeopardize U.S. Ability to Provide for Taiwan's Defense," Heritage Foundation *Issue Brief* No. 3634, June 8, 2012, http://www.heritage.org/Research/Reports/2012/06/Arms-Trade-Treaty-and-the-US-Ability-to-Provide-for-Taiwans-Defense.
4. Anatoly Temkin and Henry Meyer, "Russian Billionaire's Boat Said to Ship Arms to Syria," *The Province*, June 2012, http://www.theprovince.com/news/Russian+billionaire+boat+said+ship+arms+Syria/6727527/story.html (accessed June 7, 2012).
5. Louis Belanger, "Russia Ships Arms to Syria in Violation of Arms Embargoes," *Huffington Post*, January 23, 2012, *http://www.huffingtonpost.com/louis-belanger/russia-ships-arms-to-syri_b_1224652.html* (accessed June 6, 2012).

Security Council arms embargoes apply to a relatively limited range of items, over a particular period of time, and to a particular state. The ATT, by contrast, will be based on national implementation, will not be enforceable with armed force, and will apply to a very wide range of items and activities, to everyone, all the time.

Yet somehow, magically, the ATT is supposed to do what U.N. Security Council arms embargoes have failed to achieve, and it is necessary precisely because these embargoes have avowedly failed. The reason Security Council embargoes fail is obvious: Many nations do not actually respect, enforce, or support them. This will be even truer of the much broader ATT.

Many of the eight remaining criteria in the Draft Paper pose more direct problems for the United States. All of these criteria are to be applied by national authorities, and no arms transfer should be made if there is a "substantial risk" that the transfer would violate a single criterion. In the order in which they occur in the Draft Paper, these criteria are that arms should not:

1. "Be used in a manner that would seriously undermine peace or security or, provoke, prolong or aggravate internal, regional, subregional or international instability."

- If this criterion had existed in 1941, it would have made U.S. support for Britain before Pearl Harbor under the Lend Lease program illegal, because the purpose of that program was to "prolong" the "international instability" we now know as the Second World War. In many cases, the U.S. wants to bring wars to a close. But on occasion—when the good guys (or the less bad guys) are losing—it wants to prolong them so that the good guys can win. The idea that all wars should be ended as soon as possible gives every advantage to the aggressors, because they will hit first and then be able to argue that the war should not be prolonged by the defender.

- Many wars that are not currently being actively fought are not legally over. A state of war still exists between Taiwan and the People's Republic of China and between Russia and Japan. The PRC, at least, is very likely to use this criterion to argue that U.S. arms sales to Taiwan would "prolong" or "aggravate" instability. Indeed, since the Korean War is still technically ongoing and the U.N. is a party to that war—fighting was concluded by an armistice signed in 1953 by the U.N. Command—the U.N. itself could be held to be in violation of any requirement not to "prolong" wars.

- More broadly, by and large, the U.S. seeks to diminish international instability, but in some cases, instability exists unavoidably, in large part because of the behavior of dictatorial, autocratic, and aggressive states. The idea that the achievement of international stability should be an overriding objective governing arms transfers gives the initiative to those states, because they will always claim that U.S. arms sales to their enemies are the reason why they are forced to be aggressive.

- The universal pursuit of internal stability is particularly dangerous. Before the Libyan people rebelled against him, the regime of Muammar Qadhafi appeared to be very stable internally. Stability can easily be nothing more than a code word for "very successfully repressive dictatorship."

  Moreover, given the fact that states will always be armed—and this right will undoubtedly be endorsed by the ATT—a requirement to avoid provoking internal instability amounts to ensuring that a dictator's domestic opponents will have no arms and no international access to arms. That is an excellent way to ensure that state-led slaughters like the one now going on in Syria can proceed without impediment. It is also a direct assault on the Reagan Doctrine, the U.S. policy of supporting anti-Communist insurgents. If the U.S. goal is to be the pursuit of mere stability, it should never support any rebellion against any authoritarian regime.[6]

2. "Be used to commit or facilitate serious violations of international humanitarian law."

The laws of war, sometimes known as international humanitarian law (IHL), are worthy of U.S. support insofar as they genuinely represent the well-attested and enduring practice of nations or if the U.S. has

6. Russia has added a unique twist to this issue: It asserts that because rebels in Syria and Libya received support from third parties, it would be "quite unfair" for it not to be legally constrained from arming the Syrian government. Thus, perversely, Russia holds that resistance to tyranny is a legal justification for supplying more arms to the tyrants. See RIA Novosti, "Russia Opposes Arms Embargo on Syria—Lavrov," November 29, 2011, http://en.rian.ru/russia/20111129/169138657.html (accessed June 19, 2012).

defined and accepted them by action of Congress and the President. A full review of the state of the laws of war is beyond the purpose of this paper, but the following concerns are relevant to the ATT:

- While the U.S. is a signatory to many of the relevant treaties and conventions on the laws of war (the 1949 Geneva Conventions foremost among them), it has not signed or has not ratified a number of these treaties, including Geneva Protocols I and II (1977) and the Rome Statute of the International Criminal Court (1998). The U.S. has also not signed a number of other treaties that are commonly, though incorrectly, described as part of international humanitarian law, including the Ottawa Treaty banning landmines (1990) and the Convention on Cluster Munitions (2008).[7]

  In short, the U.S. understanding of what constitutes "international humanitarian law" is not fully shared by many other states, and by endorsing this term, the U.S. may be committing itself to responsibilities that it does not in fact accept but will be pressured to uphold. In other words, an ATT with this provision will become yet another mechanism for accusing the U.S. of being an international law-breaker and urging it to adopt treaties that it has democratically—and wisely—refused to ratify.

- More broadly, "international humanitarian law" is a moving target. A leading pro-ATT NGO has fielded a "Legal team" that has offered the opinion that IHL has been defined by various treaties, by "declarations of the International Committee of the Red Cross/Red Crescent," and by "numerous UN resolutions."[8] They contend that treaties that the U.S. has not signed or ratified constitute IHL, as do statements by NGOs such as the Red Cross and resolutions by the United Nations.

  It used to be accepted that IHL was defined solely by the well-established practice of states and by the treaties they explicitly adopted. This new argument that IHL can be made—and is claimed to be binding on the U.S.—by a treaty between a small number of states, by U.N. resolution, or by NGO declaration means that it has become a mechanism for overriding the sovereign judgment of the U.S. and seeking to impose new commitments on it.[9]

- It is certain that this provision will be asserted by every member of the Organization of Islamic Cooperation to apply to Israel on the specious grounds that actions such as the Israeli incursion into the Gaza Strip in 2008 are a violation of international humanitarian law and that Israel cannot be trusted not to repeat these violations.[10] Many European nations, and likely a number of nations outside Europe, will join in this assertion. The treaty will be used to pressure every one of the nations that sells arms, as defined by the ATT, to Israel to end those sales. On this ground alone, the U.S. will certainly be accused of violating the ATT, which will rapidly emerge as a weapon that can be eagerly employed against Israel, over time profoundly impairing Israel's ability to defend itself.

7. The error in the assertion that these treaties constitute part of IHL is that they are arms control treaties. The traditional understanding of arms control treaties is that they apply only in times of peace; in war, while there are rules governing the use of weapons, arms control treaties as such drop away. Thus, the inclusion of arms control treaties in IHL constitutes a further expansion—and corruption—of the traditional laws of war.
8. "Nothing Subjective About Applying International Law to Arms Transfers in the #Armstreaty," *Control Arms*, March 2012, http://attmonitor.posterous.com/nothing-subjective-about-applying-internation#more (accessed June 8, 2012).
9. In testimony supporting ratification of the U.N. Convention on the Law of the Sea, U.S. Secretary of Defense Leon Panetta noted that customary international law "can change to our detriment." Since the ATT binds signatories to respect IHL, which treaty advocates view as a form of customary international law, it requires them to abide by standards that the Defense Secretary acknowledges are defined in part outside the U.S. See Leon E. Panetta, U.S. Secretary of Defense, "Law of the Sea Convention—Submitted Statement," Senate Foreign Relations Committee, May 23, 2012, http://www.foreign.senate.gov/imo/media/doc/SecDef_Leon_Panetta_Testimonydocx.pdf (accessed June 18, 2012).
10. This was the contention of the Goldstone Report, produced by a team led by Judge Richard Goldstone for the U.N. Human Rights Council. Judge Goldstone later found it necessary to "reconsider" the position he took in his own report on Israel. See U.N. Human Rights Council, *Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact Finding Mission on the Gaza Conflict*, September 15, 2009, http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/UNFFMGC_Report.pdf, and Richard Goldstone, "Reconsidering the Goldstone Report on Israel and War Crimes," *The Washington Post*, April 1, 2011, http://www.washingtonpost.com/opinions/reconsidering-the-goldstone-report-on-israel-and-war-crimes/2011/04/01/AFg111JC_story.html (accessed June 7, 2012). For a recent study of this issue, see Peter Berkowitz, *Israel and the Struggle over the International Laws of War* (Stanford, Cal.: Hoover Institution Press, 2012).

- It is far from clear whether the ATT would be—or claim to be—a treaty on the laws of war. On one hand, the requirement not to "prolong" wars implies that it would claim to be valid during wartime; on the other, since it concerns transfers to second parties and claims to respect the right of self-defense, it might be held not to apply to decisions taken by a nation in pursuit of that right during wartime. If the ATT were to be held to apply during time of war, it would obviously conflict fundamentally with the right to self-defense.

  At a minimum, any ATT should state clearly and explicitly that it does not apply during time of war and is not itself an IHL treaty. That would not permit combatants to take actions otherwise forbidden by IHL, but it would prevent the treaty's requirement not to "prolong" wars (by, for example, arming an ally) from having any legal effect.

3. "Be used to commit or facilitate serious violations of international human rights law."

- The same objections can be entered against this provision. "International human rights law" is a broad term, implying some commitments the U.S. has accepted and some it has rejected. It places the power of defining the precise commitments made under the terms of the ATT in the hands of various U.N. bodies, experts on international law, vocally assertive NGOs, and the world's nations, all of which claim to have a hand in the elaboration of international human rights law.

  This power would certainly be used to lecture and pressure the U.S. for various alleged sins—as the U.N. Human Rights Council regularly does—and would even more assuredly be wielded against Israel. On the other hand, the world's dictatorial regimes would get off very lightly for the simple reason that they exercise disproportionate influence in the U.N.'s human rights institutions.

  The record of the council on Libya illustrates this all too clearly. On March 18, 2011, the council was scheduled to consider its final report on Libya's human rights record. The report piled praise on Libya, making only 66 recommendations for improvements. (The U.S., by contrast, received 228 recommendations.) The council then did an embarrassing about-face and, in the face of the revolt that toppled Qadhafi, adopted a resolution condemning his regime.[11] In the context of the council, this is a farce. In the context of criteria contained in a legally binding treaty on the arms trade, the systemic bias of U.N. human rights institutions in favor of dictatorships is profoundly dangerous.

- This criterion is open to an additional objection that does not apply to those against the criterion based on IHL. The U.S. sometimes decides to sell arms to states that are not fully democratic and do not fully respect human rights: Saudi Arabia is one obvious example. The U.S. does this because, in the case of Saudi Arabia, it is a bulwark against the expansion of Iranian influence, and Iran is also oppressive in addition to being anti-American, aggressive, and dangerous. By the same token, the U.S. for many years supported South Korea, which was not at the time fully democratic, because it was much better than North Korea.

  The world frequently offers a choice not between good and bad, but only between bad and worse. A treaty that obliged the U.S. to sell only to buyers who were very unlikely to offend against international human rights law, however defined, would prevent it from making the most elementary and necessary choices.

  For this reason alone, this is an unwise and naïve criterion. The State Department acknowledged this problem in June 2010 when it stated that in certain regions, including the Middle East, it would be difficult to create criteria "that can be applied without exception and fit U.S. national security interests."[12] That is a polite way of admitting that criteria that would prevent the U.S. from selling arms to Saudi Arabia (among others) would not be in the interests of the U.S.

- Various U.N. organizations and NGOs have argued that strict gun

11. Brett D. Schaefer, "Treatment of Libya Illustrates the Fatuousness of the Human Rights Council," March 1, 2011, The Heritage Foundation, The Foundry, http://blog.heritage.org/2011/03/01/treatment-of-libya-illustrates-the-fatuousness-of-the-human-rights-council/.
12. U.S. Department of State, "Policy Dialogue: The Arms Trade Treaty: Policy Issues for the United States, Summary Report."

control is a human right and that the inherent right to self-defense—the existence of which was accepted by the Supreme Court in *District of Columbia v. Heller* (2008)—either should not be recognized or does not exist. Their argument, in brief, is that the state is responsible for ensuring public safety and that a state that does not restrict self-defense is failing to fulfill this obligation and thus is violating the human rights of its citizens. By this argument, the failure to enact strict gun control is a violation of international human rights law.

Thus, a further risk of accepting an IHL standard is that IHL will—as is already happening—evolve by U.N. declaration into an open rejection of the Second Amendment to the U.S. Constitution, understood not simply as protecting the right to keep and bear arms, but as being based on the inherent right to self-defense.[13] This evolution could directly affect rights protected under the Second Amendment by influencing the decisions of U.S. judges, by shaping the opinions offered by lawyers in the executive branch, or both. In short, the inclusion of the IHL criterion in the ATT raises the broader problem of transnationalism (discussed below) and offers one obvious way for the ATT to be transformed over time into a gun control treaty.

- The ongoing issue of "conflict minerals" sheds light on the way this criterion might expand over time. When it passed the Wall Street Reform and Consumer Protection Act (commonly known as "Dodd–Frank") in 2010, Congress included a provision, which was irrelevant to the purported purpose of the legislation, requiring publicly traded companies to report to shareholders and the Securities and Exchange Commission if their supply of certain minerals (commonly found in electronics) comes from the Democratic Republic of Congo on the grounds that this would reduce the demand for such minerals and thus reduce the ability of rebels in the DRC to fund their activities, which are creditably implicated in human rights abuses.[14] Since this initiative comes from Congress, it is not directly comparable to the ATT, but if opposition to the use of "conflict minerals" came to be regarded as inherent in IHL, U.S. firms manufacturing any item covered by the ATT (which will likely include computer chips as "parts and components") that contain these minerals would suddenly be described as "facilitating" the commission of human rights abuses.

  The consequences of this are impossible to predict. The U.S. might decide that it could not allow the export of this equipment, or other countries might decide that, as buying U.S. equipment involves a transfer of money to a U.S. corporation, this would constitute "facilitating" human rights abuses or violate their obligation under one of the "Goals and Objectives" of the Draft Paper to prevent "international transfers of conventional arms that contribute to or facilitate: human suffering [and] serious violations of international human rights law...." In short, once criteria involving IHL are involved—never mind the even vaguer mentions of "human suffering" and facilitating—the implications for the U.S. and U.S. manufacturers of a wide range of items are potentially limitless.

- The issue of "conflict minerals" is merely one example of a far larger problem. Almost every major firm in the U.S. defense industrial base has a supply chain and a financing base that is at least in part global. That means that the U.S. relies on components and funding from firms that are located in countries that are very likely to sign and ratify the ATT. This in turn means that any U.S. action that an ATT signatory dislikes or that a court in the signatory asserts is illegal, or the supposed misuse of any U.S. defense item by the U.S. or any other country, could jeopardize the U.S. supply chain by encouraging or even requiring the signatory to cut the chain in order to live up to its commitments under the ATT.

13. See, for example, Barbara Frey, Special Rapporteur on the Prevention of Human Rights Violations Committed with Small Arms and Light Weapons, "Progress Report on the Prevention of Human Rights Violations Committed with Small Arms and Light Weapons," U.N. Sub-Commission on the Promotion and Protection of Human Rights, 57th Session, June 16, 2005, http://www1.umn.edu/humanrts/demo/smallarms2005.html (accessed June 7, 2012). For a broader discussion of this point, see David B. Kopel, Paul Gallant, and Joanne D. Eisen, "The Human Right of Self-Defense," *BYU Journal of Public Law*, Vol. 22 (2008), p. 43, http://www.law2.byu.edu/jpl/papers/v22n1_David_Kopel-Paul_Gallant-Joanne_Eisen.pdf (accessed July 1, 2012), and David B. Kopel, "The Natural Right of Self-Defense: Heller's Lesson for the World," *Syracuse Law Review*, Vol. 59 (2008), http://ssrn.com/abstract=1172255 (accessed June 8, 2012).
14. Edward Wyatt, "Use of 'Conflict Minerals' Gets More Scrutiny from U.S.," *The New York Times*, March 19, 2012, http://www.nytimes.com/2012/03/20/business/use-of-conflict-minerals-gets-more-scrutiny.html?pagewanted=all (accessed June 8, 2012).

Moreover, the ATT creates a golden opportunity for firms in signatory countries—particularly, though not only, in Europe. These firms and the governments with which they work closely will be free to argue that European and other nations should buy only from responsible sellers, with responsibility being defined as signature and ratification of the ATT. That is an excellent way to win competitions for arms contracts against U.S suppliers.

These nations will also be free to argue that they should be able to sell to any responsible buyer, with responsibility being similarly defined. For example, European Union firms and most EU member states, for many years and against opposition from the U.S. and Britain, have argued that they should be able to sell arms to the People's Republic of China and that the arms embargo imposed after the Tiananmen Square massacre of 1989 should be lifted. For these member states, Chinese ratification of the ATT could easily be portrayed as a kind of *Good Housekeeping* Seal of Arms Sale Approval.

In short, the ATT will be, for an unstable mixture of political, legal, and commercial reasons, a way to restrict the supply chain and reduce the foreign markets of the U.S. defense industrial base while at the same time legitimating sales to nations that are not under an affirmative U.N. Security Council embargo. Russia's efforts to supply attack helicopters to Syria offer a recent example of how part of this process might work.

On June 19, 2012, it was reported in the British media that the British government, acting to support the EU arms embargo on Syria, had cancelled the insurance coverage of a Russian-owned ship that was transporting the helicopters and that, as a result, the ship had turned back to Russia.[15] This particular action by Britain was both sensible and legal, but if Britain were legally compelled, and desired, to clamp down on the financing that enabled Russian arms exports, the much more expansive criteria of the ATT could lead it and many other countries to take similar actions against financing and component supplies that enable U.S. exports and U.S. defense manufacturing more broadly.

- Finally, many major U.S. defense contractors and firearms manufacturers have foreign subsidiaries or are themselves foreign owned. The parent company of the famous U.S. firm Browning is the Herstal Group of Belgium, for example, which also owns the Winchester trademark and the U.S. firms FN Manufacturing and FNH USA. It is thus ultimately responsible for the production of a wide variety of both civilian and military firearms, including the M16 NATO rifle, the M249 SAW light machine gun, and the Browning line of shotguns and rifles. All of the concerns about the effect of the ATT on the supply and financing chain of the U.S. defense industrial base apply equally to the relationship between U.S. subsidiaries and their foreign parent firms or, similarly, relationships between U.S. parent firms (such as Boeing) and foreign subsidiaries (such as Boeing Australia).

4. "Be used to commit or facilitate serious violations of international criminal law, including genocide, crimes against humanity and war crimes."

In functional terms, this criterion duplicates those discussed above under items 2 and 3, as genocide, crimes against humanity, and war crimes can also be described as violations of human rights, the laws of war, or both.

In political terms, this criterion is intended to further the legitimacy of the International Criminal Court as constituted by the Rome Statute. The U.S. has not ratified the statute and does not accept the court's jurisdiction.[16] As this criterion adds no functional content and implies acceptance of the judgments of the court—and of future tribunals that the U.S. may or may not support—as to what is meant by the

15. Richard Spencer, Adrian Bloomfield, and David Millward, "Britain Stops Russian Ship Carrying Attack Helicopters for Syria," *The Telegraph*, June 19, 2012, http://www.telegraph.co.uk/news/worldnews/middleeast/syria/9339933/Britain-stops-Russian-ship-carrying-attack-helicopters-for-Syria.html (accessed June 22, 2012).
16. President Clinton signed the Rome Statute on December 31, 2000. On May 6, 2002, President George W. Bush officially notified the U.N. that the U.S. did not intend to ratify the Statute; this is colloquially described as "unsigning" the Statute. See Brett D. Schaefer and Steven Groves, "The U.S. Should Not Join the International Criminal Court," Heritage Foundation *Backgrounder* No. 2307, August 17, 2009, http://s3.amazonaws.com/thf_media/2009/pdf/bg2307.pdf.

term "international criminal law" and what constitutes a violation of it, the U.S. should strongly oppose the inclusion of this criterion.

5. "Seriously impair poverty reduction and socio-economic development or seriously hamper the sustainable development of the recipient State."

Many of these terms are not capable of precise definition. Thus, the commitments the U.S. would assume under this criterion are so broad as to be meaningless. The concept of "sustainable development," in particular, though widely used, can mean virtually anything and could be employed to term illegal any U.S. arms sale or transfer.

The U.N.'s Division for Sustainable Development, for example, asserts that its goal is "measurable progress in the implementation of the goals and targets of the Johannesburg Plan of Implementation," a 170-paragraph, 62-page wish list that leaves almost no area of life untouched.[17] The only activities it omits are those associated with the arms trade, which may explain why the treaty's proponents are so eager to ensure that "development" is included in it.[18]

It is unclear why those selling or transferring arms should assume responsibility for the development—never mind the "sustainable development" or "poverty reduction"—of the recipient state. If the state in question is competent to sign treaties like the ATT and to construct its own import and export control system for arms, it would seem that it should be competent to decide whether or not it should buy a particular weapon, given the state of its budget, its financial and military position, and the various domestic social and welfare policies it seeks to carry out. If it is not in fact competent to do so, its signature on the Arms Trade Treaty would appear to be devoid of practical meaning.

The clear implication of this criterion is that a good many of the world's states are either irresponsible or incapable of performing the basic functions of governance. If that implication is correct, it is a good reason to believe that the ATT will never be meaningfully implemented by most of its signatories.

6. "Be diverted to unauthorized end-users for use in a manner inconsistent with the principles, goals and objectives of the Treaty, taking into account the risk of corruption."

Leaving aside the fact that the principles, goals, and objectives of the treaty are likely to be numerous, vague, and ill defined, the criterion that arms sales should go only to authorized end users is reasonable and reflects current U.S. practice. This criterion would be clearer if it simply required that arms not be diverted to unauthorized end users, regardless of how the arms are used thereafter, but if it were phrased that way, members of the Organization of Islamic Cooperation would not be able to cite the "foreign occupation" provision that offers a coded justification of terrorism and which appears as a "Principle" in the Draft Paper as discussed below under item 8.

The argument that sellers must take into account the risk of corruption is another effort to make the U.S. and other sellers responsible for the misdeeds of buyers. The U.S. may well wish to consider the risk of corruption in the context of its own sales and transfers, but in a treaty, it raises an obvious point: If there are so many governments that are sufficiently corrupt that this criterion is necessary, the number of corrupt governments that will sign the treaty but be unable (or unwilling) to uphold it must be substantial.

7. "Be used in the commission of transnational organized crime as defined in the United Nations Convention against Transnational Organised Crime."

The U.S. ratified this convention, with reservations, in 2005. It is the only one of the criteria in the Draft Paper that appears to raise no concerns.

8. "Be used to support, encourage or perpetrate terrorist acts."

First, it is important to note that, whereas item 7 refers to a convention that defines transnational organized crime, item 8 simply refers to "terrorist acts." The absence of a definition in the case of terrorism is significant. It would be logical to assume that the U.N. has a definition of terrorism that will apply in the context

17. U.N. Division for Sustainable Development, "Goal," 2009, http://www.un.org/esa/dsd/dsd/dsd_index.shtml (accessed June 6, 2012), and U.N. Division for Sustainable Development, "Plan of Implementation of the World Summit on Sustainable Development," August 11, 2005, http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf (accessed June 6, 2012).

18. "The Legal Case for Including #Development in the #Armstreaty," *Control Arms*, May 2012, http://attmonitor.posterous.com/the-legal-case-for-including-development-in-t#more (accessed June 6, 2012).

of the ATT, but the U.N. has never adopted a definition of terrorism.

In the run-up to the 10th anniversary of the 9/11 attacks, U.N. Secretary-General Ban Ki-moon "called again for the creation of an international antiterror accord," which "has been stymied by disagreements over what acts and which groups should be labeled as terroristic." The chairman of the U.N. Counterterrorism Implementation Task Force, Robert Orr, noted that "Legally, international law covers almost everything that you would want it to cover... . [But] if someone is accusing someone else of engaging in terrorist activities, there's no clinical definition of whether they are or not."[19] The ATT cannot prevent nations from arming terrorists if nations do not agree either on who the terrorists are or on what constitutes terrorism.

At best, then, the ATT would have no effect on terrorism, but it could easily *increase* the risk of armed terrorism. U.N. declarations regularly contain a clause to the effect that the U.N. recognizes:

> the right of self-determination of all peoples, taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, and ... the rights of peoples to take legitimate action in accordance with the Charter of the United Nations to realize their inalienable right of self-determination.

This quotation comes from the "Principles" of the Draft Paper, but it is also part of many other U.N. declarations. It is included, for example, in the ATT's precursor, the 2001 U.N. Programme of Action to Prevent, Combat, and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, so the precedent for its incorporation into the ATT has been clearly established.[20]

Those new to the U.N. system may not realize the meaning of this clause. It was originally intended by African nationalists to refer to the European colonial empires and by Islamic nations to refer to the Palestinians ("peoples under ... foreign occupation"). The African context has faded, but the coded reference to Israel—and to India because of its dispute with Pakistan over Kashmir—has endured. In recent years, the clause has also come to be understood as a reference to the U.S. and allied presence in Iraq and Afghanistan. The entire clause, therefore, recognizes the supposed right of Hamas, Hezbollah, the Taliban, and other terrorist organizations—in the name of pursuing the "inalienable right of self-determination"—to attack Israel, India, the U.S., and its allies.

An ATT that contains this clause would give any nation that wishes to assist a terrorist organization a "get out of jail free" card. Such a country, if confronted by the U.S. with the claim that its supply of weapons to terrorists constituted a violation of the ATT, could simply reply that the ATT had recognized the right of all peoples to realize their self-determination and that the terrorists in question represented peoples who were engaged in an armed struggle with a nation that did not respect this right. This is why the U.N. has never been able to define terrorism: Too many U.N. member states argue that what the U.S. describes as terrorism is a legitimate struggle for self-determination.[21]

The Syrian situation offers a particularly poignant example of this problem. For years, the Assad regime in Syria has been one of the foremost armers and trainers of terrorists attacking targets in Lebanon, Israel, and elsewhere, but it now claims that the rebellion it faces is simply the result of "armed terrorist groups," which it has the right to repress, and that these so-called terrorists have been armed by other Arab nations.[22]

This illustrates one of the features that makes the ATT perversely

19. "U.N. Chief Urges Creation of International Pact Against Terrorism," Global Security Newswire, September 9, 2011, http://www.nti.org/gsn/article/un-chief-urges-creation-of-international-pact-against-terrorism/ (accessed June 4, 2012).
20. United Nations, "Programme of Action to Prevent, Combat, and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects," 2001, http://www.poa-iss.org/PoA/poahtml.aspx (accessed June 4, 2012). For more on the program, see Ted R. Bromund and David Kopel, "As the U.N.'s Arms Trade Treaty Process Begins, U.N.'s 'Programme of Action' on Small Arms Shows Its Dangers," Heritage Foundation *WebMemo* No. 2969, July 20, 2010, http://www.heritage.org/research/reports/2010/07/as-the-uns-arms-trade-treaty-process-begins-uns-programme-of-action-on-small-arms-shows-its-dangers.
21. For more on this problem, see Ted R. Bromund, "Arms Trade Treaty Risks Increasing the Threat of Armed Terrorism," Heritage Foundation *Issue Brief* No. 3624, June 5, 2012, http://www.heritage.org/Research/Reports/2012/06/Arms-Trade-Treaty-Risks-Increasing-the-Threat-of-Armed-Terrorism.
22. CNN, "Syrian Opposition Group's New Leader Calls Out Russia, China, Iran," June 10, 2012, http://articles.cnn.com/2012-06-10/middleeast/world_meast_syria-unrest_1_syrian-opposition-local-coordination-committees-syrian-people?_s=PM:MIDDLEEAST (accessed June 11, 2012).

attractive to many of the world's nations: Because it stigmatizes terrorism without actually defining it, the ATT is a weapon that nations hope to use against foreign support for their rebels (which they will define as terrorists) while at the same time legitimating their own support for terrorists abroad (whom they will refer to as resisting foreign occupation). The end result is that the ATT will not aid in stopping terrorism; it will only raise the stakes in the verbal arms race to define terrorism.

Decision-Making Model Underlying Criteria Is Even More Troubling

As problematic as the criteria in the Draft Paper are, the way it seeks to apply them is even more troubling. Currently, the criteria that the U.S. considers before transferring conventional arms are set out in Presidential Decision Directive 34, issued by President Bill Clinton on February 17, 1995. PDD 34 is a well-crafted and carefully balanced statement. It was retained by the Administration of President George W. Bush and has not been revised or discarded by the Administration of President Barack Obama. In short, it has been found to be satisfactory by Administrations of both political parties and, as it is now close to 20 years old, represents clearly settled U.S. policy.

PDD 34 states that the U.S. will apply a broad range of criteria to each arms transfer decision and will make each decision on a case-by-case basis. The criteria are to be considered as a whole; they do not constitute a checklist that must be met item by item.

For example, the first criterion is that decisions will "take into account" the "consistency [of the proposed transfer] with international agreements and arms control initiatives." That is certainly an important criterion, but PDD 34 does not imply that the U.S. will never approve any arms transfer that violates an international agreement; it is possible to imagine circumstances (such as the U.S. involvement in a war) when the U.S. would find it necessary to ignore agreements made in peacetime. In short, the PDD sets out criteria to guide decision-making, not to govern it. The PDD system is thus a "guidance" model.

The model of the Draft Paper is completely different. It sets out its 10 criteria and requires that parties to the treaty "shall not authorize" an arms transfer if there is even a "substantial risk" that the transfer would violate even one of the criteria. This is the "checklist" model, where every single criterion must be assessed and met separately. In other words, the Draft Paper describes a decision-making system that does not simply have different criteria from those of the PDD: It requires that signatories make decisions in a fundamentally different way.

The Draft Paper checklist model is incompatible with the PDD guidance model. Nor is it likely that the final ATT, presuming there is agreement on one, will abandon the checklist model and adopt the PDD's guidance model, if only because that would take an already weak, toothless, and easily circumvented treaty and eliminate from it the very thing that its supporters find most attractive: the list of criteria that must all be satisfied before a transfer can occur.

The difference between the checklist and guidance models is the single most important difference between the ATT and the current U.S. system, but it is not the only difference. Some of the PDD criteria do overlap to some extent with those in the Draft Paper. For example, the PDD states that the U.S. will consider "the human rights, terrorism and proliferation record of the recipient and the potential for misuse of the export in question." But whereas the Draft Paper states that this is a matter of respect for international human rights law, which is not under U.S. control, the PDD states it as a criterion that is to be considered by referring to U.S. information and standards.

The PDD also states that the U.S. will consider "[t]he risk of adverse economic, political or social impact within the recipient nation and the degree to which security needs can be addressed by other means." This bears some similarity to the Draft Paper criterion on sustainable development, but whereas the PDD limits itself to considering whether the transfer may have negative effects, the Draft Paper requires the U.S. to assess the totality of the recipient's economy, society, and future development and uses terms (such as "sustainable development") that are not defined solely by the U.S.

Finally, as a third example, the PDD states that the U.S. will consider the "Consistency [of any transfer] with U.S. regional stability interests, especially ... [for] transfers involving power projection capability or introduction of a system which may foster increased tension or contribute to an arms race." This criterion bears a marginal similarity to the first Draft Paper criterion, discussed above, relating to "instability."

However, the PDD notes that the important consideration is not the existence of instability in a general sense, but what the interests of the U.S. are in the stability of the region. The clear implication of the PDD is

that the U.S. might believe that stability would be enhanced by ensuring that its allies have ample defensive power or even—in rare cases—that the U.S. believes that short-term regional instability (i.e., a war) would be in its interests.[23] In short, in this regard as well as the others, any claim that the Draft Paper simply restates the PDD criteria is inaccurate.

The difference between the PDD and the Draft Paper will without doubt be replicated in the final ATT. Even if the language in the Draft Paper changes, as it undoubtedly will, the difference between the PDD and the entire approach of the ATT is not a matter of degree. It is a matter of kind.

Treaty Will Require Important Changes in U.S. Policy

PDD 34 has never been popular with arms control activists. After it was announced in 1995, it was denounced by the Arms Control Association (ACA) in a lengthy article that described it as "a pro-export arms policy," as being based on the attribution of "unsubstantiated and near-mythical qualities" to arms exports, and as deriving from a Clinton Administration that was "lacking courage to take on weapons corporations" and "lacking the vision to devise new security paradigms." The article concluded that "no progress will be made on the issue of limiting the global arms trade without significant pressure from the public."

At least in regard to the importance of public—or, rather, left-wing NGO—activism, that diagnosis was correct. But the central point of the ACA's outrage was that PDD 34 needed to be replaced by a new and entirely different model of decision-making for U.S. arms exports and supplemented by a wide variety of new multilateral arms control and arms trade agreements.[24]

The Draft Paper offers just such a new model, embodied in just the kind of multilateral agreement that the ACA praised, and that new model is clearly incompatible with PDD 34. If the U.S. were to sign and ratify an ATT based on this new model, it would be under a treaty obligation to adopt a new PDD embodying that model.

The NGOs backing the ATT will certainly insist on this: Their assertion is that the criteria in the Draft Paper are not "unduly subjective" and are "susceptible to clear interpretation and to consistent and nondiscriminatory application."[25] But even if these NGOs have no influence at all, the basic fact is that the decision-making model and the criteria contained in PDD 34 are incompatible with those that will be embodied in the ATT. The only way the U.S. can avoid applying the ATT model and criteria, apart from not signing and ratifying the treaty, is simply to refuse to carry out its treaty obligations.

Astonishingly, this appears to be the U.S. position. In June 2010, the State Department stated explicitly that it was a U.S. redline for the ATT that "The United States is not willing to accept changes to U.S. law and practice to implement or comply with an ATT, even though U.S. law and practice has been amended in the past and the future of the U.S. export control system is unclear."[26] In April 2012, Assistant Secretary of State Tom Countryman asserted that the positions of the U.S. on the ATT "have not evolved"; that (mirroring the PDD's "guidance" model) "there are very few absolute bars to an arms transfer"; and that the point of the ATT was that it would affect "other countries" that do not have "an adequate level of control" on their own arms trade.[27] The clear implication of these remarks is that the U.S. proposes to retain the PDD model and expects the treaty to affect everyone except the U.S.

Indeed, it is difficult to find any country that is willing to admit that the ATT will actually have any effect on how it conducts business: Irresponsible arms transfers are always, it would appear, the fault of the other guy. In an important joint statement in July 2011, the five permanent members of the U.N.

23. Richard F. Grimmett, "Conventional Arms Transfers: President Clinton's Policy Directive," Congressional Research Service *Report for Congress* No. 95-639, May 17, 1995, http://assets.opencrs.com/rpts/95-639_19950517.pdf (accessed June 7, 2012).
24. "Clinton's Conventional Arms Export Policy: So Little Change," *Arms Control Today*, May 1995, http://www.fas.org/asmp/library/articles/actmay95.html (accessed June 8, 2012).
25. "Nothing Subjective About Applying International Law to Arms Transfers in the #Armstreaty."
26. U.S. Department of State, "Policy Dialogue: The Arms Trade Treaty: Policy Issues for the United States, Summary Report."
27. Thomas Countryman, Assistant Secretary, Bureau of International Security and Nonproliferation, "Positions for the United States in the Upcoming Arms Trade Treaty Conference," U.S. Department of State, April 16, 2012, http://www.state.gov/t/isn/rls/rm/188002.htm (accessed June 8, 2012).

Security Council—the U.S., Britain, France, Russia, and China—noted that "[t]he decision to transfer arms is an exercise in national sovereignty, and any instrument in this field must keep this principle at its core."[28] The clear implication of this statement is that none of the permanent members (including Russia and China, two of the world's largest and most irresponsible arms exporters) has any intention of actually altering its laws or practices in response to the treaty.

The U.S. position on the ATT is that:

> We want the Treaty to tell each State Party *what* factors it must consider before authorizing a transfer—that is, criteria to keep in mind to review seriously and decide whether the transfer in question is responsible or not. But the Treaty should not tell each State Party *how* it must evaluate such a transfer—what bureaucratic process it needs to follow.[29]

The Draft Paper is indeed based on this "what, not how" model, but the "what" in the Draft Paper is a set of criteria that reflect the different "checklist" model and are quite different from those the U.S. considers in PDD 34.[30] So the U.S. position is that, on the one hand, it refuses to accept any treaty that changes U.S. policy and practice but, on the other hand, demands a treaty that will prescribe criteria that states that are party to the ATT must consider. Given the incompatibility of the Draft Paper criteria and model with PDD 34 and the very strong likelihood that these criteria and this model will carry over into the final ATT, the U.S. stand is riddled with internal contradictions. Not the least of these is the U.S. contention that the treaty must be based on respect for national sovereignty but also must prescribe the factors that states "must consider" before authorizing an arms transfer.

One possible resolution for this contradiction may be that the U.S. intends to argue that, if the ATT does not prescribe a process—a "how"—it is free to have a process that is based on reinterpreting the ATT criteria and ignoring its "checklist" model for their application. This would be an innovative piece of sophistry. It would amount to using the lack of a "how" to evade the clear object and purpose of the ATT's "what."

A U.S. Administration might be able to persuade its lawyers that this was compatible with the treaty, but this is at best a precarious strategy. For one thing, the lawyers might not agree, and even if they did, there is no guarantee that lawyers in a future Administration would see the question the same way. For another, other nations might not agree, and even if they did nothing to implement the ATT, that would not stop them from criticizing the U.S. Finally, many NGOs and international law experts would certainly not agree and would immediately relaunch their campaign against the U.S., with the added benefit that they would now have the treaty language on their side.

For its part, the U.S. argues that the ATT "must increase the U.S. ability to demarche countries which engage in the irresponsible transfer of arms."[31] The ATT will be, in other words, a tool for the U.S. to use in its diplomacy—one that will, for example, allow the U.S. to put a little more pressure on Russia to stop arming Syria. That is, regrettably, a less reasonable assertion than it appears to be.

First, treaties work both ways: If the ATT increases the U.S.'s ability to demarche other countries, it will also increase their ability to demarche the U.S., and since the U.S. is a law-abiding country, arguments based on the rule of law are particularly effective in the U.S.

Second, since the treaty will be based on national implementation and will recognize the sovereign right to buy, sell, and transfer arms, it will not create a binding obligation

28. "P5 Statement at the 3rd Preparatory Committee on an Arms Trade Treaty," U.N. Arms Trade Treaty Preparatory Committee, July 12, 2011, http://www.un.org/disarmament/convarms/ATTPrepCom/Documents/Statements-MS/PrepCom3/2011-July-12/2011-July-12-Joint-P5-E.pdf (accessed June 8, 2012).
29. Countryman, "Positions for the United States in the Upcoming Arms Trade Treaty Conference."
30. In a recent briefing, Andrew J. Shapiro, Assistant Secretary, Bureau of Political-Military Affairs (PMA), U.S. Department of State, gave an accurate summary of the PDD 34 model. When asked what the implications of record U.S. foreign military sales in 2011 might be for the ATT, Shapiro replied, "I'll have to admit that's not an issue that my bureau follows closely." Shapiro then noted correctly that the issue was handled by the Bureau of International Security and Nonproliferation. The fact is, though, that the ATT will rewrite the model on which PMA operates. See Andrew J. Shapiro, "Briefing on Department of State Efforts to Expand Defense Trade," U.S. Department of State, June 14, 2012, http://www.state.gov/t/isn/rls/rm/188002.htm (accessed June 18, 2012).
31. U.S. Department of State, "Policy Dialogue: The Arms Trade Treaty: Policy Issues for the United States, Summary Report."

that would prohibit any particular transfer: Far from controlling the arms trade, the ATT legitimizes it.[32]

Third, the claim that the U.S. can use the treaty to pressure other countries sounds reasonable. But if, for example, Luxembourg signs the ATT, that fact will not give Luxembourg any additional ability to pressure anyone. The U.S. ability to pressure other nations derives not from its signature on a treaty but from the fact that the U.S. is a superpower. Arguments that treaties create legal pressure on the lawless make sense only to those who are themselves so law-abiding that they cannot imagine others remaining unmoved by an appeal to law.

The bottom line is this: The approach the ATT is very likely to embody is not compatible with the current U.S. system. Either the ATT will change U.S. law, policies, or both, or it will not change either of these. If it does not change either of these, it is extremely difficult to understand why the ATT will compel any other signatories to make any changes. If the ATT does change U.S. law or policies, then the Administration's claim that it will not require any changes is inaccurate.

Treaty's Philosophic Foundation Is Badly and Dangerously Flawed

The ATT is not an arms control or a disarmament treaty. It is, as Assistant Secretary of State Countryman has recognized, a treaty that is at least nominally about the regulation of the arms trade. Regrettably, the treaty has managed to combine the worst of all worlds: an arms control agenda that blames weapons for the political ills of the world, a trade mechanism that seeks to limit trade by relying on vague and ill-defined standards, and a human rights inspiration that was born out of the aspirational agenda of the NGOs that have already badly distorted the traditional utility of diplomacy and the laws of war.

In reality, the ATT is fundamentally the result of an aspirational desire to promote human rights. It completely ignores the fundamental problem inherent in aspirational treaties: There is no enforcement mechanism in the treaty itself.

Not all treaties, of course, are aspirational. If two nations agree to lower their tariffs and one nation cheats, the other nation can raise its tariffs in direct retaliation. If two nations make an arms control treaty and one nation cheats, the other nation can arm itself in direct retaliation. Since each nation knows this, they both have an incentive not to cheat. But if two nations agree to respect the freedom of the press and one cheats, the second nation cannot retaliate effectively by repressing its own journalists. Similarly, if two nations (or, worse, 193 nations) agree to apply certain human rights standards to their arms exports and most of them cheat, there is no effective way for the law-abiding world to retaliate. The U.S. cannot, for example, encourage other signatories to comply by lowering its own standards in retaliation.

Such treaties are inherently incapable of being enforced within the framework of the treaty itself. The only way they can be enforced is through unilateral U.S. or multilateral NATO or U.N. diplomatic or military action.[33]

Anyone who believes that violations of the ATT are likely to be met with this kind of response should think back to the Iraq War, recall the controversies surrounding that U.S. and allied action, and then consider whether the U.S. will really be willing to act unilaterally to stop Iranian weapons transfers to Syria. Given that the U.S. and the world are straining every muscle not to go to war over Iran's illicit nuclear weapons program, the idea that they would be willing to do so over Iran's shipments of conventional weapons is laughable. The level of demand for treaties among the NGO community—and, indeed, within the U.S. government itself—is wildly higher than the level of their interest in actually seeing them physically enforced.

The problem of the enforceability of aspirational treaties is directly related to the challenge that the ATT and many other treaties that share its underlying aspirational philosophy pose to U.S. sovereignty. In

32. The words of Russian Deputy Prime Minister Sergei Ivanov in December on the subject of Russian arms supplies to Syria are relevant: "Russia will do whatever is not prohibited by any regulations, rules or agreements." The ATT will require Russia to assess certain criteria before supplying Syria, but it will not prohibit any transfers. See RIA Novosti, "'No Ban' on Russian Arms Supplies to Syria," December 1, 2011, http://en.rian.ru/world/20111201/169209507.html (accessed June 19, 2012).
33. The ATT is likely to result in the creation of a U.N.-based Implementation Support Unit to "assist" signatories. Any new U.N. body will seek to expand its authority in ways that cannot be predicted but are unlikely to be satisfactory to the U.S. Even the Draft Paper states that the ISU should "conduct outreach to increase awareness" of the ATT. It is too easy for this kind of public awareness program to devolve into U.N.-sponsored propaganda. For this and other sovereignty issues raised by the ATT, see Ted R. Bromund, "The Risks the Arms Trade Treaty Poses to the Sovereignty of the United States," Heritage Foundation *Issue Brief* No. 3622, June 4, 2012, http://www.heritage.org/Research/Reports/2012/06/Arms-Trade-Treaty-and-the-Sovereignty-of-the-United-States.

part, and as noted, this relates to the fact that the ATT is very likely to be based on criteria that the U.S. cannot control and that many other nations—not to mention NGOs—define differently. By itself, that would be a serious but not intolerable problem. As a law-abiding and democratic nation, the U.S. is very vulnerable to allied, international, and NGO pressure, but if it wants to resist, it can.

What the U.S. finds much more difficult to resist is the misapplication of law inside its own borders. The fundamental challenge that the ATT and aspirational treaties like it pose to U.S. sovereignty rests in their value as grist for the mill of legal transnationalists.

The argument of the transnationalists moves in three steps. First, they assert that customary international law (i.e., the long-standing practice of nations) is part of U.S. federal law. Then they assert that customary international law can also be defined by treaties not ratified by the Senate; foreign law (i.e., the laws of other nations); or the statements of NGOs, resolutions adopted by the U.N. General Assembly, and assertions by legal experts. Finally, they argue that U.S. federal law and, ultimately, the U.S. Constitution must be interpreted in light of this broader customary international law, from which they pick and choose items as they find convenient.

The advocates of this position are not fringe figures. They include leading figures in the legal profession. One of them, Harold Koh, is the legal adviser to the U.S. State Department and the former dean of Yale Law School, considered one of the top law schools in the U.S. Koh has stated that "[in] an interdependent world, United States courts should not decide cases without paying 'a decent respect to the opinions of mankind.'"[34] The phrase "a decent respect to the opinions of mankind" comes from the Declaration of Independence:

> When in the Course of human events it becomes necessary for one people to dissolve the political bands which have connected them with another and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

Koh is thus asserting that the document by which the U.S. cut all legal and political ties from Great Britain supports the citation of and reliance upon the legal opinions of foreign courts in the United States and, indeed, that U.S. courts "should not decide" cases without considering foreign opinions. This Orwellian use of the Declaration of Independence to import foreign law into the U.S. is a brazen assault on American sovereignty.

Like all aspirational treaties, the ATT will be a gift to legal transnationalists because its criteria can be constantly redefined by treaties and statements made outside the United States. Even if the U.S. does not sign and ratify the ATT, it is, in the transnationalist view, still incumbent on the U.S. to "respect" its terms. But if the U.S. does sign and ratify the ATT, the argument that the ATT's steadily evolving terms are legally binding on the U.S. will be there for the transnationalists' taking.

A Better Alternative

The Administration supports a "what, not how" ATT. The exact reverse would have been preferable: A "how, not what" treaty would be a substantial improvement over the ATT as currently proposed.

The ATT as it is now being negotiated is based on the futile quest for "criteria [for arms sales] that can be applied without exception." No such criteria exist. Arms sales, like international relations as a whole, are always a matter for judgment. No human rights criteria will stop China or Russia, as permanent members of the U.N. Security Council, from selling arms irresponsibly. Nor will they have any effect on Iran or any number of other bad actors.

Given that, it would have been more sensible for the ATT to impose no criteria at all and instead to proceed along the following lines:

1. Do not seek to negotiate a universal treaty. Instead, limit the treaty to states that have demonstrated a serious willingness and ability to abide by its requirements over a substantial period of time.

2. In the treaty, require states to establish effective physical border controls that (among other benefits) will seriously limit the ability of terrorists and criminals to import or export arms illegally.

34. Harold Hongju Koh, "Agora: The United States Constitution and International Law: International Law as Part of Our Law," *American Journal of International Law*, Vol. 98 (January 2004), p. 43.

This does not violate sovereignty; border control is a basic requirement of effective sovereign statehood.

3. In the treaty, require states to establish a legal system that regulates and publicizes arms exports and imports made for the purpose of promoting the national defense. Require states to criminalize efforts to circumvent this system, including by bribery. Create an exemption for secret transfers undertaken in pursuit of national security interests. This system obviously would not record every transfer, but it would accord with the reality that most national defense spending and most arms sales and transfers in a democracy are and should be matters of public record.

4. Create a purely voluntary mechanism by which the treaty signatories can assist countries that genuinely seek to fulfill the treaty's object and purpose but are not yet capable of doing so. The U.S., for example, operates an Export Control and Related Border Security Program that helps other nations to establish regulatory frameworks, licensing and enforcement techniques, and related procedures. This is the kind of foreign aid that it is fully in America's interest to support; it is voluntary, is undertaken with willing partners, and addresses genuine problems in a realm where the U.S. has significant experience.

5. Assess compliance with the treaty by annual reports among member states. Do not create any requirement for future review conferences or any new international body to monitor or enforce the treaty. State that any nation that intentionally submits demonstrably false annual reports will be regarded by all of the other treaty signatories as not being in good treaty standing.

6. For treaty signatories in good treaty standing, create a "presumption of adequacy"—i.e., that nations in good standing would be deemed by all other parties to meet whatever requirements regarding transparency and effective control sellers choose to impose on their own internal processes for authorizing the export of arms. This would in no way create a "right to buy" or an "obligation to sell." Rather, it would assure prospective buyers that the prospective sellers would not reject a transfer to them on the grounds that their controls are inadequate.

An ATT modeled on this approach would not stop some of the world's the most troubling arms transfers. It would not, for example, stop Iran from providing weapons to Sudan or Russia from providing weapons to Syria. But the ATT as currently proposed will not stop those transfers either; indeed, by stating that they reflect the sovereign right to buy, sell, and transfer arms, it will enable them.

On the other hand, many of the major problems in the realm of conventional arms transfer revolve around the inability of many of the world's nations to control their own borders and the insufficiency and corruption of their administrative mechanisms for authorizing and controlling arms transfers. There is no way to magically fix these problems, but an approach based on border and export control would result in a treaty based on well-attested requirements inherent in sovereignty, would provide a means for improving the ability of nations to meet those requirements and an incentive for them to do so, and would be one from which the U.S. could withdraw if necessary. In short, it would create what the current ATT lacks: a means for enforcement inherent in the treaty itself.

What the U.S. Should Do

There is a distinct irony in the U.S. support for an ATT: It comes just as the "Fast and Furious" scandal, involving U.S. government-sanctioned gun-running into Mexico, is being revealed. It might be wise, before the U.S. embarks fully on a campaign to tighten up on the arms trade around the world, to make sure that it has its own weapons-smuggling efforts under control.

The ATT is, however, very likely beyond salvation in any case: Its criteria will be vague, its model fundamentally different from the one the U.S. currently employs, and its foundations inherently flawed. If the ATT proceeds on its current path, the U.S. should resist criteria and clauses, such as those privileging the International Criminal Court and recognizing the legitimacy of resistance to "foreign occupation," that are not in the U.S. national interest.

But fixing these problems will not fix the treaty. Its errors are rooted in the aspirational human rights model on which it is based, a model that is a gift to legal transnationalists and—because it will be hopelessly vague—cannot be subject to effective advice and consent by the U.S. Senate. The correct course of action for the U.S. is thus, at a minimum, to refuse to sign the treaty and to announce officially that the U.S. regards it as having no

force and creating no precedent in customary international law, and thus as requiring no changes whatsoever in U.S. policy and practice.

The U.S. is right to participate in the July negotiating conference, if only to attempt to remedy the treaty's most obvious surface flaws, but it should stand ready to break consensus on the final treaty text and thus block its adoption through the U.N., if these flaws in the current Draft Paper survive essentially unaltered. It should also advance a positive alternative that would be genuinely compatible with the current U.S. system of border and export control and, unlike the ATT, would offer a modest but reasonable hope of actually improving, over time, border controls and administrative mechanisms for the arms trade around the world.

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