

ISSUE BRIEF

No. 3622 | JUNE 4, 2012

The Risks the Arms Trade Treaty Poses to the Sovereignty of the United States

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The U.N. Arms Trade Treaty (ATT) will be negotiated in July in New York. One reason to be concerned about the ATT is the risks it poses to U.S. sovereignty. Some of these risks are specific to the ATT, but the fundamental problem is that the ATT is an aspirational treaty and, as such, will impose constraints on the U.S. that will not in practice affect the dictatorial regimes at which the treaty is nominally aimed.

The ATT's Stance on Sovereignty. Because the ATT is yet to be negotiated, its text is not likely to be public until it is concluded on July 27, but in the context of sovereignty, two of its principles are reasonably clear. First, the treaty will likely assert that all U.N. member states have the inherent right of self-defense, including the right to buy, sell, and transfer arms. Second, it will likely be based primarily

on national implementation, not enforcement by a U.N. organization.

The Dilemma Inherent in an Aspirational Treaty. When applied to the world's democracies, these principles are reasonable. However, the ATT's proponents want it to be a universal treaty—i.e., one that is negotiated and signed by all U.N. member states. Many of these states are dictatorships. Thus, the treaty will on the one hand recognize that states such as Syria have the right to buy and sell arms and on the other hand require them to establish effective systems of import and export control that, like the current U.S. system, consider the human rights consequences of arms transfers.

This is a fantasy: If a state like Syria genuinely wanted to establish such a system, the treaty would not be necessary. The treaty is thus aspirational. All treaties impose limits on U.S. freedom of action. If the benefits of a treaty are mutual, it can make sense for the U.S. to accept these restrictions, for the same reason that businesses find benefit in signing binding contracts. But the ATT will effectively bind only the democracies that accept it.

The failure of other states to live up to their commitments under the ATT will not cause its restrictions on

the U.S. to lapse. In a world of states that do not respect human rights, a universal treaty based on the vague and wide-ranging human rights criteria that the ATT will seek to apply to arms transfers will always apply with more force to the law-abiding than it does to the lawless. It will always be used by the naïve and the evil to apply the powerful weapon of shame against those with a deeply ingrained respect for the rule of law.

The ATT will pretend to regulate the international arms trade, but it will have more in common with the U.N.'s aspirational treaties on human rights, which repressive regimes use to deflect attention from their misdeeds by pointing to supposed U.S. and Israeli violations.

Specific Concerns Raised by the ATT. In addition to the fundamental problem posed for U.S. sovereignty by the rise of aspirational treaties (of which the ATT is only one example), the treaty raises a number of specific concerns:

- The July conference will not seek to negotiate a detailed treaty. The Senate will therefore find it difficult to offer informed advice and consent on the ATT because its meaning, and thus the commitments arising from it, will

This paper, in its entirety, can be found at <http://report.heritage.org/ib3622>

Produced by the
Margaret Thatcher Center for Freedom

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be poorly defined. This will also open the door for U.S. allies with a strong commitment to multilateral institutions, left-wing non-governmental organizations, and dictatorships to pressure the U.S.—and U.S. businesses—to accept their interpretations of the treaty, which will seek to impinge further on U.S. freedom of action. Finally, it will empower U.S. officials to interpret the ATT as they see fit, which, by asking the Senate to write a blank check, raises further concerns about the effectiveness of the Senate’s advice and consent role and the defense of Second Amendment freedoms.

- Any ATT will provide for regular review conferences, where the skeleton ATT of July 2012 will be fleshed out with negotiated guidelines and definitions and the U.S. will be placed constantly on the defensive. These agreements will shape U.S. policy, or even be held to be legally binding on the U.S. But in addition to the risks they could pose to U.S. businesses, they will not be subject to the Senate’s advice and consent. Instead, they will further foster a culture of unaccountable rulemaking by U.S. officials.
- The treaty will require signatories to control their import and export of arms. It will be incumbent on treaty signatories not to circumvent the import control systems of other signatories. But the treaty will apply equally to the world’s dictatorships: Iran, for example,

will claim to have an import control system—and if the U.S. decided to arm Iranian rebels, it would be circumventing that system. In short, the ATT could be held to impose legal constraints on the ability of the U.S. to conduct foreign policy and, in particular, to follow the Reagan Doctrine of support for those who are resisting totalitarian regimes.

- The treaty is likely to create a U.N.-based Implementation Support Unit (ISU) 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 Chairman’s Draft Paper—the closest equivalent to a draft treaty currently available—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, which in this case could easily focus on U.S. foreign policy, or even the Second Amendment.
- The ATT raises the broader problem of the rise of transnational law, whose advocates argue that even treaties not ratified by the Senate are part of customary international law, and thus of U.S. federal law, and that U.S. courts should re-interpret the Constitution accordingly. The advocates of this position include leading figures in the legal profession. One of them, Harold Koh, is

the legal adviser to the U.S. State Department and has publicly supported “global gun control.”¹ Given the declared intentions of the transnationalists, the skepticism shown by defenders of the Second Amendment with respect to the ATT is understandable.²

What the U.S. Should Do. In the context of the Second Amendment, Senator Jerry Moran (R-KS) has introduced the Second Amendment Sovereignty Act of 2012 (S. 2205) and has followed up with Senator Jon Tester (D-MT) with a similar amendment to the FY 2013 State, Foreign Operations, and Related Programs Appropriation Bill. Either would prohibit the U.S. from expending funds to negotiate an ATT that would “restrict in any way the rights of United States citizens ... [or] otherwise regulate domestic manufacture, assembly, use, transfer, or purchase of firearms, ammunition, or related items.”

This is a valuable starting point, but because the text of the treaty will not be available until it is final, no prohibition of this sort can be fully effective. Any ATT should explicitly recognize the legitimacy of hunting, sport shooting, the right of personal self-defense, and other lawful activities related to the private ownership of firearms.

More broadly, Americans should realize that many of the risks to U.S. sovereignty posed by the ATT and other aspirational treaties cannot be fully addressed by legislative action, because these risks are inherent in any effort to negotiate vague,

1. See Harold Koh, “A World Drowning in Guns,” *Fordham Law Review*, Vol. 71, No. 6 (2003), <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=3906&context=flr> (accessed May 30, 2012).

2. For a review of some relevant concerns, see Ted R. Bromund, “Why the U.S. Should Be Concerned About the Domestic Effects of the U.N. Arms Trade Treaty,” Heritage Foundation *WebMemo* No. 3430, December 13, 2011, <http://www.heritage.org/Research/Reports/2011/12/Effects-of-the-UN-Arms-Trade-Treaty-on-the-US>.

aspirational, and universal treaties in a world full of dictatorial states. The best defense against encroachments on U.S. sovereignty—including the ability to conduct foreign policy—rests with oversight by elected officials and the vigilance of American citizens.

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