

BACKGROUND

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The U.S. Cannot Fix the U.N. Arms Trade Treaty

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Abstract

The failure of the initial negotiating conference for the Arms Trade Treaty (ATT) has been wrongly blamed on the U.S. This false accusation and the conference's lack of seriousness illustrate the fundamental flaws of any global treaty on the conventional arms trade. While improving the currently unacceptable treaty text may be possible, the treaty would still fail to achieve its purported aim and would pose irremediable risks to U.S. national interests. Yet if the U.S. blocks the adoption of a consensus text at the March conference, a significant number of states will likely negotiate a treaty outside the U.N. system. Participation in this conference is therefore a no-win game that the U.S. should decline to play on the grounds that it already has, and will continue to operate and reform, a world-class export control system that substantially achieves the supposed object and purpose of the proposed treaty.

This paper, in its entirety, can be found at <http://report.heritage.org/bg2774>

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The initial U.N. negotiating conference for the Arms Trade Treaty (ATT) on July 2–27, 2012, failed to produce an agreed treaty. On January 4, 2013, the U.N. General Assembly adopted a resolution agreeing to hold another, supposedly “final,” negotiating conference on March 18–28, 2013, on the basis of the treaty text as it stood at the end of the July conference.¹

The U.S. has been widely and inaccurately blamed for the conference's failure. In reality, the failure stemmed from the treaty's unrealistic aims and the lack of seriousness with which many participants approached the negotiations. The current text is flawed, and the July conference illustrated why better drafting cannot address the treaty's underlying deficiencies. The U.S. should announce that it will not participate in the March conference and will not sign or ratify any resulting treaty, but instead continue to develop and reform its own export control system.

The Failure of the July Conference. The July conference faced the inherently challenging task of negotiating a treaty regulating the worldwide trade in conventional arms in only four weeks. Opening the conference using only a year-old

KEY POINTS

- The U.S. has been wrongly blamed for the failure of a U.N. conference to negotiate an Arms Trade Treaty (ATT).
- Another U.N. conference will be held on March 18–28, 2013. If it also fails to negotiate a treaty, an ATT will likely be negotiated outside the U.N. framework.
- The current draft of the ATT is unacceptable to the U.S., although better drafting may fix some of the problems.
- The ATT is also inherently flawed. If the U.S. participates in the March conference, it will be faced with the no-win choice of accepting the treaty or blocking it.
- The wiser choice would be for the U.S. to announce that it will continue to operate and reform its world-leading export control system and that it will not participate in a negotiating conference that will confront it with a no-win choice.

paper by its chairman, Ambassador Roberto Garcia Moritán of Argentina, as a basis for discussions made the task even more challenging. An irrelevant Palestinian demand—supported by Egypt—to be seated as a full U.N. member state then stalled the conference, and the refusal of many authoritarian states, which were playing a spoiler role, to allow the conference to split into working groups until its closing hours further slowed the conference.

The underlying difficulties were even more intractable. Before the conference opened, the foreign secretaries of Britain, France, Germany, and Sweden published a joint statement calling for a “strong and comprehensive framework of common international standards” to prevent legitimate arms sales from being diverted to illicit networks.² Regrettably, the statement did not reflect the reality that many governments either do not want such a framework because they are autocracies that arm terrorists and insurgents, or are too weak to uphold it in practice. The very governments that are responsible for the failings that the European foreign secretaries condemned are also the ones with which the secretaries sought to negotiate the treaty.

This lack of seriousness extended into the conference itself. As it opened, the Australian delegation announced that it had sponsored the attendance of nearly 50 delegates from 35 developing nations. In other words, nearly 20 percent of the 193 nations who were supposedly intent on negotiating an ATT were so poor or disinterested that they had to be paid to attend.³ It was also rumored that the delegations of another 20 nations were composed of stand-ins from Western nongovernmental organizations (NGOs) that support the treaty.⁴ The Australian sponsored and NGO-staffed nations, comprising at least one-fourth of the conference, likely could not implement anything they sign, even if they are genuinely interested in doing so.

The conference proceeded slowly at best and at times descended to farce, such as on July 13 when the Mexican delegation called for an ATT that would cover non-explosive weapons (e.g., bows and arrows), reportedly prompting a temporary U.S. walkout. Later in the day the Mexican delegation realized that this demand was ridiculous. One member of the U.S. delegation, in a conversation with the author, estimated that fewer than 10 of the nations at the conference possessed the technical capacity to negotiate seriously and complained that the U.S. delegation was wasting an enormous amount of time explaining basic facts to everyone else.

The atmosphere at the July conference is best illustrated by an event on its closing day. The EU wanted to sign

the treaty as a “regional integration organization,” but the People’s Republic of China (PRC) objected. When the EU persisted, the PRC’s delegate made the following offer, into an open microphone and to the entire conference:

We have no room for flexibility on regional integration organizations. We have two options: no [to an EU signature], or the EU can lift the arms embargo on the People’s Republic of China. We should understand a very simple truth: bilateral relations will affect multilateral relations with states. If the EU does not treat the PRC as an equal international partner, then how can it expect the PRC to coordinate with the EU on all bilateral and multilateral questions? This is a fact in international politics and a reality in international relationships. You do not understand the PRC’s political wisdom and political will.⁵

Thus, by the end of the July conference to negotiate an ATT that will purportedly control the trafficking in conventional weapons, the treaty had become a mechanism for the PRC to seek the lifting of the post-Tiananmen Square arms embargo.

Fortunately, the conference ended before the EU could act on the PRC’s offer. Unsurprisingly, the offer went unreported by the NGOs who were busy blaming the U.S. for the conference’s failure. The episode clearly demonstrates that a treaty intended to achieve one end can easily be perverted into serving utterly different purposes.

Yet the problem was not simply that many nations were either uninterested in or technically incapable of negotiating a treaty. The conference revealed a strange paradox: With all of the world’s nations in attendance, some of them must have been responsible for the failures that the ATT supposedly seeks to remedy. But curiously, irresponsible arms transfers are always some other nation’s fault. The U.S. certainly (and rightly) did not accept any blame. Indeed, the U.S. stated before the conference opened that it wanted to increase its defense sales in order to “highlight America’s commitment to put strengthening American jobs at the center of our foreign policy.” The U.S. also made it clear that it did not want an ATT that would make the legitimate international arms trade “more cumbersome than the hurdles United States exporters already face.”⁶ No other nation at the conference was more forthcoming. Every nation favored responsibility, while implying—and occasionally stating—that the burden of increased responsibility would fall heavily somewhere else.

The underlying problem with the July conference is that the U.N., precisely because it includes almost every nation in the world, is not a suitable instrument for negotiating substantive treaties on such a profoundly divisive subject. The U.N. includes a few nations that are willing and able to negotiate seriously and that can be relied on to live up to their commitments. A much larger number of U.N. member states do not meet these criteria.

The serious nations see the ATT as a way to pressure the others—and on occasion each other, especially the United States. The rest want the treaty to amount to nothing as far as they are concerned, but hope to use it against their various enemies, both foreign and domestic. The ATT's problem is not that it has been pursued with insufficient vigor or that the text is too weak, but that relying on a treaty to stop irresponsible nations from acting irresponsibly is about as sensible as seeking to solve the problem of crime by outlawing it. If the ATT could work, it would not be necessary.

Unwarranted Criticism of the U.S. Role

It is difficult to imagine that any U.S. Administration will be more supportive of the ATT than the Obama Administration has been since 2009. This did not stop many nations and even more NGOs from blaming the U.S. for the failure of the July conference. Immediately after the conference ended, Mexico read a statement on behalf of 90 nations proclaiming that the conference had been “very close to reaching our goals” and arguing that the draft treaty text “has the overwhelming support of the international community as a base for carrying forward our work.”⁷ This claim was widely publicized and widely understood to be a criticism of the United States. Jo Adams, the head of the British delegation, stated that the conference ended when “a number of countries asked for more time to work on the text.”⁸ The U.S. was the first country to request more time; therefore, it was blamed for causing the failure of the conference.

What actually happened is that a supportive U.S. Administration and a competent U.S. delegation concluded late on the afternoon of July 27, the final day of the conference, that so many major points were still at issue that it was not possible to conclude the ATT that day. The U.S. was not the murderer who killed ATT; the U.S. was the coroner who announced that the deceased had died as a result of his own misbehavior. Far from being obstructive, the U.S. acted honorably by refusing to keep other delegations in suspense.

In the succeeding months, a number of NGOs that support the treaty have concluded that the July text contains

loopholes that render it, from their point of view, unsatisfactory or even dangerous. Yet that has not stopped these same NGOs from arguing that “it was primarily the United States of America...that scuppered chances of an agreement.” By the same token, the NGOs blame the U.S. for insisting that the conference operate on the basis of consensus—i.e., agreement by all—without acknowledging that a two-thirds majority might easily have adopted the very text they now describe as seriously flawed.⁹ Apparently, the ATT is so important that it needs to be completed rapidly, even if the price of speed is leaving national capitals with no time to actually review the final treaty text with any care before they decide to accept it.

The common theme of these inconsistent criticisms is that the U.S. is always wrong. That itself is a powerful reason for the U.S. to end its participation in the ATT process. The U.S. strategy after it announced in 2009 that it would support the negotiation of an ATT was to try not to give the treaty proponents a reason to coalesce against the U.S. The rationale was that the NGOs pushing for an ATT would—as they did in the negotiation of the Ottawa Convention on land mines in 1997 and the Convention on Cluster Munitions in 2008—only draw strength from being able to blame the U.S. for any failure and that the U.S. would therefore do better by staying in the background.¹⁰ Thus, for example, the U.S. did not take advantage of the opportunity afforded by the final ATT Preparatory Committee, held in February 2012, to submit a summary of its views before the July conference.¹¹ The U.S. believed that its views were already well known and that attracting additional attention to them would be counterproductive.

THE COMMON THEME OF THESE INCONSISTENT CRITICISMS IS THAT THE U.S. IS ALWAYS WRONG. THAT ITSELF IS A POWERFUL REASON FOR THE U.S. TO END ITS PARTICIPATION IN THE ATT PROCESS.

This U.S. strategy hinged on the assumption that it would not be pre-emptively condemned before the July conference opened and that it would find enough willing and competent partners at the U.N. to negotiate a treaty that the U.S. could accept and that Russia and China would not reject. By late July, that assumption had proven incorrect. Even before the conference began, several major European allies and NGOs attacked the U.S. for supposedly seeking to water down the prospective treaty.¹²

Yet while the treaty supporters agreed that the U.S. was the problem, they could not produce an agreed text. On the conference's closing day, no fewer than seven

working groups reported that they had been unable to reach consensus on a major issue. Russia wanted to add a section on implementation to the treaty. Pakistan wanted to ensure the treaty would not hamper the right of national self-defense (by which it meant its ability to import arms). The EU wanted the right to sign the treaty. Several African nations and the Holy See disliked the draft's reference to "gender-based violence," and a number of nations were unhappy with the way the draft dealt with non-state actors, ammunition, and the unauthorized "end use" of arms, as opposed to "end users."¹³

At the end of the conference, less than half of the nations present supported Mexico's statement that claimed agreement on a treaty would have been possible "with extra work today." Far from representing a consensus blocked by only the U.S., the number of signatories to the statement showed that only a minority of nations believed that a treaty was within reach. Of course, what matters is not the number of states that objected or whether the U.S. was one of them, but whether what the U.S. wanted was right or wrong.

THE U.S. EXPORT CONTROL SYSTEM IS WIDELY REGARDED AS THE MOST COMPREHENSIVE IN THE WORLD, AND THE STATE DEPARTMENT CALLS IT THE "GOLD STANDARD."

The U.S.'s main concerns were that full inclusion of ammunition into the treaty was unrealistic and that the treaty should contain no language that could infringe on Second Amendment rights. It repeatedly stated these positions before the conference opened and as it proceeded. While the U.S. was not fully successful on either front, no one could have been in any doubt about where the U.S. stood. The unwillingness of the conference and the NGOs to accept these concerns further demonstrates the failure of the U.S. strategy and the anti-U.S. attitude of the conference as a whole.

Since the conference closed, the drumbeat of anti-U.S. criticism has continued. In August, the Congressional Research Service (CRS) released a report noting that U.S. contracts for future deliveries of weapons reached a record high of \$66.3 billion in 2011. The U.S. celebrated these sales as "truly remarkable" and as an exemplary success for the Administration's "economic statecraft initiative."¹⁴ These sales were approved by the U.S. export control system, which the ATT supposedly would leave unchanged. The U.S. export control system is widely regarded as the most comprehensive in the world, and the State Department calls it the "gold standard."¹⁵

Yet these facts did not stop the Arms Control Association from implying that the U.S. had ruined the July conference because of its position as "the world's largest arms producer and exporter."¹⁶ The CRS report's assessment that Russia exported almost 8,000 surface-to-air missiles to the developing world between 2008 and 2011 and that Italy had sold three times more arms to Africa than the U.S. over the same period went unremarked.¹⁷ Instead, after *The Washington Post* published a stinging article on China's lack of responsibility in selling into the worst African conflicts, the Chinese *People's Daily* cited the CRS report as evidence for its contention that it was the U.S. that lacked "any principles or responsibilities in arms export" and was responsible for the failure of the ATT.¹⁸

China's hypocrisy would be amusing if it were not just one-half of the grindstone that will wear away at the United States. The other half of that grindstone is the collection of the NGOs that support the treaty, aided by European powers that will criticize the U.S. partly at the behest of the NGOs and partly out of their own commercial self-interest. Collectively, the net result will be that the autocratic powers will use the treaty to criticize the U.S. while their misdeeds are ignored by the NGOs and the other signatories that will also focus on the U.S.

When assessing irresponsibility, NGOs criticize the U.S. far more severely than they criticize China, which is genuinely and verifiably irresponsible in practice. They treat Syria with at least as much respect as they accord the United States, even though Syria, with Iran's aid, was busy slaughtering its own civilians during the July conference.¹⁹ In short, in considering any treaty, it is important to look at its context, because the treaty's context helps to shape its interpretation, its implementation, and the amendments that signatories will seek in the future.

The Flaws of the Existing Draft

The existing draft text of the ATT is badly flawed. This is largely unavoidable and reflects the inherent flaws in the concept of any global treaty on the arms trade. Furthermore, no treaty can resist misinterpretation by a nation that is intent on doing so. Thus, virtually any clause in the current ATT text could be problematic—and bad for the U.S.—in that the U.S. will interpret it one way, and Russia, for example, will interpret it in another, and there will be no way to hold Russia to the correct sense of the treaty.

For example, Article 4.1 states that, when considering whether to authorize an export of conventional arms, "each State Party shall assess whether the proposed export

would contribute to or undermine peace and security.”²⁰ This summer, Russia argued that its export of arms to Syria contributed to security by allowing the Assad regime to fight on an equal basis against those trying to overthrow it. In the future, China will be free to argue that this criterion should limit U.S. arms sales to Taiwan on the grounds that the sales undermine Chinese security and threaten the peace.²¹

Moreover, while the NGOs and the U.N. will be very interested in any asserted U.S. or Israeli violations of the treaty, they will largely ignore the violations of other states. One leading NGO argues that the ATT cannot have loopholes “that those not acting in good faith could exploit.”²² That is impossible. Just as a more careful definition of murder will not stop murderers, a better-drafted ATT will not stop those who want to violate it.

Nonetheless, it is important to examine the draft text as it stands and to consider where it might plausibly be improved by amendments that stand a reasonable chance of adoption. The following assessment is thus deliberately narrow, focusing only on specific textual elements that pose problems for the U.S. and setting aside for the next section any broader considerations. In the following sections, quotations from the draft treaty text are italicized.

Preamble

Underlining the need to prevent, combat and eradicate the illicit trade of conventional arms and to prevent their diversion to the illicit market and for unauthorized end use

By not explicitly limiting itself to international trade, this clause implies that the treaty’s purpose includes the control of domestic trade and unauthorized domestic end use. Governments could use this clause to justify expanding the activities they regulate under the authority of this treaty beyond international trade in conventional arms. In the U.S., this could validate a push for federal licensing of domestic firearms end use, i.e., a federal licensing program not just for firearms dealers, but also for all firearms sales, regardless of the type of firearm or the purchaser.

Reaffirming the sovereign right and responsibility of any State to regulate and control transfers of conventional arms that take place exclusively within its territory, pursuant to its own legal or constitutional systems

This clause affirms a vital truth about state sovereignty: that democratic nations have the right to govern themselves. However, by affirming the state’s “responsibility”

to regulate and control conventional arms within its own borders, it also implies that domestic regulation and control is a duty, not something from which a state may choose to refrain altogether. The clause does not specify the nature of this responsibility or to what authority the state is responsible, and it could be interpreted as a criticism of the Second Amendment.

The clause should be amended to reflect the fact that U.N. member states—through a federal system, in the case of the U.S.—are solely responsible for domestic regulation, which must be governed by and fully compatible with their respective constitutions. The word “exclusively” hints at an argument advanced by Mexico that few if any transactions involving firearms are genuinely domestic because they might conceivably affect another nation at some future date. The word “exclusively” should be deleted to clarify that every sovereign nation has the right, as limited by national laws and constitutions, to regulate transfers that originate in its territory, whether these transfers are exclusively domestic or not.

Recalling the United Nations Disarmament Commission guidelines on international arms transfers adopted by the General Assembly

These guidelines contain a number of objectionable items, including a justification of terrorism under the guise of legitimating resistance to “colonial or other forms of alien domination.”²³ This clause should be deleted.

Noting the contribution made by the 2001 UN Programme of Action to preventing, combating and eradicating the illicit trade in small arms and light weapons in all its aspects, as well as the 2001 Protocol against the illicit manufacturing of and trafficking in Firearms, their parts and components and ammunition, supplementing the United Nations Convention against Transnational Organized Crime

It is incorrect to assert that the U.N. Programme of Action has made any verifiable contributions to addressing illicit trade.²⁴ The U.S. has not signed or ratified the 2001 Protocol. This clause should acknowledge that not all U.N. member states participate in all of the programs it names.

Recognizing the security, social, economic and humanitarian consequences of the illicit trade in and unregulated trade of conventional arms

By not explicitly limiting itself to international trade, this clause implies that the illicit and unregulated trade includes domestic sales and transfers. That is objectionable in itself, but the clause poses a broader problem. Because the U.S. is a federal system, the federal government has limited jurisdiction. That is why it can require licensing for those “engaged in the business” of dealing in, manufacturing, or importing firearms and why it can regulate interstate sales, but not intrastate sales. Thus, in the U.S., the federal government cannot and does not regulate the entire trade in conventional arms. The states also regulate it. Yet this clause implies that treaty signatories should be responsible for regulating and controlling the entire trade. It will be difficult for any ATT to respect and accommodate the difference between the U.S. federal system and the centralized systems of other nations.

IT WILL BE DIFFICULT FOR ANY ATT TO RESPECT AND ACCOMMODATE THE DIFFERENCE BETWEEN THE U.S. FEDERAL SYSTEM AND THE CENTRALIZED SYSTEMS OF OTHER NATIONS.

Taking note of the legitimate trade and use of certain conventional arms, inter alia, for recreational, cultural, historical, and sporting activities and lawful ownership where such ownership and use are permitted and protected by law

This clause was inserted in an effort to satisfy the United States, but it is inadequate, both because it is incomplete and because treaty preambles are not binding—they merely provide part of the context for interpreting the terms of the treaty.²⁵ The ATT should not simply take note of civilian ownership in its preamble. For the purposes noted in this clause and for the purpose of self-defense, the ATT should clearly and explicitly exempt civilian ownership, as defined and protected by national law and under the ultimate control of national constitutions, from its formal scope.

Recognizing the active role that non-governmental organizations and civil society can play in furthering the object and purpose of this Treaty

This is a standard U.N. bromide that is out of place in this treaty. The object and purpose of the treaty is, nominally, to commit governments to apply certain standards to the international trade in conventional arms. That is a

job for governments alone, not for NGOs or for civil society, except insofar as government is necessarily subject to the will of the people. This clause is a sop to the NGOs that are largely responsible for the treaty and should be deleted because it will be used to justify further NGO campaigns against the U.S. and the Second Amendment.

Principles

The duty to respect and ensure respect for international humanitarian law and to respect and ensure human rights

Neither “international humanitarian law” nor “human rights” has a fully agreed international definition. This clause will be used to pressure the U.S. to comply with treaties that it has not ratified and to uphold so-called international norms, which will be styled as human rights, that it has not accepted through its domestic legislation. For example, Barbara Frey, a U.N. special rapporteur, has argued that gun control is a human right.²⁶

The responsibility of all States, in accordance with their respective international obligations, to effectively regulate and control international transfers of conventional arms, as well as the primary responsibility of all States in establishing and implementing their respective national export control systems

The word “primary” implies that another body—in the context of this treaty, perhaps the U.N.—has a secondary authority over national export control systems. This word should be replaced with the word “sole.” Moreover, the reference to “effective” regulation invites an international assessment of domestic U.S. laws, regulations, and policies relevant to the U.S. export control system.

The necessity to implement this Treaty consistently and effectively and in a universal, objective and non-discriminatory manner

The word “universal” could be held to imply that treaty signatories cannot have different export control systems for particular countries, such as the U.S. has for defense exports to Britain, Australia, and Canada. The word “objective,” especially when coupled with the words “universal” and “consistently,” will be used to criticize the U.S. decision to sell—or not to sell—to a wide variety of countries, on the grounds that the decision was political. The essence of the ATT is that it encourages nations to

discriminate against certain potential buyers. It therefore cannot be nondiscriminatory. The State Department has already pointed out that “specific regional or country concerns...create challenges for establishing criteria that can be applied without exception.”²⁷ This means, for example, any criteria allowing sales between U.N. member states will exclude Taiwan, which is not a U.N. member state.

THE ESSENCE OF THE ATT IS THAT IT ENCOURAGES NATIONS TO DISCRIMINATE AGAINST CERTAIN POTENTIAL BUYERS. IT THEREFORE CANNOT BE NONDISCRIMINATORY.

In other words, the more the treaty demands nondiscriminatory decision making, the more it runs afoul of U.S. policy, which discriminates in favor of some countries and against others. This clause is a sop to the Non-Aligned Movement and should be deleted.

Article 1

Goals and objectives

The goals and objectives of the Treaty are...

b. To prevent, combat and eradicate the illicit trade in conventional arms and their diversion to the illicit market or for unauthorized end use

This is one of the most troubling clauses in the treaty. By not explicitly confining itself to international trade, it clearly implies that the treaty’s goals and objectives include controlling and ending the illicit domestic trade, the illicit domestic market, and unauthorized domestic end use. Phrased in this way, this clause is an open invitation to interpret the treaty as requiring measures of domestic gun control to achieve the treaty’s goals and objectives. Because of its placement in Article 1, which defines the treaty’s essential purpose, it could be held to govern the interpretation of other, contradictory, clauses later in the treaty.

Article 2

Scope

A. Covered Items

1. This Treaty shall apply to all conventional arms within the following categories at a minimum

The phrase “at a minimum” could be held to imply merely that signatories have a right to regulate other items if they so desire, which would be reasonable. But it could also be held to imply that treaty signatories accept an obligation to expand the treaty’s scope at a future date. This phrase should be deleted.

(h) Small Arms and Light Weapons

If small arms are included—excluding them would be preferable—the treaty should clearly and explicitly contain a total exemption for lawful civilian possession and include no language that could be held to apply to any form of domestic civilian activity. This clause, in combination with others, could also impinge severely upon the ability of museums and dealers in military antiques to carry out activities relevant to public education and the study of military history.

2. Each State Party shall establish or update, as appropriate, and maintain a national control list that shall include the items that fall within paragraph 1 of this article, as defined on a national basis and, at a minimum, based on relevant United Nations instruments.

Even if the definition is done on a national basis, the obligation to base national control lists on U.N. instruments—in this case, primarily the U.N. Register of Conventional Arms—implies that the U.S. cannot adopt different definitions as new weapons systems are developed because these definitions would no longer be based on the minimum U.N. standard. This lack of flexibility is undesirable and could actually make it more difficult for the U.S. to operate its import and export control system effectively.

B. Covered Activities

3. This Treaty shall apply to those activities of the international trade in conventional arms set out in articles 5, 6, 7, 8 and 9, hereafter referred to as “transfer,” for the conventional arms covered under the scope of this Treaty.

Articles 5–9 contain a number of undefined concepts and unclear language that complicate understanding of the important term “transfer.” This clause uses the term “international,” which appears to be reasonable. However, a number of countries led by Mexico contend that all trade in firearms should be treated as international because any domestic sale or transfer of a firearm might

at some point affect another country. Without a definition of “international” that limits the treaty to activities that are strictly and genuinely international, the treaty will be interpreted by some nations as mandating gun control measures inside the U.S.

In an age of globalization, the argument that nothing is a wholly domestic concern is not new. In the recent past, even U.S. politicians have used it to justify the acceptance of wide-reaching treaty commitments relevant to the domestic trade in firearms. For example, when President Bill Clinton signed the Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials (CIFTA) on November 14, 1997, he stated that “in [this] era...our borders are all more open to the flow of legitimate commerce,” a fact that he apparently believed justified the controls contained in the convention.²⁸

Article 3

Prohibited Transfers

2. A State Party shall not authorize any transfer of conventional arms within the scope of this Treaty if the transfer would violate its relevant international obligations, under international agreements to which it is a Party, in particular those relating to the international transfer of, or illicit trafficking in, conventional arms.

As noted above, the treaty defines “transfer” by reference to Articles 5–9, which is unsatisfactory. Moreover, the U.S. has signed, but not ratified CIFTA, which supposedly seeks to control illicit trafficking.²⁹ Therefore, the U.S. holds itself obligated not to violate the treaty’s object and purpose, which includes the domestic regulation of firearm manufacturing and assembly in an intrusive manner. The danger from this clause is somewhat mitigated by the fact it appears to apply CIFTA’s requirements only to nationally authorized international transfers, but the fact that the treaty (in Article 8) seeks to regulate the domestic activities of arms brokers could be held to mean that it also requires the U.S. to enforce CIFTA’s requirements inside the United States.

3. A State Party shall not authorize a transfer of conventional arms within the scope of this Treaty for the purpose of facilitating the commission of genocide, crimes against humanity, war crimes constituting grave breaches of the Geneva Conventions of 1949, or serious violations of Common Article 3 of the Geneva Conventions of 1949.

This is a carefully drafted clause. As it is unclear whether any transfer would ever be made explicitly “for the purpose” of committing genocide, this clause may have no practical meaning. But regrettably, the clause includes the phrase “crimes against humanity.” The most comprehensive definition of this phrase is contained in the Rome Statute, which created the International Criminal Court. However, the U.S. has not ratified the Rome Statute and is not bound by a definition which many other nations will apply when convenient. Accusations of the commission of “crimes against humanity” are too often politically motivated and frequently targeted at the U.S. and Israel, as in the case of the Goldstone Report on the 2008–2009 Gaza War, which was later retracted by its lead author.³⁰ The likely upshot of this clause is that bad actors will disregard it by using the “purpose” requirement, while the U.S. will be criticized for failing to abide by the “crimes against humanity” criterion. Fixing this problem with better drafting may be impossible, because any ATT will likely contain this criterion.

Article 4

National Assessment

2. Prior to authorization and pursuant to its national control system, the State Party shall assess whether the proposed export of conventional arms could:

(a) Be used to commit or facilitate a serious violation of international humanitarian law;

(b) Be used to commit or facilitate a serious violation of international human rights law; or

(c) Be used to commit or facilitate an act constituting an offence under international conventions and protocols relating to terrorism to which the transferring State is a Party.

This is the most problematic requirement in the entire draft. Neither international humanitarian law (IHL, traditionally known as the laws of war) nor international human rights law (IHRL) has a clear meaning that is fully shared by all likely treaty signatories. In theory, this problem might be remedied by drafting more precise criteria to use in the national assessment of a proposed arms export, but in practice U.N. member states will likely disagree on precise criteria or what would constitute a “serious violation” of such criteria. The only way to secure

a treaty is to base it on criteria that are fuzzy enough to secure general assent. Regrettably, that lack of clarity will work against the U.S. because the U.S. will be held by other signatories—and NGOs—to have agreed to a set of evolving norms that it is not solely responsible for defining. This is in essence a problem inherent in any ATT, not just in this draft.³¹

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

The world rarely offers a choice between clearly good and clearly bad options, but only between the alternatives of not great and worse. A treaty that obliges the U.S. to sell only to buyers who are extremely unlikely to violate 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.”³² That is a polite way of admitting that criteria that would prevent the U.S. from selling arms to Saudi Arabia and other countries would not be in the interests of the U.S.

The third criterion, which relates to terrorism, is in the U.S. interest, but it is limited in that it applies primarily to the International Convention for the Suppression of Terrorist Bombings (1997), to which 165 U.N. member states are party. Iran is not among them, and the U.S. has given formal notification that it regards Pakistan’s reservation to the treaty as an effort to “limit the scope of the Convention on a unilateral basis.”³³ The convention has not made any obvious contribution to preventing terrorism before or after 9/11.

More broadly, Robert Orr, the chairman of the U.N. Counterterrorism Implementation Task Force, notes that “[l]egally, 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.”³⁴ In short, this criterion will be evaded by those who wish to do so. Finally, this criterion offers many possibilities for nations to define their own armed opposition as terrorists—and on the basis of the treaty to demand international action against the foreign nations that support this opposition—while seeking to evade public recognition of the support that they offer to similar armed oppositions in other nations.

3. In making the assessment, the exporting State Party shall apply the criteria set out in paragraph 2 of this article consistently, and in an objective and non-discriminatory manner, taking into account relevant factors, including information provided by the importing State.

As noted above, the requirement to be “objective” and “non-discriminatory” is contrary to the basic purpose of the treaty.

6. Each State Party, when considering a proposed export of conventional arms under the scope of this Treaty, shall consider taking feasible measures, including joint actions with other States involved in the transfer, to avoid the arms:

(a) Being diverted to the illicit market or for unauthorized end use;

(b) Being used to commit or facilitate gender-based violence or violence against children;...

(d) Becoming subject to corrupt practices; or

(e) Adversely impacting the development of the importing State.

The risks of this clause are mitigated by the fact that it requires only a consideration of feasible measures, which is a weak requirement. Nonetheless, it is problematic for a variety of reasons. First, it implies that foreign states exporting civilian firearms to the U.S. have a legal obligation to consider taking measures—not solely in cooperation with the U.S.—to prevent those firearms from reaching the illegal market. The meaning of this obligation is unclear, but its scope is potentially large, especially because the definition of what constitutes the illicit market in the importing state is up to the judgment of the exporting state. It is difficult to know how this obligation will affect U.S. firms that import firearms, parts, and components from foreign suppliers.

Second, while the U.S. already weighs most of these criteria when considering its own arms exports, the draft implies that they are a checklist of items to be satisfied separately, not a set of concerns to be considered in light of other objectives, which is the current U.S. practice.

Third, the requirement to consider whether arms adversely impact development is so broad as to be meaningless and implies that importing states are not ultimately responsible for deciding the role that imports play in their national defense strategies. If they are not responsible for making that decision, it is unclear why they are responsible enough to meaningfully sign the ATT.

Finally, the requirement to avoid facilitating “gender-based violence or violence against children” is both extremely broad and dangerously vague. The U.N. opposes what it has described as “the powerful cultural conditioning that equates masculinity with owning and using a gun,” implying that any kind of involvement with firearms is a form of gender-based violence.³⁵ This clause is likely to become a basis for further campaigns by both the U.N. and NGOs.

Article 5

General Implementation

1. Each State Party shall implement this Treaty in a consistent, objective and non-discriminatory manner, in accordance with the goals and objectives of this Treaty.

As noted above, these requirements are incompatible with the basic purpose of the treaty.

2. The implementation of this Treaty shall not prejudice obligations undertaken with regard to other instruments. This Treaty shall not be cited as grounds for voiding contractual obligations under defence cooperation agreements concluded by States Parties to this Treaty.

Treaty supporters regard the second sentence in this clause—inserted at India’s request—as a major loophole because it allows any state to completely evade the entire treaty simply by signing a defense cooperation agreement with another state. They are correct. While this clause creates a safe harbor for U.S. agreements with Britain and Australia and is welcome on those grounds, it would be far better to safeguard those and similar arrangements by recognizing that national export control systems can have different systems of regulation for different export destinations.

As currently drafted, this clause renders the entire treaty nonsensical. In practice, it would be binding only on the U.S. and other democracies because authoritarian states could simply sign—or claim to have signed—defense cooperation agreements with each other and then state that they were exempt from the treaty. In theory, the U.S. could do the same thing, but the Senate and many other interested parties are unlikely to allow a U.S. Administration to claim that its actions are legitimated by a defense cooperation agreement that does not in fact exist.

3. Each State Party shall take all appropriate legislative and administrative measures necessary to implement the provisions of this Treaty and shall designate competent national authorities in order to have an effective and transparent national control system regulating the international transfer of conventional arms.

In most cases, a national export control system should be transparent. But on some occasions, for reasons of national security or foreign policy, the U.S. may wish to deny or approve a requested sale without giving the grounds for its decision. In such cases, transparency is undesirable. A blanket requirement for transparency is unwise, unworkable in practice, and likely to generate ill-will and disputes between signatories. Furthermore, in this clause and others, the treaty does not explain what authority is to judge whether particular measures are “appropriate,” especially since signatories are supposed to take “all appropriate” measures. This requirement invites an international assessment of domestic U.S. laws, regulations, and policies relevant to the Second Amendment and to the U.S. export control system.

This and similar clauses should be amended to read “take appropriate legislative measures, subject to and limited by national laws and constitutional protections and as determined exclusively by the State Party, that are necessary to implement the provisions of this Treaty.”

5. States Parties involved in an international transfer of conventional arms shall, in a manner consistent with this Treaty, take appropriate measures to prevent diversion to the illicit market or for unauthorized end use.

This implies that if Belgium, for example, licenses the export of civilian firearms to the U.S., both Belgium and the U.S. have a positive obligation to take “appropriate measures” to prevent those firearms from being sold illegally in the U.S. This obligation is strongly stated as a

“shall,” and since the treaty does not clearly acknowledge the exclusive, sovereign right of states to make decisions within their own territory, the requirement that measures be “consistent with this Treaty” does not limit the obligation sufficiently. No treaty should imply that a foreign nation has a legal obligation to take actions relevant to law enforcement inside the U.S. This clause should be amended to refer to Article 6.2, which requires exporting states to make information about the export in question available to the importing state.

Moreover, this clause implies that the President should use his power to control the import of defense articles to prevent the diversion of imported firearms “to the illicit market.” This could take many forms. Importers could be required to provide a list of final end users or to obtain prior approval for resale or retransfer of imported firearms, parts, and components. This would be a considerable burden on importers and could require a new registry for purchasers of imported firearms, parts, and components, regardless of type.

Currently, the Bureau of Alcohol, Tobacco, Firearms, and Explosives maintains a list of firearms covered under the 1968 National Firearms Act (NFA), including machine guns, silencers, and certain short-barrel rifles and shotguns. The National Firearms Registration and Transfer Record is thus, supposedly, a current ownership record for all firearms as defined by the NFA. This list is constantly changing as NFA firearms are manufactured, imported, and sold. The creation of a national registry for imported firearms, including those not currently covered by the NFA, would appear to be incompatible with the Gun Control Act of 1968, which prohibits the federal government from maintaining a national registry of non-NFA firearms.

6. If a diversion is detected, the State or States Parties that made the detection may notify the State or States Parties that could be affected by such diversion, to the extent permitted in their national laws, in particular those States Parties that are involved in the transfer or may be affected, without delay.

This clause implies that states party to the treaty may serve as free-roaming busybodies, detecting and notifying other states of supposed deficiencies in the transactions of third parties, on the grounds that the other states might be “affected” by the supposed deficiencies. If applied to the U.S., Mexico, in particular, would likely use this clause to notify other signatories of a diversion any time a U.S.-registered or U.S.-manufactured firearm was

found in Mexico or anywhere else outside the U.S. This clause would become a way to register complaints about the regulation of firearms ownership inside the United States and give rise to many disputes. This clause should be deleted because no treaty clause is needed to empower a nation to communicate information about this or any other subject to another nation, provided that the communication is permitted by national laws.

Article 6

Export

4. Each State Party shall establish and maintain a national control system to regulate the export of ammunition for conventional arms under the scope of this Treaty, and shall apply article 3, and paragraphs 1, 2, 3, 4, and 5 of article 4 prior to authorizing any export of ammunition.

The treaty does not define the term “export” or any of the other terms in the following three articles. Britain has suggested defining “export” as “the change of title, control or ownership of conventional arms from one person in one State party to another person in another State party, including by way of gift, loan, sale or lease.”³⁶ That would arguably exclude intra-company supply chain activity and the shipment of individual personal property (e.g., a shooter traveling to hunt, or to a competition), as long as the property does not change ownership. Such an exclusion would be highly desirable. In any case, the treaty should carefully define “export” to make it clear that its requirements do not apply to activities that take place within national borders.

Treaty supporters regard the draft’s treatment of ammunition as a major loophole, and it is one of the grounds on which they criticize the U.S. They are incorrect. This clause was the result of a U.S. effort to address a seemingly insoluble problem. On the one hand, the draft treaty subjects ammunition exports to national control. On the other hand, because ammunition is a consumable commodity, there is no feasible way for the U.S. to prevent it from being diverted. The nation that diverted it could always claim that it was expended in a training exercise. Thus, the treaty, because it omits paragraph 6 of Article 4, does not require the U.S. to prevent ammunition from being diverted to the illicit market. This is not a loophole. It is a recognition of reality.

Article 7

Import

1. Each importing State Party shall take measures to ensure that appropriate and relevant information is provided, upon request, in accordance with its national laws, to the exporting State Party to assist the exporting State Party in its national assessment.

As noted under Article 6, the treaty does not define “import.”

This clause would require the U.S. to provide “appropriate and relevant information” to foreign countries when they are considering whether to sell arms, parts, or components into the U.S. market. The treaty leaves the precise nature of this information up to the exporter. It could thus be used by foreign suppliers to pressure U.S. manufacturers, importers, or both by requiring them to divulge information to the U.S. and then to the foreign seller that would be commercially prejudicial or violate the privacy of individual U.S. end users. In the U.S., the provision of this information is ultimately governed by the Constitution, not simply by “national laws.”

This clause should be limited to requiring the provision of factual information about the federal government’s policies relevant to the assessment criteria.

2. Each importing State Party shall put in place adequate measures that will allow them to regulate, where necessary, imports of conventional arms under the scope of this Treaty. Each importing State Party shall also adopt appropriate measures to prevent the diversion of imported conventional arms under the scope of this Treaty to the illicit market or for unauthorized end use.

The second sentence in this clause would require the U.S. to adopt “appropriate measures” to prevent an imported firearm from reaching the illicit market. These measures already exist in the U.S. under federal and state firearms laws. Yet some will undoubtedly argue that these laws are insufficient to meet the ATT’s “all appropriate” standard. This sentence provides an open-ended justification for any administrative controls that a U.S. Administration desires and is legally able to impose. For example, any resale or retransfer of an imported firearm without prior government authorization could be deemed to be an “unauthorized end use.”

The second sentence should be deleted, and the first sentence rewritten to create an obligation to control the import of conventional arms at national borders.

Article 8

Brokering

Each State Party shall take the appropriate measures, within its national laws, to regulate brokering taking place under its jurisdiction for conventional arms under the scope of this Treaty.

As noted under Article 6, the treaty does not define “brokering.” This is particularly significant because, whereas “export” and “import” at least have everyday meanings, “brokering” does not. Furthermore, “brokering” is, in part, a domestic activity, so it is particularly important that regulating it does not provide an excuse to regulate other domestic activities related to the sale or transfer of firearms. In practice, any requirement to control brokering would likely produce administrative overreach and expand regulation to activities beyond those involved in the actual transaction between buyer and seller.

Even within the U.S., “brokering” is an extremely vexed subject. The State Department has attempted for almost a decade to amend part 129 of the International Traffic in Arms Regulations (ITAR), which deal with brokers and brokering activities.³⁷ The proposed amendments have been the subject of considerable controversy in U.S. industry.³⁸

The stakes involved in this definition are high, as illustrated in May 2011 by the civil settlement that BAE Systems plc (BAES) of the United Kingdom entered into with the U.S. government. The settlement dealt with alleged ITAR violations by BAES, in particular “in connection with unauthorized brokering of U.S. defense articles,” for which BAES paid an aggregate civil penalty of \$79 million.³⁹ Moreover, because the U.S. applies most export controls extraterritorially—i.e., the controls follow the part, not the person—the rest of the world has a stake in how the U.S. regulates brokering. Collectively, this U.S. experience shows just how hard it is to define brokering and how regulation of it tends to expand in scope over time.

Article 9

Transit and Transshipment

1. Each State Party shall adopt appropriate legislative, administrative or other measures to regulate, where

necessary and feasible, conventional arms covered by this Treaty that transit or transship through its territory.

The treaty does not define “transit” or “transshipment.” The treaty appears to be incompatible with existing international law, under which the nations control their territorial waters, but respect the right of innocent passage for vessels of all nations. This clause would make the U.S. responsible for regulating arms on vessels that innocently transship its waters. At a minimum, this would require inspection of paperwork, and it could require the U.S. and other nations to board the vessel in question, thus breaching the right of innocent passage.

Article 10

Reporting and Recordkeeping

1. Each State Party shall maintain national records, in accordance with its national laws and regulations, of the export authorizations or actual exports of the conventional arms under the scope of this Treaty and, where feasible, details of those conventional arms transferred to their territory as the final destination or that are authorized to transit or transship territory under its jurisdiction.

This clause raises the “innocent passage” problem noted under Article 9. The requirement to collect “details” on imported conventional arms is also problematic, given the next paragraph:

2. Such records may contain, inter alia, quantity, value, model/type, authorized international transfers of conventional arms under the scope of this Treaty, conventional arms actually transferred, details of exporting State(s), importing State(s), transit and transshipment State(s) and end users, as appropriate. Records shall be kept for a minimum of ten years, or longer if required by other international obligations applicable to the State Party.

This is the only clause in the draft that refers to “end users.” It implies that the best form of treaty compliance would be for the U.S. federal government to maintain information about individual end users (i.e., owners) of imported firearms. This requirement is governed by the phrase “may contain,” but it is still troubling that the treaty refers to individuals in this clause.

This clause also points to a dilemma that the existing

draft seeks unsuccessfully to evade. In most nations, firearms are heavily controlled or private ownership of firearms is forbidden at the national level. It is therefore possible for these nations—in theory, if not in practice, given their administrative deficiencies—to record the identity of the end user of any imported arms. In many cases, the nation’s armed forces are the end users. However, in the U.S., the states, not the federal government, are responsible for registering firearms, so the federal government cannot promise to provide information on end users.

This is why the treaty includes the “may contain” and “as appropriate” clauses, which allow the U.S. to argue that providing the identities of end users would not be appropriate. These contortions will ultimately satisfy no one. They leave the U.S. open to charges of bad faith from treaty signatories and raise suspicions in the U.S. that the treaty is intended to promote firearms registration at the federal level. The basic fact is that the U.S. system is different from the systems of other nations—sufficiently different to make these types of unsatisfactory evasions essential if a treaty is to be drafted by all of them.

3. Each State Party may report to the secretariat, when appropriate, any actions taken to address the diversion of conventional arms to the illicit market or for unauthorized end use.

This clause is governed by the word “may,” but it again implies that the best form of treaty compliance would be for the U.S. to report to the treaty secretariat created by Article 12 “any” domestic actions it takes to “address” the diversion of firearms into the illicit market. This is a request for reports of expansive and potentially unlimited scope. At a minimum, these reports should be limited to arms imported under the scope of the treaty and should be subject to and limited by national laws and constitutional protections.

Article 11

Enforcement

Each State Party shall adopt appropriate national measures and policies as may be necessary to enforce national laws and regulations and implement the provisions of this Treaty.

This clause has been criticized by conservatives concerned with the domestic application of the treaty. However, the requirement to enforce a treaty by national

action is normal and obviously preferable to supranational enforcement. On its own, it is not problematic. The question is whether the rest of the treaty is well drafted, respects the rights of U.S. citizens, and is in the U.S. national interest. If the treaty meets all of these criteria and passes through the full U.S. ratification process, then the requirement in this article is correct and sensible.

Article 12

Secretariat

1. This Treaty hereby establishes a secretariat to assist States Parties in the effective implementation of this Treaty.

The treaty secretariat envisioned in this draft is modest in size, although it is unclear why a secretariat is needed at all. In any event, the secretariat should not be tasked with assisting in “implementation.” It is the U.S. position that the treaty should be implemented exclusively at the national level. Any suggestion of a supranational responsibility for assisting in implementation is undesirable because it empowers the treaty secretariat to make its own judgment on what constitutes “effective” implementation and thereby impose its own interpretation of the treaty.⁴⁰ This clause should be revised to restrict the secretariat to providing only administrative support.

3. The secretariat shall be responsible to States Parties. Within a minimized structure, the secretariat shall undertake the following responsibilities:...

c. Facilitate the matching of offers of and requests for assistance for Treaty implementation and promote international cooperation as requested

This clause makes it clear that the secretariat will be responsible for distributing money from the voluntary trust fund described in Article 14.3. It lacks any safeguards to prevent distribution of any U.S. funds for purposes of which the U.S. does not approve or to nations that are hostile to the U.S., support terrorism, or are dictatorships. The treaty secretariat should have no role in disbursing funds, which should be handled completely bilaterally.

Article 13

International Cooperation

1. States Parties shall cooperate, as appropriate, to

enhance the implementation of this Treaty, consistent with their respective security interests and national laws.

This clause should make it clear that any cooperation must be compatible with rights protected by national constitutions and that any cooperation must be fully compatible with the clear and explicit exemption for civilian ownership, as defined and protected by national law and under the ultimate control of national constitutions.

2. Each State Party is encouraged to facilitate international cooperation, including the exchange of information on matters of mutual interest regarding the implementation and application of this Treaty in accordance with its respective security interests and national legal system.

This clause should be amended in a similar fashion.

4. Each State Party may cooperate, as appropriate, in order to enforce the provisions of this Treaty, including sharing information regarding illicit activities and actors to assist national enforcement and to counter, prevent and combat diversion to the illicit market or for unauthorized end use, in accordance with national laws. States Parties may also exchange experience and information on lessons learned in relation to any aspect of this Treaty, to assist national implementation.

Much of this clause merely restates activities in which states already engage. It should, however, be limited to encouraging cooperation on matters within the scope of the treaty, i.e., the international trade in conventional arms, so that it does not become an excuse for focusing on the domestic illicit market.

Article 14

International Assistance

1. In implementing this Treaty, each State Party may seek, inter alia, legal or legislative assistance, institutional capacity building, and technical, material or financial assistance. Each State Party in a position to do so shall, upon request, provide such assistance.

The obligation to provide assistance in this clause is limited by the fact that only states “in a position to do so” are required to provide assistance. Nonetheless, the

words “shall...provide” indicates a positive obligation to provide aid, although not necessarily financial aid. The “shall...provide” clause should be replaced with the words “may consider, upon request, the provision of such assistance.”

3. States Parties may also contribute resources to a voluntary trust fund to assist requesting States Parties requiring such assistance to implement the Treaty. The voluntary trust fund shall be administered by the secretariat under the supervision of States Parties.

This is also a weak obligation. States “may” contribute to the trust fund, which is voluntary. It is nonetheless an undesirable clause, both because the fund is clearly under the control of the treaty secretariat and because only the weak control of the “supervision of States Parties” prevents the secretariat from using the funds—including U.S. funds, if the U.S. decides to contribute—to assist nations that are U.S. enemies, complicit in terrorism, or dictatorships.

Article 17

Provisional Application

Any State may at the time of its ratification, acceptance, approval or accession, declare that it will apply provisionally articles 3 and 4 of this Treaty pending its entry into force for that State.

This clause implies that Articles 3 and 4, which might reasonably be regarded as central to the object and purpose of the treaty, are not obligatory until the treaty enters fully into force because a state “may...declare” it will apply them provisionally. This, in turn, implies that nations can sign the treaty and not be bound by its object and purpose as defined by Articles 3 and 4 until that point.

Article 20

Amendments

3. Any amendment to this Treaty shall be adopted by consensus of those States Parties present at the Conference of States Parties. The depositary shall communicate any adopted amendment to all States Parties.

The U.S. cannot accept a procedure that allows a number of treaty signatories—even by unanimous

agreement—to amend a treaty in a way that obligates all states parties. This would set an extremely dangerous precedent.

The U.S. has consistently held that states are bound only by the obligations to which they positively consent. For the U.S., it additionally implies that the U.S. would be bound by amendments that would not be subject to Senate advice and consent. The U.N. itself states that “[to] become party to a treaty, a State must express, through a concrete act, its willingness to undertake the legal rights and responsibilities contained in the treaty.”⁴¹ The amendment procedure in Article 20 does not respect this requirement.

Article 21

Conference of States Parties

2. The Conference of States Parties shall:

a. Consider and adopt recommendations regarding the implementation and operation of this Treaty, in particular the promotion of its universality;

b. Consider amendments to this Treaty;

c. Consider and decide the tasks and budget of the secretariat;

d. Consider the establishment of any subsidiary bodies as may be necessary to improve the functioning of the Treaty.

It is important to bear in mind that the ATT is a process, not an event. Many of the activities mandated for the conference of states parties are undesirable or even dangerous. The conference will not be required to operate by consensus, so while its recommendations will carry weight and may be regarded by many nations as legally binding, the U.S. will be able to do little more than lobby and vote against them. The conference should not be obligated to promote the treaty’s universality, which by including the incompetent or the dictatorial must come at the expense of effective control of the genuinely undesirable portions of the international arms trade. The secretariat’s tasks are supposedly set out in Article 12: Article 21 should not imply that they can be redefined by majority rule. The treaty is to be implemented on the national level: There is no need for subsidiary bodies. The mention of them implies that the

secretariat is only the start of a larger apparatus to be created by the treaty.

Article 22

Dispute Settlement

1. States Parties shall consult and cooperate to settle any dispute that may arise between them with regard to the interpretation or application of this Treaty.

In practice, this requirement is relatively innocuous because there is no mandatory and binding dispute resolution mechanism. While the word “shall” implies a legal obligation, most of the disputes created by this treaty will not be amenable to cooperative settlement because they will be profoundly political. It would be unwise for the U.S. to accept even relatively weak obligations that it cannot possibly fulfill.

2. States Parties shall settle any dispute between them concerning the interpretation or application of this Treaty through negotiations, mediation, conciliation or other peaceful means of the Party’s mutual choice.

The same objection applies to this clause.

Article 23

Relations with States Not Party to This Treaty

States Parties shall apply articles 3 and 4 to all exports of conventional arms within the scope of this Treaty to States not party to this Treaty.

It is important that this article does not imply that states parties are obliged to apply different standards to states not party to the treaty. In other words, this article affirms that the obligations of the treaty relate to the internal procedures of the states parties and do not include assessing whether other nations are parties to the treaty. On the other hand, this article does not—and cannot—prohibit states from making such an assessment part of their national import and export control system. In other words, if the U.S. does not sign and ratify an ATT, this article neither requires states that are party to the treaty to discriminate against U.S. imports and exports nor prevents them from doing so.

Article 24

Relationship with Other Instruments

States Parties shall have the right to enter into agreements in relation to the international trade in conventional arms, provided that those agreements are compatible with their obligations under this Treaty and do not undermine the object and purpose of this Treaty.

There is no clear standard for the “object and purpose” criterion. Given Article 5.2, it is unclear that any agreement would necessarily be incompatible with the obligations the treaty creates. On the other hand, it could be argued that treaties such as the U.S.–U.K. Defense Trade Cooperation Treaty violate the treaty requirement of “universal” implementation. This article, like many others in the draft, will generate disputes between signatories, could be held to limit the U.S.’s freedom of action, and will not restrain the ill-intentioned.

ANY TREATY NEGOTIATED THROUGH THE U.N. WILL TREAT DEMOCRACIES AND DICTATORSHIPS EQUALLY.

The ATT’s Fundamental Flaws

Even its supporters acknowledge that the existing treaty text needs a legal scrub before it can be regarded as acceptable. It is curious that this effort was not undertaken before the March 2013 conference. This fact suggests that many nations—most likely the dictatorships—are as unwilling today as they were in July 2012 to allow any drafting to proceed out of their sight. While some of the problems noted above may be remedied at the March conference, the conference is unlikely to address all of them. Even then, the conference cannot eliminate the treaty’s fundamental flaws, which are inherent in its structure. These flaws include:

Equal Treatment of Democracies and Dictatorships. Any treaty negotiated through the U.N. will treat democracies and dictatorships equally. As stated in paragraph 7 of the draft principles, any ATT will recognize that all signatories have the inherent right as sovereign states to “acquire conventional weapons for legitimate self-defense...and to produce, export, import and transfer conventional arms.” These rights properly pertain only to law-governed democracies. In practice, today, dictatorships also have them. The treaty, like any

nearly universal treaty that includes dictatorships and democracies on equal terms, will take that practical reality and enshrine it as a principle established by treaty, thus making it harder to move toward a world in which dictatorships do not have the privileges that rightly pertain to sovereign democracies.

Refusal to Understand the Failings of Security Council Arms Embargoes. An ATT is regularly demanded on the grounds that existing U.N. Security Council arms embargoes are routinely violated.⁴² But whereas the embargoes are narrow in scope and geographical application, the ATT intends to cover the conventional trade in arms across the entire globe. Paradoxically, the ATT is supposed to work where the embargoes have failed.

Security Council embargoes fail because nations chose not to respect them or are too ill-governed to enforce them. Even U.N. peacekeepers themselves have been creditably accused of violating U.N. embargoes by the BBC.⁴³ The vastly more expansive ATT will not change that reality. It reflects a belief that the way to change the world is to smother it with law, an approach that inherently impinges more heavily on the law-abiding than the lawless.

NGOs like to quote U.S. Assistant Secretary of State Tom Countryman's statement that there must be "a new sense of responsibility upon every member of the United Nations that you cannot simply export [conventional arms] and forget [about them]."⁴⁴ In reality, involving all of the world's nations in the ATT process through the U.N., which has itself completely forsaken neutrality and openly supports the treaty, makes achieving meaningful results harder, not easier.⁴⁵ If the world's nations wanted to be responsible, they would be. A treaty will not compel them to change. If the world's nations wanted higher standards on their import and export control systems, they could have them now, without a treaty. It is a fantasy to believe that an ATT covering the entire world and backed by nothing more than the words of the treaty itself will succeed where the Security Council, backed by the authority of Chapter 7 of the U.N. Charter, has failed. It is member states that, by design or negligence, arm terrorists and violate existing embargoes. What is needed is not a new treaty on the arms trade, but nations that are willing and able to uphold the commitments they have already made.

The Dilemma of Effective Enforcement. The volume of the demand for an ATT is much higher than the volume of the demand for the effective enforcement of an ATT. For example, to halt the flow of Iranian weapons into

Syria, the U.S. and its allies would need to take military action on a large scale. Yet there is no hint of support for such action among the NGO community. Indeed, when the General Assembly recently discussed the Syrian situation, one treaty-supporting NGO approvingly described the discussion as focusing on "the inferiority of violent to peaceful solutions."⁴⁶ While the NGOs driving the treaty are wary enough to proclaim occasionally that they do not regard the treaty as a silver bullet, their hopes for it are extremely high. For example, one supporter at Amnesty International argues that a properly drafted treaty will "prevent arms fuelling atrocities and abuses."⁴⁷

Given the track record of Security Council embargoes, reality will be disappointing. When the ATT approach fails, its supporters will not give up. They will escalate to demanding the mandatory involvement of an international court. Indeed, one influential supporter has already stated that in her view "a State's own national assessment decisions [regarding arms transfers] could be made subject to legal challenges in international courts."⁴⁸ This would completely alienate the U.S. and virtually every other major power, but still not solve the problem because court decisions are meaningless in lawless states.

Blaming Exporters, Not Importers. The ATT places the majority of its obligations on arms exporters, not importers. This is in line with the tendency of both the U.N. and uncritical believers in arms control to blame problems on weapons, not on those who use them. Yet it is the importers of the arms, not the exporters or the arms themselves, that are actually responsible for arming terrorists or committing human rights violations with the arms in question. The ATT assumes by its very nature that all signatories are responsible actors, but if they were, the treaty would be unnecessary. It reflects a world view that blames problems not on the world's autocracies and ill-governed states, but on the better-governed places that paradoxically are primarily responsible for negotiating the treaty.

THE ATT ASSUMES BY ITS VERY NATURE THAT ALL SIGNATORIES ARE RESPONSIBLE ACTORS, BUT IF THEY WERE, THE TREATY WOULD BE UNNECESSARY.

Blaming the United States. The history of the negotiating conference and of the agitation for the ATT shows that the treaty's proponents are more interested in blaming the U.S. than they are in focusing attention on the evils of regimes such as Iran, Syria, China, and Russia. This is in part because the U.S. is amenable to pressure,

whereas Iran murders its dissidents. Blaming the U.S. is safer as well as easier.

Any treaty on the arms trade will focus disproportionate attention on the U.S. and Israel while placing little or no pressure on regimes that commit enormous human rights abuses and regularly arm terrorists. Any U.S. Administration that supports the negotiation of such a treaty is fashioning a scourge for its own back and the backs of its successors. The U.S. has the world's most comprehensive export control system and asserts that the ATT will (and must) require no changes in it.

However, the ATT creates an international commitment. No matter how much it is supposedly based on national implementation, it gives other signatories the power to argue that the U.S. by allowing a particular import or export is not living up to its treaty commitments. Given the visibility of the U.S., the value of U.S. defense exports, U.S. sensitivity to charges of bad faith, and the realities of international politics, any such claim will influence the U.S. far more than it influences the world's bad actors.

Rejection of Support for Resistance to Tyranny.

The essence of any ATT is that it supposedly will lead to creation of a national import and export control system for conventional arms. It will also require exporting nations to "take appropriate measures to prevent the diversion [of arms] to the illicit market or for unauthorized end use."⁴⁹ It is a given that the Assad regime of Syria, a U.N. member state, will claim that the insurgents seeking to overthrow it are both illicit and unauthorized. Thus, any ATT will throw up a high legal barrier to the U.S. or any other signatory arming individuals seeking to overthrow a tyrant. Providing arms in this manner is commonly known as the Reagan Doctrine, but it has been a bipartisan instrument of U.S. foreign policy since the end of the World War II.

Incompatibility with the U.S. Export Control

Reform Initiative. The Obama Administration is currently attempting to reform the U.S. export control system. The basic principle of this reform is that the U.S. should build higher walls around fewer items, and that many items that are neither sensitive nor dangerous (e.g., tires for military vehicles) should not be subject to the elaborate controls that rightly pertain to satellites or tanks. Whether this reform effort will succeed remains to be seen, but it aims in a sensible direction. It is also basically at odds with any ATT, which will always seek to expand the scope of the items that it covers.⁵⁰ While the U.S. asserts that "the Treaty will correspond with and be supportive of United States Export Control Reform," it is

hard to reconcile a reform process that seeks to decontrol items with a treaty that seeks to control them.⁵¹

Incompatibility with the U.S. Decision-Making Model on Exports. The criteria that the U.S. considers before transferring conventional arms are set out in Presidential Decision Directive 34, issued by President Clinton on February 17, 1995. The directive is well crafted and carefully balanced. The George W. Bush Administration retained it, and the Obama Administration has not revised or discarded it. The directive states that the U.S. will apply a broad range of criteria to each arms transfer decision and make each decision on a case-by-case basis. The criteria are to be considered as a whole, not as a checklist that must be met item by item.

While the latest draft of the ATT is certainly an improvement on the original chairman's Draft Paper, which set out a much more extensive set of criteria, it still takes essentially a checklist approach to export assessments.⁵² Any ATT is extremely unlikely to allow signatories to balance human rights concerns against their fundamental national interests. Yet on occasion, as illustrated by U.S. arms sales to Saudi Arabia, this is exactly what the U.S. needs to do. Thus, the ATT is not compatible with the existing U.S. decision-making model.

Furthermore, the ATT is itself a moving target. Interpretations of its human rights criteria will only become more restrictive over time. Even now, the opposition Labour Party in Britain is calling for an export control system based on a "pre-emptive" risk assessment, which would "place greater emphasis on existing social political and economic drivers of conflict that we now know would offer a better assessment of emerging threats and dangers of future instability."⁵³

The Problem of Legal Control. The U.S. should be careful in negotiating and signing any treaty for a number of reasons. One reason is that the U.S. applies legal scrutiny to virtually every action. A treaty like the ATT—which covers an enormous range of transactions, contains many undefined terms, and applies to a huge body of U.S. law, code, practice, and policy—offers unlimited opportunities to create currently unforeseen legal challenges and obstacles. This proliferation of lawyers and law can be extremely dangerous to the security of the U.S. and its allies and to stopping genuinely irresponsible arms transfers. For example, in late 2002, U.S. and Spanish forces stopped a North Korean ship carrying 15 Scud missiles hidden beneath sacks of cement to Yemen. The U.S. eventually allowed the ship to proceed after a lengthy internal legal wrangle that left U.S. allies perplexed at the U.S. conclusion that it lacked the legal authority to confiscate

the missiles.⁵⁴ No matter what it thinks it is doing now, the Administration cannot evade this problem, which is inescapable as long as this type of legal review remains deeply embedded in the U.S. military and security decision-making system.

The Second Amendment. Describing the ATT as a gun grab treaty is unhelpful. The problem is much more subtle, and focusing on the very minimal risks of a gun grab distracts from the serious and longer-term problems posed by the ATT.⁵⁵ Both the Non-Aligned Movement (120 nations) and the overlapping African Group (54 nations) want civilian possession of firearms included in the ATT. While Canada is staunchly supportive of civilian possession, Mexico and a number of other Central and South American nations are bitter opponents. Many nations in the European Union have little interest in supporting civilian possession, and there is even less support for the U.S. view that individual self-defense is an inherent right. The U.N. itself is the home of the Program of Action on small arms and the International Small Arms Control Standards (ISACS). It argues that the “arms trade must...be regulated in ways that would...minimize the risk of misuse of legally owned weapons” and campaigns against “community attitudes” that “contribute to the powerful cultural conditioning that equates masculinity with owning and using a gun, and regards gun misuse by men as acceptable.”⁵⁶

Scholars as senior as Harold Koh, former Dean of the Yale Law School and the State Department’s Legal Adviser during President Obama’s first term, have argued that “the only meaningful mechanism to regulate illicit [international] transfers is stronger *domestic* regulation,” and that “[s]upply-side control measures within the United States” are essential.⁵⁷ For their part, while asserting that the ATT would have no impact on domestic firearms ownership, treaty-supporting NGOs simultaneously state that the tragedy in Newtown, Connecticut, has “opened the debate within the United States on weapons controls in ways that it has not been opened in the past.”⁵⁸

It is therefore no surprise that defenders of Second Amendment rights view the ATT with profound skepticism and believe the treaty’s advocates are being less than fully candid in their assertions that the ATT would have no domestic effects. The regular statements by the Administration are too general to reassure, such as the recent statement by U.S. Deputy Permanent Representative to the Conference on Disarmament Walter S. Reid in the 2012 First Committee debate that the ATT must not infringe “on the constitutional right of our citizens to bear arms.” The statements are also made in the context of U.N.-based negotiations, when the U.N.,

the NGOs that are driving the negotiations, and most of the nations negotiating the treaty believe in and practice gun control.⁵⁹

Although the current draft text has improved thanks to U.S. efforts, its flaws only exacerbate this underlying problem. Any ATT that emerges from the negotiating process will likely offer this and future U.S. administrations a number of justifications to impose further administrative controls on firearms, and it is certain to subject the U.S. to continual pressure at every future ATT review conference to move closer to the so-called international consensus on this issue. This pressure will be applied not just to the U.S. government. It could affect importers, exporters, and manufacturers, and the individuals that work for them or buy from them.

The ATT is not a gun grab, but it does create many openings for the slow, steady exertion of administrative pressure at home and international pressure from abroad.⁶⁰ If the ATT does not have this intent, then it should, as recommended above, contain a clear and explicit civilian exemption. The unwillingness of the NGOs and the U.N. member states to support such an exemption speaks volumes about their purposes.

THE ATT IS NOT A GUN GRAB, BUT IT DOES CREATE MANY OPENINGS FOR THE SLOW, STEADY EXERTION OF ADMINISTRATIVE PRESSURE AT HOME AND INTERNATIONAL PRESSURE FROM ABROAD.

The Fallacies of the Loophole Hunt. The current concern of NGOs—and the nations that support the treaty—to find its loopholes is ultimately pointless. The loopholes are not in the treaty. The treaty is the loophole.

In mid-December 2012, a Russian official, in the course of denying that Russia was arming Syria by way of Turkey, stated: “If it has been necessary to ship any military hardware or weapons to Syria, this would have been done through the established procedure rather than in an illegal way.”⁶¹ Given that the U.S. wants only “a good, short document that spells out principles of what states must do,” it is unlikely that anything in the treaty will disrupt Russia’s “established procedure,” make this procedure illegal, or force Russia to behave any better.⁶²

Indeed, long before the negotiations began in July 2012, the U.N. Institute for Disarmament Research found that the world’s nations wanted most of all a provision recognizing their inherent right to buy, sell, and transfer arms. That is exactly what the ATT will do. The transfer criteria and the rest of the treaty are window-dressing that will

affect only the nations that take them seriously.⁶³ In the world of the ATT, irresponsible arms transfers are always the fault of the other guy.

The U.S. argues that an ATT will and must “increase the U.S. ability to demarche countries which engage in the irresponsible transfer of arms.”⁶⁴ In other words, the ATT will be a tool for the U.S. to use in its diplomacy. For example, it will allow the U.S. to put a little more pressure on Russia to stop arming Syria. That assertion is less reasonable 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. When coupled with the fact that the U.S. has the largest foreign arms sales in the world, the risk that the treaty will be turned against the U.S. is obvious.

While the U.S. obviously has a considerable ability to resist foreign pressure, that ability is not limitless. After all, the U.S. entered into the ATT negotiations in large part because it felt itself unable to resist the pressure for them. This dynamic will continue to operate if and when the ATT comes into existence.

Second, because the treaty will be based on national implementation and recognize a nation’s sovereign right to buy, sell, and transfer arms, it will not create a binding obligation that would prohibit any particular transfer. Far from controlling the arms trade, the ATT legitimizes it.⁶⁵

Third, the claim that the U.S. can use the treaty to pressure other countries sounds reasonable. However, if Luxembourg, for example, 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 U.S. status as a superpower. Arguments that treaties create legal pressure on the lawless only make sense to those who themselves are so law-abiding that they cannot imagine others remaining unmoved by an appeal to law.

The idea that the U.S. can use the ATT to exert pressure on others is also belied by recent U.S. experiences in human rights diplomacy. On November 12, 2012, the U.S. was reelected to the U.N. Human Rights Council. The U.S. won fewer votes (131 of the possible 193) in this election than Gabon, an autocracy ruled by the same party since 1968, and the unfree nations of UAE, Cote d’Ivoire, Kazakhstan, and Ethiopia—which received at least 178 votes each.⁶⁶ More broadly, the record of the world’s many human rights treaties in actually improving human rights

in oppressive nations is extremely poor. Saudi Arabia may have pledged to eliminate discrimination against women, but it has done no such thing in practice.⁶⁷

These facts are significant because, although the ATT is described as a treaty on the arms trade, in many ways it is a human rights instrument. It is promoted as such by human rights organizations, its standards are human rights standards, and it can be expected to operate as a human rights treaty. Regrettably, that means it will also share the biases of the U.N.’s human rights institutions, which reflect the reality that in a world with many unfree nations, the U.N. and its institutions naturally reflect the priorities and champion the causes of the unfree. Expecting the ATT and the institutions that it creates to behave any differently is naïve. In the realm of human rights, that is wrong. When human rights reach into the realm of international security and the arms trade, it is both wrong and dangerous.

It is too often forgotten that the U.S. has the most comprehensive export control system in the world, a fact that even the treaty’s proponents have conceded. Their enthusiasm for the U.S. inclusion in the treaty is therefore motivated either by a naïve belief in treaties, by a desire to change the U.S., or both. In practice, the ATT will change U.S. law and/or policies or it will not. If it does not change them, it is extremely difficult to understand why the ATT would compel any other signatory to make any changes. If the ATT does change U.S. law or policies, then the Administration’s claim that it will not and must not is inaccurate.⁶⁸

The Problem of Transnational Legal Norms. The fundamental problem with the ATT is that it embodies an approach to international law that departs profoundly from the approach of the U.S. Constitution, which created the U.S. government as the agent and voice of the American people. In a recent speech, Koh summarized the nature of this new approach:

Make no mistake: this is not your grandfather’s international law, a Westphalian top-down process of treaty-making where international legal rules are negotiated at formal treaty conferences, to be handed down for domestic implementation in a top-down way. Instead, it is a classic tale of what I have long called “transnational legal process,” the dynamic interaction of private and public actors in a variety of national and international fora to generate norms and construct national and global interests.... Twenty-first century international lawmaking has become a swirling interactive process whereby norms get “uploaded” from

one country into the international system, and then “downloaded” elsewhere into another country’s laws or even a private actor’s internal rules.⁶⁹

Under this new approach, the U.S. government is not merely or even primarily supposed to transmit the choices of the American people into the world at large. It is supposed to receive the views of the world at large and transmit them to—or impose them on—the American people. This is particularly troubling because what Koh describes as norms might just as well be described as the policies that he prefers. Since there is no obvious way to decide which norms will prevail in particular circumstances, the implication is that lawyers like Koh have the right—or even the obligation—to pick and choose as they see fit, with the additional proviso that their preferences have the force of law. That is not an approach fit for a democracy.

The fundamental conflict in the U.S. position on the ATT is that an ATT that is based on sovereignty, which is what the U.S. claims it wants, cannot simultaneously be based on “common international standards” if those standards are in practice defined by the ever-evolving sentiments of the “international community” and regularly tightened by the treaty conferences that will be dominated by the unsatisfied majority.⁷⁰ This problem is particularly pressing in the context of the ATT, which concerns matters of national security and constitutionally protected liberties, involves so many actors that are deeply skeptical of the U.S., and contains vague standards (e.g., IHL and IHRL) that are constantly being redefined in ways that the U.S. cannot fully control. The U.S. may assert and sincerely believe that its arms transfers are fully compliant with all applicable IHL and IHRL standards, but many nations will disagree. Under Koh’s doctrine, the U.S. has no clear basis for standing its ground. Indeed, it will be argued that it has a positive legal obligation to accept widely held contrary views.

What the U.S. Should Do

The ATT is flawed partly because the current treaty draft is unsatisfactory in many ways. The March conference may fix some of these flaws, but others will likely remain. The conference may also introduce new problems or be taken over and effectively torpedoed by states that want a treaty that fulfills every item on the humanitarian wish list and is therefore unacceptable to the U.S. and many other states.

Yet whatever happens with the text, the ATT’s underlying problems will remain. Any global treaty on the arms trade is by its very nature aspirational, and those

aspirations will bind law-abiding states while having no effect on the lawless. For that reason, the ATT is a no-win game for the United States.

Therefore, the United States should:

- **Declare that it will not participate in the March negotiating conference.** There will likely eventually be an ATT. Given this, the best outcome would be to negotiate the ATT through the U.N. because the alternative is an ATT negotiated outside it. An ATT negotiated outside the U.N. will likely be even more unacceptable to the U.S. and give additional impetus to the NGO-led effort to bring to international security the same unserious and aspirational approach that has all but destroyed human rights diplomacy.

The U.S. will be criticized no matter what it does. If it does not attend the March conference, it will be criticized for refusing to participate. If it attends and blocks adoption of a treaty that a majority of nations are willing to accept, it will trigger the negotiation of a treaty outside the U.N. and a NGO-led and European-led campaign against the U.S. If it attends the conference and does not block the treaty, it will be understood to have signaled that it regards the treaty as acceptable, which will start a similar campaign for U.S. ratification. If the U.S. signs or signs and ratifies the treaty, it will be criticized for failing to live up to its treaty commitments, and the critics will have the U.S. signature on the treaty on their side, even if their interpretation of the treaty’s requirements is biased and unfair.

The U.S. was right to participate in the July negotiating conference, if only to attempt to remedy the treaty’s most obvious surface flaws. However, events at that conference and since then have confirmed that the treaty is not a serious international instrument. Most of those urging its negotiation are similarly unserious, and both it and its NGO backers are irremediably biased against the U.S. The fact that the March conference will operate on the basis of consensus is no help. The U.S. strategy for the treaty hinges on the argument that, because it is being negotiated on the basis of consensus, it will “promote the same high standards for the entire international community that the United States and other responsible arms exporters already have in place.”⁷¹ Yet this means that the U.S. must be ready to reject the entire treaty if it does not promote high standards. This is an easy demand to make, but it poses a serious dilemma.

Consensus is certainly preferable to majority rule, but as the world's leading power, the U.S. simply matters more than the rest of the U.N. membership. It matters more whether the U.S. breaks or upholds consensus because if the U.S. breaks consensus, it threatens the legitimacy of the entire U.N. system in a way open to no other nation. Moreover, many other states can accept consensus in the knowledge that their failure to live up to their obligations will be ignored. The U.S. does not have that luxury. As Kenneth Anderson notes:

Given that there is no enforcement in the real world... [nations] are willing to go with language with which they will simply not comply and abandon their promises without serious consequences later on. The United States, as a dominant player, however, cannot so freely and costlessly engage in insincere promising. Unlike the smaller players, its assent to consensus language will be noted and commented upon, not merely as a matter of the content of the particular negotiation in question but as a question of the system as a whole, and not just by states-party at the United Nations but by the whole network of global-civil-society kibitzers seeking to leverage themselves into players. No one scrutinizes smaller players in this way because, individually, they do not matter much to the system as a whole. While no one can force the United States to act against its will, the United States potentially pays a reputational cost that is different in kind from, and potentially, typically even, much larger than, that of other, smaller actors, if the United States engages in insincere promising and defection as the smaller players do.⁷²

The U.S. does not need the ATT to achieve any positive aims or to operate and reform its own export control system. It is engaging in the negotiations for reputational reasons. Yet precisely because the U.S. is the leading power, it will take a reputational hit no matter what it does. For the U.S., consensus negotiations at the U.N. are a rigged game. If the subject is serious enough and game is rigged badly enough, the only sure way to avoid losing badly is to refuse to play, politely but firmly. Thus, the U.S. should not participate in the March conference.

- **State the official U.S. position on the treaty.** If a treaty emerges from the March negotiating conference or any future conference, the U.S. should state officially that it does not plan to sign or ratify the treaty and that

the U.S. regards it as having no force and creating no precedent in customary international law and thus requiring no changes in U.S. policy and practice.

- **State its position on the treaty's status and implementation.** Both the Senate and the House have roles to play in this process. The Senate has the lead responsibility on treaties and should both state its concerns with the treaty as it stands and identify the problems inherent in any attempt to craft a global treaty on the arms trade. The House has a shared responsibility for any necessary implementing legislation, and any authorization of funding related to the treaty must originate in the House. In the course of expressing similar concerns, the House should refuse to appropriate any funds unless and until the treaty has passed through the full ratification procedure and the U.S. is officially a party to it. Finally, both the Senate and the House should state their views on the obligations that the U.S. would assume if the President signs the treaty, but the Senate does not consider it. Both should state that they do not regard the U.S. as bound to uphold its object and purpose and that they do not regard the treaty—whether the President signs it or not—as having any force or creating any precedent in customary international law. They should also state that they do not regard it as requiring any changes whatsoever in U.S. policy and practice.

Conclusion

The ATT has already come under intense criticism in both the House (a letter from Representative Mike Kelly (R-PA) signed by 130 Representatives) and the Senate (a letter from Senator Jerry Moran (R-KS) signed by 51 Senators).⁷³ The March negotiations may raise new concerns and are unlikely to resolve many existing ones. The U.S. has little to gain in these negotiations. If they fail and the treaty proponents negotiate a convention outside the U.N., neither Russia, China, the U.S., nor many other countries are likely to join. The U.S. will then be condemned, but it will be condemned no matter what it does. The U.S. could face the risk of foreign discrimination against U.S. arms sales and foreign refusal to supply parts, components, and financing to U.S. arms manufacturers, but those risks would exist even if the U.S. joins the treaty. If it does join, the U.S. would face a wide range of additional risks associated with participation in a legal regime that it does not ultimately control.

Many nations sell, buy, and use arms irresponsibly. Many problems in international affairs cannot be

remedied rapidly, and none can be solved until the conditions exist for a remedy. Understanding this is an essential part of being serious about international affairs. The basic condition that is necessary to address the problem of irresponsible international arms sales is the existence of many more well-governed, law-abiding, democratic states in the world than there are today. The example of nuclear proliferation is relevant. The most effective form of nuclear proliferation prevention was not the Non-Proliferation Treaty. It was, by far, the collapse of the Soviet Union and the end of the Cold War. What is needed to control the international arms trade is not a treaty. It is the inevitably slow but essential building-up of governing capacity under democratic law. Without that, no treaty will be effective.

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