

ISSUE BRIEF

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Congress Should Continue to Oppose Arms Trade Treaty As It Enters Into Force

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On December 24, 2014, the U.N. Arms Trade Treaty (ATT) will enter into force. Treaty supporters claim that the ATT, which the U.S. has signed but not ratified, will then become international law, implying that it will apply to the U.S. In fact, the treaty will be binding only on those nations that have ratified it. Congress should therefore continue to oppose ratification of the ATT and ensure that it is not implemented before it passes through the entire U.S. treaty process.

The ATT Enters Into Force

Under Article 22 of the ATT, the treaty will enter into force 90 days after it is ratified by its 50th national signatory. The ATT secured its 50th ratification on September 25 and will therefore enter into force on December 24. As of December 18, the treaty had been ratified by 55 nations. All but 16 of the ratifications are from Europe or small, impoverished islands. With the exception of Australia, Japan, Mexico, New Zealand, and Nigeria, the treaty has no support from major nations outside Europe. Nor has it been ratified by any of the world's genuinely irresponsible arms exporters.

When in Force, ATT Will Not Bind the U.S.

Treaty supporters argue, in the words of the German Mission to the U.N., that when the ATT enters into force, it will be “a legally binding treaty that will regulate the international arms trade by establishing universal criteria for the export and import of arms.”¹ Rachel Stohl, Senior Associate at the Stimson Center, similarly asserts that the ATT is “the first global legally binding treaty that will regulate the cross-border trade in conventional arms.”²

By using this language, the treaty's advocates are asserting either that the ATT is directly binding on the U.S. or that the ATT is customary international law (CIL) and is therefore binding on the U.S. because it represents the well-established practice of nations. In either case, their strategy is to pressure the U.S. into compliance with the ATT but to short-circuit the Senate's responsibility for providing advice and consent on treaties. As Rebecca Peters of the International Action Network on Small Arms, a treaty advocate, puts it, “countries tend to move towards compliance [with treaties they have not ratified]...because of peer pressure but also market pressure.”³ Treaty advocates seek to foment and build that pressure.

This strategy was not invented simply to advance the ATT. The left dislikes the U.S. treaty process because it believes that this process has blocked U.S. ratification of the treaties they support. It has therefore increasingly sought ways to bring the U.S. into compliance with these treaties that evade the U.S. process. As it became obvious that the Senate was unlikely to approve the ATT, it was predictable that the left would adopt its favorite strategy of seeking to impose this treaty on the U.S. without securing the consent of

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the elected representatives in the Senate. In the coming years, treaty advocates will continue to pursue this strategy with steadily greater focus and energy.

But no nation can be bound by a treaty to which it has not explicitly consented: The ATT is binding only on nations that have ratified it. Nor does the ATT represent well-established practice: An overwhelming majority of the world's nations have not ratified the ATT, and many of the nations that have ratified it are in practice incapable of fulfilling its requirements. It is therefore not CIL. The ATT's entry into force thus has no legal implications for the U.S., and the U.S. should not be pressured into applying a treaty that the Administration has not even submitted for consideration by the Senate.

Actions of Treaty Signatories Demonstrate ATT's Failure

It is commonly held that nations are obliged to avoid defeating the object and purpose of a treaty they have signed but not yet ratified. The Administration accepts that this obligation applies to the ATT.⁴ Diplomats from other nations are even more insistent, to the point of implying that Senate ratification is a mere procedural hurdle: The Foreign Minister of Finland, for example, has stated that “we expect the U.S. to abide by the Treaty even if ratification will take some time.”⁵

As the American Law Institute states, however, “it is often unclear what actions would have...[the] effect” of defeating the object and purpose of a treaty.⁶ Furthermore, the policies of leading ATT signatories, including the U.S., demonstrate that they do not recognize that this obligation has any force in practice.

In September, Germany announced that it would arm Kurdish fighters.⁷ France is rumored to be arming Syrian rebels. In the U.S., the Administration supported language in the National Defense Authorization Act (NDAA) to waive human rights requirements for arms recipients in Iraq and Syria.⁸ All of these nations have signed the ATT, but all of these actions are *prima facie* violations of the ATT and of the supposed requirement not to defeat its object and purpose. These actions also demonstrate that the ATT, if seriously applied, would—contrary to the Administration's claims—constrain U.S. foreign policy.⁹

For their part, treaty advocates campaign against U.S. actions by opposing the NDAA provisions on the grounds that they violate the ATT while ignoring the massive Iranian transfer of arms to the Syrian regime and to Islamist terrorist groups that attack Israel. Instead, the advocates irrelevantly protest British arms sales to Israel and South Korean tear gas sales to Turkey.¹⁰

The advocates, though, are most excited about the prospect that the People's Republic of China (PRC)

1. Press release, “UNSCAR—Major German Contribution to UN Arms Control,” Permanent Mission of Germany to the United Nations—New York, December 10, 2014, http://www.new-york-un.diplo.de/Vertretung/newyorkvn/en/__pr/press-releases/2014/2014/20141210-uns-car-german-contribution.html?archive=2990622 (accessed December 16, 2014).
2. Rachel Stohl, “Arms Trade Treaty Implementation Moves Forward in Berlin,” Stimson Center, December 3, 2014, <http://www.stimson.org/spotlight/arms-trade-treaty-implementation-moves-forward-in-berlin/> (accessed December 16, 2014).
3. Thalif Deen, “Gun Lobbyists, Minus Weapons, Gather at World Body,” Inter Press Service, July 2, 2014, <http://www.ipsnews.net/2014/07/gun-lobbyists-minus-weapons-gather-at-world-body/> (accessed December 16, 2014).
4. Transcript, “The Arms Trade Treaty: Just the Facts,” statement by U.S. Assistant Secretary of State Thomas Countryman, Arms Control Association, November 7, 2013, <http://www.armscontrol.org/print/6014> (accessed December 16, 2014).
5. “Keynote Speech by Foreign Minister Erkki Tuomioja,” Embassy of Finland—London, November 3, 2014, <http://www.finemb.org.uk/public/default.aspx?contentid=315358&nodeid=35864&contentlan=2&culture=en-GB> (accessed December 16, 2014).
6. American Law Institute, *Restatement of the Law Third: The Foreign Relations Law of the United States*, Vol. 1 (1986), at §312(i).
7. “Germany to Deliver Weapons to Iraqi Kurds Battling IS Terrorists,” Deutsche Welle, September 2, 2014, <http://www.dw.de/germany-to-deliver-weapons-to-iraqi-kurds-battling-is-terrorists/a-17894131> (accessed December 16, 2014).
8. National Defense Authorization Act for Fiscal Year 2015, Sec. 1209(j), “Waiver Authority.”
9. “The Arms Trade Treaty: Just the Facts,” statement by U.S. Assistant Secretary of State Thomas Countryman.
10. Amnesty International, “USA Must Not ‘Open the Floodgates’ of Weapons to Armed Groups in Iraq and Syria,” December 8, 2014, <http://www.amnesty.org/en/news/usa-must-not-open-floodgates-weapons-armed-groups-iraq-and-syria-2014-12-08?linkId=11044651>; Amnesty International UK, “Under Pressure: How Long Will It Take Ministers to Stop Arming Israel?” August 6, 2014, <http://www.amnesty.org.uk/blogs/yes-minister-it-human-rights-issue/under-pressure-how-long-will-it-take-ministers-stop-arming>; and Amnesty International, “South Korea: Stop Tear Gas Supply or Risk Fuelling Repression in Turkey,” December 15, 2014, <http://www.amnesty.org/en/news/south-korea-stop-tear-gas-supply-or-risk-fuelling-repression-turkey-2014-12-15?linkId=11154460> (accessed December 16, 2014).

may sign the ATT.¹¹ What they fail to realize is that the PRC will sign only if it is certain that the ATT will not constrain it in any way. The actions of Germany, France, and the U.S. have provided that assurance: In future, complaints about PRC violations of the ATT will be met by a Chinese retort that it is supporting internationally recognized governments and is, in any case, only following the West's example. In short, PRC signature of the ATT will merely confirm what is already obvious: The ATT will be used primarily to pressure the U.S., Israel, and Britain.

Continued Congressional Action Vital

The ATT has done nothing to impede the irresponsible portions of the arms trade, and its democratic signatories have wisely demonstrated that they will ignore it when vital interests are at stake. But it is still dangerous because it is being driven forward behind closed doors by nations and activists that want to expand the scope of the treaty in ways the United States cannot accept.

The Senate, led by Jerry Moran (R-KS) and Joe Manchin (D-WV), and the House of Representa-

tives, led by Mike Kelly (R-PA) and Collin Peterson (D-MN), have repeatedly warned the Administration that the ATT is unacceptable.¹² Congress also has repeatedly banned the expenditure of funds to implement the ATT, most recently in the Consolidated and Further Continuing Appropriations Act, 2015.

As the ATT enters into force, Congress should be aware both that the U.S. has no new obligations under it and that the Administration has demonstrated that it will not respect the ATT's object and purpose when this would be inconvenient. Above all, it should continue to oppose ratification of the ATT and should hold hearings to ensure that its funding bans are respected and that the U.S. is not slowly pressured into compliance with the ATT as the activists desire.

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11. "Keynote Speech by Foreign Minister Erkki Tuomioja."

12. News release, "Sens. Moran, Manchin, Inhofe and Half of Senate to White House: U.S. Will Not Be Bound by U.N. Arms Trade Treaty," Office of Senator Jerry Moran, October 15, 2013, <http://www.moran.senate.gov/public/index.cfm/news-releases?ID=2bf77dee-cd0b-44dd-a779-8e9183c571a5> (accessed September 23, 2014), and press release, "Rep. Kelly Sends Letter to White House Opposing Arms Trade Treaty," Office of Representative Mike Kelly, October 15, 2013, <http://kelly.house.gov/press-release/rep-kelly-sends-letter-white-house-opposing-arms-trade-treaty> (accessed September 19, 2014).