

THE U.N. ARMS TRADE TREATY: A PROCESS, NOT AN EVENT

Ted R. Bromund, Ph.D.

**Senior Research Fellow in Anglo-American Relations,
The Margaret Thatcher Center for Freedom,
The Heritage Foundation**

With the adoption by the U.N. General Assembly of the Arms Trade Treaty (ATT) on April 2, 2013, and its opening for national signature on June 3, 2013, the ATT came into being. It will not take long for the treaty to secure the fifty national ratifications that it needs to come into force. But the single most important fact about the ATT is that it is a process, not an event. Thus, while the ATT's entry into force will be a significant milestone, it merely marks the shift from one part of the campaign that led to the creation of the treaty to another. In order to understand the ATT today, and the risks that it is likely to pose in the coming years, the history of the negotiation of the ATT is even more relevant than the text of the actual treaty, because that history shaped the text and will shape the campaign to interpret and implement it in the decades to come.

THE CONTEXT OF THE “NEW DIPLOMACY”

The ATT is ultimately part of a much broader phenomenon: the rise of a new kind of diplomacy, and treaty-making. This diplomacy is now well over a decade old. It was central to the adoption of the Ottawa Convention on anti-personnel land-mines in 1997, and the Convention on Cluster Munitions in 2008, as well as the creation of the International Criminal Court (ICC) in 1998.

This diplomacy is characterized by several factors. First, it is pressed by organized campaigns driven by Western non-governmental organizations (NGOs). These campaigns make sophisticated use of the emotive display of suffering individuals and of the demonization of carefully-chosen villains (Israel, in the case of cluster munitions),

as well as statements by famous individuals (Princess Diana, in the case of land mines), demonstrations, and social media. Second, they are aided by a regularly changing but reasonably stable set of governments centered in Western Europe. Third, these groups are profoundly skeptical about state sovereignty and state-centered diplomacy, the United Nations, the traditional laws of war, and international law as embodying the customary and well-established practice of nations, preferring in all areas to emphasize the supposed standing of a transnational network of NGOs to speak on behalf of the people to a supranational elite who are responsible for making and administering the rules that will govern the world.¹ In all these respects, it takes a number of lessons from the governing practices of the European Union, which explains in part why these campaigns tend to be led from Europe.

The ideology behind this vision coalesced in the 1990s. After the end of the Cold War and before 9/11, there was a widespread if profoundly mistaken view that arms control—and indeed diplomacy, security, and the entire international state system—needed to be and could be transformed. This mindset produced the concept of “human security”; institutions such as the ICC that are based on the rejection of state sovereignty; and the belief that arms control is fundamentally about fulfilling human rights.² Many states were basically uninterested in these beliefs, but in each case a few were willing to go along, in part so they could claim the credit of being out in front on the advance into this brave new world.

In the 1990s, more and more institutions and treaties were created on a narrow base of states. The Kyoto Protocol (1997) required 55 ratifications. The Ottawa Convention (1997) entered into force after only 40 ratifications, only one-fifth of the world’s states. The Rome Statute (1998) that created the ICC required 60 ratifications. Each time, advocates claimed that the new institution or treaty constituted a step forward for the world, a new source of moral suasion, and a new source of customary international law that would ultimately bind even non-signatories—a profoundly political argument that is based on their contempt for sovereign, democratic states. That contempt often extends to the United Nations, in large part because it is based on state sovereignty and often on a requirement for consensus, which explains why the Ottawa and the Cluster Munitions conventions were adopted outside the U.N. system. It also extends

to the United States, which was either skeptical about, or directly opposed to, all of these new institutions and treaties.

The reality is that when these treaties and institutions came into being, they represented only a minority of the world. While many states signed later, many fewer altered their behavior or believed that the treaties they were signing would ever apply to them. These creations illustrate the decay, not the growth, of international institutions because the new institutions are not created by serious, verifiable, treaty commitments among responsible democratic nation-states. This decay derives ultimately from the transnationalist attack on sovereignty, the refusal of transnational activists to accept that signing a treaty is not the same as solving a problem, and their desire to use the treaty process to circumvent domestic political processes to achieve their political objectives. When David Davenport wrote a groundbreaking article on “The New Diplomacy” in 2002, he noted that the “Ottawa Process” which drove the creation of that convention, “took on more of the character of a marketing campaign than of a traditional treaty negotiation.”³ It is easy, in considering these treaties, to place too much emphasis on their texts, and too little on the campaigning vision behind them. But it is that vision which inspired and animates them, that vision which will shape their implementation and interpretation, and that vision which will drive their expansion when they fail to solve the problems at which they are nominally directed.

THE ORIGINS OF THE ARMS TRADE TREATY

The ATT is part of this history, though it has distinguishing features of its own. In the widest sense, the ATT began with the belief that, as the Cold War came to an end, it was time for arms control to turn from placing limits on weapons of mass destruction to a focus on controlling small arms and light weapons. Simultaneously, a series of wars and crises – from the first Gulf War, to the Balkans conflicts, to the 1994 Rwanda genocide and the disintegration of the Democratic Republic of the Congo (DRC) – helped to build the perception that something had to be done. After several years of academic conferences and campaigns by NGOs, U.N. Secretary-

General Boutros Boutros-Ghali brought the movement to the U.N. in 1995 when he encouraged states to focus on “the weapons that are actually killing people in the hundreds of thousands.”⁴ Kofi Annan, the next U.N. Secretary-General, reinforced the campaign in 2000 by calling for a worldwide effort to prevent war by reducing the “illicit transfers of weapons, money, or natural resources” that he argued help to fuel conflicts.⁵

The campaign received its biggest boost when a group of Nobel Peace Laureates, led by former Costa Rican President Oscar Arias, began to campaign in 1996 for a global agreement to control arms transfers. This group was brought together and their aspirations were shaped by the NGOs, led by Amnesty International, which formed a group that grew steadily and was formalized into the Control Arms campaign – founded by Amnesty, Oxfam, and the International Action Network on Small Arms (IANSA) – in 2003. As early as 2001, the NGOs were circulating a draft treaty, which – like the final ATT – sought to embody international humanitarian and international human rights law into a relatively short text. As Amnesty proudly notes, the activists “engaged in innovative public stunts aimed at pressing governments to introduce the draft treaty at the UN. The public events included a camel caravan across the Sahel in Mali, elephants in India, and a Control Arms-branded longboat which won the annual boat festival in Cambodia’s capital Phnom Penh.”⁶

This campaign drew virtually no attention from any non-governmental opposition, and indeed garnered little coverage in the press. But it demonstrated a formidable level of sophistication and commitment. Particularly impressive was the focus of the campaign on the slogan – repeated with tiresome regularity – that the world regulates bananas more tightly than it does the trade in conventional arms.⁷ The fact that many nations were evidently uninterested in, or incapable of, regulating that trade might have suggested that a treaty would not achieve much, but as a device for implying the necessity of action, the slogan worked brilliantly, and the reference to bananas lent itself to innumerable public relations stunts. As a matter of fact, though, the world of conventional diplomacy was hardly inactive. In 1997, President Bill Clinton signed the Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms,

Ammunition, Explosives, and Other Relations Materials, commonly known by its Spanish-language acronym, CIFTA. This Convention was negotiated under the auspices of the Organization of American States, and applies only to OAS members. The U.S. Senate has not ratified the Convention, which, because it is broadly drafted, poses serious prudential risks to liberties protected by the First and Second Amendments.⁸

On the global level, action – some well-advised, some less so – was also under way. In 1996, the “Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies,” named for a suburb of The Hague, came into operation. The Arrangement was a successor to the West’s controls on defense and dual-use trade with the nations behind the Iron Curtain during the Cold War. As of mid-2013, it is composed of 41 nations. It operates by consensus – i.e. by agreement of all participants – and in confidence, and is essentially a process of discussion of export control systems and proposed arms transfers between trusted nations that continue to operate their own systems.⁹ In addition to Wassenaar, other specialized non-proliferation regimes, including the Missile Technology Control Regime (1987) and the Australia Group on chemical and biological weapons (1985), as well as the U.S.-led Proliferation Security Initiative (2003) have come into existence over the past several decades. For its part, the U.N. General Assembly agreed on guidelines for international arms transfers in 1996 – though these guidelines are, of course, not binding – and in the wake of 9/11, the U.N. Security Council unanimously passed Resolution 1373, which requires all U.N. members to take wide-ranging actions against terrorism, including “eliminating the supply of weapons to terrorists.”¹⁰ The Security Council has also adopted a series of arms embargoes around the world, from Sierra Leone to the DRC.

Finally, and specifically focused on small arms and light weapons, the U.N. Programme of Action to Prevent, Combat, and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects” (PoA) was launched in 2001, after a U.N. General Assembly resolution of 1996 led to the creation of a Group of Governmental Experts. The Administration of President George W. Bush viewed the PoA with considerable skepticism, but allowed

it just enough daylight to survive. The PoA is now fully intertwined with a series of other – nominally unrelated – initiatives, including the U.N. Firearms Protocol (2005, negotiated as part of the U.N. Convention Against Transnational Organized Crime), the U.N. International Tracing Instrument (2005), and the International Small Arms Control Standards (ISACS), a so-called “set of internationally accepted and validated standards” under development by the U.N. Coordinating Action on Small Arms (CASA) mechanism.¹¹

It is therefore far from correct to assert that the so-called international community was inactive in the face of the small arms and light weapons issue. But none of these initiatives satisfied the activists. The Wassenaar Arrangement had too few members to be attractive, and was in any case not legally binding. The PoA was also not a treaty process, and though its supporters continue to want to try to make it into one, the evidence that the PoA has so far been ineffective is so overwhelming that even its backers can muster only tepid support for it. The activists entertain great hopes for ISACS, which has so far operated in the background, but that project is still in embryo. Finally, and most brazenly, the ATT’s supporters openly recognize that most U.N. Security Council arm embargoes have failed – and from this, they draw the conclusion that a treaty is necessary and will work. Bearing in mind that the Security Council could choose to enforce its embargoes under Chapter Seven of the U.N. Charter – in plain words, with force – while the ATT will be enforced only nationally, and is thus a weaker instrument, this argument has a lack of coherence that is genuinely remarkable.¹² It amounts to an assertion that since the highest U.N. body responsible for preserving peace and security has failed, a U.N. treaty will do the job.

In spite of the incoherence of the arguments in its favor, the ATT steadily picked up momentum. The decisive moment, in retrospect, was a speech by British Foreign Secretary Jack Straw on September 30, 2004 declaring that Britain supported the negotiation of a treaty on the international arms trade.¹³ Straw spoke at the annual conference of the then-ruling Labour Party, and at the time, and later, insiders believed that Straw had acted at least in part to quiet Party opposition to the Iraq War, which was extremely controversial in Britain. Straw’s speech, and Britain’s support, led to

action in the United Nations. The U.N. General Assembly passed resolutions supporting the negotiation of the ATT in 2006 and 2008, the Secretary-General solicited the views of member states in 2007, a Group of Government Experts reported in 2008, and an Open-Ended Working Group reported in 2009.¹⁴

Throughout this process, the U.S. was one of the few nations publicly opposed to the negotiation of an ATT: in 2008, for example, the only two nations that voted against the resolution were the U.S. and Zimbabwe, though Russia and China abstained, apparently confident that their votes would go unnoticed and that the U.S. would take the heat for voting in the negative. This calculation was correct: throughout the negotiation of the ATT, the treaty supporters have consistently downplayed the significance of abstentions by major autocratic players and focused on blaming the U.S. The U.S. position, on the other hand, was based on the calculation that the ATT offered the U.S. little if any upside, and a lot of downside: the treaty would not make it any easier to administer the U.S. export control system, would not restrain bad actors abroad, and was all too likely to end up trying to reach inside the U.S. in ways that the Administration feared would restrict freedoms protected by the Second Amendment. One Administration official described it, when out of office, as “a feel-good measure that causes the high-minded to swoon but earns nothing but sniggers from the people who actually regulate their governments’ arms transfers.”¹⁵

But, by 2009, the U.S., with a new administration headed by President Barack Obama, faced a dilemma. It could keep on opposing the treaty, and perhaps keep it from coming into existence through the U.N., but at the cost of considerable opprobrium and with the risk of driving the entire treaty process out of the U.N. entirely, as had already happened with land mines and cluster munitions. An ATT created outside the U.N. would almost certainly be even worse than one created inside of it. Or the U.S. could decide to support the negotiation of the treaty and try to limit the damage by keeping it in the U.N. With so many nations supporting the negotiation of the treaty, backing it also offered the enticing possibility of an easy win, in a context that would demonstrate – at home and abroad – the commitment of the new Administration to support the U.N. and to be as unlike the Administration of President George W. Bush

in as many ways as possible. And, finally, the treaty did command some genuine support within the Administration, from supporters of the U.N. and for other reasons. It was with this combination of concern about the likely results of continued opposition combined with hopeful optimism about the effects of obtaining it that the U.S. moved, in a statement on October 14, 2009 by then-Secretary of State Hillary Clinton, to announce its support for the negotiation of the treaty.¹⁶

THE NEGOTIATING CONFERENCES OF 2012 AND 2013

After that, the ATT process moved rapidly. Four Preparatory Conferences followed in 2010-2012, along with two further collections of U.N. member state views on the ATT in July 2011 and June 2012, and, ultimately, a negotiating conference in July 2012. In this process, four important facts became evident. First, as the U.N. Institute for Disarmament had recognized as early as 2007, while there was virtual unanimity on the demand for an ATT, nations wanted the ATT for reasons that had little if anything to do with the demands of the activists: as the Institute itself noted, the single most-requested clause in an ATT was one guaranteeing the right of all nations to manufacture, import, export, transfer, and retain conventional arms.¹⁷ Far from being a measure to control the international arms trade, many nations viewed an ATT as necessary to give it a new and firmer legitimacy. Other nations wanted the treaty because it would, in the words of the October 2008 resolution, supposedly deny arms to criminals and terrorists. One need only recall that the government of Syria describes the rebels who have sought since 2011 to overthrow it as terrorists to recognize the purpose of this claim: many U.N. member states began the negotiation process by viewing an ATT as a promising coup prevention plan.

These differences of view would emerge with considerable effect in the treaty negotiating conference of 2012. But three further facts also shaped the outcome of that conference. Though there was wide canvassing of views, and much activity by NGOs, the July 2012 negotiating conference began its four weeks of work on July 2 with

only a year-old paper by the Conference chairman as the basis for negotiation, and facing the tacit opposition of nations such as Iran, which did all they could to obstruct the conference. Second, few nations actually have the expertise necessary to discuss the issues involved in export control in a serious way: one member of the U.S. delegation put the number of technically competent delegations at no more than ten of the almost two hundred attending the March conference.¹⁸ Third, and finally, the U.S. strategy throughout the process was to avoid appearing as the road block to consensus, which was itself a key U.S. redline. If the treaty was going to fail, in short, it was going to fail because of someone other than the United States. The public relations advantages of this strategy are obvious, but collectively, these facts meant that in retrospect, the first negotiating conference, in July 2012, had little chance of success: the entire world, operating throughout the conference almost entirely in a plenary format, was trying to negotiate a treaty from scratch on the trade in all conventional arms in only four weeks. It was a futile gesture.

The July 2012 conference came to an ignominious end when, on its final day, the U.S. pointed out that the treaty was not ready for signature, and could not be fixed in the remaining hours. This was correct, though it signaled the failure of the Administration's negotiating strategy, because it allowed the NGOs and nations supporting the ATT to blame the U.S. for their own failure to come up with an acceptable text. (This led to a sequel in the March 2013 negotiating conference when a complex lie, readily swallowed by the media, was spread widely about the end of the July conference.)¹⁹ What the collapse in July showed was that, apart from wanting a strong treaty, the pro-treaty forces had no interest in the actual content of the treaty, whether it fit the form required of treaties, or whether the treaty could actually be implemented in practice. For them, the important thing was simply to have a treaty.

The lack of expertise on many delegations undoubtedly contributed to this clamor, as did the fact that an unknown but substantial number of national delegations were actually working for the pro-treaty NGOs. This scandalous practice is common at U.N. conferences, where many poorer nations are glad to round out their numbers with individuals who have no actual connection to the

nation that they are nominally serving.²⁰ It means that many nations regularly endorse whatever the NGOs want, and it means that the skeptical NGOs at the U.N. are completely outnumbered by the reflexively supportive ones.²¹

The July collapse did not stop the process for long. In November, the U.N. General Assembly voted through a renewed negotiating mandate, leading to the second and – in the U.N.’s words – “final” conference in March 2013. The emphasis on “final” made it clear that, if this conference did not conclude a treaty, one was very likely to be negotiated outside the framework of the U.N. entirely. Throughout this process – in spite of assertions to the contrary – the U.S. position remained unaltered: the U.S. voted in favor of renewed negotiations in November, after the U.S. elections, but this was no post-election surprise. Proceedings at the U.N. had been delayed by Hurricane Sandy, and there is no reason to believe the U.S. would have acted any differently if the vote had taken place as scheduled before the elections.²²

The March conference did have the advantage of working from the July text, but it still failed to achieve consensus, when at the last moment Iran, North Korea, and Syria objected to the agreed text. This was unexpected: most conference attendees were confident that a treaty would be reached by consensus, and the pro-treaty NGOs at the conference were trumpeting, immediately before the final session, a statement from the Iranian media stating the Iran had agreed to support the ATT. The text itself was repeatedly amended, and its last revision appeared to have the purpose of winning the support of the recalcitrant dictatorships. But if so, they were insufficient. After a ridiculous last-second effort by Mexico to redefine the concept of consensus was blocked by Russia, and after a string of skeptical speeches – at least 29 nations condemned the draft text – the conference closed late on Thursday night, April 27, without agreement. But the following Tuesday, May 2, the U.N. General Assembly heard the conference report and, on a vote of 154 in favor to 3 against (Syria, North Korea, and Iran), and with 23 abstentions (including China, Cuba, Egypt, India, Indonesia, Russia, and many Arab regimes) it adopted the ATT.²³

THE PROCESS AND SUBSTANCE OF THE ATT

The ATT opened for signature on June 3, 2013 at the United Nations. It will enter into force ninety days after the deposit of the fiftieth instrument of ratification, which is likely to happen by 2014, if not sooner. A Conference of States Parties will be convened no later than one year following the ATT's entry into force, meaning that such a conference is likely to be held in summer 2014.

In the United States, the Administration has already announced that – after a review that surprisingly took no more than six weeks – it plans to sign the treaty.²⁴ The prospects for Senate ratification are cloudy at best: the ATT has already been the subject of a series of Dear Colleague letters, Senate resolutions, and Senate and House concurrent resolutions. All of these measures have attracted the support of at least 34 Senators, which would, if maintained during consideration of the treaty, be sufficient to block it. An amendment sponsored by Sen. Inhofe (R-OK) in March 2013 was approved by a vote of 53-46, indicating that a majority of Senators oppose the treaty.

But U.S. signature of a treaty, even absent Senate advice and consent, has consequences. The U.S. holds itself bound to “refrain from acts which would defeat the object and purpose of [a signed] treaty.” This obligation lasts as long as the treaty is signed but not ratified. The obligation derives in part from the 1969 Vienna Convention on the Law of Treaties. The State Department “considers many of the provisions of the Vienna Convention on the Law of Treaties to constitute customary international law,” and therefore the U.S. will generally act in a manner consistent with its terms. Deciding what acts would defeat the object and purpose of a treaty is not an objective exercise: the 1986 edition of the Restatement of the Law: The Foreign Relations Law of the United States says that “it is often unclear what actions would have such effect.” But, in essence, the “object and purpose” obligation is a back door to something that is in the neighborhood of, but not the same as, Senate ratification without the Senate (or the House) being involved at all.²⁵ This weakness in the U.S. treaty system is well-known to those who follow the process closely, but usually comes as a surprise to the media, and even to members of the Senate. Thus, once the U.S. signs the ATT,

it will be up to the State Department's lawyers, in collaboration with their colleagues in other relevant executive departments, to decide how the U.S. must act in order to avoid defeating the ATT's object and purpose.

This will not be easy. At the outset, it should be noted that the ATT, contrary to standard treaty practice, does not define most of its terms, and to the extent it contains any definitions at all, these are based on concepts that are themselves undefined. The ATT does contain, in Article 1, a statement of its "object and purpose." But in Article 5, it directs signatories to implement the treaty not in accordance with Article 1, but "bearing in mind the principles referred to in this Treaty." This directs the reader back to the Principles section at the opening of the treaty text. This curious construction appeared only in the final treaty draft, and appears to have been an effort to persuade the dictator nations to support the ATT, as the treaty Principles – among other points – reaffirm the principle of non-intervention in internal affairs, which is highly prized by the dictators (and by the United States, though for entirely different reasons).²⁶ But this drafting makes it unclear whether it is the Article 1 that actually defines the "object and purpose" of the treaty, or whether it is really the Principles that are central to it. That, in turn, makes it even more difficult than normal to ascertain what the "object and purpose" standard requires.

The process by which the treaty was adopted raises its own set of concerns. One of the U.S. red lines for its participation in the entire negotiating process was that the treaty be adopted by consensus. This was in part to protect U.S. interests, but it was also to ensure, as then-Secretary of State Hillary Clinton put it, that "all countries can be held to standards that will actually improve the global situation." This did not happen: three nations opposed the ATT, and, in the General Assembly vote, a further 23 – including most of the world's most irresponsible arms exporters – abstained. Yet the Administration abandoned its own red line and supported the adoption of the treaty through the majority rule General Assembly. This is not the first time a treaty has been adopted in this way: in 1996, the General Assembly was used to circumvent India's opposition to the Comprehensive Test Ban Treaty. But the ATT is a much broader treaty, and has much less support. By abandoning its

consensus red line, the U.S. has reinforced a dangerous precedent: by backing the move to the GA, the U.S. has given the numerous opponents of consensus a precedent they are free to use as a threat against it in all future negotiations.²⁷

A further concern relates to the ATT's amendment process. The U.S. wanted all treaty amendments to be adopted by consensus, but in the end, it was forced (Article 20.3) to accept a process that allows for amendments by a three-quarters majority vote. In return, the U.S. won a provision (Article 20.1) postponing any amendments until six years after the treaty enters into force, which will likely be in 2019. The treaty also makes clear (Article 20.4) that amendments apply only to nations that accept them. But particularly given the treaty's creation of a Secretariat (Article 18), a majority rule amendment process will over time create an international instrument with diverging interpretations and commitments. Such an instrument will be a source of political and legal pressure on the United States to comply in practice with amendments it has not accepted. Treaty supporters have already compiled a lengthy list of desired amendments, and will undoubtedly accumulate many more in the coming six years.²⁸

But in the end, the debate on the ATT will likely revolve around the core provisions in its text. In the U.S., that debate has focused on concerns related to the Second Amendment, but it should be noted that the treaty raises a wide range of other concerns. Its impact on museums of military history or on sports shooters travelling abroad could be severe, depending on how its terms are interpreted.²⁹ Centrally, though, the treaty relates to the conduct of U.S. foreign policy, and it is on this that concerns are likely to focus. Two issues are salient. First, at the core of the treaty are Articles 6 and 7, which ban arms exports in certain circumstances and set up a series of human rights standards for assessing potential exports, and require nations to assess whether they have "knowledge" that a transfer would be used to commit or "facilitate" a violation of those standards.

The U.S. already has a system for assessing arms exports, which was set out in Presidential Decision Directive 34, issued by President Clinton on February 17, 1995, and has been retained unaltered by the Administrations of George W. Bush and Barack Obama. This system includes assessing the human rights consequences of a U.S.

arms sale. But the treaty uses the terms “international humanitarian law” – formerly known as the laws of war – “international human rights law,” and “serious acts of gender-based violence.” These terms have no stable meaning, and in practice are subject to constant redefinition and expansion. The U.S. does not and cannot know what will be meant by these terms in the future, so in practice the treaty will be a steadily-moving conveyor belt pulling the U.S. along in the direction of the norms devised by the transnational elite and the NGOs who support the “new diplomacy.” The treaty’s undefined “facilitate” criterion makes this problem even worse, as almost any arms export could be said to have (Article 7.1) “the potential” to facilitate an undesirable outcome. Finally, the “knowledge” criterion is a negligence standard – a “known or should have known” standard – and will open up signatories to U.N.-led investigations to determine what policy-makers knew and when they knew it. Collectively, the heart of the treaty has no clearly defined meaning, is based on terms that are readily and frequently politicized, and is custom-built to promote a transnational agenda. It was perhaps for this reason that Assistant Secretary of State Tom Countryman, who led the U.S. delegation to both U.N. conferences, described the ATT as “ambiguous.”³⁰ The second core problem in the realm of foreign policy relates to the Reagan Doctrine, the U.S.’s bipartisan post-war policy of arming opponents of totalitarian or autocratic regimes when it serves the U.S.’s national interests. It is unlikely that many rebels would reliably pass the human rights tests in the ATT, and even if they do, the treaty also requires signatories (Principles) to “prevent . . . [the] diversion” of arms. It is a certainty that any regime will define shipments of arms to its internal opponents as diversion. Thus, the treaty raises a high legal bar against the arming of rebel movements anywhere, an argument that some high-profile treaty supporters are already making in particular cases.³¹ This parallels the broader hypocrisy of the treaty advocates towards the U.S., which they alternately praise as the nation with the most responsible arms export control system in the world and condemn as world’s largest arms supplier, with the implication (vehemently denied by the Administration) that the treaty will clamp down on U.S. arms sales more broadly.³² That is certainly the wish of at least some treaty advocates, and given the conveyor belt effect that the vague terms at

the heart of the treaty will have over time, it is likely that they will get their way, regardless of the desires, or the intentions, of the Obama Administration.

The other fundamental area of concern, of course, relates to the treaty's potential domestic effects. The relevant problems can be broken down into three main areas. First, there are the potential commercial effects. Many firearms firms that sell in the U.S. market are foreign-owned – including Remington, Winchester, and Glock – and regardless of whether or not the U.S. signs or ratifies the ATT, the U.S. market could be affected by the decision of foreign signatories to interpret its terms in such a way as to limit the export of firearms, or of parts and components for them, to the U.S. Moreover, most major U.S. firms source at least some components from foreign suppliers, and virtually all such firms rely on international markets for financing and insurance. In both the domestic U.S. market – where imported firearms constitute approximately 35 percent of new sales – and as regards the resale of U.S. arms with foreign components to third parties (such as Israel or Taiwan), the treaty creates the serious possibility of what amounts to commercial or financial blackmail by foreign suppliers, or foreign nations.³³

Second, there are the specific provisions of the treaty text. The ambiguity of the treaty makes it difficult to assess, but two points are particularly troubling. First, in three places – the Preamble, Article 8(1) on imports, and Article 12(3) on record keeping – it refers to “end user” or “users.” This term applies to the final, authorized user of a weapon, and can therefore refer to individual firearm owners. The U.S. fought hard to remove this language from the treaty, but was unsuccessful. Article 12(3) states that “Each State Party is encouraged to include in those records [of imported arms] . . . end users, as appropriate,” and Article 13, on reporting, requires nations party to the treaty to “submit annually to the [treaty] Secretariat . . . a report for the preceding calendar year concerning authorized or actual exports and imports of conventional arms.” It is unclear whether the reports to be collected in Article 12(3), which could include the identity of individual firearms owners, are the same reports that are to be sent to the Secretariat in Article 13. But the urgency with which the U.S. opposed the treaty's use of the term “end users” indicates that it felt concerns on this score, and Article

12(3) certainly implies that the best form of treaty compliance is to create a national register containing the identities of individual owners of imported firearms.

The treaty also focuses extensively – three times in the Preamble, once in the Principles, and in Articles 1, 11, 13, and 15 – on the issue of diversion, meaning the transfer of a weapon to an unlicensed or otherwise unauthorized user. For the U.S. this is problematic in part because it is the states, not the federal government, that license firearms: treaty provisions that seek to transfer the entire responsibility for diversion prevention to the federal government run afoul of federalism. It is also problematic because the emphasis on diversion stems in large part from Mexico, which has long sought to use the ATT to promote gun control inside the United States.³⁴ Indeed, the treaty's nearly incomprehensible Article 11(2), on diversion, was reportedly written in Spanish, translated into English by a non-native speaker, and dropped into the text at the last moment.³⁵ Above all, there is the sixth treaty Principle, which notes:

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

This Principle does not explicitly limit the responsibility to prevent diversion to the international trade – implying that nations have an obligation to prevent it domestically as well. It also gives nations only a “primary” responsibility – not an exclusive one -- for operating their own national control system. (This latter phrase is not sinister: the U.S. already has an export and import control system.) As with much of the treaty, ambiguous drafting makes the treaty's obligations difficult to ascertain with certainty, but it implies that nations party to the treaty have a broad responsibility to prevent diversion, which could be used to justify the imposition of further domestic regulations.

Defenders of the treaty often assert that it has nothing to do with domestic ownership of firearms, that it recognizes the legitimacy of such ownership, and that it does not in any way

touch rights protected by the Second Amendment. The claim that the treaty focuses only on the international trade is at best a half-truth, because the treaty does seek to regulate brokering (Article 10), which is a domestic activity. This claim also ignores Mexico's argument – which many treaty advocates accept – that there is no such thing as genuinely domestic ownership, as any firearm could at some point conceivably be exported or transferred to another nation. The treaty also says far less about legal civilian ownership than its supporters imply. The relevant text appears only in the Preamble, which is not legally binding, and it states, in its entirety, that signatories are:

Mindful of the legitimate trade and lawful ownership, and use of certain conventional arms for recreational, cultural, historical, and sporting activities, where such trade, ownership and use are permitted or protected by law.

This clause omits the right of individual self-defense. Like the entire treaty, it is also predicated on the belief that, while governments have an inherent right to weapons, individuals can bear arms only if “permitted” to do so by governments or when such an activity is “protected.” This is a philosophy that is almost diametrically opposed to the belief that undergirds the Second Amendment, which is that the right to keep and bear arms is inherent, and exists apart from government permissions or protections.

But focusing narrowly on articles in the treaty risks missing the third, and final, concern: because the treaty does not define its terms, it has no set meaning. Barbara Frey, a U.N. Special Rapporteur for the U.N. Commission on Human Rights, has already argued that gun control is a human right.³⁶ If this interpretation is widely accepted, the treaty's text will not change, but what is meant by its reference to “international human rights law” certainly will. Moreover, the number of influential individuals and organizations involved in the ATT, and related treaties and processes, who have advocated gun control or expressed skepticism about the Second Amendment is substantial. This strongly suggests that voices supporting, or even

urging, the reinterpretation of the treaty's vague requirements and even vaguer terms will not be lacking.

For example, Harold Koh, former Dean of the Yale Law School and the State Department's Legal Adviser during President Obama's first term, has argued – following Mexico's lead – 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.³⁷ Rachel Stohl condemns the U.S. for “consistently object[ing] to international restrictions on civil ownership.”³⁸ Amnesty International, the NGO that began the push for the ATT, states that the Treaty is only a “start” on the road to the control of “domestic internal gun sales.”³⁹ The U.N. CASA program, in a paper on “The Impact of Poorly Regulated Arms Transfers on the Work of the UN,” argues that, through the ATT, the “arms trade must . . . be regulated in ways that would . . . minimize the risk of misuse of legally owned weapons,” and in a phrase that has particular resonance given the treaty's language on gender-based violence, opposes “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.”⁴⁰ The overwhelming impression left by treaty advocates is not that they support the right to keep and bear arms: it is that they recognize that criticizing this right is bad politics but are occasionally unable to restrain themselves.

The Arms Trade Treaty is not a ‘gun grab.’ It is, though, a vehicle that could be driven in many directions. Arguments to the contrary are ultimately based on a simple argument: trust me. Article 12(3) clearly contains, for example, a reference to collecting the identity of individual end users of imported firearms. It also contains language allowing signatories to justify their decision not to collect those identities. A promise that the U.S. government will rely on this language and not collect identities is nothing more than that: a promise. The ATT requires governments to take some domestic actions, and it suggests, encourages, and justifies many more such actions. The current Administration has already demonstrated its commitment to pursuing public policy on firearms by way of unilateral executive action. Any contention that the ATT is consistent with the Second Amendment rest fundamentally on an unsupported assumption that

this Administration—and all future Administrations—will not use it as a justification for issuing new executive orders, executive actions, regulations, and the like.⁴¹

During the drafting of the ATT, the negotiating conference was repeatedly warned that, by failing to clearly exclude lawfully owned civilian weapons from the scope of the treaty, it risked arousing domestic U.S. hostility.⁴² This advice was rejected, on the grounds that excluding civilian weapons would create a loophole. But since the entire treaty is supposed to be implemented at the national level, this was and is untrue: there is no good reason why such implementation cannot respect lawfully owned civilian weapons on a nation-by-nation basis. The treaty's failure to include language of this sort only makes sense if the treaty is, as many of its supporters hint, ultimately intended to have a much broader reach. It is here where the U.N.'s many other activities, including through the PoA and ISACS, come into play. The ATT is formally and legally separate from all of these, but many of the same individuals and U.N. institutions work in all of them, and concepts developed in one forum will flow into all of them. The risk of the ATT is not that it will lead to a gun grab. Claims of that nature actually distract attention from the real problem which is that the ATT will provide a treaty-based mechanism for the slow exertion of pressure from so-called norms derived through ISACS and PoA, and through the best practice guidelines, implementation standards, and model legislation that the U.N., the NGOs, and even industry will create when the ATT enters into force.

In, as there were many highly able commoner generals and politicians, such as Hampden, if one reads through the history.

CONCLUSION

The ATT is ambiguous for a reason. There was no chance that all the world's nations would ever have been able to negotiate a clear treaty, with careful definitions, regulating the entire world's trade in conventional arms. Moreover, if they had been able to do so, it is very unlikely that such a treaty would have been acceptable to the United States, because it would almost certainly have sought to place unacceptable limits on civilian ownership. Ambiguity was

therefore a negotiating necessity, as well as, for the U.S., a negotiating strategy. But it also necessarily resulted in an unclear treaty that raises unanswerable concerns about the effect it will have on U.S. foreign and domestic policy, and in a treaty that is an ideal vehicle for the transfer of transnational norms into the U.S. policy and legal system. It was never likely that the ATT would be genuinely satisfactory for the U.S. The basic fact is that the U.S. is a federal system, with a Second Amendment, and has unique security interests and responsibilities around the world. No treaty that fits other nations would work for it. The only way to square the circle was to create an ambiguous treaty. The U.S. delegation at both U.N. negotiating conferences was effective, and did the best it could, but once the idea of the ATT came into existence, and especially once it was picked up at the U.N., the U.S. was playing a losing hand – though as the example of Harold Koh suggests, it was a game that at least some in the Administration may not have wanted to win.

The irony is that the U.S. was one of the very few responsible exporters in the room at the U.N. With all of the world's nations present, some of them must have been responsible for the evils they all freely condemned, but in the world of the ATT, irresponsible arms sales are always the other guy's fault. All too frequently, the fault was placed on the head of supposedly rogue arms traffickers, above all Viktor Bout, who, if he did not exist, would have had to be invented. But this is hypocritical nonsense: it is the U.N. member states, including a number of those that called most loudly for the ATT, who are overwhelmingly responsible for the irresponsible trade in arms.⁴³ No treaty that falls to recognize that basic fact can have a hope of success, and no treaty negotiated through the U.N. will ever recognize that basic fact. Its supporters will instead follow a predictable course: blame U.S. foreign and domestic policies, and seek to steadily tighten the terms of the treaty in order to constrain the U.S.

The risks of the ATT are best summarized with an anecdote. On the last day of the March conference, I was sitting in the U.N. conference room. It had been a long two weeks, and I was looking forward to getting out of the U.N. Sitting next to me was a long-time veteran of the process, a convinced treaty supporter. We began to chat, and I said "I'm looking forward to this being over." She looked

at me penetratingly, and replied “Don’t you realize? This will never be over.” And then, with a guilty tone, she added “Don’t quote me.” She was right. The ATT is a process that will never be over.

ENDNOTES

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14. The most convenient source for these documents is the site of Reaching Critical Will, an NGO that strongly supports the ATT, at <http://www.reachingcriticalwill.org/disarmament-fora/att#docs>.
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19. Ted R. Bromund, "The Arms Trade Treaty: The Big Lie About July 2012," Heritage Foundation Foundry, April 1, 2013, at <http://blog.heritage.org/2013/04/01/the-arms-trade-treaty-the-big-lie-about-july-2012/>.
20. Ted R. Bromund, "The U.S. Cannot Fix the U.N. Arms Trade Treaty," p. 4, March 13, 2013, Heritage Foundation Backgrounder #2774, at <http://www.heritage.org/research/reports/2013/03/the-us-cannot-fix-the-un-arms-trade-treaty>.
21. The Reaching Critical Will site does not include all NGO statements on the ATT. For these statements, consult at <http://www.un.org/disarmament/ATT/statements/>. In July 2012 and March 2013, a total of seven skeptical NGOs spoke, as against one supportive NGO, but since many national delegations contained NGO staffers, and since many of the skeptical NGOs were raising points of particular interest – not opposing the ATT outright – this count does not mean the skeptics predominated.
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43. John Reed, "T-72s Were Indeed Being Sent to Sudan Rebel Army," *DefenseTech*, December 9, 2010, at <http://defensetech.org/2010/12/09/t-72s-were-indeed-being-sent-to-sudan-rebel-army/>. Kenya was a major African supporter of the ATT that was, at the same time, smuggling T-72 tanks to South Sudan.