

CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

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GENERAL INTERNATIONAL AND U.S. FOREIGN RELATIONS LAW

President Trump “Unsigns” Arms Trade Treaty After Requesting Its Return from the Senate
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In a speech before the National Rifle Association (NRA) on April 26, 2019, President Trump announced that he was requesting the return of the Arms Trade Treaty (ATT) from the Senate and that the United States would unsign this treaty.¹ Shortly thereafter, Trump issued a formal letter to the Senate requesting the ATT’s return.² As of late September, the Senate had not formally approved Trump’s request.³ Nonetheless, on July 18, 2019, the Trump administration communicated to the secretary-general of the United Nations that the United States does not intend to become a party to the ATT and thus has no future legal obligations stemming from signature.⁴

The ATT seeks to “[e]stablish the highest possible common international standards for regulating or improving the regulation of the international trade in conventional arms” and to “[p]revent and eradicate the illicit trade in conventional arms and prevent their diversion.”⁵ In particular, the ATT requires each state party to establish and maintain a national control system to regulate and document the international export, import, transit, trans-shipment, and brokering of conventional arms.⁶ The national control system documentation as well as a report of the national laws and regulations enacted to implement the provisions of the treaty are to be made available to the other state parties.⁷ Additionally, each state party must consider whether a transfer of conventional arms “would contribute to or undermine peace and security” in the international community, and the state is entirely prohibited from engaging in a transfer if the state knows that the transferred arms would be used in the commission of genocide, crimes against humanity, or war crimes.⁸ Presently, 104 nations are party to the ATT.⁹

¹ Remarks at the National Rifle Association Institute for Legislative Action Leadership Forum in Indianapolis, Indiana, 2019 DAILY COMP. PRES. DOC. No. 243, at 6 (Apr. 26) [hereinafter Trump Announcement].

² Donald J. Trump, Message to the Senate on the Withdrawal of the Arms Trade Treaty, 2019 DAILY COMP. PRES. DOC. No. 249 (Apr. 29) [hereinafter ATT Return Request].

³ See S. Res. 204 – An Executive Resolution to Return to the President of the United States the Arms Trade Treaty, at <https://www.congress.gov/bill/116th-congress/senate-resolution/204> [<https://perma.cc/8KY7-J4QY>] [hereinafter S. Res. 204] (showing that a resolution to return the ATT was introduced to the Senate on May 13, 2019, but has not yet been approved).

⁴ See Depository Notification from the UN Secretary-General, UN Doc. C.N.314.2019.TREATIES-XXVI.8 (July 19, 2019) [hereinafter Unsigning Letter].

⁵ Arms Trade Treaty, Art. 1, C.N.266.2013.TREATIES-XXVI.8 (Apr. 2, 2013), available at https://treaties.un.org/doc/Treaties/2013/04/20130410%2012-01%20PM/Ch_XXVI_08.pdf [<https://perma.cc/7T83-KGMU>] [hereinafter ATT].

⁶ *Id.* Arts. 2(2), 5(2)–(5). The ATT defines conventional arms as including the following categories: “(a) Battle tanks; (b) Armored combat vehicles; (c) Large-caliber artillery systems; (d) Combat aircraft; (e) Attack helicopters; (f) Warships; (g) Missiles and missile launchers; and (h) Small arms and light weapons.” *Id.* Art. 2. The treaty also covers ammunition and munitions fired, launched or delivered by the above-listed arms as well as the parts and components which can be assembled into these arms. *Id.* Arts. 3–4.

⁷ *Id.* Art. 13(1).

⁸ *Id.* Arts. 6(3), 7(1).

⁹ United Nations, *Depository Status for the Arms Trade Treaty*, at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&cmdsg_no=XXVI-8&chapter=26&clang=_en#3 [<https://perma.cc/WBC2-K34Y>] [hereinafter UN Depository Status for ATT].

The UN General Assembly adopted the ATT on April 2, 2013,¹⁰ and it entered into force on December 24, 2014.¹¹ The U.S. secretary of state at the time, John Kerry, signed the ATT on September 25, 2013, and President Obama transmitted the treaty to the Senate for its advice and consent on December 9, 2016, within his last two months in office.¹² In his letter accompanying the transmission, Obama noted that the United States did not need to change or enact any regulations or laws to comply with the treaty.¹³ The Senate referred the ATT to the Senate Foreign Relations Committee on the same date, but no further action has been taken by the Committee.¹⁴

Speaking at an NRA convention on April 26, 2019, Trump publicly announced his intent to withdraw the ATT from the Senate's advice and consent process, simultaneously signing a letter requesting the ATT's return.¹⁵ Trump also stated: "[T]he United States will be revoking the effect of America's signature from this badly misguided treatment [agreement]. We're taking our signature back. The United Nations will soon receive a formal notice that America is rejecting this treaty."¹⁶ Following Trump's statement, the White House issued a public statement reiterating Trump's announcement "that he will never ratify the ATT and will ask the Senate to return it."¹⁷ The statement continued:

- The ATT is being opened up for amendment in 2020 and there are potential proposals that the United States cannot support.
...
- By announcing the United States will not join the ATT, President Trump is ensuring this agreement will not become a platform to threaten Americans' Second Amendment rights.
...
- Currently, 63 countries are completely out of the agreement, including major arms exporters like Russia and China.

¹⁰ GA Res. 67/234B (Apr. 2, 2013).

¹¹ See ATT, *supra* note 5, Art. 22 (providing that the treaty would enter into force ninety days after the fiftieth ratification or accession); UN Depository Status for ATT, *supra* note 9 (listing the date of its entry into force).

¹² Message from the President of the United States Transmitting the Arms Trade Treaty, S. TREATY DOC. NO. 114-14, at III (Dec. 9, 2016).

¹³ *Id.* (explaining that "United States national control systems and practices to regulate the international transfer of conventional arms already meet or exceed the requirements of the Treaty" and adding that a "key goal of the Treaty is to persuade other States to adopt national control systems for the international transfer of conventional arms that are closer to our own high standards"); see also CONG. RESEARCH SERV., RL33865, ARMS CONTROL AND NONPROLIFERATION: A CATALOG OF TREATIES AND AGREEMENTS 54 (2019) ("Because the United States already has strong export control laws in place, the ATT would likely require no significant changes to policy, regulations, or law.").

¹⁴ 114th Cong., 162 CONG. REC. S6998-7000 (daily ed. Dec. 9, 2016) (statement of Sen. Inhofe); 114th Congress, The Arms Trade Treaty, at <https://www.congress.gov/treaty-document/114th-congress/14> [<https://perma.cc/FBZ7-D857>] (showing that the latest action with regard to the ATT was its referral to the Senate Foreign Relations Committee).

¹⁵ Trump Announcement, *supra* note 1, at 6.

¹⁶ *Id.* (second alteration in the original document).

¹⁷ White House Fact Sheet, President Donald J. Trump is Defending Our Sovereignty and Constitutional Rights from the United Nations Arms Trade Treaty (Apr. 26, 2019), at <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-is-defending-our-sovereignty-and-constitutional-rights-from-the-united-nations-arms-trade-treaty> [<https://perma.cc/8CFJ-CQ95>].

- The ATT cannot achieve its chief objective of addressing irresponsible arms transfers if these major arms exporters are not subject to it at all.¹⁸

Three days later, Trump issued an official letter to the Senate, stating:

I have concluded that it is not in the interest of the United States to become a party to the Arms Trade Treaty (Senate Treaty Doc. 114-14, transmitted December 9, 2016). I have, therefore, decided to withdraw the aforementioned treaty from the Senate and accordingly request that it be returned to me.¹⁹

Trump's request to the Senate is not unprecedented. In 1856, President Pierce sent an analogous request to the Senate, which formally returned the treaty shortly thereafter.²⁰ Since then, this request-and-return procedure has occurred periodically.²¹ Other presidents to make this type of request include President Wilson,²² President Franklin D. Roosevelt,²³ and President Nixon.²⁴ In the modern era, the Senate's process for returning a treaty involves a resolution referred out by the Senate Foreign Relations Committee, which the Senate then has the opportunity to adopt by a majority vote.²⁵ In a major report prepared in 2001 about

¹⁸ *Id.*

¹⁹ ATT Return Request, *supra* note 2.

²⁰ On August 9, 1856, Pierce wrote: "Deeming it advisable to withdraw [the treaty between the United States and the Netherlands] from the consideration of the Senate, I request that it may be returned to me." 10 J. EXEC. PROC. S. U.S. 140, 140-41 (1856). On August 13, 1856, after the message was read in the Senate, the Senate ordered "the convention . . . between the United States and His Majesty the King of the Netherlands, be returned by the Secretary to the President of the United States, agreeably to the request contained in his message dated 9th August, instant." *Id.* at 142.

²¹ See David C. Scott, Comment, *Presidential Power to "Un-Sign" Treaties*, 69 U. CHI. L. REV. 1447, 1468 (2002) (explaining that the exchange between Pierce and the Senate "provide[d] an initial model to which most later interactions conform"); MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* 175 (1990) ("Between 1947 and 1963, forty-five treaties were withdrawn, in each case pursuant to a request of the President (which was met by the Senate's unanimous consent, order, or resolution)"). While presidents often "request" the return of a treaty from the Senate, there are also examples in which they have used more robust language. See 24 J. EXEC. PROC. S. U.S. 474, 474 (1885) (quoting President Arthur's February 18, 1885 message to the Senate "recall[ing] the treaty" rather than requesting its return); 34 J. EXEC. PROC. S. U.S. 58, 58 (1902) (quoting President Theodore Roosevelt's December 8, 1902 message to the Senate "withdraw[ing]" a treaty between the United States and Dominican Republic rather than asking for the treaty's return).

²² On March 21, 1918, Wilson requested that the Senate return two treaties previously signed by the United States and Great Britain; the Senate did so on the same day. See 52 J. EXEC. PROC. S. U.S. 792, 792 (1918). Additionally, Wilson requested that another treaty between the United States and Great Britain be returned on January 15, 1920. See 55 J. EXEC. PROC. S. U.S. 83, 83 (1920). The Senate complied with this request two days later. *Id.* at 86.

²³ On May 7, 1934, Roosevelt submitted a treaty between the United States and Mexico to the Senate and requested that a treaty previously signed by the two nations be returned. See 75 J. EXEC. PROC. S. U.S. 509, 509 (1934). The Senate returned the treaty on April 1, 1935. See 76 J. EXEC. PROC. S. U.S. 493, 493 (1935).

²⁴ On February 24, 1970, President Nixon requested to withdraw a treaty with Mexico from the Senate. See 112 J. EXEC. PROC. S. U.S. 74, 74-75 (1970). The message was referred to the Senate Foreign Relations Committee that same day, *id.*, and the treaty was returned on March 13, 1970. *Id.* at 117.

²⁵ See CONG. RESEARCH SERV., S. PR. 106-71, *TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE* 145 (2001) ("The normal practice for returning treaties has been for the committee to report out, and for the Senate to adopt, a Senate resolution directing the Secretary of the Senate to return a particular treaty or treaties to the President."); Standing Rules of the Senate, S. Doc. 113-18, Rule XXX(1)(d) (Jan. 24, 2013) ("On the final question to advise and consent to the ratification in the form agreed to, the concurrence of two-thirds of the Senators present shall be necessary to determine it in the affirmative; but all other motions and questions upon a treaty shall be decided by a majority vote, except a motion to postpone indefinitely, which shall be decided by a vote of two-thirds.")

the role of the Senate with respect to treaties and other international agreements, the Congressional Research Service stated: “The President does not have the formal authority to withdraw a treaty from Senate consideration without the Senate’s concurrence.”²⁶ Historically, the Senate has apparently always consented to the return of a treaty requested by the president.²⁷ This may stem in part from the fact that, as a matter of U.S. constitutional practice, treaties can only be ratified with the concurrence of the president, and the president is under no legal obligation to ratify a treaty even after the Senate has given its advice and consent.²⁸

For the ATT, Senator Rand Paul, a member of the Senate Foreign Relations Committee, presented a resolution to return the treaty to Trump approximately two weeks after Trump’s formal request to the Senate.²⁹ As of late September of 2019, the Committee had not yet acted on the resolution.³⁰

Trump did not wait for the Senate to return the ATT before communicating to the United Nations that the United States did not intend to become a party to the ATT. On July 18, 2019, his administration sent the following message to the UN secretary-general:

This is to inform you, in connection with the Arms Trade Treaty, done at New York on April 2, 2013, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on September 25, 2013.

The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary’s status lists relating to this treaty, and all other publicly available media relating to the treaty be updated to reflect this intention not to become a party.³¹

This language closely tracks language from Article 18 of the Vienna Convention on the Law of Treaties regarding the duration of international legal obligations arising from treaty

²⁶ CONG. RESEARCH SERV., S. PRT. 106–71, *supra* note 25, at 145; *see also* GLENNON, *supra* note 21, at 174–75 (observing that since “the President (should the Senate give its consent) retains the discretion to decline to proceed to ratification, it might seem sensible that the President can withdraw a treaty from the Senate without its consent” but that “[n]onetheless, practicality argues against such presidential authority, since at that point the Senate, not the President, has custody of the official treaty documents; they are not then within the President’s control”); *but see* Scott, *supra* note 21, at 1477 (arguing that the president should have “the unilateral power . . . to withdraw treaties from the Senate,” including “in order to ‘un-sign’ it”).

²⁷ Scott, *supra* note 21, at 1471; *see also* RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 303, rep. n. 4 (2018) (“The President may also request that a treaty be withdrawn from further Senate consideration, and as a matter of practice the Senate has cooperated with such requests.”).

²⁸ CONG. RESEARCH SERV., S. PRT. 106–71, *supra* note 25, at 152 (“U.S. law does not impose any legal obligation on the President to ratify a treaty after the Senate has given its advice and consent.”).

²⁹ 165 CONG. REC. S2792-2793 (daily ed. May 13, 2019) (statement of Sen. Paul); U.S. Senate Committee on Foreign Relations, Committee Membership, at <https://www.foreign.senate.gov/about/membership> [<https://perma.cc/9QCJ-MZG9>].

³⁰ S. Res. 204, *supra* note 3. Notably, U.S. Senator Bob Menendez, the ranking member of the Senate Foreign Relations Committee, issued a statement on April 26, 2019, criticizing Trump’s announcement. *See* U.S. Senate Comm. on Foreign Relations Ranking Member’s Press, Menendez on Pres. Trump Telling NRA He is Cancelling U.S. Participation in Global Arms Treaty (Apr. 26, 2019), at <https://www.foreign.senate.gov/press/ranking/release/menendez-on-pres-trump-telling-nra-he-is-cancelling-us-participation-in-global-arms-treaty> [<https://perma.cc/5JMN-C7NA>].

³¹ Unsigning Letter, *supra* note 4.

signature. Article 18 provides that, after it has signed a treaty, “[a] State is obliged to refrain from acts which would defeat the object and purpose of [this] treaty . . . until it shall have made its intention clear not to become a party to the treaty.”³² A common interpretation of this provision is that a state party may not act in such a manner that would make it impossible or substantially more difficult for the state to ultimately comply with the treaty.³³

An earlier example—the initial example³⁴—of treaty “unsigned” by the United States occurred when the administration of President George W. Bush sent an analogous letter to the United Nations in 2002 in connection with the Rome Statute establishing the International Criminal Court.³⁵ The Rome Statute was in a different procedural posture than the ATT, however, because it had not yet been submitted to the Senate for advice and consent.³⁶ Thus, Trump’s unsigned is the first time a United States president has unsigned a treaty at a time when, as a matter of U.S. domestic legal procedure, the treaty was pending before the Senate. Few commentators have thus considered whether such an action is permissible as a matter of U.S. constitutional law or whether the Trump administration’s notification to the United Nations can be taken as adequate for purposes of Article 18 at a time when the treaty is pending before the Senate.³⁷

³² Vienna Convention on the Law of Treaties, Art. 18, May 23, 1969, 1155 UNTS 331, 8 ILM 679. Although the United States is not a party to the Vienna Convention, it views many aspects of the treaty as reflective of customary international law. See U.S. Dep’t of State, Vienna Convention on the Law of Treaties, at <https://2009-2017.state.gov/s/l/treaty/faqs/70139.htm> [<https://perma.cc/DK9B-H4V3>].

³³ Edward T. Swaine, *Unsigned*, 55 STAN. L. REV. 2061, 2078 (2003); see also Curtis A. Bradley, *Unratified Treaties, Domestic Politics, and the U.S. Constitution*, 48 HARV. INT’L L.J. 307, 329 (2007) (“[Article 18’s] drafting history suggests that the object and purpose obligation is designed to ensure that one of the signatory parties . . . does not change the status quo in a way that eliminates or substantially undermines the reasons for entering into the treaty.”).

³⁴ Swaine, *supra* note 33, at 2064 (noting that the Bush unsigned was “apparently unprecedented”). At the beginning of his administration, Trump similarly unsigned the Trans-Pacific Partnership Agreement—an internationally binding agreement that President Obama had signed, although one that, as a matter of U.S. domestic constitutional practice, was intended to receive the approval of Congress rather than of two-thirds of the Senate. See Letter from the Acting U.S. Trade Representative to the TPP Depository (Jan. 30, 2017), available at <https://ustr.gov/sites/default/files/files/Press/Releases/1-30-17%20USTR%20Letter%20to%20TPP%20Depository.pdf> [<https://perma.cc/2V4X-BPJ4>] (stating that “the United States does not intend to become a party to the Trans-Pacific Partnership Agreement” and therefore “has no legal obligations arising from its signature on February 4, 2016”).

³⁵ See U.S. Dep’t of State Press Release, International Criminal Court: Letter to UN Secretary General Kofi Annan (May 6, 2002), at <https://2001-2009.state.gov/r/pa/prs/ps/2002/9968.htm> [<https://perma.cc/V227-T5TQ>]. In language that appears to be the model for the ATT Unsigned Letter, the letter stated: “This is to inform you, in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000. The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depository’s status lists relating to this treaty.” *Id.*

³⁶ President Clinton authorized the signing of the Rome Statute in the last weeks of his administration, but he did not submit it to the Senate for advice and consent. William J. Clinton, Statement on the Rome Treaty on the International Criminal Court (Dec. 31, 2000), available at <https://www.govinfo.gov/content/pkg/WCPD-2001-01-08/pdf/WCPD-2001-01-08-Pg4.pdf> (stating that “I will not, and do not recommend that my successor submit the treaty to the Senate for advice and consent until our fundamental concerns are satisfied”).

³⁷ Among the sparse examples are Scott, *supra* note 21, at 1475 (asserting that “if the President asks for the return of the treaty, but the Senate denies his request . . . it appears the President cannot ‘unsigned’ the treaty,” although also arguing that the president can unilaterally force the return of the treaty from the Senate); Ryan Chorkey Burke, Note, *Losers Always Whine About Their Test: American Nuclear Testing, International Law, and the International Court of Justice*, 39 GA. J. INT’L & COMP. L. 341, 361 (2011) (claiming that “[o]nce the President submits a treaty for the Advice and Consent of the Senate, however, the document becomes the legal property of

Senate Gives Advice and Consent to Ratification of Four Bilateral Tax Treaties
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In July of 2019, the U.S. Senate gave advice and consent to protocols updating tax treaties with Spain, Switzerland, Japan, and Luxembourg, after a nearly decade-long period during which no tax treaties were approved by the Senate. This drought was primarily due to the privacy concerns of a single senator, Rand Paul of Kentucky, who deployed the Senate's procedural rules to increase the difficulty of the advice and consent process. Tax treaties with Hungary, Chile, and Poland, as well as a protocol to a multilateral tax convention, remained pending in the Senate Foreign Relations Committee as of mid-August of 2019.

Bilateral tax treaties typically focus on some combination of reducing double taxation and deterring tax avoidance. In the years leading up to 2011, the Senate generally gave its advice and consent to these treaties within a year or two of their signing.¹ Senator Paul's opposition, which began shortly after he joined the Senate in 2011, changed this pattern.²

In a 2014 letter, Senator Paul explained that his concern with pending tax treaties stemmed from provisions that, in his view, increased the scope of authority of tax officials to share and ascertain taxpayer information and represented a departure from individual privacy rights:

the Senate Foreign Relations Committee, making it impossible for the President to unsign it until it is returned") (internal quotation marks and citations omitted).

¹ *E.g.*, U.S. Senate Resolution of Advice and Consent to Ratification of the Tax Convention with Malta, 111th Cong., 156 CONG. REC. S5976 (daily ed. July 15, 2010) (signed Aug. 8, 2008; advice and consent on July 15, 2010); U.S. Senate Resolution of Advice and Consent to Protocol Amending Tax Convention with New Zealand, 111th Cong., 156 CONG. REC. S5976 (daily ed. July 15, 2010) (signed Dec. 1, 2008; advice and consent on July 15, 2010); U.S. Senate Resolution of Advice and Consent to Ratification of the Protocol Amending Tax Convention with France, 111th Cong., 155 CONG. REC. S12350-S12351 (daily ed. Dec. 3, 2009) (signed Jan. 13, 2009; advice and consent on Dec. 3, 2009); U.S. Senate Resolution of Advice and Consent to Ratification of the Protocol Amending 1980 Tax Convention with Canada, 110th Cong., 154 CONG. REC. S9332 (daily ed. Sept. 23, 2008) (signed Sept. 21, 2007; advice and consent on Sept. 23, 2008); U.S. Senate Resolution of Advice and Consent to Ratification of the Tax Convention and Protocol with Bulgaria with Proposed Protocol of Amendment, 110th Cong., 154 CONG. REC. S9332 (daily ed. Sept. 23, 2008) (signed Feb. 26, 2008; advice and consent on Sept. 23, 2008); U.S. Senate Resolution of Advice and Consent to Ratification of the Tax Convention with Iceland, 110th Cong., 154 CONG. REC. S9332 (daily ed. Sept. 23, 2008) (signed Oct. 23, 2007; advice and consent on Sept. 23, 2008); U.S. Senate Resolution of Advice and Consent to Ratification of the Tax Convention with Belgium, 110th Cong., 153 CONG. REC. S15706 (daily ed. Dec. 14, 2007) (signed Nov. 27, 2006; advice and consent on Dec. 14, 2007); U.S. Senate Resolution of Advice and Consent to Ratification of the Protocol Amending Tax Convention with Germany, 110th Cong., 153 CONG. REC. S15706 (daily ed. Dec. 14, 2007) (signed June 1, 2006; advice and consent on Dec. 14, 2007); U.S. Senate Resolution of Advice and Consent to Ratification of the Protocol Amending Tax Convention with Denmark, 110th Cong., 153 CONG. REC. S14654 (daily ed. Nov. 16, 2007) (signed May 2, 2006; advice and consent on Nov. 16, 2007); U.S. Senate Resolution of Advice and Consent to Ratification of the Protocol Amending Tax Convention with Finland, 110th Cong., 153 CONG. REC. S14654 (daily ed. Nov. 16, 2007) (signed May 31, 2006; advice and consent on Nov. 16, 2007).

² See Diane M. Ring, *When International Tax Agreements Fail at Home: A U.S. Example*, 41 BROOK. J. INT'L L. 1185, 1197–207 (2016) (describing Paul's concerns and his method of delaying the treaties); see also Jim Tankersley, *Senate Approves Tax Treaties for First Time in Decade*, N.Y. TIMES (July 17, 2019), at <https://www.nytimes.com/2019/07/17/business/tax-treaties-vote.html> ("Mr. Paul has long objected to those information-sharing provisions on privacy grounds, and he succeeded for years in holding up approval of the treaties.").