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## 中國與「武器貿易條約」談判：規範與利益的爭議

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中文摘要：中國在武器貿易條約之談判研究提供了一個結合國際關係與國際法，並藉此促成這兩個學科之對話。通過這個案例，我們明確的區別出所謂中國政府在共識法、強行法以及在國家責任等國際條約上的爭議之所在。通過這個案例，我們更為準確的區分所謂具有拘束或是沒有拘束間的灰色地帶，從而得出了中國在其所謂崛起的過程中並未善盡其大國之應有之責任。

中文關鍵詞：武器貿易條約，中國，國際安全，國際關係、國際法

英文摘要：The study of Chinese treaty behavior under the Arms Trade Treaty offers us an opportunity to recognize the importance of combining both international relations and international law in order to engage in a dialogue of cross-disciplinary discourse. Using the ATT as the focal point, this research challenges the conventional discourse of legal debates on various claims and seeks to link the apparent illegalities of these claims to the issue of consensus rule, the validity of peremptory norms, and state responsibilities. By examining both the political and legal interpretations of the Chinese positions, especially by looking into the gray area between two types of binding and non-binding law, this research seeks to elaborate upon and support an argument that the Chinese treaty behavior is incompatible with its rising status as a responsible power. Whether or not Chinese treaty behavior threatens international security, however, remains to be seen.

英文關鍵詞：Arms Trade Treaty, China, international security, international law

How Chinese Treaty Behavior Threatens International Security: An  
Anatomy of the IR/IL Nexus

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## **Introduction**

On April 2, 2013, the UN General Assembly endorsed the Arms Trade Treaty (ATT) by a vote of 154 in favor, 3 voting against, and 22 abstaining (including China) (UNODA, 2013). The main task of the ATT is to establish common international standards for regulating the international trade in conventional arms and it has the purpose of promoting cooperation, transparency and responsible action by State Parties in the international trade in conventional arms. The ATT aims to set standards for all cross-border transfers of conventional weapons ranging from small firearms to tanks and attack helicopters. It would create binding requirements for states to review cross-border contracts to ensure that weapons will not be used in human rights abuses, terrorism, violations of humanitarian law and organized crime. The ATT requires 50 ratifications before it enters into force. Accordingly, on December 24, 2014, (UNODA, 2014) 90 days after the first 50 states ratified the treaty, the ATT enters into force (UNODA, 2014). This paper explores treaty behavior exhibited by the Chinese in one of the recent treaty negotiations.

One school of thought argues that once the ATT becomes international law, China will then be required to accede to it which entails status as a State Party with the responsibility to implement the ATT provisions in full (Kirkham & Isbister, 2014: 4). Another school argues that the ATT is binding only to ratifying State Parties and no state is bound unless it signs and ratifies or later accedes to the treaty (Johnstone, 2013: 270). In either case, states are urged to accede to or ratify the treaty and promote its norms. The treaty negotiation thus offers an opportunity to revisit China's intractable dispute of a time-honored principle in the face of a pending decision on the ATT accession. It may also serve as a prologue to the study of China's treaty behavior from an interdisciplinary perspective on international relations and international law (IR/IL). While treaty compliance has been a major emphasis of IR/IL scholarship of the past decades (Guzman, 2014), China's record in abiding by arms control norms has long been recognized in theoretical and political agendas. A substantial body of knowledge has been accumulated in the past two decades, shedding considerable light on key dimensions of the question (Frieman, 2004; Kent, 2007; Medeiros, 2007). In fact, China has a long tradition of trying to burnish its international image as a responsible rising power by deflecting international opprobrium in order to legitimize its multilateral strategy (Johnston & Evans, 1999). China's remarks in recent years during the ATT negotiation echo similar grievances from the past and also allow China to influence international normative discourse.

Thus, the treaty compliance of China in a sense is too narrow a focus of norm-making at this juncture; it overlooks interpretation and the normative aspect of international law with regard to Chinese legal discourse during the entire negotiation process. Whereas the pros and cons of the two approaches have been debated exhaustively in past works on China's compliance with international regimes, China's references to the legal interpretation of international law have scarcely been raised among students of Chinese treaty behavior. The legal interpretation has been the subject of intense interest among legal scholars, but neglected by international relations scholars. Such avoidance may be seen by some as an indication that international law is not germane to the case of China, and by others as evidence that these approaches are inapplicable to the Chinese case. However, this is deceptive. No true efforts have yet been made. Using the ATT case as the focal point, this paper will also explore Chinese treaty behavior exhibited in previous treaty accessions and offer a preliminary explanation about why China has maintained a decision to abstain. What was China's approach to the ATT negotiation? Can China instead present itself as a pragmatic alternative instead of being seen as obstructive? As with the uncertainty of many issues, the Chinese entered the negotiations with a number of concerns about the proposed treaty.

The principal purpose of this paper is twofold;(1) to explore the negotiations of the ATT and the positions of China's treaty behavior, i.e. ignorance, passivity and indecisiveness to tackle the IR/IL theoretical debates on power and norms which simply reflected upon the immensity of China's overarching strategy,(2)to forge the initial anatomy of an IR/IL nexus by focusing on both the sources of international law, as well as the distributive aspects of state power as fundamental shapers of international law, which can then be used to gauge the validity of Chinese claims on the ATT negotiation.

### Contents of the ATT: Basic Treaty Obligations

The ATT is the product of nearly two decades of advocacy and hardworking. After a seven-year effort, a UN diplomatic conference was formally convened in July 2012, but flounder on reaching consensus on a final text so another two week-long diplomatic conference was convened in March 2013 to complete work on the treaty. However, Iran, North Korea, and Syria blocked consensus on the final treaty text, forcing treaty proponents to move it to the UN General Assembly for final approval. On April 2, 2013, the UNGA endorsed the ATT by vote after years of on-and-off discussions. The treaty opened for signature on June 3, 2013, requiring 50 ratifications before entering into force (Arms Control, 2013). This is a result of the

concerted efforts of the international community and broke a 20-year long stalemate. The significance of the ATT is worth noting. Politically, the Treaty requires State Parties, prior to their export of conventional weapons, to conduct national risk assessments for transfers of weapons covered under the Treaty's scope to prevent the transfer of arms in situations where they will likely violate international humanitarian and human rights law. A number of states have called Article 6 of the ATT the 'heart' of the treaty. It prohibits any transfer of conventional arms — or their ammunition/munitions, parts or components — if the transfer would violate a state party's obligations with regard to Security Council arms embargoes, or obligations under treaties to which it is a party, or if the state party 'has knowledge at the time of authorization' that the arms or items would be used to commit genocide, crimes against humanity, or certain war crimes. Therefore, the ATT helps to recognize, as a causal link, that the absence of common international standards on the import, export and transfer of conventional arms' has been a contributory factor to conflict, the displacement of people, crime and terrorism and that it has undermined peace, reconciliation, safety, security, stability, and sustainable development (Casey-Maslen, 2013). In other words, the ATT linked together arms trade, international human rights law and humanitarian law (Oxfam, 2012). Against this backdrop, it is salient at this juncture to summarize the major contents of the ATT.

To be in compliance with the ATT, the State Parties must: (Arms Control, 2013)

- *Establish and maintain an effective national control system for the export, import, transit, and transshipment of and brokering activities related to (all defined as "transfers" in the ATT) the eight categories of conventional arms covered by the ATT, as well as exports of related ammunition and of parts and components that are used for assembling conventional arms covered by the treaty (Articles 3, 4, and 5.2);*
- *Establish and maintain a national control list (Article 5.3) and making it available to other states-parties (Article 5.4);*
- *Designate competent national authorities responsible for maintaining this system (Article 5.5);*
- *Designate at least one national contact point responsible for exchanging information related to the implementation of the ATT (Article 5.6);*
- *Prohibit transfers of conventional arms, ammunition, or parts and components for the eight categories of conventional arms covered by the ATT that would violate obligations under Chapter VII of the UN Charter or international agreements relating to the transfer or illicit trafficking of conventional arms or where there is knowledge that the items will be used in the commission of*

- genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, or other war crimes (Article 6);*
- *Review applications for exports of the eight categories of conventional arms covered by the treaty and conducting a national export assessment on the risk that the exported arms could have “negative consequences” for peace, security, and human rights, denying an arms export if the assessment determines that there is an overriding risk that the exported arms will be used to commit or facilitate a serious violation of international humanitarian or human rights law or offenses under international conventions or protocols relating to terrorism or international organized crime and taking into account the risk of the exported arms being used to commit or facilitate serious acts of gender-based violence or violence against women and children (Article 7);*
  - *Take measures to regulate conventional arms imports (Article 8);*
  - *When importing conventional arms, provide information to assist the exporting state-party in conducting its national export assessment, including by providing documentation on the end use or end user (Article 8);*
  - *Take measures, where necessary and feasible, to regulate the transit and transshipment of conventional arms (Article 9);*
  - *Take measures to regulate brokering taking place under its jurisdiction (Article 10);*
  - *Take measures, including risk assessments, mitigation measures, cooperation, and information sharing, to prevent the diversion of conventional arms to the illicit market or for unauthorized end use and end users (Article 11);*
  - *Maintain national records for each export authorization or delivery of conventional arms for at least 10 years (Article 12);*
  - *Provide annual reports to the secretariat on export and import authorizations or deliveries of conventional arms to be distributed to states-parties (Article 13);*
  - *Take appropriate measures to enforce national laws and regulations to implement the treaty (Article 14);*
  - *Cooperate with other State-Parties in order to implement the ATT effectively (Article 15).*

### Contours of the Chinese Negotiation Process

At the beginning of the negotiation, China posited that the impetus for the ATT to regulate the flow of conventional arms no doubt will constrain its interests as the 5<sup>th</sup> largest arms supplier in the world, thus exhibiting an obvious amount of resistance

to this endeavor (Holtom, Bromley, Wezeman & Wezeman, 2013: 254). It was to a large extent due to, during the negotiation, the draft treaty including a provision prohibiting arms sales to countries where human rights are violated, as a large part of China's arms sales destinations are on the list of such states. It is suggested that many of the recipients of China's arms supplies over the past decade have been developing countries with poor human rights records including Angola, Democratic Republic of the Congo, Libya, Sudan and Zimbabwe which produced punchy news headlines (Cordano, 2014; Lynch, 2012). Ironically, China's decisions not to veto the UNSC in adopting a decision against Sudan, Zimbabwe or Libya shed a different light on China's new role under Chapter VII of the UN Charter. Overall, China has been criticized for hindering international efforts to improve the human rights situation in those states with bad track records (Cai, 2013: 793). Intriguing questions arise for China such as how to decide whether human rights are violated in country A or B, and if so, to what extent and in what way such violations may lead to restrictions or a ban on arms deliveries. Meanwhile a process aimed at regulating the arms trade was launched, following an active campaign by NGOs, through the adoption by the First Committee of the 61<sup>st</sup> Session of UNGA on December 6, 2006, of a resolution (A/Res/61/89) entitled, "Towards an Arms Trade Treaty." This resolution is for a future "comprehensive, legally binding instrument establishing common international standards for the import, export and transfer of conventional arms" and it was here that China cast its first abstention (Yes: 153, No: 1, Abstentions: 24, Non-Voting: 14, Total: 192) (United Nations, 2006). The Chinese delegation explained its position that, "[L]egal arms trade is related to the security, defense need[s] and economic interest[s] of every country. How to conduct this kind of trade should be decided by arms exporters and importers. Whether it is necessary to establish shared rules or international laws to regulate the arms trade is very complicated and sensitive." (Stavrianakis & Yun, 2014: 3) In China's mind, arms trades are bilateral in nature and not suitable for multilateral discussion. But international relations are more than the sum of bilateral relations. An international society operates on rule-based norms. However, the proponents of this multilateral treaty insisted that the ultimate goal is to put an end to the free-for-all nature of international weapons transfers.

To win overwhelming support for this goal requires years of intensive negotiations before the Treaty could be an effective political force against excessive and destabilizing arms flows, particularly in conflict-prone regions (United Nations, 2013a). It has also withstood an amount of recognizable passive resistance from 2006 onwards, in specific from China given that its fast-growing economy and potential arms trade constitutes a major political hurdle in the negotiation process. Two years later, by a large majority the UNGA adopted a new resolution entitled "Towards an

Arms Trade Treaty: Establishing Common International Standards for the Import, Export and Transfer of Conventional Arms” (A/Res/63/240) at the end of December 2008. This resolution decided the establishment of a working group open to all member states and tasked with working on the elements of a text “for inclusion in a future treaty.” (United Nations, 2009a) China abstained for the second time (Yes: 133, No: 1, Abstentions: 19, No-Voting: 39, Total: 192). During 2009-2010, an initial session of the Open-Ended Working Group was created with the support of the US, which also established a timeline for a conference in 2012. (United Nations, 2009b) The first two sessions of the working group, which had been held in 2009, led to the adoption of an intermediate report on July 17, 2009. This allowed progress to be made regarding the points for which there is the most agreement, and established the process within the UN. During these sessions the US developed a more favorable position and some skeptical countries began to approve the process, with China abstaining for the 3<sup>rd</sup> time (Yes: 153, No: 1, Abstentions: 20) (United Nations, 2010). The resolution, which received the support of 153 Member States, reaffirms the objective of a universal, legally binding instrument of a treaty, embodying the highest possible common standards regarding the export, import and transfer of conventional weapons. The treaty would call for limiting the supply of weapons and munitions in areas of conflict and instability, to maintain peace, security and regional stability and to enhance respect for human rights and international humanitarian law. The resolution entitled "Arms Trade Treaty" adopted on October 20, 2009 by the First Committee of the 64th session of the UNGA might have strengthened and sped up the process, as it made provisions for the organization of a UN conference in New York in 2012 on the ATT (United Nations, 2013b).

For China, concerns about “...divergences of views still exists on many important issues such as purpose and objectives, scope of application, relevant principles and elements of the ATT” pose another hurdle and suggest deep suspicious of the ATT. Despite the setback, for the first time since work began on the ATT, the five permanent members of the Security Council formally gave a joint declaration in favor of an international instrument on conventional arms transfers. In their July 12, 2011 joint statement, the P5 hailed the Treaty’s potential to help solve “key problems resulting from the illicit trafficking and uncontrolled proliferation of conventional arms.” (United Nations, 2011) The five countries reaffirmed their joint understanding that the proposed ATT should not be “a disarmament treaty nor should it affect the legitimate arms trade or a state’s legitimate right to self-defense.” (Arms Control, 2011) China, which had abstained on all of the 2006, 2008, 2009 resolutions, now took a different position but still remained skeptical of the need for a treaty. China’s unwillingness to support it implies that the treaty will have practical effects on its

conduct. In their July 12 joint statement, the P5 supported the efforts aimed at establishing an “international instrument.” This choice of words was notable because an international instrument could be a document that is politically but not legally binding and therefore would be viewed by many as much weaker than a treaty. Perhaps this reflected remaining reservations on the part of China about the scope and purpose of any treaty since it did not entirely reflect the mainstream view in support of a comprehensive, legally binding treaty establishing the highest-possible common international standards for the transfer of conventional arms. The P5 statement could provide a refuge for China at a time when a majority of states, especially African and Caribbean states, were in favor of a strong ATT (Reaching Critical Will, 2012). A consensus ruling certainly helped to bring three of the largest arms traders – China, Russia, and the US – to the fore (Arms Control, 2012). As the US was actively contemplating a robust treaty, it was exerting influence on China as well.

The years 2012 and 2013 witnessed the last two rounds of the ATT Negotiation Conference finalize the treaty. On July 27, 2012, delegates failed to agree on a landmark U.N. Arms Trade Treaty. On the final hours of negotiations, the US, Russia and China demanded that more time was needed. One year later, on March 28, 2013, delegates failed for the second time to adopt the ATT by consensus (Nuclear Threat Initiative). A spokesman for China's Foreign Ministry said China has participated positively in the treaty negotiation process under the UN framework and maintained a responsible and constructive position, and that China will continue to make efforts in regulating the conventional weapons trade around the world and fight illegal arms trade and trafficking (Xinhua, 2013a). But at the 67<sup>th</sup> UNGA Plenary, in the 71<sup>st</sup> & 72<sup>nd</sup> Meetings, the first arms trade treaty on conventional weapons was passed. The assembly voted 154-3 in favor of a resolution that opened the Treaty for signature, with Syria, North Korea and Iran voting against it (United Nations, 2013c). As predicted, China was among the 23 abstentions. China insisted that the ATT should be reached through consensus and accepted by all parties. Wang Min, China's deputy permanent representative to the UN, stated that, “China has all along supported the negotiations on the Arms Trade Treaty... We expect all parties to reach consensus on an effective treaty to regulate the conventional arms trade and to combat illicit trafficking of small arms and light weapons. "He also expressed deep worries about the “...possible negative precedent for multilateral arms control negotiations... China is not in favor of pushing through a multilateral arms control treaty at the GA which concerns the international security and the security of all nations.” “To our regret, the draft resolution concerning the Arms Trade Treaty does not address the concerns of China,”<sup>1</sup> said Wang, explaining the reason for the abstention. "We could support a

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<sup>1</sup><http://arcadeh.com/archives/post/tag/xinhua/page/3/>.

treaty reached through consensus," he stressed and, "Only by doing so can we ensure the universal support and effective implementation of the treaty."(Xinhua, 2013b)

All in all, China has demonstrated, in each consecutive abstaining vote, consistency in the direction of dissenting. At first glance, China's stance could seriously undermine as well as obstruct more than two decades of effort to the socialization and adaptation of international norms aimed at ensuring a more proactive, practical and constructive role for arms suppliers. Some have argued that on conventional arms transfers, the Chinese Government has been more cautious, but the degree of accountability and transparency remains problematic. However, here too positive changes have occurred in awareness, capacity, and openness to dialogue by Chinese officials (Stavrianakis, Leng & Zhang, 2013). In particular, the Chinese perceptions on the ATT initiative have changed substantially from an initial lack of interest in support for the ATT process. Chinese official statements have changed in the past two years, from initial skepticism, to emphasizing specific issues/objections to proposed treaty texts, to loosening up on those issues, to finally being constructive in finding a meaningful compromise. Although China abstained at the final UN vote on the ATT, which was agreed by the UNGA on April 2, 2013, China played a constructive role in the run up to and during the two diplomatic conferences that led to the UNGA vote. Here, China's abstention appeared to be based on procedural issues rather than the substance of the treaty text itself (Zhang, 2014). Such a record of intrigue, however, requires further exploration into the details.

### The Chinese Strategy of Negotiation

To be sure, China has taken a cautious approach to the proposed treaty. During the negotiation, China was not the only state to withhold its consent by abstention. States that submitted their views were also skeptical or cautious about the feasibility or necessity of the ATT. For instance, on the scope of the ATT, the treaty covers a broad scope of conventional arms, but it is not comprehensive. It does not cover all conventional arms, and there is still debate as to whether hand grenades or armed drones would fall within the categories listed in the treaty (Doermann, 2013). The treaty encompasses the seven categories of weapons set out in the UN Register of Conventional Arms (UNROCA), plus small arms and light weapons. These weapons are subject to all the obligations in the treaty, whereas ammunition and parts and components for these weapons are only subject to the prohibitions on transfers in Article 6 and the export criteria in Article 7 (Doermann, 2013). Article 2 also establishes the scope of activities to which the treaty shall apply. These are 'activities of the international trade' that comprise export, import, transit, trans-shipment, and

brokering (Doermann, 2013).

For its part, China insists that in any UN treaty negotiation, especially one based on consensus, due attention must be given to the concerns of all members states as a principle (United Nations, 2012). However, in practice the so-called procedural rule of adoption by consensus for the conduct of treaty negotiation can no longer stand due to an often-mentioned protracted gridlock at the CD since the 1990s. For a majority of the states, the most important question of the negotiation is whether the ATT helps or hinders the development of new norms against transferring arms when there is a risk of violating human rights and international humanitarian law. China instead saw it quite differently, stating that “the necessity to negotiate a specific treaty to re-establish common guidelines for arms trade, and the relation between the treaty and the existing conventional arms transfer principles and mechanisms at the international, regional, sub-regional and national levels, need to be further discussed in a comprehensive and cautious way by the international community on the basis of universal participation.”(United Nations General Assembly, 2011) China is fully aware that once the ATT enters into effect, little time will be left for China to alter what it realizes will eventually become a strategic liability. China sees little prospect for action to reverse this trend (Ministry of Foreign Affairs, PRC, 2011a).

Another issue in China’s mind brings with it similar concerns. China objects to the prohibitions to state-to-state gifts of conventional weapons: a tension representing something more fundamental about the Chinese understanding of the principles of international relations rather than the practice. China also contests that the notion of trade encompasses all possible activities, including non-commercial ones such as gifts and loans (Ministry of Foreign Affairs, PRC, 2011). Ultimately, implacable opposition to China’s definition set the tone for the term used by the ATT. What’s more, at the core of the ATT are two articles that link the decision to transfer arms to the likelihood of serious violations of international humanitarian law or international human rights law. Article 6(3) prohibits the transfer of conventional arms, their ammunition and parts and components when the transferring state has knowledge that they will be used to commit genocide, crimes against humanity or a limited set of war crimes, including grave breaches of the Geneva Conventions, attacks directed against civilian objects or civilians, or other war crimes defined by international agreements to which the state is a party (Doermann, 2013). To a degree, China accepts the need for a treaty to recognize international human rights and humanitarian law, but has opposed strict rules for such criteria (Amnesty International, 2013). Judging from the Chinese official statements, this is highly plausible even though there is a rather restricted and limited pool of knowledge on the issue.

The degree of accountability and transparency of the Chinese commitment

remains problematic. Moreover, China wants to exclude ammunition as well as parts and components from key provisions of the treaty. China is firmly opposed to any requirement to establish a national control list of arms and for such lists to be published (Amnesty International, 2013). China abstained from early UN General Assembly resolutions on the ATT between 2006 and 2011 and initially opposed the inclusion of ammunition and small arms and light weapons in its scope. China also opposed an obligation for states to deny authorization for arms exports that could be used to violate international humanitarian law and international human rights law. China insisted that it was abstaining because it opposed the adoption of a multilateral arms control treaty through a majority vote at the GA. Once again, China reiterated that the ATT should be reached through consensus and accepted by all state parties.

China complains that the ATT does not address the concerns of China. "China is not in favor of pushing through a multilateral arms control treaty at the General Assembly which concerns international security and the security of all nations. We are very much concerned about the possibility of negative precedents from multilateral arms control negotiations. We should insist on negotiating through consensus to reach a treaty acceptable by all parties," said by Wang Min, China's deputy representative to the UN (Xinhua, 2013c). China's major concerns about the precedent that the ATT process might set for other arms control negotiations at the CD seems extremely detrimental to its security wellbeing. To overcome anxiety of its own, China attempts to block states that might seek to promote the ATT model as a means of overcoming the gridlock in the CD, as was the case in previous agreements, i.e. the Comprehensive Test Ban Treaty (CTBT) of the 1997, or even earlier, the revised Landmines Protocol, also known as Protocol II of the Convention on Certain Conventional Weapons of 1981, where the consensus rule has prevented agreement on a program of work since 1996 (Johnston, 2008: 117-132).

China particularly insists that the ATT contain provisions banning arms sales to non-state actors: a disagreement underscoring a long-held contention about US arms sales to Taiwan (Parker, 2008: 4). But whether China would retaliate against US arms sales always looms at large. China also opposes the inclusion of binding language aimed at preventing arms from being exported to countries where they could be used to undermine human rights. Thus, China was seen as a reluctant supporter if not an antagonist towards ATT efforts to combat the regional instability and humanitarian crisis fueled by illicit trafficking and the misuse of conventional arms. All in all, China's negotiation efforts seem to have a strong bearing in its previous practices. It did not begin with the advent of the ATT, rather it began more than ten years earlier when China attempted to chart a course to address China's concerns.

## An Anatomy of the IR/IL Nexus

This section will examine the social/legal norms of conventional arms trade from three distinctive levels (the domestic, international and transnational) to clarify the extent to which Chinese behavior is embedded in the earlier international proposals to control arms trade. On the domestic level, the social processes of acculturation offer an explanation of the impact of global norms on conventional arms trade, which shape China's perceived national interests. Explanations on the social processes of the P5 Initiative and the UNROC are cogent at this juncture.

China's involvement in international conventional arms transfer initiatives can be traced back as early as the 1990s after the Iraqi invasion of Kuwait, with the United States' initiatives to solicit the support of the P5 of the Security Council to curb arms transfers to the Middle East. The so-called "Guidelines for Conventional Arms Transfers" by the P5 suggested a set of transfer criteria including considerations of likely use, recipient behavior and existing obligations (United Nations, 1991). Transfer criteria such as notification in advance of certain arms sales, an annual report on transfers, meeting regularly and on an ad hoc basis if a "supplier believes guidelines were not being observed" as well as whether the guidelines would apply globally or just to the Middle East were all discussed. China insisted that the Guidelines should be applicable to US arms sales to Taiwan (Parker, 2008: 4). These issues were not resolved, and the P5 process ceased to function after a 1992 meeting. The second attempt to regulate conventional arms transfers was with the UNROC in 1993 (Frieman, 2004: 110-112). According to this, states are required to submit information on their sales and purchases of seven categories of military hardware. As such, China made annual reports on imports and exports dated for 1994-96. However, China disputed that the US arms sales to Taiwan are an attempt to "politicize" the UNROC and to infringe upon China's sovereignty and interfere in its internal affairs via the UN system. China also contended that it's a violation of the stipulation by the relevant UNGA Resolutions that the UNROC should only record the conventional arms transfers among sovereign states. China registered its protest by suspending its report to the UNROC during 1998-2006 periods. Only after the US removed arms sales to Taiwan from its reports to the UN did China resume submitting data annually on imports and exports of conventional arms in the seven categories to the UNROC in 2007 (Ministry of Foreign Affairs, PRC, 2011b). All of these above-mentioned events had a strong bearing on the later development at the domestic level of China's first version of "Regulations of the PRC on the Administration of Arms Exports," which served as an indicator of China's proven record of institutionalizing international

norms in to domestic regulations. The Regulations stipulate the following: (Xinhua, 2002)

Article 1: These Regulations are formulated for the purpose of strengthening the unified administration of arms exports to maintain the normal order of arms exports.

Article 2: “Arms exports” referred to in these Regulations means the trading export of equipment, special production facilities and other materials, technology and related services, which are used for military purposes.

Article 5: The following principles shall be observed in exporting arms: (The National People’s Congress, PRC, 2007)

- (1) Arms exports should only be conducive to reinforce the self-defense capabilities of the recipient country;
- (2) There should be no injury to the peace, security and stability of the region concerned and the world as a whole;
- (3) There should be no interference in the internal affairs of the recipient country.

Article 6: Where an international treaty concluded or acceded to by the People’s Republic of China contains provisions different from these Regulations, the provisions of the international treaty shall prevail, except for the provisions on which reservations are made by the PRC.

Article 26: Illegal activities in violation of the provisions in Article (20) of these Regulations shall be banned by the State Administration of Arms Trade and punishments shall be given by the relevant competent departments of the State in accordance with the provisions of the relevant laws and administrative rules and regulations.

Article 27: Any violation of the provisions of these Regulations, if constituting a crime, shall be investigated for criminal liability according to law.

Consequently, a number of general inferences concerning China’s past record with international norms on conventional arms emerging from the P5 Initiative, the UNROC and the Wassenaar Arrangement (WA) (Ministry of Foreign Affairs, PRC, 2010) could be given. In the first place, these export control regimes are soft laws by nature, since they are not legally binding. These non-binding rules or instruments represent promises that in turn create expectations about future conduct from which

legal consequences flow. They can also generate a focal point, focusing on compliance once the focal point has been created (Joyner, 2009: 360-369; Guzman & Meyer, 2010). It is clear that the Chinese record has been far from haphazard. However, China's behavior has been much less clear in that it has had a much more fractionated appearance than have its statements. This fractionation is shown particularly in the gap between China's words and actions. The difference between China's report to the UNROC and actual arms sales suggest the possibility that these contrasts were related to the unique Chinese way of interpretation. For example, the three principles governing China's arms export controls (Article 5) are particularly sound. They are compatible with international norms and are conducive to promoting international security. However, on actual events, China's stances have been a source of controversy in the sense that they have been too vague to be subject to interpretation, nor have they specified criteria for a risk assessment process to determine whether an arms transfer should proceed.

Another issue is related to the transparency of Chinese behavior in arms transfers. In fact, China's control lists of conventional arms are more detailed than those of the UNROC, and they cover the munitions lists of the WA. Moreover, in an effort to better integrate international standards on military and dual-use goods into China's existing export control legislation, the State Council issued export control regulations covering 183 dual-use technologies in November 1998. China's export control policies on conventional arms are by and large consistent with those of the WA. Thus, China's export control policies for conventional arms are more or less aligned with the existing international arrangements (Saferworld, 2012: 39-40; Huang, 2012). However, China is often the target of accusations of illicit or undesirable arms transactions, (Saferworld, 2012: 40) as in the cases of China's UN embargo violations with the Democratic Republic of Congo and the Chinese government's arms supply to President Mugabe of Zimbabwe (Jeuck, 2011; Kopel, Gallant & Eisen, 2010). China's denials of these accusations are, in fact, typified by generalities and lack of factual information since evidence related to Chinese arms transfers, their types, quantities and their recipients is considered secret or confidential. As a result, accusations of norm violation by China, for better or worse, will continue and the debate about China's role, or non-role, in the sale of arms to undesirable clients is unlikely to result in any positive action until the Chinese government increases access to information on Chinese arms transfers, thus making their claims and counter-claims more plausible (Jeuck, 2011; Kopel, Gallant & Eisen, 2010).

As well, the above-mentioned cases led to constraints on China's action but involved no material sanctions for non-compliance. China's behavior was constantly monitored by NGOs to gauge China's reputation for responsibility and cooperation in

the context of nonproliferation. The codification of international rules into China's first version of "Regulations of the PRC on the Administration of Arms Export" is one indicator of integration into international normative practice even at this initial stage of improvement. Social norms in this sense are seen as shared expectations, on the part of a group, about appropriate behavior. For China, to break out the post-Tiananmen diplomatic isolation and to acquire a new identity as a responsible major power has meant sensitive concerns about its international image (Johnston, 2003).

Next, on the ATT China insists that, "avoiding consensus may lead to wider differences and even confrontation. Neither is helpful for the effectiveness and universality of the treaty." It seems that the principle of agreement by consensus weighed heavily upon China's principled position, both because of the potential negative effect of a lack of consensus on effective implementation of the treaty, and because of the possibility of majority voting displacing consensus as the norm for passing agreements in multilateral arms control negotiations. It is not a favorable option for China and its worry is exacerbated by the concern that the CD—where consensus is mandatory—would be sidelined by any such development. The issue reminds us about the conflicting doctrines of consent and consensus in the classic international legal debates on the sources of international law. For the consent school, the main bulk of rules of international law owe their existence to the consent of the individual subjects of international law themselves—individual states. Each state is bound only by those rules of international law to which it has consented. The main instrumentality by which international law is created is the international treaty. An international treaty creates international law only for those states that are a party to it (Morgenthau, 1955: 253), although international law contains a small numbers of rules that are binding upon individual states regardless of their consent.

The need to substitute the unanimous consent of all subjects of international law for genuine international legislation gives rise to yet another type of complication peculiar to international law. This is the problem of ascertaining the meaning of the provisions of international treaties, of the rights they confer, and of the obligations they impose (Morgenthau, 1955: 299). The consensus school, on the other hand, promises the strengthening of the contribution of international law to international order. It is argued that, "...when there is overwhelming solidarity in international society in favor of the view that a particular rule or course of action has the status of law, then recognition of its legal status cannot be averted merely because a particular recalcitrant state or group of states withhold its consent. If the view of an overwhelming majority or preponderance of states may be taken to represent the will of in the international community, this appears to open the way for strengthening of

the international law of coexistence.” (Bull, 1977: 156) However, the attraction of the consensus doctrine lies in the opportunities it offers to develop international law not in relation to the actual practices of states, but in conformity to China’s own views as to what international order or international justice requires (Bull, 1977: 158). The adoption of the consensus rule in the CD was designed to rally the greatest possible support. However, consensus was not meant to be a blocking factor as it was up to each state to be flexible. Since the conclusion of the negotiation of the CTBT in August 1996, the CD remains deadlocked. With the exception of 1998 and 2009, it has not been able to reach consensus on a program of work and thus hasn’t commenced substantive deliberations. The principal problems include difficulties in the current relations between key players, disagreement among them on the prioritization of main issues on the CD’s agenda, and attempts of some countries to link progress in one area to parallel progress in other areas. The key items under consideration include: a treaty banning the production of fissile material for nuclear weapons or other nuclear explosive devices (FMCT), nuclear disarmament, prevention of an arms race in outer space (PAROS), and negative security assurances (NTI). In this sense, consensus does not require unanimity. A decision may be taken by consensus despite reservations on the part of a member or members so long as such a reservation is not tantamount to an objection. For example, Rule 25 of the CD provides, in effect, that the approval of reports does not require that every view in a report be agreed upon by all members (UNIDIR, 2009).

The ATT was endorsed by a super-majority of UNGA member states after efforts to reach agreement by consensus failed. Questions arise as to which provisions apply to State Parties, to states that voted for it but have not ratified it, and to states that voted against it. An appreciation of the ATT suggests that some of its provisions are taking on a peremptory norm (*jus cogens*), in the sense that no derogation is allowed even by states that do not become State Parties. Other provisions reinforce legal obligations and thereby strengthen the execution of international law for staunching the illicit conventional arms trade (Kellan, 2014). In order to resolve questions of the ATT’s ambiguous legal status and for a better understanding of what the ATT propounds, Nicholas Onuf’s treatment may be helpful (Onuf, 2008). Onuf argued that a *jus cogens* is a compelling law or a higher law that must be followed by all states. The 1986 Vienna Convention on the Law of Treaties affirmed *jus cogens* as an accepted doctrine in international law. States have used the concept of *jus cogens* in their efforts to achieve reforms in the existing law and international legal order. China is deeply concerned about the grip that the majority rule has had on the content of existing international law, by controlling its source. To manipulate the source, China has to influence the content of peremptory norms, which are central to and

constitutive of the legal order. This would lead to a renovation of the legal order, which would start from the central norms. The struggle over peremptory norms and the emergence of a new source of international law are simultaneously taking place, which together constitutes the source of the international legal order and the constitutive propositions of international legal order. Thus, there is a relation between a struggle over peremptory norms and the elaboration of their content and the resistance of western states. It is highly plausible that China views jus cogens through the positivist prism of state consent. The requirement of state consent is justified on grounds that states are independently sovereign and autonomous, and therefore states cannot be bounded by norms to which they have not consented (Griddle & Fox-Decent, 2009: 36). According to the consent-based approach, international norms achieve peremptory status through the same sovereign lawmaking processes that generate international law. Specifically, states may consent to peremptory norms by codifying the norms in treaties, accepting them as customary laws, or employing them as general principle of law (Griddle & Fox-Decent, 2009: 36). There is a close interaction between international human rights treaties and the customary international law of human rights. The recognition of a right in an IHR treaty that is ratified by a large number of states, and not challenged by non-ratifying states, gives strong evidence for the customary nature of the provisions of those human rights treaties. Therefore, categories of human rights law are also considered as jus cogens norms and norms erga omnes (norms that create duties toward all), and an agreement in violation of these norms is automatically null and void in international law (Cali, 2010).

On the transnational level, the growing role of nongovernmental actors in law making by international organizations is revealing. They are not delegated law-making power per se, but through a diffuse normative process, they have an impact on the development of law (Dunoff & Pollack, 2013: 269). By accepting the active participation of non-state actors, they have tacitly delegated some law-making power to them. International legal scholarship and IR theory have been slow to recognize the role of NGOs in the making and enforcement of international law. In international law, doctrines defining international legal personality exclude non-state actors (Dunoff & Pollack, 2013: 240). As non-state actors, including NGOs, have assumed a higher level of global activity, China is beginning to weather the shift. China worried that humanitarian norms were driving the negotiation process at the expense of the legitimate military needs of states (Johnston, 2008: 123). As such, in the eyes of China often it has been crusading NGOs that have led the way for states to see the international dimension of what was previously regarded as a purely state prerogative. Hence, there was uneasiness that NGOs were driving the agenda,

establishing the standards for state behavior and in some cases actually participating in national delegations. According to the Chinese view, this will introduce unpredictability into what should remain state-to-state negotiations (Johnston, 2008: 123).

Now, as far as the state responsibility for aiding and assisting human rights violations through arms transfers is concerned, state responsibility for internationally wrongful acts means that situations such as a violation of international human rights or humanitarian law may be committed by, for example, state B using weapons it has received from state A. Even if the transfer is lawful under the national legislation of State A, i.e. in accordance with the PRC domestic regulations, applicable in both the transferring state A and receiving states, the state that has transferred the weapons which are then used to commit a violation may still have committed an international wrongful act through its “aid and assistance” to the state that committed the violation (Bellal, 2012). The principle that a state can bear legal responsibility for helping another state to breach international law has been recognized by the UNGA in the ‘Articles on Responsibility of States for Internationally Wrongful Acts,’ adopted by the UNGA in 2001, which declare a state which aids or assists another state in the commission of an internationally wrongful act is responsible for doing so if that state does so with knowledge of the circumstances of the internationally wrongful act; and with knowledge that the act would be internationally wrongful if committed by that state. Therefore all states have a responsibility to not knowingly aid or assist another state in the committing of any unlawful act. If a state knows, or should know, that weapons or munitions are likely to be used in breach of international law, which transfer must not go ahead. States involved in arms transfers bear some responsibility for the abuses carried out with the weapons that they furnish (Amnesty International, 2005). Moreover, what is most directly relevant to R2P concerns, under Article 6.3 of the ATT, is that states are forbidden to transfer weapons if they know they would be used in the commission of crimes against humanity, grave breaches of the Geneva Conventions, including attacks against civilians or war crimes (Stavrianakis, Leng & Zhang, 2013: 10-111).

## Conclusion

Analytically, the study of Chinese treaty behavior under the ATT offers us an opportunity to recognize the importance of combining both international relations and international law in order to engage in a dialogue of cross-disciplinary discourse. The past 20 years have already seen a dialogue between the two disciplines with liberal institutionalism and social constructivism taking stock of the legal concepts related to

the making, interpretation and enforcement of international law. Such efforts have resulted in a better understanding of post-atrocity societies, which must embrace international justice via a transnational legal process, and also enable us to understand the role of norms in international politics. Thus, the value and importance of international law can be seen as an explanatory factor in the analysis of state behavior in the international system. In doing so, a transnational legal process model explains the process of interaction and norm interpretation. It also generates legal rules that will guide future transnational interactions between state parties.

Using the ATT as the focal point, this paper challenges the conventional discourse of legal debates on various Chinese claims and seeks to link the apparent illegalities of these claims to the issue of consensus rule, the validity of peremptory norms, and state responsibilities. By examining both the political and legal interpretation of the Chinese position, especially by looking into the gray area between the two types of binding and non-binding law, or in Robert Keohane's dichotomy of constitutive and regulatory norms, this paper seeks to elaborate upon and support an argument that the Chinese behavior is incompatible with its rising status as a responsible power. Although abstaining, China has not articulated irrevocable objections to the treaty. Whether or not Chinese treaty behavior threatens international security, however, remains to be seen.

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在執行本案期間曾兩度前往中國大陸北京與上述機構之學者專家就研究主題敬行訪談，訪談單位以中國軍控協會最為權威，該機構為中國大陸外交部之研究智庫，主要負責度外之交流工作，其人袁乃為外交部軍控司之人員，其他機構多為高效及研究機構成員。

11/16-11/19 出國報告

11/16:北京清華政治所

11/17:中國軍控協會

11/18:北京外國語大學國關學院

11/19:中國現代研究院

11/19:北大國關學院戰略研究中心

# 科技部補助計畫衍生研發成果推廣資料表

日期:2015/12/16

科技部補助計畫	計畫名稱: 中國與「武器貿易條約」談判: 規範與利益的爭議
	計畫主持人: 袁易
	計畫編號: 103-2410-H-004-129- 學門領域: 國際關係
無研發成果推廣資料	

103年度專題研究計畫研究成果彙整表

計畫主持人：袁易		計畫編號：103-2410-H-004-129-					
計畫名稱：中國與「武器貿易條約」談判：規範與利益的爭議							
成果項目		量化			單位	備註（質化說明： 如數個計畫共同成果、成果列為該期刊之封面故事...等）	
		實際已達成數（被接受或已發表）	預期總達成數（含實際已達成數）	本計畫實際貢獻百分比			
國內	論文著作	期刊論文	0	0	100%	篇	
		研究報告/技術報告	0	0	100%		
		研討會論文	1	0	100%		
		專書	0	0	100%	章/本	
	專利	申請中件數	0	0	100%	件	
		已獲得件數	0	0	100%		
	技術移轉	件數	0	0	100%	件	
		權利金	0	0	100%	千元	
	參與計畫人力（本國籍）	碩士生	2	0	100%	人次	
		博士生	0	0	100%		
博士後研究員		0	0	100%			
專任助理		0	0	100%			
國外	論文著作	期刊論文	0	0	100%	篇	
		研究報告/技術報告	0	0	100%		
		研討會論文	0	0	100%		
		專書	0	0	100%	章/本	
	專利	申請中件數	0	0	100%	件	
		已獲得件數	0	0	100%		
	技術移轉	件數	0	0	100%	件	
		權利金	0	0	100%	千元	
	參與計畫人力（外國籍）	碩士生	2	0	100%	人次	
		博士生	0	0	100%		
博士後研究員		0	0	100%			
專任助理		0	0	100%			
其他成果 （無法以量化表達之 成果如辦理學術活動、 獲得獎項、重要國際 合作、研究成果國際 影響力及其他協助產 業技術發展之具體效 益事項等，請以文字 敘述填列。）		具體成果已在the 43rd Taiwan-American Conference China (12/4-5, 2014)發表，並投稿 Issues and Studies, 目前在修正中。					

	成果項目	量化	名稱或內容性質簡述
科教處計畫加填項目	測驗工具(含質性與量性)	0	
	課程/模組	0	
	電腦及網路系統或工具	0	
	教材	0	
	舉辦之活動/競賽	0	
	研討會/工作坊	0	
	電子報、網站	0	
	計畫成果推廣之參與(閱聽)人數	0	

# 科技部補助專題研究計畫成果報告自評表

請就研究內容與原計畫相符程度、達成預期目標情況、研究成果之學術或應用價值（簡要敘述成果所代表之意義、價值、影響或進一步發展之可能性）、是否適合在學術期刊發表或申請專利、主要發現或其他有關價值等，作一綜合評估。

1. 請就研究內容與原計畫相符程度、達成預期目標情況作一綜合評估

達成目標

未達成目標（請說明，以100字為限）

實驗失敗

因故實驗中斷

其他原因

說明：

2. 研究成果在學術期刊發表或申請專利等情形：

論文： 已發表  未發表之文稿  撰寫中  無

專利： 已獲得  申請中  無

技轉： 已技轉  洽談中  無

其他：（以100字為限）

3. 請依學術成就、技術創新、社會影響等方面，評估研究成果之學術或應用價值（簡要敘述成果所代表之意義、價值、影響或進一步發展之可能性）（以500字為限）

本研究計畫乃為針對中國大陸在傳統武器國際條約的約束下之反應，由於中國大陸的武器出口目前已為全球排名第四，此一出事之發展恐會對地區穩定產生衝擊，質得密切觀察，此乃本研究之價值所在。