

ISSUE BRIEF

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Arms Trade Treaty Could Jeopardize U.S. Ability to Provide for Taiwan's Defense

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The U.N. Arms Trade Treaty (ATT) will be negotiated in July in New York. One reason to be concerned about the ATT is the risks that it poses to America's ability to sell arms to Taiwan. The U.S. is legally—as well as strategically and morally—obliged to provide for Taiwan's defense. It should neither sign nor ratify a treaty that would increase the difficulty of meeting that commitment.

The U.S.'s Legal Obligation to Provide for Taiwan's Defense. The U.S. is obligated by the 1979 Taiwan Relations Act (TRA) to make available the hardware and services necessary for Taiwan's defense. The Act makes it clear that U.S. arms sales to Taiwan will be based solely on Taiwan's defense needs and not on consultation with the People's Republic of China (PRC).¹ Something as simple as Assistant Secretary

of State Thomas Countryman's allowance for "bilateral diplomatic exchanges [with China, about proposed arms exports] to seek to find mutual accommodations about our differing views of the world and the common interest of promoting regional security"² could be, in the context of arms sales to Taiwan, a violation of U.S. law.

The weight of this legal obligation is increased by the fact that Taiwan is a democracy under threat from the non-democratic PRC. When the United States chose to recognize the PRC as the government of China in 1979, it nonetheless felt a moral obligation to help the people of Taiwan defend themselves.

There are also strategic considerations at work. Taiwan is part of a chain of islands extending the length of China's coastline whose owners are allied to the U.S. This "first island chain," stretching from Japan through Taiwan and the Philippines to the Strait of Malacca, gives the U.S. an invaluable geopolitical position, both to monitor developments within the PRC and to protect some of the world's most important sea lanes.

Challenges Posed By the ATT to the U.S. Obligation to Taiwan. In June 2010, the U.S. State Department set out "several

challenges" that affected the U.S. as it began the ATT negotiations. These included "[s]pecific regional or country concerns, including Taiwan, China, and the Middle East [that] create challenges for establishing criteria that can be applied without exception and fit U.S. national security interests. These concerns would make Senate ratification difficult."³

One reason for the State Department's concern is that the ATT is likely to recognize—in the words of the current Chairman's Draft Paper, the closest equivalent to a draft treaty currently available—"the inherent right of all States to individual or collective self-defense," and thus their right to buy, sell, and transfer arms. But Taiwan is not a U.N. member state, nor is it recognized as sovereign by a majority of U.N. member states. It thus appears that the ATT will not recognize Taiwan's right to buy or import arms.

Moreover, the ATT will require signatories to control their imports and exports of arms. It will be incumbent on treaty signatories not to circumvent the import control systems of other signatories. The PRC claims—correctly—that it operates the import control system for China, and, much more controversially, that Taiwan also constitutes part of its

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territory. By the same token, the Chairman's Draft Paper uses terminology from the U.N. Charter to reaffirm "the right of all States to territorial integrity." The ATT thus provides the basis for a Chinese argument that U.S. sales or transfers of arms to Taiwan would circumvent the PRC's import control system, violate China's territorial integrity, and thus violate the treaty.

Finally, the ATT will very likely establish a series of criteria that treaty signatories are required to apply to proposed arms transfers. One of these criteria is likely to be that arms transfers should not "seriously undermine peace and security or provoke, prolong or aggravate internal, regional, subregional or international instability." Since the Chinese civil war has never been formally concluded, a state of war still exists between Taiwan and the PRC. Consequently, this criterion offers the PRC a third argument that U.S. sales or transfers to Taiwan would violate the terms of the ATT.

ATT Will Enable PRC "Lawfare," Threatening Taiwan's Ability to Defend Itself. The ATT poses three distinct, but overlapping, threats to the legal obligation of the U.S. to provide for the defense of Taiwan, or to the ability of Taiwan to provide for its own defense.

1. Chinese pursuit of legal warfare. Over the past decade, the PRC has developed a sophisticated understanding of lawfare,

or legal warfare. The PRC understands lawfare as a form of combat that can hamstring opponents, thereby allowing China to seize the political initiative. Lawfare raises doubts among adversary and neutral military and civilian authorities, as well as the broader population, about the legality of their actions. It thereby diminishes political will and potentially hinders military activities.⁴ If the U.S. signed and ratified the ATT, the PRC could, on one or all of the grounds noted above, argue that U.S. arms sales to Taiwan constitute a violation of the ATT. The ATT will thus enhance the PRC's ability to wage legal warfare.

2. Supposed establishment of international law. Even if the U.S. does not sign and ratify the ATT, the treaty will be interpreted wrongly by its signatories and the international legal community, including many influential legal scholars in the United States, as constituting customary international law. The PRC would be able to use this interpretation in international venues—including the U.N.—to back its claim that the U.S. is a violator of international law. The U.S. would have to confront this campaign, while the ATT would certainly discourage any nation other than the U.S. from supplying arms to Taiwan. Depending on how broadly the ATT defined the parts and

components to which it applies, it could also discourage other nations from trading in dual-use items with Taiwan.

3. Conflicts with the Taiwan Relations Act. For one or more of the reasons noted above, the obligations of the U.S. under the ATT—if it were to sign and ratify the treaty—would likely conflict with its obligations under the TRA. While the U.S. Administration of the day would ask its lawyers to weigh in on this conflict, there is no ironclad legal procedure for resolving such conflicting obligations: Any resolution would have to come via a political decision of the President.

A U.S. Administration that earnestly wished to fulfill its obligations under the TRA would likely do so, regardless of the ATT. But a U.S. Administration that believed U.S. sales to Taiwan endangered U.S. relations with the PRC, or did not want to sell arms to Taiwan for any other reason, would be able to cite the ATT as a reason not to proceed with those sales. The PRC would certainly make this argument to the U.S. and assert that the U.S. would be violating international law by proceeding with the sales. Even if the U.S. does not sign or ratify the ATT, U.S. legal scholars who interpret it as customary international law could use it to argue that the U.S. should not proceed with a proposed sale.

1. Dean Cheng, "Getting Serious About Taiwan's Air Power Needs," Heritage Foundation *Backgrounders* No. 2616, October 14, 2011, <http://www.heritage.org/research/reports/2011/10/getting-serious-about-taiwans-air-power-needs>.
2. Assistant Secretary of State Thomas Countryman, "Positions for the United States in the Upcoming Arms Trade Treaty Conference," U.S. Department of State, April 16, 2012, <http://www.state.gov/t/isn/rls/rm/188002.htm> (accessed June 8, 2012).
3. "Policy Dialogue: The Arms Trade Treaty: Policy Issues for the United States, Summary Report," U.S. State Department, June 21, 2010, <http://www.state.gov/documents/organization/148527.pdf> (accessed June 8, 2012).
4. Dean Cheng, "Winning Without Fighting: Chinese Legal Warfare," Heritage Foundation *Backgrounders* No. 2692, May 21, 2012, <http://www.heritage.org/research/reports/2012/05/winning-without-fighting-chinese-legal-warfare>.

What the U.S. Should Do. The ATT can only raise yet another hurdle to U.S. arms sales to Taiwan. Given the bipartisan commitment to the defense of Taiwan, embodied in the TRA, the State Department is correct to recognize that this poses a serious challenge to Senate ratification of the ATT. But as serious as the Senate's advice and consent responsibility is, the problems raised by the ATT go beyond the issue of ratification.⁵

The ATT is based on the futile quest for "criteria [for arms sales]

that can be applied without exception." No such criteria exist: Arms sales, like international relations as a whole, are always a matter for judgment. In the July negotiations, the U.S. should make it clear that it cannot accept any treaty that would impinge on its ability to apply that judgment to its legal obligation to provide for the defense of Taiwan, and that it will not regard any ATT as constituting customary international law. Elected officials have the broader responsibility to make it clear that they recognize the

importance of the U.S. commitment to Taiwan, and to stand by that commitment in word and deed.

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5. For some of these problems, see Ted R. Bromund, "The Risks the Arms Trade Treaty Poses to the Sovereignty of the United States," *Heritage Foundation Issue Brief* No. 3622, June 4, 2012, <http://www.heritage.org/Research/Reports/2012/06/Arms-Trade-Treaty-and-the-Sovereignty-of-the-United-States>.