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American Companies, Taiwan, and U.S. Anti-boycott Law

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The recent news that China threatened Boeing Aircraft because of the company's dealings with Taiwan only sharpens the sense of cynicism prevalent among critics of the Bush Administration's China policy, but China's actions raise a more pressing question: Are U.S. firms that heed China's warnings about conducting business with Taiwan in violation of U.S. anti-boycott law?

Anti-boycott Law. In the mid-1970s, Congress passed two laws designed to ban participation by U.S. firms in other nations' economic boycotts or embargoes when they are not sanctioned by the U.S.: the Ribicoff Amendment to the 1979 Tax Reform Act and the 1977 amendments to the Export Administration Act. The point of the anti-boycott laws was to require U.S. firms to refuse participation in foreign boycotts that the U.S. does not sanction.¹ In other words, American companies are prohibited from collaborating in other nations' foreign or military policies that run counter to U.S. policy.

Originally designed to discourage U.S. businesses from abetting Arab boycotts against Israel, the Export Administration Act defines boycotts as:

refusing, or requiring any other person to refuse, to do business with or in the boycotted country, with any business concern organized under the laws of the boycotted country, with any national or resident of the boycotted country, or with any other person, pursuant to an agreement with, a requirement of, or a request from or on behalf of the boycotting country.²

This definition provides very few loopholes, and for good reason: The United States should not allow unfriendly or hostile foreign governments to use U.S. businesses as economic weapons against America's friends or allies. Israel was and is a friend, and under U.S. domestic law, so is Taiwan.

A U.S. company violates anti-boycott law if it acts to comply with, further, or support a boycott imposed by a foreign country against a nation friendly to the United States. Additionally, in order for a violation to occur, the friendly nation must not be the object of any form of boycott pursuant to U.S. law.³

Companies must report any requests they receive to undertake conduct that would violate this prohibition.⁴ For example, if Arab countries threaten to boycott Boeing's products because the company supplied military equipment to Israel, U.S. law would require Boeing to report such threats to the United States government, and Washington presumably would take retaliatory action.⁵

A Chinese Boycott. On May 12, 2008, *Defense News* reported that over the past two years, China has threatened to stop buying commercial airliners from Boeing, or rotary-winged aircraft from Bell

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Helicopter and Sikorsky, if these companies continue to sell weapons and “advanced helicopter technologies” to Taiwan.⁶

It comes as little surprise that China is threatening foreign companies in order to strengthen its own embargo against Taiwan. However, in light of the recent *Defense News* report, corporate attorneys may want to thumb through the Code of Federal Regulations to ensure that their companies are not neglecting the reporting obligations or anti-boycott provisions of the Export Administration Regulations.

U.S. defense firms are insulated from some of China’s wrath because they sell most of their defense equipment to Taiwan through the Pentagon’s foreign military sales (FMS) component of the Defense Security Cooperation Agency. Because these companies hold their military dealings with Taiwan at arm’s length, they may not have an “intent to comply” with the boycott. After all, they know their products and services will get to Taiwan via FMS and the U.S. government.

However, firms should be aware that far lesser actions than refusing to sell arms to Taiwan could be a violation. For example, failing to report that China (or an Arab country) had made a boycott request is

a violation of the statute, as Hansen Aggregates West, Inc., discovered in 1999.⁷ In order to comply fully with anti-boycott law, U.S. defense industry companies would seem obliged by law to notify the Commerce Department via Form BIS-621P⁸ each time they receive specific threats from the Chinese government or its agents about their business with Taiwan.

Other U.S. companies, however, have complied with Chinese government threats. No one who does business in China would doubt that U.S. companies and individuals are routinely threatened, cajoled, warned, or otherwise importuned to sever relations with Taipei, but U.S. companies have also been enlisted to put pressure on Taiwanese *commercial entities* because such organizations supposedly “support Taiwan independence” in some form or another.⁹

For example, in 2001, China blacklisted Credit Suisse First Boston (CSFB) because the U.S.-based investment bank invited Taiwan’s finance minister to speak at a conference. According to *The New York Times*, China’s sanction of CSFB prompted two other U.S. firms, Goldman Sachs and Merrill Lynch, to drop plans to sponsor similar events with Taiwan’s government.¹⁰

1. 50 U.S.C. App. 2407(a); 15 C.F.R. § 760.2.
2. Section 2407(a)(1)(A) of the Export Administration Act of 1979 (PL 96-72 of September 29, 1979) as amended.
3. 50 U.S.C. App. 2407(a)(1)(A); 15 C.F.R. § 760.2(1), (2).
4. 50 U.S.C. App. (b)(2); 15 C.F.R. § 760.5.
5. See also “Remarks of Assistant Secretary of Commerce for Export Enforcement Darryl W. Jackson and Director of Antiboycott Compliance Ned Weant, Industry Coalition on Technology Transfer Meeting,” April 9, 2008, at <http://www.bis.doc.gov/news/2008/djackson04092008.html> (June 18, 2008).
6. Wendell Minnick and Vago Muradian, “China Threatens U.S. Defense Contractors over Taiwan,” *Defense News*, May 12, 2008, p. 4.
7. U.S. Department of Commerce, Bureau of Industry and Security, Office of Antiboycott Compliance, “Don’t Let This Happen to You!,” at <http://www.bis.doc.gov/antiboycottcompliance/casehistories/oaccasehistories2.html> (June 7, 2008).
8. U.S. Department of Commerce, Bureau of Industry and Security, “Report of Request for Restrictive Trade Practice Or Boycott Single Transaction,” at <http://www.bis.doc.gov/antiboycottcompliance/doc/bis-621p.pdf> (June 18, 2008).
9. According to the private comments of a former chairman of Taiwan’s Council for Economic Planning and Development, a Taiwanese electronics firm (whose proprietor was identified in the Chinese media as “pro independence”) was forced to sell its China production lines to a rival in 2003. The sale took place when a major U.S. electronics firm informed the Taiwan company that it could no longer purchase its components. Because the U.S. firm was the Taiwan firm’s biggest customer, the Taiwan firm was obliged to sell out to another Taiwan firm that was approved by the Chinese government.
10. Craig S. Smith, “U.S. Diplomat Said to Protest Chinese Actions on First Boston,” *The New York Times*, September 6, 2001, at <http://query.nytimes.com/gst/fullpage.html?res=9E0DE6D61239F935A3575AC0A9679C8B63> (June 18, 2008).

Were the firms' actions an example of an "agreement to refuse or actual refusal to do business with or in [Taiwan] or with blacklisted companies," which is prohibited under the anti-boycott provisions of the Export Administration Regulations?¹¹ If Goldman Sachs and Merrill Lynch were not responding to pressure from the Chinese, perhaps China's aggressive response to CSFB sent a strong signal to the other institutions that support for Taiwan will carry considerable economic consequences. If the two firms took action to preempt a Chinese objection, the law does not necessarily require a report. However, if China did make its opposition explicit, the affected companies are required to report such interference.

Perhaps the firms assumed that the anti-boycott regulations applied only to Arab and Islamic boycotts against Israel and Jewish persons and were unaware that Congress also intended these rules to apply to Chinese-enforced boycotts against Taiwan. Or it may be that the U.S. Department of Commerce is unaware that the boycott applies to China-Taiwan, as its Web-based information on anti-boycott legislation refers exclusively to Israel-Jewish acts.¹² If the U.S. government's message concerning the parameters of its own anti-boycott laws is ambiguous, ensuring corporate adherence will be difficult.

Regardless of the Commerce Department's confusion, Taiwan may well be covered by U.S. anti-boycott law. In 1979, the House of Representatives included language in its draft of the Taiwan Relations Act (TRA) stipulating that "in interpreting the word 'boycott' in this act, Taiwan shall be considered a 'friendly' country under the antiboycott provisions of the Export Administration Act of 1969."¹³ This provision was not retained in the legislation as passed. The reason:

[I]t is included, in substance, in section 4 which is described in "Application of Laws, International Agreements," below.... Section 4(b)(1) specifically provides that U.S. laws referring or relating to a foreign country shall apply with respect to Taiwan, and Section 4(b)(8) makes clear that Taiwan will be treated as a "friendly country" for purposes of United States laws. *The anti-boycott provisions of the Export Administration Act, for example, are made applicable with respect to Taiwan by these sections.*¹⁴

TRA Section 2(B)(4) also states an intent "to consider any effort to determine the future of Taiwan by other than peaceful means, including by *boycotts* or embargoes, a threat to the peace and security of the Western Pacific area and of grave concern to the United States."

Next Steps for the Administration and Congress. Foreign government boycotts against countries "friendly" to the United States that are not specifically approved by the U.S. government run counter to United States foreign policy goals. Yet there are countless instances of U.S. persons, both corporations and individuals, supporting Chinese boycott demands against at least one country "friendly" to the United States—Taiwan.

Presumably, the Administration would wish, and the Congress certainly intends, that U.S. persons be enjoined from participating in China's economic campaign against Taiwan, but it is so much a part of the business landscape that most U.S. companies surely view compliance with Chinese boycott demands as an annoying but unavoidable cost of doing business in that communist country. Such behavior will cease only if the U.S. government takes the following steps:

11. U.S. Department of Commerce, Bureau of Industry Security, Office of Antiboycott Compliance, "Who Is Covered by the Laws?" at <http://www.bis.doc.gov/antiboycottcompliance/oacrequirements.html#whatsprohibited> (June 7, 2008).
12. *Ibid.* For example, under "Conduct that may be penalized under the TRA and/or prohibited under the EAR" the Web site lists "Agreements to refuse or actual refusal to do business with or in Israel or with blacklisted companies," and anti-boycott case histories are exclusively anti-Israel cases. Also See U.S. Department of Commerce, Bureau of Industry Security, Office of Antiboycott Compliance, "Case History Examples," at <http://www.bis.doc.gov/antiboycottcompliance/oaccasehistories.html> (June 7, 2008).
13. *Taiwan Relations Act Conference Report: Joint Explanatory Statement of the Committee of Conference*, H. Rpt. 96-71, 96th Cong., March 24, 1979, p. 12.
14. *Ibid.*, p. 13. Emphasis added.

1. **Advise U.S. businesses that anti-boycott provisions apply to Taiwan.** It is quite likely that few, if any, U.S. persons have actually focused on the applicability of the 30-year-old Taiwan Relations Act to anti-boycott regulations and Taiwan.
2. **Remind U.S. businesses that they must report Chinese pressure to boycott Taiwan.** Any commercial behavior vis-à-vis Israel that the law would find abhorrent would likely be found objectionable when directed against Taiwan. U.S. businesses may be obligated to report instances of foreign government, corporate, or personal inducements or threats to participate in a boycott of Taiwan's government or companies.
3. **Take Remedial Action.** Presuming that U.S. companies file the required reports, the U.S. government should develop a large report base to buttress formal diplomatic demarches against China. Of course, the Chinese are notoriously oblivious to U.S. demarches, but it is possible to shame the Chinese by bringing their practices into the light of day by regular notifications to Congress, via the U.S. Department of Commerce or the U.S. Trade Representative, of the number and type of such incidents.

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