

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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MINGTAI FIRE & MARINE INSURANCE CO., LTD.,

Plaintiff-Appellant,

v.

UNITED PARCEL SERVICE, INC., et al.,

Defendants-Appellees.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

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BRIEF FOR THE UNITED STATES  
AS AMICUS CURIAE

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IN THE UNITED STATES COURT OF APPEALS  
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No. 98-15088

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
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NO. C-97-20211-JW

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BRIEF FOR THE UNITED STATES  
AS AMICUS CURIAE

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Pursuant to Rule 29 of the Federal Rules of Appellate  
Procedure, the United States submits this brief as amicus curiae.

**INTEREST OF THE UNITED STATES**

The question presented on this appeal is whether the adherence to an international agreement by the People's Republic of China ("PRC") binds Taiwan. The United States has a very strong interest in ensuring that it does not. The United States has not recognized in the PRC a power to bind Taiwan to the PRC's

international commitments. To the contrary, through executive orders and legislation, the President and Congress have ensured that the United States may maintain separate relations with the authorities on Taiwan.

The United States submits this amicus brief to make clear that plaintiff's position, if accepted, would create significant foreign policy problems for the United States. As this Court has recognized, the views of the executive branch on matters of foreign policy are entitled to great weight. See Taiwan v. United States District Court for the Northern District of California, 128 F.3d 712, 718 (9th Cir. 1997) (holding that the State Department's interpretation of a statute addressing foreign policy matters "is entitled to substantial deference in light of the 'primacy of the Executive in the conduct of foreign relations' and the Executive Branch's lead role in foreign policy") (quoting First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 767 (1972) (plurality)).



**STATEMENT OF THE ISSUE PRESENTED FOR REVIEW**

Whether the People's Republic of China's adherence to the Warsaw Convention is binding on Taiwan.

**STATEMENT OF THE CASE**

**A. Foreign Policy Background.**<sup>1</sup>

**1. Relations Between the United States and Taiwan.**

When President Carter established diplomatic relations with the People's Republic of China on January 1, 1979, he ended diplomatic relations with the Republic of China (Taiwan). See Taiwan, 128 F.3d at 714. The President did not, however, recognize in the PRC a power to make its international agreements and arrangements binding on Taiwan.

To the contrary, the President determined that the United States would "maintain commercial, cultural and other relations with the people of Taiwan without official government representation and without diplomatic relations." President's Memorandum for All Departments and Agencies on Relations With the

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<sup>1</sup> Pertinent executive orders and statutory provisions are reproduced in the addendum to this brief.

People on Taiwan (Dec. 30, 1978), 44 Fed. Reg. 1075 (1979).<sup>2</sup> To that end, the President declared that federal "[d]epartments and agencies currently having authority to conduct or carry out programs, transactions, or other relations with or relating to Taiwan are directed to conduct and carry out those programs, transactions, and relations" through an unofficial instrumentality that would be created by statute. Ibid. The President emphasized that "[e]xisting international agreements and arrangements in force between the United States and Taiwan" were not altered by the recognition of the PRC, but instead would "continue in force and [would] be performed and enforced by departments and agencies \* \* \* through that instrumentality." Ibid. See generally New York Chinese TV Programs, Inc. v. U.E. Enterprises, Inc., 954 F.2d 847, 850-51 (2d Cir.), cert. denied, 506 U.S. 827 (1992).

The President's direction to continue separate relations with Taiwan was codified in the Taiwan Relations Act of 1979, Pub. L. No. 96-8, 93 Stat. 14, 22 U.S.C. § 3301 et seq. ("TRA").

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<sup>2</sup> This presidential memorandum was superseded by Exec. Order No. 12,143 (June 22, 1979), 44 Fed. Reg. 37,191 (1979), which was in turn superseded by Exec. Order No. 13,014 (Aug. 15, 1996), 61 Fed. Reg. 42,963 (1996).

In enacting this legislation, Congress sought "to promote the foreign policy of the United States by authorizing the continuation of commercial, cultural, and other relations between the people of the United States and the people on Taiwan." 22 U.S.C. § 3301(a). See also Taiwan, 128 F.3d at 714; New York Chinese TV, 954 F.2d at 851.

Under the TRA, these relations are to be conducted on behalf of the United States by a nonprofit corporation called the American Institute in Taiwan ("AIT" or "Institute"), see 22 U.S.C. § 3305(a), and on behalf of the people of Taiwan by an instrumentality called the Taipei Economic and Cultural Representative Office ("TECRO") (formerly known as the Coordination Council for North American Affairs ("CCNAA")). See 22 U.S.C. § 3309(a); Exec. Order No. 12,143 (June 22, 1979), 44 Fed. Reg. 37,191 (1979) (recognizing CCNAA as the instrumentality with authority to act on behalf of Taiwan); Exec. Order No. 13,014 (Aug. 15, 1996), 61 Fed. Reg. 42,963 (1996) (recognizing TECRO as CCNAA's successor). See generally Taiwan, 128 F.3d at 714 (describing this background).<sup>3</sup>

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<sup>3</sup> For ease of exposition we will use the name TECRO to refer (continued...)

The TRA makes plain that "[t]he absence of diplomatic relations or recognition shall not affect the application of the laws of the United States with respect to Taiwan \* \* \*." 22 U.S.C. § 3303(a). The TRA expressly states that "[f]or all purposes, including actions in any court of the United States, the Congress approves the continuation in force of all treaties and other international agreements, including multilateral conventions, entered into by the United States and the governing authorities on Taiwan" before January 1, 1979, unless and until terminated in accordance with law. Id. § 3303(c). The TRA further provides that "[w]henver the President or any agency of the United States is authorized or required by or pursuant to the laws of the United States to enter into, perform, enforce, or have in force an agreement \* \* \* relative to Taiwan, such agreement \* \* \* shall be entered into, performed, and enforced, in the manner and to the extent directed by the President, by or through the Institute." Id. § 3305(b). Finally, the TRA requires the Secretary of State to transmit to Congress the text of any agreement to which the Institute is a party (unless such

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<sup>3</sup>(...continued)  
to both TECRO and CCNAA.

public disclosure would prejudice national security interests).  
Id. § 3311(a).<sup>4</sup>

Pursuant to the Taiwan Relations Act, AIT has entered into at least 87 agreements with TECRO since 1979. See 61 Fed. Reg. 33,948 (1996) (listing AIT-TECRO agreements as of July 1, 1996). See also Treaties in Force 315-316 (January 1, 1997) (listing pre-1979 U.S.-Taiwan agreements currently in force); New York Chinese TV, 954 F.2d at 849-52 (holding that the Treaty of Friendship, Commerce and Navigation that the Republic of China signed with the United States in 1946 remains in force).

## **2. The Warsaw Convention.**

The Convention for the Unification of Certain Rules Relating to International Transportation by Air (1929), 49 Stat. 3000 (49 U.S.C. 40105 note), popularly known as the Warsaw Convention, is an international agreement that prescribes an extensive set of legal principles applicable to the international air transportation of persons, baggage, and goods. At the core of

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<sup>4</sup> By executive order, the President has delegated many of his functions under the TRA to the Secretary of State. See Exec. Order No. 12,143, § 1-1 (June 22, 1979), 44 Fed. Reg. 37,191 (1979); Exec. Order No. 13,014, § 1 (Aug. 15, 1996), 61 Fed. Reg. 42,963 (1996).

the Convention is a series of provisions governing the nature and scope of a carrier's liability for three categories of harms – personal injury, damaged or lost goods or baggage, and damage due to delay – that occur in the course of international air travel.

The Warsaw Convention applies if the place of departure and the place of destination are situated either within the territories of two parties to the Convention, or within the territory of a single party to the Convention, if there is an agreed stopping place outside that territory. See Warsaw Convention, Article 1.

Adherence to the Convention is effected by depositing an instrument with the Polish government. See Warsaw Convention, Articles 37, 38. The United States adhered to the Convention in 1934. See T.S. No. 896, 49 Stat. 3000 (1934). The Republic of China never adhered to the Convention. See Goldhirsch, The Warsaw Convention Annotated: A Legal Handbook App. 9 (1988).

The People's Republic of China adhered to the Convention in 1958. See Shawcross & Beaumont, Air Law App. 17 (1997) (ER 30). In adhering to the Convention, the PRC made a declaration purporting to extend the Convention to Taiwan. See id. at App.

21 n.8 (ER 34) (declaration stating that the Convention "will of course apply to the entire Chinese territory including Taiwan"). In response to the PRC's declaration, the United States informed the Polish government – the depository for the Warsaw Convention – that, since the United States recognized "the Government of the Republic of China as the only legal Government of China and does not recognize the so-called 'People's Republic of China', it regards this action as being without legal effect." Department of State File # 399.72/7-359 (Sept. 17, 1959). The authorities on Taiwan have consistently maintained that the R.O.C. never adhered to the Convention and that Taiwan is therefore not bound by its terms.

**B. Factual Background And Proceedings Below.**

Plaintiff Mingtai Fire & Marine Insurance Company brought this action against UPS for losing cargo that plaintiff had insured.

UPS apparently promised to carry the cargo from Taipei, Taiwan to San Jose, California, but failed to do so. Complaint ¶¶ 8-11 (ER 3-5). Mingtai sued UPS, alleging a claim under the Warsaw Convention for loss of cargo, as well as various state law

claims. Complaint ¶¶ 7-29 (ER 3-9). Mingtai sought \$83,454.80 in damages. Complaint at 9 (ER 9).

The district court granted summary judgment for UPS on the Warsaw Convention claim. Citing the Taiwan Relations Act, the district court held that the PRC's adherence to the Warsaw Convention does not bind Taiwan. Order 5-8 (ER 72-76). The court further held that the Federal Aviation Administration Authorization Act of 1994 preempts plaintiff's state law claims, apart from the claim for breach of contract. Order 8-10 (ER 76-78). The court held that the contract between UPS and the company insured by plaintiff limited UPS's liability for breach of contract to \$100, and awarded plaintiff \$100 on that claim. Order 10 (ER 78).

#### **SUMMARY OF ARGUMENT**

The question presented on this appeal is whether, when the PRC consents to be bound by an international agreement, it also binds the authorities on Taiwan. The district court correctly held that it does not.

In 1958, when the PRC deposited its declaration of adherence to the Warsaw Convention, the United States and most other



members of the international community recognized the Republic of China as the only legal government of China. Indeed, the ROC held the China seat at the United Nations. The ROC never adhered to the Warsaw Convention and the United States has never concluded that the Convention is in force with respect to Taiwan. See Treaties in Force 315-16, 329; Department of State File # 399.72/7-359.

On January 1, 1979, the United States recognized the PRC as the sole legal government of China. When the United States recognized the PRC, both political branches took steps to ensure that the United States could continue to have separate relations with the people on Taiwan. The President issued a memorandum directing federal departments and agencies to conduct unofficial relations with Taiwan through an instrumentality soon to be created by statute. Congress enacted the Taiwan Relations Act to implement that presidential directive and to establish the American Institute in Taiwan, the instrumentality that acts on behalf of the United States in entering agreements with TECRO, the counterpart instrumentality on Taiwan. Since 1979, the AIT

has entered into at least 87 agreements with TECRO that regulate U.S.-Taiwan relations in many important fields.

Plaintiff's arguments all start with the premise that the district court's ruling contravenes U.S. foreign policy. That premise is incorrect. In fact, it is plaintiff's position that has the potential to undermine the foreign policy that the executive branch and the legislature have jointly established. The judgment of the district court should therefore be affirmed.

#### ARGUMENT

##### **ADHERENCE TO THE WARSAW CONVENTION BY THE PEOPLE'S REPUBLIC OF CHINA DOES NOT BIND THE AUTHORITIES ON TAIWAN.**

The district court held that the PRC's adherence to the Warsaw Convention does not bind the authorities on Taiwan. This decision is correct.

A. On January 1, 1979, the United States recognized the PRC as the sole legal government of China. See Exec. Order No. 12,143 (June 22, 1979), 44 Fed. Reg. 37,191 (1979). As explained, when the United States recognized the PRC, both political branches took steps to ensure that the United States could continue to have separate relations with the people on Taiwan. The President declared that existing agreements between

the United States and Taiwan would remain in force, and directed federal departments and agencies to carry out new agreements through an instrumentality that would soon be created by statute. See President's Memorandum for All Departments and Agencies on Relations With the People on Taiwan (Dec. 30, 1978), 44 Fed. Reg. 1075 (1979). Congress codified this presidential directive in the Taiwan Relations Act, which reaffirmed that existing agreements with Taiwan would remain in force, see 22 U.S.C. § 3303(c), and which provided that new agreements would be entered into, at the President's direction, through the American Institute in Taiwan. Id. § 3305(b).

The legislative history of the TRA confirms that the political branches intended that the United States would maintain separate arrangements with Taiwan. According to the Conference Report, "[t]he conference substitute provides that \* \* \* relations with respect to Taiwan shall be conducted through the American Institute in Taiwan" and "includes the Senate provision expressly granting authority for the Institute to enter into, perform, and enforce agreements and other transactions with respect to Taiwan." H.R. Conf. Rep. No. 96-71, at 14-16 (1979),

reprinted in 1979 U.S.C.C.A.N. 36, 95, 98-100. Deputy Secretary of State Warren Christopher testified that "[t]he United States \* \* \* would find no difficulty if the [TRA] is passed in treating the people on Taiwan as a valid treaty partner for purposes of important treaties, such as aviation arrangements \* \* \*."

Taiwan: Hearings Before the Senate Committee on Foreign Relations on S. 245, 96th Cong., 1st Sess. 49 (Feb. 5, 1979). He explained that "[u]nder international law, I think that our judgment is clear that it is legally permissible to have a treaty or an agreement with an entity that is not formally recognized as a government." Id.<sup>5</sup>

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<sup>5</sup> See also, e.g., Taiwan: Hearings Before the Senate Committee on Foreign Relations on S. 245, 96th Cong., 1st Sess. 84 (Feb. 5, 1979) (statement of the Department of State Legal Adviser Herbert J. Hansell) (explaining that AIT and TECRO "would be the mechanism through which a new agreement [with Taiwan], if there were to be a new agreement, would be entered into"); Implementation of the Taiwan Relations Act: Hearings Before the Subcommittee on Asian and Pacific Affairs of the House Committee on Foreign Affairs, 96th Cong., 2d Sess. 27 (June 11, 1980) (statement of Richard Holbrooke, Assistant Secretary of State for East Asian and Pacific Affairs) ("[O]ur relationship with Taiwan is not static. \* \* \* I want to emphasize that we do not have a policy to replace or terminate all of the treaties and agreements that we maintain with Taiwan. Each agreement, as the circumstances require, will be considered on its own merits, on a case-by-case basis.").

Pursuant to the Taiwan Relations Act and the executive orders addressing relations with Taiwan, AIT has entered into at least 87 agreements with TECRO, including seven agreements that govern aviation. See 61 Fed. Reg. 33,948 (1996). In addition, the Treaty of Friendship, Commerce and Navigation that the Republic of China signed with the United States in 1946 has remained in force since that time. See Treaties in Force 315-316 (January 1, 1997); New York Chinese TV, 954 F.2d at 851.

B. Plaintiff argues that the district court's decision contravenes the President's decision to recognize the PRC. Plaintiff asserts that the court violated separation of powers principles by usurping the President's power to determine foreign policy.

These arguments are predicated on the assumption that the district court's ruling "contradicts U.S. foreign policy." Pl. Br. 13. As explained above, this assumption gets U.S. foreign policy exactly backwards. Indeed, it is plaintiff's position that, if accepted, would have the potential to undermine the legal and political edifice that the legislative and executive

branches co-authored and that has successfully governed U.S.-Taiwan unofficial relations for nearly twenty years.

Plaintiff suggests that the district court erred by deciding a political question, and violated the act of state doctrine by declaring the PRC's effort to adhere to the Warsaw Convention on Taiwan's behalf invalid. These arguments are meritless.

The Taiwan Relations Act and the executive orders addressing relations with Taiwan demonstrate that any "political question" has been resolved by the political branches. The legislature and the executive branch agree that Taiwan is not bound by the PRC's treaty regime, but instead may maintain separate agreements with the United States.

The act of state doctrine is "a consequence of domestic separation of powers, reflecting 'the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder' the conduct of foreign affairs." W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l, 493 U.S. 400, 404 (1990) (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964)). See also Credit Suisse v. United States District Court for the

Central District of California, 130 F.3d 1342, 1346 (9th Cir. 1997). The doctrine is implicated only if the relief sought or the defense interposed in a lawsuit would "require[] a court of the United States to declare invalid the official act of a foreign sovereign performed within its own territory."

Kirkpatrick, 493 U.S. at 405; Credit Suisse, 130 F.3d at 1346.

The district court was not asked to invalidate the PRC's effort to adhere to the Warsaw Convention on Taiwan's behalf, and did not do so. The President and Congress already have determined that the PRC may not bind Taiwan to its international agreements. The district court simply followed federal law as set forth in the executive orders and the Taiwan Relations Act. This ruling in no way "'hinder[s]' the conduct of foreign affairs." Kirkpatrick, 493 U.S. at 404 (quoting Sabbatino, 376 U.S. at 423). The district court's judgment should therefore be affirmed.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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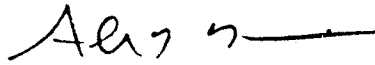
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AUGUST 1998



CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 32

I hereby certify that this brief is double-spaced and uses a monospaced typeface, with 10 characters per inch and 3,163 words.

A handwritten signature in black ink, appearing to read "Alisa B. Klein", written over a horizontal line.

ALISA B. KLEIN

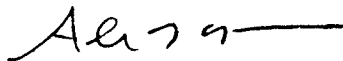
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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of August, 1998, I caused an original and fifteen copies of the foregoing brief to be filed with the Court by regular mail, postage prepaid, and caused two copies of the foregoing brief to be served on the following counsel:

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