

THE POLITICAL SIDE OF CORPORATE LAW: TWO FAILED
MERGERS AND A CAUTIONARY TALE FROM TAIWAN

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I. INTRODUCTION

Corporate decisions are rarely made for economic reasons alone. When reaching a certain level of complexity or scale, businesses and their owners need to observe and evaluate government politics or even participate in those politics to achieve their intended economic outcome. For some corporate decisions there is still a political component, no matter how contractarian they may seem to academics or how economically reasonable or managerially sensible they appear to businesspersons. This is especially true in areas of business where the state actively intervenes for reasons of historical path-dependence or the great number of interests involved.

In theory, such interventions are legitimate when they are designed to balance the potential misuse of corporate power with state interests. However, state interventions also create problems which often accompany governmental action in the market, among them: waste, judgmental error, and rent-seeking. Such political interventions, more often than not, confound already complex corporate decisions and make business owners venture into an area where they either are unfamiliar or could easily make less-than-optimal, perhaps even foolish, decisions.

This article analyzes two failed mergers in Taiwan to showcase the problems that can arise when business owners either care too much or too little about the political impact of their decisions. Rare opportunities to expand in an increasingly competitive market motivated both cases. The first was an attempt by a young banking tycoon to overtake the then-largest state-owned banking group when privatization was under consideration. The second case involved a snack maker with a strong ideology who tried to gain political clout by building his own media empire with a newspaper, news television channel, and one of the largest domestic cable companies. Both cases failed spectacularly. Prosecutors filed several felony charges against the key persons in the first case and the Fair-Trade Commission of Taiwan teamed up with the National Communication Council ("NCC") to block the acquisition in the second one. Behind the actions and reactions in these cases are lessons for a broad audience, one that crosses geography and time, as they highlight the difficulties inherent to making a judgment when politics mix with economics, while law stands in the middle.

There is two distinct goals in examining these cases. From a micro, actor-based perspective, these cases point out the dangers the political side of corporate law poses for large businesses and complex transactions because the incentives, behavior models, and structural variables in the political arena—including the decision-making process and actors—are

all different. When the political side of corporate law persists or even grows, large-business owners either need to improve their political skills to maneuver among political pitfalls and demands, individually or collectively, or face the possibility of giving up their position as controlling shareholders in large corporations, breaking up their conglomerates, and eventually divesting to diversify and thus diminish the political risks. Either scenario may be economically suboptimal before the transition to a new equilibrium, even, when possible, is complete.¹

From a macro, socio-economic angle, this article provides a useful law-and-society study. It offers a snapshot of the current status and development of business law and its operation in Taiwan. These cases illustrate how a country faces the clash of business and politics with a concrete, detailed background discussion of Taiwan's economic and legal development. Additionally, it tells a more general story about the development of business, business law, and the problems encountered once a developing economy becomes a developed one. There exists a larger, more general phenomenon about the seemingly unavoidable collision between political and corporate power. The predicament of Taiwan is valuable for other similarly situated countries facing the same transition, and it might also serve as a friendly reminder to more developed countries around the globe when dealing with political tensions of all varieties.

The second and third parts present two recent cases in Taiwan. The corporate decisions in both cases appeared sensible economically, but both later encountered a political headwind which brought unpredicted resistance and bad consequences. The fourth part provides the social and legal background of these two cases. The fifth part examines how corporate decisions become political ones when government, public opinion, laws, and money collide and create unsolvable problems. It also considers the dynamics, the modes of exchange, the future of this tension, and alternative routes from a generalized perspective. The sixth part focuses on the conclusion.

¹The justification for political intervention is not assumed here. Logically, some political interventions are well reasoned and carefully executed, but some are not. Even in the former scenario, they often come from a political rationale more than an economic one. For those that might enhance overall social welfare, however, businesses may still view them as hostile or damaging (without just compensation). Even when setting the interests of business aside, the net social effect or cost-benefit balance of interventions, when adding in the costs of political decision-making and its enforcement, can be doubtful at times.

II. CASE ONE: CTBC–RED FIRE

A. *The Rise of Chinatrust/CTBC*

Established in 1966, Chinatrust Commercial Bank (renamed "CTBC Bank," a bank subsidiary of the CTBC Financial Holding Company) is currently the largest private commercial bank operating in Taiwan. The CTBC Bank operates 147 branches in Taiwan and 100 oversea outlets with NT \$1.73 trillion in deposits and NT \$2.16 trillion in total assets as of 2019.² Founded by the Koo family, CTBC has been one of the largest and most esteemed privately-owned commercial banks in Asia for decades.³

Its founder, Koo Chen-fu, was an heir of the famous Koo family in central Taiwan, a family that has enjoyed over 200 years of history in Taiwan since its ancestors migrated there from China; the family rose to command notable political and economic influence during the period of Japanese rule (1895–1945).⁴ Koo Chen-fu, born in 1917, inherited the Koo family's economic power and political influence.⁵ He successfully maintained close ties with the Kuomintang (KMT, or Nationalists), the ruling party of the Republic of China in Taiwan from 1949 until 2000, after Japan returned control of Taiwan to the Republic of China (ROC) after World War II.⁶ Maintaining these close ties was difficult, as his

²Originally, Chinatrust was named China Securities and Investment Corporation in 1966. In 1971, its name was changed to Chinatrust Investment Company Limited. In 1992, it was transformed into Chinatrust Commercial Bank. In 2002, CTBC Financial Holding Co., Ltd. (CTBC Holding) was established, and Chinatrust Commercial Bank became its most important subsidiary. Chinatrust Commercial Bank later changed its English name to CTBC Bank in 2013. *CTBC Bank*, CHINATRUST FINANCIAL HOLDING CO. LTD., http://www.ctbcholding.com/en/en_ctcb.html (last visited May 22, 2022); *Corporate Profile*, CHINATRUST FINANCIAL HOLDING CO. LTD., http://www.ctbcholding.com/en/en_abo_intro.html (last visited May 22, 2022); Corporate Finance Institute, *Top Banks in Taiwan*, CORPORATE FINANCE IN TAIWAN, <https://corporatefinanceinstitute.com/resources/careers/companies/top-banks-in-taiwan/> (last visited May 22, 2022).

³*CTBC Bank*, CHINATRUST FINANCIAL HOLDING CO. LTD., http://www.ctbcholding.com/en/en_ctcb.html (visited May 22, 2022); *Jeffrey Koo, Sr. Family*, FORBES, <https://www.forbes.com/profile/koo-jeffrey-sr-family/?sh=6f1fc5a736a6> (last visited May 22, 2022).

⁴See generally HO TSAI-MAN C. & SUN WENBIN, ENTREPRENEURSHIP AND RISK: THE BECOMING OF THE KOO BUSINESS DYNASTY, 3 SOCIAL TRANSFORMATIONS IN CHINESE SOCIETIES 153, 159, 167 (Kwok-bun Chan et al. eds., 3d ed. 2008).

⁵Lindy Yeh, *The Koo Family: A Century in Taiwan*, TAIPEI TIMES (Apr. 15, 2002), <http://www.taipeitimes.com/News/taiwan/archives/2002/04/15/132003>.

⁶*Id.*

family had been closely cooperating with Japan during the occupation⁷ and during the postwar economic turmoil on the island. The fortunes of the Koo family rose again with the economic rise of Taiwan starting in the 1970s, as the family extended its investment in several key sectors in Taiwan, including banking and telecommunications. In 1990, being one of Taiwan's most recognized economic leaders and having helped Taiwan's informal diplomatic relations with several foreign countries without having any official title, Koo Chen-fu took the position of the first president of the Straits Exchange Foundation.⁸ Acting on the authorization of the ROC government, this foundation is a private negotiating body created to conduct negotiations with China for various economic and political matters after 40 years of shutout and military belligerence between Taiwan and China.⁹ As the highest delegation of Taiwan to China responsible for negotiation, this position emblemizes the influence Koo Chen-fu and his family enjoyed in Taiwan.¹⁰

As the family extended its reach and influence, Koo Chen-fu passed control of Chinatrust to his nephew Jeffrey Koo, Sr. (born in 1933), in the 1980s. Following in his uncle's footsteps, Jeffrey Koo Sr. was also a successful businessman who steadily built Chinatrust into the crown jewel of the Koo family's various assets.¹¹ He aggressively pushed for financial innovations in Taiwan at a time when most financial institutions were still under the direct control of the government, both in the sense of ownership and in terms of daily management. Jeffrey Koo Sr. and his eldest son Jeffrey Koo Jr.—a graduate of Wharton School who joined the management of Chinatrust in the early 1990s—involved themselves in politics as part of the family tradition of fostering business through political ties.¹²

B. The Second Financial Consolidation and the Red Fire Case

In late 2004, the then-ruling Democratic Progressive Party (DPP) and its government attempted to consolidate several financial institutions, called "The Second Financial Institution Consolidation" (er ci jin gai, or

⁷Han Cheung, *Taiwan in Time: Sedition or a Groundless Verdict?*, TAIPEI TIMES (July 22, 2018), <http://www.taipeitimes.com/News/feat/archives/2018/07/22/2003697135>.

⁸See *infra* Section IV.A.

⁹See YEH, *supra* note 5.

¹⁰See *infra* Section IV.A.

¹¹See YEH, *supra* note 5.

¹²See *Corporate Profile*, CHINATRUST FINANCIAL HOLDING CO. LTD., http://www.ctbcholding.com/en/en_abo_intro.html (last visited May 22, 2022).

二次金改). At the time, the prevailing issues the government tried to deal with included the relatively large number of small-sized financial institutions (including credit unions), the high degree of competition among financial institutions in local markets, and the low interest rate that led to a low profit margin for financial institutions.¹³ There was also the lingering problem of a declining growth rate in the general economy.¹⁴ According to official statements, the primary goals of this initiative were to create three large financial institutions—each holding at least ten percent of the market share—to halve the number of banks owned by government and financial holding companies and to encourage at least one financial company to list abroad, which was considered a symbol of entering the global market.¹⁵ In other words, what was on then-president Cehn Shuibian's mind at the start of the second term of his presidency was the structural transformation of "re-concentration" in the financial industry. Potentially, the change brought by this initiative would help Chen Shuibian and the DPP politically by redistributing the power and control of financial institutions in the domestic market.

Sensing the government's plan as a once-in-a-generation business opportunity, Jeffrey Koo Jr., then the vice chairman of Chinatrust Financial Holding Company and anointed heir of the company, secretly set up a strategic group within the company and planned a hostile takeover of the largest state-controlled financial group—Mega Financial Holding Company ("Mega Financial").¹⁶ Around that time in 2003, Mega Financial coincidentally appointed a new chairman who was close to then-president Chen Shui-bian and had undergone a comparatively unstable period.¹⁷

¹³See generally *Reforming Taiwan's Banks/Folly by Numbers*, *ECONOMIST* (Nov. 24, 2005), <http://www.economist.com/node/5223143> (2005 article in the *Economist* provided a clear account of the over-competition issue).

¹⁴*President Chen Presides over a Meeting of the Economic Advisory Group*, OFFICE OF THE PRESIDENT (REPUBLIC OF CHINA (TAIWAN)) (Oct. 20, 2004), <http://english.president.gov.tw/Default.aspx?tabid=491&itemid=18091&rmid=2355>.

¹⁵*Reforming Taiwan's Banks/Folly by Numbers*, *supra* note 13; *see also id.*

¹⁶Jeffery Koo Jr. v. Taiwan, Case No. 2008-SLA(Severe Litigation Appeal [*zhong shang su*])-54, (Taiwan High Ct. May 31, 2013) [hereinafter *First High Court Decision*].

¹⁷Mega Financial's new chairman in 2003, Cheng Shengchih, was also a surprise to many. Originally a son-in-law of another domestic transportation group, Evergreen, and working there more than 20 years, Cheng left Evergreen in 2001 to become chairman of Chiao Tung Bank, a wholly state-owned industrial bank with a long history dating back to the beginning of the 20th century in mainland China. Later, at the end of 2002, Chiao Tung Bank, joined by another state-owned bank and insurance company, renamed the resulting composite Mega Financial Holding Company. Because he had little experience in the financial industry, Cheng Shengchih's appointment was rumored to have come largely from his (and Evergreen's) political ties with the newly elected Chen Shui-bian (in 2000 for his first term). *See Historical Overview*, MEGABANK, <https://www.megabank.com.tw/en-us/english/index/about-mega/history> (the

Jeffrey Koo Jr., who had expended much effort in developing a cozy relationship with Chen Shuibian's family even before Chen Shuibian won the presidency in 2000, understood the chance to expand his financial empire in an already-crowded Taiwanese banking market had arrived.¹⁸

To achieve this goal, Koo secretly instructed a group of company executives to purchase Mega Financial's stock on the market.¹⁹ To avoid revealing his plan, Koo first contacted Barclay Capital Hong Kong (HK) to discuss setting up a structured product.²⁰ After its establishment, Chinatrust used the funds held by its Hong Kong branch—roughly USD \$400 million—to purchase Barclay's structured notes.²¹ When this investment structure was in place in mid-2005, Koo and his executives later instructed Barclay Capital HK to lock these notes in Mega Financial's shares.²² This allowed them to control a sizeable stake in Mega Financial, in the guise of a collective investment by a foreign bank without triggering much public attention.²³ However, this purchase was carried out without the approval of the Chinatrust board.²⁴ Around the beginning of 2006, Koo used company funds of roughly NT\$27.5 billion to secretly acquire a 9.9 percent stake in Mega Financial by early 2006, either through Chinatrust's investment arm directly or through Barclay Capital HK indirectly.²⁵

A purchase of this size eventually attracted internal attention from Chinatrust.²⁶ After revealing his plan to in-house counsel, and based on the advice thereof, Koo and other executives decided to transfer the holding of Barclay's structured notes to a company called Red Fire to try

history of Mega Financial Holding Company); see Huang Qinya (黃琴雅), Zhèngshēnchí yǒuqíng yǒu yì (鄭深池有情有義) (*Affectionate And Righteous Cheng Shengchi*), BUSINESS TODAY WEEKLY (July 25, 2002), <http://www.businesstoday.com.tw/article/category/80393/post/200207250032/%E9%84%AD%E6%B7%B1%E6%B1%A0%E6%9C%89%E6%83%85%E6%9C%89%E7%BE%A9%20P.10>; Zhu Jizhong (朱紀中), Zhèng Shēn Chí de jīn kòng bà yè (鄭深池的金控霸業) (*Cheng Shengchi's Ambition In Financial Industry*), BUSINESS TODAY WEEKLY (June 12, 2003), <https://www.businesstoday.com.tw/article/category/80395/post/200306120029/%E9%84%AD%E6%B7%B1%E6%B1%A0%E7%9A%84%E9%87%91%E6%8E%A7%E9%9C%B8%E6%A5%AD%20P.48> (explaining how Cheng Shengchih gained control over Chiao Tung Bank and Mega Financial Holding Company).

¹⁸*First High Court Decision*. Facts listed below are based on the criminal indictment brought by prosecutors and court decisions. For the complete list of court decisions, see Appendix 1.

¹⁹*Id.*

²⁰*Id.*

²¹*Id.*

²²*First High Court Decision*.

²³*Id.*

²⁴*Id.*

²⁵*Id.*

²⁶*First High Court Decision*

to get around securities law and a major shareholder's filing requirement.²⁷ Red Fire was a paper company under the direct control of Chinatrust HK staff and Koo's brother-in-law, who was also an important executive of Chinatrust and right-hand man to Jeffrey Koo Jr.²⁸ To mask the overt insufficiency in funds, Koo and his aides completed this transaction through several layers of offshore subsidiaries and deviated from standard procedures, basically by having Chinatrust loan its money to Red Fire to allow the latter to purchase Barclay's structured notes from Chinatrust HK.²⁹ When all was set, Koo and his aides formally brought this takeover proposal to Chinatrust's board for discussion and received permission to initiate a hostile takeover of Mega Financial in January 2006.³⁰ In February—after receiving clearance from the board and filing an application to the Financial Supervision Commission—Koo and his aides instructed Red Fire to redeem its holdings of Barclay's structured notes, which in turn led to a sell-off of the corresponding stock of Mega Financial by Barclay HK. In the meantime, Chinatrust started its own purchase of Mega Financial's stock from the open market. Due to the strong sell-side pressure from Barclay, as planned, Mega Financial's stock was up only slightly when Chinatrust built up its position in spring 2006. However, without a clear indication about the desirability of it, Red Fire enjoyed a profit of about NT \$1 billion (USD \$30.47 million) by redeeming the structured notes—mostly due to the rise of Mega Financial's stock price in this period.³¹ The profit, however, was Red Fire's and did not appear on Chinatrust's books or in its financial reports, at least for the time period between Barclay's sale and the eventual eruption in mid-2006.³²

²⁷*Id.*; see also Art. 25 of SECURITIES AND EXCHANGE ACT (Taiwan) (requiring a filing to the securities regulator when a shareholder has a stake exceeding ten percent of all issued shares in a public company).

²⁸*First High Court Decision.*

²⁹*Id.* (According to the court's judgment, Red Fire, as a company with registered capital of USD \$1, was able to acquire all notes with the five percent down payment (USD \$19.5 million) provided through a series of paper companies by Chinatrust HK. A detailed flow of funds can be found in the fact part in the court opinions.).

³⁰See Robin Kwong, *Chen Fires Lawyer in Trial Protest*, FINANCIAL TIMES (May 7, 2009), <https://www.ft.com/content/ad3e08b4-3b23-11de-ba91-00144feabdc0>.

³¹Based on court's finding, Red Fire sold Barclay structured note, after re-paid USD \$401,081,349 to Chinatrust HK, and reaped a profit of USD \$30,474,717.12 in its own account. Taiwan v. Chang, Case No. 2007-SL(Severe Litigation [*zhong su*])-19 (Taipei District Ct. Oct. 7, 2008) [hereinafter *District Court Decision*], at line 280, 514-15.

³²Whether money left in a paper company's account (special purpose vehicle in this case), which is controlled and known to a group of top corporate executives but not to board of directors and not appeared from the company's formal record, constitutes a damage to the company and thus suffice a breach of trust has become the center of legal battle in later court decisions. See *infra* C.

As news of the bid for Mega Financial surfaced, magazines and newspapers started to question the secret buy-in by Chinatrust and whether public policy should allow further concentration between two financial giants. At the same time, public opinion also became skeptical of the close tie between Koo and Chen Shuibian's family and towards a potential bribe between them. As public criticism mounted and made national headlines, the Financial Supervision Commission and prosecutors responded by initiating an administrative and criminal investigation into these allegations.

C. The Fallout

In June 2006, the Financial Supervision Commission (FSC), the agency charged with maintaining regulatory authority over financial institutions, swiftly ordered that a fine of NT \$10 million be paid by Chinatrust for having violated standard procedures in a series of transactions leading up to the purchase of Mega Financial's shares.³³ The FSC also required Chinatrust's board bring suit to recover Chinatrust's the NT\$1 billion loss suffered in the sale of Barclay's notes to Red Fire.³⁴ In late 2006, Jeffrey Koo Jr., the focus of all inquiries, decided to remain in Japan to avoid criminal investigation, an arrest warrant was issued in response.³⁵

³³Risk Staff, *Chairman of Chinatrust Commercial Bank Resigns*, Risk.net (Aug. 1, 2006), <https://www.risk.net/regulation/1498916/chairman-chinatrust-commercial-bank-resigns>.

³⁴Financial Supervision Commission, *News Release*, July 20, 2006 [Decision Concerning Chinatrust Hong Kong Branch and Defects in Its Dealing on Structured Products], available at https://www.fsc.gov.tw/ch/home.jsp?id=96&parentpath=0,2&mcustomize=news_view.jsp&dataserno=34009&dtable=News (At point 5, in addition to partial business suspension and a fine of NT\$10 million, FSC demanded the board of Chinatrust take necessary legal step to recover bank's loss from the transaction with Red Fire, or brought suit against whoever causes this loss). Jeffrey Koo Sr., then the chairman of Chinatrust board, personally paid the NT \$1,003,533,000 difference in Red Fire deal on behalf of the whole board in August 2006 as a remedy to failed corporate governance. Feeling satisfied with this remedy, FSC later lifted most of its bans in previous order. Financial Supervision Commission, *News Release*, Sept 21, 2006 [Decision on Risk Management Defects and Their Improvement, and Lifting Previous Bans Entailed from Chinatrust Financial's Mishandling of Its Investment in Mega Financial], available at https://www.fsc.gov.tw/ch/home.jsp?id=96&parentpath=0,2&mcustomize=news_view.jsp&dataserno=34352&dtable=News. See also, Kathrin Hille, *Koo Family Scion Quits Chinatrust Post*, FINANCIAL TIMES (July 23, 2006), <https://www.ft.com/content/8b5cc85c-1a60-11db-848c-0000779e2340>. In the same order of July 20, 2006, the FSC also demanded a NT\$10 million fine and the resignation by Jeffrey Koo Jr. of all his positions at Chinatrust.

³⁵*Prosecutors Issue Warrant for Arrest of Jeffrey Koo Jr.*, TAIWAN NEWS, <https://www.taiwannews.com.tw/en/news/335891> (Dec. 5, 2006).

In 2007, Taipei's district prosecutor office formally indicted Chinatrust's three key executives—CFO, general counsel, and deputy chief investment officer.³⁶ The charges in the criminal case included: (a) breach of trust (for misappropriating the company's funds to the benefit of a third party—Red Fire in this case—and causing harm to Chinatrust's interests), (b) stock market manipulation (for causing Mega Financial's stock price to fall artificially low), and (c) insider trading (for prematurely purchasing shares of Mega Financial while having undisclosed material information about the trading company).³⁷ According to the indictment, Red Fire and Koo allegedly made USD \$30.47 million in profit from the illegal trading and did not return the profit to the company's shareholders, which harmed Chinatrust and violated the principle of fairness in the local market.³⁸

As expected, all three charges faced strong challenges from the lawyers for the defense, as all of the defendants alleged that they were simply following Koo's orders and thought that they were serving the company's ultimate interest by seizing an opportunity for expansion. In October of 2008, the Taipei District Court found three of Koo's fellow managers guilty of breach of trust and stock manipulation, but not guilty of insider trading—mainly because, at the time Chinatrust made its purchase of Mega Financial's stock, the "news" or "information" for the purpose of insider trading was not "clear and certain."³⁹ The sentences handed down to the three defendants ranged from seven years and two months to eight years in prison.⁴⁰ After the decision of the district court, Koo decided to return to Taiwan after having spent two years in Japan.⁴¹

³⁶ *Chinatrust Executives Charged*, TAIPEI TIMES, (Feb. 16, 2007) <https://www.taipeitimes.com/News/biz/archives/2007/02/16/2003349290>

³⁷ *District Court Decision*. Koo, his right-hand man and brother-in-law, Cheng Chuing-Zaa (Chinatrust's CEO for Corporate Banking Division), and another officer were on the run abroad and refused to come to court to face investigation at the time of prosecution.

³⁸ *District Court Decision*, at line 280, 514-15.

³⁹ *Id.* at line 3223-3573, particularly 3534-44. In addition, Taipei District Court considered Barclay structured note as foreign securities, was beyond the jurisdiction of local securities law. *Id.* at line 3545-51.

⁴⁰ *Id.* at line 18-29.

⁴¹ See Chris Wang, TNP, *Groups File Suit against SIP*, TAIPEI TIMES (July 20, 2011), <http://www.taipeitimes.com/News/front/archives/2011/07/20/2003508664>, (the reason for Koo's return in 2008, according to court documents, was that he cut a deal with prosecutors to return to Taiwan to face a trial and to testify against Chen Shui-bian's family in a bribery case, in exchange for an agreement that the prosecutor would not enforce a detention order and thus allow him remain at large to defend himself upon his return); Lin Chang-sen et al., *Banker to Appeal Guilty Ruling: Lawyer*, FOCUS TAIWAN (Oct. 18, 2010), <http://focustaiwan.tw/search/201010180020.aspx> (in 2010, Koo was sentenced to nine years in prison by the Taipei District Court. During the trial, Koo admitted that he had embezzled USD

In May 2013, the Taiwan High Court ("High Court") affirmed the ruling of the district court and sentenced Jeffrey Koo Jr. to nine years and eight months in prison after finding him guilty of violating securities and banking laws, plus a NT \$150 million fine.⁴² The three other defendants' sentences were slightly lengthened by several months each.⁴³ However, all of the defendants appealed to the Taiwan Supreme Court ("Supreme Court"). In its decision, the Supreme Court questioned the degree of harm the defendants' actions had actually brought to the company so as to constitute a breach of trust, because the defendants were allegedly conducting a sensible business expansion.⁴⁴ In revoking the decision of the lower court, the Supreme Court demanded the High Court provide a more convincing calculation of the so-called damages in its decision of remand.⁴⁵

After the trial dragged on for an additional four years, the High Court rendered a decision that substantially reduced the sentences for all defendants in August 2018.⁴⁶ First, a panel of three judges acquitted the then general counsel of Chinatrust Bank, for he had been urging management to take a cautious approach in the takeover and had pointed out possible violations of securities regulations internally.⁴⁷ Second, the panel found all remaining defendants not guilty on the counts of stock market manipulation and insider trading, mainly because the preemptive purchase before a public announcement by the bidder should not be considered manipulative in its effect on the stock price of the target company.⁴⁸ Third, the court upheld a guilty verdict for the breach of trust charge.⁴⁹ However, the sentences for Koo, the CFO, and the deputy chief investment officer were substantially reduced by two to four years.⁵⁰ This reduction was due to the passage of the Criminal Speedy Trial Act in 2010, which stipulated that in cases where the overall trial time exceeds eight

\$9.57 million out of Red Fire's windfall to cover his financial donations to former President Chen Shui-bian and his wife in the period between 2002 and 2005 and remitted the remaining USD \$20.90 million to overseas units of Chinatrust Financial).

⁴²*First High Court Decision*.

⁴³*Id.* at line 36-45.

⁴⁴ Jeffrey Koo Jr. v. Taiwan, Case No. 2014-TA (Taiwan Appeal [*tai shang*])2792 (Sup. Ct. Aug. 14, 2014) [hereinafter *First Supreme Court Decision*].

⁴⁵*Id.*

⁴⁶ Jeffrey Koo Jr. v. Taiwan, Case No. 2014-FSAR (Financial Severe Appeal Remand [*jin shang zhong geng*])(1), 9 (Taiwan High Ct. Sept. 12, 2018).

⁴⁷*Id.*

⁴⁸*Id.*

⁴⁹*Id.*

⁵⁰ Jeffrey Koo Jr. v. Taiwan, Case No. 2014-FSAR (Financial Severe Appeal Remand [*jin shang zhong geng*])(1), 9 (Taiwan High Ct. Sept. 12, 2018).

years without a final judgment, then the court shall reduce the defendants' sentences by half.⁵¹

However, the High Court's second judgment was again overturned by the Supreme Court in November 2019.⁵² The ruling reversed the judgment for Koo Jr. (both the guilty and not-guilty part) and the guilty judgments for Chang and Lin.⁵³ The not-guilty verdict for Chang and Lin was affirmed on the counts of insider trading and stock manipulation.⁵⁴ In its second judgment, the Supreme Court maintained the question of breach of trust should depend on the nature of Red Fire and the purchase of the structured notes from Barclay HK.⁵⁵ In its opinion, the Supreme Court found the High Court delivered a contradiction by demanding a return of profit and concurrently finding that Red Fire was a paper company outside CTBC's control.⁵⁶ In the Supreme Court's view, if Red Fire was truly a self-standing company outside the control of CTBC, there were no grounds to demand that Red Fire return its profit, as the latter legally enjoyed the right to have the trading difference.⁵⁷ However, if Red Fire was still under CTBC's control, as it was controlled by CTBC staff, there should be no loss of profit by leaving money in Red Fire.⁵⁸ Primarily for this reason, the Supreme Court remanded the decision on breach of trust and asked the High Court to properly decide what harm Koo Jr. and his staff had caused CTBC.⁵⁹

III. CASE TWO: THE MEDIA EMPIRE DREAM OF WANT WANT GROUP/CHINA TIMES

The Want Want group and its failed expansion presents a somewhat different story. This case of desired expansion and its ultimate failure

⁵¹THE CRIMINAL SPEEDY TRIAL ACT (Taiwan), art. 7 ("For the outstanding case with no final judgement is made after eight years from the date the case is pending in the first instance, except when a not guilty verdict shall be rendered, the court may, upon the request of the accused, and after considering the following circumstances, reduce the sentence at discretion if the court concludes that the accused right to a speedy trial is gravely violated so that remedies shall be provided: 1. Whether the delay in litigation proceeding is caused by the accused; 2. The balance between the complication of the case in terms of legality and facts and the delay in proceeding; 3. Other circumstances related to the speedy trial.").

⁵²Jeffrey Koo Jr. v. Taiwan, Case No. 2018-TA, 4941 (Sup. Ct. Nov. 14, 2019).

⁵³*Id.*

⁵⁴*Id.*

⁵⁵*Id.*

⁵⁶Jeffrey Koo Jr. v. Taiwan, Case No. 2014-FSAR (Financial Severe Appeal Remand [*jin shang zhong geng*])(1), 9 (Taiwan High Ct. Sept. 12, 2018).

⁵⁷*Id.*

⁵⁸*Id.*

⁵⁹*Id.*

showcases current corporate development in Taiwan and the legal issues involved, while also shedding light on how political forces shape the outcome of an economical decision in a complex context.

A. The Rise of the Want Want Group and Its Bid for China Times

The Want Want group was first established in 1962 in a small county in Taiwan.⁶⁰ In 1976, then-owner Tsai Eng-meng and his father introduced a series of rice cracker products with great commercial success.⁶¹ Although the brand name of Want Want had become a quite popular across Taiwan by the mid-1980's, its simple product line lacked the high profile other food giants enjoyed.

Tsai began his investment in Mainland China in 1989, where his product lines that later expanded to dairy products and beverages⁶² were well received. The Want Want group was first listed in Singapore in 1996, and then delisted in 2007 and relisted in Hong Kong in 2008.⁶³ In 2013, Want Want China Holdings Limited was selected by Forbes magazine as one of "Asia's Fabulous 50," a list of the fifty best publicly traded companies in the Asia-Pacific region.⁶⁴ After three decades of effort, the Want Want group had become a food complex boasting USD \$3.1 billion in annual sales and employing 47,000 workers.⁶⁵

After enjoying financial success in China, Tsai Eng-meng started to expand the company's reach outside the food industry and initiated a series of investments back in Taiwan.⁶⁶ In 2007, the Want Want group bought an insurance company, Union Insurance, which faced financial difficulties because its previous owner had been charged with asset tunneling. With a purchase price of NT \$1.5 billion, Tsai owned seventy-five percent of the

⁶⁰*Id.*

⁶¹*Id.*

⁶² *Want Want China Holdings Ltd., Company Profile*, NIKKEI ASIA, <https://asia.nikkei.com/Companies/Want-Want-China-Holdings-Ltd>.

⁶³ *Want-Want China, History of Want Want*, <http://www.want-want.com/en/about/history>.

⁶⁴ *Want Want China, Company Profile*, FORBES, <http://www.forbes.com/companies/want-want-china/> (last visited May 22, 2022).

⁶⁵*Id.*; see also Agence France-Presse, *Food Tycoon is Taiwan's Richest: Forbes*, ABS-CBN NEWS (May 24, 2012, 3:39 PM), <https://news.abs-cbn.com/business/05/24/12/food-tycoon-taiwans-richest-forbes>. For first several years in the 2010s, Tsai was listed by *Forbes* magazine as the richest man in Taiwan, with a worth close to US \$8 billion. See also #7 *Tsai Eng-Meng*, FORBES, <https://www.forbes.com/profile/tsai-eng-meng/?list=taiwan-billionaires#25e80e3959f4>. As of 2018-2019, at age 62, Tsai's worth declined to around six billion and ranked fifth in Taiwan. For current number on employee and financials, *Want Want China, Company Profile*, *supra* note 64.

⁶⁶#7 *Tsai Eng-Meng*, *supra* note 65.

company.⁶⁷ The company ranked sixth in the domestic insurance market, with a market share of near 6 percent in 2018.⁶⁸

By the end of 2008, Tsai Eng-meng launched another bid for China Times Group for NT \$20.4 billion.⁶⁹ Back before the turn of the century, the daily newspaper market in Taiwan was largely divided among three major newspapers: Liberty Times, United Daily News, and China Times. In 2003, Apple Daily, a newspaper focusing on entertainment news (with tabloid-style reporting) entered the market.⁷⁰ These four papers shared almost all of the domestic market for daily newspapers around the time of the bid. Historically, China Times had been a quality paper during the period of KMT rule and played an important role in furthering the democratization movement in the 1980s.⁷¹ Generally, it was considered a liberal voice for most of its time before the early 2000s.

By 2008, China Times Group owned two major local newspapers (China Times and Commercial Times, with the latter focused on economic news for business-minded readers), and two TV channels (CTI Television and China Television) as its most important assets, along with publishing businesses and others.⁷² The China Times Group was facing substantial losses at that time as part of a long-term decline in revenue from advertisements for traditional print, a similar situation faced globally on account of new media.⁷³ Television programming had also been dealing with intense competition in Taiwan since the 1990s, as regulations encouraged competition and many channels joined the market.⁷⁴ The result was a too-crowded market with low production budgets and a low

⁶⁷Jackie Lin, *Union Insurance Co. Recapitalization Plan Backed by Investors*, TAIPEI TIMES, 11 (June 30, 2007), <http://www.taipetimes.com/News/biz/archives/2007/06/30/2003367522>. See also, *Corporate History*, UNION INSURANCE COMPANY, https://www.wunion.com/?page_id=1131 (last visited May 22, 2022).

⁶⁸*Corporate Background*, UNION INSURANCE COMPANY, https://www.wunion.com/?page_id=4675&lang=en (last visited May 22, 2022).

⁶⁹Lisa Wang, *China Times Group Is Sold to Want Want*, TAIPEI TIMES, Nov. 5, 2008, <http://www.taipetimes.com/News/biz/archives/2008/11/05/2003427822>.

⁷⁰Yvette Tan, *Apple Daily: The Hong Kong Newspaper That Pushed The Boundary*, BBC NEWS (June 24, 2021), <https://www.bbc.com/news/world-asia-china-53734887> (“[The Apple Daily] started off as a local tabloid with a reputation for sensational headlines and paparazzi photographs. But over its 26 years in print, Hong Kong’s Apple Daily became something rarer - a newspaper unafraid to be openly critical of the Chinese state and a standard bearer for the pro-democracy movement.”)

⁷¹Lisa Wang, *supra* note 69.

⁷²Tina Wang, *Tsai Prevails in Billionaire Media Battle in Taiwan*, FORBES (Nov. 4, 2008, 11:55 AM), http://www.forbes.com/2008/11/04/taiwan-want-want-markets-equity-cx_twdd_1104markets05.html; see also Lisa Wang, *supra* note 69.

⁷³Lisa Wang, *supra* note 69.

⁷⁴*Id.*

quality of programming.⁷⁵ Facing challenges from all fronts, the takeover offer happened even though the China Times was once a highly respected newspaper with a history of quality journalism.⁷⁶

The bid from the snack-making billionaire faced intense public suspicion. Unlike buying TV channels, buying paper-based media such as a newspaper or magazine requires no governmental review or approval under domestic law.⁷⁷ However, Tsai Eng-meng's success in China and his ties with high-ranking Chinese officials triggered concerns about China indirectly influencing—or even overtly controlling—one of the key newspapers in Taiwan.⁷⁸ Moreover, transferability of skills between managing a snack company to the world of media was also subject to criticism,⁷⁹ especially when all media assets would be wrapped into one package as a result of the deal.⁸⁰ When tensions escalated, critics of the deal maintained that the National Communications Commission ("NCC"), a counterpart of the FCC in the United States, needed to exercise its review power for the transactions involving the two television channels.⁸¹ Under rising public pressure, the NCC conducted a public hearing and heard arguments from both sides, with detailed reference to comparative experiences in the United States and the European Union.⁸² Eventually, in May 2009, the NCC cleared the TV channel transactions with several conditions.⁸³ The conditions mostly involved the separation of staff and resources between the two channels and the appointment of one

⁷⁵*Id.*

⁷⁶*See* Tina Wang, *supra* note 72.

⁷⁷*Id.*

⁷⁸*Id.*

⁷⁹*Id.*

⁸⁰*See* Tina Wang, *supra* note 72.

⁸¹National Communications Commission [NCC], *China Television Business Co., Ltd. Applies for Changes to Chairman, Managing Director, Director, Supervisor and General Manager" and "China Sky Tv Business Co., Ltd. Applies for Chairman, Director, and Supervisor Change Case" Processing Instruction*, at 7. This document is downloadable from NCC website at https://www.ncc.gov.tw/chinese/files/09060/8_10953_090603_1.doc (last visited May 22, 2022). As alternative, the same file can be retrieved from NCC website main page (<https://www.ncc.gov.tw/chinese/index.aspx>) via search function, using its Chinese title “「中國電視事業股份有限公司申請董事長、常務董事、董事、監察人及總經理變更案」暨「中天電視事業股份有限公司申請董事長、董事及監察人變更案」處理說明書” as keyword. In this 31-page document, NCC provided a detailed discussion of its handling of this application, the different arguments presented in the public hearing, and the relevant academic literature and the considerations behind its final decision.

⁸²*Id.* at 8.

⁸³*Id.* at 16.

independent director to the boards of both channel companies.⁸⁴ Tsai Eng-meng openly criticized these conditions as unfair, and named three commissioners of the NCC as unduly discriminating against him and the Want Want group.⁸⁵

B. Expansion to MSOs (Multiple System Operators)

Becoming the new owner of China Times put Tsai Eng-meng in the national spotlight for the first time and gave him a much larger voice in affecting Taiwan's public opinion. However, it resulted in the exodus of elite journalists and substantial layoffs. This was followed by a steep decline in both readership and viewership as a result of pro-China and pro-Want Want programming, especially in presenting the news. This decline has not reversed since. The overall reaction to this transaction was largely negative among journalists and other observers, both because of the lack of follow-up investment from the Want Want group in the increasingly competitive media world and its unbalanced political stance.

After having a taste of owning a major local newspaper, Tsai scaled up his ambition into cable operations in the hopes of controlling or influencing more channels or news outlets. In 2010, China Network Systems ("CNS") was the second-largest multiple system operator in Taiwan and was up for sale with operations in regions of northern and southern Taiwan along with its one million cable television subscribers.⁸⁶ CNS had a major shareholder at that time—MBK Partners, a private equity firm from Korea.⁸⁷ Both sides saw an opportunity to meet the needs of each other; and a deal was structured for a sale of the sixty percent stake in CNS owned by MBK for USD \$2.4 billion when it was first reported in October 2010.⁸⁸ However, the news about the deal between CNS and Want Want led to even greater criticism than the company had faced the past

⁸⁴*Id.* at 21-22. For a summary of this decision and a shorter version of its reason, see National Communications Commission, *Press Release*, May 27, 2009, available at https://www.ncc.gov.tw/chinese/news_detail.aspx?site_content_sn=8&is_history=1&pages=1&sn_f=10889.

⁸⁵Tina Wang, *supra* note 72.

⁸⁶Ting-I Tsai, *MBK to Sell 60% Stake in CNS TV*, WALL. ST. J., (Oct. 26, 2010, 12:01 AM), <https://www.wsj.com/articles/SB10001424052702304248704575574363216045110>.

⁸⁷*Id.*

⁸⁸*Id.*; Justine Su et al., *Group Vows to Assuage Misgivings about Expansion into Cable TV*, FOCUS TAIWAN (July 26, 2012, 7:38 PM), <http://focustaiwan.tw/news/aip/201207260031.aspx> (the final term was set to USD \$2.52 billion, which allowed the Want Want group to acquire about 1.18 million cable TV subscribers nationwide).

two years.⁸⁹ Both Want Want and CNS experienced strong scrutiny in 2011 when seeking regulatory approval.⁹⁰ Scholars as well as pro-DPP politicians challenged Want Want in public hearings and urged more rigorous reviews from agencies including the NCC, Fair Trade Commission, and the Investment Commission of MOEA.⁹¹ After a prolonged review and fierce public outcry, the NCC approved the deal in July 2012, premised on twenty-five commitments to be fulfilled by Want Want and related parties, plus three conditions that allowed the NCC to revoke its approval if conditions were not met or their fulfillment did not exist anymore.⁹² Among the commitments, the most important ones were to divest CTI Television, which Tsai Eng-meng already owned; to convert CTV's news channel to a non-news channel; and to set up internal safeguards for journalistic autonomy for CTV's remaining news programs.⁹³

When this decision was issued, Tsai Eng-meng originally showed signs of compliance, but later changed his mind.⁹⁴ Since the add-on conditions and commitments mainly concerned the concurrent ownership of CTI/CTV and CNS, and the suit challenging the NCC's decision on the Want Want/CTI case that was still pending in administrative court, Tsai decided to transfer his ownership in CTI to his friends as a means of meeting the commitment required by the NCC, while simultaneously seeking opportunities to reopen the review process in January 2013 by challenging the NCC's procedural error. As the NCC toughened its stance and rejected the view that setting up a financial trust to hold stock in CTI would be considered divestiture,⁹⁵ and with long legal proceedings awaiting him, Tsai eventually abandoned his deal and stopped short of owning one of the largest cable MSOs in Taiwan in 2014.⁹⁶

⁸⁹*Id.*

⁹⁰*Id.*

⁹¹*Id.*

⁹²Shelley Shan, *Want Want Cleared to Buy CNS TV Arm*, TAIPEI TIMES (July 26, 2012), <http://www.taieitimes.com/News/front/archives/2012/07/26/2003538653>; *see also* National Communications Commission Meeting Minutes No. 496, Proposition 7 (July 25, 2012), https://www.ncc.gov.tw/chinese/files/12073/67_25654_120914_1.pdf

⁹³ *Id.* Proposition 7, and attachment 3-6 (concurring opinion from four commissioners).

⁹⁴*Id.*

⁹⁵In 2014 February, MBK sought to withdraw the application to the NCC for approval to transfer its stake to the Want Want group. The NCC maintained the decision about the application had been made and rendered; therefore, there was no room for withdrawals in the legal sense. *See* Shelley Shan, *Ruling on Want Want Group to Stand: NCC*, TAIPEI TIMES, 3 (Feb. 13, 2014), <http://www.taieitimes.com/News/taiwan/archives/2014/02/13/2003583405>.

⁹⁶After the failed attempt to sell its stake in CNS to Want Want, MBK struggled to find a buyer in Taiwan that could successfully clear administrative scrutiny, mostly because

C. The Bid for Apple Daily, Next TV, and Next Magazine

More media deals were on the horizon as the general business environment for traditional media was challenged by new types of digital media. In late 2012, another owner of a major media group looked for his exit in Taiwan. Apple Daily newspaper, Apple TV, and Next Magazine, all owned by Hong Kong media magnate Jimmy Lai (Lai Chee Ying), were rumored to be up for sale.⁹⁷

Jimmy Lai, a Hong Kong born anti-communist businessman who focused on retail clothing before the 1989 Tiananmen Square protests, sold his clothing business and began his venture into the news industry in Hong Kong.⁹⁸ In 1990, he founded Next Magazine Hong Kong, which focused on tabloid journalism.⁹⁹ After its success, in 1995, he launched Apple Daily, a daily newspaper in Hong Kong.¹⁰⁰ Next magazine and Apple Daily are tabloid-style publications, focusing on both sensationalism and hard-hitting political and business reporting.¹⁰¹ Both publications were popular and sound businesses in Hong Kong during their first decade of operation.¹⁰² Worried about his anti-communism, Lai later decided to transplant this model to Taiwan, as he tried to hedge the political risk when Hong Kong was handed back to China by the United Kingdom in 1997.¹⁰³ In 2000, he started a Taiwanese version of Next Magazine and later Apple Daily in 2003.¹⁰⁴ Being the first media company to bring tabloid journalism to Taiwan, Next magazine and Apple Daily became the most

candidates had investments in China or were already big enough to trigger antitrust concern. Some surfaced buyers included Tin Hsin Group (another food conglomerate with heavy investment in China) in 2014 and Far EasTone (the third-largest mobile carrier in Taiwan) in 2016. Finally a local conglomerate with a focus on real estate (at the same time the owner of the largest printed daily newspaper in Taiwan, *Liberty Times*) closed the deal using a charity trust as the acquiring party in 2018. In short, after seeking a possible buyer for almost a decade, MBK finally found its exit from Taiwan's MSO market. See Shelley Shan, *Foundation Denies Its Fund Helping in CNS Buy*, TAIPEI TIMES (Aug. 17, 2018), <https://www.taipeitimes.com/News/taiwan/archives/2018/08/17/2003698676>.

⁹⁷See Stanley Cheung, *Hong Kong Apple Daily confirms Jimmy Lai's Pullout from Taiwan*, TAIWAN NEWS (Oct. 17, 2012), <https://www.taiwannews.com.tw/en/news/2050206>.

⁹⁸See *Next Media Ltd. – Company Profile, Information, Business Description, History, Background Information on Next Media, Ltd.*, REFERENCE FOR BUSINESS, <https://www.referenceforbusiness.com/history2/91/Next-Media-Ltd.html>.

⁹⁹*Id.*

¹⁰⁰*Id.*

¹⁰¹*Id.*

¹⁰²*Next Media Ltd.*, *supra* note 98.

¹⁰³*Id.*

¹⁰⁴*Id.*

commercially successful daily newspaper and magazine in the local market.

Success with print media in combination with the looming challenge of digital media led Lai to extend his reach into television. In July 2009, Lai was about to spend much of his personal wealth in the multimedia arena established by Next Television Taiwan.¹⁰⁵ Focusing on 24-hour high-definition programming, Next Television aimed to stretch its influence from press media into several brand-new TV channels.¹⁰⁶ In the beginning, Lai planned to set up five different channels for Next Television, but when applying for permission from the NCC, Lai encountered scrutiny, as many criticized the style and taste in stories reported by Next Magazine and Apple Daily.¹⁰⁷ After long negotiations, Next Television received permission to operate as a news channel in July 2011.¹⁰⁸ However, Lai's prowess in news content production invited many enemies. Next Television faced a boycott by almost all local MSOs right after its launch and could not get its programs aired by most cable providers.¹⁰⁹ The prolonged boycott and the attendant renegotiation, along with the huge cost of producing new high-definition programming at the time, considerably worsened Next Television's and Lai's financial condition.¹¹⁰ After three years of hard work and substantial spending with no end in sight for the boycott by local MSOs, Jimmy Lai reluctantly faced the sad reality of a possible sale of Next Television around July, 2012.¹¹¹

After various rumors about possible bidders, the buying side turned out to be a consortium led by Tsai Eng-meng's son and several other major businesspersons.¹¹² At first, the deal was intended to include Next

¹⁰⁵Ting-I Tsai, *Next Media Plans Taiwan TV Stations*, WALL ST. J., (Feb. 26, 2009), <https://www.wsj.com/articles/SB123556783987371081>.

¹⁰⁶*Id.*

¹⁰⁷Ming-Yeh T. Rawnsley, *Anti-media Monopoly Explained*, TAIPEI TIMES (Feb. 4, 2013), <https://www.taipeitimes.com/News/editorials/archives/2013/02/04/2003554169>.

¹⁰⁸*Id.*

¹⁰⁹Camaron Kao, *FTC to Investigate TV Channel Boycott*, TAIPEI TIMES (Nov. 27, 2012), <https://www.taipeitimes.com/News/biz/archives/2012/11/27/2003548682>.

¹¹⁰*See HK Media Mogul Plans to Sell Taiwan Operation*, TAIPEI TIMES (Apr. 7, 2012), <http://www.taipeitimes.com/News/front/archives/2012/04/07/2003529708>.

¹¹¹*Id.*

¹¹²The other members of the buying consortium included Jeffrey Koo Jr.; Wang Wen-yun, the Formosa Plastics chief executive; and Li Shih-tsung, the head of Lung Yen Life Service, a funeral and cemetery service company. Neil Gough & Lin Yang, *Controversial Media Deal in Taiwan Nears Collapse*, N.Y. TIMES DEAL BOOK (Mar. 26, 2013), <http://dealbook.nytimes.com/2013/03/26/controversial-media-deal-in-taiwan-nears-collapse/> (Interestingly, it seemed difficult to ascertain why this group of businessmen worked together in the first place and what their motives were individually or collectively, as they were of different ages and had different backgrounds, lines of business, and other characteristics. One

Magazine, Apple Daily, and Next Television.¹¹³ However, the sales targets started to shuffle as the negotiation unfolded.¹¹⁴ Whether Tsai Eng-meng's son could successfully acquire another TV channel license without damaging the Want Want group was a serious problem all in itself, let alone the fact that the Want Want group and Tsai Eng-meng were still fighting with the NCC in the bid for CNS.¹¹⁵ This caused much discussion within the bidding group, and alternatives such as changing the lead person or tailoring the acquisition to only include Next Magazine and Apple Daily were all well discussed.¹¹⁶ Finally, in November 2012, the bidding group signed a preliminary agreement with Next Media to pay NT \$16 billion, or USD \$534 million, to acquire the publications. Next Television was separated from this deal to look for another buyer.

The news about a sale of Next Magazine and Apple Daily to Tsai Eng-meng's son prompted opposition on an unprecedented scale for a business merger in Taiwan.¹¹⁷ This transaction was uniquely sensitive for good reason; the pro-China political stance of the bidding consortium—contrasted with Jimmy Lai's long-time criticism of the Chinese Communist Party and along with internal tensions among different voices for or against China—all hinted at the impossibility of the deal reaching a consensus politically.¹¹⁸ Tens of thousands of protesters took to the streets in early 2013, warning the liberal media was being threatened, and they urged the government to stop the deal.¹¹⁹ Faced with vocal public opposition, regulators in Taiwan agreed to examine the deal with extreme care and took a tough stance.¹²⁰ A drafted bill designed to prevent media monopolies and safeguard ownership diversity was fiercely proposed in parliament.¹²¹ Realizing the new hurdles to overcome and fearing that a

guess about what allied them is that they might have shared a dislike for tabloid journalism—or at some point had been its victims—and cast an envious eye on the power that a media owner or co-owner could have.).

¹¹³*Id.*

¹¹⁴*Id.*

¹¹⁵*Id.*; see also, *Press Freedom in Taiwan: Keeping the Doctor Away—Beijing's Critics Win a Battle in Taiwan*, ECONOMIST (Apr. 6, 2013), <http://www.economist.com/news/asia/21575831-beijings-critics-win-battle-taiwan-keeping-doctor-away>.

¹¹⁶*Press Freedom in Taiwan*, *supra* note 120.

¹¹⁷*Id.*

¹¹⁸*Id.*

¹¹⁹*Id.*

¹²⁰See *Press Freedom in Taiwan*, *supra* note 120.

¹²¹J. R., *Give Us Our Daily Apple*, TAIWAN'S PRESS: ECONOMIST blog (Jan. 21, 2013), <http://www.economist.com/blogs/banyan/2013/01/taiwan%E2%80%99s-press>; OFFICE OF INFORMATION SERVICES, EXECUTIVE YUAN, ACT TO PREVENT MEDIA MONOPOLY AND MAINTAIN PLURALISM DRAFTED (Apr. 25, 2013),

tougher stance might lead to a political witch hunt, the consortium reluctantly dropped the deal in March 2013. Next Television was later sold to another local media tycoon, Lien Tai-Sheng, in August of 2013 at the bargain price of USD \$47 million, while Next Magazine and Apple Daily remained in Jimmy Lai's control.¹²²

IV. CORPORATE AFFAIRS, POLITICS, AND OBSCURE LAW

A. Socio-economic Background and the Tradition of Dialogue

The impingement of politics on corporate decisions is nothing novel to many seasoned business owners. The nexus between corporate decisions and politics has always been a research interest within academic disciplines such as law and development. In law and development, much discussion surrounds newly industrialized countries (NICs)¹²³ and how economic growth is built on government intervention, institutional design, and collaboration between the political system and multiple economic players such as large-business owners. As one of the most-cited NICs, Taiwan has a government-business relationship sharing some of the features commonly found in the literature of law and development.¹²⁴ The socio-economic background and the tradition of dialogue between

<https://english.ey.gov.tw/Page/61BF20C3E89B856/3d79c54f-ba44-487d-94cf-c3d816b2ed6d>. However, the bill was still under deliberation in Congress at the time of this writing and so seems unlikely to pass anytime soon.

¹²²Camaron Kao, *Next Media Makes Deal to Sell Next TV to ERA's Lien*, *TAIPEI TIMES*, 1 (Apr. 16, 2013), <http://www.taipetimes.com/News/front/archives/2013/04/16/2003559842>; Russell Flannery, *Next Media To Sell TV Business to Taiwan's ERA Communications Chairman Lien Tai-sheng*, *FORBES* (Apr. 15, 2013, 10:18 PM), <http://www.forbes.com/sites/russellflannery/2013/04/15/next-media-to-sell-tv-business-to-taiwans-era-communications-chairman-lien-tai-sheng/>.

¹²³"NIC" designates a country whose economy has transitioned from mainly agriculture to manufacturing. NICs began to be recognized in the second half of the 20th century, when economies such as those of Hong Kong, South Korea, Singapore, and Taiwan underwent rapid industrial growth and later those of other countries such as Turkey, Thailand, Malaysia, Mexico, Brazil, Argentina, South Africa, Russia, China, and India. See *Newly Industrialized Country*, *ENCYCLOPEDIA BRITANNICA*, <https://www.britannica.com/topic/newly-industrialized-country>.

¹²⁴See Chien-sheng Shih, *Economic Development in Taiwan after the Second World War*, 100 *WELTWIRTSCHAFTLICHES ARCHIV*, 113-34 (1968)(General discussion of the development model of postwar Taiwan around the 1980s and the government's role); Deborah Brautigam, *The State as Agent: Industrial Development in Taiwan, 1952-1972*, in *ASIAN INDUSTRIALIZATION AND AFRICA* (Howard Stein ed.) (1995). For more recent discussion, see Jinn-Yuh Hsu & Lu-Lin Cheng, *Revisiting Economic Development in Post-war Taiwan: The Dynamic Process of Geographical Industrialization*, 36 *REGIONAL STUDIES* 8, 897-908 (2002).

business and politics provide a good starting place for understanding how the two cases discussed above turned out as they did.

After the end of World War II, the then-ruling party—KMT—retreated to Taiwan upon losing the civil war to the Chinese Communist Party in 1949 after five years of bitter battle which spread throughout China and added to the devastation the country faced in World War II. With limited resources and a defeated army, KMT stabilized the situation on this much smaller island, which had been ceded by China to Japan because of the First Sino-Japanese War in 1895 and was returned to China at the end of World War II in 1945. Fortunately—with the help of the eruption of the Korean War, US aid, and the relatively superior industrialized foundation provided by previous Japanese control of the island—KMT slowly but successfully transformed Taiwan into a robust economy. First, with import substitution and then export expansion to match the postwar world order, Taiwan's resurgence after World War II fit the typical description in the law and development literature and became a model of development by the 1980s.¹²⁵

Similar to many emerging economies of the same period in the neighboring region, the economic development of Taiwan focused on: (1) a government-led development plan, (2) tight capital and foreign exchange control, and (3) a financial sector under the state's heavy restrictions and influenced by the US government, who regarded economic development as an integral part of a defense strategy to reshape the post-World War II world order.¹²⁶

After the end of the World War II, the rise of private capital in emerging or transitional economies was more often a result of careful

¹²⁵See LIU SHINKEI (劉進慶), *TAIWAN POSTWAR ECONOMIC ANALYSIS (台灣戰後經濟分析)*, Revised Edition (2012).

¹²⁶This was a near clone of the Marshall Plan in the East Asian region. See *Marshall Plan*, ENCYCLOPEDIA BRITANNICA, (Jan. 27, 2020), <https://www.britannica.com/event/Marshall-Plan>; see also *George Catlett Marshall*, THE GEORGE MARSHALL FOUNDATION, <https://www.marshallfoundation.org/marshall/the-marshall-plan/history-marshall-plan/> (last visited May 22, 2022). Recently, National Taiwan University Library started a digital archive program called the de Beausset Collection and a documentary "Valery S. de Beausset and U. S. Aid to Taiwan," which featured Mr. Valery Sergei de Beausset, a project manager of a US engineering and consulting firm J.G. White Engineering Corporation, which was responsible for implementing US aid to Taiwan during the 1950s. Through this archive and oral history, how US aid took form and was implemented in that period is vividly documented. See also Jieh Hsiang & Shu-Fen Hung, *Background of the Film*, NATIONAL TAIWAN UNIVERSITY LIBRARY, <http://www.lib.ntu.edu.tw/events/debeausset/content01-1.htm> (last visited May 22, 2022) (introduction in English). Accord David W. Chang, *U.S. Aid and Economic Progress in Taiwan*, 5 ASIAN SURV. 152, 152-154 (1965) (discussing U.S. aid and its immediate effect for economic stabilization and restoration).

government planning than of natural competition.¹²⁷ This government sponsorship is often linked to intricate interactions between local economic power and political authority. What may start as a dialogue or collaboration can take various forms, including an initiation, approval, or acquiescence of government at different levels with distinct political actors. Similar development along these lines in this region was observed in Taiwan, Japan, South Korea, and later China.¹²⁸

The more immediate historical background to the two cases can be summarized as follows: in 2000, Taiwan held its second direct presidential election in history.¹²⁹ The first election was in 1996, and marked the end of one-party rule by KMT since the end of World War II.¹³⁰ Due to a split

¹²⁷The term "transition economy" in this paper is used narrowly to describe a state near to becoming a developed country, contrasted with its more common use of referring to an economy transitioning from a planned economy to market economy. In this use, Taiwan and Korea are both of particular interest. Although the terms "developing country" and "developed country" are sometimes used without many consensus criteria, MSCI (Morgan Stanley Index), a developed markets index, provides a useful proxy in an investment scenario. As of 2022, MSCI Developed Market Index includes only five Asian markets (Australia, Hong Kong, Japan, New Zealand, and Singapore). MSCI Inc., MSCI Developed Markets Indexes, <https://www.msci.com/our-solutions/indexes/developed-markets>. This showcases the difficulty in completing the transition to full "developed country" status, despite many years' economy success and technological/societal advances in both Taiwan and Korea. Another reference for "developing" versus "developed" comes from the Department of Economic and Social Affairs of the United Nations Secretariat (UN/DESA). See UNITED NATIONS DEPT. ECON. SOC. AFF. ET AL., *Country Classification*, WORLD ECONOMIC SITUATION AND PROSPECTS (2014), https://www.un.org/en/development/desa/policy/wesp/wesp_current/wesp2014.pdf (last visited May 22, 2022). Notably, Taiwan—as a WTO member—had decided to give up its developing member status and switched to a developed member in 2018. Kensaku Ihara, *Taiwan Quits "Developing Economy" Status in WTO with Eye on China*, NIKKEI ASIAN REVIEW (Oct. 17, 2018), <https://asia.nikkei.com/Politics/Taiwan-quits-developing-economy-status-in-WTO-with-eye-on-China>; Scott Morgan, *Developed Economy Status Paves Taiwan's Path to CPTPP Membership*, TAIWAN NEWS (Oct. 24, 2018, 7:45 PM), <https://www.taiwannews.com.tw/en/news/3559885>; see also, *Top 25 Developed and Developing Countries*, INVESTOPEDIA, <https://www.investopedia.com/updates/top-developing-countries/> (Apr. 25, 2021) (referencing other countries).

¹²⁸This form of patronage worked widely in the region. In the case of postwar Taiwan, KMT, as a just-migrated ruling political party from mainland China, had no choice but to collaborate with local economic actors who had been on the island for many years in order to ease the turmoil after its defeat in the civil war from 1945 to 1949. The need to cooperate with local economic actors and the need to preserve privilege for mainland capitalists/industrialists who followed KMT to Taiwan as payback for their loyalty led to multiple patronage. Later this state-business link evolved into an electoral clientelism after the democratization of the 1980s and 1990s. See Chin-Shou Wang & Charles Kurzman, *Dilemmas of Electoral Clientelism: Taiwan, 1993*, 28 INTERNATIONAL POLITICAL SCIENCE REVIEW 2, 225-45 (2007).

¹²⁹ *Taiwan Profile - Timeline*, BBC NEWS (Feb. 1, 2019), <http://www.bbc.com/news/world-asia-16178545>.

¹³⁰One-party rule ended in 1986 with the first opposition party, the DPP (Democratic Progressive Party), announcing its establishment despite the fact that the law at that time did not allow a new political party to organize and register formally owing to martial law. The

in KMT, candidate Chen Shuibian of the Democratic Progressive Party was elected, ending more than fifty years of KMT rule.¹³¹ Born in 1950 in a rural area in the southern part of Taiwan, Chen Shuibian has been a lawyer and long-time advocate of both democratization and human rights.¹³² Politically, he was also a pro-independence activist. After a first term of mixed results, he was reelected to a second term in 2004 by a small margin, arguably due to rising pro-independence momentum and a controversial assassination attempt during a campaign event one day before the election that left him with a minor wound.¹³³ After a first term full of political transitions that caused some uncertainty, Chen's second term was clouded by domestic economic challenges and corruption allegations against his family, both of which were related to his announced economic reform agenda.

During Chen's presidency, his economic reform agenda was to continue with the privatization that started in the mid-1990s. The idea was to transform the local economic structure from low- and mid-level manufacturing to high-end manufacturing and services, in the hope of continuing Taiwan's economic success from the 1970s and meeting the need to become globally competitive. Besides replacing economically less-efficient sectors and participants—mostly state-owned large companies holding large assets but with limited profits—the proposed reform had a political agenda to weaken the link between the old KMT government and large-business owners by relocating economic resources and building strong ties with the new winners. This would result, it was thought, in political support for the DPP and Chen's government.

The change of ruling party, along with the shift toward a global economic scene, tested the acumen and ability of Taiwanese business owners to adjust. Some business owners saw it as an opportunity to expand aggressively by means of favoring the DPP, Chen Shuibian, and his family, in either a political or an economic way to gain a better position in this

democratic movement at that time soon led to the lift of martial law in Taiwan in 1987, which had started in 1949. Taipei Times, 20th Anniversary of the End of Martial Law: Taiwanese Society Under Martial Law Remembered (July 15, 2007), <https://www.taipeitimes.com/News/taiwan/archives/2007/07/15/2003369646>.

¹³¹*Taiwan Profile—Timeline*, supra note 129; John Gettings & Infoplease Staff, *Key Events in Taiwanese History from World War II to the Present*, INFOPLEASE (Feb. 28, 2017), <http://www.infoplease.com/spot/taiwantime1.html>.

¹³² Terry McCarthy, *Profile of a President*, TIME (Mar. 27, 2000), content.time.com/time/world/article/0,8599,2053775,00.html.

¹³³See generally Keith Bradsher & Joseph Klein, *Taiwan's Leader Wins Re-election; Tally Is Disputed*, N.Y. TIMES (March 21, 2004), <https://www.nytimes.com/2004/03/21/world/taiwan-s-leader-wins-re-election-tally-is-disputed.html>.

change. Others looked more at the economic result or rationale in this landscape shift and tried to avoid (or pretended to avoid) political involvement in this political as well as economic transition.

Even looking in hindsight, it is not clear what category the Chinatrust case falls in. Jeffery Koo's coziness with Chen Shuibian's family, especially his only son and his wife, was repeatedly reported in local media and became a target of fierce criticism.¹³⁴ The heightening distrust and hostility toward the political ties of the private capitalists, combined with resistance from former economic beneficiaries who stood to lose from the potential commercial consolidation of the shifting economic order—in this case bankers in other banks and Mega Financial—set the political and economic backdrop for the Red Fire case.

The second case—the Want Want group's serial expansion into the media industry—represents a different kind of story. The Want Want group's political investment, as generally perceived, leaned heavily toward China, as the rice cracker maker aspired to be one of the richest men in the region. Tsai Eng-meng's pro-China stance, which was exemplified by his public defense of the 1989 Tiananmen Square military crackdown in the Washington Post in 2012,¹³⁵ infuriated many people who supported democracy in China, Hong Kong, and Taiwan.¹³⁶ This stance made him a controversial, and probably one of the most unwelcomed, figures in the public eye.¹³⁷ His blunt, personal political inclination influenced his business moves and ran counter to the pro-independence momentum in Taiwan of the preceding two decades; this set the tone of public opinion when his merger attempts were revealed and scrutinized. This tone remained consistent even when KMT held the presidency from 2008 to 2016 and the party promoted a more moderate approach to Taiwan-China relations and cooperation across the Taiwan Strait.

¹³⁴For example, Next magazine ran a picture that showed Jeffrey Koo Jr. and Chen Shui-bian's only son, Chih-Chung Chen, hugging after having had a fancy dinner together. People at that dinner included Chih-Chung Chen's newlywed wife and Chen Shui-bian's right-hand man deputy and secretary-general to the president, Ma Yong-cheng. *Rich's Night Banquet, Jeffrey Koo Jr.'s Hug with President's Son*, NEXT MAGAZINE (June 30, 2005), <https://tw.appledaily.com/headline/daily/20050630/1878140/>.

¹³⁵Andrew Higgins, *Tycoon Prods Taiwan Closer to China*, WASH. POST (Jan. 21, 2012), https://www.washingtonpost.com/world/asia_pacific/tycoon-prods-taiwan-closer-to-china/2012/01/20/gIQAhswmFQ_story.html.

¹³⁶*Id.*

¹³⁷Xin Yu, *Call for Boycott After Comments—Chinese Activists Blast a Taiwanese Businessman for Defending a Deadly Crackdown*, RADIO FREE ASIA (Jan. 24, 2012), <http://www.rfa.org/english/news/china/comments-01242012172714.html>.

B. Legal Aspect

Several points in both cases are worthy of further scrutiny from a legal perspective. First, in the Red Fire case, whether the alleged misconduct can or should be classified as a criminal offense is not without some doubt. The purchase of the target company's stock via a third party's structured product potentially ran afoul of the rule of full disclosure of stock ownership under securities law.¹³⁸ However, according to the rule, this should only lead to a modest monetary penalty and not necessarily constitute a breach of trust in a criminal sense.¹³⁹ Another troubling issue is whether the secret pre-announcement purchase can or should be considered insider trading and market manipulation under securities law.¹⁴⁰ Several reasons bear upon this question: First, there is no mention of bidders' trading activity associated with merger and acquisition (similar to what is regulated under Rule 14e-3 of the Securities and Exchange Act of 1934) in Taiwan's Securities Exchange Act.¹⁴¹ In this sense, whether the pre-announcement trading by the potential bidder is illegal per se or should be classified as insider trading under current law is still unclear. Second, while the purpose is to hide its true ownership position, the latter trading of a derivative on the market by the bidder created an effect of slowing

¹³⁸SECURITIES AND EXCHANGE ACT (Taiwan), art. 25, paragraphs 1-2. Paragraph 1 reads "Upon registering the public issuance of its shares, a company shall file with the Competent Authority and announce to the public the class and numbers of the shares held by its directors, supervisors, managerial officers, and shareholders holding more than ten percent of the total shares of the company." Paragraph 2 states, "The stockholders referred to in the preceding paragraph shall file, by the fifth day of each month, a report with the issuer of the changes in the number of shares they held during the preceding month. The issuer shall compile and file such report of changes with the Competent Authority by the fifteenth day of each month. The Competent Authority may order an issuer to make public announcement of such information should it deem the measure necessary." Official English translation can be found at LAWS AND REGULATIONS DATABASE OF THE REPUBLIC OF CHINA (maintained by Ministry of Justice, 法務部全國法規資料庫 (L. & Reg. DB)) [L. & Reg. DB], <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=G0400001>.

¹³⁹SECURITIES EXCHANGE ACT (Taiwan), art. 178 (stating violation can be punished by an administrative fine up to NT\$2,400,000, roughly USD\$80,000. Before the 2002 amendment, the maximum fine was NT\$600,000. The maximum was raised again to NT\$4,800,000 in March 2019). Available at <https://law.moj.gov.tw/ENG/LawClass/LawSearchContent.aspx?pcode=G0400001&norge=178>.

¹⁴⁰ See SECURITIES EXCHANGE ACT, arts. 157-1, 151, 171 para. 2, <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=G0400001> (stating in Taiwan, both prohibitions can lead to a severe criminal penalty—minimum seven-year imprisonment, when illicit profit is over NT\$100 million).

¹⁴¹ See generally SECURITIES AND EXCHANGE ACTS, art. 157-1. (the article prohibiting insider trading does not say anything about corporate bidders' trading activity associated with merger and acquisition).

down the would-be rising of the target company's stock price. Whether this activity is subject to the criminal charge of market manipulation is questionable as its "manipulative" effect is more incidental to the trading than the intentional result of this arrangement. As Chinatrust's arrangement worked more toward price stabilization and pre-merger lock-in without gaining illegitimate profit from a third party on the market, whether a finding of market manipulation can be grounded in securities law is still much at the center of debate.¹⁴² Third, setting aside—for the sake of argument—the missing difference that was originally kept in Red Fire at the time when the news erupted, the Supreme Court, in its first opinion, raised the fundamental logical problem of whether these maneuvers really harmed Chinatrust, as the goal was to facilitate Chinatrust's pursuit of its takeover target. That is to say the extent these maneuvers—which tread on securities regulation though clear administrative regulation violation but with a debatable criminal effect—can be equated with the felony criminal offense of breach of trust. The affirmative stance was taken without much questioning by prosecutors and lower court decisions, but it was later questioned by the Supreme Court.¹⁴³ In this regard, the proper code of conduct or standard of review—either in the form of a substantive stipulation of law or in the form of carefully crafted court decisions—is still absent in these prolonged legal battles in Taiwan.

Second, besides the appropriate application of substantive rules, some controversial allegations also complicated the proceeding of this case as a pure legal one. The prosecutor's office first alleged insider trading and market manipulation as Jeffrey Koo Jr.'s main charges. In 2011, in open testimony in the court, Jeffrey Koo Jr. stated one prosecutor used these accusations as leverage to persuade or pressure him to testify against Chen Shuibian's family in a corruption case in exchange for lesser charges or bail.¹⁴⁴ These allegations also cast much doubt on the impartiality of the

¹⁴²This point is clearly shown in the all lengthy court opinions in the Red Fire case. Even in the latest one by the Supreme Court in May 2022, Supreme Court remanded manipulation part of Koo to High Court for further consideration again. See Jeffrey Koo Jr. v. Taiwan, Case No. 2021-TA (Taiwan Appeal [*tai shang*])4769 (Sup. Ct. May 12, 2022).

¹⁴³See *First Supreme Court Decision*.

¹⁴⁴Dong Jiebai, *Jeffrey Koo Jr.'s Attorney: Returning to Taiwan in Exchange of Bail*, UNITED EVENING NEWS (Taiwan), Apr. 19, 2011, at A9 (Koo Jr.'s attorneys testified that Koo's returning to Taiwan was based on the consideration that then-prosecutor of SID (Special Investigation Division of the Supreme Prosecutors' Office) met him in Japan and persuaded him to return to Taiwan and testify against Chen Shui-bian in the latter's bribery case and hinted that he could apply for witness protection and remain free from custody. Later, in the first High Court trial in 2013 April, Koo Jr. confirmed the story in his testimony.).

prosecutors in terms of their handling of this case from the perspective of procedural rules.¹⁴⁵

Lastly, the length of time consumed in court for the Chinatrust case is astounding. The prolonged trial—more than twelve years without a final judgment and more than fifteen including the prosecutorial investigation stage—invited questions about defendants' right to a speedy trial in the justice system. At the time of this writing, it is widely expected the case will last another five years before it is final, as the Supreme Court remanded the case for a second time. In addition, the serial criminal investigations including other criminal investigations such as related-party transactions—in conjunction with the prolonged trial—substantially impaired the company's market reputation, long-term development, and stock price. Arguably, the unfamiliarity with the practice of corporate takeover and its political tint compounded the severity of this failed takeover attempt. An easy intrusion by politics and law into the realm of business put the defendants' liberty and corporate name on the line for the not-so-unusual business activity of acquisition. Dozens of judges and prosecutors have been ground down in the seemingly endless legal procedure. In this regard, it can be said that all parties lost something in this case.

For the Want Want group's serial failed mergers, the exercise of regulatory powers was inadequate, even flawed, as the legal rules involved were not clear either. Criticisms arose from several aspects. First, in Want Want's initial move toward becoming a media empire by controlling two news channels, whether the NCC had the discretion to "review" the qualification of a new owner and management, as well as what constitutes the ideal "qualification," is debatable from a legal aspect. Relevant laws only say that "any change of actual owner and legal representative (i.e., chairman of the board of directors)" must be filed with the agency.¹⁴⁶ The NCC interpreted this rule as implying the power for it to review and reject a new owner when necessary. However, this issue was brought to court

¹⁴⁵The prosecutor mentioned in this "negotiation" was later dismissed following her denial of these allegations. However, due to the fact that SID refused to initiate any legal proceeding to ascertain the allegation's validity publicly, there is no way of knowing who in the allegation is correct. *Investigation Concerning Koo Jr.'s Accusation is Officially Close Due to Lack of Evidence*, CHINA TIMES (Taiwan) (July 5, 2011), <https://www.chinatimes.com/newspapers/20110705000374-260106?chdtv>.

¹⁴⁶*C.f.* generally Regulations for Administration on Type II Telecommunications Business, Arts. 12-1 and 12-2, https://www.ncc.gov.tw/English/news_detail.aspx?site_content_sn=66&is_history=0&pages=0&sn_f=2131, (National Communications Commission) (stating that mergers require oversight by NCC, but not directly giving NCC power to review qualifications of new owners).

and contended vigorously. As courts weakly defended the NCC's position on this issue, the definition of the NCC's review powers—as well as its tension with the constitutional right of free speech and free press—is a problem which should ideally be solved by an improved regulatory process or a clear mandate from the legislature. The lack of clear congressional authorization puts the courts in a difficult position to define the power of a newly introduced independent committee—the NCC in this case—and its exercise. This is a task difficult as well as sensitive for the courts to fulfil mainly due to courts' lack of policy analysis capability and tools, as they are more apt to mechanical reasoning and law application.

Second, the NCC's decisions involved in the Want Want group's three-stage media expansion obviously deviated from its earlier practice in other cases. Particularly for the deal involving CNS cable system, the NCC departed from its precedent substantially, in which Fubon Financial Group—currently the largest in Taiwan—took over a key MSO company and formed the largest MSO in Taiwan in the same year (2010).¹⁴⁷ Obviously the piling on of unprecedented public pressure is a plausible explanation for the change of attitude, and similarly, it is reasonable to think that both agencies (NCC and FTC) have their learning curves and have to develop different standards or procedures due to a changing environment. However, the fine line between arbitrariness and adaptability requires more careful reasoning. The proper protection of business interests—both at the individual and industry levels—is equally important, especially in light of the need for substantial structural transition in that media industry. In this regard, the challenges the agencies face, and their inadequacy are acute from a legal point of view.

Undeniably, it is a powerful argument that takeover in the media industry is of particular import or should even be subject to a greater level of scrutiny when foreign—particularly Chinese—investment is involved, given the special circumstances between Taiwan and China. In fact, a mechanism similar to the Committee on Foreign Investment in the United

¹⁴⁷*Fubon Chief to Buy Cable Group Kbro from Carlyle*, TAIWAN NEWS (July 27, 2010), <https://www.taiwannews.com.tw/en/news/1329866> (Kbro had roughly 22 percent of the cable TV market in Taiwan when the deal was first announced in September 2009. The owners of Fubon Financial, Daniel Tsai and Richard Tsai, reached a deal of NT\$65 billion with Kbro's owner, Carlyle Group. Already having roughly 10 percent of the MSO market before the deal, the Tsai brothers used their personal funds to form another company to complete this transaction and got approval from both the FTC and NCC in a bit more than a year); *Da-Fu to Take Over Kbro: Cable Fee Expected to Reduce*, ECONOMIC DAILY NEWS (Taiwan), Nov. 18, 2010, at A1, (The transaction was cleared by the NCC with 15 commitments required on November 17, 2010. The final deal was to purchase only 80 percent of Kbor with NT\$6 billion to avoid the NCC's redline of owning less than one-third of the market shares).

States (CFIUS) has also been in place in Taiwan since 1954.¹⁴⁸ This mechanism could do a better job of providing a safeguard to any takeover with the potential to imperil national interests. However, due to the lack of a clear division of regulatory power and the lack of experience in coordinating among agencies of this scale, Want Want's failure in the media industry became unnecessarily long and painful. In 2014, upon realizing that a more systematic way of dealing with these matters was needed, the Ministry of Economic Affairs changed the Investment Commission's organization in which it added a representative from the National Security Bureau (deputy director-general) as one of the commissioners to address potential concerns.¹⁴⁹

Returning to the political implication for corporate law, the NCC's decision clearly acknowledged or compounded political or ideological judgments when it applied heightened scrutiny in the China Times/CTV case with an unprecedented number of conditions and obligations placed on the new owner.¹⁵⁰ Thereafter ensued a long, complicated court fight lasting for years—even after the deal was sealed.¹⁵¹ However, the proper consideration of the "political" stance of the owner of a media/news group, especially in a business transaction of this size, is elusive but inescapable. A clear and satisfactory stipulation still seems far away as long as the court fight produces little consensus on this point.

In retrospect, from the perspective of business and business law, the problems could be eased if either a clearer and generally applied rule was spelled out *ex ante* or if a speedy but careful decision by the regulatory agency had been made. This clarity would minimize the overall cost for transaction planning and business decision-making. *Ad hoc* interpretation and enforcement does not help anyone in the long run.

¹⁴⁸ Investment Commission of Ministry of Economic Affairs, About Us, <https://www.moeaic.gov.tw/about.view?type=atlo&lang=en> (last visited May 22, 2022) (in the beginning, the purpose of this office was to facilitate foreign investment by providing a single window for easy entry. As much regulation is gradually lifted, the task of MOEAIC has slowly transformed, since the turn of this century, into a checking mechanism against Chinese investment in sensitive sectors and for technical cooperation).

¹⁴⁹ *MOEA: National Security Bureau Joins MOEAIC*, TAIWAN NEWS (Apr. 21, 2014) <https://www.taiwannews.com.tw/ch/news/2464186>; *see also* INVESTMENT COMMISSION OF MINISTRY OF ECONOMIC AFFAIRS ORGANIZATIONAL RULE, Art. 2.

¹⁵⁰ *See* Shan, *supra* note 92.

¹⁵¹ *See* Appendix 2-1.

C. Summary

In both cases, the prolonged court fight and the seemingly endless legal process revealed the vulnerability of a legal system in the midst of learning. What is more, both deals involved either new media or an arms race of financial consolidation. While large-scale business expansion may possess some legitimacy due to background changes, how the review standard should be properly set is a more difficult question to answer. Finally, the political situation in both cases—either because of the principal characters or the sensitive nature of the industry—compounded the problem by making a weak rule particularly unstable and prone to incur substantial social cost for all concerned.

From a business perspective, the two cases provide clear examples of the dear price that a business may pay when it ventures into a political-economic entanglement, with bad political image and communication, on the one hand, and an insufficiently delicate legal environment, on the other. Similarly, public image and political investment can backfire and derail a transaction or even devastate a business. In this regard, the process of evaluating both the formation and dynamic nature of the political side business law is vital for economic actors and for business law at large.

V. POLITICAL-ECONOMIC LIAISON REVISITED: A LESSON FOR TRANSITION ECONOMIES

A. *The Exchange and Its Unstable Nature*

The interaction between corporate owners and political power has attracted much interest from both a theoretical and an empirical perspective. Since the second half of the 20th century, the former has traditionally been dominated by a public choice school of thought and rent-seeking when researchers have used economic tools to analyze political decisions and regulation.¹⁵² The same phenomenon similarly draws much

¹⁵²Historically, the public choice school was led mainly by James Buchanan, George Stigler, Sam Peltzman, and Gary Becker and conducted extensive study of the economics of regulation. For the related economics of regulation literature, most notably, *see e.g.*, George J. Stigler, *The Economic Theory of Regulation*, 2 BELL J. OF ECON. 3, 3–21 (1971); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J. OF LAW AND ECON. 211, 211–40 (1976); Gary S. Becker, *A Theory of Competition among Pressure Groups for Political Influence*, 98 Q. J. OF ECON. 371, 371–400 (1983).

attention from scholars in political science and other social sciences when using a more descriptive method to analyze reasons and dynamics.¹⁵³

Most times, intricate dynamics arise when politics and business intersect. Particularly in complex transactions, as showcased in the two cases from Taiwan, this interaction and its results may change the course and fate of billion-dollar deals. Due to various reasons, this reality is not always anticipated or foreseen by the business side, and even has the potential for miscalculation.

The interaction often presents itself in various forms of "exchange" or "dialogue;" two factors make this interaction less stable in a real-world scenario. First, the exchange between political decision-makers and large-business owners tends to have its high political and social cost external to the exchanging parties—especially when the exchanges become institutionalized and are part of the political-economic structure.¹⁵⁴ When negative impacts compound, the exchange will likely be disrupted by pressure from social constituents.¹⁵⁵ Second, the changing and complex nature of politics and the social environment makes the exchange less balanced and stable than what the business side needs.¹⁵⁶ These features led to the failures in the two cases discussed.¹⁵⁷

Despite both sides hoping for a stable exchange, the political decision process is unstable by nature for various reasons, such as reelections or multiple interests or parties involved.¹⁵⁸ This is even more

¹⁵³See generally MICHAEL USEEM, *THE INNER CIRCLE: LARGE CORPORATIONS AND THE RISE OF BUSINESS POLITICAL ACTIVITY IN THE U.S. AND U.K.* (1984); DAVID VOGEL, *AMERICAN BUSINESS AND POLITICAL POWER: PUBLIC OPINION, ELECTIONS, AND DEMOCRACY* (1989). For discussion specifically related to East Asian countries, see, e.g., Chalmers Johnson, *Political Institutions and Economic Performance: The Government-Business Relationship in Japan, South Korea, and Taiwan*, in *THE POLITICAL ECONOMY OF THE NEW ASIAN INDUSTRIALISM* 136 (Frederic C. Deyo ed., 1987); ROBERT WADE, *GOVERNING THE MARKET: ECONOMIC THEORY AND THE ROLE OF GOVERNMENT IN EAST ASIAN INDUSTRIALIZATION* (Princeton Univ. Press 2003) (1990).

¹⁵⁴Stigler, *supra* note 152, at 3.

¹⁵⁵See Stigler, *supra* note 152, at 3-4, 11-12; see also Peltzman, *supra* note 152, at 212.

¹⁵⁶See Stigler, *supra* note 152, at 3-4; see also Becker, *supra* note 152, at 372.

¹⁵⁷Actors on both sides have incentives to keep this "exchange" or "dialogue" alive and working as long as the exchange can bear fruit as expected. This echoes the rent-seeking activities in economics much-discussed in the second half of the 20th century. See, generally, Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 *WESTERN ECON. J.* 224, 224-32 (1967). The specific term "rent seeking" was coined by Professor Anne Krueger. See Anne O. Krueger, *The Political Economy of the Rent-Seeking Society*, 64 *AM. ECON. REV.* 291, 291, 293, 295-96 (1974).

¹⁵⁸See *20th Anniversary of the End of Martial Law*, *supra* note 130; see also *Taiwan Profile – Timeline*, *supra* note 129.

likely in a modern democracy or political party system.¹⁵⁹ If the skill or system to aggregate people with different agendas and stimulate trade among them is inadequate, the political side may not be able to provide a useful exchange to business owners.¹⁶⁰ The situation becomes increasingly difficult to handle when the exchange is large in size or is sensitive.¹⁶¹ Therefore, this increases the likelihood of a disruption, or at least the complexity of the situation. When this happens, the mutual decision-making process—or dialogue—will be in danger and the hazard of mishandling tends to heighten and persist, a high risk for costs for some or all involved.

From a realistic standpoint, this sort of dialogue or even exchange may still play its role in areas that are less subject to political intervention. If looking from today's perspective, the geo-political tension and changing dynamics in the trade war (as well as actual war) make almost all areas of business political. Agriculture can be political today, let alone rare minerals or defense industry. Even for those areas, the dialogue may not be structurally stable as the political interests tend to be diffused and conflicted and the economic interests in large corporations seem long-lived comparatively. This structural imbalance in life expectancy makes the communication less effective than it needs to be, or so it was for the business owners in the two cases in Taiwan.

The lesson is twofold. First, the communication and exchange with political decision-makers, for various reasons mentioned above, usually cannot be as stable or predictable as desired. Second, if possessing a capitalist logic of ever-expanding growth, business owners inevitably run a real risk of clashing with governmental intervention at some point.¹⁶² Business actors occasionally render themselves victims of political will or regulatory capriciousness, or they may become the victims of the ambiguity and inefficiency in bureaucracy. The unstable nature becomes more obvious when the two sides share little in terms of rationale or objectives.

¹⁵⁹*Taiwan Profile – Timeline*, *supra* note 129.

¹⁶⁰See Becker, *supra* note 152, at 372-73, 375.

¹⁶¹*Id.* at 375.

¹⁶²*Id.* at 371, 373, 375, 382-84.

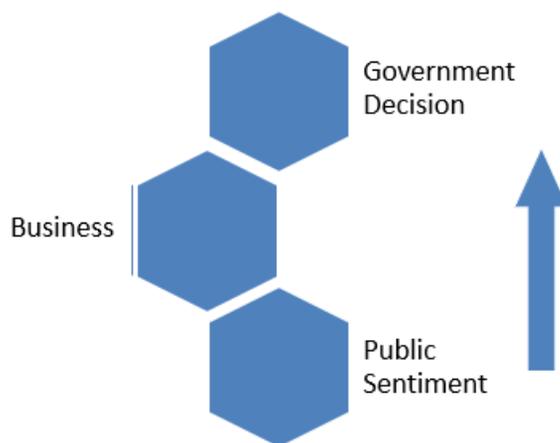


Figure 1. Business-politics dialogue in a simple world—when a stable exchange is reached.

B. The Second Half of Politics

Business owners may well understand the importance of interacting with politics or political actors. However, knowing its importance is one thing, whereas successfully navigating the sea of politics has never been an easy task, even for savvy business moguls. This difficulty comes largely from two reasons. One is the divided identity of politics among its constituents, professional politicians, and the general public as main actors, and government officials and judges as secondary ones. The other reason is the volatile and uncertain nature of politics—in stark contrast with economics, business, and capital. The latter group enjoys more metrics and rules, the relatively long-lasting structure of capital, and a logic different from what politicians tend to use.

To understand this difficulty, it is helpful to start with a review of the interaction with political power in the two Taiwanese cases. Admittedly, the bidding parties in both cases were, to various extents, aware that their public, political connection would affect the direction of their business decisions or the outcomes thereof. Here, the political connection usually means a connection with a formal political system such as government officials, congress, or party leaders, or the showing of a

political ideology (the first half).¹⁶³ However, in the two Taiwanese cases, there was another group of actors in the political domain—the general public and its perception of the businesses' political connections (the second half)—that was ignored. As the political image and perceptions often concurrently shape public opinion, this, in turn, influences policy-setting and the corresponding government decisions if legal rules allow room for some discretion. Being extremely careful about the first half of politics—that is, to give almost sole regard to formal political connections—business actors in both cases were surprisingly ignorant about the second half of politics. Compounding the struggle was that even when focusing on the formal half of politics, only those business owners still erred when trying to stake the right amount or back the right side in placing their bets. These mistakes ultimately thwarted the attempted mergers, which might have had a chance to survive and bear some economic fruit, and the ultimate price for all involved was high and counterproductive to the whole system.

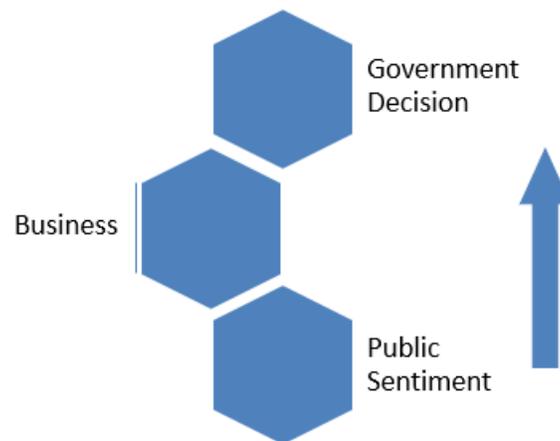


Figure 2. Divided identity in politics—how public opinion changes government's attitude.

It is even more interesting to look at this matter from an opposite angle. When businesses make political mistakes, or when pure business

¹⁶³Stigler, *supra* note 152, at 3, 5-7, 13. See also Becker, *supra* note 152, at 393-94.

mistakes turn political, the burden may fall on the fine-tuning of political decision-makers, such as bureaucrats and courts, to properly determine the fate of these businesses and their agents.¹⁶⁴ This observation, or question, will then lead us to a missing but indispensable piece in this puzzle.

C. Both Sides are Caught Between "a Rock and a Hard Place" – Rule of Law as Solution

For businesses, two different perspectives arise when facing an unstable interaction with political institutions. One is to tell businesses to stay away from any politically sensitive area or action in its entirety. The opposing perspective is to accept the low predictability of the possible political dynamics and improve a business's skill in detecting, countering, and managing these situations—perhaps even increasing "investment" in this area or in certain political actors to avoid the perils of inaction.

For the political side, two distinct countermeasures can be similarly expected. Those who value "dialogue" or "exchange" will try to reestablish the communication for the collective good—or perhaps for private benefit—when this interaction is disrupted. Those who view the unstable nature as preventative of long term success will discourage any business-politics interaction, or at least clearly signal politically sensitive areas in order to avoid the conflict of business and politics and uncertainty as well. In other words, the second approach is to use a clearer "code of conduct" and ultimately a better "rule of law" as an interface to replace a direct

¹⁶⁴When using the Want Want group's Next Magazine/Apple Daily deal as an example to see the three-way dynamics among public opinion, business decision, and law, one finds more interesting details in its development even after it was terminated. At the peak of widespread public protest, one main argument made by the protestors was worry over concentration of media power, which later led to a strong voice arguing for the enactment of a Media Anti-monopoly Law in 2013. At that time, public opinion was overwhelmingly against that deal, and new legislation that placed heavier restrictions on media consolidation transaction was supported unanimously by politicians from across the spectrum and the NCC alike. Despite this appearing unanimity, the legislation's draft (officially named Media Pluralism Maintenance and Anti-trust Act, with 41 articles in total), after six years' of sluggish progress, was finally completed by the NCC and submitted to Executive Yuan to get the final clearance from the Cabinet in January 2019, a necessary step before it is sent to Congress for debate and to be voted into law. See National Communications Commission, *NCC Passes Draft of Media Pluralism Maintenance and Anti-trust Act*, (Jan. 16, 2019), https://www.ncc.gov.tw/english/news_detail.aspx?site_content_sn=360&is_history=0&pages=0&sn_f=3584. However, even after the initial rejection by the Cabinet and later amendments, this draft was finally sent to the Congress in late 2019 but never being scheduled for formal deliberation, at least for the time of this writing. Perhaps the disappearing public attention and the political wrestling from all relevant parties in it, along with the inherent difficulty in defining "monopoly" in media all contribute to the doomed fate of this proposed legislation.

interaction between business and the political system or potential conflicts thereof.

Rule of law is a preferred strategy for several reasons. Beyond its wide adoption in the traditional development literature, one of its greatest practical strengths is its ability to counter the instability or fragility of the political system. As mentioned above, political systems and their actors are volatile. The investment of actors in it tends to be short-lived, especially in some countries. Also, public opinion is unpredictable and prone to shift, especially as media evolves. Whether the "exchange" between two worlds can proceed—even when both sides want it—is a legitimate question, and reasonable minds may differ. This assessment does not even include the consequences of negative externalities when these exchanges fall into legally ambiguous gray areas.¹⁶⁵

For the business side, the choice mentioned above may be nonexistent; the first solution is not very practical, particularly in transitional economies. When businesses reach a certain self-supporting economic scale and state aid is less needed, what those businesses face is an ever-growing appetite and pressure from the market for expansion and growth. In this sense, the first solution—minimizing contact and staying away—seems impractical or unattractive. If true, this results in an increased need for a stable ruling system, or a better rule of law system, to resolve the conflicts with politics when they eventually happen. In a practical sense, the lack of an efficient court system or adjudicating capacity evidenced—as evidenced in the cases—discussed marks a double-hit for businesses seeking to build and use political connections as a weapon. In a situation like this, the rule of law option provides better boundary lines for businesses to ward off undue government intervention—whether it takes the form of protectionism, populism, paternalism, or arbitrariness.

¹⁶⁵Rule of law as a strategy surely faces its own difficulty as law interpretation and design struggle to conceive a complete law that can foresee future changes of circumstance on the one hand and, on the other hand, political intervention can still be found and anticipated in various situations. This is true even for the many developed economies that boast a longer history of rule of law. See, e.g., Sheera Frenkel, et al., *Delay, Deny and Deflect: How Facebook's Leaders Fought through Crisis*, N.Y. TIMES, (Nov. 14, 2018), <https://www.nytimes.com/2018/11/14/technology/facebook-data-russia-election-racism.html>.

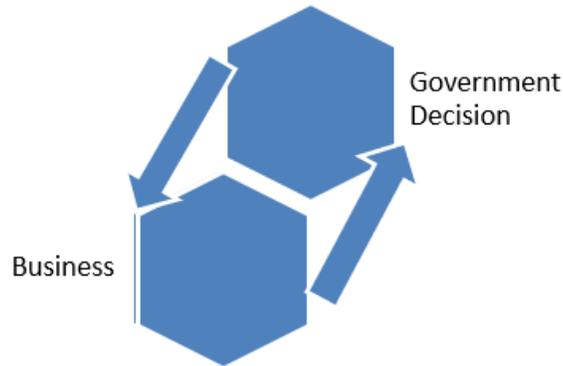


Figure 3. Rule of law as a better solution for both sides as it replaces an unstable, or even stable, politics-corporate liaison—if law and court can sensibly withstand influence from the political side.

However, adopting the rule of law option may face challenges of its own. First, in contrast to its long-term benefit, a political system may want to extract short-term resources from business and intentionally delay the improvement of rulemaking in related areas. By preventing the judicial system from intervening effectively, the political system may gain more from the political-business interactions. Second, even for a political system willing to weaken the political-business liaison, the task of making rules clear and sensitive enough to attend to the uniqueness of different categories of business interactions is inherently challenging work. It requires strong legislative expertise and decision-making, which may not be readily available in many countries. Whether the court system is attentive enough to this high expectation—especially in complex transactions—is similarly unclear. This concern may be particularly conspicuous when the law or administrative rules are absent, as seen in the two cases from Taiwan. In some areas, the decision between who is more suitable for deciding these matters—regulatory agencies or the judicial system—is another open question. Even when sound laws or rules are in place, it may still be tempting for agencies to bypass a stated rule for what they believe are the best solutions to deal with the complicated issues. A touted benefit usually includes substantive expertise and time efficiency, especially when the latter is the key element in dynamic business world. When all the push-and-pull is added up, the rule of law option may still

have contest as the best option. This is further complicated when a different stage of development is considered.¹⁶⁶

D. A Story of In-and-Out of Love and Again – The Dilemma of Transitional Economies Revisited

From a broader perspective, the two cases demonstrate an acute tension between two positions—businesses' need and anxiety in their economic activities versus the distrust, or even hostility, from the public toward expansive commercial ambition and the consolidation of local economic power. This tension poses a fundamental question: How should a government view itself in this duality and draw a line setting a suitable boundary?

In the past, Taiwan—like many other emerging economies in the postwar era—experienced a long period where the state/public sector dominated many economic activities, and the political-business relationship was stable and delivered a fair level of economic success. But when Taiwan started its transition to a complete market-oriented economy, beginning around the mid-1990s, the delicate interplay among the government, general public perception, and large corporations—as well as the unstable dynamics among them—started to become more acutely discordant. The public faced a dilemma between capitalists with their profit-oriented agendas and government actors with a declining ability to plan and execute complex business projects. The amicable, albeit sometimes unstable, exchange between government and business caused more uncertainty or opportunistic behaviors on both sides—especially when the overall political-economic situation became furcated, conflicting, and complex. Boiled down, when the government shuts down a reasonable business plan which had a chance of success, the burden of development

¹⁶⁶ See David Kennedy, *Laws and Developments*, in LAW AND DEVELOPMENT: FACING COMPLEXITY IN THE 21ST CENTURY (John Hatchard & Amanda Perry-Kessaris eds.), 17-26 (2012); see also, MARIANA MAZZUCATO, THE ENTREPRENEURIAL STATE: DEBUNKING PUBLIC VS. PRIVATE SECTOR MYTHS (2015), which argues that the United States' economic success is a result of public and state-funded investments in innovation and technology. Similar, but not exactly identical, the theme of this article is that the dialogue—or relationship between state and business—does not necessarily mean a good thing for long-term development, or the opposite. Surely that implies state aid can be beneficial for development, as Mazzucato argues. However, this observation cannot be a normative one as implying more state involvement is needed or desired. In other words, state involvement, or its exchange with business, can be working in either direction, but the stability of its existence (or nonexistence) and functioning must be clearly understood and anticipated by all related parties.

shifts back onto the shoulder of the government. High-growth periods, an increasing appetite for better social welfare from the public, and mounting governance tasks as the world becomes more complex—especially in combination—can make a government's job in its transition stage more convoluted and its reaction less responsive. From this perspective, the failing mergers discussed above were failures of dialogue. The traditional two-way communication is no longer effective; the new model of a three-way communication among state, the general public, and business are not in place yet to build mutual trust; the strategy of "stay away, minimal contact, and no expansion" is not a viable long-term solution for businesses in a challenging world. As a result, the problem of industrial development is left unsolved and the transition becomes both painful and seemingly endless.

Ideally, setbacks like those displayed in the cases should initiate another round of attempts at a new balance or model of collaboration. In reality, this is not so in Taiwan. After these two cases and a series of similar controversies,¹⁶⁷ the business world has become extremely

¹⁶⁷Other conspicuous cases include the Taishin Financial–Chang Hwa Bank case, the Farglory bribery case, and the Yuanta structured note case. The Taishin Financial–Chang Hwa Bank case is also an unhappy remnant of "the second wave of financial institution consolidation." In 2005, in response to declining bank health, the Ministry of Finance decided to sell its 22.5% ownership to the highest bidder and relinquish its control over Chang Hwa Bank. Taishin Financial won the bid by offering a much higher premium than expected. The Ministry of Finance then followed up its promise and allowed Taishin Financial to control Chang Hwa Bank but also stopped a full merger between the two. However, in 2014, the Ministry of Finance, as the key holder of the many other state-controlled banks, started a proxy fight and took back control of Chang Hwa Bank. Taishin Financial then brought a suit against the Ministry of Finance for breach of contract, and both sides, argued bitterly about whether there was contract (i.e., voting contract) between both sides and whether it was legally binding. The latest development was that the Supreme Court vacated the High Court's decision, which had ruled in favor of the Ministry of Finance, in May 2019, and currently this case is still pending in the High Court. See Crystal Hsu, *Minister Speaks Up for Minority Owners in Taishin Bid to Regain CHB Control*, TAIPEI TIMES (May 12, 2017), <http://www.taipetimes.com/News/biz/archives/2017/05/12/2003670391>. Misfortunes do not only befall financial industry. Farglory Group is a top development and construction company in Taiwan. Its founder, Chao Teng-hsiung, was accused of bribing a county deputy magistrate with NT\$16 million to gain advantage in the bidding process for a public housing project. During the trial, after a long detention, however, it turned out there was a similar bribe early on, and Chao claimed that he was "forced" to pay the bribe and offered details on how he fought several times to knock down the bribe from NT\$24 million, and how angry he was when both sides negotiated the actual number he needed to pay. See Lauly Li, *Farglory Chair Claims He Is a Victim of Alleged Bribery*, CHINA POST (Aug. 26, 2014), <https://chinapost.nownews.com/20140826-54642>. Though denied by the county deputy magistrate, there is no easy way to determine whether his story is true. Lending some credence to Chao's story is that his group is commercially successful, with many ongoing projects, which made winning the bid less important, in light of the development project's size. Yuanta structured note case exemplifies another hard-to-imagine absurdity in the politics-business interaction for

conservative, and a dialogue between politics and business seems either shut-down or feeble. It is understandable that when corporations cannot find a way to equalize the political risk created by their scope, a simple rejection of political considerations could seem like the most sensible option.

If the pressure for a complete transition into the developed stage is mounting, the need for a new equilibrium will echo accordingly. However, whether a new equilibrium or model can be attained is unknown. A guess about future directions can be made according to historical developmental routes and Taiwan's current socio-economic structure. From a business angle or the angle of corporate law, a logical analysis suggests that a possible way out is to divest large companies to avoid political risk.¹⁶⁸ As the cases show, for most companies worldwide, except in the United States and the United Kingdom, controlling shareholders are still active and powerful. At times, their political stance inevitably will be under strong scrutiny when certain issues surface. When under scrutiny, shareholders may find it a sensible choice to divest and transform their investment into smaller equity holdings in other companies, that is, to relinquish their controller status in their original company. This way out works particularly well for companies faced with the problems of an aging founder or one with poor political communication skills. This developmental model may lead to a more US-style dispersive ownership structure, as part of a long-

both sides. Yuanta Financial is a financial holding company that owns the largest market share of the securities business in Taiwan. In a 2007 criminal investigation, the owner of Yuanta Financial, Rudy Ma, and his wife were accused of violating securities law by a breach of trust and earning an illegal profit of around NT\$600 million through a merger with Fuhwa Financial Holdings. However, Ma and his wife defended themselves by asserting that their family had absorbed NT\$1.15 billion (USD \$34 million) in losses from the structured notes deal in the 2004 structured note crisis brought on by a command from the Financial Supervision Commission. The so-called illegal profit was just the result of their trying to "park" some of the loss caused by the FSC command, in contrast to what the FSC had desired to be absorbed by controlling shareholders, in one of the subsidiaries that later become part of the merger deal. The final result led to seven years and four months imprisonment for the couple in 2014. *See* Rich Chang, *Taipei Prosecutors Investigate Senior Yuanta Executives*, TAIPEI TIMES (Nov. 1, 2007), <http://www.taipeitimes.com/News/biz/archives/2007/11/01/2003385813>; Shelley Huang, *Lawyer for Yuanta Pair Pins Blame on Government Policies*, TAIPEI TIMES (July 21, 2009), <http://www.taipeitimes.com/News/taiwan/archives/2009/07/21/2003449164>; Yang Kuo-wen & Chien Li-chung, *Supreme Court Upholds Yuanta Pair's Convictions*, TAIPEI TIMES (July 1, 2014), <http://www.taipeitimes.com/News/taiwan/print/2014/07/01/2003594099>.

¹⁶⁸From a corporate law perspective, one possible solution to the unstable dialogue is when controlling shareholders opt to slowly divest, cash out, or use a diversified vehicle to spread their economic risk resulting from their political affiliation. This route to some extent echoes the ownership structure shifts from block-holding to dispersion, as Adolf Berle and Gardiner Means described the US development 90 years ago. *See generally* ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION & PRIVATE PROPERTY* (1932).

term corporate structural transformation, and removes the personal political risk of its controller from the equation.

Viewed from a law and society perspective, the two cases demonstrate the fragility of the once-formidable coalition between political decision-makers and large-business owners as Taiwan entered its transitional stage. However, for government, if the traditional developmental route or responsibility for development is still imperative, the government may well need either to restore useful dialogue, as had happened in the old days, or alternatively, to institute a functioning, capable rulemaking, and rule-enforcing system along with a court system as suggested previously in this article. With clear and just legal duties and rights stipulated for corporations (and even government as well), corporate powers can at least suffer less harm than they might otherwise, no matter whether a government wants to sustain its old success in its half-century-old developmental strategy, or whether a government chooses to stay vegetative in its development. But more likely in transitional economies, when the responsibility of solving this type of problem shifts back to the government, reliance on a rule-of-law approach is a better position for a government to take for itself. That will ultimately lead to more open and stable dynamics going forward, both in an economic and a political sense.¹⁶⁹

VI. CONCLUSION

Large corporations can be both a help and a threat to political power, as the latter can be the same to the former. This creates an environment in which a political-business alliance becomes important. However, the two-way dynamics between political power and big business are not always smooth, stable, or even pro-efficiency, and surely not identical. As modern corporations are prone to stricter scrutiny by law and public attention, the increasing regulations render dialogues and dynamics between business and political actors more important and more difficult to predict. For owners of a large business, this entails real uncertainty, as actors, logics,

¹⁶⁹The phenomenon of crony capitalism has been at the center of discussion in recent years—especially how it works and shapes political and economic structures in developing countries. See, e.g., *Our Crony-Capitalism Index: Planet Plutocrat*, ECONOMIST (Mar. 15, 2014), <http://www.economist.com/news/international/21599041-countries-where-politically-connected-businessmen-are-most-likely-prosper-planet>; see also *The New Age of Crony Capitalism*, ECONOMIST (Mar. 15, 2014), <http://www.economist.com/news/leaders/21598996-political-connections-have-made-many-people-hugely-rich-recent-years-crony-capitalism-may>.

and tools are different by nature on both sides. This may even hold true just on the political side.

Regulations for economic affairs—even corporate law focused on connecting and encouraging voluntary contracts—often have a political side. Therefore, effective communication and the ability to reach agreement quickly and settle conflicts with political actors is crucial skills for business owners. This is especially true for matters prone to sensitive public discussion.

The struggle of business actors in the two cases discussed in this article shows not just some misfortune at the individual or corporate level; they illustrate how the "dialogue" or "exchange" between politics and business can stop and the consequences that result. At a theoretical level, the cases also reveal what was missed in terms of development strategy or what key element in transforming a developing economy to a more stable developed economy was needed when this kind of dialogue or exchange is generally considered to be an indispensable part of economic growth or country development.

The inevitable political side of corporate law will not only change the course of corporate activities at the decision-making level, but it possibly will also bring about more long-term changes—such as those to industrial structure or to ownership structure. The failure to handle this dynamic change in a thoughtful and proper manner has proven itself to be a costly misfortune for all parties involved. This misfortune is expected to continue for those who overlook a new model of communication and collaboration—for setting a wrong target, for choosing a wrong path, or for coming too late in an increasingly competitive world.

Appendix 1: Red Fire case

Instance	Docket number/Case name	Filing year	Decision time	Main result	Counts
1 (District Court)	Taipei District Court Decision, Case No. 2007-SL (Severe Litigation (zhong su))-19 臺灣臺北地方法院 96 年重訴字第 19 號刑事判決 (Defendants: Chinatrust's CFO Chang, Chief Counsel Deng, Deputy Director of corporate investment Lin)	2007	2008/10/7	Chang—8y Deng—7y 2m Lin—7yr 6m	Breach of trust ✓ Stock manipulation (Other manipulative method) ✓ Stock manipulation (Matched orders) X Insider trading X
1 (District Court)	Taipei District Court Decision, Case No. 2008-FSL (Financial Severe Litigation (jin zhong su))-40 臺灣臺北地方法院 98 年金重訴字第 40 號刑事判決 (Defendant: Koo Jr.)	2009	2010/10/18	Koo—9y	Breach of trust ✓ Stock manipulation ✓ Insider trading X
2 (High Court)	Taiwan High Court, Case No. 2008-SLA (Sever Litigation Appeal (shang zhong su))-54 & 2010-FLSA (Financial Severe Litigation Appeal (jin shang zhong su)) (cases merged) 臺灣高等法院 97 年上重訴字第 54 號刑事判決 & 99 年度金上重訴字第 75 號 (All four defendants)	2008 & 2010	2013/5/31	Koo—9y 8m Chang—8y 6m Deng—7y 6m Lin—8y	Breach of trust ✓ Stock manipulation ✓ Insider trading X
3 (Supreme Court)	Supreme Court of Taiwan, Case No. 2014-TA (Taiwan Appeal (tai shang))-2792 最高法院 103 年台上字第 2792 號刑事判決	2013	2014/8/14	Vacate and remand. Mainly criticizing the lower court for not stipulating what "interest" was harmed by the alleged breach of trust conduct.	

2 (High Court)	Taiwan High Court, Case No. 2014-FSAR (Financial Severe Appeal Remand (jin shang zhong geng)) (1)-9 臺灣高等法院 103 年度金上重更(一)字第 9 號刑事判決	2014	2018/9/12	Koo—3y 6m Chang—4y Deng—not guilty Lin—2y	Breach of trust ✓ Stock manipulation X Insider trading X
3 (Supreme Court)	Supreme Court of Taiwan, Case No. 2018-TA (Taiwan Appeal (tai shang))-4941 最高法院 107 年度台上字第 4941 號刑事判決	2018	2019/11/14	Affirm in part (not guilty part affirmed), reverse in part (vacated Koo, Chang, and Lin's guilty verdicts and remanded). Questioning whether, when the trading profit was registered under Red Fire, Chinatrust was harmed or had the legal right to enjoy the trading profit.	
2 (High Court)	Taiwan High Court, Case No. 2018-FSAR (Financial Severe Appeal Remand (jin shang zhong geng)) (2)-21 臺灣高等法院 108 年度金上重更二字第 21 號刑事判決	2019	2021/4/28	Consider Chinatrust suffered no harm from Red Fire transaction, and there was no clear evidence that defendants had intended to harm Chinatrust	Not guilty on all counts
3 (Supreme Court)	Supreme Court of Taiwan, Case No. 2021-TA (Taiwan Appeal (tai shang))-4769 最高法院 110 年度台上字第 4769 號刑事判決	2021	2022/5/12	Vacate and remand. Focusing on breach of trust part and criticizing the lower court for ignoring the fact that defendants did take some of the profit from the transaction for personal use and thus caused "interest" harmed for the Chinatrust. For stock manipulation, not-guilty decision for Chang and Lin is affirmed.	

Appendix 2-1: *Want Want–Chinatimes Group (CTV), 8 YEARS, 8 DECISIONS*

Instance	Docket number/Case name	Filing year	Decision time	Main result
1	Taipei High Administrative Court, Case No. 2009-L (Litigation (su)) 1714 臺北高等行政法院 9 年新字第 1714 號判決	2009	2011/10/14	NCC's decision is upheld
2	Supreme Administrative Court, Case No. 2012-D (Decision (pan)) 245 最高行政法院 101 年判字第 245 號行政判決	2012	2012/3/15	Remand. Questioning NCC's adding of new conditions that had not appeared in other similar cases before this case without providing adequate reasoning for the different treatment. Also questioning NCC's condition of requiring an independent director, a practice not applied to all but only to this case, which may raise concerns of equal protection.
1	Taipei High Administrative Court, Case No. 2012-LRF (Litigation Remanded First (su geng yi)) 66 臺北高等行政法院 101 年訴更一字第 66 號判決	2012	2012/11/29	NCC's decision is upheld. Maintaining that the concentration of media ownership as a trend justifies stricter conditions for approval.
2	Supreme Administrative Court, Case No. 2013-D (Decision (pan)) 256 最高行政法院 102 年判字第 256 號行政判決	2013	2013/5/2	Remand. In this ruling, Supreme Administrative Court criticized Taipei High Administrative Court for reaching its conclusion (i.e., the growing concentration of media ownership and its detrimental effect on diversity of expression) without providing empirical grounds for its determination, which is necessary when using its discretion and placing extra burden on a business.

1	Taipei High Administrative Court, Case No. 2013-LRS (Litigation Remanded Second (su geng er)) 62 臺北高等行政法院 102 年訴更二字第 62 號判決	2013	2014/9/25	CTV's claim loses ground due to the fact that CTV's old license was long expired in 2010, and it had already obtained a new license since then. No right to be protected in this case anymore since 2010.
2	Supreme Administrative Court, Case No. 2015-D (Decision (pan)) 87 最高行政法院 104 年判字第 87 號行政判決	2014	2015/2/25	Vacate and remand. Original conditions in NCC's decision are still in effect and triable. This is supported by the fact that NCC was still legally levying a penalty for CTV's failure to meet its conditions.
1	Taipei High Administrative Court, Case No. 2015-LRT (Litigation Remanded Third (su geng san)) 29 臺北高等行政法院 104 年訴更三字第 29 號行政判決	2015	2015/11/12	NCC's decision is vacated
2	Supreme Administrative Court, Case No. 2016-D (Decision (pan)) 461 最高行政法院 105 年判字第 461 號行政判決	2016	2016/9/8	Lower Court's decision is sustained

Appendix 2-2: *Want Want—Chinatimes Group (CTI, 8 YEARS, 8 DECISIONS)*

Instance	Docket number/Case name	Filing year	Decision time	Main result
1	Taipei High Administrative Court, Case No. 2009-L (Litigation (su)) 1715 臺北高等行政法院 98 年訴字第 1715 號行政判決	2009	2010/6/24	NCC's decision is revoked. Satellite broadcast TV regulation should cover both public interest and the nature of economic activity and allow the agency a certain level of discretion. However, in its decision, NCC did not provide clear empirical evidence to support its particular use of discretion in this case.
2	Supreme Administrative Court, Case No. 2011-D (Decision (pan)) 1347 最高行政法院 100 年判字第 1347 號行政判決	2011	2011/8/4	Vacate and remand. Maintaining that NCC's decision did provide some explanation for its use of discretion. Lower court should use its authority to investigate the empirical evidence if it thinks this is needed.
1	Taipei High Administrative Court, Case No. 2012-LRF (Litigation Remanded First (su geng yi)) 159 臺北高等行政法院 101 年訴更一字第 159 號行政判決	2012	2012/5/31	NCC's decision is upheld. Both sides citing legal expert opinions for supporting or attacking the conditions attached to NCC's decision, as the agency provided additional factual grounds for its decision. This court had an expansive and commanding reading of media diversity and determined that the plaintiff's market size in this case warranted special treatment (lines 1588-1617).
2	Supreme Administrative Court, Case No. 2013-D (Decision (pan)) 30 最高行政法院 102 年判字第 30 號行政判決	2013	2013/1/17	Vacate and remand. Supreme Administrative Court in this decision questioned, due to the unclear language used, whether the Satellite Broadcasting Act actually gives NCC the right of approval when a cable TV company files for a change of its directors. This decision also criticizes the lower court for acceding to special treatment too quickly without having adequate factual support.
1	Taipei High Administrative Court, Case No. 2013-LRS (Litigation Remanded Second (su geng er)) 19 臺北高等行政法院 102 年訴更二字第 19 號行政判決	2013	2014/9/25	NCC's decision is upheld. Considering that a change of the responsible person and directors is an integral part of the satellite TV license and such change will be subject to NCC's approval (lines 1056-1080). Furthermore, because a later change to the directors list (a new slate of directors) had been approved by NCC. In this case, the plaintiff's claim is no longer necessary as there is no existing right that needs to be protected.
2	Supreme Administrative Court, Case No. 2015-D (Decision (pan)) 146 最高行政法院 104 年判字第 146 號行政判決	2015	2015/3/31	Vacate and remand. Maintaining that NCC's conditions continue to restrict the plaintiff's activities. In this sense, as conditions and obligations are still in effect, the plaintiff has a legal right to sue without dismissal.
1	Taipei High Administrative Court, Case No. 2015-LRT (Litigation Remanded Third (su geng san)) 42 臺北高等行政法院 104 年訴更三字第 42 號行政判決	2015	2015/12/29	NCC's conditions revoked in part (prohibiting shared managers and cross promotion between CTV and CTI, establishing an ethics committee within CTI, maintaining independent programming staff between CTV and CTI) and sustained in part (no cross directorship between CTV and CTI).
2	Supreme Administrative Court, Case No. 2016-D (Decision (pan)) 313 最高行政法院 105 年判字第 313 號行政判決	2016	2016/6/16	Adopting <i>Chevron</i> -style deference and upholding NCC's condition 1 (no cross directorship between CTV and CTI), condition 3 (establishing ethics committee) and condition 4 (independent programming staff) with minor modification. Condition 2 (no cross promotion between CTV and CTI), considered to be too broad without specifying a range, is thus revoked.