BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF MANUFACTURERS AND NATIONAL FOREIGN TRADE COUNCIL

Case Number at the Second Instance:
Year 104 Chong Shang Zi No. 505

Division at the Second Instance: Division Tao

Linda E. Kelly
Peter C. Tolsdorf
Leland P. Frost
MANUFACTURERS' CENTER FOR LEGAL ACTION
733 10th Street, N.W., Suite 700
Washington, DC 20001
(202) 637-3000

Counsel for the National Association of Manufacturers

Rufus H. Yerxa
President
NATIONAL FOREIGN TRADE COUNCIL
1625 K Street, N.W., Suite 2000
Washington, DC 20006
(202) 464-2026

Counsel for the National Foreign Trade Council

The National Association of Manufacturers ("NAM") and the National Foreign Trade Council ("NFTC") (together, the "Amici") respectfully submit this brief and request that this honorable Court consider Amici's views on the important subject of whether the decision of the court below – holding that the defendants General Electric Company ("GE"), Technicolor SA ("Technicolor," formerly known as Thomson, SA) and Thomson Consumer Electronics (Bermuda) Ltd. ("Thomson") be held jointly and severally liable for the obligations of RCA Taiwan Limited ("RCA-Taiwan") in the circumstances of this case – would apply Article 154 of the Republic of China's Company Act in a manner that violates international norms of corporate law and would be harmful to Taiwan's critical interest in supporting its manufacturing industry and attracting foreign investment.

I. INTRODUCTION AND DESCRIPTION OF THE AMICI CURIAE AND THEIR INTERESTS

The NAM and NFTC have a strong interest in the outcome of this matter. Founded in 1895, the NAM is the largest manufacturing association in the United States, representing approximately 14,000 small and large manufacturers in every industrial sector. The NAM is the voice of the American manufacturing community and a leading advocate for policies that help manufacturers compete in the global economy and create jobs worldwide.

A principal function of the NAM is to represent the interests of its members before important governmental institutions such as legislative bodies, executive

agencies and the courts. The NAM regularly files briefs in cases raising issues of concern to the manufacturing community.

The NFTC, consisting of more than 300 member companies, is the premier business organization advocating a rules-based world economy. Founded in 1914 by a group of American companies that supported an open world trading system, the NFTC exclusively advocates the international and public policy priorities of its members on subjects such as international trade, investment, tax, export finance and human resource management. Among NFTC's concerns are issues involving the fair treatment of international investments under each nation's laws and the fair treatment of international businesses when subject to local judicial proceedings in those jurisdictions where they do business.

Amici and their members have a substantial interest in the maintenance of a predictable, consistent and lawful system of corporate governance internationally. Many of Amici's members invest in companies that manufacture goods in Taiwan, operate subsidiaries or affiliates that manufacture goods in Taiwan, or purchase goods or parts that are manufactured in Taiwan. As described in Section II below, both foreign investment and manufacturing are critical elements of Taiwan's economic growth.

Traditionally, the legal system of the Republic of China has encouraged foreign investment by honoring the principle of corporate separateness and

providing foreign investors with assurance that their liabilities relating to those investments will be limited to the amount invested – a fundamental principle of corporate law. The Republic of China's traditional corporate policy is one of the many legal factors that have created a robust economy that provides many good manufacturing jobs.

Thus, development of the law regarding the principle of corporate separateness is important to both Amici and Taiwan. The decision of the court below, in disregarding this principle, departs from longstanding precedent and potentially could harm the economy of Taiwan by rendering it an unpredictable and unfavorable location in which to invest in manufacturing facilities compared to other jurisdictions that follow international norms. This honorable Court should correct the decision of the court below and determine that defendants GE, Technicolor and Thomson cannot be held jointly and severally liable for any liabilities of RCA-Taiwan in this case.[1]

[1] Amici understand that the defendants in this action, including GE, Technicolor and Thomson, have raised numerous other issues in this appeal. Although this brief addresses solely the question of the principle of corporate separateness, Amici do not mean to suggest that the other issues raised by the defendants on appeal are not equally meritorious. Amici address the issue of corporate separateness because of its unique importance to their members and to the economy of Taiwan.

II. FOREIGN INVESTMENT AND MANUFACTURING ARE CRITICAL ELEMENTS OF TAIWAN'S ECONOMY

A. Foreign Investment Is Critically Important to Taiwan's Economy.

Taiwan has long sought to be an attractive jurisdiction for foreign investors and has been successful in that endeavor. According to the Investment Commission of the Ministry of Economic Affairs, 3,415 foreign direct investment ("FDI") projects totaling US $7,513,192,000 were approved in 2017. *See* Investment Commission of the Ministry of Economic Affairs, *Taiwan FDI Statistics Summary Analysis* (Dec. 2017).[2] The United Nations reported that the inward-bound FDI in Taiwan totaled over $75 billion as of 2016, or about 14% of Taiwan's gross domestic product. *See* United Nations Conference on Trade and Development, *World Investment Report 2017, Country Fact Sheet: Taiwan*.

The United States is Taiwan's second largest single source of foreign direct investment. *See* U.S. Department of State, Bureau of Economic and Business Affairs, *2017 Investment Climate Statement-Taiwan* (2017).[3] In 2017, according to U.S. Department of Commerce data, the total stock of U.S. FDI in Taiwan amounted to $15 billion. *Id*. Manufacturing, depository institutions and wholesale trade lead U.S. direct investment in Taiwan. *See* Office of the United States Trade

[2] Taiwan FDI data reflect approved investments and do not take into account disinvestment. *See* U.S. Department of State, Bureau of Economic and Business Affairs, *2017 Investment Climate Statement-Taiwan* (2017).

[3] The report, however, also identified that "structural impediments in Taiwan's investment environment" included "excessive or inconsistent regulation."

Representative, *U.S.-Taiwan Trade Facts*, https://ustr.gov/countries-regions/china/taiwan#. In addition, the value added to U.S. parent companies from majority owned affiliates in Taiwan exceeded $7.8 billion. *See* U.S. Bureau of Economic Affairs, *Activities of U.S. Multinational Enterprises in the United States and Abroad*, at 5 (Dec. 2016).

B. Taiwan's Economy Is Strongly Dependent Upon the Manufacturing Sector.

Manufacturing represents approximately 31% of Taiwan's Gross Domestic Product ("GDP"). *See* Directorate-General of Budget, Accounting, and Statistics, *GDP: Preliminary Estimate for 2017Q4 and Outlook for 2018* (Feb. 13, 2018). In the fourth quarter of 2017, the output expansion of semiconductors and machinery-and-equipment contributed to the Taiwan manufacturing sector growing by 3.20%, which followed the 4.45% growth in the previous quarter. *See id*. For 2017, Taiwan's GDP grew by 2.86% and manufacturing accounted for 1.33% of that growth. *See id*.; *see also* Edward White, *Taiwan Manufacturing Gauge Points to Solid Growth*, FINANCIAL TIMES (Nov. 30, 2017) (noting that "companies scaled up production levels and raised their staff numbers at quicker rates" and "the [manufacturing] sector is on course to remain on an upward trajectory in the coming months"). In 2017, an estimated 36% of Taiwanese workers were employed in the industry sector, of which manufacturing is vastly predominant. *See* The World Factbook – Central Intelligence Agency, *Country Profiles-Taiwan*,

(Feb. 8, 2018); Directorate-General of Budget, Accounting, and Statistics, *GDP: Preliminary Estimate for 2017Q4 and Outlook for 2018* (Feb. 13, 2018).

In 2016, Taiwan shipped $280.5 billion worth of goods. *See* World's Top Exports, *Taiwan's Top 10 Exports*, http://www.worldstopexports.com/taiwans-top-exports/. The vast majority of these exports were in manufactured goods, such as:

- Electrical machinery, equipment: $124.1 billion (44.3% of total exports)
- Machinery including computers: $30.2 billion (10.8%)
- Plastics, plastics articles: $17.6 billion (6.3%)
- Optical, technical, medical apparatus: $14.8 billion (5.3%)
- Vehicles: $9.3 billion (3.3%)

Id. Consequently, the manufacturing sector accounts for more than two-thirds of the exports of Taiwan. *See generally* National Bureau of Economic Research, *Trade Patterns and Trends in Taiwan*, http://www.nber.org/chapters/c6927.pdf.

Taiwan's manufacturing export strength allows it to maintain a favorable trade balance. In 2016, Taiwan maintained a favorable trade balance of $49.8 billion. *See* FocusEconomics, https://www.focus-economics.com/countries/taiwan. Recently, "President Tsai Ing-wen . . . has launched an initiative to promote economic growth by increasing domestic investment and [foreign direct investment]" through the "leverag[ing] [of] Taiwan's strengths in high-technology,

manufacturing, and R&D." U.S. Department of State, Bureau of Economic and Business Affairs, *2017 Investment Climate Statement-Taiwan* (2017).

As the foregoing data illustrate, remaining an attractive location for both domestic and foreign investment, particularly in the manufacturing sector, is crucial to the success of Taiwan's economy. The decision of the court below, however, has the potential to create an inhospitable business environment, thereby threatening to impede the continuing prosperity and growth of the manufacturing sector as well as discourage further foreign investment.

III. COMPANIES RELY ON THE PRINCIPLE OF CORPORATE SEPARATENESS IN STRUCTURING THEIR BUSINESSES

The fundamental principle of a corporation is that it is a separate entity from its owners, whom invest in reliance upon the fact that their liability is limited to the capital they invested. As stated by Nicholas Butler, the President of Columbia University, in 1911:

> "The limited liability corporation is the greatest single discovery of modern times . . . even steam and electricity are far less important than the limited liability corporation, and they would be reduced to comparative impotence without it. . . . It makes possible huge economy in production and in trading. It means a steadier employment of labor at an increased wage. It means the only possible

> engine for carrying on international trade on a scale commensurate with modern needs and opportunities."

Butler, Politics and Economics, Address at the 143rd Annual Banquet of the Chamber of Commerce of the State of New York (1911).

Moreover, when it comes to corporate law, a state's institutions can have a pivotal impact on creating and maintaining a state's economic success. *See* Robert M. Sherwood, *The Economic Importance of Judges*, 9 Fed. Cir. B.J. 619, 620 (1999) ("[S]ustained economic success of a country depends not on any initial or subsequent endowment of capital and technology, but on its ability to create and maintain formal and informal rules, which keep transaction costs low, protect rights, and support agreements."). The World Bank also has recognized that a state's ability to remain consistent in the application of modern, international norms of corporate law allows for governments to "facilitate" rather than "control" economic activity, thereby encouraging economic growth. World Bank, *World Development Report 1996: From Plan to Market*, 90-91 (1996); *see also* World Bank, *World Development Report 1997: The Role of the State in a Changing World*, 4 (1997) ("Most important, we now see that markets and governments are complementary: the state is essential for putting in place the appropriate institutional foundations for markets. And government's credibility – the predictability of its rules and policies and the consistency with which they are

applied – can be as important for attracting private investment as the content of those rules and policies.")

IV. THE REPUBLIC OF CHINA HAS LONG HONORED THE DOCTRINE OF CORPORATE SEPARATENESS, AND THE 2013 COMPANY ACT ADOPTS INTERNATIONAL NORMS IN THAT REGARD

From its first adoption of its corporate statutes, the Republic of China has honored the doctrine of corporate separateness. As shown in detail in the briefs submitted by the parties, the case law in Taiwan also has long established this principle. *See, e.g.*, the Appeal Reasons (1) of GE at 9-11; the Appeal Reasons of Technicolor SA at 2-4, 11-14. For example, in the Year 2002 Tai-Shang-Zi-No.792 judgment (*see* Defendant Evidence 74 of the first instance trial record), this Court overruled the High Court's effort to treat two separate corporations as one, stating "Hua Yi Company and the appellant are ultimately two difference subjects of rights. It is inappropriate that the previous judgment sees Hua Yi Company and the appellant as the same and conclude that the new company will be responsible for all liabilities of Hua Yi Company in terms of legal effect." Hence, this Court upheld the principle of limited shareholder liability and rejected the High Court's interpretation of piercing the corporate veil.

Similarly, in the Year 2012, Tai-Shang-Zi-No.1888 judgment (*see* Appellee Evidence 7 of the second instance trial record), this Court upheld the High Court's judgment, which stated that "the Company Act 'in principle' recognizes the

company and shareholders as separate and distinct legal entities and as such the rights and obligations of a company are usually separate from its shareholders. The Shareholders are responsible for the company's liabilities only to the extent of the amount of their respective capital contribution. Such is an example of the principle of shareholders limited liability and is really beneficial in the formation of companies."

In 2013, the Company Act was amended to permit a very limited exception to the principle of corporate separateness, and Article 154 now states:

> 1. The liability of shareholders shall be limited to payment in full of the share they have subscribed except for those described in paragraph 2.
>
> 2. Where a shareholder abuses the corporation's status as a legal entity in a manner that causes the corporation to incur an obligation that is clearly difficult to discharge, and the circumstances are serious in nature, the shareholder shall be liable for fully discharging the obligation.

This amendment, which for the first time provided for "veil piercing," was intended to limit the basis for doing so to the express circumstances set forth in Article 154. It appears that, in amending the Company Act, the legislature sought to create an exception that would be similar to the laws of other nations that permit

exceptions to the principle of corporate separateness in cases of abuse. Therefore, understanding the international norms is relevant in this regard.

First, the principle of corporate separateness must be recognized as the rule, not the exception. "The autonomy of the corporate personality, the idea that the corporation is to be pierced only in the exceptional case of wrongdoing, is a doctrine that has become established throughout the world." *See* Vivian G. Curran, *Harmonizing Multinational Parent Company Liability for Foreign Subsidiary Human Rights Violations*, 17.2 CHI. J. OF INT'L L. 402, 408 (2016). "[T]he concept of separate legal personality is established all over the world." Dalia Palombo, *Chandler v. Cape: An alternative to piercing the corporate veil beyond Kiobel v. Royal Dutch Shell*, 4 BRIT. J. AM. LEGAL STUD. 453, 453 (2015).

Indeed, leading courts throughout the world recognize that any exceptions to the doctrine of separate personality must be narrowly drawn. For example, the United States Supreme Court has stated: "It is a general principle of corporate law deeply 'ingrained in our economic systems, that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries.'" *United States v. Bestfoods*, 524 U.S. 51, 61 (1998) (citing other authorities). However, "the corporate veil may be pierced and the shareholder held liable for the corporation's conduct when, *inter alia,* the corporate

form would otherwise be misused to accomplish certain wrongful purposes, most notably fraud, on the shareholder's behalf." *Id*. at 62.

In the United Kingdom, the Court of Appeal in the case of *Adams v. Cape Industries plc* [1990] Ch 433, reconfirmed the principle that "[i]n spite of the obvious economic connection between companies within the same group, English company law has steadfastly maintained its policy of treating such companies as distinct legal entities." In that case, the Court of Appeal refused to enforce a judgment rendered against an English parent company, finding that the operations of a subsidiary company within the United States were insufficient to confer jurisdiction over the parent company.

In addition, the Supreme Court of Japan stated in a 1969 judgment that "[g]enerally speaking, a shareholder is a different legal entity from the corporation. This rule should apply to a so-called 'one man company' as well." *Yamayoshi Shokai v. Hoshihara*, 551 Hanrei Jiho 80. The court recognized an exception "if the legal entity is deemed to be as only a 'sham' or 'alter ego' of the person behind the corporation or was a corporation just set up to avoid or evade the application of the law abusing the right to form the corporation." *Id*.

Similarly, Article 154, paragraph 2 of the Company Act applies only when "a shareholder abuses the corporation's status as a legal entity in a manner that

causes an obligation that is clearly difficult to discharge, and the circumstances are serious in nature." That standard cannot be met here.

V. THE FACTS HERE DO NOT MEET THE TEST FOR PIERCING THE CORPORATE VEIL UNDER ARTICLE 154, AND MISAPPLYING THAT TEST WOULD DISCOURAGE FOREIGN INVESTMENT IN TAIWAN BY PLACING ITS CORPORATE LAWS OUTSIDE OF INTERNATIONAL NORMS

Interpreting Article 154 both as it is written and as consistent with international norms provides no basis for the court below to hold GE, Technicolor or Thomson jointly and severally liable for the acts of RCA-Taiwan. By the plain terms of the Company Act, GE, Technicolor and Thomson did not "abuse the corporation's status as a legal entity." RCA-Taiwan was by no means a shell company. It had operated a substantial business in Taiwan for decades, had substantial assets and was adequately capitalized. The corporation and its conduct at issue existed long before GE or Technicolor acquired RCA-Taiwan's parent company, Thomson.

Article 154, paragraph 2 also requires that, in order to justify piercing the corporate veil, the defendants have abused the corporation's status as a legal entity "in a manner that causes the corporation to incur an obligation that is clearly difficult to discharge." Here, GE, Technicolor and Thomson did not cause any obligation of RCA-Taiwan; those obligations resulted from the operation of RCA-Taiwan's own business. Nor did GE, Technicolor or Thomson take any action that

rendered RCA-Taiwan's obligations "difficult to discharge." RCA-Taiwan has always had sufficient capital and assets to satisfy any obligations. At the time that RCA-Taiwan's factory ceased to operate, the claims in this case were neither pending nor threatened. For example, the Employees Association was not formed until 1999, long after the closing of the factory. Regardless, the fact that the assets of RCA-Taiwan remained sufficient to satisfy the obligations that were determined years later indicates that the defendants have taken no action that could have been intended to impair the employees' ability to obtain compensation.

Likewise, the element of fraud, nearly always present in cases of piercing the corporate veil, is absent here. No evidence indicates that RCA-Taiwan was created for purposes of committing fraud or that it operated in such a manner. Rather, the entity was used to operate a legitimate business, and neither GE nor Technicolor nor Thomson altered the way in which that business had been run.

As a result, the judgment below does not adhere to the express terms of Article 154 and departs from international norms by ignoring the distinctions between the parent company and subsidiary without sufficient justification, which could signal to potential investors that Taiwan is a disadvantageous jurisdiction in which to invest. Upholding the decision below will discourage foreign investment and hinder the manufacturing sector of the local economy.

CONCLUSION

For all the foregoing reasons, Amici urge that the Court interpret Article 154 strictly as drafted and as intended, which was to be consistent with international norms, and reverse the judgment below. Such a ruling will benefit the economy of Taiwan by retaining its longstanding reputation as a jurisdiction where laws are predictable and align with international principles of fairness.

Respectfully submitted,

Linda E. Kelly
Peter C. Tolsdorf
Leland P. Frost
MANUFACTURERS' CENTER FOR LEGAL ACTION
733 10 Street, N.W., Suite 700
Washington, D.C. 20001
(202) 637-3000

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