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Christopher C. H. CHEN

Singapore Management University, chchen@smu.edu.sg

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Enforcement of the Duties of Directors by the Securities and Futures Investors Protection Center in Taiwan

Christopher CHEN Chao-hung

Assistant Professor of Law, Singapore Management University

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Abstract

The purpose of this article is to examine the role of the Securities and Futures Investors Protection Center (SFIPC) in Taiwan in enforcing the duties of directors. To help shareholders or investors pursue a director for breach of company law or securities regulations, Taiwan created the SFIPC, a charity sanctioned by statutes, to bring class action or direct legal action on behalf of minority shareholders or individual investors. By conducting an empirical survey of judgments from lawsuits involving the SFIPC since its creation, we found that the SFIPC is generally very active in enforcing securities regulations but far less active in breaches of company law. This reflects the public nature of the institution as well as a fundamental defect regarding directors' fiduciary duties and statutory derivative action in Taiwan's company law. The SFIPC has shown strong performance in the civil courts but has a dismal record in the criminal courts. If the past is a guide, then regulators in Taiwan should reconsider the role of the SFIPC if its goal is to strengthen the enforcement of corporate director liability and address the shortcomings of derivative actions in company law.

I. Introduction

Is it sufficient to rely on shareholders to enforce their rights in company law? How likely are investors to win civil remedies against breaches of securities regulations by misbehaving directors of the company they invested in? Why not create a third-party institution to enforce the rights of shareholders and securities regulations? This article will attempt to answer these questions based on experiences in Taiwan, which created the Securities and Futures Investors Protection Center (SFIPC) in 2003 to enforce company law and securities regulations to protect shareholders and investors. Our analysis may offer some lessons for policy makers in China and other parts of Asia Pacific where individual investors play an important role in the market.

Unlike many other markets, Taiwan's stock market is dominated by individual investors who are responsible for over 60% of all trading activity on the Taiwan Stock Exchange.¹ To protect the large number of individual investors, the Securities Investor and Futures Trader Protection Act in July 2002 created the SFIPC, which formally opened its doors on 1 January 2003.² The SFIPC had the power to bring class action to sue delinquent directors or companies for breach of company law or securities regulations, and after 2011 it even had the legal standing to bring an action in its own name.

As illustrated below, the SFIPC has been quite active in pursuing directors or companies.³ However, how the SFIPC has performed beyond the number of lawsuits filed and whether it has served its function of protecting investors (or is simply a disturbance to the market) are not known. By analysing judgments involving the SFIPC as parties between 2003 and 2013, this article hopes to shed light on the performance and effectiveness of the SFIPC in terms of enforcing company law and securities regulations.

In the following sections, we first introduce the legal background in Taiwan, including directors' duties, certain rules within the Securities and Exchange Act, and the law that empowers the SFIPC. We also paint a picture of why derivative actions have not been popularly used by shareholders. In Part III, we examine the performance of the SFIPC in both civil and

¹ See Taiwan Stock Exchange, Securities Trading Values by Type of Investors (year 2012), http://www.twse.com.tw/en/statistics/statistics_list.php?tm=07&stm=031 (last visited 19 March 2014).

² <http://www.sfipc.org.tw/main.asp> (5 February 2014).

³ See Part III below.

criminal proceedings from several angles, including type of dispute, success rate and legal representation. Part IV concludes this article.

II. Legal Background in Taiwan

In this part, we introduce some laws relating to directors' duties under Taiwan's company law and securities regulations. We further explain deficiencies in the enforcement of directors' duties and the rare use of derivative actions in company law, which paved the way for the creation of the SFIPC.

A. Duties of Corporate Directors

Taiwan is a civil law jurisdiction largely following the German legal tradition but with a strong influence from Japan. This is reflected in Taiwan's Company Act, which was first promulgated in Mainland China in 1929. In the past two decades, however, common law jurisdictions, notably the US, have had a considerable influence.

Before November 2001, a corporate director owed only a duty of care to the company under company law. In essence, a director's duty to the company was comparable to that of an agent.⁴ Under Taiwan's Civil Code, the contractual relationship between a company director and the company takes the nature of a 'contract of mandate', as the director handles the company's affairs.⁵ Thus, under the Civil Code, a director 'shall be in accordance with the instructions of the [company] and with the same care as he would deal with his own affairs. If he has received remuneration, he shall do so *with the care of a good administrator* (emphasis added).'⁶

However, neither the Civil Code nor the Company Act before 2001 offered anything similar to the fiduciary duties in common law countries. The duty of care of a good administrator does not connote the concept of loyalty.⁷ This led to the amendment of article 23 of the Company Act in October 2001, which provides that

I. The responsible person of a company shall have the loyalty and shall exercise the due care of a good administrator in conducting the business operation of the company;

⁴ Len-yu Liu, *Modern Corporate Law* 119 (revised 9th edition, 2013).

⁵ Civil Code art. 528.

⁶ Civil Code art. 535.

⁷ Liu (n 4) 119.

and if he/she has acted contrary to this provision, shall be liable for the damages to be sustained by the company there-from.

II. If the responsible person of a company has, in the course of conducting the business operations, violated any provision of the applicable laws and/or regulations and thus caused damage to any other person, he/she shall be liable, jointly and severally, for the damage to such other person.⁸

In short, former subsection 1 has been moved to subsection 2 of article 23. A new subsection 1 has been inserted to accommodate the new duty of loyalty alongside the duty of care of a good administrator. This has been seen as a transplantation of fiduciary duties from common law jurisdictions.

However, there are considerable flaws in the way that Taiwan introduced the duty of loyalty. First, the new article 23 only offers one remedy: compensation for the company's losses. If we compare this with common law, it is unduly restrictive. For example, in some situations a director may have profited from his breach of duty, whereas the company may have suffered no loss at all. In this situation, a disgorgement of profits, which was not specified until December 2011,⁹ would be more appropriate. The amendment of 2011 has certainly strengthened directors' duties in Taiwan. However, this is still not sufficient, which leads to our next point.

Second, Taiwan has transplanted fiduciary duties from common law without further clarification. In common law countries, the fiduciary duties of directors have been developed and elaborated through extensive case law over the past three centuries. However, in 2001, legislators in Taiwan brought in the broad idea of fiduciary duty without further specifying existing categories of a breach of the duty of loyalty (such as self-dealing, corporate opportunity and misuse of information). This is in contrast with the way China that introduced fiduciary duties into their company law.¹⁰ Even the UK's Companies Act 2006 provides specific rules for certain known categories of breach of fiduciary duties.¹¹

Nor is the court in Taiwan assisted by the concept of equity, as equity has not been part of Taiwan's civil law tradition. Instead, judges in Taiwan are bound by statutes, which may

⁸ Companies Act art. 23. English translation is extracted from the Ministry of Justice website: <http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=J0080001>.

⁹ Companies Act art. 23(3) (as amended on 14 December 2011).

¹⁰ E.g., Chinese Company Act art. 149–150.

¹¹ See UK Companies Act 2006 ss. 170–177.

explain why a Taiwanese court cannot mandate a director to disgorge his profit unless the statute allows it to do so. A company also has no means to rescind an unfair contract it has entered into with a director unless there has been fraud, mistake or duress. In sum, it was appropriate to introduce the concept of fiduciary duties in Taiwan. However, the way that it was done lacks sufficient detail to substantiate the duty under Taiwanese law.

In addition to duties under company law, there are other provisions in the Securities and Exchange Act that directors are often found to violate. First, directors may be liable for inadequate disclosure, including publishing misleading information regarding the issuance of securities or approving financial statements that contain false or misleading information.¹² Second, a director should disgorge any profit if he buys and then sells (or vice versa) the company's stocks within six months (i.e., short-swing trading).¹³ Third, a director could be liable to the counterparty in the stock market if he conducts insider dealing.¹⁴ Fourth, a director may be liable to the counterparty in the stock market if he commits market manipulation, including market rigging, wash sales, rumour spreading or other manipulative schemes.¹⁵ As we will see later,¹⁶ these provisions have frequently been cited by investors or the SFIPC in lawsuits against a company or its directors. In addition to short-swing trading, there could be criminal liability for a breach of securities law.¹⁷

B. Shareholders' Derivative Action in Taiwan

While there is no common law derivative action in Taiwan, the Company Act does offer a statutory derivative action. The Company Act provides that

- I. Shareholder(s) who has/have been continuously holding 3% or more of the total number of the outstanding shares of the company over one year may request in writing the supervisors of the company to institute, for the company, an action against a director of the company.
- II. In case the supervisors fails to institute an action within 30 days after having received the request made under the preceding Paragraph, then the shareholders filing such request under the preceding Paragraph may institute the action for the

¹² Securities and Exchange Act art. 20 and 20-1.

¹³ Securities and Exchange Act art. 157.

¹⁴ Securities and Exchange Act art. 157-1.

¹⁵ Securities and Exchange Act art. 155.

¹⁶ See Part III below.

¹⁷ Securities and Exchange Act art. 171(1).

company; and under such circumstance, the court may, at the petition of the defendant, order the suing shareholders to furnish an appropriate security. In case the suing shareholders become the loser in that lawsuit and thus causing any damage to the company, the suing shareholders shall be liable for indemnifying the company for such damage.¹⁸

A similar provision has existed since 1966. In addition to the quantity of shares a shareholder must hold to be qualified to bring a derivative action,¹⁹ Taiwan law requires that a shareholder must first request the ‘supervisors’ to institute a lawsuit on behalf of the company against a director before the shareholder can file a lawsuit on his own. The ‘supervisor’ is a special feature Taiwan inherited from Japan.²⁰ Like directors, supervisors are elected by shareholders at the general meeting, but they do not participate in the management of the company and are not independent directors.

Supervisors function as an organ of a company to ‘supervise the execution of business operations of the company, and may at any time or from time to time investigate the business and financial conditions of the company, examine the accounting books and documents, and request the board of directors or managerial personnel to make reports thereon.’²¹ Each supervisor has the power to hire an attorney or accountant to investigate the company’s affairs.²² The idea is to maintain checks and balances on the board of directors through a separately elected organ of the company. A supervisor may ask the board to stop certain behaviour if he believes it violates any law or regulation.²³ A supervisor should be the legal representative of the company in a lawsuit between the company and a director,²⁴ although the supervisor has no power to institute a lawsuit on behalf of the company without a mandate from the general meeting.²⁵

On the face of it, Taiwanese law seems to be sensible. However, there are considerable problems with article 214 of the Company Act. First, in reality, supervisors often do not provide

¹⁸ Company Act art. 214. English translation extracted from the Ministry of Justice website: <http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=J0080001>.

¹⁹ The threshold was dropped from holding 10% or more of the shares for over a year to 5% in 1983 and 3% in 2011.

²⁰ See I-Ching Tu, *A Comparison of the Reform of the Internal Governance Regime of a Company in Taiwan and Japan: Focusing on Public Companies* (2010) 184 Taiwan Law Review 22 (2010).

²¹ Company Act art. 218(1). English translation extracted from the Ministry of Justice website: <http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=J0080001>.

²² Company Act art. 218(2) and 219.

²³ Company Act art. 218(2) and 194.

²⁴ Company Act art. 213.

²⁵ Liu (n 4) 540 and Supreme Court Judgment 79 Tai-shan No. 1995.

any useful function. Supervisors have to rely on the votes of substantial shareholders to be elected in a general meeting, which brings them closer to management or the majority shareholders.²⁶ In fact, they are often the representatives of a substantial shareholder. In addition, supervisors of many family-owned companies are simply family members of the chairman or the controller shareholder. The potential conflict of interest is obvious.²⁷ Therefore, it is naïve to believe that the supervisors of a company would actively pursue directors for breaches of duty.²⁸

Second, shareholders do not have sufficient incentive to bring a derivative action.²⁹ On one hand, shareholders must advance litigation expenses and even post collateral to the court to file a derivative action.³⁰ Even if they win, all compensation will go to the company. The purpose of this rule is to prevent frivolous lawsuits, but it offers little incentive to shareholders to file a derivative action.³¹ It has also been argued that these extra requirements of the law may hinder legitimate action.³² On the other hand, a shareholder filing a derivative action also faces potential liability to compensate a defendant director if the court determines that the facts relied upon by the plaintiff shareholder are fictitious.³³ Given that the onus of proof is in principle on a plaintiff,³⁴ this potential legal liability offers a strong disincentive to potential plaintiffs.

The result is that there have been very few derivative actions in Taiwan. As part of this study, we also examine the number of derivative actions brought under Company Act article 214 since 2000.³⁵ Overall, we found only 12 derivative actions brought by shareholders between 2000 and 2013, including one still under trial, though there have been 8 lawsuits filed by supervisors on behalf of the company against its director(s). We should also note that none of

²⁶ Liu (n 4) 541–542.

²⁷ Liu (n 4) 543.

²⁸ Although there has been discussion about whether Taiwanese law should keep the position of supervisor in the Company Act, the government apparently intends to maintain the current regime. However, the financial regulator has shown the future direction by forcing listed companies to have sufficient independent directors and various committees (e.g., an audit committee) by 2017. See the website of the Financial Supervisory Commission: http://www.sfb.gov.tw/ch/home.jsp?id=95&parentpath=0,2&mcustomize=news_view.jsp&dataserno=201311260002&aplistdn=ou=news,ou=multisite,ou=chinese,ou=ap_root,o=fsc,c=tw&toolsflag=Y.

²⁹ Cheng-Fong Chou, *Study on Article 10-1 of Securities Investor and Futures Trader Protection Act: Focusing on Derivative Suits* (2010) 27 *Journal of New Perspective of Law* 159, 177. Wan-Ruu Tseng, *The Practical Function and Future Development of Derivative Action: Some Blind Spots* (2010) 159 *Taiwan Law Journal* 27, 27–28.

³⁰ Chou (n 29) 171–172.

³¹ Da-Yin, Liao, *The New Regime on Derivative Action by Securities Investor Protection Institution* (2011) *Cross-Strait Law Review*, 5, 11–12.

³² Liao (n 31) 10–11.

³³ Company Act art. 215.

³⁴ Chou (n 29) 173.

³⁵ See below Part III for more explanation of the source and scope of the survey.

these 12 lawsuits under Company Act article 214 were about listed companies. Thus, those lawsuits do not directly affect a large number of shareholders or investors, raising little public concern. Against this backdrop, the SFIPC was created to protect small shareholders and individual investors. This is discussed in the next section.

C. Creation of the SFIPC

The SFIPC was created pursuant to the Securities Investor and Futures Trader Protection Act (SIFTA), first promulgated in July 2002. As its name suggests, the purpose of the SIFTA is to protect investors in the stock and futures markets and to promote sound development of the markets.³⁶ The main part of the SIFTA concerns the establishment and organisation of an investor protection institution. Although in theory more than one such institution can be incorporated, in fact only one, the SFIPC, has been designated by the regulator in Taiwan.

The initial funding of the SFIPC, about NTD \$1,031 million (around SGD \$45 million or USD \$34 million), was first contributed by a number of financial institutions, including the Taiwan Stock Exchange, Taiwan Futures Exchange, Taiwan Depository & Clearing Corp, a number of trade associations and some securities and futures brokers.³⁷ In addition, each registered securities firm must contribute 0.0185/10,000 of its total transaction value each month to a protection fund managed by the SFIPC,³⁸ in addition to the 5% of transaction fee income contributed each month by the stock and futures exchanges.³⁹ These contributions provide the SFIPC with its financial power.

The SFIPC has a variety of functions. First, it offers a venue for mediation (of investment disputes),⁴⁰ although this function may overlap with that of the Financial Ombudsman Institution (FOI) created by the Financial Consumer Protection Act in 2011. Second, the SFIPC also manages a protection fund that can offer compensation to investors when securities or futures brokers become insolvent and cannot meet their obligations.⁴¹ Third, the SFIPC may bring a

³⁶ Securities Investor and Futures Trader Protection Act art. 1.

³⁷ SFIPC Annual Report 2012, at 17, on the SFIPC website: <http://www.sfipc.org.tw/main.asp>.

³⁸ *Id.* For a futures firm, the contribution is determined by the function of a fixed fee per contract.

³⁹ *Id.*

⁴⁰ Securities Investor and Futures Trader Protection Act art. 22-27.

⁴¹ Securities Investor and Futures Trader Protection Act art. 20-21.

class action against a company or its management to protect the public interest. Article 28 of the SIFTA provides that

the protection institution may submit a matter to arbitration or institute an action in its own name with respect to a securities or futures matter arising from a single cause that is injurious to multiple securities investors or futures traders, after having been so empowered by not less than 20 securities investors or futures traders.⁴²

In addition to actions seeking monetary compensation, an action under article 28 (hereinafter referred to as ‘Art. 28 action’ or ‘class action’) may also include proceedings for ‘compulsory execution, provisional attachment, provisional injunction, participation in reorganization or bankruptcy proceedings, and other powers necessary to the protection institution’s exercise of rights in a securities or futures matter arising from a single cause.’⁴³ However, one issue with Art. 28 action is that the SFIPC must be authorised by 20 or more investors. This rule means that the role of the SFIPC is rather reactive. To overcome this limitation, the SFIPC sometimes adopts the strategy of purchasing a company’s shares so that it can bring an action in the capacity of a shareholder.⁴⁴

Moreover, to strengthen corporate governance and investor protection, the SFIPC received greater power to file a lawsuit in May 2009.⁴⁵ Under the new article 10-1, the SFIPC can

request the supervisors of the company to institute an action against the director on behalf of the company, or may request the board of directors of the company to institute an action against the supervisor on behalf of the company’ (i.e., to bring a derivative action) or to apply to the court for an order to remove a director or supervisor pursuant to the Company Act, provided that the SFIPC ‘discovers conduct by a director or supervisor of an exchange-listed or OTC-listed company in the course of performing his or her duties that is materially injurious to the company or is in violation of laws, regulations, and/or provisions of the company’s articles of incorporation.’⁴⁶

⁴² Securities Investor and Futures Trader Protection Act art. 28-1(1). English translation extracted from the Ministry of Justice website: <http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=G0400038>.

⁴³ Securities Investor and Futures Trader Protection Act art. 28-1(3).

⁴⁴ See e.g. Taiwan High Court Judgment 93 Fu-min No. 7; Taiwan High Court Judgment 102 Shan No. 604; Taoyuan District Court Judgment 95 Gin No. 2; Taipei District Court Judgment 94 Gin No. 31; Kaohsiung District Court Judgment 93 Su No. 506.

⁴⁵ Liao (n 31) 7.

⁴⁶ Securities Investor and Futures Trader Protection Act art. 10-1.

The new article 10-1 (Art. 10-1 action) certainly gives the SFIPC more power to sue a director for breach of duties. However, it is unclear how far article 10-1 of SIFTA can override the rules in article 214 of the Company Act (e.g., minimum shareholding, length of shareholding or the plaintiff's obligation to pay damages).⁴⁷ The explanatory notes for article 10-1 clearly link the new amendment with the difficulty to bring a derivative action or to remove a director. Thus, there is a strong sense that article 10-1 grants the SFIPC more power to bring a direct action to sue a director to improve corporate governance and to protect investors.

The SFIPC further published guidelines for its actions under article 10-1. According to the guidelines, the SFIPC can file an Art. 10-1 action against a director (or supervisor) who has been charged with violation of securities regulations for inadequate disclosure, insider dealing, irregular arm's length transactions, the embezzlement of company assets or illegal lending in violation of a company's constitution.⁴⁸ However, the SFIPC may not bring a direct action if the action is time-barred or the amount of damages claimed is below NTD \$5 million (about SGD \$217,000).⁴⁹ Moreover, the SFIPC is required to first ask the company to sue a director or supervisor before it can file an Art. 10-1 action.⁵⁰ This may make an Art. 10-1 action more consistent with derivative action in company law if the defendant is a company director.

D. Pros and Cons for the SFIPC

It has been suggested that the creation of the SFIPC should address the defects in the derivative action regime⁵¹ or even replace derivative action in company law.⁵² In theory, a securities class action should deter potential wrongdoers.⁵³ Some also argue that the SFIPC could help to complement the dispute resolution regime for securities lawsuits by offering more choice for investors or shareholders, given that Taiwan's legal service market is not as developed as

⁴⁷ Chou (n 29) 174–175. Tseng (n 29) 31.

⁴⁸ See art. 3 of the Guidelines for Lawsuits under Art. 10-1 of the Securities Investors and Futures Traders Protection Act (財團法人證券投資人及期貨交易人保護中心辦理證券投資人及期貨交易人保護法第十條之一訴訟事件處理辦法).

⁴⁹ *Id.*, art. 4-5.

⁵⁰ *Id.*, art. 7.

⁵¹ Chou (n 29) 173, 177.

⁵² Liao (n 31) at 14.

⁵³ See generally Yu-hsin Lin, *The Compensation and Deterrence Function of Securities Fraud Litigation: From Securities Class Actions in the US* (2008) 14 Financial and Economic Law Review 73.

those in Europe and the US.⁵⁴ With its financial resources and an army of lawyers, the SFIPC could resolve the financing problems that plague the derivative action regime in company law.⁵⁵

However, there are also critics. First, it is clear that Taiwan's regime is rather special from a comparative law perspective, especially after the SFIPC was given legal standing to bring an action on its own. Unlike the US, Taiwan does not adopt a lawyer-oriented class action regime.⁵⁶ Taiwan's regime also differs from that of Germany (e.g., the '*musterfeststellungsantrag*' that extends the effect of a judgment to other similar cases)⁵⁷ and the class action of South Korea and Japan.⁵⁸

Second, Taiwan's solution is to create a charity (i.e., the SFIPC) to bring a class or direct action. This raises doubts about the combined private and public nature of the SFIPC's actions. The SFIPC is to a certain extent akin to a quasi-regulator, given its source of funding and the government's control on the appointment of key positions.⁵⁹ However, the mission of the SFIPC is also to protect private interests of minority shareholders or individual investors. Thus, some critics question the wisdom of combining derivative action (for shareholders) with securities litigation (for investors or potential investors) under one roof.⁶⁰ Some also question whether actions brought by the SFIPC are still derivative in nature.⁶¹

Simply put, there could be a conflict of roles for the SFIPC: representing shareholders versus serving the public interest.⁶² In addition, the SFIPC has been criticised for its limited success (i.e., little compensation awarded), lack of efficiency (e.g., litigation taking too long) and the possibility of interfering in private settlements with public resources.⁶³ Lack of transparency

⁵⁴ Wen-yeu Wang and Ji-min Chang, *Securities Class Action Conducted by Non-profit Organization: the Investor Protection Center* (2007) 15 Cross-Strait Law Review 5, 26.

⁵⁵ Sze-Jun Cheng, *Governance of Securities Lawsuits: Focusing on the Finance of Litigation* (2011) 31 Journal of New Perspective of Law 97, 119–120.

⁵⁶ Wang (n 54) 14; Shao (2013) 2. Lin (2008) 181

⁵⁷ Wang (n 54) 10–12.

⁵⁸ Wang (n 54) 12–14; Liao (n 31) 17. For a discussion of the regime in South Korea, see generally Dae Hwan Chung, *Introduction to South Korea's New Securities-related Class Action* (2004) 30 J Corp L 165.

⁵⁹ Wang (n 54) 16–17.

⁶⁰ Liao (n 31) at 19.

⁶¹ Tseng (n 29) 28.

⁶² Liao (n 31) at 15–16.

⁶³ Lin (n 53) 191, citing Wang (n 54) 27–29

is also a concern.⁶⁴ As the SFIPC literally monopolises this market, there is arguably not enough diversity for investors or shareholders to choose from to meet different demands.⁶⁵

On this basis, we may ask whether the SFIPC does actually help to enforce directors' duties, offer a supervisory mechanism for monitoring company management and reduce agency costs, or whether it is as inefficient and ineffective as has been claimed. In Part III, we explore the SFIPC's performance in the courts, which will shed light on its function in enforcing company law and securities regulations.

III. The SFIPC and the Enforcement of Company Law and Securities Regulations

From the SFIPC's annual report, there is no doubt that it has brought many lawsuits and helped numerous investors to reach settlements or acquire compensation.⁶⁶ From its record, it appears that the SFIPC has actively pursued companies or directors (sometimes even auditors and accountants) regarding their legal responsibility. However, it may be misleading if we merely look at the number of lawsuits brought by the SFIPC or the remedies awarded. To get a better idea, we have to examine both civil and criminal judgments involving the SFIPC as a party (or an agent of investors) since its creation.

There are two main resources of information. First, we extract the judgments that involved the SFIPC from the 'Law and Regulations Retrieving System'⁶⁷ (the LRRS system) operated by the Judicial Yuan of the Republic of China (i.e., Taiwan's manager and regulator of the entire judicial system), which has published all judgments at every level since 2000,⁶⁸ including the years since the SFIPC was created. Thus, this system provides us with the most comprehensive source of relevant judgments. The keyword used for searching was the full name of the SFIPC in Mandarin Chinese. Using this name to search allowed us to survey all of the judgments in which the SFIPC represented a plaintiff, appellant or respondent and situations in

⁶⁴ Wang (n 54) 31–32.

⁶⁵ Wang (n 54) 26–27.

⁶⁶ SFIPC Annual Report 2012, at 19–21.

⁶⁷ <http://jirs.judicial.gov.tw/Index.htm>.

⁶⁸ The system publishes all Supreme Court judgments since 1996 (since 2000 for the Taiwan High Court and all District Courts). As the SFIPC was created in 2002, the system should contain all judgments at all levels involving the SFIPC.

which the SFIPC intervened in a civil action. From the information collected, we are able to evaluate the performance of the SFIPC in enforcing company and securities laws.

Second, we supplement our research by analysing a list of cases published by the SFIPC in its website.⁶⁹ The list of cases provided by the SFIPC also offered some information about the timeline of relevant lawsuits and the number of persons authorising the SFIPC. However, it seems that the SFIPC's list contains only class actions (i.e. Art. 28 actions). Thus, this research will only use the list offered by the SFIPC to complement our research data.

In the following sections, we first paint a general picture of the SFIPC's performance in terms of seeking remedy. We then separately analyse criminal and civil actions brought by the SFIPC before further considering the grounds for these actions and the legal representation of the SFIPC. Finally, we provide an overall appraisal of the SFIPC based on the data presented.

A. General Performance

The SFIPC can be involved in a lawsuit in a few ways. First, the SFIPC can bring an Art. 28 class action if it is authorised by 20 or more investors.⁷⁰ Second, since 2009 the SFIPC has been able to bring an Art. 10-1 action on its own.⁷¹ Third, the SFIPC can intervene in a civil lawsuit as a third party if it can justify to the court its interest in the case.⁷² Fourth, the SFIPC can bring a lawsuit in the capacity of a shareholder if it owns shares in a company.⁷³ Fifth, apart from filing (or intervening in) a lawsuit in the civil division of courts, the SFIPC (or investors) can file an ancillary civil action along with a criminal case (in the first or second instance).⁷⁴

Through our survey of the LRRS system, we found 138 lawsuits involving the SFIPC that contain sufficient information for analysis.⁷⁵ These 138 lawsuits resulted in 247 judgments, including 129 issued by District Courts (i.e., the first instance), 77 by the Taiwan High Court or

⁶⁹ See the table of all cases in <http://www.sfipc.org.tw/main.asp>.

⁷⁰ See Part II.C above.

⁷¹ See Part II.C above.

⁷² Code of Civil Procedure art. 58 et seq.

⁷³ See n 44 above.

⁷⁴ Code of Criminal Procedure art. 487 et seq.

⁷⁵ There are two lawsuits whose judgments show that the SFIPC was involved but provide insufficient information for us to trace them. To facilitate the analysis, we have omitted these two lawsuits from our dataset. See Supreme Court Judgment 99 Tai-shan No. 159 (2010), and Taiwan High Court Judgment 95 Fu-min-shan No. 42 (2006) upholding Taipei District Court 95 Fu-min No. 227 (2006).

its branches (i.e., the appellate court), and 41 by the Supreme Court. This is in addition to numerous other rulings regarding procedural issues or injunctions. We should note that for some lawsuits judgment in the court is still pending. As we have no means of examining these lawsuits, our analysis covers only those that had received judgment by the end of 2013.⁷⁶

Among the 138 lawsuits, only 8 were Art. 10-1 actions. In 11 cases the SFIPC was the legal representative of the plaintiffs. The SFIPC intervened with a civil lawsuit as a third party in 4 cases. In 58 lawsuits, the judges clearly indicated that these were Art. 28 actions. According to the SFIPC's own list, it seems that there are 68 Art. 28 class actions, with the SFIPC being authorised by as few as 20 persons to as high as 25,092 persons in a single case.⁷⁷ In addition, 59 lawsuits (42.75%)⁷⁸ were brought as ancillary civil actions under criminal proceedings and the remaining 79 (57.25%) lawsuits were brought directly to the civil courts. It is not clear, however, in how many lawsuits the SFIPC brought an action in its capacity as a shareholder. On this basis, we can provide a general appraisal of the performance of the SFIPC.

First, how successful was the SFIPC in these lawsuits? By analysing the final judgments available by the end of 2013, we find that the SFIPC won (including one partial win) 45 lawsuits (32.61%) and lost 86 (62.32%), with 7 cases (5.07%) still pending after being remanded by the Supreme Court.⁷⁹

We can also analyse each instance and each judgment separately.⁸⁰ Overall, we find that the SFIPC enjoyed slightly better success in the first instance, winning 50 of 129 (38.76%) judgments at the District Court level.⁸¹ At the High Court level, the SFIPC has had less success,

⁷⁶ According to the SFIPC, it has brought civil actions from 68 corporate scandals or incidents since its creation, resulting in numerous judgments in all levels. From the case provided by the SFIPC, it is clear that many lawsuits are still pending for a further decision. Out of the 68 cases in the list, 43 cases are still waiting for the first judgment in District Courts.

⁷⁷ The mean for persons authorising the SFIPC in each case out of the 68 cases listed by the SFIPC is 1,109 persons, with the median only 223 persons.

⁷⁸ According to the SFIPC's own list published on 1 April 2014, 23 of the 68 class actions (33.82%) were ancillary civil actions.

⁷⁹ According to the SFIPC, it claims to have won 16 class actions its annual report in 2012. See SFIPC Annual Report 2012 at 21-22. However, we should not be too indulgent with the difference in numbers, as differences may be down to the way this research and the SFIPC calculates how it wins a lawsuit.

⁸⁰ Note that sometimes in a particular court (notably the Taiwan High Court) there can be more than one judgment on a lawsuit if the case has been remanded by a higher court. Therefore, the number of judgments shown in this paragraph does not equal the number of lawsuits in the previous paragraph.

⁸¹ Some ancillary civil actions were brought before the end of trial in the Taiwan High Court (including branches). For those actions, there would be no judgment from the District Courts.

winning only 20 of 77 judgments (25.97%).⁸² At the Supreme Court level, the SFIPC has won 16 of 41 (39.02%) appeals to the top court. If we focus on the 41 appeals to the Supreme Court, the majority (27 of 41, 65.85%) were appeals by the plaintiff (i.e., the SFIPC) with only 12 cases appealed by the defendant(s) and 2 by both parties. Among the 27 appeals by the plaintiff alone, the plaintiff won only 8 (29.63%), in contrast to the defendant's success rate of 58.33% (7 of 12) in overturning a lower court judgment. Thus, it seems that the defendants are more successful in appeals to the Supreme Court. However, so far we have found no statistically significant relationship between who makes an appeal and who wins the appeal in the Supreme Court ($\chi^2 = 2.89, p = 0.09$).⁸³

Second, has the performance of the SFIPC improved over time? The hypothesis is that the SFIPC and its counsels should have become more specialised over time so that its win rate should improve. As a lawsuit may continue for several years, we can analyse the result of judgments in each instance separately. From our data, it seems that the SFIPC has not really performed better over time. In the first instance, the SFIPC did enjoy pretty good success between 2006 and 2007, winning 12 judgments in 18 lawsuits. However, the win rate at all levels dropped below 40% in four of the past five years. If we treat the year of judgment as an interval variable, our data shows no proof that the SFIPC has improved its win rate over time.

Third, we can further analyse the purpose of these lawsuits. The overwhelming proportion of the 138 lawsuits (122 or 87.14%) were about claiming compensation from the defendant(s). The plaintiff applied to the court to rescind a general meeting resolution in 7 lawsuits (5.19%) and asked for a director to account to the company for the profits in 5 cases (3.70%). The SFIPC requested the court to remove a director in 4 lawsuits (2.96%). In addition, the SFIPC was involved in two actions regarding the enforcement of debts. Therefore, it seems that the primary motive for the actions was to seek compensation for shareholders or investors.

Moreover, we should note that the SFIPC enjoyed a higher win rate (4 of 5 lawsuits, or 80%) when the action was about suing a director to account for his profits. In fact, all five lawsuits claiming disgorgement of profits were about a violation of the short-swing transaction

⁸² If a lawsuit resulted in more than one judgment due to being remanded by the Supreme Court, we used the result of the last judgment as the benchmark.

⁸³ This excludes the two cases in which both parties appealed.

rule.⁸⁴ This may be because it is relatively easy to prove whether a director has purchased and sold a company's shares within a six-month span.

We can regroup these lawsuits into two categories: those claiming damages and other lawsuits. Among the actions suing for damages, the plaintiff won 36 of 122 lawsuits (29.51%) with 7 cases still pending after being remanded by the Supreme Court.⁸⁵ In contrast, the plaintiff won 9 of 18 lawsuits (50.50%) that were not about claiming damages. Although the win rate for non-damage actions appears higher, we find no statistically significant relationship between actions claiming damages and the final result of a lawsuit ($\chi^2 = 2.43$, $p = 0.12$) if we exclude those lawsuits still pending after being remanded by the Supreme Court. Thus, the type of action does not seem to be a valid predictor of the outcome.

B. The SFIPC in Criminal Courts

In this section, we focus in general on the SFIPC's performance in ancillary civil actions in the criminal courts. This will help us to evaluate the SFIPC's litigation strategy more closely.

Forcing the settlement of civil cases by first initiating criminal proceedings is a common tactic adopted by some practitioners and litigants in Taiwan. There are certain clear strategic benefits to this approach. First, there is no need to advance litigation expenses to courts in a criminal proceeding.⁸⁶ The court will absorb the investigation and trial costs. Thus, it is cheaper for a claimant to start an ancillary civil action (after initiating a criminal case) than to file a civil lawsuit directly, as a criminal case does not require the plaintiff to advance litigation expenses (about 1% of the claim amount) to the court.⁸⁷

Second, Taiwan's criminal procedural law allows a victim to open a criminal case without going through a public prosecutor.⁸⁸ If a criminal charge is successful (regardless of whether it is brought by the victim or, more commonly, by a public prosecutor), the victim can

⁸⁴ Securities and Exchange Act art. 157.

⁸⁵ If we disregard pending cases, the plaintiff won 366 of 115 (31.30%) lawsuits for actions claiming damages.

⁸⁶ For a civil lawsuit, a plaintiff is usually required to advance litigation costs to the court. The amount to be advanced is decided based on a progressive formula, but is generally about 1% of the amount claimed. If a claimant wins the lawsuit, the court may order the defendant to repay all or part of the advanced amount. A claimant who loses, however, also loses the amount advanced. See Code of Civil Procedure art. 77-13 and <http://www.judicial.gov.tw/assist/assist04.asp>.

⁸⁷ Code of Civil Procedure art. 77-13.

⁸⁸ Code of Criminal Procedure art. 319.

then build a civil case from the result of the criminal case (by an ancillary civil action or by direct civil lawsuit).⁸⁹ This approach may help victims overcome their disadvantage in producing evidence, because a public prosecutor or judge in a criminal case has more power to investigate.⁹⁰ Third, initiating a criminal proceeding may intimidate some defendants, who may fear any criminal investigation or the stigma attached to it. This may encourage the defendant to settle the case as quickly as possible.

However, this strategy has some shortcomings. The result of an ancillary civil action hinges upon the outcome of the criminal proceedings, even though the threshold for proving a crime is higher than for proving a tort or a breach of contract. An ancillary civil action will be dismissed if the defendant is found not guilty,⁹¹ and once dismissed, the doctrine of *res judicata* prevents the plaintiff from filing another civil action for the same dispute. In addition, it is also arguable whether a claimant might include other defendants (who are not part of the criminal proceedings) in an ancillary civil action.⁹² This may limit the usefulness of bringing an ancillary civil action. Therefore, forcing a civil settlement by instituting criminal proceedings is like putting all of the eggs into one basket. It may be cost-effective to an extent, but it can backfire if the criminal charge is dismissed.

How has the SFIPC fared in the criminal courts? As mentioned earlier, 59 of the 138 lawsuits involving the SFIPC were brought as ancillary civil actions to criminal proceedings. Thus, it seems that SFIPC often relies on criminal proceedings to seek civil remedies. Our data supports the argument that the SFIPC still relies heavily on criminal or administrative investigations to overcome its disadvantage in evidence.⁹³

How successful was the SFIPC in ancillary civil actions? Among the 59 ancillary civil actions, the SFIPC won only 6 cases (10.17%) with 3 cases still pending after being remanded by the Supreme Court. This is substantially lower than the SFIPC's general win rate.⁹⁴ There is a statistically significant relationship between an ancillary civil action and the final result of a lawsuit with a moderate negative correlation (i.e., the SFIPC losing) ($\chi^2 = 24.23$, $p < 0.001$,

⁸⁹ Code of Criminal Procedure art. 487 *et seq.*

⁹⁰ Code of Criminal Procedure art. 154-171. See also Cheng (n 55) 311.

⁹¹ Code of Criminal Procedure art. 503.

⁹² Cheng (n 55) 120-121.

⁹³ Cheng (n 55) 121.

⁹⁴ See Part III.A above.

correlation = -0.43).⁹⁵ Thus, our data shows that there is no particular advantage if the SFIPC chooses to file an ancillary civil action instead of a direct civil action. Any litigation expenses saved may not be justified by the very low win rate for ancillary civil actions. It is also unclear to what extent the SFIPC was able to collect evidence from these criminal proceedings.

It worth noting that 54 of the 59 ancillary civil actions were eventually decided on procedural grounds. The most common reason was that the criminal charge against a particular defendant had been dismissed by the criminal court. Thus, under the Code of Criminal Procedure, the court must dismiss the ancillary civil action.⁹⁶ In another 7 cases, appeals were dismissed because they did not meet procedural requirements. It is not that defendants often escape criminal sanctions for corporate scandals. For a more complete picture, a much deeper analysis of the criminal judgments of relevant scandals is required in future.

Does the reliance on criminal proceedings cause undue delay? We could not acquire information from judgments extracted from the LRRS system. However, the SFIPC's list of class actions shows that in all but one case out of the 68 Art. 28 class actions (98.53%) a defendant has been subject a criminal charge. In addition, using year as the minimum benchmark,⁹⁷ we find that in all but one case (98.53%) a class action is preceded by criminal proceedings. In 16 of 68 cases (23.88%), the class action was filed in the same calendar year with the criminal charge, with 44 class actions (65.67%) filed in the calendar year after a criminal proceeding was initiated. Thus, it seems that the SFIPC has a pattern of filing class actions one or two years after a public prosecutor initiated a criminal investigation, though we should note that the SFIPC does need some time to acquire a sufficient number of authorisation from potential plaintiffs so that it would always take more time for the SFIPC to file a class action than a public prosecutor pressing for a charge.

There is no clear proof that the SFIPC has used criminal proceedings to intimidate defendants or to force civil settlements. It seems that the SFIPC relies on criminal proceedings to collect evidence, yet it is hard to evaluate how much evidence the SFIPC has obtained from such proceedings. Although filing a separate civil action after a criminal proceeding may cause

⁹⁵ For convenience, we have excluded the 7 pending cases (including 3 ancillary civil actions) from the calculation of association.

⁹⁶ See n 91 above.

⁹⁷ This is due to the fact that the SFIPC does not always record the month when an action starts.

significant delay in seeking compensation, our data shows that the SFIPC should avoid attaching an ancillary civil action to a criminal trial, because it has lost most lawsuits in criminal courts, thus not justifying any savings in costs and time.

Finally, the presence of the SFIPC may have some effect on other aspects of criminal proceedings, though it may not have much success in ancillary civil actions. For example, a public prosecutor once asked for probation if the defendant promised to donate money to the SFIPC.⁹⁸ Sometimes courts may reduce a sentence if a defendant has voluntarily settled with the SFIPC or the victims, because this shows the defendant's regret after committing a crime.⁹⁹ Nonetheless, we should note that the courts have no obligation to reduce the sentence if a defendant has settled with the SFIPC or a victim; this is just one factor that may affect sentencing.¹⁰⁰

C. The SFIPC and Direct Civil Actions

In contrast to ancillary civil action, the SFIPC has done much better when filing lawsuits directly to the civil courts. Of the 79 direct civil lawsuits, the SFIPC eventually won 39 (49.37%) with 4 cases still pending after being remanded by the Supreme Court.

Unlike ancillary civil actions, 67 of the 79 direct civil actions were eventually decided on substantial grounds. There are a few points worth noting. First, so far the SFIPC has not had much success in filing Art. 10-1 actions in its own capacity, winning only 1 out of 8 lawsuits (12.50%) in our dataset.¹⁰¹ One explanation is that the Supreme Court held that article 10-1 of the SIFTA does not apply retrospectively to disputes occurring before the implementation of article 10-1 in 2009.¹⁰² Although this decision has been heavily criticised by scholars, this unfortunately remains the prevailing view of the courts. Thus, we may have to wait a few more years before we can evaluate the effect of article 10-1.

⁹⁸ Supreme Court Judgment 100 Tai-shan No. 863 (Criminal).

⁹⁹ Taiwan High Court Judgment 96 Shan-gan(1) No. 426 (Criminal)(2007); Taiwan High Court Judgment 96 Shan-gan(2) No. 652 (Criminal)(2008); Taiwan High Court Judgment 96 Gin-shan-Chong-su No. 40 (Criminal)(2008); Taiwan High Court Judgment 96 Gin-shan-Chong-su No.70 (Criminal)(2008).

¹⁰⁰ Supreme Court Judgment 100 Tai-shan No. 3945 (Criminal); Taiwan High Court Judgment 99 Gin-shan-Chong-su No. 9 (Criminal)(2010).

¹⁰¹ This includes on ancillary civil action brought on the ground of art. 10-1. If we exclude this case, the SFIPC won only 1 out of 7 cases (14.29%).

¹⁰² Supreme Court Judgment 100 Tai-shan No. 1303 (2011).

Second, if we ignore these Art. 10-1 actions, the SFIPC does enjoy a certain degree of success in the civil courts, winning 38 of 72 (52.78%) direct civil actions,¹⁰³ with another 4 cases still pending judgment. In addition, only 7 of 72 lawsuits were decided on procedural grounds. This shows that the SFIPC is more likely to acquire a substantial decision by filing a direct civil action. Among the 65 lawsuits where the SFIPC acquired a decision on substantial grounds, it won 35 (53.85%) with 3 cases still pending. This means that the SFIPC has proved the defendants liable without attaching a lawsuit to a criminal proceeding.

Third, we should not imply that criminal proceedings have no impact on direct civil actions. Although our data show a poor record of filing ancillary civil actions, this does not prevent the SFIPC from using evidence collected in criminal proceedings for other direct civil actions, even though it takes longer to conclude the civil action if the SFIPC awaits the criminal court's decision. However, if the SFIPC played this waiting game for direct civil actions, the delay in seeking justice, in addition to the common procedural delays that plague Taiwan's judicial system, could contribute to the abovementioned criticism of the SFIPC for inefficiency.¹⁰⁴

D. Grounds for Action

Regardless of whether a lawsuit is filed with a civil or criminal court, we can further analyse the disputes underlying the SFIPC's actions, as shown in the table below.

Table 1 Ground for Action

Type	Number (% of all 138 lawsuits)	Cases won by the SFIPC ¹⁰⁵ (% of cases of the same kind)	Civil actions won by the SFIPC	Ancillary civil actions won by the SFIPC
(1) Market rigging (including wash sale)	25 (18.12%)	13 (52.00%) with 1 case still pending	9 of 14 (64.29%)	4 of 11 (36.36%) with 1 case pending
(2) Insider dealing	44 (31.88%)	9 (20.45%), with 4 cases pending	8 of 16 (50%) with 2 cases pending	1 of 28 (3.57%) with 2 cases pending
(3) Short-swing transactions	5 (3.62%)	4 (80.00%)	4 of 5 (80%)	NA

¹⁰³ This excludes an ancillary civil action brought under art. 10-1 of the SIFTA.

¹⁰⁴ See Part II.D above.

¹⁰⁵ In this table, we use the final result by the end of 2012 as a benchmark.

(4) Inadequate disclosure, including provision of false or misleading information and false disclosure or financial statements	46 (33.33%)	14 (30.43%), with 2 cases pending	14 of 30 (46.47%) with 2 cases pending	0 of 16 (0%)
(5) Arm's length transactions	5 (3.62%)	2 (40.00%)	1 of 2 (50%)	1 of 3 (33.33%)
(6) Defective general meeting resolution	6 (4.35%)	2 (33.33%)	2 of 6 (33.33%)	NA
(7) Deceptive behaviour when making a compulsory purchase	2 (1.45%)	1 (50.00%)	1 of 1 (50%)	NA
(8) Breach of the directors' duty of care	2 (1.45%)	0 (0%)	0 of 2 (0%)	NA
(9) Embezzlement of company assets	3 (2.17%)	0 (0%)	0 of 1 (0%)	0 of 2 (0%)
(10) Other	1 (0.71%)	0 (0%)	0 of 1 (0%)	NA

In reflecting on the data in Table 1, we first find that most actions brought by the SFIPC concerned three issues: inadequate disclosure, insider dealing and market rigging.¹⁰⁶ Thus, it seems that the SFIPC was more involved with enforcing securities regulations than company law. In particular, the SFIPC was very active in enforcing civil liabilities in insider dealing and inadequate disclosure. In contrast, few cases involved directors breaching their duty of care or loyalty in company law.

This does not imply that violating securities regulations is not a breach of directors' duties. Article 23 of the Company Act (i.e., directors' fiduciary duties) was also often raised to support causes of action in the Securities and Exchange Act¹⁰⁷ as well as tort.¹⁰⁸ However, it is clear that a breach of directors' duties was raised mostly to support the main cause of action, namely insider dealing or inadequate disclosure. Thus, from the records of the past decade, it is fair to argue that the SFIPC was more concerned with protecting investors than minority shareholders.

In addition, in only 38 of the 68 class actions (55.88%) in the list provided by the SFIPC the defendants were directors of a company. In contrast, in 35 cases (51.47%) the SFIPC also

¹⁰⁶ This is also supported by information offered by the SFIPC. From the 68 class actions in the SFIPC's own list, 37 (54.41%) involved issues about inadequate disclosure, 15 (22.06%) involving market rigging, and 16 (23.53%) involving insider dealing. Out of the 68 class actions, only 3 did not contain any of those 3 issues.

¹⁰⁷ E.g., Securities and Exchange Act art. 157-1 (for civil liability for insider dealing).

¹⁰⁸ Civil Code art. 184.

sued accountants for damages. This coincides with the fact that most class actions were about inadequate disclosure by a public company. However, it also shows that litigation brought by the SFIPC does not concentrate on corporate directors.

Second, if we focus on cases with a strong element of breach of directors' duties, we find that most such cases were about the embezzlement of company assets or irregular arm's length transactions. Only two cases dealt directly with a director's duty of care to the company. This left little chance for the SFIPC to help courts clarify a director's fiduciary duties in a local context. In addition, while embezzlement of company assets or arm's length transactions breach the duty of loyalty, the SFIPC has had no chance so far to argue a case for corporate opportunity or cases where a director has misused company information (other than insider dealing or inadequate disclosure to the public). Therefore, the impact of the SFIPC on the development of a director's fiduciary duties seems limited.

Third, while the SFIPC seems to have had some success in cases of market rigging, its record is much less impressive in cases of insider dealing or inadequate disclosure. It is striking that the SFIPC has lost all ancillary civil actions regarding inadequate disclosure. This article cannot provide a quick and easy explanation for these differences. Nonetheless, we suspect that the difficulty in proving a wrong (and/or a crime) may be one factor contributing to the SFIPC's record in the three main grounds for legal action. In addition, for cases involving inadequate disclosure, the SFIPC often sued a long list of persons from directors, employees to external auditors. This might have reduced the SFIPC's win rate as courts might be reluctant to hold all of them liable to investors or shareholders.

E. Legal Counsel for the SFIPC

The legal representation of the SFIPC may also shed light on the lawsuits it has brought. Among the 247 judgments that involved the SFIPC, we could find information regarding legal representation in 227.¹⁰⁹ Out of these 227 judgments, we found a total 14 attorneys representing the SFIPC. In particular, 7 lawyers represented the SFIPC more than 10 times in the past decade at all levels. They are shown in the table below.

¹⁰⁹ For clarity, this research considered a counsel to be an attorney if the designation 'attorney-at-law' (*lu shi*) appeared after his name in a judgment.

Table 2 Times of appearance of the SFIPC's legal counsel

Name/Court	District Court	Taiwan High Court	Supreme Court	Total
Xu, De Sheng	40	27	15	82
Lin, Jun Hong	45	21	13	79
Huang, Bin Chun	42	21	8	71
Wang, Zun Min	22	20	12	54
Chen, Hui Yin	22	11	4	37
Chen, Wen Zi	18	13	2	33
Liang, Jia Hua	9	5	3	17

It is not clear from the SFIPC website who those lawyers are. Many probably were (and still are) SFIPC employees. This may help the SFIPC to control legal costs. A quick search of the lawyer registration system operated by the Ministry of Justice¹¹⁰ shows that these 14 lawyers were born mostly during the 1970s, with the eldest born in 1968 and the youngest in 1983. This means that the SFIPC was represented mostly by lawyers in their 30s and early 40s. The year they were certified as attorneys¹¹¹ was mostly in the 2000s, except for two (with one whose date is unknown).¹¹² With all due respect to these lawyers, the SFIPC has not been represented by senior lawyers.

This article acknowledges that there is no proven correlation in Taiwan between a lawyer's seniority and success in litigation. Table 2 also shows a high concentration of legal representation. Perhaps it is more cost-effective for the SFIPC to use its pool of employees who are qualified lawyers than to hire an army of external counsels. In theory, such concentration may help these lawyers to be more specialised. Nonetheless, with their relative youth and inexperience and the fact that the SFIPC has not won more lawsuits over time,¹¹³ it is arguable whether the SFIPC could win more lawsuits by adding more variety and seniority to its legal team.

¹¹⁰ <http://service.moj.gov.tw/lawer/baseSearch.asp>.

¹¹¹ A lawyer does not necessarily pass the bar exam in the same year or the year after receiving government certification; thus this is not a perfect measure of an attorney's seniority or years of practice.

¹¹² They could pass the bar exam some years before certification by the Ministry of Justice, thus the year of certification is not an accurate measure of a lawyer's seniority or years of practice.

¹¹³ See Part III.A.

F. Appraisal of the SFIPC over the Past Decade

What can we learn from the foregoing data? Here are a few reflections to ponder. First, the SFIPC may not be as ineffective as has been claimed in terms of winning some compensation for shareholders or investors. As our data suggests, the SFIPC won about half of its direct civil actions. Nevertheless, it may be wise for the SFIPC to refrain from filing ancillary civil actions as a matter of strategy unless it is certain a defendant will be convicted.

Second, another dimension to define the efficiency of the SFIPC is to examine the time delay between the occurrence of a corporate scandal and the time to acquire a judgment. For this purpose, we may offer some quick analysis by relying on the information offered by the SFIPC about its 68 class actions. On the one hand, if we analyse the time between filing a civil action to civil courts¹¹⁴ and the court issuing a judgment, we find that the average time spent on the trial in District Courts is 3.57 years out of 21 cases that have resulted in a first judgment by March 2014.¹¹⁵

On the other hand, if we analyse the time between a scandal and the start of a civil action (of any kind), we find that on average it takes 4.07 years before the SFIPC files a class action among the 68 class actions.¹¹⁶ However, if we exclude two clear outliers,¹¹⁷ the mean of the remaining 66 cases is still 3.76 years.¹¹⁸ Although we do not have a meaningful benchmark in Taiwan for us to evaluate how long a lawsuit can take in each stage in general, it is fair to argue that on average it would take several years before investors receiving the first judgment, let alone the procedural delay that may take place in the appellate stage. While there could be various reasons for the time delay, hardly we can call it justice if a victim has to wait for an average of 7 years to at least acquire a first judgment. From this angle, there seems to be room for improvement.

Third, it is obvious that the SFIPC has been more involved with securities lawsuits related particularly to inadequate disclosure and insider dealing. There is no doubt that many victims of inadequate disclosure and insider dealing were individual investors lacking the

¹¹⁴ According to the SFIPC, this includes some ancillary civil actions that were transferred from criminal courts.

¹¹⁵ The median is 3 years. The longest wait is 8 years (2 cases).

¹¹⁶ The longest is 18 years and the second is 11 years. The median is 4 years and the standard deviation is 2.48.

¹¹⁷ For the purpose of this research, we exclude those cases that are more than two standard deviations away from the mean.

¹¹⁸ The median is 4 years and the standard deviation is 1.58.

financial means to seek remedy even if they had the legal right. From this angle, the presence of the SFIPC would have helped individual investors to seek civil remedy, reflecting the public nature of the SFIPC as indicated by scholars.

In contrast, the SFIPC has so far offered little enforcement of company law, and its role in protecting minority shareholders has been rather limited. On the one hand, many high-profile scandals have involved a breach of securities regulations, so the breach in fiduciary duties was not the most prominent issue, especially as a breach of securities regulations may result in a criminal offence. On the other hand, it may be that the SFIPC, having only limited resources, focuses more on bigger scandals involving larger public companies rather than on breaches of company law in medium or smaller firms.

The above analysis is reinforced by the fact that an overwhelming portion of lawsuits brought by the SFIPC was about listed companies. Except for 4 lawsuits that were not directly related to a corporate scandal,¹¹⁹ 91.79% (123 lawsuits) of the remaining 134 lawsuits were about listed companies (including 60 that have been delisted). Thus, it is fair to suggest that the SFIPC focuses on bigger companies.

If our observation is true, there are some further points to make. First, our data shows that the SFIPC is more concerned with protecting investors (i.e. those fooled by inadequate disclosure or insider dealing) than minority shareholders who suffer from mismanagement of a company. It is not that the concepts of investors and shareholders are fundamentally different. In a way, shareholders are also investors of a company. However, when the SFIPC is pre-occupied with the welfare of those trading in the stock market, the institution pays little attention or diverts few resources to protect existing shareholders who have little means to monitor the management.

Second, our analysis shows no evidence that Art. 10-1 action has helped revive statutory derivative action in company law as some expected it would. Nor is it clear how far the Art. 28 action has addressed the shortcomings of derivative action in company law. There have been simply too few cases brought by the SFIPC purely on the grounds of a breach of the Company Act without breach of securities regulations at the same time. The derivative action in company

¹¹⁹ Those lawsuits were directed against a trader or broker that were not associated with a particular company.

law remains the only viable option for minority shareholders in a non-public company to pursue a director for his breach of duties. The fundamental defect to Taiwanese law remains in existence.

Third, the lack of disputes related to company law also means that the SFIPC's actions have not helped clarify the scope of a director's fiduciary duties in Taiwan's Company Act. The SFIPC may have more financial power than most minority shareholders, but the SIFTA has not changed the fact that in the SFIPC there is a fundamental defect in fiduciary duties under Taiwanese law. Arguably, the lack of lawsuits to enforce company law may also result from a lack of clarity about the underlying cause of action. If this is the case, it cannot be addressed simply by granting the SFIPC more power to file a lawsuit. Unless there is a significant turnaround in litigation brought by the SFIPC, its effect on enforcing company law will remain limited.

Therefore, if one of the SFIPC's primary goals is to help bring derivative action to offer an effective liability regime to curb directors' agent costs, our data shows that the SFIPC has not been active in this regard. Following this line, our data supports the argument that regulators should consider splitting the SFIPC's roles or creating similar institutions to offer more variety to potential victims. This could introduce more competition to create a more effective market for enforcing company law and securities regulations.

IV. Conclusion

In conclusion, to answer the questions raised at the beginning of this article, we argue that there is a fundamental defect in Taiwan's company law in the fiduciary duties of directors and in statutory derivative action, reflected by few derivative actions in the past decade. To help shareholders or investors to pursue a director for breach of company law or securities regulations, Taiwan created the SFIPC, a charity sanctioned by statutes to bring class action or direct legal action on behalf of minority shareholders or individual investors. Our empirical survey of judgments from lawsuits involving the SFIPC since its creation shows that the SFIPC is active in enforcing securities regulations, but far less active in breaches of company law. This reflects the public nature of the institution. The SFIPC has shown strong performance in civil courts, but its record in criminal courts is dismal. If the past is a guide, regulators in Taiwan should reconsider

the role of the SFIPC if its goal is to enforce the liability of corporate directors and address the shortcomings of derivative action in company law.