Representative Litigations in Corporate and Securities Laws by Government-Sanctioned Nonprofit Organizations: Lessons from Taiwan

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I. INTRODUCTION ................................................................. 58

II. NPO MODEL FOR REPRESENTATIVE LITIGATIONS IN TAIWAN ........... 62
   A. A Basic Framework: Private Actions in Corporate and Securities Laws ........................................... 62
   B. Securities Class Actions .......................................................... 67
   C. Derivative Suits ................................................................... 71
   D. NPO as Private Attorney General ........................................... 73

III. A PUBLIC CHOICE EVALUATION OF THE TAIWAN MODEL ............. 75
   A. Why Design a Government-Sanctioned NPO? ......................... 75
   B. Underenforcement in Securities Law Actions ......................... 81
   C. Overenforcement in Corporate Law Actions ......................... 84
   D. The Utilization and Evolution of the NPO Model ....................... 86

IV. DECOUPLING THE CLASS COUNSEL FROM THE LEAD PLAINTIFF: A REFORM PROPOSAL .......................................................... 89

V. CONCLUSION ....................................................................... 93

I. INTRODUCTION

In the widely known corporate governance regime of the United States, derivative suits and securities class actions are two major forms of litigations launched against corporate mismanagement. They are often classified as representative litigations.¹ In derivative suits, shareholders

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¹ See Irving R. Morris, A View of Representative Actions, Derivative and Class, from a Plaintiff’s Attorney’s Vantage Point, 3 Del. J. Corp. L. 273-75 (1978) (“Representative suits are of two kinds. There is a derivative type and there is a class type.”); Susanna M. Kim, Conflicting Ideologies of Group Litigation: Who May Challenge Settlements in Class Actions and Derivative Suits, 66 Tenn. L. Rev. 81-83 (1988) (“Class actions and derivative suits are both often referred to as ‘representative’ actions.”).
sue on behalf of the plaintiff-corporation for the recovery of damages. The shareholders’ right to sue is derivative because they represent the corporation. In addition to derivative suits, shareholders can bring class action suits directly to recover damages. In class action suits, the plaintiffs represent all members of the class who share a common interest. The most influential rights of action on which direct suits or class actions are based come from U.S. federal securities regulations.  

The representative nature of both derivative suits and securities class actions inherently hinders the initiation of these types of litigations. If the persons who actually bring the representative suit bear all of the expenses, shareholders of the plaintiff-corporation in a derivative suit or class members in a securities class action would unfairly benefit from those litigations. This classical problem of collective action tends to stifle the incidence of representative litigations.  

On the other hand, it is simply not cost effective for investors with small claims to launch individual direct actions. Therefore, wrongdoers face little risk of being sued for recovery by the victims. Nonetheless, derivative suits and securities class actions are often brought in the United States. One of the major reasons why representative litigations are so popular is that rules governing litigation expenses encourage entrepreneurial behavior among lawyers with respect to organizing and initiating such actions. The legal norm in the United States differs from the rule of many civil law countries in that the losing party in American courts generally does not have to pay the attorneys’ fees of the prevailing party.  

Plaintiffs involved in representative litigations, therefore, bear much less financial risk than their counterparts in Europe because the widely-adopted principle on legal fee allocation in Europe is that the losing party of a lawsuit is required to pay for the court fees of both parties. Moreover, in the United States, plaintiffs are also relieved of  

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2 See Robert A. Prentice, *The Future of Corporate Disclosure: The Internet, Securities Fraud, and Rule 10b-5*, 47 EMORY L.J. 1, 4 (1998) (stating that “Rule 10b-5 is the most significant antifraud securities provision in the world[,]”).

3 See John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 412 (2000) (“Client financing of the action is highly unlikely because of the inherent collective action problem in class actions; that is, a class representative who expects to receive one percent (or less) of the recovery will not logically finance one hundred percent of the action’s costs.”).


the obligation to pay their own attorneys’ fees up front if a contingency fee arrangement is used.\(^7\) Such an arrangement allows lawyers to be paid a portion of any proceeds arising from the judgment or settlement of the case. In the same vein, lawyers would receive no fee if no recovery is obtained. Thus, the contingency fee arrangement works as a fee-shifting mechanism, shifting the burden of attorneys’ fees from the plaintiffs’ shoulders to their attorneys’ if they are not successful in court. Furthermore, the so-called “common fund” doctrine—in which the attorneys’ fees would not be borne by the representative plaintiffs—is applied not only to securities class actions but also to derivative suits, which could render substantial benefit to the corporation.\(^8\) Therefore, the court may find that the represented corporation in a derivative suit is responsible for the attorneys’ fees.\(^9\) With these rules governing the payment of fees, entrepreneurial lawyers who are willing to risk their time and energy in exchange for significant potential returns may seek out prospective plaintiffs and serve as litigation financiers to bring representative litigations.\(^10\)

Encouraging more victims to sue for relief in civil courts is often what legal reforms in other countries hope to accomplish.\(^11\) Taiwan is no exception to this trend. It has sought remedies to help investors seek justice in civil courts. The government-sanctioned non-profit organization (“NPO”) model is one such remedy.

In 2002, Taiwan enacted the Securities Investors and Futures Traders Protection Act (“Investor Protection Act”).\(^12\) Through the authorization of this Act, the Securities and Futures Investors Protection

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\(^7\) See Richard W. Painter, Litigating on a Contingency: A Monopoly of Champions or a Market for Champerty?, 71 CHI.-KENT L. REV. 625, 626 (1995) (“Charging on a contingency is most prevalent in the personal injury arena, but has spread to...shareholder derivative suits, ...securities litigation . . . .”).

\(^8\) See Barbara Warnick Thompson, Note, Attorneys’ Fees in Class Action Shareholder Derivative Suits, 9 DEL. J. CORP. L. 671, 674–76 (1985).


\(^12\) ZHENQUAN TOUZIREN JI QIHUO JIAOYIREN BAOHU FA [INVESTOR PROTECTION ACT] (Taiwan).
Center (“IPC”), a government-sanctioned NPO, was established in January 2003. One of the IPC’s missions is to bring class actions on behalf of securities investors. In addition to the IPC, the Taiwanese government set up a new NPO to serve as a mediation institute for financial disputes, in response to local investors’ outcry after the bankruptcy of the Lehman Brothers Holdings Inc. (“Lehman Brothers”) in 2008. In emerging economies where governments often have more control, Taiwan’s NPO model may prove attractive under such conditions and may be the prototype to copy. In countries like the United States where control over frivolous lawsuits is a serious problem, Taiwan’s NPO model may portend the future of “public enforcement” proposals.

Part II of this article describes the basic framework of private rights in Taiwan’s regime of corporate and securities laws. It also provides a detailed analysis of how the NPO is empowered to bring representative litigations, particularly securities class actions and derivative suits. Part III critically evaluates the NPO model through the lens of public choice perspectives. This Part also refutes the idea that conventional NPO theories explain the formation of the NPO. The NPO theories apparently ignore the public nature of the government-sanctioned NPO, which can be illuminated by the public choice and interest group perspectives. For Taiwan, it is simply not feasible to adopt the U.S. legal regime and culture of securities class actions entirely. The future viability of representative litigations in Taiwan depends upon determining how the NPO model can be adapted such that it can be better aligned with the goals of the benevolent lawmakers and policy designers. Further, Part III also discusses the underenforcement and overenforcement that is present in securities law actions and corporate law actions, respectively. Part IV explains how decoupling the role of class counsel from the NPO’s role as lead plaintiff may be a key adaptation in improving the NPO model. Introducing attorneys from outside the NPO into class actions will bring

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14 See infra notes 179-189 and accompanying text.


more competition and produce innovative lawyering. These attorneys can also serve as monitors of the government-sanctioned NPO and make the NPO responsive to vulnerable investors. This article concludes with the observation that the public choice perspectives can better capture the nature of Taiwan’s NPO model, and suggests that more market participation will allow the NPO model to work better.

II. NPO Model for Representative Litigations in Taiwan

A. A Basic Framework: Private Actions in Corporate and Securities Laws

Corporate law and securities law are often discussed without clearly distinguishing between the two, but the core issues that each area is concerned with are different. The former deals mainly with issues of agency problems between management, shareholders, and creditors, while the latter addresses the problem of asymmetrical information among market participants, thus characteristic legislative strategies differ between the two fields. To deal with the somewhat vague concept of fiduciary duties, a standard-based approach is used in corporate law.

The globally influential Delaware corporate law, with its noteworthy divergence between directors’ duty of care with respect to standards of conduct and standards of review, offers a telling example.

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19 See KRAAKMAN ET AL., supra note 18, at 21–22.


21 See KRAAKMAN ET AL., supra note 18, at 24 (“[F]ew jurisdictions rely on the rules strategy as a principal device for regulating complex, intra-corporate relations . . . . Rather than rule-based regulation, then, intra-corporate topics such as insider self-dealing tend to be governed by open standards that leave discretion for adjudicators to determine ex post whether violations have occurred.”).


23 See Ehud Kamar, A Regulatory Competition Theory of Indeterminacy in Corporate Law, 98 COLUM. L. REV. 1908, 1914–15 (1998) (“Legal norms can be sorted along a continuum, with the two poles being rules and standards . . . . Delaware law is at one end of this continuum. It relies extensively on broad legal standards that grant courts wide discretion in deciding corporate disputes.”).
The main purpose of securities law, on the other hand, is to require issuers to fully disclose all pertinent information in order to strengthen investors’ confidence in the stock market; it often comprises a large number of technical, rigid rules and adopts a rule-based approach. Viewed from the perspective of the traditional civil law distinction between private law and public law, corporate law, with its core of fiduciary relationships, is a private law in nature. Comparatively, the rule-based securities law always attempts to empower government agencies to regulate the securities market and should basically be considered a public law.

Private rights of action are extant in both corporate and securities law, but conventional wisdom often applies different meanings to their existence and exercise. Public enforcement, through public agents, plays a major role in the enforcement of public laws, such as securities laws. Private rights of action in the enforcement of public laws are often deemed to be exercised to reinforce the regulatory regime. The interplay of private enforcement and public enforcement in the enforcement of public laws has been extensively discussed. The private enforcement of public laws can produce more enforcement and avoid bureaucratic agency slack. However, more enforcement is not necessarily efficient enforcement, and it often wastes far too many resources. In addition, unanticipated private enforcement actions may also interfere with enforcement schemes designed by a monopolistic public enforcer. Determining how to calculate and achieve the optimal level of overall enforcement has been a subject of extensive discussion.

24 See id. at 1921.
enforcement, which involves a combination of public and private enforcement, is therefore a serious consideration in the field of securities law.\textsuperscript{32}

In contrast to securities law, private, standards-based corporate law is naturally designed with private rights of action therein to deal with the agency problems.\textsuperscript{33} For the vindication of private rights, the role of the state is often limited to furnishing the court system.\textsuperscript{34}

Taiwan enacted the Securities and Exchange Act (“SEA”) in 1968.\textsuperscript{35} Rule 10b-5, the best-known general antifraud provision in the U.S. securities legal regime, was also the basis for Article 20, Section 1 of the SEA.\textsuperscript{36} This section now reads: “During the public offering, issuing, private placement, or trading of securities, there shall be no misrepresentations, frauds, or any other acts which are sufficient to mislead other persons.”\textsuperscript{37} A comparison of this statement with its U.S. counterpart, U.S. Rule 10b-5, illustrates two significant differences. First, Rule 10b-5 does not contain an express right of action in pursuance of a civil remedy.\textsuperscript{38} While American courts have recognized the implied private right of action in Rule 10b-5 for some time now,\textsuperscript{39} how far Rule 10b-5 can extend remains a highly controversial issue, one that the U.S. Supreme Court tries to answer from time to time.\textsuperscript{40}

\begin{footnotesize}
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\item[33] See KRAAKMAN ET AL., \textit{supra} note 18, at 28–29.
\item[35] ZHENGQUAN JIAOYIFA [Securities and Exchange Act] (Taiwan).
\item[37] ZHENGQUAN JIAOYIFA [Securities and Exchange Act] art. 20 § 1 (Taiwan).
\item[38] 17 C.F.R. § 240.10b-5 (2013).
\item[39] See Kardon v. National Gypsum Co., 69 F. Supp. 512, 513 (E.D. Pa. 1946) (“It is also true that there is no provision in Sec. 10 or elsewhere expressly allowing civil suits by persons injured as a result of violation of Sec. 10 or of the Rule [10b-5]. However, ‘The violation of a legislative enactment by doing a prohibited act, or by failing to do a required act, makes the actor liable for an invasion of an interest of another . . . .’”). The implied right of action in Rule 10b-5 was first recognized by the U.S. Supreme Court in the \textit{Superintendent of Insurance} case. \textit{See} Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 13 n.9 (1971).
\item[40] Two recent opinions from the U.S. Supreme Court that have drawn a lot of attention are Stoneridge Inv. Partners v. Scientific-Atlanta, Inc., 552 U.S. 148 (2008) and
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SEA, however, expressly offers a right of action to securities purchasers or sellers to recover losses from those who violate this general antifraud rule.\(^{41}\) This difference may have subtle impacts.\(^{42}\) The express grant of a private right of action in Taiwan suggests that compensation for the victims can always serve as a major justification, and the reach of the right of action can be decided on this basis. On the other hand, American jurists tend to take a constrained approach in clarifying what is actionable under the judicially-created implied private right of action.\(^{43}\)

Secondly, Article 20-1 of the SEA provides another instance of legal recourse for compensation for damages to the defrauded investors in cases involving financial misstatements of the issuers or the public corporations.\(^{44}\) The potential defendants expressly identified in this Article of the SEA are the “primary actors,” including the issuer, the directors, supervisors\(^{45}\), officers, and other employees who have placed their signatures on the financial statements, as well as the accountants who audited them.\(^{46}\) It offers no provision in regards to liabilities for secondary actors. As shown above, no subjects—neither the primary actors nor the secondary actors—are mentioned in the text of Article 20, Section 1. It remains unsettled whether this general antifraud rule imposes liability in secondary actors. In comparison to the U.S. securities regime,\(^{47}\) liability of

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\(^{41}\) ZHENGQUAN JIAOYI FA [Securities and Exchange Act] art. 20 § 3 (Taiwan) (“Anyone who violates the provisions of paragraph 1 shall be held liable for damages sustained by bona fide purchasers or sellers of the said securities.”).

\(^{42}\) ZHENGQUAN JIAOYI FA [Securities and Exchange Act] art. 20 § 3 (Taiwan).

\(^{43}\) See Stoneridge, supra note 40, at 165 (“Concerns with the judicial creation of a private cause of action caution against its expansion. The decision to extend the cause of action is for Congress, not for [the Court].”).

\(^{44}\) ZHENGQUAN JIAOYI FA [Securities and Exchange Act] art. 20-1 (Taiwan).

\(^{45}\) Taiwan Company Law requires a corporation to have at least one supervisor, and a public corporation must have at least two. GONGSI FA [COMPANY LAW] art. 216 (Taiwan); ZHENGQUAN JIAOYI FA [Securities and Exchange Act] art. 26 § 1 (Taiwan). However, in accordance with Taiwan Securities Exchange Law, a public corporation can operate without the supervisor if it sets up an audit committee comprised of all the independent directors. ZHENGQUAN JIAOYI FA [Securities and Exchange Act] art. 14-5 § 1 (Taiwan).

Supervisors, like directors, are to be elected by the shareholders, and their main function is to monitor the directors and the management team. See Christopher John Gulinello, The Revision of Taiwan’s Company Law: The Struggle Toward a Shareholder-Oriented Model in One Corner of East Asia, 28 Del. J. Corp. L. 75, 107–11 (2003).

\(^{46}\) ZHENGQUAN JIAOYI FA [Securities and Exchange Act] art. 20-1 § 1, § 3 (Taiwan).

secondary actors is certainly an issue worthy of attention. However, this issue is of much less practical importance in Taiwan. In securities fraud cases, plaintiffs in Taiwan always employ as their actionable rights, not only the antifraud provisions in the SEA, but also the general tort provisions in the Civil Law.\(^{48}\) Therefore, the general tort rule can act as a catchall provision to which the secondary actors involving a securities fraud are subject. In this sense, the general tort provisions should be viewed as part of the securities antifraud legal regime in Taiwan.

In terms of the corporate law regime, three types of representative litigations can be found in Taiwan Company Law. First, the corporation can initiate a fiduciary duty litigation to recover damages from the wrongdoings of directors. Company Law recognizes that directors, supervisors, and officers owe duties of care and loyalty to the corporation they serve.\(^{49}\) Shareholders who meet the standing requirements can bring a derivative suit on behalf of the corporation.\(^{50}\) However, the defendants named in a shareholder derivative suit stipulated in Taiwan Company Law can only be the corporation’s directors and/or supervisors. Thus, if the shareholders’ targets are corporate officers, a derivative suit is ineffective and impracticable.

In addition to derivative suits, which can be found in most of the modern legal regimes, shareholders in Taiwan can bring other types of suits that may also be classified as representative litigations. For instance, shareholders can seek a court verdict to remove the directors and/or supervisors whose conduct has severely harmed the corporations or seriously violated the corporation’s laws or charter.\(^{51}\) In this type of action, the corporation shareholders who are bringing the action are named as petitioners rather than the corporation itself. Nonetheless, on the face of this action, the intent is to terminate the corporation’s relationship with its directors and/or supervisors. In other words, it is brought for the public good, but not for the personal benefit of the plaintiff-shareholder. In this light, it shares the same representative nature as derivative suits.

Another type of suit that can be brought for the benefit of the corporation is a shareholders’ action to nullify the resolutions when the corporation’s shareholder meeting reaches resolutions that are deemed to violate laws of procedure or substance.\(^{52}\) This type of suit, in which the

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\(^{48}\) See MINFA [Civil Law] art. 184 § 1 (Taiwan) (“A person who, intentionally or negligently, has wrongfully damaged the rights of another is bound to compensate him for any injury arising therefrom. The same rule shall be applied when the injury is done intentionally in a manner against the rules of morals.”).

\(^{49}\) GONGSI FA [COMPANY LAW] art. 23 § 1 (Taiwan).

\(^{50}\) GONGSI FA [COMPANY LAW] art. 214 (Taiwan).

\(^{51}\) GONGSI FA [COMPANY LAW] art. 200 (Taiwan).

\(^{52}\) GONGSI FA [COMPANY LAW] art. 189, 191 (Taiwan).
corporation is named as the defendant, often occurs when the corporation’s management fails to acknowledge that the meeting has been wrongfully convened or the resolution was unlawfully made. From a legal and logical standpoint, the plaintiff-shareholders bring such suits to correct mistakes made by the corporation’s decision-making bodies, which, therefore, benefit the corporation overall.

B. Securities Class Actions

The concept of “class action” was not well received in Taiwan until the Consumer Protection Law (“CPL”) was enacted. In accordance with Taiwan’s Code of Civil Procedure, persons with “common interests” can have their appointees bring a group litigation on behalf of all named plaintiffs. However, rules and practices on the burden of legal costs and financing litigations in Taiwan are not compatible with class actions. Contingent fee arrangements contribute substantially to the thriving class actions in the United States. However, such arrangements are rarely seen in Taiwan. Article 35, Section 2 of the Attorneys’ Code of Ethics, issued by the Taiwan Bar Association, allows lawyers to be entitled to payment conditioned on the resolution of a civil case dispute in the retainer agreement. However, this “post-payment” clause does not expressly allow lawyers to relieve the client’s obligation of paying retainer fees. It is also expected that the total amount of fees should be capped in instances where lawyers bill clients through the use of a flat fee arrangement. For example, the Charter of the Taipei Bar Association notes that a lawyer should not charge more than 500,000 New Taiwan dollars (“NT$”) for any single case where the litigation amount is less than NT$5 million. If the litigation amount is more than NT$5 million, lawyers may increase the fee.


55 See Janet Cooper Alexander, Contingent Fees and Class Actions, 47 DEPAUL L. REV. 347, 347-48 (1998) (contingent fee arrangements are “indispensable in class action litigation . . . Indeed, in most class action litigation no other form of compensation would be practical.”).

56 LUSHI LUNLI GUIFAN [ATTORNEYS’ CODE OF ETHICS] art. 35 § 2 (Taiwan) (“Lawyers cannot request for post-payment in family, criminal and juvenile cases.”).

57 Id.

58 NT$30 is approximately equal to US$1. The current exchange rate is available at http://www.federalreserve.gov/releases/h10/current/.

59 TAIBEI LUSHI GONGHUI ZHANGCHENG [CHARTER OF THE TAIPEI BAR ASSOCIATION] art. 29 (Taiwan).
by not more than three percent of the total litigation amount. As a result, the more entrepreneurial, U.S.-style lawyers who might otherwise actively coordinate groups of plaintiff-investors to bring such a suit are not found in Taiwan.

Further, Taiwan does not have a “loser pays” rule; the losing party in a case in Taiwan is generally not responsible for the prevailing party’s attorneys’ fees. However, the losing party does have to bear other litigation expenses, including court fees of 1 to 1.5 percent of the litigation amount. Plaintiff-investors may thus be deterred by the financial risk of the litigation expenses.

The CPL significantly changes the class action landscape by introducing the consumer protection group class action. Whenever more than twenty victimized consumers opt in, the CPL empowers consumer protection groups to initiate a legal action against the defendants for compensation of demonstrated losses, as well as possible punitive damages of up to triple the amount of those demonstrated losses. The CPL also exempts such consumer protection groups from court fees, which are proportional to the litigation amount and paid up front by the plaintiffs, for that portion of the litigation amount that exceeds NT$600,000.

While the CPL makes consumer class actions possible, it also allows for attempts to prevent frivolous lawsuits. For example, the CPL applies demanding criteria to any group requesting the status of a consumer protection group. First, the group must be organized either as a member-based, legal entity with more than 500 members, or as a nonprofit foundation whose registered assets must be more than NT$10 million. Second, the group must also have been established for more than three years and be officially certified by consumer protection authorities.

60 Id.

61 But see Shen, supra note 54, at 44 (“[I]n matters of appeal to a court of third instance, since an appellant is required to appoint an attorney as his/her advocate, the attorney fees in the court of third instance shall be exceptionally included as part of the litigation costs, and the losing party must bear them.”).


63 See Shen, supra note 54, at 48-49.

64 XIAOFEIZHE BAOHU FA [Consumer Protection Act] art. 50 (Taiwan).

65 XIAOFEIZHE BAOHU FA [Consumer Protection Law] art. 52 (Taiwan).

66 XIAOFEIZHE BAOHU FA [Consumer Protection Law] art. 49 (Taiwan).

67 XIAOFEIZHE BAOHU FA [Consumer Protection Law] art. 49 § 1 (Taiwan).

68 XIAOFEIZHE BAOHU FA [Consumer Protection Law] art. 49 § 1 (Taiwan).
Third, the CPL further notes that lawyers representing the class action may be reimbursed only for necessary expenses; they may not charge their usual service fees.\(^\text{69}\) Finally, the group cannot initiate a lawsuit without the consent of a consumer protection authorities’ ombudsman.\(^\text{70}\)

The class action mechanism offered by the CPL is not helpful to securities law enforcement. This is because the definition of “consumers” in the CPL is “those who enter into transactions, use goods or accept services for the purpose of consumption,”\(^\text{71}\) and investors who buy and sell securities do not meet this criterion. However, investors defrauded by securities wrongdoing are plagued by the same collective action problem faced by consumers when they try to initiate class actions. To ease this problem, a NPO known as the Securities and Futures Market Development Institute (“SFI”) took action in 1998.\(^\text{72}\) Under the Ministry of Finance directive, the SFI was founded in 1984 and financed by the Taiwan Stock Exchange, fourteen stock brokerages, and fourteen banks offering brokerage services.\(^\text{73}\) The SFI’s original mission is to “promote internationalization and liberalization of the securities market,” and its purpose is “to plan, design and promote market-related activities, including nurturing the professionalism of industry labor force, training professionals, educating investors, and compiling and disclosing market information.”\(^\text{74}\) In other words, the establishment of the SFI had little to do with protecting investors, and even less to do with initiating litigations on behalf of investors. This is validated by the fact that the SFI did not set up an investor service and protection center, and the first group litigation for investors was not brought until 1998, fourteen years after its inception.\(^\text{75}\) At that time, the SFI, rather than the plaintiff-investors, bore the attorneys’ fees and court fees.\(^\text{76}\)

Against the backdrop of the class action rules in the CPL, making a new law modeled after the CPL to facilitate securities class actions had been recommended.\(^\text{77}\) Similarities between the litigation problems of

\(^{69}\) XIAOFEIZHE BAOHU FA [Consumer Protection Law] art. 49 § 2 (Taiwan).

\(^{70}\) XIAOFEIZHE BAOHU FA [Consumer Protection Law] art. 49 § 1 (Taiwan).

\(^{71}\) XIAOFEIZHE BAOHU FA [CONSUMER PROTECTION LAW] art. 2 (Taiwan).

\(^{72}\) See Lawrence Liu, Simulating Securities Class Actions: The Case in Taiwan, 3 CORP. GOVERNANCE INT’L, No. 4, at 8 (2000) (describing briefly the history and role of the SFI).

\(^{73}\) See ZHENG QUAN JI QI HUO SHI CHANG FA ZHAN JI JIN HUI 2003 NIAN NIAN BAO [2003 SECURITIES & FUTURES INSTITUTE ANNUAL REPORT] 9 (Taiwan).

\(^{74}\) Id.

\(^{75}\) Id.

\(^{76}\) See Liu, supra note 72, at 8.

\(^{77}\) Id. at 13.
defrauded securities investors and victimized consumers face are clear.\textsuperscript{78} While the draft of this new law was submitted to the legislature in 1999,\textsuperscript{79} it did not garner enough legislative momentum until the beginning of this century. The collapse of Enron and WorldCom, and other companies that were involved in corporate scandals in the United States, together with corporate shenanigans occurring in Taiwan, constituted sufficient exogenous impetuses for Taiwan’s lawmakers to finally take action. The Investor Protection Act was finally enacted in July 2002, and it empowered the securities authorities, or the Financial Supervision Commission (“FSC”), to require all related exchanges, self-regulatory organizations, and securities finance enterprises to finance the establishment of the Investors Protection Center (“IPC”).\textsuperscript{80} This Act required consistent, ongoing contributions from securities firms, futures firms, and the exchanges. The IPC’s charter identifies the board of directors, which consists of eleven members, as its decision-making body.\textsuperscript{81} At least two-thirds of the directors are scholars, experts, or impartial persons appointed by the FSC, and the remaining directors are selected by the FSC from a group of individuals recommended by the contributors.\textsuperscript{82}

According to the Investor Protection Act, the IPC may bring a securities class action as long as more than twenty investors who are harmed by the same securities incident are willing to delegate their rights to, and be represented by, the IPC.\textsuperscript{83} The IPC finances the entire cost of the litigation, and all proceeds arising from the litigation are distributed to the plaintiff-investors after deducting any legitimate expenses paid by the IPC.\textsuperscript{84} Those necessary expenses may not include the attorneys’ fees or other compensation for the services offered by the IPC, because the IPC is not allowed to charge the plaintiff-investors it represents.\textsuperscript{85}

\textsuperscript{78} See Kraakman et al., supra note 18, at 193 (“This aspect of [the vulnerabilities of public investors of] capital markets regulation . . . is a close cousin of consumer protection law . . . ”).

\textsuperscript{79} See Liu, supra note 72, at 14.

\textsuperscript{80} ZHENGQUAN TOUZIREN JI QIHUO JIAOYIREN BAOHU FA [INVESTOR PROTECTION ACT] art. 7 (Taiwan).

\textsuperscript{81} CAITUANFAREN ZHENGQUAN TOUZIREN JI QIHUO JIAOYIREN BAOHU ZHONGXIN JUANZHU ZHANGCHENG [CHARTER OF THE INVESTOR PROTECTION CENTER] art. 9 (Taiwan).

\textsuperscript{82} ZHENGQUAN TOUZIREN JI QIHUO JIAOYIREN BAOHU FA [INVESTOR PROTECTION ACT] art. 11 (Taiwan).

\textsuperscript{83} ZHENGQUAN TOUZIREN JI QIHUO JIAOYIREN BAOHU FA [INVESTOR PROTECTION ACT] art. 28 § 1 (Taiwan).

\textsuperscript{84} ZHENGQUAN TOUZIREN JI QIHUO JIAOYIREN BAOHU FA [INVESTOR PROTECTION ACT] art. 33 (Taiwan).

\textsuperscript{85} Id.
The IPC enjoys huge cost advantages in bringing these class actions. The Investor Protection Act originally exempted the IPC from paying court fees for the portion of the litigation amount in excess of NT$100 million. Amended in 2009, the current cap amount was reduced to NT$30 million.\(^{86}\) The Taiwanese court, with the express authorization of the Investors Protection Act, can exempt the IPC from having to pay the standard deposit for injunctions or attachments applications.\(^{87}\) The usual amount set for the deposit is one-third of the claim.\(^{88}\) However, but for that rule, the deposit required for the court’s temporary actions would have prohibited securities class actions with large claim amounts.

C. Derivative Suits

As was previously noted, Taiwan Company Law outlines three types of representative litigation: (1) derivative suits brought by shareholders on behalf of the corporation against the directors and/or supervisors; (2) removal suits brought by shareholders against the directors and/or supervisors; and (3) nullification suits to amend resolutions of a shareholder or board meeting brought by shareholders against the corporation. The standing requirements for nullification suits are not rigorous, and almost any individual shareholder can initiate such an action.\(^{89}\) However, owing to the reasons explained briefly below, it is rare for shareholders to launch derivative suits or removal suits.

Taiwan Company Law provides that derivative actions against the directors and/or supervisors can be brought by a shareholder or a group of shareholders, who, individually or as a group, has held more than three percent of the corporation’s outstanding shares for no less than one year.\(^{90}\) If the defendants are directors, shareholders must first make a demand in writing to a supervisor before bringing the action on behalf of the corporation; if the defendants are supervisors, the demand shall be made to the board. Unless the supervisor or the board brings an action within thirty days from the date the demand is made, the shareholders can initiate a suit on behalf of the corporation.\(^{91}\)

In addition to the high shareholding threshold, shareholders are

\(^{86}\) **ZHENGQUAN TOUZIREN** Ji QihuO Jiaoyiren Baohu Fa [Investor Protection Act] art. 35 §§ 1, 2 (Taiwan). Court fees for a case with a litigation amount of NT$30 million are NT$276,000 for the court of first instance; if the case is appealed, the court fees for both the court of second instance and the court of third instance is NT$414,000. See supra note 62.

\(^{87}\) **ZHENGQUAN TOUZIREN** Ji QihuO Jiaoyiren Baohu Fa [Investor Protection Act] art. 35 § 3 (Taiwan).

\(^{88}\) See Lin, supra note 62, at 173 n.124.

\(^{89}\) **GONGSI FA** [Company Law] art. 189, 191 (Taiwan).

\(^{90}\) See Gulinello, supra note 45, at 112–13.

\(^{91}\) See Gulinello, supra note 45, at 107 n.144.
discouraged from initiating a derivative suit by the following rules stipulated in Taiwan Company Law. The Company Law provides that, at the request of the defendants, the court can order the plaintiff-shareholders to tender a significant deposit, which increases their financial burden.\footnote{GONGSI Fa [COMPANY LAW] art. 214 § 2 (Taiwan).} Further, if the plaintiff-shareholders lose the case and the corporation is harmed in any way, the corporation can sue the plaintiff-shareholders to recover the loss.\footnote{Id.} If the derivative action is based on false factual statements, the defendants can also sue the plaintiff-shareholders to recover any costs or losses arising from the lawsuit.\footnote{GONGSI Fa [COMPANY LAW] art. 215 § 1 (Taiwan).}

In Taiwan, the removal of directors is one of the powers enjoyed by shareholders, as they can also seek a court verdict to remove the directors.\footnote{GONGSI Fa [COMPANY LAW] art. 200 (Taiwan).} To win such a case, the plaintiff-shareholders must prove that the defendant-director’s conduct has severely harmed the corporation or seriously contravened the law or the corporation’s charter. The extant procedural requirements are not easily met because it requires the following: (1) the plaintiff-shareholders must hold three percent or more of the corporation’s outstanding shares; and (2) the proposal to have the directors removed has been made, but not passed, at a shareholder meeting.\footnote{Id.}

As an institute that provides for the protection of investors, the IPC is designed to acquire the status of a shareholder of each and every listed corporation in Taiwan. Under the authority of the Investor Protection Act, the IPC can use its funds to purchase the shares of listed corporations. However, the Investor Protection Act limits the number of IPC shares in any listed corporation to 1,000 (the equivalent of one transaction unit in the Taiwan stock market).\footnote{TAIWAN ZHENGQUAN JIAOYISUO GUFEN YOUXIAN GONGSI YINGYE XI ZE [OPERATING RULES OF THE TAIWAN STOCK EXCHANGE CORPORATION] art. 60 (Taiwan).} As a result, the underwriting and listing rules formulated by securities self-regulatory organizations oblige the underwriters or the listing corporation to reserve 1,000 shares for the IPC.\footnote{CAITUAN FAREN ZHONGHUAMINGUO ZHENGQUAN GUITAI MAIMAI ZHONGXIN ZHENGQUANSHANG YINGYE CHUSUO MAIMAI XINGGUI GUPIAO SHENCHAO ZHUNTU [GreTai Securities Market Rules Governing the Review of Emerging Stocks for Trading on the GTSM] art. 8 § 1 (Taiwan).}

These rules render the IPC as a shareholder of every corporation whose shares are listed or traded over the counter. The status of shareholder enables the IPC to initiate shareholder actions. This status
allows the IPC to bring a nullification suit against the corporation, but with such a small amount of shares, it cannot launch a derivative or removal suit. In 2009, the Investor Protection Act was amended to dispel these legal obstacles. It now exempts the IPC from the three percent shareholding requirement and therefore empowers the IPC to bring such actions so long as it finds that the conduct of any director has severely harmed the corporation or seriously violated the law or the corporation’s charter.

D. NPO as Private Attorney General

Borrowing the term coined by the U.S. Court of Appeals Judge Jerome Frank in 1943 and frequently quoted in United States legal literature, we can view the NPO as a “private attorney general.” To be sure, the SFI and the IPC are organized in the form of a nonprofit organization in accordance with Taiwan Civil Law. Neither of them can be thought of as purely private institutions because both are created and sanctioned by the law or government fiat. In view of the public/private approach, Taiwan’s NPO approach is certainly a hybrid one.

To distill the nature of the hybrid approach in the spectrum, Professor William Rubenstein of Harvard Law School proposes that we can look into three characteristic features: the lawyer’s client, the lawyer’s reward, and the lawyer’s goal. The public lawyers represent government or the public interest, and work for a fixed salary. The core of their efforts is deterrence of future wrongdoing. In contrast, the private lawyers represent nongovernmental parties, and are paid by their clients in the form of a flat fee, an hourly rate, or a contingency-fee arrangement. The

99 To bring the derivative or removal suit, the plaintiff-shareholders must hold at least three percent of the corporation’s outstanding shares. GONGSI FA [COMPANY LAW] art. 200; art. 214 § 1 (Taiwan).

100 ZHENG QUAN TOU ZI REN JI QI HUO JIAO YI YEN BAO HU FA [INVESTOR PROTECTION ACT (TAIWAN)] art. 10-1.

101 See Assoc. Indus. of N.Y. v. Ickes, 134 F.2d 694, 704 (2d Cir. 1943).

102 MINFA [Civil Law] arts. 59-65 (Taiwan).

103 See supra note 73.

104 See Wang & Chen, supra note 15, at 118 (“Taiwan relies primarily on public enforcement. However, Taiwan also employs a government-sanctioned non-profit organization, the Securities and Futures Investors Protection Center, to help mitigate inadequate public enforcement. This is essentially a hybrid approach . . . .”). See also Lin, supra note 62, at 195 (“Traditional enforcement theory’s taxonomy of public and private enforcement seems inadequate to capture the special attributes of in-between nonprofits.”).


106 Id. at 2140.
private lawyers’ goal is compensation for their clients.

Viewed in this light, the IPC’s role in derivative suits and securities class actions may be similar to that of private lawyers. While the cases initiated by the IPC are handled by IPC staff lawyers, the clients and the goals that the IPC serves seem to be more private than public. The injured individuals and corporations, respectively, can be seen as the IPC’s clients in derivative suits and securities class actions. With respect to class actions, the Investor Protection Act has the opt-in rule instead of the U.S.-style opt-out rule in that injured individuals must give permission to the IPC to join the class action and become plaintiffs.\(^{107}\) This rule has further weakened the argument that the IPC’s function is to look after the general public. This also suggests that compensation for the plaintiff-investors or corporation, rather than deterrence, is the major goal that the IPC pursues.

Nonetheless, the IPC’s position may be moved along the public/private spectrum back toward the public end if we take into account its monopoly status in initiating the legal actions. As explained above, private parties and lawyers are allowed to bring group litigations and derivative suits, but they are discouraged from initiating litigations because of the financial risks and other concerns.\(^{108}\) The creation of the IPC thus renders it the de facto monopoly status of being the lead plaintiff of representative litigations. Decisions to bring such suits are to be made by the IPC’s board of directors, not the investors who believe that they have been defrauded.\(^{109}\) Being a not-for-profit organization, the operation of the IPC is not subject to market pressure and is not market-oriented. In this light, in addition to playing the role of plaintiff in bringing representative litigations, the IPC may not offer any contributions that other public agencies lack and need. In short, the IPC is hardly a “necessary supplement”\(^{110}\) to extant governmental enforcement as the private attorney general in U.S.-style representative litigations is often deemed. It is more accurate to say that the IPC was created to supplement the private lawyering and absorb the financial risks arising from the litigations.


\(^{108}\) See supra note 54-62 and accompanying text.

\(^{109}\) CAITUANFAREN ZHENGQUAN TOUZIREN JI QIHUO JIAOYIREN BAOHU ZHONGXIN BANLI TUANTISUSONG HUO ZHONGCAISHIJIAN CHULI BANFA [Rules on Investor Protection Center’s Management of Class Actions and Arbitrations] art. 8 (Taiwan); CAITUANFAREN ZHENGQUAN TOUZIREN JI QIHUO JIAOYIREN BAOHU ZHONGXIN BANLI ZHENGQUAN TOUZIREN JI QIHUO JIAOYIREN BAOHU FA DISHITIAO ZHIYI SUSONG SHIJIAN CHULI BANFA [Rules on Investor Protection Center’s Management of Article 10-1 Actions] art. 8 (Taiwan).

\(^{110}\) See J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964) (Private enforcement “provides a necessary supplement to Commission action.”).
III. A Public Choice Evaluation of the Taiwan Model

A. Why Design a Government-Sanctioned NPO?

Taiwan’s efforts to increase the enforcement of private rights in corporate and securities laws have sparked discussions among scholars.111 While the Taiwan model was established under the strong influence of its government, most commentators consider the NPO’s formality the more relevant center of discussion. Several theories, including the “government failure/market failure” theory, “contract failure” theory, and “voluntary failure” theory, are proffered to justify the practice of the SFI and the IPC.

Pointing out that the Taiwan model is a creative partnership between the public and private sectors, Professor Curtis Milhaupt of Columbia Law School employs the theories of “government failure/market failure” and “contract failure” to explain the emergence of the SFI and the IPC as NPO entities.112 The “government failure/market failure” theory, first developed by Professor Burton Weisbrod of Northwestern University, is based on the prediction that the NPO form emerges as a response to the government’s failure to provide public services in this regard and to the insufficiency of private market remedies that meet diverse societal demands.113 In accordance with this theory, the SFI and the IPC emerged to protect investors in the wake of the Asian financial crisis and, particularly, the local stock market turmoil.114 However, the very creation of the NPO indicates the government’s recognition that some specific protections and resources should be provided as well as actions to meet that need. Simply put, a government failure is not present here, as Weisbrod’s theory requires.115 The government has the government-sanctioned IPC established and is not absent in investor protection in this regard. In addition, the NPO funding type Weisbrod identifies should come from private donors and can have only an indirect relationship with the government.116 Thus, the legally created, government-sanctioned IPC


112 Id. at 172, 195–98.


114 See Milhaupt, supra note 111, at 186.


116 See Weisbrod, supra note 113, at 29 (“Whatever the form of governmental encouragement [to the NPO], it is only partial; there is a private cost to the donor. Yet, despite the cost, people donate to charities . . . . The invisible institutions—social
cannot be wholly reconciled with Weisbrod’s theoretical model.

Alternatively, the “contract failure” theory posits that the NPO produces goods where serious information asymmetry problems between potential sellers and buyers make such contracts too costly.\(^{117}\) Professor Henry Hansmann of Yale Law School, who first proposed this theory, suggests that the provision of public goods is most effectively accomplished by an organization that is funded by voluntary contributions.\(^{118}\) Professor Hansmann notes that when the provider is formed as a NPO instead of a for-profit firm, it will attract more donations:

> The reason is simply that contributors would have little or no assurance that their payments to a for-profit station were actually needed to pay for the service they received. A for-profit station would have every incentive to solicit payments far in excess of the total needed to pay for its broadcasts, and simply to distribute the difference to the owners as profits.\(^{119}\)

On the other hand, a NPO, which has a non-distribution constraint,\(^{120}\) is believed to be more trustworthy in handling the donations from its contributors.\(^{121}\) While the NPOs’ non-distribution constraint, a feature Professor Milhaupt repeatedly called attention to,\(^{122}\) may explain why consumers might prefer a NPO as opposed to a for-profit institution, it does not explain the preference for NPOs over government, and why the

\(^{117}\) See Milhaupt, supra note 111, at 172.

\(^{118}\) See Henry B. Hansmann, The Role of Nonprofit Enterprise, 89 Yale L.J. 835 (1980).

\(^{119}\) See id. at 850.

\(^{120}\) See Avner Ben-Ner & Benedetto Gui, The Theory of Nonprofit Organizations Revisited, in The Study of the Nonprofit Enterprise: Theories and Approaches 5 (2003) ("The principal characteristic that distinguishes NPOs from other private organizations is the presence of strict limits on the appropriation of the organization’s surplus in the form of monetary gain by those who run and control it. Most often these limits take the form of a statutory prohibition to distribute any dividends or bonuses—the so-called ‘nondistribution constraint’ . . . . ").


\(^{122}\) See Milhaupt, supra note 111, at 178 n.36 ("[Many] expressed doubt that Taiwan’s) SFI should be considered a NPO at all, given its close relationship to the government. But the SFI meets both the legal and functional definition of a NPO . . . its members are bound by the non-distribution constraint.”).
government chose to offer this protective service in the form of a NPO.\textsuperscript{123}

Professor Milhaupt also suggests that an expanded form of the “contract failure” theory can shed light on the reasons why the government uses the NPO rather than a for-profit law firm to offer legal services.\textsuperscript{124} Specifically, he suggests that “trust in the NPO form among market participants provides the government leeway to expand its enforcement efforts into the civil enforcement realm by co-opting the SFI into its investor protection agenda, and obtaining private sector funding for those enforcement efforts.”\textsuperscript{125} According to this reasoning, some might find it difficult to gauge the difference between market participants’ “trust in the NPO form” and “trust in the governmental form.” Nevertheless, funding for litigation is a real concern. Hence, a more likely reason why the securities authorities employ the SFI rather than a for-profit law firm is because this transfers the burden of litigation expenses to the SFI. It would arouse controversy if the government financed litigation expenses from its own budget. On the other hand, the SFI has its own independent, less strictly regulated funding at its disposal.\textsuperscript{126}

A third theory that explains the SFI’s emergence and the IPC as NPO entities is the “voluntary failure” theory, which some commentators believe explains the Taiwan model better than the theories outlined thus far.\textsuperscript{127} This theory is based on the belief that the transaction costs of mobilizing governmental responses tend to be higher than that of mobilizing voluntary actions. According to the theory, voluntary organizations are the primary response to market failure and the government as the derivative institution responding to voluntary failure.\textsuperscript{128} When the demand for securities class actions rose in Taiwan toward the end of the last century, no for-profit law firms were willing to play the role of investors’ protector, and no NPOs existed to meet the demand. This voluntary failure necessitated the Taiwanese government’s intervention.\textsuperscript{129} Taiwan’s creation of NPOs aligns fairly closely with the original theoretical model, but Professor Lin who supports this rationale suggests that one puzzle remains to be answered: the Taiwanese government does not subsidize the NPOs financially; rather, market participants do (as per

\begin{itemize}
\item[\textsuperscript{123}] See Knauer, \textit{supra} note 115, at 993–94.
\item[\textsuperscript{124}] See Milhaupt, \textit{supra} note 111, at 195–97.
\item[\textsuperscript{125}] Id. at 196.
\item[\textsuperscript{126}] By 2002, before the IPC’s creation, registered assets of the SFI were NT$660 million. \textit{See Zheng Quan Ji Qi Huo Shi Chang Fa Zhan Ji Jin Hui 2003 Nian Nianbao [2003 Securities & Futures Institute Annual Report]} 9 (Taiwan).
\item[\textsuperscript{127}] See Lin, \textit{supra} note 62, at 187–88.
\item[\textsuperscript{128}] See LESTER M. SALAMON, PARTNERS IN PUBLIC SERVICE 44 (1995).
\item[\textsuperscript{129}] See Lin, \textit{supra} note 62, at 188.
\end{itemize}
the Investor Protection Act). However, the puzzle raised toward the application of voluntary theory may be misplaced. The real question regarding this application of voluntary theory is that the SFI and the IPC are simply not purely private organizations, but government-sanctioned institutes. Because the “voluntary theory” goes hand-in-hand with the system of “third-party government,” the collaboration between the government and the voluntary sector is the sticking point in the theories originally proposed by Professor Lester Salamon of Johns Hopkins University. The IPC is, directly or indirectly, controlled by political actors as well as major securities industry members. Taiwan’s NPO model does not reflect an actual government/nonprofit partnership, but seems to take on the form of an entity that involves cooperation from both the government and business sector.

Viewed in light of the conflicts faced by scholars and theories, it is obvious that the formation of this government-sanctioned NPO in Taiwan does not fit well with traditional NPO theories. Instead of focusing on the form of Taiwan’s NPO, this article argues that the perspectives of public choice theory and interest group theory shed more light on the government’s choice of the NPO model. Public choice can be defined as the economic study of nonmarket decision-making. Lawmakers, bureaucrats, and other political actors are assumed to be personal utility maximizers who pursue political power, try to maximize the budgets they control, and seek economic benefit like homo economicus. People with common interests may be viewed as members of an interest group who try to influence lawmaking or policymaking processes and outcomes. Interest group theory treats policies or regulations as commodities purchased by particular interest groups that outbid competing interest groups.

When interest groups comprised of widely-dispersed shareholders who individually owned small shareholdings decried their losses, political actors killed two birds with one stone by passing the Investor Protection

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130 Id. at 189.
131 See supra note 73.
132 See supra note 13.
133 See SALAMON, supra note 128, at 48–49.
134 See infra note 80-82 and accompanying text.
136 See SHAUN HARGREAVES HEAP, MARTIN HOLLIS, BRUCE LYONS & ROBERT SUGDEN, THE THEORY OF CHOICE: A CRITICAL GUIDE 62 (1992) (“Homo economicus is an instrumentally rational and calculating seeker of preference satisfaction. He is the figure who typically appears in neoclassical economic theory as a maximizer of utility.”).
Act and creating the NPOs. First, the government can take credit for protecting the stock market and for responding to the demands of investors as a group.138 In addition, the government devised a method whereby its control of the government-sanctioned NPOs involves no financial commitment. As explained in detail below, funding of the IPC does not come directly from the government,139 but control of the IPC is mostly seized by the securities regulator, or the FSC.140 In other words, the creation of the IPC is not only monetarily costless for the government, but also expands the political actors’ influence on initiation of class actions.

A basic tenet of interest group theory is that the interest group’s level of effectiveness varies in accordance with the gravity of the collective action problem its members face.141 Accordingly, a group of widely-dispersed shareholders may not be very effective. Other constituents affected by the NPO’s creation might have been expected to form a coalition of powerful interest groups to protest this remedial legislation. Interestingly, there has been no serious attempt by any groups to block the passage of the Investor Protection Act during the legislative process. It is more likely that the business groups find the Investor Protection Act an unsatisfying but acceptable choice. Public corporations and their directors and officers, the major potential defendants in securities class actions, must not welcome the increased likelihood of being sued by the IPC. However, given the fact that investors’ complaints can no longer be ignored, the IPC model may well be the most favorable class action regime potential defendants could hope for. The Investor Protection Act grants de facto monopoly status to the IPC with respect to legally servicing a class action. Investors suing on their own behalf are severely disadvantaged by increased litigation costs. Thus, the government-sanctioned IPC is the only option available to victimized investors. As long as the IPC exercises its power conscientiously, the problem of strike suits is, to a large extent, eliminated.

Since the IPC is granted de facto monopoly status, one might wonder why the class action plaintiffs’ bar would not lobby against the Investor Protection Act. The simple answer is that a viable interest group could not be formed, because no securities class actions were ever brought by any law firms before the Investor Protection Act was passed. It would also be extremely challenging for lawyers, if they ever tried to lobby for

138 Article 1 of the Investor Protection Act provides that the purpose of this Act is to “to safeguard the rights and interests of securities investors and futures traders and promote the sound development of the securities and futures markets.” See Zhengquan Touzi Ren Ji Qihuoo Jiaoyiren Baohu Fa [INVESTOR PROTECTION ACT] art. 1 (Taiwan).
139 See infra note 143-148 and accompanying text.
140 See infra note 151-153 and accompanying text.
the same cost-saving treatments that the IPC enjoys. After all, all of the IPC’s cost-saving advantages granted by the Investor Protection Act are uncommon to Taiwan’s legal system.\textsuperscript{142} A wider scope of application lowers financial risks for potential plaintiffs. Because this makes the remedial process less costly for investors, it enhances the possibility of frivolous suits at the same time. A strong opposition from the business community and the defense bar can be expected if such a proposal is ever implemented by the political actors.

The group of securities industry members who are legally required to finance the NPO model is another interest group that may not support the concept of a government-sanctioned NPO. The Investor Protection Act creates the Investor Protection Fund to financially support the IPC as well as other operations.\textsuperscript{143} For the seed funding at the establishment stage, this Act does not expressly indicate the amount of money that each contributor must donate. It states only that each contributor must “contribute a certain amount of assets” and that the amount is to be determined by the authorities.\textsuperscript{144} Following the establishment stage, the contributors are required to allot certain percentage of monthly revenue to the Investor Protection Fund.\textsuperscript{145} The IPC was established with a total of NT$1.031 billion from its funds.\textsuperscript{146} The contributors fall into one of four categories: (1) securities exchanges that are organized as quasi-government entities in Taiwan, including the Taiwan Stock Exchange, the Taiwan Futures Exchange, and the GreTai Securities Market (the over-the-counter market exchange in Taiwan); (2) the Taiwan Securities Central Depository Company, of which the quasi-government Taiwan Stock Exchange is the controlling shareholder; (3) self-regulated securities organizations, which include the Chinese Securities Association, Securities Investment Trust and Consulting Association of the Republic of China, and the Taipei Futures Association; and (4) four securities financing companies: Fuh

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\item \textsuperscript{142} See Shen, \textit{supra} note 54, at 44.
\item \textsuperscript{143} ZHENGQUAN TOUIZIREN JI QIHUO JIAOYIREN BAOHU FA [INVESTOR PROTECTION ACT] art. 20 § 1 (Taiwan)(“Use of the protection fund shall be limited to the following: 1. Payments to securities investors or futures traders in accordance with Article 21. 2. Expenditures by the protection institution for operation in accordance with this Act and other necessary expenses. 3. Payment of fees for initiation of litigation or arbitration procedures in accordance with this Act. 4. Other uses as approved by the competent authority.”).
\item \textsuperscript{144} ZHENGQUAN TOUIZIREN JI QIHUO JIAOYIREN BAOHU FA [INVESTOR PROTECTION ACT] art. 7 § 2 (Taiwan).
\item \textsuperscript{145} ZHENGQUAN TOUIZIREN JI QIHUO JIAOYIREN BAOHU FA [INVESTOR PROTECTION ACT] art. 18 § 1 (Taiwan).
\item \textsuperscript{146} See CAITUANFAREN ZHENGQUAN TOUIZIREN JI QIHUOJIAOYIREN BAOHU ZHONGXIN 2012 NIAN NIANBAO [2012 INVESTORS PROTECTION CENTER ANNUAL REPORT] 17 (Taiwan).
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Hwa Securities, Global Securities Finance Corporation, Fubon Securities, and EnTei Securities.\textsuperscript{147}

In short, the IPC funding does not come from just the private sector, but also from quasi-government entities, which are strictly regulated and controlled indirectly by the government.\textsuperscript{148} More importantly, the IPC’s mission extends beyond bringing representative litigations. It also serves as a venue where disputes between investors and corporations, as well as disputes between investors and securities industry members, can be mediated if all of the relevant parties agree to do so.\textsuperscript{149} The IPC’s funds are also used to cover investors’ losses in the event that a securities brokerage firm becomes insolvent and fails to tender the securities or cash owed to them.\textsuperscript{150} As unsatisfied investors seek to take part in alternative dispute resolution, the securities industry members’ exposure to litigations is further decreased. Allotting the funds as a safety net when the members fail to perform the contract is significant for market confidence and good for business. Thus, it is not surprising that the securities industry members have few complaints about the “tax” imposed on them.

B. Underenforcement in Securities Law Actions

The analysis above suggests that most affected interest groups find the establishment of the IPC acceptable, at least in principle. However, if the IPC initiates class actions too aggressively, the interest groups’ accepting attitudes are expected to change, and the business community might become concerned enough to lobby against it. No less than two-thirds of the IPC’s directors are directly appointed by the FSC.\textsuperscript{151} The remaining one-third of the IPC’s directors are selected and appointed by the FSC based on recommendations made by the contributing securities industry members.\textsuperscript{152} Therefore, the IPC may not be immune to influence from political actors and the business community.\textsuperscript{153} Whenever it is

\textsuperscript{147} Id.

\textsuperscript{148} The Taiwan Stock Exchange is an example. The competent authority, or the FSC, is authorized by Article 102 of the SEA to supervise the stock exchange. Article 126 of the SEA empowers the FSC to appoint one-third of board members of the stock exchange. The Taiwanese government can exercise its control power over the stock exchange from within and above.

\textsuperscript{149} ZHENGQUAN TOUZIREN Ji Qihuo Jiaoyiren Baohu Fa [INVESTOR PROTECTION ACT] art. 22 (Taiwan).

\textsuperscript{150} ZHENGQUAN TOUZIREN Ji Qihuo Jiaoyiren Baohu Fa [INVESTOR PROTECTION ACT] art. 21 (Taiwan).

\textsuperscript{151} ZHENGQUAN TOUZIREN Ji Qihuo Jiaoyiren Baohu Fa [INVESTOR PROTECTION ACT] art. 11 § 1 (Taiwan).

\textsuperscript{152} Id.

\textsuperscript{153} The IPC currently has eleven directors. Five of them are academics. In
uncertain whether to bring a securities class action, it is likely that the IPC may err on the side of not being aggressive enough.

Since the IPC’s inception, enterprises in Taiwan have not criticized its existence or performance. It is reasonable to surmise that the IPC does not wield its power indiscriminately. To the contrary, an examination of ongoing litigations brought by the IPC indicates that, if anything, it has taken a rather lenient approach. The number of the IPC’s ongoing cases is seventy-one. Of these seventy-one cases, twenty-four are civil suits piggybacking on criminal actions. All of the remaining forty-seven cases that the IPC brought directly to the civil court had parallel criminal actions.

It is not unexpected to find representative litigations accompanied by parallel criminal prosecutions. Securities fraud in Taiwan can result in civil remedy and criminal penalty, and the corporate wrongdoers may well be the targets of prosecutors and private parties. In fact, parallel lawsuits are also often seen in the United States. What is surprising in Taiwan’s case is that forty-six out of forty-seven class actions with parallel criminal prosecutions were initiated after the related criminal prosecutions were officially brought. It shows that the IPC seldom rushes to court.

 addition to the IPC’s chairman and president, the other four members are the chairman of Taiwan Depository & Clearing Corporation, the president of Taiwan Futures Exchange, vice president of Taiwan Stock Exchange, and the chairman of Taiwan Securities Association. Most of them are retired high-ranked public officials, and all of them have strong ties with the securities industry. See CAITUANFAREN ZHENGQUAN TOUZIREN JI QIHUOJIAOYIREN BAOHUI ZHONGXIN 2012 NIAN NIANBAO [2012 INVESTORS PROTECTION CENTER ANNUAL REPORT] 12-13 (Taiwan) (listing the IPC’s directors).


155 According to Taiwan Criminal Procedure Law, piggybacked civil lawsuits are those wherein criminal victims file for civil remedy in the criminal court when judges hear the case that prosecutors have brought to the court. See XINGSHI SUSONG FA [Code of Criminal Procedure], art. 487 §1 (Taiwan) (“Those who injured by an offence may bring an ancillary civil action along with the criminal procedure, to request compensation from the defendant and those who may be liable under the Civil Code.”). See also Liu, supra note 72, at 6–7 (explaining the advantages for the injured private parties to bring piggybacked civil lawsuits).

156 Take the general antifraud clause, Article 20, Section 1 of the SEA, as an example. Civil remedy for this securities fraud is provided in the Article 20, Section 3 of the SEA. Criminal penalty is stipulated in Article 171, Section 1 of the SEA. See ZHENGQUAN JIAOYI FA [Securities and Exchange Act] art. 171 §1 (Taiwan).


158 The only exception is Case No. 7 (ABIT Computer Corporation) listed in the IPC’s table of cases as cited in supra note 154. Defendants in this case were criminally indicted in May 2007, but the IPC brought the civil actions against them in November 2006.
The IPC can always base the plaintiffs’ private rights of action on the facts and evidence that prosecutors offer to the court. Thus, it does not have to be innovative in building its cases.

Several obvious flaws stem from the IPC’s decision to rely almost exclusively upon prosecutors’ findings before proceeding to civil courts. Given the significant variance in the evidentiary standards required by criminal and civil courts, defendants who are acquitted in criminal courts may well be found civilly liable for victims’ losses were they tried on the same factual basis. Reliance on criminal prosecutions means that the IPC overlooks potential defendants who are not criminally prosecuted but may nonetheless be found liable for investors’ loss should the cases be brought to the civil courts. In addition, because no new information about the violations would be offered in the IPC’s follow-up suits, the role of civil actions only seems to increase the monetary cost that offenders convicted in criminal courts have to pay. If that is the case, a model that imposes civil penalties that are then distributed to the victims may be more effective than the current regime wherein civil actions are brought by the IPC.

In terms of information gathering, the IPC is much better equipped than other civil plaintiffs. In accordance with the Investor Protection Act, the IPC may request issuers, securities firms, securities service industries, and futures enterprises to assist or provide information in class action initiations. The IPC is authorized to report entities that fail to cooperate with the FSC. The strong relationship between the IPC and governmental authorities may also deter companies from refusing to cooperate. In a practical sense, the quasi-investigation power granted to the IPC is definitely not toothless. The IPC’s passive exercise of its quasi-

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159 The evidentiary standard of criminal cases in Taiwan is proof beyond a reasonable doubt. See Margaret K. Lewis, *Taiwan’s New Adversarial System and the Overlooked Challenge of Efficiency-Driven Reforms*, 49 Va. J. Int’l L. 651, 666 n. 60 (2009). In contrast, Section 1, Article 222 of Civil Procedure Code of Taiwan provides that “except as otherwise provided, in making a judgment the court shall, taking into consideration the entire import of the oral argument and the result of evidence-taking, determine the facts by free evaluation.” The evidentiary standard is clearly not, and lower than, the standard of “beyond a reasonable doubt.” See Minshi Susong Fa [Code of Civil Procedure], art. 222 § 1 (Taiwan).


161 Zhenguquan Touziren Ji Qihuo Jiaoyiren Baohu Fa [Investor Protection Act] art. 17 § 1 (Taiwan).

162 Zhenguquan Touziren Ji Qihuo Jiaoyiren Baohu Fa [Investor Protection Act] art. 17 § 2 (Taiwan).
investigation power is due to its lack of intent and innovative skill to fully enforce the law, rather than its lack of authority to sanction uncooperative entities. The underenforcement of the IPC’s powers and laws aligns well with the economic theory of enforcement in regards to public enforcement.

C. **Overenforcement in Corporate Law Actions**

Taiwan’s lack of derivative suits is partly attributable to the fact that it would be very challenging for shareholders to secure evidence of wrongdoing individually. Directors and/or supervisors’ breach of their fiduciary duties may constitute a criminal violation of “breach of trust” covenants in Taiwan Criminal Law. If a block of shareholders suspects wrongdoing on the part of directors and/or supervisors, the shareholders may prefer to report their suspicions or findings to prosecutors rather than to bring a derivative suit themselves, despite meeting the standing requirements and being willing to bear the cost of a civil suit. In this respect, too, the IPC’s power to initiate representative litigations in corporate law may also be underenforced.

It is the risk of “overenforcement” that distinguishes the IPC’s power to initiate corporate law actions. Plaintiff-shareholders who bring representative litigations in corporate law pursue this course of action for the benefit of the corporation. However, the board generally represents the corporation, and the board’s responsibility is to maximize the corporation’s earnings. In this regard, the IPC’s intervention and conflicts with the board may not be a good thing. It also means that there will always be some shareholders who disagree about the advisability of bringing such a suit.

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163 **Cf.** Lin, supra note 62, at 183 (citing an interview with a lawyer working in the IPC and stating that “because there is virtually no penalty for violating this clause, the quasi-investigation power of the IPC is relatively weak . . . . The difficulty in obtaining evidence is still the most significant obstacle that the IPC faces when bringing securities litigation.”).

164 **See** Liu, supra note 72, at 5 (“[T]he high information cost to plaintiffs discourages” derivative suits.).

165 **Zhonghua Mingguo Xing Fa [Republic of China Criminal Law]** art. 342 § 1 (Taiwan). According to this Section, a person who manages the affairs of another for the purpose of taking an illegal benefit for himself or for a third person or to harm the interests of his principal and who acts contrary to his duties and thereby causes loss to the property or other interest of the principal will be sentenced to imprisonment for not more than five years or short-term imprisonment; in lieu thereof, or in addition thereto, a fine of not more than NT$1,000 may be imposed.

166 **See** Liu, supra note 72, at 6 (suggesting criminal enforcement is an alternative to derivative suits).

167 **See** Stephen M. Bainbridge, Corporation Law and Economics 403 (2002) (The mechanism of derivative suits “is a high cost constraint and infringement upon the board’s authority.”).
The inherent deficiency of derivative suits is even more pronounced in Taiwan. Before 2001, Taiwan Company Law required the election of directors to be conducted through cumulative voting. The voting rule was made optional with cumulative voting as the default in the 2001 revisions, but has reverted to the mandatory cumulative voting rule since the end of 2011. According to the cumulative voting rule, each share has the same number of votes as the number of directorships to be elected, and the shareholders can willfully allocate their votes to one or several candidates. Unlike the straight voting rule under which the vote of a simple majority determines every seat, the cumulative voting rule allows minority shareholders to accumulate their votes to support a relatively small number of candidates and boost their chances of winning board seats. Consequently, it is not unusual for factional splits and conflicts to occur on Taiwan’s corporations’ boards. Under such circumstances, it is probable that the representative litigations in corporate law would be employed, for better or worse, as a weapon in the fight for corporate control. The IPC’s representative litigations in such a scenario may compromise equitability and constitute inappropriate intervention.

The Ta-I Inc. case is a case in point. As mentioned above, the cumulative voting rule was the only default rule in Taiwan from 2001 to 2011, during which time corporations could adopt the straight voting rule for elections by simply amending their charter. During the 2007 board of directors election season, Yageo Inc. (the acquiring company) secured

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168 See Gulinello, supra note 45, at 97, 103.

169 GONGSI FA [COMPANY LAW] art. 198 § 1 (Taiwan). Before 2011, Article 198, Section 1 of Taiwan Company Law read as follows:

In the process of electing directors at a shareholders’ meeting, unless otherwise stipulated in the corporate charter, the number of votes exercisable in respect of one share shall be the same as the number of directors to be elected, and the total number of votes per share may be consolidated for election of one candidate or may be split for election of two or more candidates. A candidate to whom the ballots cast represent a prevailing number of votes shall be deemed a director elect.”

The 2011 amendment deleted the phrase “unless otherwise stipulated in the corporate charter” from this Section, and made the cumulative voting mandatory for the directors’ election.

170 Id.


172 Id. at 150 (indicating that cumulative voting strengthens the corporate insurgents’ hands in negotiation and increases the chances of a proxy contest.).

173 See ZUGAO FAYUAN [Supreme Court], Civil Division, 98 Tai-Shang No. 923 (2009) (Taiwan).
more than forty percent of Ta-I Inc.’s outstanding shares and expected to occupy close to half of the seats on the board under the cumulative voting rule, while the Ta-I Inc. management group was expected to maintain a weak board majority.

However, at the shareholders’ meeting, a shareholder abruptly proposed to amend the charter and change the cumulative voting rule to the straight voting rule. The amendment was passed. In the ensuing election where the straight voting rule was adopted, the Ta-I Inc. management group hence acquired all of the board seats, and Yageo Inc. left the meeting with none. Yageo Inc. complained that, for the charter amendment to be passed at that meeting, it should have been expressly listed on the meeting agenda and could not be raised on site. Yageo Inc. fiercely argued that the amendment and the election should be void or nullified.

Legal controversies aside, this case was a corporate control fight scenario, and both parties had more than sufficient resources to litigate this issue fully. Surprisingly, it was not Yageo Inc., but the IPC—a Ta-I Inc. shareholder—that brought an unsuccessful suit to overturn the charter amendment resolution. The reason the IPC offered for bringing the suit was that the abrupt change in the shareholder meeting was inherently inequitable, but the IPC disclosed a little more information. There is no way to know if the directors or decision-makers commenced the action based on Yageo Inc.’s complaints and/or other lobbying efforts. The only certainty is that there is no need for “public goods” litigation to deter wrongdoers in such circumstances, given the way Yageo Inc. could look after its own interests. In this regard, the IPC’s litigation initiation may be subject to another form of “overenforcement” criticism.

D. The Utilization and Evolution of the NPO Model

The securities authorities and the contributors from the securities industry appoint all of the IPC board directors. Judging from the IPC’s directors’ experience and background, the IPC undoubtedly has a stellar, independent board. Nonetheless, the ability of an independent board to monitor and run a for-profit corporation is often subject to skepticism.

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174 See Wang & Chen, supra note 15, at 150–51 (identifying the IPC’s lack of transparency).

175 The term “overenforcement” may be defined to mean “the violator of a legal rule suffers excessive harm—or more harm than is necessary for optimal deterrence—from the actual implementation of that rule.” Richard A. Bierschbach & Alex Stein, Overenforcement, 93 Geo. L.J. 1743, 1744 (2005). It is often used to denote that more cases are brought than is socially optimal. See, e.g., James J. Park, Rules, Principles and the Competition to Enforce the Securities Laws, 100 Cal. L. Rev. 115, 121 (2012).

176 See, e.g., Sanjai Bhagat & Bernard Black, The Uncertain Relationship Between Board Composition and Firm Performance, 54 Bus. Law. 921 (1999); Donald C. Langevoort, The Human Nature of Corporate Boards: Law, Norms, and the
Some doubt may also be cast on the function of an independent board in not-for-profit organizations. In view of the influence of the government and securities enterprises, whether the IPC’s decisions to commence or terminate legal actions are in the plaintiff-investors’ best interest has raised some concerns among scholars. The IPC’s inaction in the wake of the 2008 financial crisis provides evidence to support the suspicion.

As the financial crisis unfolded, Lehman Brothers filed for bankruptcy protection on September 15, 2008. A large number of Taiwan’s investors who purchased structured notes that were issued or guaranteed by Lehman Brothers through local banks complained that the banks violated the suitability principle while soliciting them to purchase the complex financial products.

Following the eruption of the crisis, it was surmised that the IPC could bring class actions on behalf of investors who had invested in the structured notes. However, the IPC finally decided not to take action on the basis that the product sold was not technically a “security” defined in the SEA. Besides, it is argued that this dispute is not technically a securities incident required by the Investor Protection Act. Thus, the IPC’s decision was both a legal and political one. If it had brought a class action, many local banks would have been sued by the IPC on behalf of investors across Taiwan and thus would have been exposed to a huge amount of liability. The IPC’s decision not to take action in this instance was undoubtedly great news for the then-crumbling banking industry. Investors were encouraged to settle their disputes with financial

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Unintended Consequences of Independence and Accountability, 89 GEO. L.J. 797 (2001).

177 See Kathleen M. Boozang, Does an Independent Board Improve Nonprofit Corporate Governance?, 75 TENN. L. REV. 83 (2007).

178 See Wang & Chen, supra note 15, at 150–51. See also Lin, supra note 62, at 194 (“[I]t is probable that the government will influence the IPC’s litigation decisions both at the cost of investors’ welfare and to the benefit of the government’s interests.”).


180 The suitability principle is “recognized in the securities law that imposes a duty on a securities broker to sell only securities to a buyer that are ‘suitable’ for the buyer based on the buyer’s financial wherewithal, tax status, investment objectives and other factors.” See Frank A. Hirsch, The Evolution of a Suitability Standard in the Mortgage Lending Industry: The Subprime Meltdown Fuels the Fires of Change, 12 N.C. BANKING INST. 21 (2008).


182 ZHENGQUAN JIAOYI FA [Securities and Exchange Act] art. 6 (Taiwan).

183 ZHENGQUAN TOUZIREN JIQI HUO JIAOYIREN BAOHU FA [INVESTOR PROTECTION ACT] art. 28 (Taiwan).
institutes.\textsuperscript{184} The IPC was, instead, ordered to play a neutral role and mediate between banks and investors.\textsuperscript{185} The IPC’s inaction was partly the reason why so many investors reached a settlement with the banks, even though the investors were dissatisfied with the compensation.\textsuperscript{186}

Against this backdrop of the IPC’s inaction, politicians had to address the public’s expectations that the government would deal with widespread banking malpractice. As a result, the Financial Consumers Protection Act was enacted in June 2011.\textsuperscript{187} The NPO model was once again utilized, and another government-sanctioned NPO, the Financial Ombudsman Institution (“FOI”), was formed by law.\textsuperscript{188}

Modeled on an alternative dispute resolution approach, the FOI was created “in order to handle financial consumer disputes fairly, reasonably, quickly and effectively, thereby protecting the interests of financial consumers . . . .”\textsuperscript{189} While two-thirds of the IPC’s board members must be appointed by the FSC, all of the FOI directorships are to be determined by the FSC.\textsuperscript{190} Although the law in Taiwan expressly prohibits the board or its directors from getting involved in particular mediation cases which are to be handled by the ombudsman committee set up within the FOI,\textsuperscript{191} it should also be noted that those ombudsman committee members are selected by the board, and approved by the FSC.\textsuperscript{192} This comparison reveals that the government’s control over the FOI is greater than its control over the IPC.

Still, the government and the board of the FOI are given leeway to influence mediation results. For example, when mediating financial


\textsuperscript{185} Wrangling over Lehman Bros-linked claims Rumbles On, TAPEI TIMES (Oct. 3, 2008), http://www.taipeitimes.com/News/biz/archives/2008/10/03/2003424869.

\textsuperscript{186} Structured Note Ruling Insufficient, Investors Say, TAPEI TIMES (June 6, 2009), http://www.taipeitimes.com/News/biz/archives/2009/06/06/2003445485.

\textsuperscript{187} JINRONG XIAOEIZHE BAOHU FA [FINANCIAL CONSUMERS PROTECTION ACT] (Taiwan).

\textsuperscript{188} JINRONG XIAOFEI ZHENGYI CHULI JIGOU SHELI JI GUANLI BANFA [Rules on Establishment and Management of Financial Consumer Dispute Institute](Taiwan).

\textsuperscript{189} JINRONG XIAOEIZHE BAOHU FA [FINANCIAL CONSUMERS PROTECTION ACT] art. 13 § 1 (Taiwan).

\textsuperscript{190} JINRONG XIAOEIZHE BAOHU FA [FINANCIAL CONSUMERS PROTECTION ACT] art. 15 § 3 (Taiwan).

\textsuperscript{191} JINRONG XIAOEIZHE BAOHU FA [FINANCIAL CONSUMERS PROTECTION ACT] art. 15 § 5 (Taiwan).

\textsuperscript{192} JINRONG XIAOEIZHE BAOHU FA [FINANCIAL CONSUMERS PROTECTION ACT] art. 17 (Taiwan).
disputes—which are similar in nature and involve a large number of financial consumers or financial enterprises—the FOI, in accordance with the law, may temporarily suspend all such cases and institute case-handling guidelines subject to the approval of government agencies.\textsuperscript{193} Interestingly enough, no capacity to initiate class actions for financial consumers is granted to the FOI by the Financial Consumers Protection Act. In view of the Investor Protection Act of 2002 and the CPL of 1994, some explanations from the political actors are needed for the lack of a class action scheme in the Financial Consumers Protection Act. No explanations have been offered. A reasonable guess would be that political actors believe that class actions are frivolous or may harm the country’s economy. On the other hand, the IPC’s inaction and the FOI’s incapacity to bring the class actions may be the products of regulatory capture.\textsuperscript{194}

IV. DECOUPLING THE CLASS COUNSEL FROM THE LEAD PLAINTIFF: A REFORM PROPOSAL

Taiwan’s current NPO model is certainly not a perfect solution for representative litigations.\textsuperscript{195} However, an overhaul of the current model may not only risk damaging the investors’ confidence, but it may also disrupt Taiwan’s social and legal culture. How Taiwan should proceed from this point on and how Taiwan’s NPO model can improve are

\textsuperscript{193} Jinrong Xiaofeizhe Bao Hu Fa [Financial Consumers Protection Act] art. 22 (Taiwan).

\textsuperscript{194} Taking the IPC and the FOI together, what happened to both of them is somewhat similar to the transformation of the Legal Services Corporation (LSC) in the United States. The LSC is a private, non-profit corporation established by the Congress in 1974. Joshua D. Blank & Eric A. Zacks, Dismissing the Class: A Practical Approach to the Class Action Restriction on the Legal Services Corporation, 110 Penn. St. L. Rev. 1, 4–5 (2005). Its purpose is to provide financial support for legal assistance in noncriminal proceedings or matters to persons who cannot afford legal assistance. \textit{Id.} The LSC-funded legal service providers employed the class action device for judicial relief of the disadvantaged and for social reform. \textit{Id.} at 10–11.

Thereafter, the U.S. Congress passed the Omnibus Consolidated Rescissions and Appropriations Act of 1996. \textit{Id.} at 7. Under this Act, “the LSC was subjected to a thirty percent reduction in federal funding and nineteen new restrictions,” one of which prohibits “grantees of LSC funding from filing any class action lawsuits on behalf of clients, regardless of the subject matter or type of defendant.” \textit{Id.}

\textsuperscript{195} See Milhaupt, supra note 111, at 202 (“Another benefit of the NPO as supplier of investor protection is that it leaves open the possibility of improvement in both government and market alternatives, and may in fact spur such improvements. The NPO can be viewed as a transitional device that may be competed out of existence when alternative supplies of law enforcement public goods are developed . . . . There may come a time when the shareholder activist NPOs of Japan, Taiwan, and Korea will wither away or pursue other objectives as the investor protection environment improves or as for-profit enforcers (attorneys) take over a larger share of the market.”). See also Wang & Chen, supra note 15, at 150 (suggesting that “the Taiwanese NPO is certainly not a perfect solution.”).
questions worth asking. Decoupling the class counsel from the lead plaintiff offers a useful starting point.

In Taiwan’s NPO model of class actions, all of the investors who want to opt into the IPC’s class actions have to delegate their right to sue to the IPC. Investors then become named plaintiffs who will never show up in court. Cases will be tried by the IPC’s staff lawyers. Thus, the IPC serves as both the lead plaintiff and the class counsel in any class actions it brings.

According to the IPC’s 2012 annual report, its administrative department is staffed with nine full-time employees, and its legal service department is staffed with twenty-two full-time employees. In view of the complexities of securities cases and the defendants’ resourcefulness in such cases, the generalized problem of understaffing faced by many government agencies is even more apparent in the IPC.

Bringing representative litigations is not the IPC legal department’s only task. It is also responsible for educational work and offering legal consultancy services to investors. Given this workload, staff lawyers lack the necessary incentive to build more cases and bring more representative litigations. Even if the IPC staff lawyers—with their already heavy workload—wanted to initiate class actions targeting corporations other than those whose management teams have already been criminally investigated or prosecuted, the board and/or the government—which are not immune to influences from political actors and business community—may not allow it. Thus, the underenforcement of the IPC’s powers and laws leaves investors undercompensated and wrongdoers largely undeterred.

In short, the IPC requires more extensive monitoring if it purports to be a litigation machine, which not only brings suits in the wake of prosecutors’ actions, but also actively and innovatively takes legal action to detect wrongdoing. The principal concern in Taiwan’s NPO model is the opposite of the U.S. lawyer-driven system, where determining ways to ease the agency problem between the class counsel and the class action members is the major issue. The most common complaints made about

196 See supra note 83.
197 See CAITUANFAREN ZHENGQUAN TOUZIREN JI QIHUOZAIYIREN BAOHU ZHONGXIN 2012 NIÁN NIÁNBAO [2012 INVESTORS PROTECTION CENTER ANNUAL REPORT] 11 (Taiwan).
199 See supra note 153.
the U.S. system are that there are too many class actions, and that lawyers earn exorbitant fees from such actions and leave too little for the class members. Auctioning off the opportunity to serve as class counsel is one remedial suggestion that has attracted attention and has been vigorously debated. Choosing the right lead plaintiff to monitor the class counsel has also been proposed as a solution.

Situated at the other extreme end of the class action regime spectrum, Taiwan’s NPO model needs more market participation to revitalize it and make it more beneficial to the securities market. I believe deconstructing the IPC such that its function as class counsel is decoupled from its other responsibilities is a practical and important step. Currently, most of the IPC’s litigation work is handled by its staff lawyers. This work should be outsourced to for-profit law firms. The cases that the IPC hopes to initiate should be put up for auction. Lawyers who ask for the lowest fees for any particular case should be entitled to bring the case and collect the fees. Using the auction approach to select legal counsel would better replicate the legal service market. The cost of bringing a lawsuit would be determined by the lawyers who take part in the auction. Moreover, since political actors control the government-sanctioned IPC indirectly, the auction approach limits the amount of political influence or corruption involved in the selection of class counsel.

As mentioned in Part II(B), most class actions currently brought by the IPC are piggybacked onto criminal actions initiated by prosecutors. Because the trial is open to the public, the bid-winning class counsels will have access to evidence presented in the criminal proceedings of such cases. Thus, the class counsels are a bit of a “free ride” with respect to the work produced by criminal investigations. In this light, these cases can be regarded as “easy” cases. As a result, the bidding lawyers’ proposed fees


203 See Elizabeth Chamblee Burch, Optimal Lead Plaintiffs, 64 VAND. L. REV. 1109 (2011).


205 See FAYUAN ZUZHI FA [Court Organic Act], art. 86 (Taiwan).
can be somewhat reduced. It is reasonable to assume that, in a comparison between making or buying legal services, retaining outside counsel may, in the end, prove more cost-effective than hiring staff lawyers to do the same work, so long as the transaction cost is not high. It would also increase the organization’s ability to meet its mandate to protect investors.

The more important focus, however, is on cases that the IPC may classify as “premature,” or those cases which the IPC seems to feel uncomfortable taking immediate action on. Taking early legal action could be beneficial to investors, however. An example would be a case where it appears urgent to seize the potential defendants’ properties and prevent them from further wrongdoing. However, a premature action might give the defendants grounds to attack the IPC’s impartiality. Therefore, opinions solicited from outside counsel or the bidding for-profit lawyers would help the IPC make better decisions and correct some of the behavioral biases that the IPC may exhibit given its bureaucratic, NPO-like structure. Furthermore, opinions from outside counsel would lend additional justification and transparency to the IPC’s decisions. The IPC’s refusal to bring class actions on behalf of structured note investors in the wake of the 2008 financial crisis is not clearly substantiated by any opinions from renowned legal practitioners or scholars. Its decision to initiate legal proceedings in the Ta-I Inc. case may appear to be justified from a layman’s perspective. However, judging from the result, this decision turned out to be a mistake. If the IPC had solicited opinions from outside counsel, it might have dropped the case or handled it differently. Having outside counsel work with the IPC may well transform the IPC from a quasi-governmental institution to a real and more effective public-private partnership entity.

Costs and funding issues related to hiring outside counsel may be the greatest concern for those who oppose the decoupling proposal. However, as suggested above, outsourcing may be more cost-effective in those “easy” cases. Thus, bringing more “premature” cases will be more costly. It may also be more productive to do so as due warning can be given and disseminated in the market. The trade-off should be weighted in favor of protecting investors. In this view, the root of the funding problem is the prohibition on the IPC to charge the plaintiff-investors any attorneys’ fees. The Investor Protection Act requires that the necessary


208 See supra note 173.

expenses for class actions should be defrayed from the proceeds of such actions, but it also disallows attorneys’ fees from being imposed on the plaintiff-investors. The wholly charitable nature of the IPC’s service frees investors from financial burden of litigations. However, its monopoly status in the class action legal market also prevents for-profit lawyers from offering their input and efforts to protect investors.

V. CONCLUSION

Reviving representative litigations is regarded as one critical step in reinforcing corporate governance. With the creation of NPOs to facilitate the initiation of such litigations, the Taiwan model is often praised in its efforts to strengthen the protection of securities investors. Scholars have tried to employ the theories underlying the emergence of NPOs to justify the existence and performance of the IPC. Nonetheless, such attempts fail to fully capture the governmental nature of Taiwan’s NPO model. Problems of underenforcement and overenforcement, as discussed in this article, are not well heeded. Public choice perspectives reveal why the government-sanctioned NPO model is supported in Taiwan and what its flaws are.

In comparison with the U.S. model driven by entrepreneurial lawyers, Taiwan’s NPO model has had few frivolous suits and little market participation. To strike a balance, this article proposes that the IPC should outsource its litigation work to for-profit law firms and retain its role as the lead plaintiff. This approach may prove to be cost-effective in “easy” cases, and allow the IPC to be more innovative in some “premature” cases. With this built-in market-based feature, the NPO model may do more good than it currently does.

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210 ZHENGQUAN TOUZIREN JI QIHUO JIAOYIREN BAOHU FA [INVESTOR PROTECTION ACT] art. 33 (Taiwan).