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Public Enforcement in China's Securities Markets: Is it a 'Law Matter'?

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In recent years, with the rapid development of China's stock market and the awakening of investors' awareness of protection, the number of public enforcements in the Chinese public securities market have exploded, and the primary regulator of the securities trading, China Securities Regulatory Commission (CSRC) has become increasingly active in providing remedies for investors. It seems that the quality of rule of law in enforcing securities law of the country has been dramatically improved. However, based on a careful analysis on a series of the cases, this statement may not be quite accurate. This paper aims to deeply explore the social and political factors that are significantly directing the enforcement of securities law in contemporary China by examining the two landmark judicial cases occurred in the recent years.

I Introduction

Based on the strong legal restriction and enforcement, the court is responsible for hearing and resolving all kinds of legal disputes in the financial market, so it is regarded as an indispensable institutional element in the legal environment of the modern financial market.ⁱ Indeed, in the course of China's financial market development in the recent decade, market participants have been expecting and calling for the judicial system to play a more important role. Theoretically speaking, a professional and independent public enforcement in securities market may benefit both the private interest of investors and economic efficiency in the securities markets, as the enforcement activities may actively and timely illustrate the risk and uncertainties within the market and then the enthusiasm of the participants will be increased substantially.ⁱⁱ

In fact, ever since the China's Supreme People's Court (SPC) released the Notice of the Supreme People's Court on Relevant Issues Concerning the Acceptance of Civil Tort Disputes Caused by False Statements in the Securities Market in 2002, the judicial protection of financial investors has been extremely inadequate and suppressed by the authorities.ⁱⁱⁱ However, in recent years, with the rapid development of China's financial investment market and the awakening of investors' awareness of protection, the number of public enforcements in the Chinese public securities market have exploded, and the primary regulator of the securities trading, China Securities Regulatory Commission (CSRC) has become increasingly active in providing remedies for investors.

Against this background, several judicial cases in the area of investor protection in securities markets which were decided by high-level courts in China, have been deemed as a 'progress' in rule of law in financial markets. However, based on a careful analysis on some of the cases, the answer seems not quite positive, as the logic of such very influential enforcement in Chinese securities market is opposite to the legal reasoning of securities law. Therefore, this paper aims to provide readers with a detailed legal and social investigation of the motivation and logic of the enforcement activities in China's securities markets, which may help both law practitioners and scholars better understand the developing trend of the securities law in practice.

This paper is organized as follows: the first section briefly summarizes the recent development of enforcement activities in China's public securities market; following that, the main body of the research carries out two detailed case studies on false statement decided by the Chinese courts showing that the enforcement activities in the Chinese securities market is seriously against securities law principles. Based on the cases studies, the fourth section tries to discuss the social and political logic of the enforcement activities in the Chinese securities market.

II Securities Enforcement in China: Inactive Courts vs. Active Regulators

The regulatory enforcement in China's public securities market emerged in 1992, by contrast, the first civil lawsuit against false statement didn't occur until the end of 1996.^{iv} Three years later, the first civil lawsuit regarding market manipulation occurred in China, namely *Investors v YiAn Technology Co., Ltd* (1999) which was finally decided by Intermediate People's Court of Guangzhou City in September 2003. Although the market demands for judicial remedies for misconducts in the securities market is increasing dramatically since the late 1990s, the SPC decided to reject all kinds of securities litigations.

The SPC issued the Notice on the Temporary Rejection of Civil Cases Involving Securities Investment in September 2001, saying that the courts in China were not yet qualified to accept nor hear such cases, therefore the people's courts at all levels were required to reject any civil petition regarding false statements, insider trading and market manipulation in China's securities market. This was not changed until January 2002, under pressure in the securities market, the SPC issued the Notice of the Supreme People's Court on Relevant Issues Concerning the Acceptance of Civil Tort Disputes Caused by False Statements in the Securities Market.^v As soon as the notice was issued, ten listed companies were sued by investors, and more than 900 cases were handled by nine local courts in different provinces of China.^{vi} However, even up to now, the SPC never issue any judicial policy that allows courts at all levels to accept the judicial cases regarding insider trading in China's public capital market which is the most serious misconducts in the Chinese stock market.

It is admitted that China's active financial investments has substantially pushed forwards the legal reform in the securities market during recent years, particularly the CSRC as the leading regulator of the market has been much powerful in enforcing and punishing wrongdoers in the market than ever before.^{vii} To some extent, the rule of law in China's financial investment market and market environment has been better. However, some of the influential landmark cases in this area show us another picture. In China's stock market, with the continuous strengthening of enforcement by the CSRC, the rapid increase of regulatory punishment in the securities market has also led to the resistance of the punished parties in the transactions. As one of the consequences, the number of the cases in which the CSRC is sued by the punished parties also increased, which may provide scholars another perspective and sources for investigating the Chinese judicial authorities' attitude towards enforcement of securities law issues and they are also useful material for scholars to explore a series of social factors which formed the Chinese judges' decision-making in such cases.

III Enforcement Activities in China's Securities Market: A Law Matter?

Guangda Securities Co., Ltd v. CSRC (2014)

Case Brief^{viii}

On August 16, 2013 at 11:00am, based on a series of arbitrage opportunities in 180 ETF (open index funds) in the A-Share market of Shanghai Stock Exchange, Everbright Securities Co., Ltd, one of the leading investment banks in China, carried out a trading through its new automatic trading system. However, design flaws in Everbright's automatic trading system had triggered extremely huge buy orders^{ix} from the proprietary trading department of the brokerage. After realizing its mistake, Everbright Securities made effort to reduce its potential loss by taking short positions in index futures starting from 11:30am on the same day and even turned a profit of 87.2 million yuan before disclosing the problems of its computer systems.

Against the very abnormal market fluctuation caused by Everbright's transactions, the secretary of the company publicly denied any doubts regarding its transaction from the public media at 11:59am. After an internal investigation of the company, the fat-finger trading and the defect of the trading system of Everbright was not officially disclosed to the public until 2:24pm of the same date. As a consequence, a huge number of retail investors rushed to buy 180ETF constituent stocks in the belief that there were some great good news such as the pilot of preferred stock after the market fluctuation caused by Everbright's fat-finger deal. However, after the event was announced by the stock exchange on the afternoon of the same day, the stock market plunged, and small and medium-sized investors were unable to sell their stocks due to the T+1 system^x, causing heavy losses.

The CSRC the watchdog of the Chinese stock market made its official response to this event on August 30 2013, the CSRC determined that "Everbright Securities took wrong treatment, its hedging transactions constituted insider trading, violation of internal control requirements of securities companies and other illegal behaviors",^{xi} and the CSRC also decided to confiscate its illegal gains of RMB 87.21 million and imposed a fine of five times.^{xii} Three months later, the CSRC imposed a fine of RMB 600,000 on each persons who directly responsible for the wrongdoings.^{xiii}

Does Everbright Securities' Hedging Dealing Constitute Insider Trading?

According to the Punishment Decision Notice of the CSRC: "Everbright Securities was aware of the real cause of market changes, but the public investors are not aware of it. In this case, Everbright Securities should stop trading any stock immediately, until the disclosure of insider information and reasonable risk aversion..... therefore, the hedging dealing of the Everbright Securities constitutes insider trading "^{xiv}. According to Article 76 of the Securities Act of China (2005 Revision), "prior to the disclosure of insider information, insiders of securities trading and those who have illegally obtained insider information shall not buy or sell **securities of the company**, or disclose such information, or suggest others to buy or sell such securities." This is the legal basis of the insider trading under the Chinese financial law. Obviously, the legal reasoning of the CSRC on this case is not persuasive at all, because according to the above provision, the securities traded in an insider trading must be 'the securities of the company', in other words, the traded securities must be the securities of the trader itself. In the case of Everbright, however, the traded securities is the constituent stock of the 180 ETF of Shanghai Stock Exchange, instead of any shares of the Everbright Securities Co., Ltd.

Because of the above very weak legal reasoning the CSRC'S Punishment Decision Letter, the general manager of strategic investment department of Everbright Securities filed an lawsuit against the CSRC, asserting that the hedging deal should not be fined as insider trading. Ironically, both the first instance decision given by First Intermediate People's Court of Beijing^{xv} and the final verdict decided by the Higher People's Court of Beijing^{xvi} very firmly side with the CSRC and totally ignore the lag between the fact of the Everbright case and the definition of insider trading under the Securities Act and the basic legal principle of securities law, even though such a mistake is so obvious.

Dandong Xintai Electric Co., Ltd v CSRC (2016)

Case Brief

In November 2011, Xintai Electric Co., Ltd (Xintai) submitted its initial public offering (IPO) to the CSRC and applied for listing on the Growth Enterprise Market (GEM) of Shenzhen Stock Exchange. After a long-term waiting, in January 2014, Xintai then obtained 'The Approval of the Initial Public Offering of Dandong Xintai Electric Co., Ltd. and Listing on the Growth Enterprise Market' issued by the CSRC. In May 2015, however, the Liaoning Securities Regulatory Bureau reported the potential financial fraud after an inspection of the company, which triggered an regulatory investigation of Xintai by the CSRC.^{xvii} Based on the evidence of financial fraud, the watchdog issued an Punishment Decision on Xintai in July 2016, which states the main facts of the case: in order to get approval of listing in the stock exchange, Xintai made false accounts of collection of receivables by means of forging bank documents and several illegal conducts. All those false statements of financial data of the company are substantially relevant to the IPO application. In accordance with the relevant provisions of the GEM Listing Rules (2014 Revision), Shenzhen Stock Exchange then decided to terminate the listing of Xintai, and Xintai became the first listed company to be forced to withdraw from the GEM market. ^{xviii}

According to the Punishment Decision issued by the CSRC in June 2017, however, the law firm the lawyers who signed the name on the Prospectus of Xintai were also fined RMB 1.8 million by the regulator for their 'culpable negligence of detecting the false financial records in due diligence'.^{xix} According to the Punishment Decision, it is clearly stated that:

'Firstly, Intermediaries should issue independent professional opinions and assume corresponding legal responsibilities within their respective responsibilities. The "legal opinion" issued by lawyers in the process of enterprise IPO is an important channel for investors to obtain the true information of the issuer, an important reference for investment decision-making, and an important basis for the issuance and approval of the regulatory authorities. Lawyers should maintain sufficient practice. Be cautious, work diligently and responsibly, and ensure that the documents issued are free of false records, misleading statements and major omissions.....According to Article 14 of the Measures for the Administration of Law Firm's Securities Law Business (2007), When a lawyer gives a legal opinion, he shall perform the special duty of care of the legal professional for business matters related to the law, and perform the general duty of care of ordinary people for other business matters. Documents issued must not contain false records, misleading statements or major omissions.However,the law firm clearly ensured in their signed Legal Opinion on Xintai IPO Application that 'there is no any fraud records in Xintai's financial and accounting reports of the last three years''^{xx}. Based on the above reason, the CSRC decided that the law firm should

be liable for the financial fraud of Xintai.

The law firm that signed in the Legal Opinion on Xintai's IPO Application filed an administrative action against the CSRC in December 2017, asserting that the lawyer should be liable for the financial and accounting frauds, as this has materially beyond the professional ability and responsibility of a lawyer. Nevertheless, the court totally rejected the plaintiff's claims reasoning that:

'.....the law firm should pay full attention to and conduct prudent inspections on important matters related to the company's operations. The financial status of the company is undoubtedly the content that the law firm must examine in the process of completing the legal report, and should be the focus of the legal due diligence. In the process of completing the due diligence report, the law firm should make full use of various methods to conduct a comprehensive investigation of the overall situation of the company including the company's financial situation. Accounts receivable is one of the matters that the law firm should pay full attention to Accounts receivable is one of the important factors affecting the company's financial situation, and fictitious recovery of accounts receivable is a common means for companies to carry out financial fraud.'^{xxi}

Based on the above analysis, the court sided with the CSRC and decided that the law firm should be liable for the accounting fraud.

Should Every Qualified Lawyer Holds a CPA or ACCA?

According to both the foresaid Article 14 of the Measures for the Administration of Law Firm's Securities Law Business (2007), it can be seen that securities lawyers as an expert in securities law, need to fulfill a higher standard of duty of care for legal matters, for those ordinary non-legal business matters, however, the lawyers are only required to perform with a general duty of care as an ordinary person. Moreover, according to Article 15 of the same regulation, "*Attorneys from state organs, organizations with functions of managing public affairs, accounting firms, asset appraisal institutions, credit rating agencies, notarization agencies (hereinafter collectively referred to as Documents obtained directly by public institutions may serve as the basis for issuing legal opinions, but lawyers shall perform the duty of care specified in Article 14 of these Measures and explain them; for those instruments that are not directly obtained from public institutions, they may be verified and verified. As the basis for issuing legal opinions.*" In other words, securities lawyers are not required to perform with the duty of care as a CPA or qualified auditors when they examine the information of non-legal information, such as the records of account receivables in this dispute. Obviously, the court's decision is not persuasive.

The court illustrated the negligence of the law firm by highlighting the importance of the data of account receivables, however, account receivables is not the only financial and accounting data which are important for IPO review and investors. Then if we follow the legal reasoning of the court, we may ask whether all the work done by an CPA should be re-undertook by the lawyer in any one case? Or we may have to ask whether the law should require all the lawyers who review the information of an IPO candidate company must also hold a CPA or ACCA? The answer may not

difficult to be given, because 'expert' means a division of labor, but not reverse.

Overall, based on the two judicial enforcement activities in China's securities market during the recent decade, it seems that the legal reasoning of the courts is not satisfactory, at least their legal reasonings were not persuasive enough. The further question will be how should we understand the relationship between the rapid development of the securities markets in the country and the unprofessional practice in enforcing the law in the judicial system?

IV Policy-oriented Judicial Enforcement in China's Financial Investment Sector

China's Judicial Reform Proposals and the Judicial Practice

In order to improve the justice in market economy of China, the SPC launched a comprehensive reform of China's judicial system in 1999, which particularly emphasize the quality of enforcement activities in financial markets in China. Such a series of judicial reform is organized and proposed in the form of "Five-year Reform Plan (FRP)" to keep path with the social development of the country. In this process, there are not only political and ideological reform, but also many detailed reforms of judicial technology and bureaucratic and managerial reform of judicial system of China. Therefore, examining the current situation of China's judicial system reform in the past ten years would be helpful to correctly understanding the "non-legal logic" phenomenon and its essential problems reflected in the above two influential financial investment cases.

According to 'The Third FRP for the People's Courts (2009-2013)' released by the SPC in March 2009, it was firstly highlighted that "the goal of deepening the reform of the judicial system and management of the People's Courts is: 1) to further optimizes the allocation of functions and powers within the departments of the People's Courts; 2) to reform the financial supporting system at all levels of the courts in China; and 3) to meet the people's growing demands of the justice in economic activities and to essentially enhance the relative shortage of the People's Court's professional ability; 4) to advance the socialist judicial system of with Chinese characteristics and to build a fair, efficient and authoritative socialist judicial system.....". At this stage, we can find that the reform mainly focuses on the overall reform of macro-system construction, human resource system of the courts and related supporting systems, rather than a political function of the judicial bodies. Therefore, the judges' discretion in this period was relatively more active than before, and it was under a relatively liberal political management atmosphere.^{xxii}

However, with the rapid strengthening of centralization in the political system and the strengthening of ideological control in the recent half a decade. Accordingly, the political function of China's courts has been particularly strengthened. In February 2015, the SPC issued the "The Fourth FRP for the People's Courts (2014-2018)", in which the primary goals of the reform of the court system in China were defined as follows: "1) to ensure all the judicial activities of the People's Courts are in accordance with the law; 2) to carefully consider the Chinese people's satisfaction of the decisions made by the judges and courts in each given judicial case; 3) to resolve the deep-seated problems affecting judicial justice and the professional ability of the People's Courts, which aims to improve judicial credibility of the judicial system in the country.....". Obviously, compared with "The Third FRP for the People's Courts (2009-2013)", it is obvious that in this period the SPC's reform proposal focuses more on the social effects of Chinese judges' judicial activities. In order to cope

with the severe continuous decline of China's economy, effect alleviation of serious conflicts within the Chinese economy and society became the key point of the judicial reform of the Chinese courts.^{xxiii}

Against such a political background, it will not be difficult to understand why the SPC of China directly instructed the lower courts to accept and decide the investors' lawsuits regarding compensation caused by insider trading in the foresaid case of Everbright Securities. The main concern in this case is not the correctness in legal reasoning, but the satisfaction of the public, especially the huge community of the investors who lost their money in this case. In other words, if the courts fail to appease investors' sentiment and anger against the Everbright Securities, it was likely to lead to seriously negative evaluation on both the CSRC and the courts. Similarly, after the crash of China's stock market in 2015, Chinese investors have seriously doubted about the regulatory ability of CSRC.^{xxiv} At that moment, the courts have a political responsibility to stably stand up for the securities market regulator. Therefore, even in the situation that the CSRC imposed a fine on the law firm that did not commit any fault in Xintai case, the court did not hesitate to side with the CSRC, demonstrating the correctness of the CSRC's punishment from a 'legal perspective' and also reflecting the court's clear-cut stand in protecting investors of securities market.

In February 2019, the SPC published "The Fifth FRP of the People's Courts (2019-2023)". In comparison with the previous four FRPs in the last two decades, the present on-going legal reform has once again entered a different new era, that is, political supremacy has become the primary task of the Chinese courts. The Fifth FRP states that ".....In the first place, the China Communist Party's political construction should always be put at the primary and supreme position of judicial activities;..... the implementation of the Party's policies and statutes must ensure the Party's absolute leadership in the whole field of the judicial system throughout the country;the whole process of the judicial reform must adhere to the leadership of the party system building a people's court." Based on this, it is not hard to imagine that in a predictable future, the enforcement activities may to a large extent follow the legal logic reflected in the Everbright and Xintai cases which are discussed in the paper. For both the regulators nor judges of the Chinese securities market, insisting on strict and pure legal reasoning and principles of financial law when they enforce securities law, may not an easy work and more judicial and regulatory enforcements will involve more concerns in relation to social policies and ideological factors.

Judges' Personal Interest in Judicial Practice of Sensitive Cases

It can be imagined that under the current judicial system of China, people's courts and judges who are highly subordinate to politics and need to carry out judicial practice of financial disputes are most likely to gain higher professional reputation within the system and even be well received by the society, so they will have more political status and economic benefits correspondingly. On the other hand, the interests of the judges are interwoven with those of the Party and the Chinese government. Therefore, the public satisfaction of the regulatory bodies and the government are often closely related to the interests of the courts. That is to say, the judges are not willing to dissatisfy the regulator by sacrificing their own interests, so it is logical that the 'political correctness' is generally rooted in the hearts of judges. On the other hand, even though the judgment of a given

case causes negative evaluation in legal profession, for instance, the judge's legal reasoning or the application of the law are imperfect or even unprofessional, the judge's "work assessment" determined by the current political and legal system will mark him as qualified. Against such a social background, it is easy to infer what kind of behavior the judge chooses.^{xxv} As a result, the Chinese courts and judges themselves are not opposed to accepting such role assignment. What's more, they even have greater initiative to play a role in public policy formulation and implementation, encouraged by various explicit or implicit institutions.

V Conclusion

This paper focuses on the recent landmark judicial cases regarding securities law enforcement in China's public financial market, which aims to provide insights for understanding the new trends in Chinese business law practices. The rapid development of the Chinese securities markets in the past two decades substantially pushed forwards the legal reform of law in financial markets, however, owing to political constraint conditions of the Chinese society and its economic reform, the rule of law in legal and regulatory practice is still far from satisfaction, though the role of the court and regulators has been much more active than ever before. The two case studies carried out in this paper further show that the legal reasoning in enforcing securities law and regulations in China is not strictly nor purely based on legal principles. Furthermore, even the protection of investors in a given disputes in financial market is not the pure philosophy of the judges or regulators, by contrast, the social effect in a certain political environment of the Chinese society and economy is always playing a quite active and significant role in directing public enforcement activities in China's securities market. This may provide scholars and law practitioners with another perspective to better understanding the relationship between the law and financial market development in contemporary China.

ⁱ John C. Coffee, 'Law and the Market: the Impact of Enforcement ' (2007) 156 (2) *University of Pennsylvania Law Review* 229.

ⁱⁱ Bernard Black, 'The Legal and Institutional Preconditions for Strong Securities Markets' (2001) 48 *UCLA Law Review* 781.

ⁱⁱⁱ This judicial rule should be regarded as one of the milestone of the enforcement of Chinese securities law, as it clearly exclude the Chinese courts' jurisdiction of disputes in relation to insider trading, market manipulation and only permits the courts to deal with legal disputes relating to false statement.

^{iv} *Zhongmin Liu v. Bohai Group Co., Ltd* [1997] decided by the People's Court of Jinan City (Lixia District).

^v See Min Xiao, *Investor Protection and the Cost of Equity: Evidence from Chinese Listed Companies* (Peking University Press 2009) 75.

^{vi} *Ibid.*

^{vii} Zhaoquan Yang, *Practice on Securities Supervision* (Law Press 2017) 11-14; Huiqiang Xing, *An Empirical Study on the Enforcement of China's Securities Fraud Cases* (China Legal Publishing House 2016).

^{viii} See more details regarding the fact of this case from Yinzhi Miao, *Enforcement Mechanisms of Securities Law in P. R. China* (Peking University Press 2017) 195-201; Chengyong Liu, *Insider Trading of Financial Derivatives* (Law Press 2018) 50-69.

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- ^{ix} Everbright Securities's wrong buy order valued RMB 23.4 billion, but it finally actual transacted RMB 7.27.
- ^x The A-Share trading rule is T+1, which means that a certain stock is forbidden to sell on the same day and can only be sold the next day.
- ^{xi} The full details of the CSRC's punishment on Everbright Securities is available at: http://www.csrc.gov.cn/pub/newsite/bgt/xwdd/201308/t20130830_233365.htm. Accessed 10 August 2019.
- ^{xii} Ibid.
- ^{xiii} The full details of the CSRC's punishment on responsible individuals is available at: http://www.csrc.gov.cn/pub/zjhpublic/G00306212/201311/t20131115_238363.htm. Accessed 10 August 2019.
- ^{xiv} The full details of the CSRC's punishment on Everbright Securities is available at: http://www.csrc.gov.cn/pub/newsite/bgt/xwdd/201308/t20130830_233365.htm. Accessed 10 August 2019.
- ^{xv} Administrative Law Judgement No.2438 [2014], First Instance, First Intermediate People's Court of Beijing.
- ^{xvi} Administrative Law Judgement No. 943 [2015], Second Instance, Higher People's Court of Beijing.
- ^{xvii} Lidan Guan, 'The Final Decision on the Xintai Case: the Chief Director Will be Put Into Prison for Three Years for Fraud' SohuFinance, 22 May 2019, available at: http://www.sohu.com/a/315676501_100001551 accessed 18 August 2019.
- ^{xviii} Ibid.
- ^{xix} The full text of the Punishment Decision of the CSRC is available at http://www.csrc.gov.cn/pub/zjhpublic/G00306212/201706/t20170630_319382.htm, accessed 19 August 2019.
- ^{xx} Ibid.
- ^{xxi} The official report of this case is available at <http://bjgy.chinacourt.gov.cn/article/detail/2018/06/id/3375817.shtml>, accessed 20 August 2019.
- ^{xxii} See more detailed analysis from Chi Zhang, 'Re-establish the Accountability of the Judicial System in China: A Critical Assessment of 'The Third Five-year Reform Plan of the People's Court of China 2009-2013'' (2012) 11 *Legal System and Society* 73.
- ^{xxiii} Also see Haiding Xie, 'The Logic of Economy under the Rule of Law in China' (2017) (6) *Chinese Journal of Law* 21.
- ^{xxiv} See Yinzhi Miao, *Enforcement Mechanisms of Securities Law in P. R. China* (Peking University Press 2017) 249-266.
- ^{xxv} Tao Huang, *The Public-policy-oriented Court: the Institutional Evolution of the Judicial System of China's Financial Law* (Law Press 2013) 51.