

Insider Trading Law in East Asia and Enforcement: Japan, China, Hong Kong and Taiwan Visited

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I. Introduction

Insider trading law has been an area which discussions, both theoretical and practical ones, heavily center around. But recently, the lack of comparative data and empirical evidence in this area is identified as major obstacles for answering insider trading's theoretical debates.

One major difficulty in empirical investigation is to identify the total number of insider trading activities, which forms the basis for evaluating the effectiveness of the enforcement of insider trading law, and in turn the enforcement's cost/benefit analysis. There are several reasons for this difficulty. First, insider trading generally involves the transfer of secret, as well valuable, business information. The transfer of valuable information is mostly conducted among individual persons in an undisclosed fashion. As the information is later delivered to someone who is not clearly linked to the insiders, the trading activities hence become hard to be discovered or proved by its nature.¹ Second, it is rare to have anyone report the leak of information if the transmission of information is agreed to by the information holder. Market and trading parties are not in the position to pinpoint that the other side of a trading is an informed one. Due to the features mentioned, the major methods used to detect illegal insider trading activities are mostly about stock exchange monitoring system and whistle-blowing.

Third, the stock exchange monitoring system compares the major news releases, the change of trading volume and price and the trading activities by various accounts and tries to establish the possible link or a model of network. The enforcement based on the how strong the model appears and use traditional criminal investigation methods, such as wire-taping, bank accounts and other communication examination, and finally encouraging defendants to testify against each other to secure at least some guilty verdict or pleas. This is the common method of detecting insider trading case for countries across the board. However, to establish the links between trades and information for evidence's purpose is always difficult, and it is also similarly difficult to know how many cases are still under radar, which makes evaluating the effectiveness of the operation of current system almost impossible. Last, some enforcement heavily relies on whistle-blowing. But the practical question is how many available whistle-blowers out there. Also, the reliance on whistle-blower means the enforcement of insider trading law can be highly uncertain, or idiosyncratic at its best.

Due to the difficulties mentioned above, this paper presents the insider trading laws and their enforcement in four East Asian countries. By observing different designs and the latest practices, this paper evaluates the match between market condition and the insider trading law. Two sub-set issues of the implementation of insider trading law are under particular scrutiny: the use of criminal based and non-criminal based sanctions and the reasons behind; and the cost/effectiveness of enforcing individual insider trading rule. Facing the difficult in extracting answer from single country data, this study presents a comprehensive picture in East Asia and analyzes the enforcement-relating issues from the comparative approach.

¹ The information flow is unobservable. C.D. Collver, 13 J. of Corp. Fin. 270, 271 (2007).

This paper proceeds as follows. Part One is introduction. From Part Two and Three, this paper present in insider trading laws in Japan and China. Part Four briefly discussed the enforcement of insider trading law in Taiwan and Hong Kong. Part Five compares enforcement intensity and the use of non-criminal sanctions in different jurisdictions.

II. Japan

Insider trading in Japan had been a mystery. The law on the book appeared as thorough and carefully-drafted. Enacted in 1988, which is relatively late from a comparative law perspective, no important piece is missing in an effort to set up a legal net to prevent insiders using corporate undisclosed material information for private trading and obtain financial interest. Essential enforcement, general or specific alike, is also in place to deal with the detection, prevention and prosecution of the potential market abuse conduct.

Historically, the implementation of law against insider trading in Japan and its effect has been long criticized as non-functioning. Public perception is also unclear. The severity, including the damage it causes to the financial market and relevant industries and how general public perceives it, is yet to sufficiently formulated and examined.

1. Rules

In Japan, the rule concerning insider trading was first found in Securities Exchange Act of 1948.² In Article 58 of Securities Exchange Act of 1948, it first clearly provided that any use of scheme to defraud should be prohibited. In Article 189, it required the disgorgement of short-swing profit from the trades conducted by insiders. In addition, general disclosure requirement had been in place since the inception of Securities Exchange Act of 1948.³

In 1988, two amendments about prohibition of insider trading were added. Article 199-2 and 199-3 covered receptively dealt with general prohibition of insider trading and prohibition of insider trading under tender offer. It was the first time insider trading has incurred criminal penalty in Japan. In 1992, Article 58 and 189 were re-numbered as Article 157 and 164 respectively.⁴

In 2006, *Securities Exchange Act* was expanded and renamed as *Financial Instruments and Exchange Act of 2006*, which took effect in 2007. Most insider trading rules are remained in the *Financial Instruments and Exchange Act*. As of end of 2012, Japanese insider trading regulation can be generally illustrated by the following table:

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⁴ Law No. 73 of 1992.

| | SEL of 1948 | 1988 Amendments to SEL | FIEL of 2006 |
|---|-------------|------------------------|--------------|
| General Anti-Fraud Provision | § 58 | § 58 | § 157 |
| Disclosure of Insider Trading | §188 | § 154 | § 163 |
| Short-Swing Disgorgement | §189 | §189 | § 164 |
| General Prohibition of Insider Trading | | § 190-2 | § 166 |
| Prohibition against Insider Trading in Tender Offer | | § 190-3 | § 167 |

Table 1: Insider Trading Law in Japan: Past and Now

According to current law in Japan, Article 166 of *Financial Instruments and Exchange Act* is the general prohibition against insider trading in Japan. Article 166 paragraph 1 defines the meaning of insider trading and the range of insiders. It prohibits corporate insiders using material undisclosed corporate information which she learns from her work to trade company's securities, directly or derivatively.

Corporate insiders here include:

1. Directors (including independent director, supervisor, and accounting advisor)⁵, agents, employees. Corporate insiders include directors, agents and employees of its parent company or subsidiaries.
2. Shareholders, when they learn corporate inside information from exercising her right to inspect corporate book and records based on Companies Act Section 433.
3. Whoever learns the corporate inside information from performing legal duty or authority toward the listed companies.
4. Whoever learns the corporate inside information from negotiating or conducting contracts with the listed companies.
5. Directors, agents and employees from companies who received corporate inside information from previous item No.2 and No. 4.

Further, anyone who receives insider information from the insiders list above is also prohibited from trading until that information is publicly disclosed.⁶

Article 166 paragraph 2 defines what constitutes "material fact." In a general sense, Japanese law embraces an abstract approach to regulate the range of information to be regulated, that is, deciding from the gravity of the information rather than the type on information.⁷ To supplement, it also provides detailed examples to illustrate the

⁵ Directors, according to *Corporation Act*, generally include directors (including independent director), supervisor, and accounting advisor. *Corporation Act*, Art. 329. *Financial Instruments and Exchange Act* does not clearly define the range of director.

⁶ Article 166, para 3.

type of information which will be considered as “material” per se in Article 166, paragraph 2, no.1 to 3, which include information about corporate major transaction, business alliance, issuance of new shares, dividends, change of major shareholder, or difference between different financial/business forecasts, etc.⁸ Similar examples are also applied to subsidiary of a listed company. In paragraph 4 and 5, it also provides the method in which information is conceded as “publicized” and the definition of parent company/subsidiary.

The legal effect of violating Article 166 paragraph 1 and 3, as well breaching Article 167, is a criminal sentence up to five years imprisonment and/or five millions Japanese yen fine.⁹ Also, the gain from illegal trading shall be confiscated according to *Financial Instruments and Exchange Act* article 198-2, para 1.¹⁰ Further, according to *Financial Instruments and Exchange Act* article 175, Prime Minister also can, after the proper investigation and the decision from the administrative court within FSA, issue “money payment order (*kachoukin*)”¹¹ to those being accused of insider trading. The demanded amount equals to the gain obtained or loss avoided from any trading six months prior to the announcement of material undisclosed information, and goes directly to the treasury.¹²

2. Enforcement

A. Legal proceeding and Institution:

In Japan, Financial Service Agency, which is under direct command of Prime Minister, is the main regulatory agency in charge of regulating financial institutions and administering related laws. Securities and Exchange Surveillance Commission (SESC), which was established in 1992 in responding to the financial scandals in 1991, is in fact

⁷ Article 166, Para 2, no.4 (“material facts mean those concerning operation, business or property of the listed company, etc. that may have a significant influence on investors' investment decisions”).

⁸ According to Article 29-4, major shareholder means a shareholder who controls 20 percent of voting shares or more. Article 29-4, para. 2.

⁹ Article 197-2, para 13. The maximum penalty was three years imprisonment and three million Japanese yen before the 2006 Amendment,.

¹⁰ Article 198-2, para 1.

¹¹ It is an administratively imposed monetary penalty or surcharge for violations in FIEA, which is sometimes alternatively termed as “administrative monetary penalty” in official document. See, e.g., Financial Services Agency, Outline of the Bill for Amendment of the Financial Instruments and Exchange Act, available at <http://www.fsa.go.jp/en/refer/measures/20080305/02.pdf>.

¹² Basically, it uses the highest or lowest price in two weeks after the announcement of material information and purchased/sold price as calculation basis.

charged with the task of enforcing insider trading law in Japan.¹³ As an independent regulatory body under FSA, SESC has one chairman and two commissioners who are directly appointed by Prime Minister. Market Surveillance Division and Investigation Division, two out of the six divisions under SESC, are in particular relevant in terms of enforcing insider trading law.

In a collaborative effort, Self Regulatory Organizations, especially Tokyo Stock Exchange, take the first line of monitoring insider trading and suspicious activities. Tokyo Stock Exchange's self-regulatory arm---Tokyo Stock Exchange Regulation---has Market Surveillance & Compliance branch under its Compliance Department, which is responsible for spotting potential insider trading and other illegal trading activities.¹⁴

B. Enforcement Overview:

According to the data from FSA, the overview of enforcement of insider trading law by FSA can be summarized as follows:

| Years/Case and Outcomes | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 |
|---|------|------|------|----------|------|------|------|------|
| Cases Examined by FSA | 693 | 884 | 951 | 889(224) | 649 | 613 | 819 | 515 |
| Fine by FSA | 9 | 9 | 21 | 18(9) | 38 | 20 | 15 | 18 |
| Transfer cases for criminal prosecution | 5 | 9 | 2 | 7(2) | 7 | 4 | 6 | 2 |

Table 2: Overview of Insider Trading Cases Enforcement in Japan

- Source: FSA, *Public Companies Compliance Forum*, <http://www.fsa.go.jp/sesc/kouen/kouenkai/20090304b.pdf> (2009/3/4); FSA, *Efforts by the Authorities for Combating Insider Trading*, <http://www.fsa.go.jp/sesc/kouen/kouenkai/24/20130109-1.pdf> (2013/1/9).
- Note 1: Before 2008, the year was counted from July to June of next year. After 2008, the base shifted to from April to March of next year. Due to the change in base, number in bracket in the column of 2008 is the number which are double-counted during the period of 2009 April to 2009 June.
- Note 2: 2012 data only available till 2012 October.

¹³ Securities and Exchange Surveillance Commission, *Securities and Exchange Surveillance Commission*, <http://www.fsa.go.jp/sesc/english/aboutsesc/all.pdf>, 2.

¹⁴ See Tokyo Stock Exchange website, http://www.tse.or.jp/english/about/index-r.html#title_3 (English); http://www.tse.or.jp/about/tse/index-r.html#title_3 (Japanese) . Further detail of the function of Market Surveillance & Compliance, see Tokyo Stock Exchange website <http://www.tse.or.jp/sr/compliance/baishin/jinyo.html> (Japanese). It is noteworthy that on January 1, 2013, Tokyo Stock Exchange Group and Osaka Stock Exchange, the two remaining stock exchanges in Japan, agreed to combine their business and officially formed the Japan Exchange Group. Japan Exchange Group, About JPX, <http://www.jpx.co.jp/en/about-jpx/about-jpx.html>.

At first blush, the number of cases which are actually brought to an administrative fine or criminal charge is not substantial, especially in light of the size of Japanese securities market and trading volume. The illegal gain from insider trading in Japan, which can be gauged by the disgorgement ordered by court, is not surprisingly huge. Below is the data provided by FSA.

| Disgorgment Amount | Defendant Number | Major Cases in Its Catogory |
|------------------------------|------------------|---|
| Less than 100 million Yen | 48 | 2005. 3.14 チノン事件（約 1,373 万円） 2008. 5.30 野村証券事件（約 5,500 万円） 2010. 5.11 あおぞら銀行事件（約 5,824 万円） |
| 100-500 million Yen | 12 | 2006. 7.25 日本経済新聞社事件（約 1 億 1,674 万円） 2008.10. 7 L T T バイオファーマ事件（約 4 億 1,223 万円） 2009. 3.27 キャビン事件（約 3 億 5,500 万円） |
| 500 million to 1 billion Yen | 5 | 2007. 6. 7 伊藤園事件（約 9 億 4,478 万円） |
| Over 1 billion Yen | 2 | 2006. 6.22 ニッポン放送事件（約 11 億 4,900 万円） 2009.10.20 グッドウィル事件（約 15 億 3,180 万円） |
| Total | 67 | |

Table 3: Insider Trading Disgorgement Ordered by Court (2005-2012)

- *Soucre: SESA, Material for Insider Trading Regualtion Amendment Working Group, availaible at http://www.fsa.go.jp/sinqi/sinqi_kinyu/insider_h24/siryoyou/20120731/04.pdf, page 2.(2012 July 31)*
- *Note 1: 2012 data only available till 2012 July 6.*

An important trend of enforcement in Japan is the increasing use of money payment order or administrative monetary penalty. The amount of administrative monetary penalty, However, is generally modest. The table below is the data from 2005 to 2012.

| Penalty Amount/Year | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 | Total |
|----------------------------|----------|-----------|-----------|-----------|-----------|-----------|--------------|--------------|---------------|
| Less than 1 million Yen | 4 | 9 | 12 | 11 | 25 | 11 | 8(1) | 7(4) | 87(5) |
| 1 million to 5 million Yen | 0 | 1 | 3 | 3 | 11 | 6 | 5 | 4 | 33 |
| Over 5 million Yen | 0 | 1 | 1 | 3 | 2 | 3 | 2 | 1(1) | 13(1) |
| Total | 4 | 11 | 16 | 17 | 38 | 20 | 15(1) | 12(5) | 133(6) |

Table 4: Administrative Monetary Penalty (Insider Trading Related) in Japan

- Source: SESA, Material for Insider Trading Regulation Amendment Working Group, available at http://www.fsa.go.jp/singi/singi_kinyu/insider_h24/siryu/20120731/04.pdf, page 3. (2012 July 31)
- Note 1: Numbers in bracket indicates cases involving large new stock issuance and public offering.
- Note 2: 2012 data only available till 2012 July 6.

Noteworthy, it appears that Japanese approach places more emphasis on preventive side, which includes intensive monitoring toward securities firm by stock exchanges for the potential lack of internal control in both securities firms and issuance companies. Securities firms are also required to adequately advise their clients to prevent potential insider trading from inside the company,¹⁵ and actively to monitor suspicious trading activities by their clients.¹⁶ As a result, according to data provided by it, Tokyo Stock Exchange the recent insider trading cases in Japan can be summarized as follows.

| 公表日 | 対象証券会社 | 事案の概要 | 東証における処分 | 備考 |
|------------|---------------|--|-----------|----------------|
| 2003年6月27日 | 大和証券 SMBC | 従業員による内部者取引（2件） | 過怠金 200万円 | 行政処分 行為者刑事罰 |
| 2007年1月19日 | 大和証券 | 内部者取引であることの疑いを持ちながら注文を受託 | 戒告 | 行政処分 行為者課徴金 |
| 2007年3月9日 | 三菱 UFJ 証券 | 法人関係情報に基づく自己売買 | 戒告 | 行政処分 |
| 2008年5月28日 | ドイツ証券 | 法人関係情報に基づく自己売買 | 過怠金 300万円 | |
| 2008年6月27日 | SBI イー・トレード証券 | 顧客の有価証券の売買その他の取引に関する管理について法人関係情報に係る不公正な取引の防止を図るために必要かつ適切な措置を講じていない状況 | 戒告 | 行政処分 |

¹⁵ See, e.g., “Regulations for Trading Supervision Systems at Trading Participants to Prevent Unfair Trading.” Tokyo Stock Exchange, <http://tse-gr.info/rule/JPH18TE8302030601001.html> (Japanese version); http://www.tse.or.jp/english/about/rules/b7gie600000044tu-att/trading_participants_trading_supervision_systems_rules.pdf (English version).

¹⁶ Id, at Rule 2 and Rule 3.

| | | | | |
|-------------|----------------|---|-------------|----------------|
| 2009年10月20日 | カブドットコム証券 | 法人関係情報に係る不公正な取引の防止を図るために必要かつ適切な措置を講じていない状況 | 過怠金 500万円 | 行政処分 行為者課徴金 |
| 2010年2月16日 | ビー・エヌ・ピー・パリバ証券 | 取引の信義則違反及び法人関係情報に基づく自己売買その他の取引等をする行為 | 過怠金 1億円 | 行政処分 |
| 2012年8月7日 | SMBC 日興証券 | 法人関係情報に関する管理について不公正取引の防止を図るために必要かつ適切な措置を講じていない業務運営状況及び法令違反行為を含む不適切な勧誘行為 | 過怠金 8,000万円 | 行政処分 |
| 2012年9月18日 | 高木証券 | 法人関係情報に関する管理について不公正取引の防止を図るために必要かつ適切な措置を講じていない状況 | 過怠金 500万円 | 行政処分 行為者課徴金 |
| 2012年10月31日 | 野村證券 | 法人関係情報に関する管理について不公正な取引の防止を図るために必要かつ適切な措置を講じていない状況及び法人関係情報を顧客に提供して勧誘する行為 | 過怠金 2億円 | |

Source: Tokyo Stock Exchange Regulation, Efforts of The Tokyo Stock Exchange Relating to Insider Trading (インサイダー取引に係る東京証券取引所の取組みについて), available at http://www.fsa.go.jp/singi/singi_kinyu/insider_h24/siryuu/20120925/02.pdf. (2012/9/25). Also, Tokyo Stock Exchange Regulation, Disciplinary Actions, <http://www.tse.or.jp/sr/activity/cmpshobun.html>; <http://www.tse.or.jp/english/sr/activity/cmpshobun/index.html>.

Similarly, Japanese authorities from time to time use measures to curb insider trading supplementarily even when a criminal conviction cannot be obtained. For instance, companies are often pressed by FSA or SESC to fire possible offenders or terminate their employment as a part of administrative discipline.¹⁷

C. Case Features and Development Direction:

Based on the recent discussion, substantial insider trading cases in Japan takes place during the course of IPO, new stock issuance, tender offer or reorganizations in recent years.¹⁸ Also, it appears corporate insiders in traditional sense are not primary perpetrators in Japan. In contrast, non-corporate insiders, such as business partners, journalists, press workers, accountants/investor bankers, probably due to the lack of sensitivity in related regulations, constitute a more substantial part of the

¹⁷ Shinya Fukuda, *Securities and Exchange Surveillance Commission's Responses Toward Insider Trading* 29, in Public Companies Compliance Forum, available at <http://www.fsa.go.jp/sesc/kouen/kouenkai/20090304b.pdf> (2009/3/4). Similar observation, see Kyotaka Suzuki, *Challenge of the Securities and Exchange Surveillance Commission* 6, 8, 10, <http://www.fsa.go.jp/sesc/kouen/kouenkai/20100422.pdf> (2010/4/22).

¹⁸ For a compilation of recent insider trading cases, see Appendix 2.

perpetrators.¹⁹ Also, cases involving foreign companies or transactions through the internet are increasing.²⁰ At the same time, the number of inadvertent insider trading is decreasing.²¹

Further, another feature in the recent enforcement of insider trading law in Japan is the growing use and reliance on “Money Payment Order.” In contrast to criminal charges, the money payment order as an administrative fine possesses several advantages. First, it avoids long process of criminal trial and FSA feels more certain in the outcomes, and the perpetrators similar welcome the lighter punishment. Second, it has lesser burden of proof compared to criminal prosecution.²² Therefore, a tendency of more expansive use of money payment order, and reluctance in pressing for criminal charges, has become gradually recognizable in Japan.²³

Another point of interest is the identities of violators. Although the total number is small and may not reflect the whole picture, the composition of violators in administrative monetary penalty still serve a good reference.

| | | | Total (2005-2012) | |
|------------------------------|--------------------|--------------------------|-------------------|----|
| Violation of Art. 166 | Corporate insiders | directors | 9 | 61 |
| | | managers | 26 | |
| | | company itself | 3 | |
| | | persons know by contract | 23 | |
| | Tippees | | 43 | 43 |

Table 5-1 : Identities of Administrative Monetary Penalty Defendants (Violation of Art. 166)

¹⁹ Shinya Fukuda, *Securities and Exchange Surveillance Commission’s Responses Toward Insider Trading* 5, in Public Companies Compliance Forum , available at <http://www.fsa.go.jp/sesc/kouen/kouenkai/20090304b.pdf> (2009/3/4)

²⁰ Id., at 6-7.

²¹ Id., at 7.

²² Id., at 20.

²³ Id.

Source: SESA, Material for Insider Trading Regulation Amendment Working Group, available at http://www.fsa.go.jp/sinqi/sinqi_kinyu/insider_h24/siryou/20120731/04.pdf, page 4.(2012 July 31)

| | | | Total (2005-2012) | |
|------------------------------|--------------------|--|-------------------|----|
| Violation of Art. 167 | Corporate insiders | directors | 1 | 6 |
| | | managers | 1 | |
| | | tendering companies and persons know by contract | 4 | |
| | Tippees | | 25 | 25 |

Table 5-2: Identities of Administrative Monetary Penalty Defendants (Violation of Art. 167)

Source: *Id.*

III. China

Insider trading has been a much-discussed phenomenon in Chinese securities market. Traditionally, Chinese securities market has been long criticized as a paradise of insider trading by many commentators.²⁴ However, the role insider trading plays in Chinese capital market is complicated and much debate is still surrounding this issue. Here I start with the rules about insider trading in China and the related mechanisms, and then observe the enforcement and try to understand the reasons behind these enforcement phenomena.

1. Law

Currently, Securities Law (Securities Law of the Republic of China²⁵) is the main source regulating insider trading in China. First, Article 5 generally prohibits insider trading, market manipulation and fraud which happen in the process of securities issuance and transaction.²⁶ From Article 73 through Article 76, a more detailed version of rules is

²⁴ See below 2 for more detail.

²⁵ Securities Law was first adopted on December 29, 1998 (at the 6th Meeting of the Standing Committee of the Ninth National People's Congress, promulgated by Order No. 12 of the President of the People's Republic of China on December 29, 1998). The current version of Securities Law was amended on October 27, 2005 (at the 18th Meeting of the Standing Committee of the Tenth National People's Congress, promulgated by Order No. 43 of the President of the People's Republic of China on October 27, 2005), and has become effective since January 1, 2006. The Central People's Government of the People's Republic of China, http://www.gov.cn/flfg/2005-10/28/content_85556.htm.

provided. Article 73 simply prohibits the use of inside information, legally obtained or not, to trade in transacting securities.²⁷ Article 74 defines the range of “insiders”²⁸ and Article 75 provides the definition of “inside information.”²⁹ In Article 76, it first prohibits insiders from leaking insider information or suggesting others to purchase or sell securities based on the inside information.³⁰ Also, it also stipulates the civil liability to compensate if any other investors are harmed due to the insider trading activities.³¹

As of the procedural side, China Securities Regulatory Commission is the agency that is in charge of enforcing rule relating insider trading prohibitions.³² Securities Law also gives China Securities Regulatory Commission power to suspend trading activities by the investigated party for fifteen days (which can be extended to thirty days if

²⁶ Article 5 states: “Securities shall be issued and traded in accordance with laws and administrative regulations. Fraudulent and insider trading and manipulation of the securities trading market are prohibited.” For English translation, see China Securities Regulatory Commission, http://www.csrc.gov.cn/pub/csrc_en/laws/rfdm/statelaws/201205/t20120525_210597.htm.

²⁷ Article 73 reads: “Persons possessing inside information relating to securities trading and persons obtaining such information unlawfully are prohibited from making use of such inside information in securities trading activities.” Id.

²⁸ Insiders in China include (1) the directors, supervisors and senior managers of an issuer; (2) the shareholders holding 5% or more of the shares of a company and the directors, supervisors and senior managers of such shareholders, as well as the persons in practical control of a company and the directors, supervisors and senior managers of such persons; (3) a company held by an issuer and the directors, supervisors and senior officers of such company; (4) the persons with access to the relevant inside information by virtue of their positions in a company; (5) the staff members of the securities regulatory authorities and other persons who perform their statutory administrative duties in respect of the issuance and trading of securities; (6) the relevant staff members of the sponsors, securities companies engaged for underwriting, stock exchanges, securities registrar and clearance institutions and securities service institutions; and (7) such other persons as may be so prescribed by the securities regulatory authority under the State Council. Securities Law of 2005, Article 74.

²⁹ Inside information here is defined as “any unpublished information relating to the business or financial position of a company, or carrying significant effect on the market price of the securities of a company” Securities Law of 2005, Article 74, para 1. In paragraph 2 of Article 74, it also exemplifies the case to be considered as inside information, which includes: (1) the major events specified in the second paragraph of Article 67 of this Law; (2) a company’s plan for profit distribution or capital increase; (3) a major change in the share capital structure of a company; (4) a major change in the surety for debts of a company; (5) any pledge, disposition or retirement of a principal business asset of a company, the value of a single transaction of which exceeds 30 percent of the total value of such asset; (6) potential liability for major losses to be assumed in accordance with law as a result of the activities of a director, supervisor or senior manager of a company; (7) the plans relating to the acquisition of a listed company; and (8) such other important information having an obvious effect on the trading price of securities as may be so defined by the securities regulatory authority under the State Council. Id.

³⁰ Article 76, paragraph 1.

³¹ Article 76, paragraph 3.

³² Article 178, 179.

necessary).³³ As of the legal effect, violation of the rules of insider trading prohibition will lead to civil penalty, which include disgorgement and fine which ranges from the amount of the gain from illegal trading activities to five times of illegal gain.³⁴ If the use of inside information to trade is for the profit of a company or other organization, the person directly in charge of trading and the other persons in similar position shall be given a warning and shall, in addition, be fined not less than 30,000 RMB but not more than 300,000 RMB.

In addition, criminal penalty is attached. According to Criminal Law of the People's Republic of China³⁵ Article 180, buying or selling securities with non-public information, along with divulging the very information, can lead to imprisonment up to five years and/or a criminal fine, which ranges from the amount of illegal gains from the trading to five times of the gains.³⁶ However, the criminal penalty is conditioned on the discretionary decision when “the circumstances are considered as serious.”³⁷ If the case is considered as substantially serious, the imprisonment term will be adjusted to from five years to ten years.

Technically speaking, the substantive rules concerning insider trading prohibition in China is comparatively simple and straightforward. Basic structure and rules are in place. In the same vein, both civil and criminal sanctions are considered and utilized, and certain discretion is allowed to provide flexibility. However, more problems start to emerge as these rules are examined through the lens of implementation. The practice in fact presents more questions concerning the interaction between securities law enforcement and the market itself, which in turn shapes the understanding and behaviors of related participants as well as the market.

2. Enforcement

In terms of enforcement, several basic questions can and should be asked before further observation concerning Chinese insider trading law to be conducted. First, is there any enforcement of insider trading prohibitions at all? How seriously or effectively these rules are implemented? Put in a different way, this is to ask whether the enforcement level really adequately respond to the actual trading that are taking place. This question in fact tries to look into how enforcement agency views this particular

³³ Article 180, para 1, no 7.

³⁴ Article 202. If there is no gain or when gain is less than 30,000 RMB, or in situations such as simply leaking information without trading, a fine from 30,000 to 600,000 RMB can be imposed instead. Article 202. Id.

³⁵ It was first adopted by the Second Session of the Fifth National People's Congress on July 1, 1979. The articles used in this paper are based on the amended version promulgated in 2011.

³⁶ Criminal Law of the People's Republic of China, Article 180.

³⁷ Id.

law-breaching conduct and its relative importance from the whole spectrum of all crime-stopping endeavors. Understandably, the answer may reasonably compound with the budget/resource issue, and techniques available for detecting actual violation as well. In the same vein, the secrecy nature of insider trading is also an important factor complicates the proper evaluation of the effectiveness of enforcement. Second, a reasonable inquiry continues to what kind of cases is actually being prosecuted. The perpetrators, the type of information, the companies involved, motives and the final punishment administered all represents relevant preferences, as well as restraints, in terms of detection or prosecution. Last, market response and general perception of public are both relevant parts in the formula of enforcement outcome.

The enforcement of insider trading law in China, traditionally, had been criticized as lukewarm at its best.³⁸ This is especially true when compared to the rumored pervasiveness of insider trading practice appeared in various document.³⁹ For example, in an earlier study in 2006, Hui Huang reported that there have been eleven cases of insider trading since 1991 in China.⁴⁰ Compared to the total number of listed companies, market size and trading volume, this number begs more questions than it answers.

However, the picture starts to change in the latest several years. Because the lack of national-wide database for court decisions, this paper uses news searches as an alternative. The search is based on news article in Xinhuanet, official website operated by Xinhua News Agency which is the government sponsored and the largest news source in China. Using keywords “insider trading,” “CSRC,” and “court” (in Chinese), below is the summary of the case numbers found in Xinhuanet.

| | 2012 | 2011 | 2010 | 2009 | 2008 | 2007 |
|---|------|------|------|------|------|------|
| Insider Trading Cases (Tried in Court) | 13 | 11 | 5 | 4 | 1 | 0 |
| Insider Trading Cases (Sanctioned or Investigated by CSRC) | 33 | 39 | 25 | 1 | 0 | 1 |
| Total (some cases are overlapped and deducted) | | | | | | |

Source: Xinhuanet, <http://www.xinhuanet.com/> (Search conducted in February 2013). Complete list of cases handled by court from 2007 to 2012, see Appendix 3.

³⁸ See, e.g., Hui Huang, *The Regulation of Insider Trading in China: A Critical Review and Proposals for Reform*, 17 *Australian Journal of Corporate Law* 1, 29 (2005)(describing the enforcement of securities law and insider trading law as “inefficacy”); Liu Duan, *The Ongoing Battle Against Insider Trading: A Comparison of Chinese and U.S. Law and Comments on How China Should Improve Its Insider Trading Law Enforcement Regime*, 12 *Duq. Bus. L.J.* 129, 145-50(2009)(discussing the “inadequate” and “unsatisfactory” enforcement of insider trading law in China).

³⁹

⁴⁰ HUI HUANG, *INTERNATIONAL SECURITIES MARKETS: INSIDER TRADING LAW IN CHINA* 28-37 (Kluwer Law International, 2006).

From a basic picture, since the insider trading prohibition in China was first established in early 1990s,⁴¹ the enforcement had been inactive for a long period. But since roughly 2010, the number increases dramatically. CSRC started to take a firmer stance against insider trading cases. Public opinion seems to follow the same line, and media grows to focus more on reporting the alleged insider trading cases than before.⁴²

Looking into those news stories closely, many of them have major shareholders involved. Especially when a company facing internal fights among substantial shareholders, the minority often stands up and alleges illegal insider trading by controlling shareholder. Although these allegations cannot be ascertained directly, it appears as likely when compared to the conducts described in the actual cases which are prosecuted or sanctioned. Similarly, news reports are, to a certain extent, based on some primitive evidence and tends to conducts its own investigation and usually evaluates the credibility of sources before reporting. Even though, the actual reason for the abrupt surge of intensity of insider trading law enforcement is still not clear, and its future development still needs further scrutiny.

IV. The Enforcement of Insider Trading Law in Taiwan and Hong Kong

1. Taiwan

Taiwan has had its insider trading prohibition in Securities and Exchange Act since 1988, the earliest among the four jurisdictions in the study. Basically, its substantive rules is modeled after that of the United States.⁴³ It prohibits corporate insiders, temporary insiders and any person who has learned the information from insiders from using material, undisclosed information to transact. Similarly, it poses criminal sanctions, including criminal fine (from 10 million to 200 million Taiwanese dollar (NTD), 1 USD is about 29.5 NTD according to the exchange rate of February 2013) and imprisonment (three years to ten years).⁴⁴ If the profit from illegal trading reaches 100 million NTD or above, the criminal fine will increase to from 25 million to 500 million, and the imprisonment term will be seven years minimum.⁴⁵

⁴¹ At that time, the prohibition was in the form of tentative form as administrative order. For detail of early rules in 1990s, see Huang, *id.*, at .

⁴² For example, in the second half of 2012 only, there are more than one thousand news articles mentioning alleged insider trading cases from the search of news website. The total number of cases is estimated more than several times of the cases actually investigated by CSRC or tried by courts based on the data from Xinhuanet.

⁴³ Securities and Exchange Act, Art. 157-1. English version is available at <http://eng.selaw.com.tw/FLAWDAT0201.asp> (official cite provided by Securities and Futures Bureau, Financial Supervisory Commission). For general information about Financial Supervisory Commission and Securities and Futures Bureau under Financial Supervisory Commission, see respectively <http://www.fsc.gov.tw/en/index.jsp>, <http://www.sfb.gov.tw/en/>.

⁴⁴ Securities and Exchange Act, Art. 171, Sec 1.

⁴⁵ Securities and Exchange Act, Art. 171, Sec 2.

The procedural rules are somewhat different. Most importantly, FSA in Taiwan does not have right to impose administrative sanction. The only power FSA has is to analyze and preliminarily investigate suspicious cases and transfer them to prosecutor if considered appropriate. Whether to press a criminal charge is up to prosecutor's discretion. The heavy reliance on criminal prosecution has become one important feature in enforcing insider trading law in Taiwan. In the twenty plus years of its existence, the criminal penalty for violating insider trading law in Taiwan has been amended several times. In the beginning, the penalty is imprisonment up to two years. Over the course it gradually becomes three years minimum or seven years minimum if profits exceeds 100 million NTD. Reason often cited in amendments is to deter. However, as in most of other countries, law in the book does not always coincide with what happens in reality. The actual enforcement presents a different picture.

First, the total insider trading cases prosecuted is not high, with an average seven cases annually.

| | Taipei District Court | Other District Courts | Total |
|--|-----------------------|-----------------------|-----------|
| Insider Trading Cases (District Court, 2000-2011) | 36 | 49 | 85 |
| Total Cases (District Court, 2000-2011) | 282,481 | 2,095,013 | 2,377,494 |

Insider Trading Case in Taiwan, 2000-2011.

- *Source: Natioanl Court Decision Database, collected and compiled by author*

Second, if taking Taipei District Court, the largest one in Taiwan, as example, it becomes striking that more defedants receiving not guilty verdict than guilty ones. Similarly, even being found guilty, more than half of them receive imprisonment less than three years. This means judges exceptionally use their discretion, according to Criminal Code Article 59, to escape the minimum requirement and impose a lesser term.

| | Taipei District Court |
|--|-----------------------|
| Cases | 36 |
| Defendants (not guilty/guilty) | 86 (47/39) |
| Defendants Receive Sentence more than 3 years | 13 (in five cases) |

Insider Trading Case in Taipei Disctrict Court, 2000-2011. Compiled by author

- *Source: Natioanl Court Decision Database*

The survey may be a surprise too much of the local audience, especially in light of the touted enforcement effort made by securities regulatory agency and prosecutors. As a general matter, the prosecuted defendants are mostly corporate insiders, and many of them are mid- level managers in mid-size public companies. The severity of their

violations may not be high enough to justify long-term imprisonment, and that may explain the phenomena of widely using the discretionary power to impose a lesser sentence by judges. However, the number of prosecutions cannot explain the whole picture. Considering the history of Securities and Exchange Act amendments, it becomes obvious that the legislators did consider that insider trading is deteriorating public confidence in the market and the situation is becoming worse, and that justified creating a rule with heavier punishment. In this light, the low number of cases seems to present a different version of story, opposing to what legislators believe.

Contrary to the effort to impose criminal sanctions against insider trading law violations, plaintiffs of insider trading (i.e., all trading counterparties who trade on the day of the violation undertook the opposite-side trade with bona fide intent) can bring tort claim against violators and demand the illegal gain from trading in Taiwan.⁴⁶ Since 2003, Securities and Futures Investor Protection Center (SFIPC), a independent public non-profit corporation, has been established to facilitate the damage claim brought by private investors.⁴⁷ Sponsored by stock exchange, OTC market and securities dealer association, SFIPC has the power to bring suits on behalf of the plaintiffs of all sorts of securities fraud, and has successfully brought several cases in the past decade against insider trading violations.⁴⁸ However, since the SFIPC cases are mostly piggy-backed on the prosecution of criminal cases and does not have independent investigation power in Taiwan, the use of civil sanction against insider trading is still limited and supplemental.⁴⁹

2. Hong Kong

Hong Kong, formerly a British colony from 1842 and a Special Administrative Region (SAR) of China since 1997, has been a trade center and financial center in East Asia for more than a century. In terms of securities trading, Hong Kong Stock Exchange was first formally established in 1891,⁵⁰ and reports of securities trading in Hong Kong date

⁴⁶ Securities and Exchange Act, Art. 157-1, sec. 3.

⁴⁷ Securities and Futures Investor Protection Center was based on the authorization of *Securities Investor and Futures Trader Protection Act of 2002*. For Securities Investor and Futures Trader Protection Act, see <http://eng.selaw.com.tw/FLAWDAT0202.asp>. For detail of SFIPC, see <http://www.sfipc.org.tw/english/main.asp>.

⁴⁸ Securities and Futures Investor Protection Center, Class-Action Litigation and Mediation, Winning Cases, available at <http://www.sfipc.org.tw/english/service/03-4.asp>.

⁴⁹ For a useful discussion of Taiwan's Securities and Futures Investor Protection Center and its institutional strength, see, e.g., Wallace Wen-Yeu Wang & Chen Jian-Lin, *Reforming China's Securities Civil Actions: Lessons from PSLRA Reform in the U.S. and Government-Sanctioned Non-Profit Enforcement In Taiwan*, 21 Colum. J. Asian L. 115, 143-51 (2008).

⁵⁰ The first formal stock trading market, the Association of Stockbrokers in Hong Kong, was established 1891. The Association was re-named the Hong Kong Stock Exchange in 1914. Hong Kong Stock Exchange, *History of HKEx and its Markets*, <http://www.hkex.com.hk/eng/index.htm>.

back to the mid-19th century. Since then, Hong Kong has been one of the largest financial trading platforms worldwide, and claimed to be the paradise of capitalist.⁵¹ As a general matter, companies traded on Hong Kong Stock Exchange have been rather concentrated in terms of equity ownership.⁵² According to an recent academic research, insiders in Hong Kong trade actively and account for larger fractions of total turnover of their firms' shares, when compared to the United States.⁵³

Despite its long history serving as a home for major financial institutions and activities in southeast Asia, Hong Kong's insider trading prohibition came relatively late.⁵⁴ The first generation of insider trading law arrived in 1991 in Hong Kong. Since 2003, the old Securities Ordinance was renamed to Securities and Futures Ordinance. The prohibition of insider trading is stipulated in Section 270 and Section 291 respectively.

Comparatively, Hong Kong's insider trading law is more detailed and shares more commonalities with Japan's approach. Hong Kong also has the similar two-track system, which means Securities and Futures Commission has the power to impose sanctions other than imprisonment, and court can impose criminal sanctions, which include imprisonment up to ten years and 10 million Hong Kong Dollar.

In terms of enforcement, the picture is dramatic different. From 2003 to 2012, there are only thirteen cases that have been charged in Hong Kong.

| | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 | Total Cases | Total Defendants |
|----------------------|------|------|------|------|------|------|------|------|------|------|-------------|------------------|
| Civil Case | 1 | 1 | 0 | 0 | 0 | 2 | 1 | 0 | 0 | 0 | 5 | 14 |
| Criminal Case | 0 | 1 | 1 | 1 | 2 | 2 | 0 | 1 | 0 | 0 | 8 | 14 |

Insider Trading Cases in Hong Kong, 2003-2012

⁵¹ See generally, JON WORONOFF, HONG KONG, CAPITALIST PARADISE (1980); Chi Kuen Lau, Hong Kong's Colonial Legacy (1997). Cf. Stephen W. K. Chiu et al., Getting Ahead in the Capitalist Paradise: Migration from China and Socioeconomic Attainment in Colonial Hong Kong, 39 Int'l Migration Rev. 203 (2005).

⁵² See, Yan-Leung Cheung et al., Tunneling, propping, and expropriation: evidence from connected party transactions in Hong Kong, 82 J. of Fin. Econ. 343 (2006).

⁵³ Chang, Eric C., Zhu, Jun and Pinegar, J. Michael Michael, Insider Trading in Hong Kong: Concentrated Ownership Versus the Legal Environment (October 2002). Available at SSRN: <http://ssrn.com/abstract=336702>.

⁵⁴ Before 1997, Hong Kong was the colony of United Kingdom and used British common law system. Even after 1997, as a Special Administrative Region ("SAR") of People's Republic of China, Hong Kong is allowed to keep its own legal system which is apart from that of People's Republic of China. In that sense, common law rules and court system are preserved in Hong Kong.

In terms of the results, the government has won most of the civil and criminal cases. For criminal cases, defendants' sentences range from three months to six years, and most of them got sentences under two years. For more details about the cases, see Appendix 4 to 6.

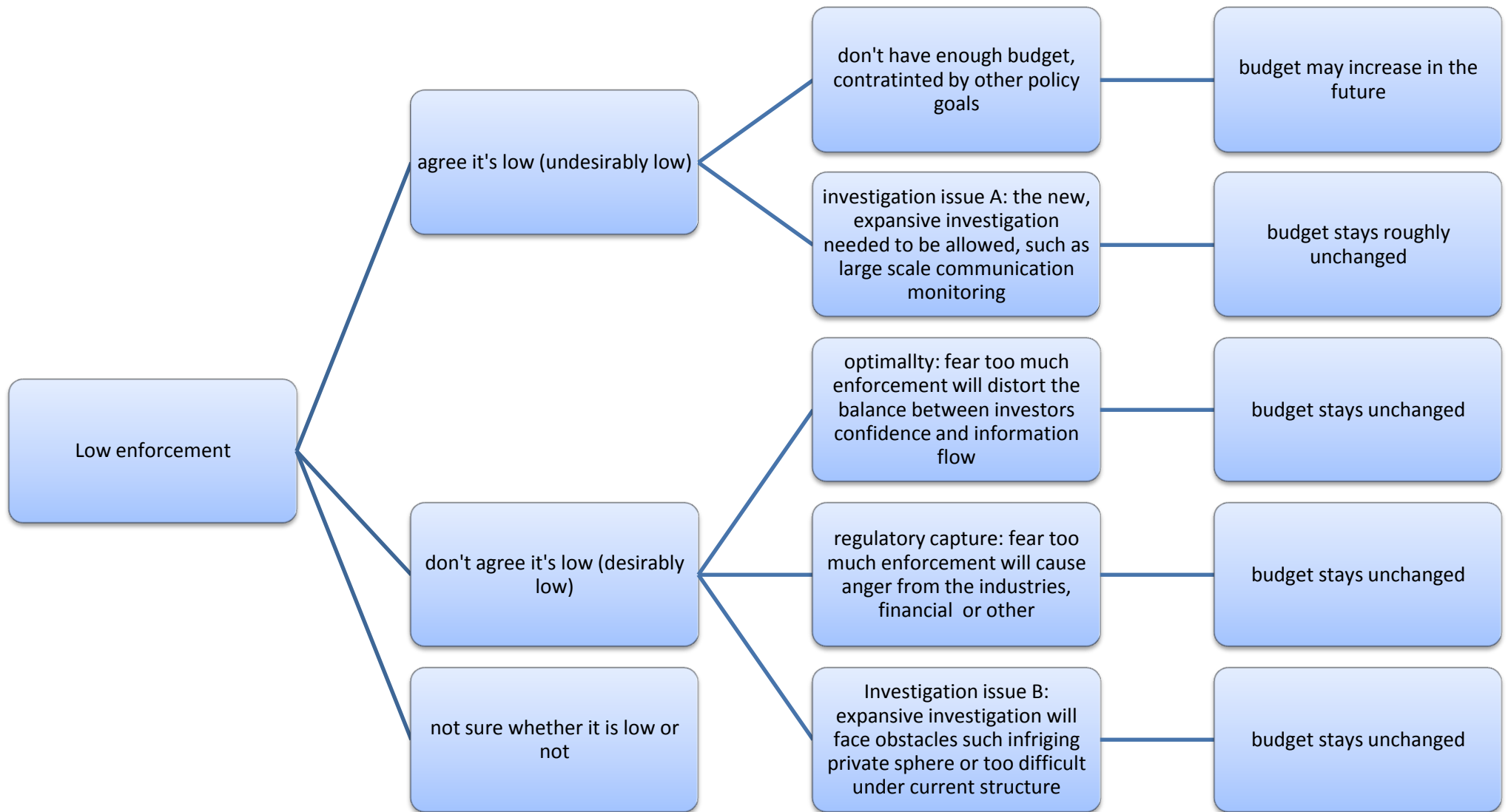
V. Observations and Explanations

1. Enforcement: Adequate or Not?

First of all, it appears obvious that the enforcement of insider trading law in all four jurisdictions is not aggressive. The reasons are likely to be multiple. In analyzing it, the possible explanations can be divided into two major groups: inadvertent and intentional ones. In inadvertently enforcing insider trading law with a rather loose manner, two main possible reasons can be deduced. First is the lack of investigative resources, which is so only relative to other crime-fighting goals by government and securities regulators. Second is the inherent problem with the insider trading law: non-victim feature, conducted in secrecy (which makes proving knowing the material, undisclosed information difficult), difficulty in establishing the link between the sender and recipient of information and the true identity of trading party, etc. Though those factors may have their plays, however, the results can be improved if the investments by regulatory agencies increase. In that regard, the more plausible inference would be either "In fact, regulators are happy with the current enforcement level, so that they do not want to invest more," or "regulators don't feel any increase in investigation capacity will change the outcome of a low prosecution and conviction rate," if the conviction-prosecution numbers has remained steadily low for many years. This could be used to explain what has happened in Japan, Taiwan and Hong Kong.

However, if a country intentionally enforces its insider trading law in a loose manner, similar reasoning may apply. The first explanation is that a country later realizes that, after the enactment of insider trading law, the aggressive enforcement would have its back-fire. The industry, market participants or the abstract market efficiency would suffer from the insider trading prohibition and the investigation process. Therefore, the regulator rather keeps a loose attitude in enforcing its insider trading law. In other word, it shows a disparity in the face and the reality: to have a tough law in the book to maintain market or non-insiders' confidence on the one hand, but on the other hand to enforce it loosely to entertain insiders in the market.⁵⁵

⁵⁵ The reasons that regulators might need insider staying happily in the market could include: (a). to increase market capitalization and liquidity by having more trading; (b). to lower the nominal pay managers have to appease social dissatisfaction or avoid direct class conflicts or to increase the actual compensation for managers or gain of major shareholders to attract talents or maintain the input of capital. It is difficult to directly prove the validity of any of the hypotheses mentioned above. However, circumstantial evidence can be used to test their plausibility.



Enforcement issue is tricky. Indeed, it seems like a “half glass” question. On the one hand, enforcement could be inadequate due to the unavailability of particular investigative methods. On the other hand, if one considers the unavailability of certain investigation methods and other restraints (such as the amount of phone wiring needed or allowed for prosecuting), the enforcement can be deemed as satisfying. In this regard, whether the glass is half-full or half-empty depends on the way how one looks at it. In that regard, enforcement issue is circular in its essence.

For example, people need to know whether the enforcement is adequate, or how inadequate it is, to decide what extra weapons should be allowed. However, adequacy is a question which cannot be ascertained before every tiny illegal trading activity is discovered. But without the help of mighty or even aggressive weapons, no insider trading case would be uncovered or convicted except those act extremely foolishly. To put differently, whether the enforcement is enough or not is in fact the premise needed to be decide before considering to open up the authorization of using other investigative weapons to crack down insider trading activities. But without using all them, we cannot know how adequate or inadequate the real world enforcement really is. Surely the use of extra weapons has its price, and the balancing is difficult but nonetheless needed.

Leaving the issue of the adequacy of enforcement in certain country aside, there are practical issues to be addressed in terms of enforcement. First is the victimless nature of insider trading. Second, the relatively sustainable, stable cooperative relationship also constitutes another barrier for detection and prosecution. The fact that there is no direct complaint from the victims makes the detection rate difficult to be assessed. Facing this difficulty, the alternative available would be comparative data from other countries, though too many factors are compounded---such as ownership/market structure, corporate and securities laws designs, quality and capacity of investigation, and general public’s perception, etc. The cross-country comparison indeed is a shaky method to answer the question of enforcement, though it may be the closest one which can be used to approach it.

2. Types of Insider Trading and Their Implications

After more than decades of implementation, blunt, uncovered insider trading by top corporate insiders becomes less frequent in Japan, Taiwan and Hong Kong. The focus of investigation slowly shifts to secondary insiders. For example, in Japan, more discussions now focus on how to prevent fund managers using the information they received from work. In particular these fund managers use these information for the benefit of their funds, such as selling the stock held by the fund when they learn a new issuance of that stock is pending. In Taiwan, the story is somehow different as fund managers profit themselves, but not the funds, when they buy stock on their own accounts before the purchase of fund. Another scenario is fund managers use the fund’s money to buy particular stock only to the benefit of managers or stockholders in that company. And later they might well either receive direct kick-back or indirect payment such as inside information for later uses from those managers or stockholders.

Hong Kong represents a somewhat obscure case when compared to Japan. On the one hand, Hong Kong enjoys a long history of having a stock exchange for more than a century and is renowned for its experience in financial field, both from the views of regulation and industry. However, the insider trading prohibition came into place relatively late. Surprisingly, the enforcement is similarly tepid. It is especially true considering the market volume, ownership structure, and the open market policy, which makes hiding money or the true beneficiary relatively easy. Leaving aside the possibility that insider trading activities might well be under-estimated in Hong Kong and its reasons, the actual cases appeared as rather simple: traditional insiders use the material undisclosed information to trade for personal gain or tip friends/relatives. But it is noteworthy that a “network” of information transmission within financial professionals is not alleged in Hong Kong, which may be striking to many.

China shows a different pattern. Prevailing in various sources but not confirmed by the actual court cases due to the limited number of them, commentaries claim that corporate insiders, controlling shareholders, together with government officials and professionals are conducting insider trading on a regular basis.⁵⁶ The scale of insider trading is also estimated to be substantial.⁵⁷ Several political reasons are cited to explain the passive enforcement of insider trading law in China. First, the historical socialist roots and remaining state ownership in large number large capital corporations in China create an environment in which political and corporate elites are closely tied. This in turns creates a band in which information and money flow secretly for exchange. Therefore, enforcement is inevitably compromised when political system is corrupt. Second, at the individual company and market level, both disclosure systems and investment intermediaries are still developing. That not only means more opportunities to exploit for insiders, but also makes the investment decision of the general public more leaned to so-called “inside information,” which in turns increases demand for inside information, and probably inside information only. In the long term, it becomes a vicious circle, and both the professional advising industry and market efficiency are victims of it.

3. Concentration of Ownership and the Role of Market and Financial Industry

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4. The Expansive Use of Civil Penalties

The use of civil penalties or civil punitive regimes (including multiple damage, punitive damage and disgorgement) as alternatives to criminal procedures has been a growing trend in Japan and Hong Kong. Similarly, it is focal point of the theoretical discussion and debate, especially in the context of enforcement against corporate misconduct. Many supportive opinions accord its position to the consequentialist thinking, which means civil penalties apply better efficiency in getting the similar result.⁵⁸ Citing the fact that a criminal punishment is procedurally more expensive due to the cost of higher degree of certainty in fact-finding and security against error, supportive opinions maintain that a punishment is only desirable when it deters a more harmful act.⁵⁹ In other words, a criminal punishment is a disutility to society, and it can be justified “only by a net gain resulting from deterrence of other more harmful acts.”⁶⁰

To be more specific, this issue can be put into tow aspects. For substantive side, a natural question is whether the civil penalty, in terms of its severity, correspond to the harm it creates and at the same time provides an adequate deterrence to future perpetrator. In the context of insider trading law, the “harm” insider trading activities incur to transacting parties and society had been hotly debated and is still a center of controversy.⁶¹ Taking the remaining doubts into consideration, a lesser penalty, compared to criminal sanctions, might be justifiable to some extent. However, the deterrence effect of civil penalty is rather unclear, depending how far and how effectively those monetary penalties go, and what supplementary measures are employed in those quasi-criminal/administrative adjudications.⁶²

For procedural side, the existence of civil penalty system can work both ways for insider trading defendants. On the one hand, it operates without those standard criminal procedural protections, such as the protection against cruel and unusual punishment and double jeopardy, and general protections by due process and higher standard of proof. The lesser procedural strictness can be detrimental to defendant’s interest. On the other hand, as insider trading cases can range from minor negligence and small scale first-time offender to carefully planned, long-term organizational plot to appropriate private benefit in a systematic fashion, a less severe violation can utilize the

⁵⁸ Lynch, at 34.

⁵⁹ Id.

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⁶² Surely different opinion points out that civil/administrative penalty may in fact impose more drastic penalty, especially in economic terms. See, id., at 40. (“The loss of a license to do business, or debarment from employment in a particular industry, can impose an economic catastrophe far beyond the tangible costs of a short jail sentence, as can significant fines-especially if they are adjusted according to the wealth of the offender.”)

benefit of relatively simple procedure to save time and resource in defending her cases. From that perspective, a different procedure serves different need in varied situations. Put differently, a functional perspective will decide which kind of procedure will be more appropriate.⁶³

To sum up, whether the expansive use of civil/administrative penalty toward violations of insider trading law is acceptable even desirable, despite its flexibility as an advantage, from the theoretical perspective, depends on the actual deterrent effect of the very design. But to ensure better deterrence often means a higher degree of or heavier penalty, which in turns evokes the concern of due process protection. Also, the uncertainty in applying procedural rule that of potential misuse of administrative authority.⁶⁴ Lastly, the use of civil penalty also risks to blur the line of civil-criminal sanctions and the moral condemnation applied in the criminal breach. With the potential issues in mind, the use of civil penalty to insider trading law violation seems a growing trend in Japan and Hong Kong, and needs to be closely observed in the future.

⁶³ Prof. Gerard E. Lynch at Columbia University cites three main reasons for using punitive civil sanctions to business crimes, which include the appropriateness of monetary sanctions, the relative abundance of corporate plaintiffs, the existence of specialized agencies for public enforcement (instead of leaving the power to prosecute to generalist public prosecutors). *Id.*, at 31-33.

⁶⁴ For the possible increase of prosecutorial power and erosion of adversarialism brought by this trend, see, e.g., *id.*, at 54-63.

VI. Reading Data and Brief Conclusion

As an attempt to provide an overview of the insider trading laws and its enforcement in East Asian countries, this paper

Basically, the enforcement of insider trading law in Japan, China, Taiwan and Hong Kong indicate high degree of similarity, despite differences remaining. The similarity mainly exist in two aspects. For the substantive law, all jurisdictions surveyed have similar rules prohibiting insider trading in place, and the definition of insiders, the types of use of undisclosed information prohibited, and reasons behind those prohibitions are strikingly similar. And in terms of enforcement, the cases reported are all modest and the total numbers are small compared to the trading volume in jurisdictions surveyed.

However, it is still unclear what real reasons cause to these similarities. Japan, China, Taiwan and Hong Kong all share diverse experience and expertise in running and maintaining their own securities market and market places are all prosper. Further, types of industries and the structure of trading clienteles are different in a conspicuous way. The reasons why those differences have not led to different thinking or shapes of insider trading law are still unclear, which would require conceiving a new theory to explain and unify the phenomenon observed.

In truth, whether the enforcement is high or low, or adequate, is a question which cannot be answered directly from the data observed. The surreptitious nature of insider trading makes direct observation and comparison impossible. Instead, using general opinions from market participants or press story seems the best alternative available to estimate the real situation. But undeniably, this estimation comes nowhere to depict the real world situations, let alone to be used as basis to draw legal theory or adjust enforcement policy in a systematic fashion.

Last but not the least, none of the insider trading laws in four jurisdictions tackles the issue of criminality of insider trading behavior directly. The low enforcement (if can be verified), in theory, could be interpreted as a secret endorsement of the proposition that insider trading, to an unknown extent, may help reward managers or major shareholders to increase their willingness of investment. However, a even more plausible explanation may attribute this phenomenon to the limit in detecting and prosecuting insider trading case securities regulatory agency face. Presumably, the second interpretation would be more convincing to many observers. But if the proposition, as maintained in this article, that enforcement is a function of investigation resource invested holds, the long term, cross jurisdiction low enforcement must beg for a new explanation. Surely, new methods must be developed and new data must be collected to provide some possibility to test the validity of this proposition. And in this case, the growing use of civil monetary penalty as in Japan and Hong Kong, along with a much lesser criminal penalty actually imposed in Taiwan, can be read as evidence supporting this intentional reluctance.

Appendix 1:

| 公表日 | 対象証券会社 | 事案の概要 | 東証における処分 | 備考 |
|-------------|----------------|---|-------------|----------------|
| 2003年6月27日 | 大和証券 SMBC | 従業員による内部者取引（2件） | 過怠金 200万円 | 行政処分 行為者刑事罰 |
| 2007年1月19日 | 大和証券 | 内部者取引であることの疑いを持ちながら注文を受託 | 戒告 | 行政処分 行為者課徴金 |
| 2007年3月9日 | 三菱 UFJ 証券 | 法人関係情報に基づく自己売買 | 戒告 | 行政処分 |
| 2008年5月28日 | ドイツ証券 | 法人関係情報に基づく自己売買 | 過怠金 300万円 | |
| 2008年6月27日 | SBI イー・トレード証券 | 顧客の有価証券の売買その他の取引に関する管理について法人関係情報に係る不公正な取引の防止を図るために必要かつ適切な措置を講じていない状況 | 戒告 | 行政処分 |
| 2009年10月20日 | カブドットコム証券 | 法人関係情報に係る不公正な取引の防止を図るために必要かつ適切な措置を講じていない状況 | 過怠金 500万円 | 行政処分 行為者課徴金 |
| 2010年2月16日 | ビー・エヌ・ピー・パリバ証券 | 取引の信義則違反及び法人関係情報に基づく自己売買その他の取引等をする行為 | 過怠金 1億円 | 行政処分 |
| 2012年8月7日 | SMBC 日興証券 | 法人関係情報に関する管理について不公正取引の防止を図るために必要かつ適切な措置を講じていない業務運営状況及び法令違反行為を含む不適切な勧誘行為 | 過怠金 8,000万円 | 行政処分 |
| 2012年9月18日 | 高木証券 | 法人関係情報に関する管理について不公正取引の防止を図るために必要かつ適切な措置を講じていない状況 | 過怠金 500万円 | 行政処分 行為者課徴金 |
| 2012年10月31日 | 野村證券 | 法人関係情報に関する管理について不公正な取引の防止を図るために必要かつ適切な措置を講じていない状況及び法人関係情報を顧客に提供して勧誘する行為 | 過怠金 2億円 | |

Source: Tokyo Stock Exchange, Efforts of The Tokyo Stock Exchange Relating to Insider Trading (インサイダー取引に係る東京証券取引所の取組みについて), available at http://www.fsa.go.jp/singi/singi_kinyu/insider_h24/siryou/20120925/02.pdf. (2012/9/25). Tokyo Stock Exchange Regulation, Disciplinary Actions, <http://www.tse.or.jp/sr/activity/cmpshobun.html>; <http://www.tse.or.jp/english/sr/activity/cmpshobun/index.html>

Appendix 2: Recent Insider Trading Case in Japan

| | |
|---------------------------|-------|
| 小松製作所自己株買付（平成 19 年 3 月） | 課徴金勧告 |
| 宝印刷社員（平成 20 年 3 月） | 刑事告発 |
| NHK記者（平成 20 年 2 月） | 課徴金勧告 |
| 新日本監査法人公認会計士（平成 20 年 3 月） | 課徴金勧告 |
| 野村證券社員（平成 20 年 5 月） | 刑事告発 |
| 上場会社社長（平成 20 年 7 月） | 課徴金勧告 |
| I R担当取締役（平成 21 年 2 月） | 刑事告発 |

Source: Shinya Fukuda, *Securities and Exchange Surveillance Commission's Responses Toward Insider Trading 4*, in Public Companies Compliance Forum, available at <http://www.fsa.go.jp/sesc/kouen/kouenkai/20090304b.pdf> (2009/3/4)

Appendix 3: Insider Trading Cases Handled by Court from 2007-2012

| | 案名 | 類別 | 日期 |
|---------------|----------|----|------------|
| 2012 年 | | | |
| 共 13 件 | 吴建敏案 | 法院 | 2013/1/16 |
| | 黄光裕案 | 法院 | 2012/12/21 |
| | 陈柏浩案 | 法院 | 2012/7/5 |
| | 李旭利案 | 法院 | 2012/6/12 |
| | 崔永年案 | 法院 | 2012/2/29 |
| | 谢风华、安雪梅案 | 法院 | 2012/1/7 |
| | 刘宝春、杜兰库案 | 法院 | 2012/2/3 |
| | 王保丰案 | 法院 | 2012/12/25 |
| | 邹炎案 | 法院 | 2013/1/21 |
| | 林光宇案 | 法院 | 2012/1/31 |
| | 季敏波案 | 法院 | 2012/8/22 |

| | | | |
|---------------|-------|----|------------|
| | 黃俊欽案 | 法院 | 2012/6/1 |
| | 彩虹精化案 | 法院 | 2012/7/4 |
| 2011 年 | | | |
| | 李启红案 | 法院 | 2011/4/7 |
| | 姚四俊案 | 法院 | 2011/12/30 |
| 2010 年 | | | |
| | 陈榕生案 | 法院 | 2010/8/5 |
| 2009 年 | | | |
| | 董正青案 | 法院 | 2009/1/9 |
| 2008 年 | | | |
| | 杭萧钢构案 | 法院 | 2008/2/14 |

Appendix 4: Insider Trading Cases in Hong Kong, Civil: Defendants and Conducts

| 案件編號 | 行為人編號 | 行為人身份 | 行為態樣 |
|------------|-------|----------|-----------|
| C01 | C01-1 | 子公司員工 | 買賣股票 |
| | C01-2 | 子公司員工 | 買賣股票 |
| | C01-3 | 子公司員工 | 買賣股票 |
| C02 | C02-1 | 投資銀行顧問 | 知悉消息後告知他人 |
| | C02-2 | 基金經理人 | 買賣所管理基金持股 |
| | C02-3 | 基金經理人 | 買賣所管理基金持股 |
| C03 | C03-1 | C03-2 男友 | 買賣股票 |
| | C03-2 | 併購方實習律師 | 知悉消息後告知他人 |
| C04 | C04-1 | 收購人 | 買賣股票 |
| | C04-2 | 收購人 | 買賣股票 |
| | C04-3 | 收購人 | 買賣股票 |
| C05 | C05-1 | 董事兼主席 | 買賣股票 |
| | C05-2 | 財務長 | 買賣股票 |

| | | |
|-------|-------|------|
| C05-3 | 基金經理人 | 買賣股票 |
|-------|-------|------|

Appendix 5: Insider Trading Cases in Hong Kong, Crimnail: Defendants and Conducts

| 案件編號 | 行為人編號 | 行為人身份 | 行為態樣 |
|------------|-------|----------|-----------|
| M01 | M01 | 子公司財務經理 | 買賣股票 |
| M02 | M02-1 | 投資銀行總監 | 買賣股票 |
| | M02-2 | 基金經理人 | 買賣所管理基金持股 |
| M03 | M03-1 | 投資銀行副理 | 知悉消息後告知他人 |
| | M03-2 | M03-1 女友 | 買賣股票 |
| | M03-3 | M03-1 兄 | 買賣股票 |
| | M03-4 | M03-1 嫂 | 買賣股票 |
| | M03-5 | M03-1 侄 | 買賣股票 |
| M04 | M04-1 | 員工（會計經理） | 買賣股票 |
| | M04-2 | M04-1 妻 | 買賣股票 |
| M05 | M05-1 | 投銀董事／總經理 | 買賣股票 |
| M06 | M06-1 | 收購人談判代表 | 買賣股票 |
| M07 | M07-1 | 員工（財務助理） | 買賣股票 |
| M08 | M08-1 | 獨立董事 | 買賣股票 |

Appendix 6: Insider Trading Cases in Hong Kong, Combined: Types of Information

| 案件編號 | 消息態樣 | 性質 | 類型 |
|------------|--|----|----|
| C01 | 上半年財報顯示利潤比去年同期下降 72% | 空 | 營運 |
| C02 | 將行 8 億 5 千萬股 top-up placement，配股價為 1.80 港元低於市價 | 空 | 股權 |
| | | | |
| M01 | 子公司的主要客戶將申請破產，需認列大量壞帳 | 空 | 營運 |
| M02 | 將被第三方德高貝登收購 | 多 | 股權 |

| | | | |
|------------|-----------------------|---|----|
| M03 | 下市計畫 | 多 | 股權 |
| M04 | 將與子公司至祥記進行 asset swap | 多 | 股權 |
| M05 | 為了近期收購油田的計畫，將發債融資 | 多 | 營運 |
| C03 | 第三方溢價公開收購所有股份 | 多 | 股權 |
| C04 | 將被中國水業收購 | 多 | 股權 |
| M06 | 第三方計畫收購大股東持有股份 | 多 | 股權 |
| M07 | 澳幣衍生工具將到期，需贖回而產生虧損 | 空 | 營運 |
| C05 | 即將低價配股發行，稀釋原有股份 | 空 | 股權 |
| M08 | 太古進行收購，將觸發公開收購 | 多 | 股權 |